Original Intent: The Judicial Uses of History and Constitutional Interpretation in Australia and the United States

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The search for certainty, consistency and neutrality in constitutional interpretation has led some commentators and judges (if we accept the sincerity of their explanations) to embrace the "original understanding" of a constitution as a supposed bulwark against a tide of "unprincipled," undemocratic (democracy conceived of in majoritarian terms), subjective, indeterminate, and "politicized" judicial activism and "law-making." They treat the intentions of the framers with respect to the meanings of the words in the text they created as dispositive of questions of constitutional interpretation and adjudication. They are the so-called "originalists" whose reverence for the "minds" of the framers is matched only by their scorn for those "liberal academics" and others who argue that a constitution is not limited to the past, though it has roots there, but is living, adaptable and in need of constant understanding and affirmation by the people whose lives it affects in the present.

The Australian and American polities and legal systems share much in common (although there are also significant differences as we shall see): both are former English colonies, both have written constitutions (and of course, the Australian one drew heavily on the American model), both have systems of representative government, both have federal systems, share a common law heritage and practice, and have entrusted the ultimate power of constitutional interpretation to supreme courts.

This article explores another feature currently common in both countries (although to a much greater extent in the U.S.): popular, academic and judicial controversy over the use of historical evidence in constitutional interpretation and the legitimacy of judicial review and "law-making." More specifically, this article seeks to discover how history has been judicially used in constitutional interpretation in the U.S.A. and Australia at the national level, what has been seen as the legitimate extent of its use and how the High Court of Australia, only now embarking on both a more explicitly political and historical role, can learn from debates over original intent in the U.S.A. over the last decade. In relation to the U.S., and then Australia, the article asks two main questions of originalism: can we readily ascertain original intent? And, if so, is it in principle the best form of constitutional interpretation? The conclusion is that originalism is inconsistent, impracticable and no more democratic than alternative approaches. But this conclusion does not preclude the judicial consideration of historical evidence in constitutional cases. Rath-

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er, such evidence (including the framers' "intentions" to the extent that these can be ascertained or (re-) constructed with any certainty) is a valid part of the social data necessary for any constitutional judgement which must resolve human disputes. Further, history can illuminate the purpose and fundamental principles of a constitution, and provide a degree of political and legal consistency.

After demonstrating that judges in both countries already construe the Constitutional text in the light of constitutional principles thought to be implied by it (for instance, republicanism — in the case of the U.S.A. — constitutionalism, representative democracy, federalism, nationhood, parliamentary sovereignty — in the case of Australia — and judicial review), the article calls on judges to make public, explicit, coherent and democratic justification for those principles. The article concludes by outlining and illustrating (in reference to Australia) a text-constrained, but democratic and constitutionalist theory of constitutional interpretation, which can enable constitutional interpreters to answer those calls. Judges cannot justify constitutional interpretations and adjudications on the basis of oracular voices from the past: they cannot but speak with their own voices to an audience in the present. It is to this audience that judges owe their constitutional duty of principled interpretation.

Upon being sworn in as Chief Justice of the High Court of Australia in 1952 Sir Owen Dixon declared that

close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal Conflicts. It may be that the Court is thought excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.¹

But how could such a strict and complete legalism, intended to blinker if not blindfold a judge against the temptations of public policy-making or personal moral or political judgements provide a safe guide along the tortuous paths of historical analysis and political and moral philosophy? Further, these are paths which a judge cannot avoid proceeding down when interpreting an avowedly political document such as a constitution. The schizophrenia of the High Court of Australia exhibits itself in an enthusiasm for policy-making dependent upon general principles supposedly inherent in the constitutional framework and its historical development, combined with a reluctance to elucidate and justify those principles or to consult primary historical materials. Happily, this naive philosophy and textbook history now has at least one opponent within the High Court itself. In 1986, Sir Anthony Mason reminded judges that

it is impossible to interpret any instrument, let alone a constitution, divorced from values. To the extent that they are taken into account, they should be acknowledged and should be accepted community values rather than mere personal values. The very present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values.²


² Id. at 5. Sir Anthony Mason went on later in the article to argue as follows: "The objection usually made to the use of the [Australian] Convention debates is that we have no means of knowing whether the remarks of a particular speaker commanded assent of the majority. The objection is not universally true
The traditional English approach to statutory interpretation — followed strictly, at least in formal terms, by the Australian High Court until very recently — has at times been just such a cloak, as Dr. Brian Galligan’s study Politics of the High Court (1987)3 substantiates. Classical English doctrine required judges to determine the meaning of words in a statute with as little resort as possible to so-called extrinsic materials (e.g. historical evidence, economic effects, political consequences). By contrast, the United States Supreme Court has long held legitimate constant reference to extrinsic historical materials. For “originalists,” the point of referring to these materials is to ascertain the original intention of the Framers (a term I will use as shorthand throughout the article although realizing how problematic it is to determine exactly whose views are to count as authoritative in constitutional interpretation) of the Constitution in using the words they did in 1787. Originalists hold this original understanding to be decisively authoritative, taking precedence over the meaning the Constitution has taken on as it has been interpreted and applied over the centuries.

The “originalist” approach to the constitution has been the subject of lively debate in the U.S.,4 partly at least because under the aegis of the Reagan administration, and even if it were true, it is a very slender reason for refusing to take account of the comments of the founders in the course of their deliberations on drafts of the Constitution.”

One speaker may provide an unexpected insight or explain why a particular draft was not accepted. What is more the debates are a primary source of material for commentaries by experts which the Court does not hesitate to use as an aid to interpretation” Id. at 25-26. Sir Daryl Dawson (currently on the bench) has also recently signalled the possibility of historical examination by the High Court of Australia — albeit of a quasi-originalist kind:

I do not think that it has ever been overtly suggested here, as it has in the United States, that it is permissible to adopt a construction which demonstrably is one which those who framed the document did not intend. We do allow the objective intention of the founding fathers, as revealed by the text, to govern our construction of the Constitution . . . Even if an intent is not revealed by the text, we may seek to find a form of intent outside the constitution by making an historical examination of the purpose of a particular provision.


tion, and thenceforth in its shadow, it has been seen by judges like William Rehnquist and Antonin Scalia of the Supreme Court, and "near-appointee" Robert Bork, as legitimating a conservative rearguard action against the "non-interpretivist," "liberal" judicial activism of the Warren Court in the 1950's and 1960's.

Ironically, in Australia — if the issue is even debated — the possibility of deriving the original intent from judicially considered historical evidence is thought by the legal fraternity to have radical rather than conservative implications. Despite the general acceptance among Australian jurisprudents that judges make law and do not simply declare it, the notion of the judge as historian or social theorist can still make many a traditional judge or lawyer blanch as she recalls what is for her the specter of a Justice Lionel Murphy or Lord Denning. Both these judges — Murphy on the High Court of Australia, Denning as a Law Lord and Master of the Rolls — were, for all the differences in their background and ideology, judicial iconoclasts who were more than usually frank about the need for judicial activism and law-making, and the eschewing of stare decisis when it seemed to stand in the way of their admittedly very different personal visions of justice (Murphy's "radical" social democracy, Denning's "classical" civil liberties). Both judges also provoked controversy in political, professional (as frequent dissenters on the bench, and with their lack of reverence for precedent) and public arenas to an unprecedented extent in the Anglo-Australian judicial world.

Recent trends in the High Court and new legislation promoting judicial recourse to a wider range of materials in interpreting statutes (notably §15AB of the Cth. Acts Interpretation Act (1901)) promise that the role of history in constitutional interpretation will become a lively issue. Questions such as whether judges


5 See, e.g., P. Bickovksi, No Deliberate Innovators: Mr. Justice Murphy and the Australian Constitution, 8 Febd. L. Rev. 460 (1977).

should be historians, what methods they should use, and whether the intentions of
the Framers should be controlling in constitutional interpretation should become
smoldering if not burning ones over the next few years. The answers one gives to
these questions will significantly influence how democratically and flexibly the
Constitution will operate.

The fact that the U.S. Supreme Court has been more openly political than the
Australian High Court and has "unashamedly" referred to a wide range of extrinsic
historical materials is consistent with the eighteenth-century natural rights philo-

sophy which was used to justify the revolution against the tyranny of the British
Crown and Parliament. The essentially liberal creed subscribed to by the Framers
involved a suspicion of governmental power, and a belief in the need to limit it,
buttressed by a defence of individual liberty and property rights. To this end, the
U.S. Constitution limits and defuses federal government power by means of a strict
separation of executive, legislature and judiciary, a bi-cameral legislature, a federal
system, and a written Bill of Rights.

The American Revolution was significantly a revolution against parliamentary
sovereignty, and also to some extent paved the way for an indigenous legal culture
that was more antagonistic to strict legal positivism and *stare decisis* than En-
gland's. This natural law tradition, the highly normative quality of much of the
Constitution's language, the sacredness of the Constitution for many in the U.S.
polity, and the reverence for its framers are all factors which help to explain the
Supreme Court's less deferential attitude towards the legislature and its use of his-
torical materials in judicial review.

Following Professor Daniel Farber, we may define originalists as those con-
stitutional interpreters "committed to the view that original intent is not only rele-
vant but authoritative, that we are in some sense obligated to follow the intent of
the framers." As with any school of thought there are extremists and moderates
among originalists: the former holding that *only* original intent is relevant, and that
whoever wins on historical evidence should win the case; the latter that other fac-
tors may be significant, especially where original intent cannot easily be deter-
mined. There are also differences among originalists about the level of generality
at which to approach original intent. Are we to focus on the framers' general prin-
ciples? Their specific intent with regard to particular words or government ma-

chinery? Or linguistic conventions? But certainly a prerequisite to join the
originalist club must be acceptance by the interpreter that, as Farber says, "clear
evidence of original intent is controlling on any 'open' question of constitutional
law."

For non-originalists the framers' intentions are not decisive in questions of
constitutional interpretation. "Aspirationalists," as they have been called in the
U.S., remind judges that it is a *Constitution* we are interpreting, not simply a liter-
ary text. It is a document which constitutes a polity in a particular way, seeking to
erect some boundaries within which laws made under its authority must stay in or-
der to be "constitutional."

8 B. Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: Belknap

(Princeton: Princeton University Press, 1959), Ch. VIII; E.S. Morgan, *The Birth of the Republic 1763-89*
(Chicago: Chicago University Press, 1977 [Revd. ed.]), especially Ch. V.

9 Farber, *supra* note 4, at 1086.

10 Id.
Can we readily ascertain original intent? And, if so, is it in principle the best form of constitutional interpretation?

