Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction

DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL AND RATIFYING CONVENTIONS

In the case of *United States v. Jin Fuey Moy*, Justice Holmes uttered one of those devastating generalizations that made him famous. "Every question of construction," said he, "is unique, and an argument that would prevail in one case may be inadequate in another." The accuracy of this epitome of the non-compulsive force of the doctrines and instrumentalities utilized by the Court becomes clearly manifest in a study of the use by the United States Supreme Court of the debates and proceedings of the constitutional and ratifying conventions. Accepting, until a later article, the proposition that the proper object of constitutional interpretation is the determination of the intent of the framers, this paper will be concerned with the use by the United States Supreme Court of one of the methods by which, according to its rhetoric, that intent may be discovered. The validity of the technique of resorting to convention debates and proceedings will also be examined.

The cases which are pertinent to this subject may be divided into five classes: 1. Those in which the Court places a primary reliance upon convention debates and proceedings. 2. Those in which the Court relies upon convention debates and proceedings to support a doctrine previously established without reference to them. 3. Those in which the Court utilizes convention debates and proceedings by way of affirmation. 4. Those in which the Court examines convention debates and proceedings to show that they do not contradict or impair the conclusion reached. 5. Those in which the Court renders a decision which conflicts with the intention of the framers as revealed by convention debates and proceedings.

* This is the second of a series of articles upon the subject appearing in this review.

2 Ibid. at 402.
3 The documentary sources of information about the debates and proceedings of the federal convention are few and incomplete. An official journal, indeed, was taken day by day, but it was not a full account in the sense of a modern stenographic record. It contains only a meager report of the proceedings conducted and the formal speeches made. A much more extensive fund of information, especially with respect to what was said in the daily debates from the floor, is to be found in Madison's notes on the federal convention, which were published under the direction of Congress in 1840. They were compiled out of notes taken at the sessions,
1. The United States Supreme Court has held that the real intention of the framers of the Constitution, ascertained from collateral material, may prevail over the literal meaning of the words and terms used in a particular constitutional provision. In other cases, where the constitutional language was of such a nature as to give rise to a judicially asserted doubt, the sole support for the decision rendered has been extrinsic evidence of the will of the Constitution makers. Thus, the volumes of the United States Reports reveal instances in which the Court relied completely upon sources of intent other than the constitutional document. But in none of these instances has a decision been given in which the reasoning of the opinion has been grounded solely upon the extrinsic aid of the convention debates and proceedings. Resort to this source of constitutional purpose has never been more than by way of primary reliance.

The case in which the Court most nearly approached absolute dependence on convention debates and proceedings was United States v. Flores. The question there was whether Article III, sec. 2 of the Constitution, extending the judicial power to all cases of admiralty and maritime jurisdiction, conferred on Congress power to define and punish offences committed by citizens of the United States on its merchant ships lying within the territorial limits of other countries, (in this case 250 miles up the Congo). Article I, sec. 8 of the Constitution grants to Congress the power "To define and punish piracies and felonies completed at the end of each day, and edited years later. In addition to these two sources of information about the secret debates and proceedings of the federal convention, there are the letters of Robert Yates and John Lansing to the governor of New York and of Luther Martin to the House of Delegates of Maryland, which were necessarily fragmentary, and which, since all three of these delegates refused to sign the Constitution, were adversely colored. Yates' Minutes are subject to these same general weaknesses and their value is further diminished by the fact that their author left the convention on July 5, 1787, two months before its work was finished. The recent discovery by Professor J. R. Strayer of John Lansing's notes, the latter having left the convention at the same time as Yates, has added somewhat to the available materials in the field, but has not given us a complete account of what happened at the federal convention. Other fragmentary bits of information on particular issues may be found in Elliott's Debates and Farrand's Debates.

It must be acknowledged, consequently, that what we know about the federal convention debates and proceedings is greatly limited by the lack of extensive and reliable contemporary reports. But students who deal with this field, after recognizing this fact, can do nothing more than examine the existing documents, and draw such conclusions as appear reasonable under the circumstances.


