2007 Sir Maurice Byers Lecture

Theories of constitutional interpretation: a taxonomy[1]

Delivered by the Hon Justice J D Heydon AC on 3 May 2007

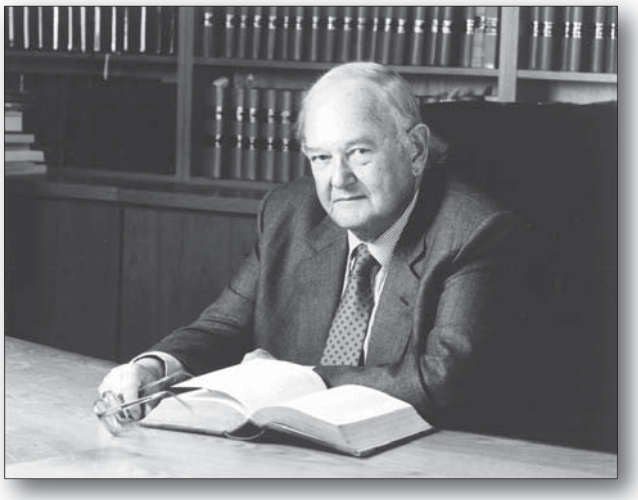
Introduction and disclaimers

There is no express provision in the Constitution mandating the principles on which it is to be interpreted. It was enacted in 1900 as a statute of the Imperial Parliament, but the *Interpretation Act 1889* (Imp), which was in force in 1900, enacts no principle of constitutional interpretation. However, the Constitution does have characteristics which some have taken as pointing to particular approaches. Thus Higgins J said: *'[I]t is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.'*[2] O'Connor J said that its terms are 'broad and general ..., intended to apply to the varying conditions which the development of our community must involve'.[3] Because it creates 'one indissoluble federal Commonwealth'[4], it will last indefinitely – perhaps until Australia loses independence after total defeat at the hands of a foreign power, or until human existence itself ends. And the Constitution provides for only one means of amendment – the difficult route marked out by s128. But although these indications in the Constitution have been used to support various theories of interpretation, the reasoning underlying them is not commanded by the Constitution itself. As McHugh J has said, '[a]ny theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself.'[5]

This lecture seeks to examine some of these theories as expounded in the High Court. This lecture is not to be taken as a criticism of any of them, or as an expression of preference for any of them, or as a defence of, or a departure from, conclusions reached in any particular cases. It seeks only to attempt the sometimes difficult task of understanding them, and classifying them. Nor does the lecture purport to be an exhaustive account of constitutional interpretation. There are many theories of constitutional interpretation advanced outside Australia, and advanced within Australia by writers, which have never had any support in the High Court. Further, lectures have to be short, mercifully, and hence it is not now possible to expound even the High Court's theories themselves exhaustively. The lecture does not deal directly, for example, with theories stemming from assumptions of federal balance[6] or the theory that 'guarantees of personal rights should not be read narrowly,[7] or theories relating to the vexed question of when and how terms can be implied into the Constitution,[8] or theories requiring the Constitution to conform to the 'principles of universal and fundamental rights,[9] Instead, the lecture concentrates on those theories which seek to explore the relationship between the meanings of constitutional words and the times at which the search for those meanings is conducted.

The stature of Maurice Byers

But before going to the lecture proper, it is necessary to say what a great honour it is to have been asked to deliver it. For anyone who has ever been at the New South Wales Bar, that invitation is one of the greatest honours the Bar Council has at its disposal. It is so because of the stature of Maurice Byers, not only at the New South Wales Bar, but in the wider scene of twentieth century Australian life generally. Before him there never was a solicitor-general – or any counsel – with his mesmeric powers over the High Court. It must be doubted whether there ever will be again. His rate of victory was extraordinarily high. His influence on constitutional development was correspondingly great. But his triumphs did not generate vanity. He was a perfect gentleman. Both as an advocate and as a man he was modest, serene, dignified, calm, gracious and elegant. He was an admirable writer[10] and speaker.[11] He was civilised, unflappable, genial and unfailingly polite. He was the quintessence of charm. He only admitted once to being disconcerted – when appearing in the High Court after the pugnacious and argumentative Sir Garfield Barwick was succeeded by the polite and quiet Sir Harry Gibbs: 'It took me some time to spot the difference. I was the only one talking. All the judges appeared to be listening.'[12] Only three things upset him. One was 1975, or at least some events during that tumultuous year. A second was constitutional doctrine he disagreed with, as when he said: 'Notions such as 'federal balance' or 'traditional state powers' are faint cries doomed to a death as inglorious as their birth.'[13] The third was any form of ill manners, particularly in court. He tended to treat the more pompous or driven of his contemporaries with mild and genial mockery, but he was profoundly kind and generous to younger people.



Sir Maurice Byers QC: 'his triumphs did not generate vanity. He was a perfect gentleman.'

Sometimes, late at night or early in the morning, when no-one else is about, to walk down Phillip Street is to sense the mist procession – to feel that the graves have given up their dead, and to experience as ghostly presences the great figures of the New South Wales Bar, for they have all walked here from the very first moment there was a New South Wales Bar. It stimulates an intense remembrance of Maurice, with a half smile, a courteous wave and a rolling gait, rhythmically and gracefully moving along, like some great and stylish vessel from the golden age of sail.

His generosity is reminiscent of events more than a century ago in the Senate. Among the members who assembled in the first federal parliament were two contrasting senators. The first was aged 31; the second 50 – a considerable age in 1901. The first represented Western Australia, the second New South Wales. The first was ill-educated, a carpenter who had often been unemployed, had prospected for

gold, and was a trade union official. The second was well-educated, a barrister who had been an acting Supreme Court judge, had spent some years in the New South Wales Parliament, and had been a minister. The first was a free trader, the second was a protectionist. In a politically abrasive age, the first was pro Labor, the second was, as they say now, of the centre right. In a sectarian age, the first was a non-conformist Protestant, the second a Catholic. The first had a straggling moustache and was undistinguished looking, but was aggressive and acerbic. The second had a full beard, was strikingly handsome, and tended to be calm and emollient. The first was one of the least well-known politicians in the country; the second was government leader in the Senate. One evening the second called the first into his room, and gave some friendly advice about how sometimes in politics patience made headway where rancorous aggression did not.[14]

That was an act of Byers-like kindness. After it, their careers diverged. The first senator, whether because of the advice which he received from the second or not, never looked back. He spent 36 years in the Senate and 24 years in federal ministries – periods which if they are not records must be close to records. When he led the Australian delegation to the Washington Naval Conference in 1921-2, his conduct so impressed the head of the British Empire delegation, Balfour, that the latter told Bruce that he regarded the leader of the Australian delegation as 'the greatest natural statesman he had ever met.'[15] Bruce agreed, and said he was 'the wisest and most courageous counsellor' he had met in his long experience. If sincere, Balfour's was a great tribute, for that very conference was attended by Charles Evans Hughes and Aristide Briand, and Balfour's experience of statesmen extended back 44 years to observing Bismarck, Disraeli and Salisbury at the Congress of Berlin in 1878. And Menzies said in 1965, just before he retired: 'I have sat in many cabinets over a total period of well over 20 years; but I have never sat with an abler man.'[16]

Senator George F Pearce

The fate of the second senator was different. He left the Senate after two years. He became a High Court judge, soon became chronically ill and died prematurely nine years later. Sir Owen Dixon said of him in 1964 in his address on retiring from the High Court that 'his work has lived better than that of anybody else of the earlier times'[17] – a direct tribute which was somewhat rare in that brilliant but sombre and rather tart oration.

The first of the two senators is now completely forgotten. Not one percent of the delegates to last week's ALP National Conference would know anything about the greatest of the Labor rats in 1916, George Pearce. The second, too, is completely unknown to the general public. But Justice O'Connor retains respect among the legal profession, or at least among some of that small fraction of it which conducts and decides litigation in superior courts. Let us hope that the near oblivion which has overtaken Senator Pearce and Justice O'Connor does not engulf the name of Maurice Byers.

Below are discussed seven originalist theories of constitutional interpretation, four non-originalist ones, and two of a hybrid character. It is desirable to begin with Justice O'Connor's approach to constitutional interpretation, for all the approaches to be discussed later either derive from it or react against it.

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First theory: the 1900 meaning

O'Connor J's theory of statutory construction

On 8 June 1904 the High Court had been in existence for less than a year. Three days of argument had concluded in *Tasmania v The Commonwealth* only five days earlier. *Autre temps, autre moeurs*, but on that day the three justices each delivered substantial judgments. O'Connor J said:[18]

> I do not think it can be too strongly stated that our duty in interpreting a statute is to declare and administer the law according to the intention expressed in the statute itself ... The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances – to the history of the law ... In considering the history of the law ... you must have regard to the historical facts surrounding the bringing the law into existence ... You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it.

This account, both in its restrictive aspects and in its liberal aspects, accorded with the general understanding of the age.

Its restrictive aspects centred on an exclusion of evidence of the subjective intention of the legislators as such: the search is for 'the intention expressed in the statute itself', not for the intention expressed elsewhere. Lord Russell of Killowen CJ had said the same thing five years earlier.[19] And Justice Holmes said four years earlier: 'we

do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means.'[20]

The liberal aspects of O'Connor J's pronouncement turned on examining 'the historical facts surrounding bringing the law into existence'. Among the relevant historical facts are the technical meaning of the language as used in a legal context, the subject matter of the legislation, what the law was at the time the statute was enacted, and what particular deficiencies existed in the law before the statute was enacted. These were ideas which had been embedded in the common law for centuries. Coke had recorded them 320 years earlier.[21] Holt CJ had repeated them 207 years earlier.[22] Taney CJ explained them 59 years earlier.[23] Lord Blackburn supported them 27 years earlier.[24] So did Lord Halsbury two years after O'Connor J spoke.[25]

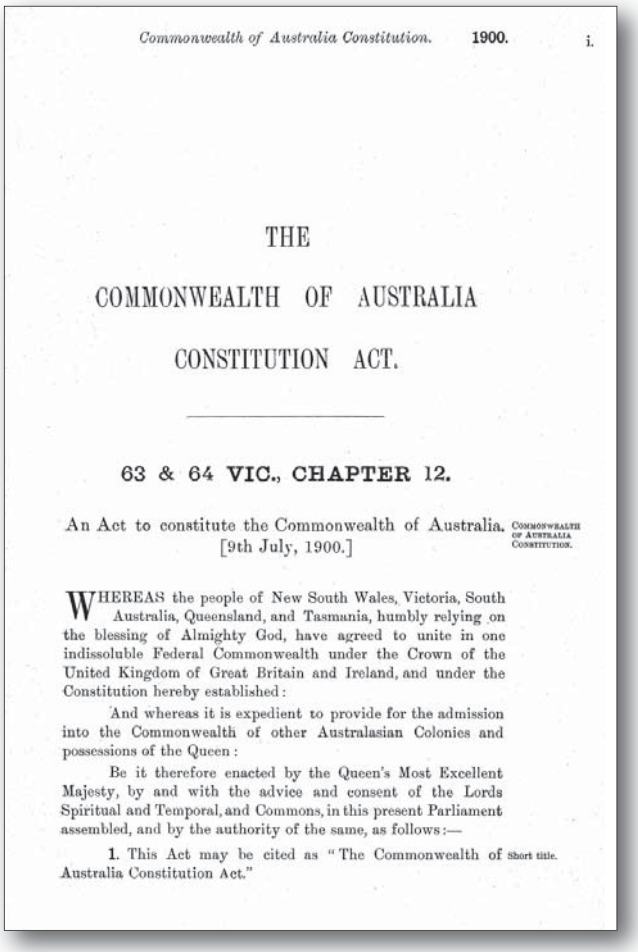
Identical private law theory of construction

Not only did O'Connor J's account of statutory construction stand in a long tradition; it also corresponded with theories extant both in 1900 and now about the construction of documents in private law – wills, contracts, conveyances, deeds, articles of association, declarations of trust, assignments and correspondence. Leaving aside the operation of remedies like rectification, what counts is not what the makers of a given document intended to do, but what the document they made actually did.[26]

Implicit in O'Connor J's stress on the need to search for the meaning of the statute as found in, and found only in, language used in a particular context is that once that meaning has been established, it remains constant. That is, a statute enacted in 1900 bears the same meaning in 1904 as in 2004. Hence, as Lord Esher MR said, 'the words of a statute must be construed as they would have been the day after the statute was passed'.[27] Similarly, if a court is construing a contract or grant of title to land made many years ago, it does so in the light of the meanings of the words used by the parties as understood at that time. It can use dictionaries illuminating meaning at that time, to see, for example, whether reservations in respect of 'sand, clay, stone and gravel' extended to rutile, zircon and ilmenite[28] and it can examine histories of the processes by which those minerals were extracted from black sands.[29]

Statutory principles of construction and the Constitution

The present significance of O'Connor J's statement of these principles of statutory construction is that he said they should be applied 'at least ... as stringently' to the Australian Constitution.[30] That view flows from the fact that, as Sir Owen Dixon said writing extra-judicially, the Australian Constitution 'is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British parliament enacted in the exercise of its legal sovereignty over the law everywhere in the king's dominions.'[31] Since the Constitution is a statute, said Sir John Latham, it is 'to be construed according to the general rules of statutory interpretation'.[32] The competing view – that the Constitution derives its force from the people – was first advanced in 1976 by Murphy J.[33] It has had some later currency,[34] and it is said to compel a different approach to construing the Constitution, discussed below.[35]



Commonwealth of Australia Constitution. **1900.** i.

