

INTERPRETING THE *CONSTITUTION* — WORDS, HISTORY AND CHANGE*

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The *Constitution* defines the essential architecture of our legal universe. Within that framework Parliament makes its laws. Under the authority conferred by the *Constitution* and by Parliament, the executive makes its regulations and instruments and administers the laws made by the Parliament. Within that framework the courts hear and determine cases including cases about the interpretation of the *Constitution* and of laws made under it and the extent of legislative and executive powers flowing from them. Ubiquitous in that universe is the common law, which, as Sir Owen Dixon observed, supplies principles in aid of the interpretation of the *Constitution*.¹ He was not averse to cosmological metaphor. He said of the common law that: '[it] is more real and certainly less rigid than the ether with which scientists were accustomed to fill interstellar space. But it serves all, and more than all, the purposes in surrounding and pervading the Australian system for which, in the cosmic system, that speculative medium was devised'.² An updated metaphor for the common law today in lieu of 'ether' might be 'dark energy'.

Our metaphorical constitutional universe is not to be likened to the 19th century Newtonian model of the real universe. That is to say, it is not driven by precise laws with determined meanings and a single predictable outcome for each of their applications. Over the last century our view of the real universe has been radically altered, not least by quantum theory which builds uncertainty into the fabric of physical reality. At the quantum level, reality lacks precision. Sir Owen Dixon was aware of this as long ago as 1937. In notes of an unpublished address given to Melbourne University law students he referred to quantum theory and what he called "probabilities" militating against a more logical analysis being made of causation'.³

The uncertainty we have discovered at the most fundamental levels of reality does not set aside the relatively reliable day-to-day usefulness of our classical models of the physical world. Nor has it prevented the development of techniques which enable reliable and usable applications of quantum uncertainty. Analogously, the law, for the most part, operates with sufficient determinacy and predictability for the activities and transactions in which governments, authorities, private entities and citizens engage. But when seriously contested interpretations are advanced in litigation and close scrutiny of the law is required, a degree of indeterminacy

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1 Sir Owen Dixon, 'Marshall and the *Australian Constitution*' (1955) 29 *Australian Law Journal* 420.

2 *Ibid* 424–5.

3 Philip Ayres, 'High Court Centenary: Sir Owen Dixon' (2003) 77 *Australian Law Journal* 682, 694.

may become apparent. That is so whether the contest is about the *Constitution*, a statute, a contract or some other form of legal text.

There are ordinarily to be found in the words of legal texts nuances and shades of meaning. Combinations of such words may narrow their individual indeterminacies. Sometimes combinations have the reverse effect. It is not unusual in a genuine contest over meaning that more than one reasonable outcome is exposed. Constructional choice is frequently a feature of the interpretation of a legal text. If the choice is identified and made according to rules which reflect the proper function of the interpreter, it is legitimate even though reasonable minds may differ as to the outcome. This is particularly the case with a constitutional document expressed in broad language which does not prescribe in a detailed way, or indeed at all, how its provisions are to be interpreted and applied and which leaves room for implications. Professor Leslie Zines exemplified the point with his usual persuasive force in his discussion of Sir Owen Dixon's judgment in *Melbourne Corporation v Commonwealth*.⁴ After referring to the position of the States under the *Constitution* as separate governments exercising independent functions, Dixon J said:

the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority. In whatever way it may be expressed an intention of this sort is, in my opinion, to be plainly seen in the very frame of the *Constitution*.⁵

Professor Zines observed that it was equally open to find a different scheme 'in the very frame of the *Constitution*'.⁶ So a person could argue that the legislative powers conferred on the Commonwealth are, in some cases, expressly limited to protect State governments.⁷ It could be said to follow that where an express limitation is not applicable, Commonwealth power would extend to making laws binding on the States. As Professor Zines pointed out, the *Constitution* does not expressly limit Commonwealth powers so as to prevent it making laws that have a purpose of controlling the execution of power by a State.⁸ There is, of course, nothing revelatory about that observation, nor should it be seen as particularly disturbing. Choosing between reasonable alternatives in the interpretation of legal texts from the *Constitution* to the simplest contract is an inescapable aspect of the exercise of judicial power.

Judicial decision-making in the area of constitutional law has long been subject to scrutiny by reference to what are sometimes called 'theories of interpretation'. These often reduce to descriptions of different methodologies. They are used

4 (1947) 74 CLR 31 ('*Melbourne Corporation*'); Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 603–4.

5 *Melbourne Corporation* (1947) 74 CLR 31, 83.