6 (1933) 289 U. S. 137.
mitted on the high seas and offences against the law of nations.” Counsel argued that “as the specific grant of power to punish offences outside of the territorial limits of the United States was thus restricted to offences occurring on the high seas, the more general grant could not be resorted to as extending either the legislative or the judicial power over offences committed on vessels outside the territorial limits of the United States and not on the high seas.” Stone rejected this contention. He adverted to the proceedings of the Constitutional Convention to show that Article I, sec. 8 was intended to transfer a power from the Congress under the Confederation to the Congress under the Constitution in pursuance of a resolution to the effect that the new Congress should have all the powers of the old, and that Article III, sec. 2 was the result of a proposal, independently made and considered in the convention, that the admiralty jurisdiction ought to be given wholly to the national government. Said the Court, “In view of the history of the two clauses and the manner of their adoption, the grant of power to define and punish piracies and felonies on the high seas cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the national government by Article III, § 2.” Thus, the procedure in this case was to rely almost wholly upon the convention proceedings as support for the decision rendered. It should be noted that the Court also based its determination, to a slight degree, on the assertion that a contrary conclusion would involve an absurd result.

The case of Ex Parte Grossman was one in which the Court’s reliance on convention debates and proceedings was only slightly less complete than in United States v. Flores. In the Grossman case the issue before the Court was whether criminal contempts fell within the constitutional clause giving to the President the “power to grant pardons for offences against the United States.” The Court, after an extensive

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7 Ibid. at 146-7.
8 Ibid. at 149.
9 It should be noted that in this case the provisions of the Constitution created a doubt, and this doubt was easily resolved by the convention proceedings.
10 The Court said: “It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the states and the national government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters.” Ibid. at 149-150.
11 (1925) 267 U. S. 87.
12 Supra note 6.
examination of convention proceedings, concluded that the words "for offences against the United States" were introduced by the committee on style and were not intended to alter the scope of the pardoning power as exercised by the King of England at the time of the adoption of the Constitution.\textsuperscript{13}

In \textit{Knowlton v. Moore},\textsuperscript{14} in deciding that the Inheritance Tax Act of 1898 was constitutional, the Court was confronted with the question of the meaning of Article I, sec. 8, requiring that "All duties, imposts and excises shall be uniform throughout the United States."\textsuperscript{16} After a lengthy discussion of convention proceedings,\textsuperscript{16} the Court concluded: "By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographic uniformity."\textsuperscript{17} "The sense in which the word 'uniform' was used is shown by the fact that the committee, whilst adopting in large measure the proposition of Mr. McHenery and General Pinkney, 'that all duties, imposts, excises, prohibitions or restraints... shall be uniform and equal throughout the United States', struck out the words 'and equal'. Undoubtedly this was done to prevent the implication that taxes should have an equal effect in each state."\textsuperscript{18} Thus, as in the preceding two cases, the Court here used convention debates and proceedings and accompanying deductions as the chief argument in support of its decision.

It is not unimportant to note precisely what feature of the convention debates and proceedings was deemed indicative of the intention of the framers in each of these cases. In the first, the things actually depended upon as disclosing purpose were the resolutions in accordance with which the two constitutional sections in question were introduced. In the second, the Court argued that a phrase, appearing for the first

\textsuperscript{13} The exact procedure in this case was to determine the scope of the pardoning power at the common law in 1789 and then to consider whether or not, on a basis of the convention proceedings, the framers had intended to change it in any way. There was also a separation of powers question in this case, but that was resolved by the determination above made.

\textsuperscript{14} \textit{Supra} note 5.

\textsuperscript{15} As in the Grossman case, changes made by the committee on style created the difficulty. The Court said: "Thus, it came to pass that although the provisions as to preference between ports and that regarding the uniformity of duties, imposts and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style." \textit{Ibid.} at 105.

\textsuperscript{16} In this case, the Court did not place its sole reliance on convention proceedings. It also discussed the practical construction placed upon the clause in question by Congress, and, to some extent, contemporaneous exposition. Fourteen pages of the Court's opinion are devoted to historical study; of these, nine are concerned with the convention proceedings and debates.

\textsuperscript{17} \textit{Supra} note 5, at 106.

\textsuperscript{18} \textit{Ibid.} at 104.
time in the report of the committee on style, and which was not there-
after discussed, is to be considered as if it had not been placed in the
Constitution. In the third, the fact that a word which gave rise to an
inference contrary to the decision of the Court was deliberately deleted
from a specific proposal was made the chief basis of a conclusion opposite
to the inference.