THE

COMMONWEALTH OF AUSTRALIA

CONSTITUTION ACT.

63 & 64 VIC., CHAPTER 12.

An Act to constitute the Commonwealth of Australia. COMMONWEALTH OF AUSTRALIA CONSTITUTION.
[9th July, 1900.]

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as "The Commonwealth of Australia Constitution Act." Short title.

Since the Constitution is to be construed as a statute, there is a need to read it as a whole[36] with a view to giving effect to the object and purpose its language expresses,[37] to read it in the light of the historical circumstances surrounding its enactment,[38] and to give it the meaning it then bore.[39]

It is true that the early High Court judges were generally not faced with an acid choice between giving the words of the Constitution what they took to be the meaning of those words in 1900, and what they took to be some different later meaning. But in view of what has recently been said by proponents of non-originalist theories, it is necessary to stress this: the view that the 1900 meaning was the true meaning was hardly ever doubted for the next three quarters of a century, and has been asserted even later.

In 1912 Griffith CJ said that the construction of the Constitution does not change 'from time to time to meet the supposed changing breezes of popular opinion.'[40] In 1972 Barwick CJ said that the words of the Constitution are to be read in 'that natural sense they bore in the circumstances of their enactment by the Imperial Parliament in 1900'.[41] In 1986 that was repeated by Wilson J,[42] and by Dawson J, who noted in *Brown v The Queen* that '[T]he perception of changed

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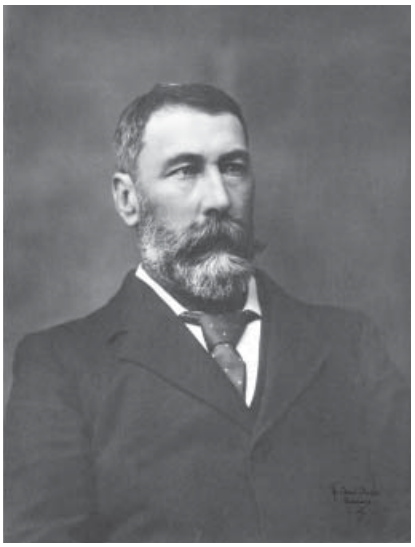
circumstances cannot of itself ever justify an interpretation which conflicts with the original intention, for a constitution must be a charter upon which more than temporary reliance can be placed.'[43] It has also been repeated by justices including Mason J in 1980[44] and Deane J in 1988,[45] despite the fact that these justices at different times have propounded other theories of construction.

The relationship between history and meaning

Griffith CJ, Barton and O'Connor JJ repeated O'Connor J's emphasis on historical analysis in 1907 when they said that 'an 'astral intelligence', unprejudiced by any historical knowledge, ... interpreting [the] Constitution merely by the aid of a dictionary might arrive at a very different conclusion as to its meaning from that which a person familiar with history would reach.'[46] Preferring the latter course, they said that 'the relevant historical facts' had to be considered so as to reveal three things – what 'the framers of a Constitution at the end of the nineteenth century may be supposed to have known', the 'object of the advocates of Australian federation' and 'the mischief and defect' which the constitutional provision under examination was remedying.[47] They said it was 'the historical facts which supply the answers to the inquiry as to the 'mischief and defect for which the law did not provide'.'[48]



Justice O'Connor

These are not merely antique phrases, for they look forward almost word for word to the techniques blessed in *Cole v Whitfield*.[49] The expression 'may be supposed to have known' is noteworthy. It is similar to a statement of O'Connor J's permitting examination of 'the state of facts which must be taken to have been within the knowledge' of the Westminster legislature in 1900.[50] McHugh J in *Theophanous v Herald & Weekly Times Ltd*,[51] with respect helpfully, said:

> The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.

So far as that involves an inquiry into what particular framers in fact took for granted or understood, it is a subjective inquiry, and a subjective inquiry which verges on an inquiry into actual intention. McHugh J denied the legitimacy of the latter inquiry.[52] On the approach of Griffith CJ, Barton and O'Connor JJ too, the inquiry is not specifically into what a particular framer in fact took for granted or understood or what particular meaning the framer was aware of. Rather the inquiry is into what the framers *may be supposed* to have taken for granted or understood, or what *must be taken to have been within* their knowledge. The inquiry is an inquiry into the common currency of the time.

The Official Record of the Debates of the Australasian Federal Convention and other extrinsic materials

During argument in *Municipal Council of Sydney v The Commonwealth*[53] Griffith CJ said of the Convention Debates:

> They are no higher than parliamentary debates, and are not to be referred to except for the purpose of seeing what was the subject-matter of discussion, what was the evil to be remedied, and so forth.

Although the court soon thereafter adopted the practice of not referring to the Convention Debates, that statement appeared to assume that among the rules of statutory interpretation extant in 1901 was a rule that materials extrinsic to the actual words of the legislation, for example parliamentary debates about a Bill before it was enacted and reports leading to the introduction of the Bill, could be considered, not as evidence of the intention of the legislature, but for the purposes referred to by Griffith CJ. It was not without opponents, but it can be seen as emerging from at least 1852,[54] and can be seen in operation in 1898, when Lord Halsbury LC referred to the report of a commission recommending the enactment then being considered by the House of Lords in order to identify the mischief that the enactment has intended to remedy.[55] Examples of that common law principle of statutory construction can be found readily, not only just before the enactment of s15AB of the *Acts Interpretation Act 1900* (Cth) and its equivalents,[56] but also much earlier:[57] arguably that legislation has tended to obscure the antecedent existence of the common law principle.[58] Thus, at a symposium in 1983 Justice Murphy said he habitually had recourse to Hansard and to committee reports. He went on: 'Indeed, for legislation in the period 1972-75, if I wanted to know what it was all about, I'd go to the Senate Hansard and sometimes find a very clear statement of the legislative intent.' Later in the symposium Justice Mason said: 'Like Mr Justice Murphy,

I often look at second reading speeches. Unlike him I do not confine my attention to those made by Senator Murphy.'[59]

In 1988 in *Cole v Whitfield* seven justices brought constitutional interpretation into line with the particular approach to statutory interpretation just discussed. They said:[60]

> Reference to the history [including the Convention Debates] ... may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.[61]

These principles correspond with those stated by O'Connor J in excluding recourse to the subjective intentions of the framers. They also correspond with them in the purposes for which historical materials may be examined as stated by him and his colleagues in early High Court cases.[62]

Later in the symposium Justice Mason said: 'Like Mr Justice Murphy, I often look at second reading speeches. Unlike him I do not confine my attention to those made by Senator Murphy.'

Even now, approaches to statutory construction do not differ radically from that stated by O'Connor J. It is 'originalist' in the sense that it depends on construing a statute by reference to the concepts current at the time when it is enacted rather than those current at the time when it is construed.[63] Whether any difference between modern 'purposive' principles of interpretation and those of O'Connor J has been exaggerated is a question too large for analysis tonight.

The fact that before 1988 the court's examination of Convention Debates was limited seems to have led to suggestions that the High Court's recourse to history in the manner described by O'Connor J 'appears to have occurred on a largely random basis',[64] and that the High Court 'has in general rejected the use of extrinsic historical material in the interpretation of the Constitution'.[65] These statements can be challenged in two ways.

The first is by pointing to theoretical statements justifying recourse to historical materials. Apart from those of the first three justices in *Tasmania v The Commonwealth*[66] and *Baxter v Commissioners of Taxation (New South Wales)*,[67] there are many others made by justices and at times as diverse as Isaacs J in 1910,[68] Isaacs and Rich JJ in 1913,[69] Knox CJ, Isaacs, Rich and Starke JJ in 1920,[70] Barwick CJ in 1975,[71] Gibbs J in 1975,[72] Aickin J in 1978[73] and Stephen J in 1979.[74]

The second way in which allegations that the High Court rejected extrinsic historical material can be refuted is by identifying the cases – to be numbered in tens, if not hundreds – in which historical materials other than the Convention Debates have been looked at, both before and after 1988, and, on the whole, not perfunctorily. That is not a task for this evening.

It is not true, then, that the High Court has rejected the use of extrinsic historical material. It may be truer, but it is not wholly true, to say that its use 'appears to have occurred on a largely random basis'. A further charge that this was done 'without detailed consideration of broader principles'[75] perhaps has some force.

Need for ambiguity?

While O'Connor J appeared to favour the view[76] that the court should search for a 1900 meaning only when the words are ambiguous, Murphy J's view was that the court may, at least in 'very exceptional circumstances', examine legislative history even if there is no ambiguity, thereby perhaps creating an ambiguity.[77] This point, at least so far as it concerns constitutional interpretation, awaits resolution.

For decades O'Connor J's approach held sway in the interpretation of the Australian Constitution. Gummow J said in 2002, however, that 'questions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago'.[78]

What other considerations have now arisen?

Second theory: connotation and denotation

One qualification to the view that the meaning of the constitutional words should be limited to a 1900 perspective was put thus by Barwick CJ: 'The connotation of words employed in the Constitution does not change though changing events and attitudes may in some circumstances extend the denotation or reach of those words.'[79]

One familiar example of the positive operation of the connotation/denotation distinction relates to airline services. In 1900 there were no airlines; the Wright brothers were not to fly until 1903; but in 1945 the power conferred by s51(i) to legislate for trade and commerce was held to apply to the provision and regulation of airline services.[80] The connotation of 'trade and commerce' had not changed; the denotation had. The utility of this distinction has been criticised.[81] Indeed some have found it difficult to understand and apply, and get it the wrong way round, rather like the doctrines of Sir Henry Maine. When the young Frank Longford found himself sharing a weekend at a country house with the prime minister, Stanley Baldwin, he asked him what the most profound thing he had learned in life was. Baldwin thought and said: 'The most profound thing I have discovered – one that has explained the whole of society to me – is what Sir Henry Maine taught in *Ancient Law* – that the movement of progressive societies has been from status to contract.' Then he paused, and asked in a puzzled way: 'Or was it the other way around?'

Third theory: ambulatory words

A third approach depends on treating some words – it could not work with all – in the Constitution as being explicitly not limited to their 1900 meanings. This is originalist in the sense that the words of the Constitution in their 1900 meaning incorporate later meanings. Thus s51(v) gives power to legislate in relation to 'postal, telegraphic, telephone and other like services'. Of the last four words, it has been said that '[l]ater developments in scientific methods for the provision

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of telegraphic and telephonic services were contemplated.'[82] In the same case it was said of s51(xviii), giving legislative power with respect to '[c]opyrights, patents of inventions and designs, and trade marks' that 'it could be expected that what might answer the description of an invention for the purpose of s51(xviii) would change to reflect developments in technology.'[83] One reading of these passages is that the language employed in s51(v) and s51(xviii) explicitly directs the reader not to employ only the 1900 meaning, but future meanings as well.