6 Zines, above n 4, 603.

7 See, eg, *Constitution* ss 51(xiii)–(xiv), (xxxi), 114.

8 Zines, above n 4, 603–4.

from time to time to offer guidance to courts and judges seen to be wandering from the true path of fidelity to original meaning or enlightened progressivism or something in between. There is a veritable menagerie of such descriptions or hortatory guides.⁹

Approaches to constitutional interpretation have been classified under a variety of designations such as ‘originalism’, ‘intentionalism’, ‘literalism’, ‘textualism’, and ‘progressive interpretation’.¹⁰ No single approach described at a level less than the uselessly general is apt to deal with all of the constructional issues that can arise in relation to contested interpretations of constitutional texts. As Gummow J and I observed in *Wong v Commonwealth*: ‘diverse and complex questions of construction of the *Constitution* are not answered by adoption and application of any particular, all-embracing and revelatory theory or doctrine’.¹¹

That observation is not particularly novel. As one academic commentator said of ‘originalism’ in 1989:

the real problem may not be that originalism is less desirable than some other global theory of constitutional law, but that no global theory can work. If so, we might do better to abandon the attempt to create a theory of constitutional interpretation, and get on with the business of actually interpreting the *Constitution*. Perhaps, in other words, constitutional interpretation is best thought of as an activity that one can do well or poorly, rather than as an application of some explicit general theory.¹²

In a typically challenging paper published in 1998 and entitled ‘Against Constitutional Theory’, Richard Posner, then Chief Judge of the United States Court of Appeal for the Seventh Circuit, dismissed theories of constitutional interpretation in the United States as a reflection of what he called the ‘academification of law school professors, who are much more inclined than they used to be to write for other professors rather than for judges and practitioners’.¹³ Constitutional theory today, he opined, ‘circulates in a medium that is largely opaque to the judge and the practicing lawyer’.¹⁴ That is not to say that Posner lacked an articulated approach. He expressed sympathy for what he called the ‘outrage’ school of interpretation, which he attributed to Thayer and Oliver Wendell Holmes. In the context of the violation of constitutional rights, judicial restraint would decline intervention to ‘stymie the elected branches of government’ unless the alleged violation was ‘certain’ or ‘stomach-turning’ or ‘shocking to the

9 See Justice J D Heydon, ‘Theories of Constitutional Interpretation: A Taxonomy’ [2007] (Winter) *Bar News: The Journal of the NSW Bar Association* 12.

10 See generally Justice B M Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234.

11 (2009) 236 CLR 573, 582 [20] (citations omitted).

12 Daniel A Farber, ‘The Originalism Debate: A Guide for the Perplexed’ (1989) 49 *Ohio State Law Journal* 1085, 1103, quoted in George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory: Commentary & Materials* (Federation Press, 6th ed, 2014) 182.

13 Richard A Posner, ‘Against Constitutional Theory’ (1998) 73 *New York University Law Review* 1, 4.

14 *Ibid.*

conscience' or 'the sort of thing no reasonable person could defend'.¹⁵ As Posner put it: 'The judge who is self-restrained in this sense wishes to take a back seat to the other branches of government, but is stirred to action if his sense of justice is sufficiently outraged'.¹⁶

There are difficulties of principle and practice in an unwavering judicial commitment to any particular methodology of constitutional interpretation. The first difficulty is that questions may arise in a particular case which challenge the utility or validity of the methodology, leading either to its distortion to accommodate the new circumstance or to its abandonment altogether. The second difficulty is that it would be wrong in principle for a judge to treat his or her preferred methodology as though it were a rule of construction. In the field of interpretation there is a variety of available and legitimate techniques. It is not appropriate to constitutionalise those techniques or any particular subset of them. To do so is to write a method of interpretation into the *Constitution*.

The rejection of all-embracing and revelatory theories or doctrines governing the construction of the *Constitution* does not mean that its interpretation is a matter of judicial whim. As Gummow J said in *SGH Ltd v Federal Commissioner of Taxation*:

it would be to pervert the purpose of the judicial power if, without recourse to the mechanism provided by s 128 and entrusted to the Parliament and the electors, the *Constitution* meant no more than what it appears to mean from time to time to successive judges exercising the jurisdiction provided for in Ch III of the *Constitution*.¹⁷

In any approach to the interpretation of the *Constitution* primary importance must be attached to the nature of the text to be interpreted. This is a consideration logically anterior to consideration of the content of the text. The *Constitution* may be a statute to be interpreted, but it is a very particular kind of statute. It provides the architecture or framework of the legal universe. It is a law which provides for the making of laws from the time of federation into the unimaginable future. It is necessarily constructed for change. This was a matter to which at least some delegates to the Constitutional Conventions were alive. John Downer, having in mind future judicial interpretation, said at the Melbourne sessions of the 1898 Convention:

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.¹⁸

15 Ibid 5.

16 Ibid.

17 (2002) 210 CLR 51, 75 [44].