2. Cases in which the Court has relied on convention debates and
proceedings as the main support of a doctrine previously established
without reference to them are rare. But there is one situation, namely,
in dealing with ex post facto laws, in which the Court has disregarded
the familiar argument of long acquiescence and upheld an early stand
of the Court on the ground that it was warranted by after-the-fact
collateral discoveries of intent.

In 1798, in the case of Calder v. Bull, the United States Supreme
Court, relying on collateral materials, restricted the application of
the "ex post facto" prohibition of the Constitution to criminal laws.
At that time, of course, neither the Journal of the Federal Convention,

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10 Supra note 5.

20 The Court felt justified in referring to the common law for definition because,
as it said: "The expressions 'ex post facto laws,' are technical, they had been in use
long before the revolution, and had acquired an appropriate meaning, by legis-
lators, lawyers and authors. The celebrated and judicious Sir William Blackstone,
in his commentaries, considers an ex post facto law precisely in the same light as I
have done. His opinion is confirmed by his successor, Mr. Woodeson; and by the
author of the Federalist, who I esteem superior to both for, his extensive and ac-
curate knowledge of the true principles of government." Ibid. at 391. Aside from the
technicality of the term, the Court relied secondly upon a reference to English
parliamentary history: "...the parliament of Great Britain claimed and exercised
a power to pass such laws, under the denomination of bills of attainder, or bills of
pains and penalties; ... To prevent such and similar acts of violence and injustice,
I believe, the federal and state legislatures were prohibited from passing any bill of
attainder, or any ex post facto law." Ibid. at 389. Thirdly, the Court relied on the
argument of the absurd consequence in the literal construction of the term: "The
prohibition, in the letter, is not to pass any law concerning, and after the fact; but
the plain and obvious meaning and intention of the prohibition is this: that the leg-
islatures of the several states, shall not pass laws, after a fact done by a subject
or citizen, which shall have relation to such fact, and shall punish him for having
done it." Ibid. at 390. Aside from these collateral materials, the Court relies upon
the inference that the "ex post facto" clause was not to protect private rights be-
cause, if so, the clauses prohibiting the making of anything but gold and silver coin
a tender in payment of debts and prohibiting the passage of any law impairing the
obligation of contracts would be useless.

21 At the time of this decision, Chief Justice Elsworth and Associate Justice
Paterson, then sitting on the bench, had been members of the Federal Convention.
It is quite possible that, the matter having been thus before the Court, what hap-
pened in the Federal Convention on this point, see infra, was common talk among
the justices; and hence the Convention debates may well have been the real founda-
tion of this decision.

22 The Journal of the Federal Convention was published in 1818. It, however,
did not disclose what Madison's Notes later made plain.
nor Madison's Notes on the Convention Debates had been published.23 In 1829, in a note to *Satterlee v. Matthewson*,24 Justice Johnson extensively examined the common law meaning of the phrase "ex post facto laws" and concluded that the framers did not intend to use it in the restrictive sense which was given to it in *Calder v. Bull*.25 In 1854,26 citing Madison's papers,27 the Court emphatically repronounced the doctrine of *Calder v. Bull*, saying, "The debates in the federal convention upon the Constitution show that the terms 'ex post facto laws'...
were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning.\textsuperscript{28} Later cases have expressly reaffirmed this language on the same reasoning.\textsuperscript{29} Thus, in this situation, the original reasoning of the Court has been largely abandoned, and the doctrine which it supported has been maintained by the argument derived from convention proceedings. The particular proceedings which were here resorted to as revealing intent were reported remarks made upon the convention floor.