In pursuing answers to the first question one comes across many obstacles. Often the Framers have not even turned their minds, at least as revealed in print or connected to their reality, to the issues currently before the U.S. Supreme Court: for example, pornography, affirmative action, surrogate motherhood, test tube babies, electronic surveillance, cable television, genetic engineering, sex changes or insider trading. Where the Framers have discussed an issue of relevance to the resolution of a current constitutional case, we have only the text of the Constitution and James Madison’s notes on the Convention debates, not published until 1840, to guide us. Extensive studies by American Constitutional historians James Hutson and Leonard Levy show that Madison’s notes are highly abbreviated (missing much more than half of what was said), and sanitized. He improved his own speeches and exaggerated his own role in the constitutional Convention. Records for the State ratifying conventions are even less reliable. Similarly, those records for the Bill of Rights debate fared no better, being left to the pro-Federalist Thomas Lloyd who, according to Levy, “seems to have resorted more to imagination than to understanding because his deficient technique of note-taking was aggravated by drunkenness.”

In any case, who do we mean when we say “the Framers” or “the Ratifiers”? When talking about “the Framers” do we mean the fifty-five who were delegates at Philadelphia, merely the thirty-nine who signed or the less than half that number who participated in drafting committees? What about the significant influence of some non-signatories present at debates? There were over 1,600 men who attended the State ratifying conventions — whose intent is to prevail? The determination of subjective intent from documentary evidence is difficult enough, but the task of aggregating into a “collective mind” views of a diverse group of individuals who often had significant disagreements is (with apologies to Dworkin) positively Herculean. Levy concludes that

[o]riginal intent is an unreliable concept because it assumes the existence of one intent on a particular issue . . . The entity we call “the Framers” did not have a collective mind, think in one groove, or possess the same convictions.

A tragic irony for originalists is that what evidence of the Framers’ intent there is shows that they did not intend their own intentions to have any binding authoritative value for future interpreters of the words in the Constitutional text they had created. Professor Powell has established that the Framers regarded “intent” as referring to the supposedly objective meaning of the language used in the text, not the subjective intentions of its authors. The notion that judges could use history

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12 Levy, supra note 4, at 288-291.
13 Levy, supra note 4, at 293.
14 Levy, supra note 4, at 295.
15 Levy, supra note 4, at 294.
16 A further irony concerning the originalists — considering their anxiety about judicial activism, and their positivistic bent — is that their interpretive theory ends up being anti-textual: the text is a mere lens through which one can see the authoritative constitutional source, the intent of the Framers and/or Ratifiers.
17 Powell, supra note 4, at 937-38.
rather than the ordinary common law rules for statutory construction was viewed with great suspicion by Madison and other chief draftsmen. For the Framers, today's conservative originalists would be seen as innovators and judicial activists!

Of course, the Framers recognized that the Constitution was no ordinary statute: it was a document intended to endure and to be interpreted liberally and flexibly rather than narrowly and pedantically. The Constitution was to be a tree of a certain kind to be sure, and interpretation could not legitimately change this, but it was a living tree nevertheless whose branches could grow in many directions from generation to generation (the declaration in the Ninth Amendment that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" supports this view). But where the text was unclear on its face the Framers did not urge that the interpreter follow their intentions as revealed in the Convention debates. The authority of the U.S. Constitution came from "We the People of the United States" — the ratifiers who had adopted the text rather than the intentions of the framers whose ideas were not even generally known in 1789.18

Original intent cannot therefore have the specific and decisively authoritative role in constitutional interpretation its supporters would like it to have. But one would think that genuine historical analysis could help elucidate the meanings of words used in the text so that the Supreme Court could maintain fidelity (or, as Dworkin would call it, "integrity")19 at a broad level to the kind of polity the Constitution sought to create — for example, fidelity to the notion of democratic republicanism or federalism. However, courts in the adversarial tradition are not the best environments, nor lawyers and judges the best-equipped personnel, to take on the role of the professional historian. Complete historical understanding does not deliver up to the Court ready-made answers to a particular dispute: but lawyers have never let the facts get in the way of a good argument, and judges must decide a case and, inevitably opt for one party's lopsided view of the past over another's. Lawyers and judges tend to use history in Orwellian fashion to argue for a particular result. Levy's study of the Supreme Court reveals that it has, in a succession of cases (including Brown v. Board of Education20 and Roe v. Wade21) "invited two sides to cook the facts on a question of original intent" and then resorted to history for "a quick fix, a substantiation, a confirmation, an illustration or a grace note."22 It used history to rationalize results reached on other grounds of principle or policy. It had neither the time, resources, expertise or will for a disinterested search for historical evidence which would convince it to decide a case in one way or another. The originalists attempted counterrevolution does not seem practicable. Instead, my theory of constitutional interpretation, introduced later, will argue that although historical evidence ought not to be controlling in constitutional readings, the highest courts can and indeed should be able to take this evidence into account (indeed since the common law judicial process is inherently retrospective, at least in part, it cannot help but undertake historical analysis to some degree).

18 As Professor Farber says, "It seems somewhat unlikely that the intent of the Scriveners was thought to be binding on the ratifiers, especially when the Framers were so careful to keep the proceedings of the Convention secret from the ratifiers themselves," Farber, supra note 4, at 1091.


20 Brown v. Board of Education of Topeka 347 U.S. 483 (1953) (deciding that there should be desegregation of blacks and whites in public schools).

21 Roe v. Wade 410 U.S. 113 (1973) (founding a woman's right to abortion).

22 Levy, supra note 4, at 311, 322.
But, assuming for the sake of argument that we can readily derive original intent, is it the model we want for constitutional interpretation? At this stage, I want only to give a lightning sketch of the normative arguments for and against originalism. There are three main arguments in support of originalism: that legitimate authority in a democracy comes from majority rule; that the proper judicial role is to interpret texts via authorial intention; and that there are no principled alternatives. To the first argument, we may question whether democratic majoritarianism is indeed the grundnorm of the U.S. polity rather than, say, a natural law philosophy of equal human rights. We may also ask why the present generation of constitutional interpreters ought to be bound by the (largely) hypothetical consent of ratifiers in the eighteenth century. Where, for instance, were blacks and women when the Constitution was adopted? In the Lockean tradition, the Framers sought continual renewal of allegiance to the Constitution as a part of civic virtue as a good republican. Citizens would have to be vigilant to determine whether the legislature and government were keeping their side of the supposed social contract. We can further cast doubt on the assertion that a legislature is necessarily a more democratic institution than a court. An argument can at least be made out that courts are in many circumstances more insulated from the direct, corrupting influences of party politics and the deals struck in the special interest State.

To the second argument, we may note that the Constitution embodies fundamental law authorizing all other laws. It can be argued further, as do deconstructionists, that the reader’s understanding of a text, as well as her own context, is equally or more important than the meaning its author hoped it would impart. For arguments against this “hypothetical voluntarism” in social contract theory, see C. Pateman, *The Problem of Political Obligation: A Critique of Liberal Theory* (Cambridge: Polity Press, 1985), Chs. 5, 6, 7 passim. For an argument that courts should be the preferred forums for resolving questions of “principle” see R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985). An alternative, process-based argument in favour of courts as democratic institutions is provided by John Hart Ely. According to Ely, judicial review is justified if it is necessary to reinforce representative democracy by keeping political channels of participation, communication and change open, or to protect a minority against denial by a hostile and discriminatory majority of its equal place in the political system, J.H. Ely, *Democracy and Distress: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1986) at 103. See also R. Dworkin, *Equality, Democracy, and Constitution: We The People in Court*, XXVIII (No. 2) A Lberta L. Rev. 324 (1990) (attacking the “statistical” and purely majoritarian conception of democracy compared with a constitutional and communal one).

23 Faibers, supra note 4, at 1097-1103.
26 The role of the reader and her or his context, and of the text and its own embeddedness in the particular and general circumstances of its creation (both subjective—the state of mind and intentions of the author—and objective; that is, the economic, political and social circumstances at the time of writing), in ideology, and in tradition, is central to all hermeneutics (including deconstructionist) approaches to reading and understanding a work. Here is not the place to attempt to develop these hermeneutic notions fully. The chief insights of modern hermeneutics are encapsulated in the metaphor of the “hermeneutic circle”: describing both a methodological device in interpretation which considers a whole in relation to its parts and vice versa (attempts must be made in reading to determine the meaning of words in terms of the sentences of which they are a part, and the sentences in terms of the work as a whole placed within its linguistic and literary context; the whole must be understood in terms of the smaller parts which together compose it; a projection of the meaning of a text must be made in order to understand the parts one reads on the way to its completion)—as in the Biblical exegesis of Luther and the grammatical techniques of the Romantic hermeneuts like Schleiermacher and Dilthey—and, further, the way in which all interpretations are encased in or encircled by a communality that binds us to tradition and to a pre-interpretive understanding of ourselves as beings.

This latter existential element is the thread which links Husserl, Heidegger and Gadamer as theorists, and explains their acceptance of interpretation as an unfolding of the primordial being of humans (Dasein). Interpretation is always preceded by “understanding” (Verstehen—self-understanding, empa-
nally, it will be argued, with Farber, that there are principled alternatives to origin-

Adherence to the doctrines of parliamentary sovereignty and legalism has meant that the High Court of Australia has not taken as activist a role as the U.S. Supreme Court. Given the longer continuity of Australia's place within the British Empire, and latterly the Commonwealth, it is not surprising that Australian courts exhibit a greater reverence for *stare decisis* and for the rule of the legislature than those in the U.S.A.27

It has often been noted by historians, social scientists and lawyers alike that in Australia the Imperial State preceded and supervised the creation of the polity and legal system. The government has largely been viewed by Australians not so much with fear and suspicion as with expediency. Federation meant more uniform and efficient government, not less government. Ever since, the State has been regarded as "one vast public utility," in the words of Hancock.s The enactment of the Australian Constitution was preceded by a Federation movement (from the early 1880s to 1900) which sought to unite the then existing self-governing colonies which had

thy, intuition, imagination and feeling rather than empirical or calculative knowledge which is somehow "external") because, in Heidegger's ringing dicta "We understand as we do because we exist as we do," "Understanding follows Being" and "Language is the House of Being." For introductions to hermeneutics see: J.M. Connolly and T. Keutner eds., HERMENEUTICS v. SCIENCE? Three German Views (Notre Dame, Ind.:University of Notre Dame Press, 1988); J. Bleicher, CONTEMPORARY HERMENEUTICS (Boston: Routledge and Kegan Paul, 1980); J. Weinshenker, GADamer's HERMENEUTICS: A READING OF TRUTH AND METHOD (New Haven: Yale University Press, 1985).