18 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 275 (Sir John Downer), cited in James A Thomson, 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' (1982) 5 *University of New South Wales Law Journal* 309, 322 n 61.

Isaac Isaacs, also speaking at the 1898 Melbourne session said: ‘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’.¹⁹

The judges carry out their interpretive duties with the tools of the common law. In statutory interpretation they also have the assistance of statutory principles of interpretation enacted by the Parliament. The process of constitutional interpretation is multi-dimensional. Each interpretational problem will have its textual, contextual, purposive and historical dimensions. It will present choices informed by what might loosely be called ‘constitutional values’. In the end, to borrow a metaphor which is sometimes used in market definition in competition law, there may be something analogous to a purposive focussing process in play. The ultimate result may be that which appears to the judge to present the sharpest picture of meaning having regard to the question which is posed. Articulating a reason for preferring one choice over another is not always easy when normative judgments are involved.

Constructional choice is particularly challenging when it is the existence or non-existence or the application or non-application of an implication that is in issue. The choices made are essentially contestable, even if presented as corollaries or logical incidents of the express provisions and their arrangement in the *Constitution*. Typically such choices are made with an authoritative tone because once made they bind until loosened by further judicial decision or by constitutional amendment.

In *R v Kirby; Ex parte Boilermakers’ Society of Australia*, in the joint judgment of Dixon CJ, McTiernan, Fullagar and Kitto JJ, their Honours said:

If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our *Constitution* was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps I, II and III and the form and contents of ss 1, 61 and 71.²⁰

A number of important implications have been drawn from both the text and structure of the *Constitution*. In *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*, while eschewing implication, the Court held that the Parliaments of the Commonwealth and the states each have the power to enact laws within their legislative competency binding on the Commonwealth, the states and the people.²¹ A qualifying implication soon emerged. The seeds of the *Melbourne Corporation* doctrine appeared in the dissenting judgment of Isaacs J in *Pirrie v*

19 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 283 (Isaac Isaacs), cited in Thomson, above n 18, 322 n 61.

20 (1956) 94 CLR 254, 275.

21 (1920) 28 CLR 129, 153–5 (Knox CJ, Isaacs, Rich and Starke JJ) (*‘Engineers’*).

McFarlane.²² He referred to the ‘natural and fundamental principle that, where by the one *Constitution* separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity* or *functions* expressly conferred on the other’.²³ The implied limits on Commonwealth legislative power affecting the states, explained in *Melbourne Corporation*,²⁴ have been applied in recent years by the High Court in *Austin v Commonwealth*²⁵ and *Clarke v Federal Commissioner of Taxation*.²⁶

In a line of decisions beginning with *Kable v Director of Public Prosecutions (NSW)*,²⁷ the principle, in the nature of an implication, has been established that a state legislature cannot confer or impose upon a state court a function which substantially impairs its institutional integrity and which is therefore incompatible with its role under Ch III of the *Constitution* as a repository of federal jurisdiction and as a part of the integrated court system. The term ‘institutional integrity’, when applied to a court, refers to its possession of the defining or essential characteristics of a court, which include the reality and appearance of the court’s independence and impartiality.²⁸ Other defining characteristics include the application of procedural fairness and adherence as a general rule to the open court principle. It is also a defining characteristic of a court that it generally gives reasons for its decisions.²⁹ In *Totani* reference was made to the historical understanding of the essential characteristics of courts by reference to 19th century legal history discussed by Windeyer J in *Kotsis v Kotsis*.³⁰ Reference was also made to observations in the course of the Convention Debates as well as the contextual implications to be derived from the continuation by ss 106 and 108 of the *Constitution* of the constitutions and laws of the former colonies.³¹ That understanding informed the concept of ‘courts’ used in Ch III.

In *Kirk v Industrial Relations Commission (NSW)*, the Court held, again by way of implication, that Ch III of the *Constitution* requires that there be a body in each state fitting the description of ‘the Supreme Court of a State’ and that its supervisory jurisdiction enforcing the limits on the exercise of state executive and judicial power is a defining characteristic of such a body.³² In coming to that conclusion the Court had regard to the ‘accepted doctrine at the time of federation

22 (1925) 36 CLR 170.