3. The cases in which the Court has used convention debates and proceedings to affirm a conclusion which apparently, and sometimes assertedly, rests chiefly upon other grounds are numerous. In Missouri Pacific Railway Co. \textit{v.} Kansas\textsuperscript{30} the presence of ambiguity was expressly denied. In that case, it was held that the provision of the Constitution requiring a vote of two-thirds of each House to pass a bill over a veto means two-thirds of a quorum of each House and not two-thirds of the whole membership. Counsel argued that the remarks of Gouverneur Morris in the Convention were in support of his contention.\textsuperscript{31} The Court examined the convention proceedings and found that the intention revealed by them was in accord with that indicated by the clear language of the constitutional document.\textsuperscript{32} Chief Justice White,\textsuperscript{33} in speaking

\textsuperscript{28} \textit{Supra} note 26, at 463.
\textsuperscript{29} Kring \textit{v.} Missouri (1882) 107 U. S. 221; Orr \textit{v.} Gilman (1902) 183 U. S. 278; Kentucky Union Co. \textit{v.} Kentucky (1911) 219 U. S. 140.
\textsuperscript{30} (1919) 248 U. S. 276.
\textsuperscript{31} \textit{Ibid.} at 278.
\textsuperscript{32} That Chief Justice White's construction of the convention debates and proceedings may not have been in conformity with the intention of the framers is suggested by the fact that the words in General Pinckney's plan, \textit{viz.,} "...if two-thirds of the members present" (5 \textit{Elliot},\textit{ Debates} at 130), were abandoned in favor of "two-thirds of that house." The same conclusion is also suggested by the fact, as was mentioned by counsel in this case, that the number was changed from three-fourths to two-thirds because it was thought that in the former case too small a number could prevent passage over the veto. The possible implication to be drawn from this last fact is that two-thirds of a quorum was intended, because a change from three-fourths to two-thirds indicated a desire to make it easier to pass a law over the President's veto, and two-thirds of a quorum is easier to obtain than two-thirds of the whole membership. This inference, however, is overcome by the fact that one-third plus one of the whole membership is a greater number than one-third plus one of a quorum, and, if the reason for changing from three-fourths to two-thirds was to increase the number necessary to prevent the overriding of the veto, the convention must have intended to require two-thirds of the whole membership to pass a bill over the President's negative. However, note should be taken of the fact that the change from three-fourths to two-thirds was only accomplished by a vote of six to four. 5 \textit{ibid.} at 538. Hence a considerable percentage of the convention membership favored the smaller number being able to prevent the passage over the veto, and, consequently, this large minority must have preferred the quorum standard. On the reasons for the change see 5 \textit{ibid.} at 536-538.
\textsuperscript{33} Chief Justice White's history on the question of the use of extrinsic material has been interesting. He has relied upon them perhaps more extensively than any
for the Court, laid comparatively little stress on what was said in the Convention, but relied mainly on congressional construction and the practice of the states. The deliberateness with which the Court here adverted to convention debates and proceedings as affirming its conclusion is significant testimony of the importance of this source of extrinsic evidence in constitutional questions.

That the value of this instrument of persuasion is fully appreciated by attorneys arguing before the United States Supreme Court is shown by the *Carter Coal Co.* case. Opposing counsel there thought it worth while to make an issue of the fate of Randolph's Sixth Resolution in the Convention, one arguing that it had been defeated three or four times and the other that it had been approved. Sutherland, in delivering the prevailing opinion, took judicial cognizance of the controversy, and made use of the material thus offered to support the decision he was rendering. He said, "In the Framers Convention, the proposal to confer a general power akin to that just discussed was included in Mr. Randolph's resolutions, the sixth of which, among other things, 

other justice. In the *Knowlton case*, *supra* note 5, he based his entire decision upon extrinsic aids. In *Missouri Pacific Railway Co. v. Kansas*, *supra* note 30, and United States v. Wheeler (1920) 254 U. S. 281, he relied very heavily upon them, although in the first he declared that the constitutional language was clear. In Brushaber v. Union Pacific R. R. Co. (1916) 240 U. S. 1, he formulated a new test for the correctness of a practical construction, namely, adoption of it by the text writers without dissent. He there said, referring to a construction put upon the taxing power by Congress: "And this practical construction came in theory to be the accepted one since it was adopted without dissent by the most eminent of the text writers." *Ibid.* at 15. Moreover, the scope of his historical reference is occasionally very extensive. In the *Knowlton case*, he alluded to Roman Law and the modern law of France, Germany, England and her colonies. In *Downes v. Bidwell* (1901) 182 U. S. 244, he examined the party platform of the Free Soil Party of 1842, the Liberty Party of 1843, Free Soil Party of 1852, the Republican Party of 1856, and Declarations of the principles of the Republican Party of 1860. *Ibid.* at 295-297.