Obviously, arguments which have their source in various philosophical versions of linguistic, epistemological, moral and cultural relativism must be dealt with by the reader of a constitutional text if she is to avoid being ethnocentric. See T.W. Nelland et al. (eds.), RELATIVISM: COGNITIVE AND MORAL (Notre Dame: Notre Dame University Press, 1982); M. Hollis et al. (eds.), RATIONALITY AND RELATIVISM (Oxford: Basil Blackwell, 1982); J. Margois et al. (eds.), RATIONALITY, RELATIVISM AND THE HUMAN SCIENCES (Dordrecht: Martinus Nijhoff, 1986).

27 Even as late as 1943, the High Court of Australia overruled its own decisions to give effect to a decision of the House of Lords (Firo v. W. Foster & Co. Ltd. 68 C.L.R. 313 (1943)). And, despite the series of decisions which apparently culminated in national judicial independence (see Viro v. The Queen) 141 C.L.R. 88 (1978)), the High Court has still taken a more conservative view of precedent, and deferential stance towards the legislature, than its American counterpart (see Dungan v. Mirror Newspapers Ltd. 142 C.L.R. 538 (1978); State Government Insurance Commission v. Trigwell 142 C.L.R. 617 (1979)); Australian Conservation Foundation Inc. v. The Commonwealth of Australia 146 C.L.R. 493 (1980); although we shall see that this attitude has by no means been a barrier to innovative policy-making. See the Hon. Mr. Justice Michael McHugh, The Law-making Function of the Judicial Process — Parts I and II, 62 AUSTL. L.J. 15-31 (January 1988), 116-127, (February 1988), especially 20-24.

been granted responsible government by the U.K. in the 1850s, and had their own constitutions (South Australia, Victoria, New South Wales, Western Australia, Queensland and Tasmania), in "one indissoluble Commonwealth." Although the impetus for Federation came from a variety of sources, including nationalist and even democratic ones, those in the pro-Federation movement (and, indeed, the anti-Federalists) were almost overwhelmingly concerned with practical economic and fiscal matters (but, admittedly, xenophobia, and anxiety over the defence of Australia against intervention by the French in the New Hebrides, Russia in Asia, and Germany in New Guinea in the 1880s, coupled with the mother country's wish that her colonies share the burden of defence, certainly played their part): principally, how to overcome the obstacles to the creation of a common market which self-interested, artificial, colonial differences in tariff policies, railway rates, river regulation, immigration, defence, posts and telegraphs, tariff policies and gold-field regulation presented.

Among the Framers of the Australian Constitution, colonial politicians, judges, lawyers, and pastoralists predominated, and there was an "almost complete absence of the trade-unionists, wage-earners and small shopkeepers." During the great maritime strikes of 1890-91, the Labour Party was formed in New South Wales to represent the interests of workers, but throughout the framing of the Constitution, the Party's interests were unrepresented by it's own members (with the exception of W.A. Trenwith from Victoria in 1897-1898). This task was left to democratic, sometimes radical, liberals (like Victorian Judge Higgins) who promoted majority rule, universal manhood suffrage, popular representation and worker interests, and combatted — with varying success — conservatives who favored parliamentary (not popular) formulation of the constitution, plural voting, franchise limited by property holdings, the new Commonwealth (the term "Commonwealth" can be used interchangeably with "Federal" to refer to the central national government) Senate as a conservative upper house (like the House of Lords or the colonial upper houses), and "free trade" or "protection" depending on their specific economic ties (New South Welshmen strongly tended to support the former, Victorians the latter).

The movement proceeded through various phases from 1890 to 1900: beginning its life with the initiative of colonial Premiers and Ministers (particularly Henry Parkes, Premier of N.S.W., who sought a full national government which would hopefully succeed in dealing with pressing inter-colonial problems where the earlier "toothless" Federal Council [1885] had spectacularly failed) who set up the first National Constitutional Convention to draft the Constitution in 1891 (creating the draft Bill of 1891), to the popularly elected Convention of 1897-98 (producing the draft Bills of 1897,1898), the Premiers' conference of 1899, and the various colonial parliamentary debates and popular ratification referenda which preceded the debate and ultimate enactment of the Commonwealth of Australia Constitution Act (1900) (U.K.) (it came into effect on 1 January 1901). Both the background of the Framers and the only partially democratic nature of the framing process (W.A. and Queensland, for instance, were poorly represented throughout the process), meant that, as Crisp concludes, echoing Hancock,

Labour consequently played a negligible direct part in the shaping and achievement of federation.

29 L.F. CRISP, AUSTRALIAN NATIONAL GOVERNMENT (Croydon, Vic., Australia: Longmans, Green 1965) 11; Ch. 1 passim. See also J. QUICK AND R. GARRAN THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH (Sydney: Angus and Robertson, 1901) Part IV, passim.
It was for the most part the big men of the established political and economic order, the men of property or their trusted allies who moulded the federal Constitutional Bill. The pastoralists, merchants and lawyers—turned politicians, tough-minded men of affairs... [who] saw federation as an expedient provision of extended governmental machinery and in no sense as a facilitation of major social change, much less of social revolution.30

The *Australia Acts*31 were the culmination of a gradual process of increasing recognition of Australia by the Imperial powers as a national polity with legislative, executive and judicial autonomy and authority, and equal and independent *de jure* sovereignty as a State at international law. This process had a number of key signals: the gaining of “responsible” self-government in the colonies, the enactment of the *Commonwealth of Australia Constitution Act* (1901) (U.K.), the Balfour Declaration (1926) (which recognized the sovereign equality of Commonwealth “Dominions”), and the *Statute of Westminster* (1931) (U.K.) (which ended the U.K. Parliament’s power to pass legislation affecting dominions without their request and consent, § 4, and the operation in relation to the Commonwealth of the *Colonial Laws Validity Act* (CLVA) (1856) (U.K.) which, broadly, invalidated Acts if they were “repugnant” [inconsistent with] to the law of England - § 2 (2).

Despite these developments, there were a number of important residual, Imperial constitutional links with Australia remaining (which principally restricted or interfered with the States’ legislative power): links which the Commonwealth and the States agreed on 16 August 1985 to abolish completely. The commitment to do so followed the precedent of fellow Commonwealth member Canada’s “patriation” of its Constitution in 1982.

The end was to be achieved via a complicated “request” and “concurrence” power in the Australian Constitution (§ 51 (xxxviii): “the exercise within the Commonwealth, at the request and with the concurrence of all the States directly concerned, of any power which can at the establishment of the Constitution be exercised only by the Parliament of the U.K. . . .”) whereby each of the six States passed an Act (sharing the title *Australia Acts (Request) Act* (1985)) “requesting the Australian and British Parliaments to enact legislation terminating the British Parliament’s power to legislate for the Commonwealth,”32 followed by two Commonwealth Acts - *Australia (Request and Consent) Act* (1985) § 3) and *Australia Act* (1986) embodying the reform provisions agreed between the Commonwealth and the States, and declaring that they requested and consented to enactment by the U.K. Parliament of an Act containing those provisions. Such an Act was indeed duly passed (*Australia Act* (1986) (U.K.)).

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The operative Act, the *Australia Act* (1986) (Cth.) came into force 3 March 1986. The main effects of this Act were as follows: termination henceforth of the power of the U.K. Parliament to legislate for Australia (Commonwealth, States or Territory) (§ 1); State Parliaments were given full power to make laws having extra-territorial application provided such laws were "for the peace, order and good government" of that State (§ 2 (1)); State legislative powers were now to include all legislative powers that the British Parliament might have exercised previously in regard to the State concerned (§ 2 (2)); the CLVA was no longer to apply to State Laws and no State law was to be held void or inoperative on the ground of "repugnancy" to any U.K. law (§ 3); the U.K. Parliament was to "cease to have responsibility of any kind for the government of any Australian State" (§ 10); appeals to the Judicial Committee of the Privy Council (originally the highest court for the entire British Empire) "from or in respect of any decision of an Australian court" (§ 11) were terminated and prohibited (except for specific savings for previously instituted proceedings) so that "the High Court of Australia . . . [was] at long last the final court of appeal in Australia."33

Despite the *Australia Acts* of 1986, the orthodox view that the Australian Constitution owes its legal force to the paramountcy of the British legislation in which it was enacted has held sway in the High Court.34 It is submitted that the orthodox understanding of the formal source of legal validity of the Constitution rests on much firmer ground than any theory about democratic compacts or popular sovereignty in Australia — "We the People of Australia" did not enact the *Commonwealth of Australia Constitution Act* (1900) (U.K.) § 9, the locus of our Constitution.35

The strength of legal positivism in Australia, and the correspondingly weak natural or higher law tradition in its constitutionalism,36 contributed to the doctrine whereby the Constitution as an Act of Parliament was to be interpreted according to the ordinary rules of statutory interpretation used in English courts.

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36 On the relative weakness of Australia's fundamental law tradition (if it can even be said to have one), compared with the U.S.A., see Winterton (1986) supra note 34, 228-235.
This approach requires the court to ascertain the intention of Parliament as revealed in the words of the text of an Act. “Intention” was understood in the artificial sense of the “will” of the legislature “manifest” in the words of the text, not as a retrospective, and sometimes no doubt posthumous, exercise in psychological analysis of present or past Parliamentarians.

As we have noted, the High Court purports to follow the English model and not without some practical effect. Officially, for instance, the Court does not take notice of the Convention debates, records of which had been thought to be too incomplete (excluding drafting committees and so forth) or to invite dangerous distraction from the words of the text adopted in the various popular State referenda. The text would be construed by the Court in the light of various canons of construction including prominently the Mischief Rule and many other maxims in Latin too tedious to recite. The Mischief Rule, for instance, is a subset of the more general purposive approach to statutory interpretation in England: to discover why Parliament is changing or adding to the background of legislation, constitutional law and common law already in existence

look to the overall intention of the legislature as discovered from reading the statute as a whole... [asking] what ‘mischief’ [or social, legal ‘defect,’ ‘evil,’ or ‘lack’] this statute was intended to remedy... [One must ask] [w]hat social purpose was intended to be achieved by this legislation... [and then] read each word and phrase so as to carry out that purpose to the extent that they are capable of being so read.