23 Ibid 191 (emphasis in original).

24 (1947) 74 CLR 31.

25 (2003) 215 CLR 185.

26 (2009) 240 CLR 272.

27 (1996) 189 CLR 51 (‘*Kable*’).

28 See generally *Public Service Association and Professional Officers’ Association Amalgamated (NSW) v Director of Public Employment* (2012) 293 ALR 450.

29 See generally *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1 (‘*Totani*’); *Wainohu v New South Wales* (2011) 243 CLR 181, 213–15 [54]–[56] (French CJ and Kiefel J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 659 [67] (French CJ).

30 (1970) 122 CLR 69, 91, quoted in *Totani* (2010) 242 CLR 1, 41 [59] (French CJ).

31 *Totani* (2010) 242 CLR 1, 41–5 [59]–[66] (French CJ).

32 (2010) 239 CLR 531, 566–7 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

... that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision'.³³

In *Wurridjal v Commonwealth*³⁴ the question whether the just terms requirement in s 51(xxxi) of the *Constitution* applied to the Territories had no clear-cut textual answer. In 1969 the High Court had concluded unanimously in *Teori Tau v Commonwealth*³⁵ that the guarantee did not so apply. In overruling that decision in *Wurridjal*, the Court had regard to textual and structural features of the *Constitution*, other decisions of the Court affecting the operation of the Territory's power, and the common law principle 'long pre-dating federation that, absent clear language, statutes are not to be construed to effect acquisition of property without compensation',³⁶ a principle referred to in Quick and Garran in their commentary on s 51(xxxi).³⁷

History shows that implications drawn from the *Constitution* are contestable and often contested, at least in academic commentary. The application of implied principles to new circumstances may also give rise to difficult constructional choices. Application can be a process of fleshing out the content of an implication, as appears from the *Kable* line of cases.

Some may believe that choice in the construction of legal texts can be avoided or restricted by the prior identification of authorial intention, that is to say in the original subjective intentions of the drafters of the *Constitution*, or of the parliamentarians who voted to enact a statute, or of the parties who have executed a contract. That belief is misplaced.

The challenge involved in applying concepts of authorial 'intention' to legal texts of all kinds was nicely illustrated by a recent decision of the High Court which, on its facts was a long way removed from constitutional law. The judgment in *Byrnes v Kendle*³⁸ was delivered on 3 August 2011. It concerned a dispute between an elderly husband and wife who had separated. The husband had bought a house in his own name and had signed a written acknowledgment of trust declaring that he held one undivided half interest in the property as tenant in common upon trust for his wife. He was alleged to have breached the trust because he let the house to his son who occupied it for two years but only paid a fortnight's rent. One of the arguments he mounted against his wife's claim for the uncollected rent was that he had not intended to create a trust.

Gummow and Hayne JJ quoted a passage from the current edition of *Scott and Ascher on Trusts*, the application of which went beyond trusts: 'Ordinarily ... the legal effect of a transaction does not depend on the parties' secret intentions, but on the outward manifestations of their intentions. For practical reasons, we

33 Ibid 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

34 (2009) 237 CLR 309 ('*Wurridjal*').

35 (1969) 119 CLR 564.

36 *Wurridjal* (2009) 237 CLR 309, 355 [76] (French CJ).

37 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 641, quoted in *Wurridjal* (2009) 237 CLR 309, 356 [76] (French CJ).

38 (2011) 243 CLR 253.

disregard the parties' undisclosed states of mind'.³⁹ Their Honours related that observation to the 'objective theory' of contract formation, concerned not with 'the real intentions of the parties, but with the outward manifestations of those intentions'.⁴⁰

Heydon and Crennan JJ saw the problem of authorial intention on a larger scale, extending to the interpretation of the *Constitution* and, beyond that, the interpretation of Shakespearian sonnets. Their Honours referred to a paper published in 1987 in the *Harvard Law Review* entitled 'Sonnet LXV and the "Black Ink" of the Framers' Intention'.⁴¹ The article was written by Charles Fried, a former Solicitor-General of the United States. Fried scornfully dismissed attempts to discern authorial intent whether in sonnets or the *United States Constitution*. He equated the search for actual authorial intent to '[taking] the top off the heads of authors and framers — like soft-boiled eggs — to look inside for the truest account of their brain states at the moment that the texts were created'.⁴² Heydon and Crennan JJ quoted the following observation from Fried's article:

The argument placing paramount importance upon an author's mental state ignores the fact that authors writing a sonnet or a constitution seek to take their intention and embody it in specific words. I insist that words and text are chosen to embody intentions and thus replace inquiries into subjective mental states. In short, the text *is* the intention of the authors or of the framers.⁴³

In this context, Heydon and Crennan JJ related constitutional construction to statutory construction and to the construction of contracts. The latter exercise depends upon finding the meaning of the language of the contract. The authorial intention in a contract is that which the parties express, not the subjective intentions which they may have had but did not express. Ultimately these considerations informed the construction of Mr Kendle's acknowledgment of trust.