The Assistant Attorney General, *ibid.* at 257-258, referring to opposing counsel's statement about Randolph's Sixth Resolution, said: "He says that that proposal was voted down three or four times, and that its persistent and continued rejection is an illustration of the jealously of federal power that existed in the Convention. The Sixth Randolph Resolution, so far from having been voted down by the Convention three or four times, was not voted down once, but was actually adopted by the Convention by the vote of eight States to two. The resolution went to the Drafting Committee, the so-called committee on detail, and there is disappeared; and in view of the fact that it was a direction by the Convention to the Committee on Drafting, it seems reasonable to suppose that the omission to include the resolution in the specific language of the Constitution was due to the understanding by the Drafting Committee and by the Convention that the granted powers were to be construed as each extending, within its own field, to all matters which could he reached by that power and wherein the States are incompetent."

Note should be taken of the fact that although the question of ambiguity is not here discussed the fact of a four judge dissent proved the presence of a doubt beyond all question.
declared that the National Legislature ought to enjoy the legislative rights vested in Congress by the Confederation, and 'moreover to legislate in all matters to which the separate States are incompetent, or in which the harmony of the United States might be interrupted by the exercise of individual Legislation'. The convention, however, declined to confer upon Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to entrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication.\textsuperscript{37}

In \textit{McPherson v. Blacker},\textsuperscript{38} the Court held valid a state act which provided for the election of presidential electors by districts. The Court conceded a doubt and resolved it largely by reference to the practical construction which the states had put upon the constitutional clause in question. The Court alluded extensively to the various proposals in the Convention for the selection of the electors, and concluded, "The final result seems to have reconciled contrariety of views by leaving it to the state legislature to appoint directly by joint ballot or concurrent separate action, or through popular election through districts or by general ticket, or as otherwise might be directed.\textsuperscript{39}

Thus, the foregoing three cases, selected from a large number in which the Court utilized convention debates and proceedings for affirmitory purposes,\textsuperscript{40} clearly illustrate the wide variety of situations in which this source of evidence on questions of constitutional intent is resorted to, and the manner in which the Court uses the materials thus found. In the first there was a judicial assertion of the absence of ambiguity; in the second the presence of a dissent proved the existence of a doubt; and in the third, the Court conceded that the constitutional language was not incontrovertibly clear. In all three, notwithstanding these differences, convention debates and proceedings were employed to support the conclusion reached.\textsuperscript{41} The importance of the technique

\textsuperscript{37} \textit{Supra} note 34, at 292.

\textsuperscript{38} \textit{Supra} note 5.

\textsuperscript{39} \textit{Tbid.} at 28.


\textsuperscript{41} Some emphasis has been laid on the various particular aspects of the convention debates and proceedings upon which the Court placed reliance. One feature of these proceedings not yet mentioned, which is sometimes used by the Court, de-
thus developed is not diminished by the many cases in the United States Reports in which counsel referred to convention debates and proceeding but the Court completely ignored them. 4

4. Assuming that the actual intention of the framers is the real object of judicial search, there is merit in demonstrating that convention debates and proceedings affirmatively support the stand taken by the Court. Contrariwise, if such positive showing cannot be made, it is in logic less effective, but still of some persuasive value, to argue, when that is possible, that the convention debates and proceedings do not reveal an intent opposed to the Court's position. This negative argument is based upon the fundamental premise that, when this collateral evidence manifests no direction, the Court's function becomes discretionary. On this theory of things, free judicial decision results equally from a showing that the convention debates and proceedings do not indicate a contrary intent, and from a showing that they do not reveal an affirmative direction, for in either case the United States Supreme Court will use other guides in its determination.