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37 A-G (Ch.) ex rel McKinlay v. The Commonwealth 135 C.L.R. 1 (1975), at 17, 47; Municipal Council of Sydney v. The Commonwealth 1 C.L.R. 208 (1904), at 213-214. Tasmania v. Commonwealth (1904) 1 C.L.R. 329, 333 arguendo; Attorney-General (Vic.) and Black v. Commonwealth 146 C.L.R. 559 (1981), 578 (per Barwick C.J.; “attention to the course of the Convention Debates might well distract the mind from the proper meaning of unambiguous words in the text”). See also the cases cited in Thomson (1982) supra note 4, at 314; and see Coper (1987) supra note 5, at 412; Mason (1986) supra note 1, at 25; Dawson (1990) supra note 2, at 93-94; Burmester in Craven (1986), supra note 5, at 29. But cf. Seamen’s Union of Australia v. Utah Development Co. 144 C.L.R. 120 (1978), at 143-144; Murphy in Attorney-General (Vic.) and Black v. Commonwealth, this note, at 626 and in Re Pearson; ex parte Sipka 57 A.L.R. 225, 232 (1983). The inadmissibility rule has not, however, stopped the High Court from referring to the Convention Debates in an elliptical fashion or using other historical sources: Coper, supra note 5, at 413-414: “In any event, the High Court’s practice of treating the Convention Debates as inadmissible seems now to have changed, although without express acknowledgement”; Burmester, supra note 5, at 29; Mason (1986), supra note 1, at 26. See also the Incorporation Case, infra.

38 The usual formal approach by the High Court to constitutional interpretation has been well-summarized by the Hon. Sir Daryl Dawson:

“The exercise in the case of a statute is spoken of as an attempt to ascertain the intention of the legislature. Although it is spoken of in that way, we all know that it is not an attempt to ascertain the actual intention of the legislature because no such intention really exists... What is meant is that a court will construe the language of a statute and arrive at the intention which is revealed by that language. If none is revealed, it is still not possible traditionally to look at the intentions of individuals, although it is permissible to look at history to see what the problem was that it was attempting to cure, and to construe the statute accordingly”


39 D.P. Derham, AN INTRODUCTION TO LAW (Sydney: Law Book Company, 1977) 139, 138. The locus classicus of this approach in English law is to be found in Heydon’s Case 3 Co.Rep. 7a. (1584). For a detailed exploration of the Mischief Rule as a legislative presumption, and of purposive construction generally, see P.A.R. Brinon, STATUTORY INTERPRETATION: CODIFIED WITH A CRITICAL COMMENTARY (London: Butterworths, 1984) 631-656, Part XV.
According to current High Court doctrine — and it must be stressed that it is the judges who control the admissibility of materials and facts in constitutional interpretation — the meaning to be given to a word in the Constitution is that which it had at the date of the enactment in 1900.

However, the strict theory has been mitigated by judicial practice in a number of ways: by the recognition that it is a Constitution being interpreted; by the influence of the common law tradition of evolutionary, judge-made law; by the Court’s reference to legislative history and general historical development; by purposive and structural interpretation using implied principles and extra-constitutional notions; and by policy choices.

The Court has recognized that the Constitution is not an ordinary statute; it is "a mechanism under which laws are to be made and not a mere Act which declares what the law is to be," as Mr. Justice Higgins once said. His statement reflects what Sir Anthony Mason has recently called the High Court’s "dynamic rule of constitutional interpretation." According to this rule one should construe the Constitution broadly and flexibly to meet the needs of the current generation of Australians. As Sir Owen Dixon once explained, the Constitution is "an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."

This principle now finds more modern expression in Barwick’s connotation/notation distinction which means, crudely, that the essence of a word can remain the same as in 1900 but it can apply to a related concept, exemplification or new instance not foreseen in 1900. The connotation is fixed, the denotation changing. Of course, this distinction can, at times, be highly artificial.

With regard to interpretation of the Constitution, reference may be made by the High Court to the draft bills of 1891, 1897 and 1898. We may now identify the main content of these constitution drafts. The 1891 Bill was the result of an unselected National Australasian (so-called because of New Zealand’s early involvement) Convention of State Premiers and delegates (forty-five men in all) in Sydney – and was drafted principally by Sir Samuel Griffith (Premier of Queensland, a lawyer, “declared positivist,” and an “arch-conservative politically”). It embodied the main features that now exist in the Commonwealth Constitution. These features may be listed as follows: a bi-cameral Federal Parliament with equal representation for all States in the Senate with the House of Representatives predominating in matters of finance and the control of the Executive; the possibility of responsible government along British Westminster cabinet lines; a federal tax uniform in all states with concurrent “state” tax powers; state determination of elector-

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42 Attorney-General for NSW v. Brewery Employees Union of NSW 6 C.L.R. 469 (1908), at 612.
43 Mason (1986), supra note 1, at 23.
44 Quoted in id. at 26.
45 Id. at 26.
al boundaries; a Federal Supreme Court; free trade between the states. Commentators Quick and Garran\textsuperscript{48} describe the impact of the Bill in the following way:

The idea was once and for all crystallized into a practical scheme:

The real work of the Convention was now practically finished, [for] in the first draft of 1891 the whole foundation and framework of the present constitution was contained . . . [although] it was in some few respects less essentially democratic in its basis . . . [and] less definite and less elaborate in its treatment of the vexed problems . . . In those few days they [the Framers] laid down the main lines from which the movement has never since wavered. On 2nd March 1891, Australian Federation was a misty abstraction; on 31st March it had definite outlines and a practical policy.

Thus, the subsequent drafts of 1897 and 1898 embellished but did not substantially alter this model.

Attempts by the Framers to forge inter-colonial agreement on the 1891 Bill by parliamentary means failed. As Quick and Garran note:

neither the [colonial] Parliaments nor the people would accept the work of the [1891] Convention as final . . . [for] in the minds of many of the people there was a vague feeling of distrust of the Constitution as the work of a body somewhat conservative in composition, only indirectly representative of the people, and entrusted with no very definite or detailed mandate by the Parliaments which created it.\textsuperscript{49}

The Bills of 1897 and 1898 were the result of “popularly” elected national Conventions (according to Davidson, “The ‘popular [pro-Federation] movement’s’ leadership was in fact composed almost exclusively of middle-class, commercial and dependent professional interests . . . and, when finally there were elections of delegates to a further convention, the ‘popular mandate’ which returned the old guard of 1891 to Adelaide in 1897 totalled slightly more than 55 percent of all voters”\textsuperscript{50} — and Queensland was not represented at all) in Adelaide, Sydney and Melbourne.

The 1897 Adelaide Convention, while claiming with their “democratic” mandate to “begin at the beginning,” commenced by discussing leading principles “almost exactly in the form of Parkes’ resolutions of 1891 [on which the 1891 Bill was based].”\textsuperscript{51} Indeed, the draftsmen of the 1897 Bill had “endeavoured to treat as reverently as possible\textsuperscript{52} the 1891 Bill. The main changes in the 1897 version can be summarized as follows: a ratio was established between the numbers of representatives in each House of Parliament (with twice as many in the House of Representatives as in the Senate); a Federal franchise was prescribed (States would determine by what criteria a person [usually a male] would be entitled to vote in future Federal elections); money bills were to originate in the Lower House; “responsible government” was formally provided for in the condition (following a section in the South Australian Constitution Act of the time) that no Commonwealth Minister of the Crown hold office for more than three months without obtaining a

\textsuperscript{48} Quick and Garran, supra note 29, at 136-37.
\textsuperscript{49} Id. at 144.
\textsuperscript{50} Davidson, supra note 47, at 233.
\textsuperscript{51} Quick and Garran, supra note 29, at 166.
\textsuperscript{52} Id.
seat in Parliament; the High Court of Australia was to be established by the Constitution (not left merely within the legislative power of the Commonwealth Parliament as in 1891), and given a final appellate jurisdiction; substantial alterations to the financial clauses; any Commonwealth or State law derogating from the freedom of trade protection would be null and void; and the provision of a more democratic constitutional amendment process whereby a proposed change would have to pass through Parliament and then be submitted to the electors of the States (a successful amendment would require approval by the electors in a majority of States and approval by an overall majority of Australian electors — in the 1891 Bill a proposed change was to be submitted to Parliament — elected “State Conventions”). The 1897 Bill went through the convention’s committee process (constitutional, financial, judicial and drafting committees), before being submitted to the various colonial legislatures for approval.

At the Sydney session of the 1897 Convention, the framers had before them 286 proposed amendments to the Adelaide draft, suggested by the ten colonial Houses of Parliament. The session closed “before more than half of the Constitution had been considered” and it had earlier reduced consideration of the amendments to “four great questions: the financial problem [how to resolve conflicts of interest between ‘big’ and ‘small’ — in terms of population — states], the basis of representation in the Senate, the power of the Senate with regard to Money Bills and the insertion of a provision for deadlocks [a joint sitting of the Commonwealth Houses of Parliament should there be a deadlock between them over ‘legislation’]. Apart from the deadlock procedure, the only other significant innovation at this session was that the Senate was to be given the power to originate Bills involving only incidentally the appropriation of fines or fees (following a then existing Standing Order of the House of Commons, U.K.).

According to Quick and Garran, the Melbourne Session of the convention in 1898 (20 January - 17 March) was “the longest and most important of all.” The whole 1897 Bill was considered and reviewed clause-by-clause in the Drafting Committee; significant debate occurring on the issues of the regulation of rivers and railway rates and finance. However, the only important changes were as follows: legislative authority of the Commonwealth Parliament was now to extend to “invalid and old-age pensions” and to the acquisition of property for the public purposes of the Commonwealth; the High Court of Australia was to be the highest court of appeal (unless the public interests of some other part of the Queen’s dominions [for example, Canada] were concerned); and the Court was also to be “the final arbiter and interpreter of the Constitution.”

There has been no clear explanation of why logically the Court should limit itself to these particular draft bills (why, for instance, is reference not made to the Bill produced at the 1899 Premiers’ Conference which made seven amendments to the 1898 Bill, and which was then put to the second national referendum?). Neither has it been explained why it is legitimate for the Court to gather evidence from general textbook histories of Federation, including Quick and Garran’s commentary, but not to examine the primary sources in Convention debates and elsewhere which are relied upon by their authors. The Court has sought to seal off history as

53 Id. at 193.
54 Id. at 188.
55 Id. at 194.
56 Id. at 202.
57 Quick and Garran, supra note 31.
original intent, which is illegitimate, from general history, though in practice it has resorted to both.\textsuperscript{58}

We can now further demonstrate the deficiency of approaching constitutional interpretation in Australia from an originalist perspective by employing the same framework that was used in examining the role of the U.S. Supreme Court.