To link text to intention in this way is to make a statement about the judicial function in interpretation. While the content and scope of the task may vary according to whether the text is a constitution, a statute, a contract or a trust deed, the general nature of the task is broadly consistent from one kind of text to another.

The constitutional dimension of the judicial function in the interpretation of legal texts was reflected in a judgment of the High Court in *Lacey v Attorney-General (Qld)* delivered on 7 April 2011.⁴⁴ Six Justices of the Court in a joint judgment

39 Ibid 275 [58], quoting Austin Wakeman Scott, William Franklin Fratcher and Mark L Ascher, *Scott and Ascher on Trusts* (Aspen Publishers, 5th ed, 2006) vol 1, [4.1].

40 *Byrnes v Kendle* (2011) 243 CLR 253, 275 [59], quoting *Taylor v Johnson* (1983) 151 CLR 422, 428 (Mason ACJ, Murphy and Deane JJ).

41 Charles Fried, 'Sonnet LXV and the "Black Ink" of the Framers' Intention' (1987) 100 *Harvard Law Review* 751.

42 Ibid 759.

43 *Byrnes v Kendle* (2011) 243 CLR 253, 282–3 [95] (emphasis in original) (citations omitted), quoting Fried, above n 41, 759.

44 (2011) 242 CLR 573 ('*Lacey*').

set out the approach to be applied in construing a provision of the *Criminal Code 1899* (Qld) permitting appeals by the Attorney-General against sentences imposed on convicted persons. The interpretive question was whether or not it was necessary for the Court of Appeal to identify error on the part of the primary judge before it could intervene on such an appeal. The joint judgment referred to *Project Blue Sky Inc v Australian Broadcasting Authority*⁴⁵ which identified the objective of statutory construction as giving to the words of a statutory provision ‘the meaning which the legislature is taken to have intended them to have’.⁴⁶ Their Honours said of legislative intention:

The legislative intention ... is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.⁴⁷

The joint judgment also reverted to a passage in the judgment of the Court in an immigration case *Zheng v Cai*,⁴⁸ decided in 2009:

judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. ... [T]he preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.⁴⁹

It was accepted that the application of the rules will ordinarily ‘involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic material’.⁵⁰ But the announcement of legislative intention is an after-the-event declaration of the constitutional legitimacy and common understanding of the interpretive process which the Court has applied. There is no basis for the belief that the Court has discerned a collective mental state on the part of those who brought the statute into existence.

The conceptual framework applicable to statutory interpretation is generally applicable to the interpretation of a statute which also happens to be a constitution. It is reflected, from the earliest days of the Federation, in the rationale adopted for the approach taken by the High Court to the use of the Convention Debates. It is not to be dismissed as crude textualism.

45 (1998) 194 CLR 355.

46 *Ibid* 384 [78] (McHugh, Gummow, Kirby and Hayne JJ), quoted in *Lacey* (2011) 242 CLR 573, 591 [43].

47 *Lacey* (2011) 242 CLR 573, 592 [43] (citations omitted).

48 (2009) 239 CLR 446 (‘*Zheng*’).

49 *Lacey* (2011) 242 CLR 573, 592 [43], quoting *Zheng* (2009) 239 CLR 446, 455–6 [28].

50 *Lacey* (2011) 242 CLR 573, 592 [44].