serves special attention. The change of a specifically worded proposal is properly regarded by the Court as a relatively authentic source from which to ascertain the intent of the framers. This same technique is applied to the Articles of Confederation and the changes made in them by the convention. In Rhode Island v. Massachusetts (1838) 37 U. S. (12 Pet.) 658, 728, the Court said: "There is yet another source of reference, from which to ascertain a true construction of the constitution." The Court then referred to the ninth article of Confederation and the special judicial tribunal set up by it for the distribution of cases between states arising out of boundary differences. The reason justifying the inference from the change made is expressed by Justice Baldwin as follows: "If, in this state of things, [being the state of things under the Articles of Confederation] it was deemed indispensable to create a special judicial power, for the sole and express purpose of finally settling all disputes concerning boundary, arise how they might; when this power was plenary, its judgment conclusive on the right; while the other powers delegated to congress were mere shadowy forms; one conclusion at least is inevitable. That the constitution which emanated directly from the people, in conventions in the several states, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of confederation, adopted by the mere legislative power of the states, had given to a special tribunal appointed by congress, whose members were the mere creatures and representatives of state legislatures, appointed by them, without any action by the people of the state." Ibid. at 728. See also Dred Scott v. Sandford, supra note 40, at 419, where the same technique was employed; United States v. Wheeler, supra note 33, at 294. Justice Baldwin in his concurring opinion in Charles River Bridge v. Warren Bridge (1837) 36 U. S. (11 Pet.) 420, 583C, applies the same operation to a provision of the North West Ordinance which had a corresponding provision in the Constitution.

The cases accord with this conclusion. In *Veazie Bank v. Fenno*, for instance, the Court, after discussing several statutes, said that this practical congressional construction was to be given great weight, "especially in the absence of anything adverse to it in the discussions of the convention which framed, and of the conventions which ratified, the Constitution." Similar expressions occur in *Smiley v. Holm*, and *United States v. Sprague*. On the other hand, the finding seems more frequently reiterated that "Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question." But the different and sometimes contradictory ways in which the Court uses the same material indicate the futility of making a distinction between the forms in which the doctrine is stated.

5. The foregoing pages indicate the importance which the United States Supreme Court attributes to the debates and proceedings of the Constitutional Convention as an aid in ascertaining the intention of the framers. The anxious care with which the Court seeks to make it apparent that the decision rendered is affirmatively directed by this intention so revealed, or, at least, is not inconsistent therewith, results less from the obligations of any controlling doctrine of constitutional construction than from a fine sense of forensic values and elements of persuasion. Even the most remote of the Supreme Court Justices is close enough to the society in which he operates to perceive that both popular and professional psychology are much preoccupied with the

43 (1869) 75 U. S. (8 Wall.) 533.
44 Ibid. at 541-543.
45 Ibid. at 544.
46 Supra note 4, at 368.
47 Supra note 4, at 730.
49 In Home Building & Loan Ass'n v. Blaisdell, supra note 48, at 427, the Court said: "In the construction of the contract clause the debates in the Constitutional Convention are of little aid." Yet in Justice Baldwin's concurring opinion in Charles River Bridge v. Warren Bridge, supra note 41, he derives considerable aid from convention proceedings in his construction of the very same contract clause. It is to be noted, however, that Chief Justice Hughes confined his expression to the Convention debates whereas Justice Baldwin resorted exclusively to the convention proceedings. In United States v. Sprague, supra note 4, losing counsel relied considerably on convention debates and proceedings and in answer they used the "nothing contrary" argument. The debates and proceedings here referred to were the very same which had been described as shedding no light on the same question in Dillon v. Gloss, supra note 48. Furthermore, the very same convention debates were used on the very same issue by way of affirmation in the Pollack case, supra note 40, as not contrary in the Veazie Bank case, supra note 43, and as not shedding any light in the Springer case, supra note 48.
notion that the intention of the framing fathers should prevail. To unsuspecting lawyer and layman alike, one of the surest methods of discovering the will of the Constitution makers is to refer to what they said and did when they made the Constitution, for these venerated patriots are universally credited with the capacity to state their exact position in words, and with having been entirely lacking in concealable purpose. But the Supreme Court's recognition of these facts, and its obvious effort to conduct itself accordingly, in no way implies that it is similarly subject to the compulsive operation of the intent so revealed. In fact, it seems clear that while the high tribunal frequently utilizes convention debates and proceedings to rationalize and buttress a stand taken, the intention of the framers thus disclosed will not control the decision rendered. There are instances in which the holding of the Court has directly conflicted with the undeniable will of the Constitution makers determined on this basis.