Fourth theory: the evolutionary nature of legal expressions

The fourth approach applies where an expression relates to doctrines 'still evolving in 1900'[84] or 'in a condition of continuing evolution'[85] or 'in a state of development'[86] or subject to 'cross-currents and uncertainties'[87] or subject to 'dynamism'.[88] In these circumstances, where it is possible to establish the meaning which skilled lawyers and other informed observers of the federation period considered a constitutional expression bore, or would reasonably have considered it might bear in future, or might reasonably have considered that it might bear in future, that meaning should be applied.[89] On this approach, although a post-1900 meaning must in one of those senses have been perceived or foreseeable, it is not necessary that a particular application of the constitutional expression was not or would not have been foreseen in 1900.[90] Although on this approach an examination of history, so far as it casts light on original meaning, may not be decisive, it is important – it is part of 'legal scholarship in preference to intuition or divination'.[91]

Fifth theory: essential and non-essential elements of 1900 meaning

The fifth theory is that some words in use in 1900 could be given meanings a century later which differed from their precise meaning in 1900 providing that that meaning was evolving into the later meanings. The fifth theory accepts that approach, but treats the constitutional words as requiring the evolving meaning to share the 'essential' characteristics of the words as used in 1900 and to be within the purposes underlying those constitutional words, as distinct from being inferred from later events or points of view. Thus the question whether modern statutes regulating the composition and functions of modern juries accord with s80 of the Constitution has been answered by examining the history of juries in England and the Australian colonies before and just after 1900 and identifying the purposes reflected in s80. Sometimes the distinction between what is essential and non-essential has been expressed as equivalent to the distinction between what is 'fundamental' and what is not,[92] or the distinction has been seen as a distinction between preserving matters of 'substance of right', as distinct from 'mere matters of form and procedure'.[93] On that approach it has been held that the following are essential characteristics of jury trial:

- unanimity;[94]
- 'representativeness',[95] which requires that even though a jury need not comprise 12 persons, the number must be sufficient to achieve representativeness;[96] and a number below 10 may not be enough;[97] and
- random and impartial selection.[98]

However, the following are not essential characteristics:

- the jury being kept separate throughout the trial;[99]
- gender or property tests for membership;[100] and
- absence of reserve jurors.[101]

How are essential characteristics to be distinguished from non-essential ones? The qualifications for jury membership in 1900 were seen as non-essential, not, it was said, because they appeared not to be 'enlightened' in the climate of 1993, but because such requirements detracted from the essential characteristics of representativeness. In America, Brandeis J said that changes to jury trials designed 'to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice' were compatible with the Seventh Amendment,[102] and that language has been approved in the High Court.[103] Nor is a characteristic like unanimity to be treated as inessential merely because many people in 1993 thought that it did not correspond with demands of 'contemporary convenience or practical utility'. A characteristic can be inconvenient or impracticable, but also be essential, and such a characteristic may not be removed except by referendum.[104] The essentiality of the characteristic depends on its relationship to the 'function' of jury trial[105] and its objectives.[106]

The expression 'the essential features of a trial by jury' goes back to the time of O'Connor J[107] and was used in the Supreme Court of the United States in the nineteenth century.[108] However, many have struggled for a much longer time with the distinction between essence and attributes, and no doubt similar difficulties arise here, particularly if this distinction is employed in analysis of parts of the Constitution other than s80, as it sometimes has been.[109] Indeed there is a sense in which the search for the meaning of all the constitutional words in 1900 is a search for the essential qualities of the institution or concept

referred to, as distinct from the insignificant aspects of that institution or concept.

It may be noted that the result of the essentiality doctrine is that 'though a law enacted in 1903 providing for an all male jury would satisfy s80, such a law if enacted today would not do so.'[110] On one view this outcome can be explained consistently with originalism by treating the 1903 understanding of the meaning of s80 as now being seen as erroneous. On another, the doctrine can be seen to have a non-originalist operation in that by producing a different constitutional meaning it has produced a different outcome in terms of validity.

Sixth theory: the centre and the circle; the core and the penumbra

A sixth theory is that put by Higgins J in the *Union Label case*:[111]

> The usage in 1900 gives us the central type; it does not give us the circumference of the power. To find the circumference of the power, we take as a centre the thing named ... with the meaning as in 1900; but it is a mistake to treat the centre as the radius.

Sometimes, instead of analysis of what is the centre or the radius, there is analysis of the 'core' and the 'penumbra'.[112]

These are not the only instances of resort to imagery and metaphor in constitutional interpretation,[113] but, here as elsewhere, the images and the metaphors are more vivid than precise. Windeyer J several times employed Higgins J's reference to the centre and the radius, but seemed to treat it as a reference to the denotation/connotation distinction.[114] Difficulties arise if Higgins J meant something else. In geometry a centre refers to something which has position but no magnitude. One cannot infer from the centre alone how long the radius is or what area the circle covers. How does one infer from the constitutional language identifying the centre what the radius is, or what the whole circle is?

A prominent American advocate of originalism, Raoul Berger, said that the key question of construction was 'what did the framers mean to accomplish; what did the words they used mean to them?' Yet in fact these are distinct questions.

In astronomy the core/penumbra distinction refers to two different types of shadow. The dark shadow cast by a small point of light when that light is interrupted by an object between the source and the viewer is called an umbra. The shadow cast by a large source of light, like the sun when the moon is between it and the earth, is part umbra and part penumbra. The umbra is a dark shadow, the penumbra a lighter shadow. But the only difference is the degree of darkness; the edge between umbra and penumbra is tolerably distinct, and the edge between penumbra and areas outside it are also distinct. An astronomer who knows the relative positions and distances of sun, moon and earth at a given time can predict where those edges will be. There is no analogy between an astronomer's treatment of these heavenly bodies and a lawyer's construction of the Constitution.

Hart used the core/penumbra distinction in a way seemingly similar to the way it is used in the cases. For rules to be workable, he said, '[t]here must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some feature in common with the standard case; they will lack others or be accompanied by features not present in the standard case.' Thus, he suggested, 'a penumbra of uncertainty must surround all legal rules'.[115] But how does one infer from the core or 'umbra' of a constitutional expression, or otherwise find out, what the penumbra is? The cases do not say, and the utility of the distinction has recently been doubted.[116]

A particular outcome can sometimes be justified by reference to more than one of the six theories just discussed. This may reflect on the validity of the taxonomy; it may reflect on the underlying difficulty of constitutional interpretation.

In relation to s51(xviii), which gives the Commonwealth legislative power over '[c]opyrights, patents of inventions and designs, and trade marks', it is possible to analyse some applications as instances falling within the central type, while others fall within a wider circumference. It is possible to analyse some as within the power because they share the essential qualities referred to by the power. It is possible to analyse some as falling within a meaning which, though it did not exist in 1900, was foreseeable then. It is possible to analyse some as instances of the words having a 1900 connotation with, later, new denotations, while others are instances of the words bearing a new connotation, though one which was foreseeable in 1900 because the types of intellectual property referred to had a capacity to change, not merely to encompass new examples, but new kinds of right. To illustrate the last point, after *Grain Pool of Western Australia v The Commonwealth* upheld the validity of legislation recognising certain 'plant variety rights', Callinan J, a party to that decision, said that it concerned 'change, not so much in meaning as in scope':[117] that is, the connotation/denotation distinction. His view is perhaps supported by the following words in the *Grain Pool case*:[118]

> The boundaries of the power conferred by s51(xviii) are [not] to be ascertained solely by identifying what in 1900 would have been treated as a copyright, patent, design or trade mark.

Another example concerns radio. In 1901, although the work of Rutherford and Marconi was well advanced, there were no radio or television broadcasts; yet in 1935 the power conferred by s51(v) to legislate with respect to 'postal, telegraphic, telephonic and other like services' was applied to radio broadcasting[119] and in 1965 to television broadcasting.[120] The operation of the denotation doctrine appears at its purest so far as the reasoning depended on a conclusion that radio and television broadcasting services are telephonic (which was Latham CJ's preferred position).[121] So far as the reasoning depended on the words 'other like services' (which was Latham CJ's alternative

This view seems to be related to the idea that the enactment of the Australia Acts in 1986 ended the sovereignty of the Westminster parliament 'and recognised that ultimate sovereignty resided in the Australian people'. But no-one seems to have gone so far as to say that the Constitution meant one thing in 1985 and another in 1987.

position), it is a less pure illustration, because the word 'like' may be seen as expressly importing future developments pursuant to the third theory discussed above.[122]

Seventh theory: the actual intentions of the founders

All the above six approaches are, wholly or in part, 'originalist'. Under them the meanings in 1900 of the words in the Constitution are potentially either the whole, or a significant part, of the key to constitutional construction, at least where those meanings can be established as different from modern meanings. But they forbid any search for the actual intentions of the founders, save to the extent to which statements by individuals of their intentions, or their views as to the intentions of others, cast light on the 1900 meanings of words in 1900. A prominent American advocate of originalism, Raoul Berger,[123] said that the key question of construction was 'what did the framers mean to accomplish; what did the words they used mean to them?' Yet in fact these are distinct questions. The framers may have intended to accomplish things which the words they used, in the meaning they had to the framers' generation, did not accomplish. Those who do favour a search for the subjective intentions of the framers form a seventh category – they are originalists, but originalists of a different kind. The principal judicial exponent of this view is Callinan J,[124] though the school does have academic adherents in Australia.[125] Its best known foe is Scalia J. An Australian critic is Gleeson CJ.[126]

It can be important to be strict in distinguishing this seventh category from the first six in relation to the Convention Debates. The first six look to the debates as evidence of original usages, but accept that what a framer said was intended may not have been achieved and that the Constitution can 'have a meaning that escaped the *actual understandings or intentions* of the founders or other persons in 1900'.[127] The seventh looks to the debates as evidence of intention, and presumes or infers that a stated intention was achieved.

It is possible to exaggerate the extent to which there are adherents to this seventh category. In *D'Emden v Pedder*,[128] Griffith CJ, Barton and O'Connor JJ said that where a provision of the Australian Constitution was indistinguishable in substance from a provision of the United States Constitution which had been judicially interpreted by the United States Supreme Court, 'it is not an unreasonable inference that its *framers intended* that like provisions should receive like interpretation.' Is that to be read as suggesting an inquiry into subjective intent? Or is to be read another way as conveying only that an expression in the Australian Constitution bears the same meaning as the same expression in the United States Constitution because that meaning was the received meaning in 1900? On that reading, while the framers may have intended that outcome, their subjective intentions are irrelevant to construction.

Similar questions arise out of much later judgments. It is common for judges to speak of the intentions of the framers, or the intention of particular provisions,[129] or a provision not 'intended to confer power' to legislate for the creation of corporations,[130] or 'the purpose which the framers ... had, or must be supposed to have had', in including ... s80,[131] or the 'constitutional purposes'[132] or 'purpose'[133] of s90, or the 'prime purpose' of s92.[134] Are these expressions references to the actual mental states of the framers of these provisions? Or are they only references to the intention which is revealed by the construction of the language? On the latter approach, in McHugh J's words in *Eastman v The Queen*: 'the relevant intention of constitutional provisions is that expressed in the Constitution itself, not the subjective intentions of its framers or makers.'[135] Thus when in the same case he spoke of what 'the framers ... intended in 1900' in relation to the appellate jurisdiction of the High Court,[136] and the 'purpose of the last paragraph of s73'[137] he is to be understood as meaning the intention or purpose expressed in s73, not any intention or purpose which the individuals who approved it had.[138] In many other judgments the context does not make meaning so clear, and days of innocent pleasure can be had by making lists of judgments delivered by avowedly non-intentionalist judges who keep speaking in language which debates the existence of intention, purpose and other mental states on the part of the framers.