In the second week of April 1904, four former delegates to the Australasian Conventions debated whether or not what had been said at the Conventions during the drafting of s 114 of the *Constitution*, could be used to assist in its interpretation. Three of them were the High Court of the day: Griffith CJ, Barton and O'Connor JJ. They were hearing a special case stated about the rateability of land previously the property of the Government of New South Wales, which had become vested in the Commonwealth by virtue of ss 85(i) and 86 of the *Constitution*. One delegate to the Convention Debates was appearing before them as counsel for the plaintiff, the Municipal Council of Sydney. He was Bernhard Wise KC, the Attorney-General of New South Wales. Wise wanted to refer to a statement of opinion expressed by a delegate at the Convention Debates that s 114 referred only to future imposition. He was met with a salvo of opposition. As appears from the report of argument, Griffith CJ did not think that statements made in the debates should be referred to.⁵¹ Barton J said that '[t]he opinion of one member could not be a guide as to the opinion of the whole'.⁵² O'Connor J deployed the parol evidence rule: 'We are only concerned here with what was agreed to, not with what was said by the parties in the course of coming to an agreement'.⁵³

Mr Wise ploughed on with perhaps an early version of an original intention argument when he said: 'It might be the duty of the Court to modify the literal meaning of the words if they clearly failed to express the intention of the delegates'.⁵⁴ O'Connor J replied: 'The people of the States have accepted it as it now stands'.⁵⁵

This could be regarded as a not too subtle suggestion that if there were a putative intention relevant to construction, it was not so much that of the drafters of the *Constitution*, as that of the people of the colonies who voted for the *Commonwealth of Australia Constitution* at the various referenda. A further relevant attributed intention might be that of the members of the United Kingdom Parliament who voted to enact the *Commonwealth of Australia Constitution Bill*. Griffith CJ closed off the arguments referring to the Convention Debates as 'no higher than parliamentary debates' and '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'.⁵⁶ The qualification was significant and seems to have been overlooked in later statements of the prohibition.

These strictures did not prevent reference to the drafting history of the *Constitution*. In *Tasmania v Commonwealth*,⁵⁷ argued a few weeks after *Municipal Council of Sydney*, the Court admitted, over objection, reference to successive drafts of the *Constitution*, to assist in determining whether the term 'imported' in s 93(i) of the

51 *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 213 ('*Municipal Council of Sydney*').

52 *Ibid.*

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 *Ibid* 213–14.

57 (1904) 1 CLR 329.

Constitution extended to goods imported before the imposition of uniform duties of customs. Griffith CJ said, in the course of argument:

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. But the expressions of opinion of members of the Conventions should not be referred to.⁵⁸

An attempt on behalf of Tasmania to invoke what Griffith CJ called ‘a principle of abstract justice’ informing a ‘higher rule of construction’ was also rejected.⁵⁹ In that context Griffith CJ linked constitutional construction to statutory construction. The *Constitution*, he said, was ‘not a code going into minute details of the means by which the federation is to be carried into effect by the sovereign power created by it’.⁶⁰ Nevertheless, as he put it: ‘The same rules of interpretation apply that apply to any other written document’.⁶¹

In a similar vein, Barton J rejected general appeals to abstract justice, the equity of the statute and public policy. At the same time he ‘gladly’ agreed that ‘the intention of a constitution is rather to outline principles than to engrave details’.⁶²

O’Connor J returned to the theme of his remarks in *Municipal Council of Sydney* about legislative intention and said that the duty of the Court in interpreting a statute is to decide and administer the law according to the intention expressed in the statute itself.⁶³ ‘In this respect’, he said, ‘the *Constitution* differs in no way from any Statute of the Commonwealth or of a State’.⁶⁴ The relationship between interpretation and the proper function of the judiciary was emphasised. The discovery of intention required recourse to contemporaneous circumstances, the history of the law, including previous legislation, and the historical facts surrounding the bringing of the law into existence. The object of the legislature could be gathered from the instrument itself. These general propositions, relating to statutory interpretation were then applied to constitutional interpretation:

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. You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it.⁶⁵

The Court considered the use of history in *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic*

58 Ibid 333.

59 Ibid 338.

60 Ibid.

61 Ibid.

62 Ibid 348.

63 Ibid 358.

64 Ibid.

65 Ibid 359.

Employes Association,⁶⁶ which later fell victim to the *Engineers* doctrine. Accepted principles for the interpretation of legal texts, including contracts, was relied upon to justify resort to historical facts. Griffith CJ referred to the character of the *Constitution* both as an Act of the Imperial legislature and as an Act embodying ‘a compact entered into between the six Australian Colonies which formed the Commonwealth’.⁶⁷ He said:

The rules, therefore, that in construing a Statute regard must be had to the existing laws which are modified by it, and that in construing a contract regard must be had to the facts and circumstances existing at the date of the contract, are applicable in an especial degree to the construction of such a *Constitution*. At the same time it must be remembered that the *Constitution* was intended to regulate the future relations of the Federal and State Governments, not only with regard to then existing circumstances, but also with regard to such changed conditions as the progress of events might bring about.⁶⁸