Thus, for example, the proposition that Congress has power to incorporate a bank was settled early in the history of the country in the cases of *McCulloc v. Maryland* and *Osborne v. Bank of United States*. This legislative exercise of authority was validated upon a construction of the "necessary and proper" clause, and upon a determination of the issue by the "former proceedings of the nation respecting it." Yet there is strong evidence that the question was publicly considered at the time of the formulation of the Constitution, and we have Madison's testimony that specific proposals to grant Congress powers to incorporate generally, and particularly to incorporate a bank were argued in the Convention and deliberately rejected. Of course, this could not have been fully known by Chief Justice Marshall at the time these decisions were handed down, because Madison's notes were not published until some years later, but the same conclusion is ines-

50 *Supra* note 42.
51 (1824) 22 U. S. (9 Wheat.) 738.
52 *McCulloc v. Maryland*, *supra* note 42, at 401.
53 Said Madison, "In a pamphlet published in May, 1781, at the seat of Congress, Pelatiah Webster, an able though not a conspicuous citizen, after discussing the fiscal system of the United States, and suggesting, among other remedial provisions, one including a national bank..." 5 Elliott, *Debates* (1881) 117.
54 See *ibid*. at 440, 543-544.
55 It is curious to note that, although several times referred to by counsel arguing before him, Chief Justice Marshall never resorted to congressional debates and proceedings. See cases and pages cited *supra* note 42, in the last two of which only Marshall did not participate. The first reference to the journal of the proceedings of the Convention found in the reports was made by Emitt arguing before Marshall in Gibbons v. Ogden, *supra* note 42. In the *McCulloc* and *Osborne* cases as shown above, Marshall decided contrary to the views of the framers as revealed by the convention debates and proceedings. In his dissent to Ogden v. Saunders, *supra* note 42, he did likewise. See *supra* notes 27 and 41.
capable from a study of the Journal of the Proceedings of the Convention, then recently made available.\textsuperscript{56}

This judicial determination of congressional power to incorporate banks, despite the contrary intention of the framers as revealed by convention debates and proceedings was later used as a precedent for denying effect to the will of the Constitution makers so disclosed. \textit{Juilliard v. Greenman,}\textsuperscript{57} held that Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts in peace time as well as in war time. The Court referred to the fact that the words “and emit bills on the credit of the United States” had been stricken by the Convention from the clause “to borrow money and emit bills on the credit of the United States”, and said, “As an illustration of the danger of giving too much weight, upon such a question, to the debates and votes in the Convention, it may also be observed that propositions to authorize Congress to grant charters of incorporation for national objects were strongly opposed, especially as regarded banks, and defeated. The power of Congress to emit bills of credit, as well as to incorporate national banks, is now clearly established by decisions to which we shall presently refer.”\textsuperscript{58} This language of Justice Gray\textsuperscript{59} was the best response he could muster\textsuperscript{60} to the arguments of a dissenting opinion in the earlier legal tender cases,\textsuperscript{61} where the same issue had been before the Court, and had been argued to a considerable degree on the basis of convention debates and proceedings.\textsuperscript{62}

In the earlier cases, Justice Bradley, after using the bank power

\textsuperscript{56} I \textit{Elliott, Debates} (1881) at 247.
\textsuperscript{57} (1884) 110 U. S. 421.
\textsuperscript{58} \textit{Ibid.} at 444.
\textsuperscript{59} Justice Gray’s stand above is interesting in view of his treatment of this aid to Constitutional construction in other cases. In a dissent to Spark and Hansen \textit{v. United States, supra} note 40, at 144, he freely adverted to convention debates and proceedings without any caution as to the weight to be given them. He justifies this conduct by a generalization that goes far in a direction opposite to that taken in \textit{Juilliard v. Greenman, supra} note 57: “This question, like all questions of constitutional construction, is largely a historical question; ...” \textit{supra} note 40, at 169. He acted similarly in \textit{Capital Traction Co. v. Hof, supra} note 40.

\textsuperscript{60} Justice Gray’s general technique in this case was an attempt to weaken the strength of the argument against him based on convention debates and proceedings. He asserts at the outset: “Such reports as have come down to us of the debates in the Convention that framed the Constitution afford no proof of any general concurrence of opinion upon the subject before us.” \textit{Supra} note 57, at 443. The lack of complete records is usually a vulnerable point in the use of Convention debates. He undermines the use of quotations from Luther Martin: “The philippic delivered before the Assembly of Maryland by Mr. Martin, one of the delegates from that State, who voted against the motion, and who declined to sign the Constitution, can hardly be accepted as satisfactory evidence for the reasons or the motives of the majority of the convention.”