Non-originalist theories of construction

Let us turn to non-originalist theories of construction.

The longer a constitution lasts, the greater the desire observers feel to identify ways in which friction between its origins at a particular time and the need for it to operate in what are thought to be very different times can be reduced. To some extent that desire is satisfied by the second to sixth originalist theories. To the extent that it has not been, non-originalist theories have been devised.

In part the issue relates to the broadening effects of changing human experience. A sculpture or a building can be understood better when viewed from different angles. The appearance of a hill alters as the light changes during the course of a day or during the changing of the seasons. A book read when young is sometimes enjoyed more when reread at a greater age, sometimes less. As people age they understand some human problems better than they did when they were young. Similarly, with more than a century of national life over, and new problems emerging, the Constitution is examined in a new light. Some may conclude that a particular construction arrived at a long time ago was right, and must be adhered to, whether or not it is now convenient or inconvenient in its operation. Others may conclude that the construction of a provision applied at an earlier time was

wrong, and a new construction must be worked out, once and for all. A third group may conclude that an old construction was right at the time it was devised but is not right for later periods, and that a new construction must be worked out for the present age, perhaps itself to be abandoned at some future time when circumstances change again. The approach of the second and third groups generally depends on some non-originalist theory of construction, and the application of that theory in a particular instance will often no doubt be triggered by a desire to avoid some grave inconvenience which experience over time has brought to light. In this sense non-originalist theories are 'consequentialist'.

Just as some originalist theories have relied on imagery and metaphor – the centre and the circle, the core and the penumbra – so have non-originalist theories. The four to be examined – not in the chronological order of their devising – are associated with Deane J, Kirby J, McHugh J and Mason CJ. Deane J sees the Constitution as a 'living force', not to be tied by the 'dead hands' of the framers. The Constitution is not to be like some piece of land perpetually under the control of a succession of medieval abbots against whom mortmain legislation had to be directed in order to compensate the monarch for non-receipt of the many feudal dues exigible on the death of a tenant. Kirby J sees the Constitution as a 'living tree'. What is more beautiful in nature than a living tree, its leaves gently moving as the breezes change? And what is more attractive than its shelter from the blazing Australian summer sun as the weary pedestrian trudges along? McHugh J favours a general construction in order to avoid leaving us slaves to the mental world of 1900 – and ever since Governor Phillip's declaration against slavery there has been a strong anti-slavery tradition in Australia. Mason CJ invokes the importance of preventing the Constitution from being frozen in 1900 – a powerful phrase, even as the world laments the loss of the polar icecaps in the age of global warming.

Although both Deane J and Kirby J rely on some obscure and inconsistent words of Inglis Clark,[139] and although Kirby J strongly approves what Mason CJ has said,[140] no one member of the quartet bases his view specifically on what any other member of it said. It is possible that over time the four views will coalesce into one. But there are fissiparous tendencies. Thus Sir Anthony Mason has pointed out that the 'living tree' theory is repeatedly referred to in Canada and that it 'can be guaranteed to bring a Cheshire cat-like grin to the face of any Canadian lawyer or law student whenever it is mentioned'.[141] Hence it is also possible that, as has happened with other rebels against once dominant traditions of thought, advocates of the non-originalist theories will cause a thousand flowers to bloom and a hundred schools to contend.

First non-originalist theory: the Constitution as a living force, free of the 'dead hands' of the framers

Deane J's non-originalist approach can be summarised thus. The legitimacy of the Constitution when adopted depended on the consent of the people living in the last decade of the nineteenth century. Its legitimacy now depends on the consent to it (by acquiescence) of the people living now. Accordingly it must be construed as 'a living force' to reflect the will of the people living now, not as a lifeless declaration of the will of the long dead framers or anyone else of their generation.

There is a dispute about whether this rejection of the 'dead hands' of the framers applies only to prevent the natural implications of the express terms being constricted, or whether the rejection affects the construction of the express terms themselves. There are passages supporting both views.

The reasoning can be seen more fully in the following passages. Deane J said of the Constitution that its 'present legitimacy ... lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people.'[142] Or, as Murphy J had earlier put it, while the original authority for the Constitution was the United Kingdom Parliament, the existing authority is 'its continuing acceptance by the Australian people'.[143] Deane J continued:

> [T]he Constitution must be construed as 'a living force' representing the will and intentions of all contemporary Australians, both women and men, and not as a lifeless 'declaration of the will and intentions of men long since dead'.[144]

This view seems to be related to the idea that the enactment of the *Australia Acts* in 1986 ended the sovereignty of the Westminster parliament 'and recognised that ultimate sovereignty resided in the Australian people'.[145] But no-one seems to have gone so far as to say that the Constitution meant one thing in 1985 and another in 1987. Nor is it clear why the Australia Acts – merely the last in a series of steps by which external control of Australian affairs declined and fell – should alter approaches to statutory construction. Two years earlier, in 1992, Deane J (and Toohey J) had found a doctrine of legal equality in the Constitution on the ground that the conceptual basis of the Constitution was the 'free agreement of 'the people'' in 1900 to unite in the Commonwealth under the Constitution.[146] Reliance on the agreement of the people in 1900 is a distinct thing from reliance on the acquiescence of the people in 1994. What then is the significance of the role that the people, through the election of governments who agreed to the Convention process, through the election of Convention delegates in the 1890s and through referenda at the end of the decade played in the adoption of the Constitution, and of their asserted subsequent acquiescence in it? Deane J did not make this plain, but Dawson J has suggested a possible significance. He argued that because the 'legal foundation of the ... Constitution is an exercise of sovereign power by the Imperial Parliament', it followed that 'the Constitution is to be construed as a law passed pursuant to the legislative power to do so. If implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances.'[147] Hence it was wrong to import 'into the Constitution, by way of implication, preconceptions having their origin outside the Constitution ...'.[148] If, like Deane J, one perceives the vital element in the adoption of the Constitution as the role of the people rather than that of the Westminster Parliament, the wider role for implications which Dawson J feared may exist. Deane J's approach seems to require the courts to exclude from consideration anything said during the House of Commons or House of Lords debates leading to the enactment of the *Commonwealth of Australia Constitution Act 1900*, anything which either imperial or colonial statesmen said about the key expressions and conceptions before 1900, and in particular anything said during the Convention Debates of the 1890s. Indeed Deane J explicitly said: [149]

> If the words of s51(xx), construed in context in accordance with settled principle, extend to authorise 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.

He said that it is wrong 'to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines'.[150]

On the strength of Deane J's reference to 'natural implications', it has been argued that Deane J was denying the relevance of historical material only in relation to the question of what implications can be drawn from the express provisions or fundamental doctrines of the Constitution, rather than to the question of what those express provisions mean or what those fundamental doctrines are, and that this is supported by the fact that in other cases Deane J advocated recourse to the intentions of the Convention Debates. However, an implication in a Constitution is as much a part of it as an express provision. And Deane J seems to have extended his approach to the construction of express terms, for he said: 'if the parliament disagrees

with any decision of the court about the meaning or effect of provisions of the Constitution, it can submit it to the people to be overruled by amendment of the Constitution.'[151]

Second non-originalist theory: the Constitution as a 'living tree'

Kirby J's non-originalist view in its most extreme form – for there are variations in what he says – can be summarised thus. The law, language and life generally have changed, and in some respects greatly, since 1900. It is vital that the Constitution not be read from the point of view of the circumstances of 1900, for to do so prevents the Constitution from being an adequate means of meeting the very different 'governmental needs' of today's Australians. The Constitution must be treated as a living tree, so that it will continue to grow and provide shelter in new circumstances to the Australian people.

On one occasion Kirby J put his position this way:

> If constitutional interpretation in Australia were nothing more than a search for the 'intentions' of the framers of the document in 1900, doubtless a single answer would, theoretically, be available as to the meaning of every word of the Constitution. Such meaning would be found in history books; not by legal analysis. But if, as I would hold, the text of the Constitution must be given meaning as its words are perceived by succeeding generations of Australians, reflected in this court, it is imperative to keep the mind open to the possibility that a new context, presenting different needs and circumstances and fresh insights, may convince the court, in later times and of later composition, that its predecessors had adopted an erroneous view of the Constitution. [152]

If, like Deane J, one perceives the vital element in the adoption of the Constitution as the role of the people rather than that of the Westminster Parliament, the wider role for implications which Dawson J feared may exist.

In terms that does not suggest that the correct interpretation of the Constitution changes from time to time. It suggests rather that there is only one correct view of the Constitution, but that it may not be ascertained for some time – for naturally new contexts may cast light on the problem of constitutional construction.

But on other occasions Kirby J suggests rather that the Constitution can have different meanings at different times, each being correct for its time. He has said that '[i]t is a serious mistake ... to attempt to construe any provision in the Constitution ... from a perspective controlled by the intentions, expectations or purposes of the writers of the Constitution in 1900'.[153] He has denied that ascertainment of the meaning borne by the constitutional language 'in 1900 is crucial or even important'.[154] The constitutional words 'are set free from the framers' intentions. They are set free from the understandings of their meaning in 1900 ....'[155] To treat the meaning in 1900 as crucial, he says, would 'limit subsequent developments, whether in the understanding of legal terms, a change in the meaning of language or radically different social circumstances to which the language would apply.'[156] The Constitution should be read 'according to contemporary understandings of its meaning, to meet, so far as the text allows, the governmental needs of the Australian people'[157] He said: 'a constitution is a living tree which continues to grow and to provide shelter in new circumstances to the people living under its protection.'[158] That suggests that those words might be given a particular meaning correctly at one point in time, and a different meaning, also correctly, at a later time.[159]

Third non-originalist theory: generality of language as a means of avoiding slavery

In summary, McHugh J's theory is in part an amalgam of some originalist theories and in part non-originalist. McHugh J thinks that the framers intended that the general words of the Constitution should apply to whatever circumstances later generations thought they covered, and that the framers almost certainly did not intend to leave later generations as slaves to the understandings of the framers themselves. To that extent the seventh theory applies, but to that extent only. McHugh J also pointed to many general expressions in the Constitution capable of an ambulatory meaning, and this has some echoes of the third and fourth originalist theories. He relies on a distinction between 'concepts' and 'conceptions' which has some affinity with, while being more sophisticated than, the second originalist theory. But he breaks with all originalist theories which give primacy to a search for specific meaning in 1900.

In *Eastman v The Queen*, McHugh J said: 'Even when we see meaning in a constitutional provision which our predecessors did not see, the search is always for *the* objective intention of the makers ....'[160] If the search is for the objective intention, that suggests that there is only one true intention, and one true construction. But that suggestion does not accord with McHugh J's general approach, for he went on:[161]

> A commitment to discerning the intention of the makers of the Constitution, in the same way as a court searches for the intention of the legislature in enacting an ordinary statute, does not equate with a Constitution suspended in time. Our Constitution is constructed in such a way that most of its concepts and purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the *current* understanding of those concepts and purposes.

Earlier McHugh J had claimed that a distinction drawn by Dworkin between concepts and conceptions exists in the Constitution: 'once we have identified the concepts ... that the makers of the Constitution intended to apply, we can give effect to the present day conceptions of those concepts.'[162] He then said:[163]

> [M]any words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts

> and circumstances succeeding generations thought they covered. Examples can be found in the powers conferred on the parliament ... to make laws with respect to 'trade and commerce with other countries, and among the states', 'trading or financial corporations formed within the limits of the Commonwealth', 'external affairs' and 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one state'. In these and other cases, the test is simply: what do these words mean to us as late twentieth century Australians?[164]

This is reminiscent of Dworkin's view that the framers of the Bill of Rights clauses in the United States Constitution framed them so as to reflect abstract principles, capable of different meaning in different ages.[165] This approach is in fact distinct from the fourth theory discussed above, because the fourth theory does not permit adoption of the current meaning from time to time unless it is within the range of meanings reasonably foreseeable in 1900. It also rejects the first theory. That this is so is made plain by his observation:[166]

> This court has not accepted that the makers' *actual* intentions are decisive, and I see no reason why we should regard the understandings of the immediate audience as decisive.