In that case, the Court made express reference to the history of the railways established by the six Colonies prior to federation, the large financial obligations incurred for their construction, and the fact that the ability of the Colonies to meet their financial obligations was dependent upon the success of the railways. Those matters were described by Griffith CJ as ‘material facts existing at the time of the establishment of the Commonwealth, and which must be taken into consideration in construing the provisions of the *Constitution* now in question’.⁶⁹

Against this background, the restriction, early in the history of the Federation placed upon the use of Convention Debates in the interpretation of the *Constitution*, did not appear to have been reflective of wider concerns about resort to history as an interpretive aid. Indeed, the restriction as expressed in 1904 did not, in terms, exclude any use of the Debates. It was directed to the use of ‘opinions’ expressed by individual delegates.

Professor Greg Craven, who has characterised the courts’ early approach to the use of the Debates as one of ‘frosty disapproval, expressed early and sternly’ plausibly attributes it to the conviction of people such as Griffith and Barton ‘that they knew their own minds as framers without any need for recourse to a written record’.⁷⁰ His observation tends to support the view that the restriction was directed to the use of the debates as evidence of the subjective intention of the drafters of the *Constitution*.

However narrow and loosely expressed the original restriction, it mutated as is not unusual in the law, into a ‘settled doctrine ... that the records of the

66 (1906) 4 CLR 488.

67 *Ibid* 534.

68 *Ibid*.

69 *Ibid* 535.

70 Gregory Craven, ‘Convention Debates’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 150, 151. See also Thomson, above n 18, 311.

discussions in the Conventions and in the legislatures of the colonies will not be used as an aid to the construction of the *Constitution*.⁷¹ In excluding resort to the Convention Debates to construe s 74 of the *Constitution* in *Mutual Life Society*,⁷² Aickin J said that there was ‘even less reason for regarding views there expressed as a legitimate consideration than there is for regarding “official” statements by Ministers in either House of the Parliament, or other statements in debates there, as an aid to construction’.⁷³ That proposition did not mean however, that the Court had to close its eyes to historical facts as providing a background against which to view the *Constitution*. It was proper to bear in mind its history in the various drafts of the *Constitution* as prepared by the Conventions and also the way in which it was amended in final discussions which took place in London in the first half of 1900.

The exclusionary rule generated artificiality and internal contradictions in the interpretive approach of the Court. In *Re Webster*⁷⁴ which concerned the construction of s 44 of the *Constitution*, Barwick CJ admitted guiltily during argument: ‘One ought not to do it, but I did it; I went and looked at the original debates’.⁷⁵

In his judgment in *Re Webster*, Barwick CJ made explicit reference to the Debates, observing:

in the Convention debates, some of its members were seemingly concerned, when speaking on the insertion in the provision which became s 44(v) of a minimum number of shareholders, with the possibility of members of the parliament defrauding the community under the cloak of what we have come to call a ‘private’ company.⁷⁶

While reference to the primary material of the Convention Debates was precluded by the ‘settled doctrine’ of the Court announced originally in the course of argument, there seems to have been no difficulty in referring to Quick and Garran’s *Annotated Constitution of the Australian Commonwealth*, much of which was based upon or reported aspects of the proceedings during the Convention Debates. Professor Geoffrey Sawer, writing in the *Federal Law Review* in 1966, said: ‘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’.⁷⁷

71 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 17 (Barwick CJ). See also *A-G (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161, 187 (Aickin J) (*‘Mutual Life Society’*); *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 577–8 (Barwick CJ), 603 (Gibbs J).

72 (1978) 144 CLR 161.

73 *Ibid* 187.

74 (1975) 132 CLR 270.

75 J D Hammond, ‘Pecuniary Interest of Parliamentarians: A Comment on the *Webster Case*’ (1976) 3 *Monash University Law Review* 91, 95 n 23, quoted in Thomson, above n 18, 314 n 11.

76 (1975) 132 CLR 270, 279, citing *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 15 April 1897, 736–8, Sydney, 21 September 1897, 1022–8.

77 Geoffrey Sawer, ‘The *Australian Constitution* and the Australian Aborigine’ (1966) 2 *Federal Law Review* 17, 22 n 27, quoted in Thomson, above n 18, 318 n 30.