Can we readily ascertain the original intent of the Australian Founding Fathers? Clearly, the problem concerning the fact that the Framers will not have always turned their attention to, or debated, issues currently before the constitutional court holds equally well in the Australian as in the American situation. Nor can the Australian "originalist" (actually a rather rare breed) avoid difficulties with the completeness, accuracy and bias of the records of the national Constitutional conventions from 1891 to 1898. These difficulties are made more acute by the long-held, formal, "settled doctrine in Australia", as Barwick, C.J. said, "that the record of the discussion [debates] in the Conventions and in the legislatures of the colonies will not be used [by the High Court of Australia] as an aid to the construction of the Constitution." The Constitution was to be approached "simply" by "read[ing] the language of the Constitution itself."\textsuperscript{59} Thus, if this formal rule is an accurate depiction of High Court practice, then the Convention record - that is, the most obvious evidentiary source of the Framers' intentions - would be excluded from judicial consideration. In fact, however, as Coper, Mason and Burmester have noted, this inadmissibility rule has not stopped (although it inevitably limits or affects judicial practice) the High Court from referring to the Convention Debates in an elliptical fashion or using other historical sources. As Burmester has stated,

The rejection by the High Court of the use of the convention Debates in the early years has continued to be the general position taken by that Court ever since, although exceptions have inevitably occurred. All the judgments are artificial, to the extent that they close their eyes to what the framers actually said, and yet resort to other historical material.\textsuperscript{60}

To complicate matters, in the recent Incorporation Case, the High Court appears to have watered down its own rule since it made decisive use of "a quite liberal dose of information gleaned from the Convention Debates" to hold that the Commonwealth lacks the power under § 51 (xx) of the Constitution to legislate in relation to the incorporation of trading and financial corporations.\textsuperscript{61}

As previously mentioned, the High Court has not coherently explained why John Quick and Robert Garran's Annotated Constitution of the Australian Commonwealth (1901), which draws heavily on the Convention Debates, can be consulted but not the Debates themselves. Indeed, if a "neutral" interpretation was sought by legalists in the High Court, why rely on a textbook authored by lawyers

\textsuperscript{58} "The Court does ... permit, and more frequently indulge in, more general historical exposition including the formation of the Constitution, evolution of particular provisions and pre-Federation history." (Footnotes omitted), Thomson (1982), supra note 5, at 310. Burmester in CRAVEN (1986), supra note 5, at 30.

\textsuperscript{59} A.G. (Ch.) ex rel. McKinlay v. The Commonwealth 135 C.L.R. 1 (1975), at 17, 19, 24, quoted in Davidson, supra note 47, at 310, n.30.

\textsuperscript{60} Burmester, supra note 5, at 29. See also Coper supra note 5; Mason supra note 2, at n.40.

who had been active in the pro-Federation movement? Garran was a councillor of
the Australian Federation League of New South Wales, author and distributor of
pro-Federalist books and other propaganda, Secretary to the Drafting Committee
of 1897-1898, and Secretary to Premier Reid at the 1899 Premiers’ Conference.
Quick was himself a Founding Father, rising to this status from being a journalist
on the Federalist Age newspaper in Melbourne, a member of the Victorian Legis-
lative Assembly (lower house) under Premier Deakin, an active member of the
Australian Natives’ Association, and founder of the Bendigo Federal League
(president 1893, 1898, 1899). In 1893, his proposal that a national constitutional
convention be popularly elected was adopted, and he himself was elected as a Vic-
torian delegate to the Australian Federal Convention which framed the Common-
wealth Constitution in 1897-1898 (being active in the Constitutional Committee).
The authors’ personal involvement is reflected in their history which is laced with
centralist, pro-Federalist, Imperialist, and anti-labour glosses on the Constitution,
draft Bills debates, and popular reactions. In finding the Convention Debates inad-
missible as evidence in High Court constitutional interpretation, Barwick, C.J. had,
citing with approval Dixon’s “strict and complete legalism,” declared that

[the problem which is presented to the Court is the matter of the legal
construction of the Constitution of Australia; itself a legal document; an
Act of the Imperial Parliament. The problem is not to be solved by resort
to slogans or to political catchcries or to vague and imprecise expressions
of political philosophy . . . .]

This declaration is inconsistent with the Court’s use of Quick and Garran’s
commentary in constitutional interpretation, a text which is replete with just the
sort of slogans, political catchcries and crude political philosophies that Barwick,
C.J. claims to ignore (and this commentary is one of the most-respected “extra-
legal” sources on the Commonwealth Constitution). Further, as postmodern and
other critics would be quick to emphasize, just as interesting and powerful, are the
silences in Quick and Garran’s text — assumptions made, ideologies and philoso-
phies neglected or omitted, and “catchcries” unheard, invented, ignored or stifled
(for instance, the radical, socialist critique of the Draft Bills to be found in the
nineteenth-century publication Tocsin). Similarly, the existence of debate or the
lack of it on an issue is ambiguous as to that issue’s importance (for instance,
would lack of discussion on a written, entrenched Bill of Rights mean that rights
were to the Framers less important goals, or that they were thought to be already
adequately protected by the ordinary common law, or some such institution?).

The difficult task of identifying exactly who is to be counted a “Framer,”
which we saw in examining the American originalism is equally — if not more so —
a problem with regard to the creation of the Australian Constitution between
1890 and 1901. Were the “Framers” the fourteen delegates to the Melbourne Con-
ference (1890)? The forty-five delegates at Sydney in 1891? The fifty delegates at
the 1897-1898 Conventions? These are only some of the perplexing questions one
can ask in relation to the Constitutional Conventions. Other problems involve
questions of hierarchy and authority concerning which persons count and to what
extent should the views of long-standing active “framers” be preferred (even when
not spending much time on a particular issue)? What of the committeemen and the

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63 See the entries on Garran and Quick in Vols. 8 and 11 respectively in AUSTRALIAN DICTIONARY OF BIOGRA-
64 See Davidson, supra note 47, at 231, n.60.
65 See Davidson, supra note 47, at 235-36.
relation between committees? What of the colonial Parliamentary and popular interventions and interpretations (like Quick's, for example)? What of participants at Premiers' Conferences? What of members of the U.K. Parliament and Home Office? No adequate originalist theory has emerged to recommend how one would answer these questions and simultaneously reconcile the inevitable conflicts of opinion that would and did emerge.

In any case, what evidence of the Framers' "intentions" (remembering that this is a fiction in the sense of fictio — made, constructed — since we cannot "get inside" anyone's mind so as to know a person's intention as she herself does) that can be gathered seems to point against any notion that the Australian "Founding Fathers" intended their own intentions to be controlling in constitutional interpretation: if they were, to generalize, under the spell of an interpretive theory it was legalism not originalism (a spell because, as we have seen, the formal theory was often departed from or had unintended consequences). At least formally, the Australian judiciary, including the High Court, is still wedded to the "ordinary" English canons of statutory construction, despite judicial and extra-judicial statements reflecting a weakening of the bond. Additionally, progressive liberals at the Conventions "intended" that the constitution be populist and dynamic — why else the power of the people under § 128 to amend the Constitution? It has also been rightly argued by Professor Tribe in relation to the U.S. Constitution, but certainly applicable to the Australian constitutional language (if not as strongly), that

[The very generality of many of the terms the Framers used — such as liberty, due process and equal protection — strongly suggests an intent not to confine their meaning to the specific outcomes and contexts of those who first used them, but to invite the development of meanings in the light of the needs and insights of succeeding generations.]

The normative arguments in favor of originalism in the U.S. such as legislative democratic majoritarianism, authorial interpretation of texts, and the supposed lack of principled alternatives fares equally poorly in Australia, but for some different reasons. Here I can only give a sketch of these reasons: the dubious "democratic" credentials of the framing process (Australian Aborigines did not take part, nor did most women); the originalist normative view underestimates the extent to which the High Court has (although erratically), and can, promote a Dworkian, humanistic, cosmopolitan notion of democracy that it is concerned with treating all persons with fair and equal concern and respect (especially important when a parliamentary majority uses its power to unfairly discriminate against a minority's interests); that the interpretation of texts via authorial intention is hardly the only approach to obtaining meaning and needs arguments as to how one can do it and why it is preferable to other "readings" (for example, textual, hermeneutic deconstructionist and "postmodernist" ones); and that in any case, the High Court, for

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its part, seems to prefer, as a formal approach, to derive the intention of Parliament (not the Framers) via textual and purposive interpretation. Of course this list by no means exhausts the possibilities for a critique of originalist normative arguments, but in itself constitutes at least one demonstration of the deficiency of those arguments.

Studies by Coper, Zines and Winterton\(^9\) amass substantial evidence that the High Court’s purposive Constitutional interpretation has not been confined to the text but has embraced various extra-Constitutional notions such as federalism, the national interest, responsible government, separation of powers and democracy. The principle of federalism has been held by the Court to imply both the necessity of judicial review to a judge between Commonwealth and State powers, and the assumption in the Constitution that there are limits to Commonwealth power.\(^7\) The use of the concept of “nationhood” by the High Court has expanded the Commonwealth’s legislative and executive power, especially via the external affairs power as enlarged in the Tasmanian Dam case.\(^7\)

In the Tasmanian Dam case the High Court held that Commonwealth legislation halting the construction of a dam in a Tasmanian wilderness region by the conservative State government was valid — principally, as an exercise of the Commonwealth’s legislative power under § 51 (xxix) of the constitution (the “... power to make laws for the peace, order and good government of the Commonwealth with respect to: ... External affairs”). The court’s judgement was explained on the basis that the legislation was passed pursuant to Australia’s obligations, under an international treaty which the Commonwealth had executed (The UNESCO Convention for the Protection of the World Cultural and Natural Heritage), to protect the natural environment in the region which would be threatened by a dam. The Commonwealth legislation was also valid by connection with § 51 (xxvi) of the Constitution (laws with respect to “the people of any race for whom it is deemed necessary to make special laws”) since it was directed towards protecting Australian Aboriginal artifacts in the area. The case was highly publicized and politicized because both leaders and parties of the respective governments had recently been elected on mandates to “build the dam” (Tasmanian Liberal [conservative] Party Government) or “save the wilderness” (Commonwealth [Australian Labor Party] Government).

The High Court’s 4-3 decision, significantly enlarged central government power, “international” considerations providing authority, in the Court’s view, for the

\(^{69}\) See Levy, supra note 4.