This does, however, pose the question that if the makers' actual intentions are not decisive, why does it matter (if it is true) that 'the makers of the Constitution intended that [the general words] should apply to whatever facts and circumstances succeeding generations thought they covered'? A similar question is thrown up by the next passage:[167]

> The fact that the meaning attributed to a particular provision now may not be the same as the meaning understood by the makers of the Constitution or their 1901 audience does not make constitutional adjudication a web of judicial legislation. They may not have envisaged that freedom of political communication was part of the system of representative government. They may not have understood that the Commonwealth power with respect to industrial disputes could be invoked by the serving of a log of claims. The participants at the Constitutional Conventions may not have understood that juries would include women or those without property or that 'the people of the Commonwealth' might include Aboriginal people. But to deny that the events following federation and the experiences of the nation can be used to see more than the Constitutional Convention participants or the 1901 audience saw in particular words and combinations of words is to leave us slaves to the mental images and understandings of the founding fathers and their 1901 audience, a prospect which they almost certainly did not intend.'

Again, if the makers' actual intentions are not decisive, why does it matter that the founding fathers almost certainly did not intend to leave later generations slaves to their mental images and understandings? The answer appears to be that the actual intentions of the framers are relevant in identifying a rule of construction giving dominance to meanings as they change in the ages after 1900, but are immaterial to the working out of that rule over those ages. The intentions of the framers were self-immolating: they intended that their intentions should not bind, save in this one respect.

Dixon J has been enlisted[168] in this camp on the strength of the following remark:[169]

> [I]t is a Constitution we are interpreting, 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.

Griffith CJ, Barton and O'Connor JJ have also been enlisted in this camp on the strength of their quotation of Story J's words: 'The [Constitution] was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of providence.'[170]

It is, however, highly questionable whether Dixon J did intend to suggest that the meaning of the Constitution could change. Dixon J did not say it changed. He said only that its application to changing circumstances could be flexible. That could be a reference to the connotation/denotation theory or to other originalist theories. Further, Dixon J's statement is reminiscent of and no doubt indebted to Marshall CJ's statements in *McCulloch v Maryland* that '[w]e must never forget, that it is a constitution we are expounding' and that constitutions are 'intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.'[171]

Some argue that the conclusion to be drawn from the words of Marshall CJ and Dixon J is not that the constitution changes from age to age. Rather it is that constitutions must be interpreted broadly, because their framers would have understood that they would last into future ages the particular problems of which they could not readily foresee. As Scalia J has said:

> The real implication was quite the opposite – Marshall was saying that the Constitution had to be interpreted generously because the powers conferred upon Congress under it had to be broad enough to serve not only the needs of the federal government originally discerned but also the needs that might arise in the future. If constitutional interpretation could be adjusted as changing circumstances required, a broad initial interpretation would have been unnecessary.[172]

Fourth non-originalist theory: a workable Constitution in modern conditions

Mason CJ's approach, put briefly, rests on the idea that the passing of time has revealed deficiencies in the capacity of Australian governments to cope under the present Constitution with modern problems arising from the increased complexity of life, the integration of commerce, the rise of the welfare state, and what would now be called globalisation. Since it has proved difficult to effect amendments to the Constitution by popular vote under s128, it is incumbent on the courts to revise the Constitution so as to improve the capacity of the Constitution, and that of Australian governments, to cope with modern life. He calls for the Constitution to be interpreted, not as if it were frozen in the restricted attitudes of the framers, but dynamically, with an orientation towards policies which will meet those problems, bearing in mind the need to consider whether it is advantageous for a particular problem to be solved by federal control. The Constitution

is a broad framework, not a detailed blueprint. The approach may be described as a cautious but consequentialist version of Kirby J's, openly favouring Commonwealth power.

Mason CJ's approach reflects a desire to keep, as it were, the national show on the road. That desire is neither ignoble nor uncommon.

Thus he said extra-judicially:

> The problem is that the words of the Constitution have to be applied to conditions and circumstances that could not have been foreseen by its authors. It follows that exploration of the meaning of the language of the Constitution at the time of its adoption and of the intentions of the authors have a limited view in resolving current issues. Accordingly, there is a natural tendency to read the Constitution in the light of the conditions, circumstances and values of our own time, instead of freezing its provisions within the restricted horizons of a bygone era. Viewed in this way, the Constitution is not so much a detailed blueprint as a set of principles designed as a broad framework for national government.[173]

He said that constitutional interpretation rests on a 'dynamic principle'.[174] He appeared to approve the view that in doubtful cases, the deciding factor when interpreting provisions concerning Commonwealth powers ought to be whether or not it is advantageous for the matter to be under federal control.[175] He said:

> the complexity of modern life, the integration of commerce, technological advance, the rise of the welfare society, even the intrusive and expanding reach of international affairs into domestic affairs, require increasing action on the part of the national government, so that it seldom appears that a narrow interpretation would best give effect to the objects of the Constitution.[176]

He favours 'policy oriented interpretation'.[177]

Mason CJ's approach reflects a desire to keep, as it were, the national show on the road. That desire is neither ignoble nor uncommon. It has been argued that the House of Lords has in recent decades adopted a similar approach to the development of the law generally.[178] The reasoning can be seen as leading to the conclusion that the power conferred on the federal parliament to legislate on 'external affairs' extends to matters geographically external to Australia. One argument for this course was that it was necessary, since if it were not taken there could be areas in which other nations could legislate, but Australia could not because neither the Commonwealth nor the states would be able to do so. This, as the argument was put, would leave an unacceptable 'lacuna', as Deane J put it,[179] or, as Jacobs J put it, would leave the 'crown in the Australian Executive Council and in the Australian Parliament' without 'that pre-eminence and excellence as a sovereign crown which is possessed by the British crown and parliament',[180] or, to use the less elevated phrase of Murphy J, would render Australia an 'international cripple unable to participate fully in the emerging world order.'[181]

These extra-judicial suggestions of Justice Mason's in 1986 had been prefigured in a judgment as early as 1975. In *North Eastern Dairy Co Pty Ltd v Dairy Industry Authority (New South Wales)* he said that the concept of 'freedom' in s92 was not to be ascertained by reference to doctrines of political economy prevalent in 1900, but is 'a concept of freedom which should be related to a developing society and to its needs as they evolve from time to time .... [T]he operation [of s92] may fluctuate as the community develops and as the need for new and different modes of regulation of trade and commerce become apparent'.[182]

Perhaps this passage can be explained by recourse to the connotation/denotation distinction and perhaps by recourse to the idea that 'free' is an expression of ambulatory meaning, necessarily calling for attention to evolving conditions in order to give it content from time to time. However, underlying the passage also appears to be the idea that the meaning of s92 'should' be changed as social 'needs ... evolve'. The fact that Mason J, of course, was party to *Cole v Whitfield*, which reverted to the ideas of 1900 to explain s92, may be seen as one of those little local difficulties that arise when a new reading of the Constitution is suddenly introduced.

Thoughts on the four non-originalist theories

These non-originalist theories of Deane J, Kirby J, McHugh J and Mason CJ, obviously enough, are inconsistent with originalist theories.[183]

Although they were stated in the last 25 years or so, they can be seen as having precursors in earlier judgments. That is particularly so of their consequentialist features. Thus Isaacs J defended a particular construction of s101 on the ground that it 'avoids serious consequences, hardly supposable as intended' and 'a most astounding result'.[184] And one reason Windeyer J gave for accepting the conclusion that s51(v) applied to legislation regulating radio and television was that 'the very nature of the subject-matter makes it appropriate for Commonwealth control regardless of state boundaries.'[185] On another occasion he justified a conclusion in relation to the appellate jurisdiction of the High Court over territory courts by reason of 'national needs'.[186] In a further judgment he gave the following as a reason for concluding that the rights of the Imperial Government over the territorial sea and its seabed extended to the Commonwealth: 'The words of the Constitution must be read ... to meet, as they arise, ... national needs ....'[187]

The high watermark of this approach was a long and famous passage in *Victoria v The Commonwealth (The Payroll Tax Case)*, decided in 1971.[188] In that passage, there are four sentences of present importance. Windeyer J said:

> I have never thought it right to regard the discarding of the doctrine of the implied immunity of the states and other results of the *Engineers' Case* as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing

> realisation that Australians were now one people and Australia one country and that national laws might meet national needs. ... But reading the instrument in this light does not to my mind mean that the original judges of the High Court were wrong in their understanding of what at the time of federation was believed to be the effect of the Constitution and in reading it accordingly.

Independently of that passage, there are reasons for thinking that Windeyer J did not always support the view that the construction of the Constitution can legitimately change from time to time. In *Ex parte Professional Engineers' Association*, decided in 1959,[189] in the course of explaining the connotation/denotation distinction, he said: 'In the interpretation of the Constitution the connotation or connotations of its words should remain constant'.

Further, in the *Payroll Tax Case*, Windeyer J was drawing attention to two types of development. One type concerned legal and factual developments which, while leaving Australia within the British Empire or Commonwealth of Nations, were causing the Commonwealth of Australia to become wholly independent even if the Australian states were not – developments that can be shortly captured by referring to the Balfour Declaration of 1926 and the Statute of Westminster 1931. The other type comprised internal legal and factual developments which were unifying the country – economic integration and the increasing paramountcy of federal law by reason of s109 of the Constitution. These changes are similar to those he referred to when he said that the words of the Constitution: 'are not to be tied to the very things they denoted in 1901. The words of s92 remain unaltered and so does their meaning; but economic methods and the forms of economic organisation and the instruments of trade and commerce have expanded and altered, and threats to the freedom of which s92 speaks arise in new ways.'[190]

Windeyer J may have been teaching that the interpretation of the Constitution can change as its interpreters take into account new national experiences and become aware of new problems to which the Constitution must be applied. But was Windeyer J saying that only one view is right? Or are both right for their particular times, even though they differ? The latter seems to be his position in the *Payroll Tax Case*, for if to return to 'the discarded theories would ... be an error', and it was not an error by the early justices to have adopted them in the first place, then the true meaning of the Constitution is seen as capable of changing from time to time.[191] Kirk has advanced a slightly different reading, namely that 'whilst the previous interpretation had not been clearly and unreasonably wrong, the 'new light' of events had shown the new approach to be more appropriate and correct.'[192]

The fact is that despite Windeyer J's unquestioned greatness, there is an inconsistency in his judgments on the present question, and sometimes ambiguity within a single judgment. In part this is because he was a pioneer, often an unconscious one, of modern theories of progressive interpretation in an age when originalist theories dominated. In part it was because in elucidating the problem he relied on Holmes J. That judge, over his very long life, in the characteristically misty grandeur of his aphorisms, was far more prone to ambiguity. For example, in *Damjanovic & Sons Pty Ltd v The Commonwealth* Windeyer J's position appears originalist, but he cites[193] Holmes J in *Missouri v Holland*:[194]

> When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said one hundred years ago.

... despite Windeyer J's unquestioned greatness, there is an inconsistency in his judgments on the present question, and sometimes ambiguity within a single judgment. In part this is because he was a pioneer, often an unconscious one, of modern theories of progressive interpretation in an age when originalist theories dominated.

Care must be taken in handling similar ambiguities in later cases. Thus in *Re Tracey; ex parte Ryan*[195] Brennan and Toohey JJ said:

> History and necessity combine to show that courts-martial and other service tribunals, though judicial in nature and though erected in modern times by statute, stand outside the requirements of Ch III of the Constitution.

So far as this refers to 'necessity' in the light of present conditions, the reasoning is non-originalist. So far as it rests on how the mental climate of 1900 would have seen necessity, it is originalist.