In Michael Coper's essay⁷⁸ in the Commentaries to the Convention Debates edited by Gregory Craven, there is an amusing extract from the transcript of argument in *Strickland v Rocla Concrete Pipes Ltd.*⁷⁹ In making submissions about the scope of the corporations power, Mr Lyons, responding to a question from the Bench, said:

I know we are not permitted to construe para (xx) by reference to what is in the convention debates, but the convention debates show — this is the only way I can answer your Honour's question — that it was not so much that the framers thought that special problems arose out of trading and financial corporations, but that they originally had all corporations and they wished to exclude special kinds ...⁸⁰

There was further exchange about the permissibility of reference to historical circumstances and the impermissibility of reference to the Convention Debates. Mr Ellicott then said: 'My friend Mr Lyons did refer to the convention debates as if they might support the view for which he contended. That reference, of course, was not permissible; but all I want to say is that if they were looked at, one would find the contrary'.⁸¹

Menzies J said 'that, too, is impermissible'.⁸² Mr Ellicott responded: 'no doubt your Honours will not look at them'.⁸³ Professor Zines described this exchange as conjuring up the image of Adam and Eve faced with forbidden fruit, though without the sequel of succumbing to temptation.⁸⁴

The settled doctrine was dispatched in *Cole v Whitfield*,⁸⁵ in which the whole Court expressly referred to the drafting history of s 92 of the *Constitution* and contributions to the debate upon the draft clause made by Griffith, Barton and O'Connor among others.⁸⁶ The Court explained the purpose of its exploration:

Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect — if such could be established — which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the *Constitution* finally emerged.⁸⁷

After reviewing the history, their Honours concluded:

78 Michael Coper, 'The Place of History in Constitutional Interpretation' in Gregory Craven (ed), *The Convention Debates 1891–1898* (Legal Books, 1986) vol vi, 5.

79 (1971) 124 CLR 468.

80 Coper, above n 78, 5.

81 Ibid.

82 Ibid.

83 Ibid.

84 Ibid.

85 (1988) 165 CLR 360.

86 Ibid 385–92.

87 Ibid 385.

Attention to the history which we have outlined may help to reduce the confusion that has surrounded the interpretation of s 92. That history demonstrates that the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade.⁸⁸

That use of the Debates might have fallen outside the fairly narrow scope of the original restriction enunciated by Griffith CJ in *Municipal Council of Sydney*.

The emphasis in this lecture has been upon the application of the general principles of the interpretation of legal texts to the interpretation of the *Constitution*. That is an approach which has its roots in the earliest decisions of the High Court. It does not require unqualified endorsement of vitalist metaphors such as ‘living force’. That latter terminology in contemporary culture evokes visions of spectral voices in the judicial mind conveying mental messages like that sent by Obi Wan Kenobe to Luke Skywalker flying his hazardous bombing mission against the Empire Death Star: ‘Use the Force, Luke ... let go’.⁸⁹

The application of the methods of statutory interpretation to constitutional interpretation defines no narrowly prescriptive methodology but looks to mechanisms which are at hand to enable the court to respond to a variety of interpretive questions. A commitment to the use of those methods does not require adherence to any of the ‘isms’ used to designate what are called, perhaps rather grandly, theories of constitutional interpretation. In their application to the *Constitution*, they require attention to be paid to the nature and content of the text, its drafting history as illustrated by the successive drafts at the Conventions, as well as the informed commentaries of those who were involved in, or close to, the drafting process. Historical facts of the time may be relevant to an understanding of the purpose of words that, taken out of context, might mislead. The common law which is the ether in which all legal texts are embedded, is also a necessary part of that understanding, not least because the interpretive mechanisms are, for the most part, derived from the common law.

The multidimensional character of the exercise of interpretation is underscored in the often quoted observation by McHugh J in *Theophanous v Herald & Weekly Times Ltd* that: ‘The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture’.⁹⁰

The application of what might be called ordinary principles of interpretation is entirely consistent with:

- recognition of the nature of the constitutional text;

88 Ibid 392.

89 *Star Wars Episode IV: A New Hope* (Directed by George Lucas, Lucasfilm, 1977).

90 (1994) 182 CLR 104, 196.

- the use of history including the Convention Debates to better understand the context and purpose of the language of the Constitution; and
- the drawing of implications by reference to text and structure and underlying constitutional doctrines.

These principles of interpretation impose a general requirement of fidelity to text and purpose, while allowing for the flexibility necessary to deal with new and difficult questions that may arise in interpretation. Whatever methodology is applied of course, the results will be contested and contestable. In the end, however, our *Constitution* requires that some body decide the contested questions about its interpretation. Generally speaking, that is the High Court.