\(^{71}\) Commonwealth v. Tasmania (1983) (46 A.L.R. 625 (considering inter alia the reach of the external affairs power of the Commonwealth under x.51 (XXIX) of the Constitution). See also R v. Burgess, ex parte Henry 55 C.L.R. 608 (1936) — in Lumb (1986), supra note 33, paras. 209, 216, 342, 245, 247, 249, 471; New South Wales v. The Commonwealth (Seas and Submerged Lands) 135 C.L.R. 337 (1975), in Lumb, supra note 33, paras. 270, 271, 346, 471, 476, 484, 646, 697, 744; Koowarta v. Bjelke-Petersen 153 C.L.R. 168 (1982), in Lumb, supra note 33, paras. 034, 330, 346. The result of the Koowarta and Tasmanian Dam cases is that the “external” affairs power has intuited into domestic or “internal” affairs and “there are virtually no limits to the topics within this wide power if the Commonwealth wants to use it.” P.H. LANE, AN INTRODUCTION TO THE AUSTRALIAN CONSTITUTION (Sydney: Law Book Company, 5th ed., 1990), at 100. See also Kimani v. Captain Cook Cruises Pty. Ltd. (No. I) 159 C.L.R. 351 (1985). On the “implied nationhood” power, see Davis et al. v. Commonwealth of Australia et al.166 C.L.R. 79 (1988). (interpreting § 51 (XXXIX), 52, 61 of the Constitution) and Tasmanian Dam case, infra.
Commonwealth to supplant State legislative and executive rights. This decision prompted some critics (especially conservative States’ rights Premiers and land developers) to say that Australian Federalism had been pronounced dead; worse still, by persons who in these critics’ view, had no authority to do so — judges unelected by the people and failing to consult them. On the other hand, the decision was a great victory for “centralists,” the Australian Labor Party (in government at the Federal Level at the time), Aboriginal rights groups, and the “green” environmentalist movement.72

The choices High Court judges have to make between national needs or the federal balance are, as in the Tasmanian Dam case, inevitably value and policy choices. Unfortunately, the Court has rarely been open about the choices it is making, the justification for them and how they “trump” competing considerations. This obviously reduces the accountability and democratic nature of the judiciary.

Research by Murphy, Fleming and Harris,73 demonstrates that the kind of non-textual notions relied upon by the High Court of Australia in its purposive constitutional interpretation, have, if anything, been even more readily employed (for reasons already identified) in American constitutional interpretation. Structural/teleological analysis, which relates a particular clause being interpreted to the overall structure and “ends” of the whole “Constitution” as a text and politico-moral scheme, and which constitutes a particular kind of polity, has been employed by the U.S. Supreme Court to bolster, variously, the doctrine of “clear mistake” (to strike down legislation if “the violation of the Constitution is so plain that no person could entertain rational doubts about the violation”74), the commitment to representative democracy (see, e.g., Justice Harlan Stone’s footnote 4 in the Carolene Products Case75), economic libertarianism (see, e.g., Meyer v. Nebraska76), or fundamental rights (see, e.g., Justice Cardozo in Palko v. Connecticut77; Griswold v. Connecticut78). Structural analysis has also been essential to the interpretation of the U.S. Constitution as a federal constitution — requiring interpretation concerning the distribution of power between the States and the Nation; and seen, for example, in judicial controversies over the meaning and extent of provisions such as the Fourteenth Amendment, the Bill of Rights, and antidiscrimination imperatives. The Supreme Court has, for example, developed the notion of “suspect classifications” — evolving out of the segregation cases and judicial reaction to the Korematsu case79 — of race, gender, religion and ethnicity. This doctrine requires that persons not be treated arbitrarily or unfairly on the basis of these classifications (of course, most laws will discriminate to some degree in defining the class of persons to which they are addressed; as, for instance, is the case with affirmative action laws). Judicial policy-making combining normative/purposive interpretation and prudential considerations can be detected in the Court’s “balancing of interests” in the segregation cases, the communism cases (especially Watkins v. United States and Yates v. United States80) and Roe v.

72 See Galligan, supra note 3, at 240-248; Detmold, supra note 5, at 1, 2, 26, 163, 164, 165, 172, 173, 174; (Current Topics), The Twilight of State sovereignty? 57 (9) AUSL J. 487-488 (1983).
74 Id. at 297.
75 304 U.S. 144 (1938); id. at 298.
76 262 U.S. 390 (1923) cited in id. at 300.
77 302 U.S. 319 (1937) cited in id.
78 381 U.S. 479 (1965) cited in id. at 113.
79 Korematsu v. United States, 323 U.S. 214 (1944), discussed in id. at 62-73.
I have argued that neither strict originalism nor legalism can be decisive in questions of constitutional interpretation. In the U.S.A. the intent of the Framers, or in Australia the often absurd assertion of the "plain meaning of the text," has veiled the complex web of principles, policies and preferences necessarily involved in constitutional interpretation and adjudication. However, it is a web continually being spun and re-spun even as judges deny such activism.

In Australia, for example, how does one find the "plain meaning" of the words "absolutely free" in § 92 which states, *inter alia*, that "On the imposition of uniform duties of customs [by the newly-created Commonwealth Government in 1901], trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free"? The High Court has in various cases since 1920 relied on textualism and literalism in interpreting these words and has inevitably been faced with absurd or contradictory meanings: namely, either that the expression "absolutely free" means that all intercourse between States (commercial or otherwise) is entirely free from any legal regulation by the Commonwealth which would completely undermine the purpose of Federation (to create a nation with a central government and a federal system with at least some overarching, uniform, national laws); or, that the expression means that the interstate trade, commerce and intercourse is only "relatively" free which would, it appears, flatly contradict the "plain" meaning of the words "absolutely free". This was the position of Justice Mason when in *Permewan Wright's* case he said: "the freedom which § 92 guarantees is a qualified, not an absolute, freedom." The Court has tried to skirt these problems by implausibly distinguishing between "absolutely free" and "license" (as Detmold asks, "And what is license if not absolute liberty?") so that Commonwealth legal regulation of interstate commerce and intercourse would be allowable, and by the balancing (without principled elaboration, justification or delimitation) of "community interests" against the (presumed) interests of traders in free trade guaranteed under § 92. This approach has produced an *ad hoc*, inconsistent and vague High Court jurisprudence and precedent on § 92. If the Court had paid attention to the fundamental political and constitutional principle and point of § 92 (but not in a narrow originalist terms), it is argued that a more coherent and flexible interpretation could have emerged.

What § 92 sought to achieve was a comprehensive, federal commonwealth and community; covering not just trade and commerce but all intercourse between States ("every conceivable way by which human beings deal with one another"). Seen in this light, then, Commonwealth laws regulating interstate intercourse are essential to preserving Federal freedom — resisting, for instance, monopolistic, fraudulent, unfair, misleading or parochial State interested economic and other practices not conducive to the commonwealth. Naturally, when Commonwealth laws can themselves be characterized by these descriptions, § 92 can be interpreted

370, n.1.
37 For a survey of interpretations of section 92, see P.H. LANE, A MANUAL OF AUSTRALIAN CONSTITUTIONAL LAW (Sydney: Law Book Company, 1987); 375-409. *See also* the references listed in Thomson (1982), *supra* note 5, at 325.
38 Detmold, *supra* note 5, at 35-36.
39 *Permewan Wright* v. Trewthitt 145 C.L.R. 34 (1979), *quoted in id. at 36.*
40 *Id.* at 35.
41 *Id.* at 43.
to invalidate them. It is these anti-federal, anti-commonwealth laws from which interstate "intercourse" is "absolutely free." As Detmold elaborates:

The fundamental constitutional provision by which the Australian colonists sought to transform their designs into reality was § 92... For an organic commonwealth the section was critical. Its function was the opening of the colonial markets and communities to each other; and thereby the organic construction and continuing nourishment of the Australian community, the point and life of the Australian commonwealth... The constitutional charge is to invalidate only those laws incompatible with the (expanded) commonwealth.7

Unless one is no longer to accord a written constitution authority as law for the present generation, one will always be confronted with the problem of reconciling the purpose of that constitution with the present purposes of the Nation, government and populace. If one is to accept some kind of constitutional polity one must recognize the point of the constitution, written or unwritten, and attribute to it some authority. Inherent in the notion of constitutionalism is the tenet that while the constitution exists, is popularly accepted, and has legal force, the interpretations, decisions or actions of the present generation should not be unfettered, or at least not unaffected by, the principles and structures provided for in it. Given that the U.S.A. and Australia both have written constitutions embodying a constrained democratic majoritarianism, how are we to be constitutional and provide adequately for the needs, desires and interests of those currently interpreting and affected by a constitution?

It is only possible here to briefly describe the theory that I argue provides the best answer to this question and adequately accommodates historical analysis in constitutional interpretation. I will use Australia as an illustration. Professor Richard Fallon has argued that constitutional law suffers from a "commensurability problem." Courts admit the relevance of a number of kinds of argument all of which we have touched upon:

arguments from the plain, necessary or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent and value arguments that assert claims about justice or social policy.

Since courts must come to a single legal decision in cases before them, the commensurability problem is "to show how arguments of all these various kinds fit together in a single, coherent constitutional calculus."90 It is contended that each kind of argument has its part to play and can be reconciled with the other; even if we sometimes must rank the kinds of argument hierarchically. Tentatively, my ranking would give priority to fundamental principles derived from the whole text.

7 Id. at 32, 39.
8 Although I will not argue it fully here, I see no major impediments to the application of my theory to the U.S.A. for a recent critique of originalism in the U.S. (advocating "democratic sovereignty": in constitutional interpretation) see S. Freeman, Original meaning, Democratic Interpretation, and the Constitution, 2191 PHIL. AND PUB. AFF. 3-42 (Winter 1992).
90 Id. at 1190.
of the Constitution when consistent with the nature of the polity it constitutes; and then, in order of decreasing importance, particular provisions of the text, framers' intent, precedent and the judges' moral and policy values. But, of course, the values of the interpreters will have a pervasive, if not explicit, impact on the treatment of each kind of argument. This article concurs with Professor Fallon, however, when he argues that this type of ranking should only come into play if the effort to achieve coherence does not succeed. Professor Fallon summarizes his theory in the following way:

The "constructivist coherence theory" that I offer has two main aspects. The first asserts that the implicit norms of our constitutional practice call for a constitutional interpreter to assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result ...Typically, legal arguments — including those of a judicial and even Supreme Court opinions — find the best arguments in all of the categories to support, or at least not to be inconsistent with, a single result . . . The various kinds of constitutional argument are substantially interrelated and interdependent. Reciprocal influences among them make it possible most of the time to achieve constructivist coherence. The role of value arguments is especially important in this respect . . .

The second element of my theory comes into play only when the effort to achieve coherence does not succeed. In such cases, the categories of argument are assigned a hierarchical order in which the highest ranked factor clearly requiring an outcome prevails over lower ranked factors.

According to this theory, judges must try to balance fairly the various antinomies that arise in considering the different kinds of argument: for example, original understanding versus authoritative current meaning; ordinary language versus "constitutional" language (for example, "due process" in American Constitutional law); and principles versus counterprinciples embodied in the Constitution. A suitably modified constructivist coherence theory of constitutional interpretation could, and, it is argued, should, operate in Australia with the fundamental principles of the Constitution governing over other kinds of argument.