It is common to test the construction of statutes by comparing the consequences of competing constructions, and choosing the one which will produce the less absurd or unreasonable results. That approach is sometimes but not always applied to the Constitution. Thus the scheme for cross-vesting the jurisdiction of state courts in the Federal Court of Australia was struck down despite the opinion of many that it was a highly 'convenient' and 'efficient' solution to what was seen as a troubling problem of 'arid jurisdictional disputes'.[196] But on other occasions regard is paid to 'practical considerations' in assessing the soundness of a particular construction.[197] On these occasions a non-originalist approach is being employed – a construction is adopted which leads to the most workable outcome in modern conditions, unless a form of originalism is resorted to by saying that an offending

construction 'would create immense practical problems ... which the makers of the Constitution can hardly have intended'.[198]

Penultimate theory: expansive construction of powers, not prohibitions

Two other theories which fall outside the originalist and organic categories remain to be mentioned.

The first is the development by Mason J of a somewhat obscurely expressed idea of Dixon CJ's.[199] Mason J said that while constitutional prohibitions should be applied in accordance with their meanings in 1900, grants of power should be construed 'so as to apply it to things and events coming into existence and unforeseen at the time of the making of the Constitution, so that the operation of the relevant grant of power in the Constitution enlarges or expands ....' The justification offered was: 'As a prohibition is a restriction on the exercise of power there is no reason for enlarging its scope of operation beyond the mischief to which it was directed ascertained in accordance with the meaning of the prohibition at the time when the Constitution was enacted.'[200] This approach has attracted little agreement.[201]

Last theory: 'common law' approach

There is an approach to the Constitution which has not been overtly applied in Australia. To some extent its silent operation can be noticed here, although it can be seen more clearly in the United States. It has been called evolutionary, and the type of evolution involved has been called 'the method of the common law'. That is, as decision succeeds decision, each cautiously proceeding by analogy with or limited extension of the one before, a body of doctrine builds up which is highly unlikely to conform either with the actual intention of the framers or with their language as it was originally understood. The doctrine of *stare decisis*, coupled with the extent to which governments and citizens have relied on the evolved position, makes it highly unlikely that that position will be overruled.[202] To call this process 'the method of the common law' does not justify it. The true method of the common law does involve gradual advances and retreats as old problems are solved and new difficulties emerge. But if the results are unsatisfactory they can speedily be dealt with by statute and less speedily by overruling. And the common law method cannot operate in relation to statutes: it is not open to the courts to evolve away from what the statute commands. This must be so a *fortiori* with that most important statute, namely the Constitution.

Has there ever been a theory of 'literalism' or 'strict textualism'?

It is sometimes suggested that a key dichotomy in constitutional interpretation is a dichotomy between approaches which are 'literalist' or are 'strictly textual' or depend on the 'plain meaning of the words' – these are condemned – and others. Those who suggest this rarely point to convincing examples of the condemned approaches. As is often the case in doctrinal controversies, much energy has been put into demolition of something which consists only of straw. What is 'literalism'? If by 'literalism' is meant examining the words in isolation, no-one advocates it. If by 'literalism' is meant examining the words in the context of the Constitution as a whole, and nothing more, no-one advocates it; indeed McHugh J has denied that it is the traditional approach.[203] If by 'literalism' is meant a doctrine under which there is 'only a very limited occasion' to 'search for meaning outside the text' by 'reference to ... the wider history of the provision concerned',[204] it does not exist. As was said earlier, the theories of interpretation deriving from O'Connor J both by precept and practice frequently involve historical inquiry.[205] It has been contended[206] that examples of 'literalism' can be found in the following expressions of Barwick CJ: 'The only true guide ... is to read the language of the Constitution ....';[207] 'the text of our own Constitution is always controlling';[208] 'what falls for construction are the words of the Constitution ....'[209] But to concentrate only on little verbal fragments is misleading. Barwick CJ favoured reading the Constitution in the light of its history in order to ascertain the 1900 meaning. Thus he said: 'The meaning which 'establishing' [in s116] in relation to a religion bore in 1900 may need examination ... to ensure that the then current meaning is adopted.'[210] He also said that the meaning of the Constitution was to be decided 'having regard to the historical setting in which [it] was created .... In the case of ambiguity or lack of certainty, resort can be had to the history of the colonies, particularly in the period of and immediately preceding the development of the terms of the Constitution.'[211] It was not a question of taking any 'literal' or 'textual' meaning, but that of conducting historical inquiry into the 1900 range of meanings.

Other possible candidates for a 'literalist' approach in the High Court of analysing the words in a vacuum are some statements of Dixon CJ denigrating the value of historical analysis. An example is *Victoria v The Commonwealth*.[212] But even there Dixon J did concede that the 'inconspicuous' role of the drafting history of s96 in Australian history 'may explain why the terms in which it was drafted have been found to contain possibilities not discoverable in the text as it emerged from the conventions'. Further, to treat Dixon J as a literalist in the narrowest sense is difficult in view of his preparedness to detect implications in the Constitution: for implications can only be found from context. It is also difficult in view of some of his judgments which reveal a deep historical understanding, for example the usages of the word 'excise',[213] or his statement that his view of s75(iii) was 'completely informed by the history of the provision, which explains ... the whole matter'.[214]

The *Engineers' Case* is sometimes criticised as embodying a rigid literal approach. But it did accept that the Constitution had to be interpreted against the historical background and 'in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it ....'[215]

Hence all extant approaches to interpretation in some degree depend on resort to a context which is wider than the words of the Constitution, even taken as a whole. It is likely that that has always been so.

Conclusion

Gummow J has said that questions of constitutional construction 'are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation'.[216] That is true. It is also true that taxonomy by itself does not solve problems, and it is important to avoid the fate which, according to Lord Millett, befell the late Professor Birks when in 'his later years he became obsessed with taxonomy' and recanted many of the propositions

which he had previously pronounced.[217] But it is desirable to seek to understand theory so far as it really does underpin constitutional construction. To try to classify competing theories is an aid, however limited, to understanding both them and the Constitution itself.

1 What follows owes much to questions raised by Henry Burmester, 'The Convention Debates and the Interpretation of the Constitution' in (ed) Gregory Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) p 25; Jeffrey Goldsworthy, 'Originalism in Constitution Interpretation' (1997) 25 Fed LR 1; Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 Fed LR 323; Jeffrey Goldsworthy, 'Interpreting the *Constitution* in its Second Century' (2004) 24 MULR 672; Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 PLR 234. I am also indebted to Lorraine Finlay, Adam Sharpe and Rebecca Spigelman for their assistance.

2 *Attorney-General (New South Wales) v Brewery Employés Union of New South Wales* (1908) 6 CLR 469 at 611-612 (emphasis in original).

3 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 – unless the particular context or the rest of the Constitution suggests otherwise.

4 *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105 per Griffith CJ, Barton and O'Connor JJ.

5 *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

6 *New South Wales v The Commonwealth* (2006) 231 ALR 1 at 224-234 [774]-[797] per Callinan J.

7 *Re Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 268 per Murphy J (s 41).

8 See the criticisms by McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 231-232 of what Deane and Toohey JJ said in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70.

9 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417 [166] per Kirby J.

10 For example, 'A Personal View of Mr Justice Murphy', *Bar News* (Autumn 1987) p 5.

11 For example, his speech at a Bar dinner on the retirement of Sir Harry Gibbs, *Bar News* (Autumn 1987) p 9; and his speech at a Bar dinner in his honour on 17 July 1994, *Bar News* (Spring/Summer 1994) p22.

12 'Sir Harry Gibbs', *Bar News* (Autumn 1987) p 9.

13 'Comment' (1984) 14 Fed LR 276.

14 G F Pearce, *Carpenter to Cabinet*, p 47.

15 Foreword to G F Pearce, *Carpenter to Cabinet*, p 12.

16 Introduction to Peter Heydon, *Quiet Decision*, p 2.

17 110 CLR xi.

18 (1904) 1 CLR 329 at 358-359.

19 *Attorney-General v Carlton Bank* [1899] 2 QB 158 at 164: the goal of statutory construction is 'to give effect to the intention of the Legislature', but subject to key qualifications – 'as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed'.

20 'The Theory of Legal Interpretation', 12 Harv LR 417 at 419 (1899).

21 *Heydon's Case* (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638, where the Barons of the Exchequer said that statutory interpretation depends on four questions:

> 'What was the common law before the making of the Act.
>
> ... What was the mischief and defect for which the common law did not provide.
>
> ... What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> ... The true reason of the remedy ....'

22 *Harcourt v Fox* (1693) 1 Show KB 506 at 535; 89 ER 720 at 734: 'A contemporary exposition of a law, if there be any question about it, as our books tell us, is always the best, because the temper of the law makers is then best known.'

23 *Aldridge v Williams* 44 US (3 How) 9 at 24 (1845): 'The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself, and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.'

24 *Direct United States Cable Co Ltd v Anglo-American Telegraph Co Ltd* (1877) 2 App Cas 394 at 412: it was necessary to consider 'the subject matter with respect to which [the statutory words] are used, and the object in view'.

25 *Van Diemen's Land Co v Table Cape Marine Board* [1906] AC 92 at 98: 'The time when, and the circumstances under which', the statute was enacted 'supply the best and surest mode of expounding it'.

26 J C Campbell, 'Commentary' (1985) 1 Aust Bar Rev 139 at 142: 'The question in construction is ...: what has been done by this document.' See also *Black-Clawson International Ltd v Papierwerke Waldhof-Aschoffenburg AG* [1975] AC 591 at 645 per Lord Simon of Glaisdale.

27 *Sharpe v Wakefield* (1888) 22 QBD 239 at 242.

28 *Minister for Mineral Resources v Brautag Pty Ltd* (1997) 8 BPR 15,815 at 15,822-15,824

29 ibid. at 15,820.

30 *Tasmania v The Commonwealth* (1904) 1 CLR 329 at 359-360. Griffith CJ stated the same view (at 338), as did McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

31 'The Law and the Constitution' (1935) 51 LQR 590 at 597.

32 'Interpretation of the Constitution' in R Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 1 at p 8.

33 *Bistricic v Rokov* (1976) 135 CLR 522 at 566; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 236-238. See Zines, *The High Court and the Constitution*, (1981) pp 250-251.

34 For example, *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351 at 442 per Deane J.

35 See pp 22-23.

36 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 151 per Knox CJ, Isaacs, Rich and Starke JJ.

37 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J.

38 See below pp16-18.

39 From this point of view it is erroneous to assert that 'originalism in Australia was unheard of until ... *Cole v Whitfield*', as Adam A Perlin does: 'What Makes Originalism Original?: A Comparative Analysis of Originalism and Its Role in Commerce Clause Jurisprudence in the United States and Australia' (2005) 23 Pacific Basin LJ 94 at 98, n 16.

40 *R v Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1912) 15 CLR 586 at 592 per Griffith CJ. See also

Attorney-General (New South Wales) v Brewery Employés Union of New South Wales (1904) 6 CLR 469 at 501 per Griffith CJ, 521-522 per Barton J, 534-541 per O'Connor J and 610 per Higgins J.

41 *King v Jones* (1972) 128 CLR 221 at 229. See also *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578 per Barwick CJ.

42 *Brown v The Queen* (1986) 160 CLR 171 at 189-190.

43 *Brown v The Queen* (1986) 160 CLR 171 at 217. See also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537.

44 *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1980) 146 CLR 559 at 615 (cf *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1 at 35).

45 *Breavington v Godleman* (1988) 169 CLR 41 at 132-133.

46 *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1106.

47 *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105-1106 and 1108.

48 *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105.

49 (1988) 165 CLR 360 at 385 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

50 *Merchant Service Guild of Australasia v Archibald Currie & Co Pty Ltd* (1908) 5 CLR 737 at 745.

51 (1994) 182 CLR 104 at 196.

52 (1994) 182 CLR 104 at 197.

53 (1904) 1 CLR 208 at 213-214. An even more restrictive ban was enunciated in *Stephens v Abrahams (No 2)* (1903) 29 VLR 229 at 241 (FC).