The theory I propose may be called a text-constrained, but democratic and constitutionalist theory of constitutional interpretation. Its main outlines can be described in a number of interlinked propositions concerning (1) the possibility of democratic judicial review; (2) the judicial consideration of historical evidence; (3) the status of the constitutional text; (4) implied constitutional principles; (5) the Mischief Rule and general constitutional principles and structures; (6) the place of judicial policy and value choices. We can now examine each of these elements in turn.

(i) Possibility of democratic judicial review.

The High Court of Australia is clearly now the chief constitutional interpreter, is not bound by stare decisis, has judicial review at its disposal and can admit a range of evidence in constitutional cases.

91 Id. at 1193.
92 Id. at 1192-93.
This article accepts Lindell’s argument that courts in Australia, like English courts at common law, have not only the authority, but the duty to exercise judicial review in relation to legislative and executive acts. This duty applies equally to the High Court of Australia in relation to the Constitutional text which is an Act of the Imperial Parliament (but, as has been, argued throughout this article, this text is not exhaustive of the constitution of Australian polity — constitutional principles, structures and conventions, for instance, play a fundamental role).

Flowing from the common law and constitutional recognition in Australia of the distinction between the exercise of judicial, executive and legislative powers, and the principle of complete judicial independence, the High Court has and must exercise where relevant its jurisdiction ("an authority to adjudicate" — per Isaacs, J. in Baxter’s Case) to exclusively "apply, and interpret for themselves, the provisions of the constitution." Since the Commonwealth and State Parliaments can only legislate validly with respect to powers provided for or saved in the Commonwealth Constitution, and because these powers are themselves subject to limitation in its text, the duty of the High Court in judicial review of the Australian Constitution can be described in the following way:

The function of examining the constitutional validity of Commonwealth or State legislation requires interpreting and determining

(a) the scope of the legislative powers and the restrictions on the exercise of these powers contained in the Constitution; and

(b) whether the legislation can be characterized as either an exercise of those powers [valid] or as falling within the restrictions placed on the exercise of these powers [invalid].

The High Court has, at least, since Webb v. Outrim in fact "acted on the assumption that they do possess the authority to review the constitutional validity of Commonwealth or State legislation." The fact that a constitutional case before the High Court involves "political" questions provides no exemption to the Court from its duty to exercise judicial review. Clearly, were such an exemption to apply to an avowedly political document such as a constitution, this judicial power would be rendered vacuous. In fact, however, no such exemption has been recognized by the High Court despite the usual positivistic denials from some judges that they are concerned only with legal questions and not political ones. Even the legalist Sir Owen Dixon recognized that "[t]he Constitution is a political instrument. It deals with government and governmental powers ... It is not a question [in judicial review] whether the considerations are political for nearly every consideration arising from the constitution can be so described, but whether they are compelling."
Thus, the High Court has through judicial review the power to achieve a coherent constitutional interpretation which takes account of the range of constitutional arguments identified by Professor Fallon, and gives precedence to fundamental principles of the constitution assumed, implied, embodied or necessitated by the Constitutional text.

We must now ask whether democratic judicial review by the High Court is possible (I assume for reasons already given that it is desirable). Here it can be reiterated that originalists have a distorted view even of representative democracy; that in Australia and the U.S. we have, at least formally, constitutional democracy; and that there are more substantive formulations (and visions) of democracy than mere representative democracy.

First, originalists describe representative democracy in terms of bare parliamentary majoritarianism. This view is not accurate even with regard to the limited political phenomena it seeks to describe. It ignores for instance, the questions of how fair, regular and free elections are to be guaranteed. In relation to Australia, especially, it neglects the doctrine of responsible cabinet government (following the Westminster model and enshrined in § 64 of the Constitution) according to which the Executive is accountable to Parliament, and Parliament, via elections, to the people. It fails, also, to appreciate the role of an independent judiciary and judicial review in representative democracies (courts determining such decisive questions as, for instance, whether an Act of Parliament has even been passed). As was said by the High Court (in The Queen v. Kirby; ex parte Boilermaker's Society of Australia), this judicial power is essential to a federal polity:

The conception of independent governments [Commonwealth and State] existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature.100

Second, the Australian (and American) polities are not merely representative democracies but constitutional democracies. The High Court, as we have seen, is the chief interpreter, and also a keeper, of the written Constitution and constitutional principles which limit executive and legislative action. The Parliament of the Commonwealth does not enjoy complete legislative sovereignty. Even if it did, the doctrine of parliamentary sovereignty is a common law, judicial notion, not by definition a parliamentary one. As Detmold has pointed out:

Thus if the ultimate constitutional rule in the United Kingdom legal system is "whatever the Queen in parliament enacts is the law" it is so only because the judges have held it to be so and continue to hold it... A simple way of expressing this constitutional state of affairs is to say that the legal status of this ultimate rule is a common law matter.101

Third, there are more substantial theories of democracy than merely representative ones. As Freeman has recently argued, there is a democratic social contract tradition stretching from Locke, Rousseau and Kant to Rawls which maintains that "democracy is not just a form of government; more elementally it is a kind of sovereignty based in the equal freedom and independence of all citizens."102 Al-
though this proposition is no doubt more true of the U.S. Constitution enacted by “We the People” than of the Australian Constitution text whose formal legal validity resides in an Imperial Act of Parliament, it does nevertheless have application to Australian conditions. First, popular participation in the Federation movement and in ratification of the Australian constitutional drafts, limited though it was, cannot be discounted as a contribution to the legitimacy of the Australian Constitution. Second, the constitution as enacted embodies and implies fundamental principles concerning the separation of powers, judicial authority and independence, responsible government, representative democracy, federalism, political participation, and individual rights. Thirdly, the constitution as written text only constrains political and legal practice while it is accepted by the Australian people. Since the passing of the Australia Acts (construed as simultaneously an exercise and abdication of sovereign legislative power by the U.K. Parliament in relation to Australia) it is open to the people of Australia (unlikely as it is) to replace the current constitution by means of the referendum procedure under § 128 without fear of being reversed by the U.K. legislature (or it could create a nouvelle ordre juridique by a republican revolution as in the United States — I take no position here on the desirability of such a course of action). Fourthly, the constitution of Australia is not limited to the constitutional text but includes constitutional conventions, the effects of judicial review, the principle of rule of law and the operation of common law principles.

Further, originalists cast a relatively keen and critical eye in relation to the efficiency and justice of the operation of the judiciary in relation to the Constitution, but have their vision obscured by complacent cataracts when looking upon the functioning of representative legislative democracy; blindly trusting “complete majoritarianism” as democratic. In fact, however, it is not clear that legislatures will always operate more democratically than courts — what is needed is a separation and balance of powers, and a recognition (like John Stuart Mill’s) that there can be a popularly elected tyranny of the majority. As James Madison warned in relation to the U.S.:

In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which Government is the mere instrument of the major number of its constituents.

Thus, again, Madison stressed that

[i]t is of great importance in a republic, not only to guard against the oppression of its rulers, but to guard one part of society against the injustice of the other part . . . If a majority be united by a common interest, the rights of the minority will be insecure.

Constitutionalist democracy concerns itself not merely with the representation of the will of the majority in government but the rights of minorities against it.

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103 See, e.g. Bailey supra note 67, (treatment of political, civil, legal, economic, egalitarian and social rights in the Australian Constitution, in Ch. 4 passim).
104 The phrase is Robert Bork's, cited in Freeman, supra note 4, at 5.
105 Letter to Jefferson, 17 October 1788, quoted in W.F. Murphy et al. (1986), supra note 4, at 28.
106 Federalist No. 51, quoted in Id. at 36. See also Federalist No. 10, quoted in Id. at 37.
Indeed Mr. Justice Brennan, currently on the bench of the High Court of Australia, has recently shown effectively that representative democracy is not working in Australia as democratically as intended. The balance of power has swung decisively in favour of the central executive government and the public bureaucracy, political parties (and the Executive as the majority party) dominate Parliament, and Parliament (with regard to initiation of legislation, fate of legislation, public debate, control of finances) is controlled by the Executive instead of vice versa. Given this demise of representative democracy, Justice Brennan argues forcefully that the equalizing, democratizing role of judicial review in constitutional interpretation is more vital than ever to the health of the Australian polity. It is worth quoting from his argument at length:

This is a more realistic view of [representative] democracy in our time, but it calls for a reappraisal of our constitutional safeguards of freedom. As the wind of political expediency now chills Parliament's willingness to impose checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed . . .

The checks imposed by the courts on the actions of the political branches of governments have been seen by some as anti-democratic, for the judges are not elected by the people. That view misconceives what is involved in the exercise of judicial power. The courts do not seek to interfere with lawful policy: that is the proper domain of the political branches. But the courts are concerned to subject the political branches of government to the rule of law, for that is the constitutional imperative which binds all branches of government. It can hardly be anti-democratic to restrain Parliament to its constitutional power, nor to constrain the Executive to conform to the Constitution and the laws enacted by Parliament.107

(2) The judicial consideration of historical evidence.

There is no reason why the High Court should not consider historical evidence, including the framers' intent (as far as it can ever be determined) in constitutional cases; providing that is does not take the originalist approach108 that the framers' intentions are somehow binding and determinative of its decision.

107Brennan, J., supra note 2, at 35, 36-37, n.2.
108The dangers of an originalist approach to historical materials combined with narrow legalism were demonstrated in the recent Incorporation case (N.S.W. v. the Cth. 169 C.L.R. 482 (1990)) in which the High Court made its first explicit and significant use of the Convention Debates. The majority held that the Commonwealth lacked the power under § 51 (xx) of the Constitution to legislate in relation to the incorporation of training and financial corporations; frustrating the Commonwealth government's legislation for a uniform, national companies and securities code. The majority combined a literalness in interpreting the word "formed" in plactum (xx) ("Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth") as meaning "which have been or shall have been created" (at 498), precedent (principally, the previously disdained decision of the Court in Huddart, Parkers & Co., Pty. Ltd. v. Moorehead 8 C.L.R. 330 (1909)) and history in coming to its conclusion. The rule now seems to be that "the Convention Debates may be used to establish the subject to which the paragraph [(xx)] was directed" (id. at 501; following Cole v. Whitfield 165 C.L.R. 360, 385 (1988), Port MacDonnell Professional Fishermen's Association Inc. v. South Australia 168 C.L.R. 340, 375-77 (1988)). The majority's consideration of the legislative history of § 51 (xx) led it to conclude that it was "concerned with existing corporations and was not intended to confer power to legislate for their creation" (at 501). Deane, J., dissenting, rejected the literal construction of the word "formed" as "unacceptably narrow and technical" (at 512) and, even more strongly, the original intent analysis employed by the majority: "The answer . . . must, of course, be found in the words of the Constitution. It is those words — and those
It has already been demonstrated that despite its protestations against consulting the Convention Debates, the High Court has and continues to engage in historical analysis and to rely, at least indirectly, on the evidence of those Debates. I follow Chief Justice Mason in arguing that even "[o]ne speaker [in the Debates] may provide an unexpected insight or explain why a particular draft was not accepted."\(^{109}\) Thus, despite the admitted defects of judges as historians, the consultation of historical evidence is a legitimate part of the High Court’s *ex post facto* judicial law-making in the common law tradition, (indeed, according to Detmold, "the constitution can hardly be interpreted without an understanding of the historical facts of federation, the main sources for which must clearly include the Convention Debates")\(^{110}\) As Freeman has argued in relation to the U.S. Constitution, the court can take account of and even be *persuaded by the reasons* given by the Framers for certain interpretations of the constitution; what it must not do, however, is to regard these reasons as *authoritative*:

> the framers’ writings on the constitution are of significance in establishing a sense of continuity and tradition especially instrumental to democratic education. We might even look to the framers for advice as one source among others. But to assign to the framers’ thoughts and intentions advisory or educational significance is not the same as to make them binding and dispositive of constitutional meanings. Their intentions cannot obligate us or settle anything . . .

To defer to their intentions because they initiated the constitution, or for whatever reason, is to forfeit democratic for ancestral sovereignty. This does not mean that we cannot be influenced by the *reasons* the founders had for constitutional provisions; but when we are, it cannot be because words alone — which constitute the *compact* made between the people of this country when, by referendum, they authorized the formal enactment of — or, in the case of the people of Western Australia, the proclamation of adherence to — the terms upon which they "agreed to unite in one indissoluble Federal Commonwealth." If the words of § 51 (xx), construed in context in accordance with settled principle, extend to authorize the making of such laws, it is simply not *to the point* that some one or more of the changing participants in Convention Committees or Debates or some parliamentarian, civil servant or draftsman *on another side of the world intended or understood* that the words of the national compact would bear some different or narrower meaning*. (At 503-504 emphasis added. See also: 511) (following Brawington v. Golleman 169 C.L.R. 41, at 131-33 (1988)). He also referred to, but did not flesh out, "the advantages of such national companies legislation", the subject of challenge by the States in this case, which to him seemed "overwhelmingly to outweigh the alleged inconvenience" *(id. at 512)*. The case demonstrates that the resort to historical evidence by judges or their resistance to it does not allow one to infer from this fact the likely ideological character of the interpretation given to a constitution (Dean, J., for example, purported to rely solely on the words of the Constitution and yet, arguably, imported into his judgment more explicitly political notions like "compacts" among people). *See further, J.G. Starke, (Current Topics), A Severe Limit on the Commonwealth’s Corporations Power, 64 AUSTL. L.J. 235 (May 1990) ; R. McQueen, Why High Court Judges Make Poor Historians: The Corporations Act case and Early Attempts to Establish a National System of Company Regulation in Australia 19 Fed. L. Rev. 245 (1990), at 245-246, 264-265; G. Kennett, Constitutional Interpretation in the Corporates Case, 19 Fed. L. Rev. 223 (1990). We must always remember, as Professor Fallon notes, that

> Far from being a simple fact awaiting discovery by the industrious researcher, the framers’ intent must be viewed as an intellectual construct, developed through a process of interpretation, that seeks to embody the principles that furnish the best political justification for a constitutional provision and that find substantial support in the political climate surrounding the provision’s framing and adoption


\(^{109}\) *Id.* n.2.

\(^{110}\) Demold, *supra* note 5, at 233.
they held them, but because these considerations impress us as good reasons anyone could accept in his or her capacity as equal citizens.\textsuperscript{111}

(3) \textbf{The status of the constitutional text.}

There is a written constitutional text in Australia and the United States which, while it is accepted by the polity, the constitutional court is bound to try to understand; respecting that the Constitution restrains its decision,\textsuperscript{112} but is in many cases open-textured. This is so especially in the U.S.A., but is certainly applicable to Australia.\textsuperscript{113}

More fundamentally, the text is not \textit{all} that there is to the "political constitution of any regime." As Freeman emphasizes:

There is . . . a sense of the term "constitution" that designates an institution, and that must be presupposed by any written constitution. In its institutional sense, the political constitution of any regime is that system of publicly recognized and commonly accepted rules for making and applying those social rules that are laws . . . the text has been [in Supreme Court judicial review] but one aspect of an ongoing process of interpretation, an activity that goes on in any regime, with or without the assistance of a written constitution [consider, for example constitutional interpretation in England]. The Court constantly, reorchestrates precedents and extends principles to develop new meanings for constitutional provisions.\textsuperscript{114}

We have seen that Freeman's description would apply also to the practice of the High Court.

(4) \textbf{Implied constitutional principles}

Within a common law and constitutionalist tradition, and despite frequent denials, the High Court, as this article has demonstrated, \textit{already} construes the Constitutional text in the light of constitutional \textit{principles} thought to be implied by it, and according to the perceived requirements of rule of law.

As Justice recently declared:

In the long history of the common law, some values have been recognized as the enduring values of a free society and they are the values which inform the development of the common law and help to mould the meanings of statutes. These values include the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one's property, the benefit of natural justice, and immunity from retrospective [that is legislation must be

\textsuperscript{111}Freeman, \textit{supra} note 4, at 28. \textit{See also}, Detmold, \textit{supra} note 5, at 230-238, on the role of reasons in the judicial process.

\textsuperscript{112}Much of the plain language of the text is taken for granted but, as Fallon argues, "arguments from the text achieve the . . . nontrivial result of excluding one or more positions that might be argued for on non-textual grounds" Fallon, (1987) \textit{supra} note 89, at 1196. Clearly much of the rationale behind written constitutions is to entrench certain features of a polity and put them — at least at a certain level of abstraction — beyond interpretive challenge: a rock of "writtenness" in a sea of interpretive possibilities.

\textsuperscript{113}On the U.S.A. see Fallon (1987), \textit{supra} note 89. For Australia, consider the language in the following sections of the Commonwealth Constitution: § 51 (ii) ("discriminate"), (xxxix) ("External affairs"), (xxxii) ("just terms"), (xxxix) ("matters incidental to the execution of any power . . ."); § 52 ("laws for the peace, order and good government of the Commonwealth"); § 92 ("absolutely free"); § 109 ("inconsistent"); § 118 ("Full faith and credit . . ."); § 116 ("free exercise of any religion").

\textsuperscript{114}Freeman, \textit{supra} note 4, at 6-7.
prospective although, as we have noted, its interpretation by courts is unavoidably ex post facto and unreasonable operation of laws.\(^{115}\)

(5) The “Mischief Rule” and general principles and structures.

It would be a relatively small step from the Court’s use of the Mischief Rule to then refer to historical evidence to help discern in the text (original intent not being decisive in interpretation) those general principles and structures designed by the Framers which bound legitimate constitutional interpretation — such as representative democracy — whatever the specific content attributed to them by the Court at any particular time. This builds on the Court’s connotation/denotation distinction, and is consistent with Dworkin’s distinction between ‘concepts’ and “conceptions” developed in his Law’s Empire.\(^ {116}\)

(6) The place of judicial policy and value choices.

Finally, in construing the broad constitutional principles and structures that have been referred to, judges must be candid about policy and value choices being made, hear argument on all sides (the equitable notion of audi alteram partem), and make an assessment based on their perception (as it must be) of current community values.\(^ {117}\)

The construction of a community’s values by legal elites (as judges of the U.S. Supreme Court and the High Court of Australia\(^ {118}\) admittedly are) is a contestable project because it can be argued that there are multi-layered and divergent normative orders in the U.S.A. and Australia (particularly as both are multicultural polities) that they would be unlikely to reflect. Nevertheless, it is submitted that even the commitment of judges to their own (possibly) narrow conception of community values is indispensable to democratic rule of law. As Professor Fallon emphasizes, the data of the community’s morality

will not be wholly without constraining force; appeal to the community’s values is more than a charade through which a judge imposes her immediate moral views . . . interpretive efforts to identify the community’s morality are required by a constitutional practice that welcomes the infusion of value arguments into our constitutional law yet retains an ideal of the judicial office in some sense representing the whole people.\(^ {119}\)

Irrespective of the content attributed by a judge to the interpretive vessel “community values,” then, as long as she is genuine in her attempt to derive them, there is a benefit in terms of judicial neutrality. If she is candid about those values, judicial accountability is increased: the values are placed before a public forum and must withstand critical appraisal (if only the glare of legal and other academia, the profession or the media).\(^ {120}\) Further, legislation can be initiated to correct judicial distortions (although admittedly its interpretation will still lie in the courts).

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\(^{115}\)Brennan, supra note 2, at 40.

\(^{116}\)Dworkin (1986), supra note 19, at 90-96.

\(^{117}\)See Mason (1986), supra note 1, at 23-28; Fallon (1987), supra note 89, at 1249, 1263; Dworkin (1990), supra note 25.

\(^{118}\)See e.g. M. Sexton, et al., THE LEGAL MYSTIQUE THE ROLE OF LAWYERS IN AUSTRALIAN SOCIETY (Melbourne: Angus and Robertson, 1982).

\(^{119}\)Id. n.297.

\(^{120}\)I have not here been able to take account of Stephen Gardbaum’s comprehensive treatment of Law, Politics ad the Claims of Community, 90 Mich L. Rev. 685-760 (February 1992).
This article has sought to demonstrate by comparative analysis the impracticality, inconsistency and normative unattractiveness of originalism as an approach to constitutional interpretation in Australia and the United States. Nevertheless, I have maintained that this conclusion does not preclude the judicial consideration of historical evidence as long as that evidence is not regarded by the judge as binding upon her constitutional interpretation. Finally, the article outlined a text-constrained, but democratic and constitutionalist theory of constitutional interpretation; suggesting its merit and showing its “fit” with existing High Court constitutional interpretation. Thus, history can play its part in elucidating the fundamentals of the written document constituting the polity we have, but it would not be decisive. With this approach to historical evidence, and a community-based model of constitutional interpretation in place, we can have some confidence in both countries, as does Dworkin in the U.S.A, that “democracy and constitutional constraint are not antagonists but partners in principle.”

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Dworkin (1990), supra note 25, at 346.