54 *Gorham's Case* (1852), quoted in *Assam Railways and Trading Co v Commissioners of Inland Revenue* [1935] AC 445 at 458-459 (Royal Commission Report rejected as evidence of legislative intention, but admissibility of the Report, and of parliamentary debates, to identify mischief assumed). See also *Hawkins v Gathercole* (1855) 6 De GM & G 1 at 22; 43 ER 1129 at 1136 per Turner LJ; *Farley v Bonham* (1861) 30 LJ Ch 239 (Sir William Page Wood VC) (reports); *Re Mew & Thorne* (1862) 31 LJBK 87 at 88-89 per Lord Westbury LC (report and speech in Parliament); *Attorney-General v Sillem* (1863) 2 H & C 431 at 531; 159 ER 178 at 223 per Bramwell B; *Holme v Guy* (1877) 5 Ch D 901 at 905 per Sir George Jessel MR ('the history of law and legislation'); *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 763-764 per Lord Blackburn; *Herron v Rathmines and Rathgar Improvement Commissioners* [1892] AC 498 at 502 per Lord Halsbury LC.

55 *Eastern Photographic Materials Co v Comptroller-General of Patents, Designs and Trademarks* [1898] AC 571 at 575; cf *Salkeld v Johnson* (1854) 2 Ex 256 at 273; 154 ER 487 at 495, rejecting a Report of the Real Property Commissioners as evidence of meaning. See P Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (1961) 4 UQLJ 1 at 4-14; Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Intentionalism' (1999) 27 Fed LR 323 at 329.

56 *Wacando v The Commonwealth* (1981) 148 CLR 1 at 25-26 per Mason J; *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 373-375; *Gerhardy v Brown* (1985) 159 CLR 70 at 104 per Mason J, 113 per Wilson J, 136 and 142 per Brennan J (in construing a South Australian Act before any South Australian equivalent to s15AB existed). Thus Stephen J said that legislative debates 'may not be resorted to to determine what it is which parliament has in fact enacted in legislating ..., but only so as to cast light upon what has been variously described as the mischief to be remedied, the subject matter which the legislation intended to deal with or the legislation's general background.': *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 600. And in England Lord Simon of Glaisdale said that the courts could have recourse to any public report which had led to the legislation: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschoffenburg AG* [1975] AC 591 at 646-647. For earlier examples, see *Shenton v Tyler* [1939] Ch 620 at 626 and 639 per Sir Wilfrid Greene MR and 646-647 per Luxmoore LJ; *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 212 per Dixon CJ, McTiernan, Webb, Fullagar and Taylor JJ; *Rookes v Barnard* [1964] AC 1129 at 1170 per Lord Reid; *Letang v Cooper* [1965] 1 QB 232 at 240 per Lord Denning MR; *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 101 per Lord Wilberforce; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 509 per Gibbs J and 520-521 per Mason J. But there were contrary voices: eg *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 47 per Gibbs J, quoted below at fn 72; *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore* (Aust) Ltd (1977) 139 CLR 449 at 478 per Mason J, suggesting that the matter was best left to parliament. For an earlier contrary voice, see *R v West Riding of Yorkshire County Council* [1906] 2 KB 676 at 716 per Farwell LJ.

57 For example, *Warnecke v The Equitable Life Assurance Society of the United States* [1906] VLR 482 at 487 per A'Beckett ACJ; *Re Armstrong and State Rivers and Water Supply Commission (No 2)* [1954] VLR 288 at 290 per Sholl J; *Eros Finance Pty Ltd v Attorney-General* [1956] VLR 320 at 324 per Sholl J; *T M Burke Pty Ltd v City of Horsham* [1958] VLR 209 at 216 per Sholl J; and *Langhorne v Langhorne* [1958] ALR 989 at 991 per Gavan Duffy J.

58 The House of Lords achieved a result very similar to s 15AB(1)(b) by developing the common law in *Pepper v Hart* [1993] AC 593 at 634.

59 Attorney-General's Department: *Symposium on Statutory Interpretation* (1983) pp 39 and 83.

60 (1988) 165 CLR 360 at 385 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

61 It may therefore not entirely be correct to say that pre-1988 practices 'can be traced to the previously fashionable rules governing the construction of the language of statutes' (*Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 401 [132] per Kirby J), for the pre-1988 practices on the convention debates were out of line with the cases referred to in notes 54-57. Admittedly there were authorities the other way.

62 See *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 213-214 per Griffith CJ (above 17); *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105-1106 and 1108 per Griffith CJ, Barton and O'Connor JJ (above 17). See also *Re Pearson; Ex parte Sipka* (1983) 152 CLR 252 at 262 per Gibbs CJ, Mason and Wilson JJ.

63 Examples of the other view can be found. One is where the expression 'the tenant's family' in a state enacted in 1920 was construed in 1976 as including a de facto wife: *Dyson Holdings Ltd v Fox* [1976] QB 503 at 511 per James LJ. See also *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705; *Victor Chandler International v Customs and Excise Commissioners* [2002] 2 All ER 315 at 322-323 [27]-[31] per Sir Richard Scott VC; F Bennion, *Statutory Interpretation* (4th ed, 2002) pp 762-763; Cross, *Statutory Interpretation* (3rd ed, 1995) p 51. That conclusion has been criticised: *Helby v Rafferty* [1979] 1 WLR

13 at 25. Australian law at least has not accepted any presumption that legislation is to be given an ambulatory operation. However, in *Brownlee v The Queen* (2001) 207 CLR 278 at 321-322 [126], Kirby J appeared to disagree: ' ... with ordinary legislation, expected to have an extended operation, it is increasingly accepted that language lives and meaning adapts to changed circumstances.'

[64] Henry Burmester, 'The convention debates and the Interpretation of the Constitution' in (ed) Gregory Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) p 26.

[65] Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 Fed LR 211.

[66] (1904) 1 CLR 329 at 350-358 per Barton J and 358-359 per O'Connor J (quoted above 15).

[67] (1907) 4 CLR 1087 at 1105-1106 and 1108 per Griffith CJ, Barton and O'Connor JJ (quoted above 17).

[68] *Evans v Williams* (1910) 11 CLR 550 at 571: in interpreting a statute, the court could consider 'the time when, and the circumstances under which' it was enacted.

[69] *Australian Tramway Employes Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680 at 695: the question whether a statute exceeded the limits of s51(xxxv) depended 'upon how the expression 'industrial dispute' was generally understood in 1900'.

[70] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152: the Constitution should be 'read ... naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it ....'

[71] *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17: 'in case of ambiguity or lack of certainty, resort may be had to the history of the colonies.'

[72] *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 47: 'In construing the Constitution regard may be had to the state of things existing when [the Constitution] was passed and therefore to historical facts.'

[73] *Attorney-General (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 187: even though the convention debates could not be referred to, resort could be had to 'historical facts as providing background against which to view the Constitution.' See also at 174-177 per Stephen J.

[74] *Watson v Lee* (1979) 144 CLR 374 at 399.

[75] Henry Burmester, 'The convention debates and the Interpretation of the Constitution' in (ed) Gregory Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) p 26.

[76] *Tasmania v The Commonwealth* (1904) 1 CLR 329 at 359. See also *Deakin v Webb* (1904) 1 CLR 585 at 630 (if no 'reasonable meaning' can be adduced from the words, the court 'can have resort to the history of the clause or the circumstances surrounding the framing of the Constitution').

[77] *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd* (1977) 139 CLR 449 at 479 per Murphy J.

[78] *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 75 [44].

[79] *King v Jones* (1972) 128 CLR 221 at 229. In *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578 he said: 'The then current meaning [ie in 1900] of the words used in the text is the meaning, the connotation, they must thereafter bear, although in application in later times they may achieve results not within the contemplation of those who wrote the text.' See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 CLR 208 at 267 per Windeyer J: 'in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they would have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.' And see *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537 per Dawson J: '[T]he words have a fixed connotation but their denotation may vary from time to time .... [T]he attributes which the words signify will not vary, but as time passes new and different things may be seen to possess those attributes.'

[80] *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29. Another common example is *Sue v Hill* (1999) 199 CLR 462. In 1900 the United Kingdom was not a 'foreign power' within the meaning of s44, because Australia was part of the British Empire: its foreign relations were conducted largely by the United Kingdom, neither the Commonwealth nor the states had complete legislative autonomy, the United Kingdom retained power to legislate for Australia, and some appeals could be heard by a court which was, if not strictly speaking a United Kingdom court, a court established by United Kingdom legislation. All those things have changed, and hence the denotation of 'foreign power' has widened to include the United Kingdom. (See *Eastman v The Queen* (2000) 203 CLR 1 at 45 [143] per McHugh J.) It has been said, however, that this is not in truth an example of a change in denotation, but that a change in connotation is involved on the ground that the essential attribute of the words 'foreign power' in 1900 was 'any sovereign state other than the United Kingdom': Dan Meagher, 'Guided by Voices? – Constitutional Interpretation on the Gleeson Court' (2002) 7 Deakin LR 261 at 268. The competing view is that the essential attribute was not being part of the sovereign state of which Australia was part, namely the British Empire, and the United Kingdom is no longer part of that sovereign state.

[81] Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) pp 17-20.

[82] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 493 [18] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. On the other hand, the words before the last four words invite treatment of radio and television as new denotations: see at 20 above.

[83] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 493 [18] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See also *Langer v The Commonwealth* (1996) 186 CLR 302 at 342-343 per McHugh J ('the people' in s24); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552-553 [44]-[45], 554 [47] per McHugh J (referring to s51(i), (xx), (xxix) and (xxxv)); *Eastman v The Queen* (2000) 203 CLR 1 at 49-50 [154] per McHugh J.

[84] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 629 [100] per Gummow J.

[85] *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416 at 482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[86] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 97 [34] per Gaudron and Gummow JJ.

[87] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 501 [41] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

88 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 496 [23] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

89 *XYZ v The Commonwealth* (2005) 227 ALR 495 at 537 [153] per Callinan and Heydon JJ.

90 *Victoria v The Commonwealth (The Industrial Relations Act Case)* (1996) 187 CLR 416 at 482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; *XYZ v The Commonwealth* (2005) 227 ALR 495 at 537 [153] per Callinan and Heydon JJ.

91 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [24] per Gaudron and Gummow JJ.

92 *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [54] per Gaudron, Gummow and Hayne JJ.

93 *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [53] per Gaudron, Gummow and Hayne JJ. See also at 303 [71].

94 *Cheatle v The Queen* (1993) 177 CLR 541 at 562 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

95 *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

96 *Brownlee v The Queen* (2001) 207 CLR 278 at 288-289 at [20]-[22] per Gleeson CJ and McHugh J, 298-299 [54]-[57] and 303 [68]-[71] per Gaudron, Gummow and Hayne JJ and 341 [183]-[184] per Callinan J.

97 *Brownlee v The Queen* (2001) 207 CLR 278 at 304 [72] per Gaudron, Gummow and Hayne JJ.

98 *Katsuno v The Queen* (1999) 199 CLR 40 at 64 [50] per Gaudron, Gummow and Callinan JJ (Gleeson CJ concurring); *Brownlee v The Queen* (2001) 207 CLR 278 at 287 [16] per Gleeson CJ and McHugh J; 299 [57] per Gaudron, Gummow and Hayne JJ.

99 *Brownlee v The Queen* (2001) 207 CLR 278 at 289-290 [24]-[27] per Gleeson CJ and McHugh J, 298-302 [54]-[67] per Gaudron, Gummow and Hayne JJ and 342-343 [189]-[192] per Callinan J.

100 *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

101 *Fittock v The Queen* (2003) 217 CLR 508; *Ng v The Queen* (2003) 217 CLR 521.

102 *Ex parte Peterson* 253 US 300 at 309-310 (1920).

103 *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [53] and 303 [71].

104 *Cheatle v The Queen* (1993) 177 CLR 541 at 561-562 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

105 *Brownlee v The Queen* (2001) 207 CLR 278 at 288 [21] per Gleeson CJ and McHugh J.

106 *Brownlee v The Queen* (2001) 207 CLR 278 at 298 [54] per Gaudron, Gummow and Hayne JJ.

107 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375.

108 *Brownlee v The Queen* (2001) 207 CLR 278 at 297 [53] per Gaudron, Gummow and Hayne JJ.

109 For example, *Attorney-General (New South Wales) v Brewery Employés Union of New South Wales* (1908) 6 CLR 469 at 616 per Higgins J; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 519-520 [103] per Kirby J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [24] per Gaudron and Gummow JJ. Legislation may be enacted under the bankruptcy power even though it does not correspond with bankruptcy legislation of the kinds existing before 1900, so long as it corresponds with some 'fundamental purpose' of bankruptcy law: *Storney v Lane* (1981) 147 CLR 549 at 557 per Gibbs CJ, approved in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 495 [22] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

110 Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 Adel LR 49 at 52.

111 *Attorney-General (New South Wales) v Brewery Employés Union of New South Wales* (1908) 6 CLR 469 at 610. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ adopted this approach in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 493-494 [18]-[19].

112 The distinction has been referred to in non-constitutional cases, e.g., *Grant v Federal Commissioner of Taxation* (1976) 135 CLR 632 at 642 per Mason J. For constitutional usages, see *New South Wales v The Commonwealth* (No 1) (1932) 46 CLR 155 at 213 per Evatt J; *Attorney-General (Victoria) v The Commonwealth* (1962) 107 CLR 529 at 543 per Dixon J (s51(xxi)); Re F; *Ex parte F* (1986) 161 CLR 379 at 391 per Mason and Deane JJ (s51(xxi)).

113 See below at 21-2.

114 *Lansell v Lansell* (1964) 110 CLR 353 at 370; *Victoria v The Commonwealth* (1970) 122 CLR 353 at 399. For a neutral reference see *Attorney-General (Victoria) v The Commonwealth* (1960) 107 CLR 529 at 577.

115 H L A Hart, 'Positivism and the Separation of Law and Morals' 71 Harv LR 593 at 607 (1958). The reasoning was criticised by Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' 71 Harv LR 630 at 662-664 (1958).

116 *Singh v The Commonwealth* (2004) 222 CLR 322 at 383 [152] per Gummow, Hayne and Heydon JJ.

117 *Singh v The Commonwealth* (2004) 222 CLR 322 at 425 [296].

118 (2000) 202 CLR 479 at 495-496 [23].

119 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.

120 *Jones v The Commonwealth* (No 2) (1965) 112 CLR 206.

121 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 at 277.

122 See above at 18.

123 *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) p 8; see also 'The Scope of Judicial Review: An Ongoing Debate' (1979) 6 Hast Const LQ 527 at 530.

124 For example, *New South Wales v The Commonwealth* (2006) 231 ALR 1 at 223 [772].

125 For example, James A Thomson, 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' (1982) 5 UNSWLJ 309 at 312.

126 *Singh v The Commonwealth* (2004) 222 CLR 322 at 337 [21]. *Cf Abebe v The Commonwealth* (1999) 197 CLR 510 at 531 [41] (referring to a consequence which the makers 'can hardly have intended').

127 *Eastman v The Queen* (2000) 203 CLR 1 at 46 [147] per McHugh J (emphasis added).

128 (1904) 1 CLR 91 at 113 (emphasis added). See also *Deakin v Webb* (1904) 1 CLR 585 at 616 per Griffith CJ; *Brown v The Queen* (1986) 160 CLR 171 at 180-181 per Gibbs CJ.

129 For example, *Mickelberg v The Queen* (1989) 167 CLR 259 at 283-284 per Deane J.

130 *New South Wales v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482 at 503 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ.

131 *Brown v The Queen* (1986) 160 CLR 171 at 179 per Gibbs CJ.

132 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185 per Barwick CJ.

133 *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 27 per Windeyer J (to prevent 'commercial disunity').

134 *Deacon v Mitchell* (1965) 112 CLR 353 at 372 per Windeyer J ('to keep the highways, waterways and airways of Australia open and without impediment for traffic moving from state to state').

135 *Eastman v The Queen* (2002) 203 CLR 1 at 46 [146].

136 *Eastman v The Queen* (2002) 203 CLR 1 at 37 [115].

137 *Eastman v The Queen* (2002) 203 CLR 1 at 40 [127].

138 *Ruhani v Director of Police* (2005) 219 ALR 199 at 263 [281] per Callinan and Heydon JJ.

139 *Studies in Australian Constitutional Law* (1901) pp 20-22. See *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 171-173 per Deane J; *Eastman v The Queen* (2000) 203 CLR 1 at 79-80 [242] per Kirby J. Yet Inglis Clark appears to have shared O'Connor J's view when he said that the Constitution should be interpreted 'consistently with the historical association from which particular words and phrases derive the whole of their meaning in juxtaposition with their context': p 21.

140 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 MULR 1 at 14.

141 'Constitutional Interpretation: Some Thoughts' (1998) 20 Adel LR 49 at 49-50.

142 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171.

143 *Bistricic v Rokov* (1976) 135 CLR 552 at 566.

144 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 173.

145 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ.

146 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486.

147 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 181.

148 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 186.

149 *New South Wales v The Commonwealth* (1990) 169 CLR 482 at 504. See also at 511 per Deane J ('it is not possible to restrict the effect of the words which were adopted by the people as the compact of a nation by reference to the intentions and understanding of those who participated in or observed the Convention Debates').

150 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171.

151 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 Fed LR 1 at 17. See *Cole v Whitfield* (1988) 165 CLR 360 at 385; *Breavington v Godleman* (1988) 169 CLR 41 at 132-133; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 274 per Brennan, Deane and Toohey JJ.

152 *Brownlee v The Queen* (2001) 207 CLR 278 at 314 [105].

153 *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 87 [77].

154 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 525 [118].

155 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 523 [112].

156 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 522 [109].

157 *Eastman v The Queen* (2000) 203 CLR 1 at 79-80 [242]. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 600 [186].

158 M Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 MULR 1 at 6. The image was used in a Canadian Privy Council case, *Edwards v Attorney-General for Canada* [1930] AC 124 at 136 and adopted by Evatt J in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 115.

159 For criticism of this approach – which has application to other non-originalist approaches – see Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 Fed LR 1 at 39; Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 MULR 672 at 679-687; Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 PLR 234.

160 (2000) 203 CLR 1 at 49 [154].

161 (2000) 203 CLR 1 at 50 [154] (emphasis in original).

162 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552 [43].

163 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552-553 [44]; see also at 553 [45] and 554 [47]; *Langer v The Commonwealth* (1996) 186 CLR 302 at 342-343.

164 Footnotes omitted.

165 *Taking Rights Seriously* (1977), pp 131-149; *Freedom's Law: The Moral Reading of the American Constitution* (1996), pp 1-38.

166 *Eastman v The Queen* (2000) 203 CLR 1 at 50 [154] (emphasis in original).

167 (2000) 203 CLR 1 at 50 [155].

168 By McHugh J in *Eastman v The Queen* (2000) 203 CLR 1 at 51 [156] and by Mason J in *Tasmania v The Commonwealth* (1983) 158 CLR 1 at 127. See also Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in (eds) Charles Sampford and Kim Preston, *Interpreting Constitutions*, 1 at 17.

169 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81.

170 *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1105, quoting from *Martin v Hunter's Lessee* (1816) 1 Wheat 304 at 326. See also the words of O'Connor J approved in *R v Coldham; Ex parte Australian Welfare Union* (1983) 153 CLR 297 at 314 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ: 'It must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve'.

171 (1819) 4 Wheat 316 at 407 and 415.

172 'Originalism: The Lesser Evil' (1989) 57 Cincinnati LR 849 at 853.

173 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 23.

174 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 25.

175 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 26.

176 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 23.

177 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 Fed LR 1 at 28.

178 D Robertson, *Judicial Discretion in the House of Lords* (1998).

179 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 602-603.

180 *New South Wales v The Commonwealth* ('the *Seas and Submerged Lands Act Case*') (1975) 135 CLR 337 at 498.

181 *New South Wales v The Commonwealth* (the '*Seas and Submerged Lands Act Case*') (1975) 135 CLR 337 at 503.

182 (1975) 134 CLR 559 at 615. See also *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1 at 35.

183 Thus Callinan J said in *Singh v The Commonwealth* (2004) 222 CLR 322 at 424 [295]: 'Courts and judges may speak of the changing meaning of language but in practice substantive linguistic change occurs very slowly, particularly in legal phraseology. When change does occur, it generally tends to relate to popular culture rather than to the expression of fundamental ideas, philosophies, principles and legal concepts. Judges should in my opinion be especially vigilant to recognise and eschew what is in substance a constitutional change under a false rubric of a perceived change in the meaning of a word, or an expression used in the Constitution. That power, to effect a constitutional change, resides exclusively in the Australian people pursuant to s128 of the Constitution and is not to be usurped by either the courts or the parliament. In any event, I am not by any means persuaded that an actual change in the meaning of a word or a phrase, if and when it occurs, can justify a departure from its meaning at the time of federation.'

184 *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 93-94.

185 *Jones v The Commonwealth* (No 2) (1965) 112 CLR 206 at 237.

186 *Spratt v Hermes* (1965) 114 CLR 226 at 277.

187 *Bonser v La Macchia* (1969) 122 CLR 177 at 224.

188 (1971) 122 CLR 353 at 395-397.

189 (1959) 107 CLR 208 at 267. The passage is more fully quoted at fn 79 above.

190 *Damjanovic & Sons Pty Ltd v The Commonwealth* (1968) 117 CLR 390 at 406-407.

191 This appears to have been McHugh J's view: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 197; *Eastman v The Queen* (2000) 203 CLR 1 at 47 [147].

192 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 Fed LR 323 at 332-333.

193 (1968) 117 CLR 390 at 407.

194 252 US 416 at 433 (1920).

195 (1989) 166 CLR 518 at 573.

196 *Re Wakim; Ex parte McNally (*1999) 198 CLR 511 at 540 [2] per Gleeson CJ, 569 [94] per McHugh J and 579-580 [121] per Gummow and Hayne JJ.

197 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 498 per Jacobs J; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332 [9] per Gleeson CJ, McHugh and Callinan JJ.

198 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 531 [41] per Gleeson CJ and McHugh J.

199 *Wragg v New South Wales* (1953) 88 CLR 353 at 385-388.

200 *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 615.

201 Perhaps Wilson J agreed at 652-653, but Barwick CJ strongly disagreed at 577 and so did Murphy J at 623; Gibbs J (at 603) and Stephen J (at 605-606) were non-committal. Aickin J agreed with Gibbs J and Mason J. Menzies J agreed with Mason J's idea in *King v Jones* (1972) 128 CLR 221 at 246. In *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219 at 229 it was not applied to s114, the whole court saying only that it 'may have some strength in the context of a prohibition which is clearly directed against an identifiable mischief'. The issue was described as involving embarkation on 'troubled waters' in *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 67 [14] per Gleeson CJ, Gaudron, McHugh and Hayne JJ.

202 Sir Daryl Dawson, 'Intention and the Constitution – Whose Intent?' (1990) 6 Aust Bar Rev 93 at 97.

203 *Eastman v The Queen* (2000) 203 CLR 1 at 47 [148].

204 Gregory Craven, 'The Crisis of Constitutional Literalism in Australia' in (eds) H P Lee and George Winterton, *Australian Constitutional Perspectives* (1992) p 2.

205 Above at 16-18.

206 James A Thomson, 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' in (ed) Gregory Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) p 312 and n 54.

207 *Attorney-General (Commonwealth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17.

208 *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578.

209 *Uebergang v Australian Wheat Board* (1980) 54 ALJR 581 at 590.

210 *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 581.

211 *Attorney-General (Commonwealth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17.

212 (1957) 99 CLR 573 at 603 per Dixon CJ (Kitto J concurring).

213 *Matthews v Chicory Marketing Board (Victoria)* (1938) 60 CLR 263 at 293-299.

214 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363: see 363-367.

215 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152 per Knox CJ, Isaacs, Rich and Starke JJ; see also at 150.

216 *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 75 [41].

217 Peter Millett, *'Jones v Jones: Property or Unjust Enrichment?'* in (eds) Andrew Burrows and Lord Rodger of Earlsferry, *Mapping the Law: Essays in Memory of Peter Birks* (2006) pp 265-266.