\textsuperscript{62} \textit{Ibid.} at 585, 605-607, 653-655.
analogy, was much more blunt in his rejection of this source of evidence of constitutional meaning, even going so far as to formulate a rule against its use. He said, "The views of particular members or the course of proceedings in the Convention cannot control the fair meaning and general scope of the Constitution as it was finally framed and now stands."

A third situation in which the Court rendered a decision manifestly contrary to the intention of the framers as revealed by convention debates and proceedings is that in which it held that the original jurisdiction of the United States Supreme Court is not necessarily exclusive. In 1884, in the case of *Ames v. Kansas ex rel. Johnston*, the Court held that Congress could assign to inferior federal courts cases which the Constitution declared should be within the original jurisdiction of the United States Supreme Court. Chief Justice Waite relied solely upon a practical construction of the Constitution by Congress as represented in the Judiciary Act, and upon an early case in which a former member of the Convention had participated. Convention debates and proceedings were not referred to by the Court. Yet they clearly show, if we accept the method of their construction sanctioned by other decisions of the United States Supreme Court, that the framers deliberately decided not to authorize what the Court here validated. The following extracts are taken from Madison's notes: (August 6, the report of the Committee of Detail; Article XI, sect. 3) "The jurisdiction of the supreme court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls ... In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all the other cases before mentioned it shall be appellate, with such exceptions, and under such regulations, as the legislature shall make. The legislature may assign any part of jurisdiction above mentioned, (except the trial of the President of the United States,) in the manner

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64 *Ibid.* at 560.
65 (1884) 111 U. S. 449.
66 1 STAT. (1789) 73, c. 20.
67 United States v. Ravara (1793) 2 U. S. (2 Dall.) 297. Here an indictment against Ravara, a consul from Genoa, was sustained in the Circuit Court of the United States for Pennsylvania against the objection that this was one of the cases named in the Constitution as within the original jurisdiction of the United States Supreme Court. The Court was held by Justices Wilson and Iredell of the United States Supreme Court and Peters of the District Court. Iredell dissented. Chief Justice Waite, in *Ames v. Kansas ex rel. Johnston*, laid some emphasis on the fact that Wilson had been a member of the Constitutional Convention and consequently he presumably knew of his own knowledge what the framers intended.
and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time.68 "August 27, . . . on a question for striking out the last sentence of the third section, 'The legislature may assigu', etc., it passed, nem. con."69

We must conclude, therefore, that while the United States Supreme Court will use convention debates and proceedings to show that the intention of the framers thus revealed affirms or does not contradict the position of the Court, such intent so discovered will be disregarded when in conflict with the interpretation of the Constitution announced by the Court.

Conceding for the time being the validity of the intent theory of constitutional construction, convincing arguments might yet be advanced against relying on the debates and proceedings of the Constitutional Convention as a source of evidence on the question of what was intended by a particular provision of the Constitution. Certainly, where the question is one of abstract meaning, the convention debates can be of little actual assistance. Instances are rare in which members of the Convention address themselves to a matter of general definition, and even then there is no assurance of a prevailing concurrence of viewpoint.70 It is clear that, in a deliberative body of fifty-five men, the silence of a vast majority in a matter of this character, or their failure to contradict interpretations propounded, is no necessary sign of their agreement. In the case of technical language, the very fact of its use indicates an assumption that it will be understood by all without explanation.71 Where the provision is specific but non-technical, what was said will be more likely to disclose the asserted mischief and the proposed remedy, always a highly individual matter, than to reveal the purpose of the Convention as a whole. The Court undoubtedly most nearly approaches accuracy in those cases in which it rules that the convention debates neither affirmatively support nor contradict the decision rendered, because it is impossible to show a general concurrence of opinion. But in any of these four situations it is well to recall that debates are comprised of the statements of particular members, and the statements of particular members, even if several of them are found to agree, may well neither indicate the intent of the general body nor

68 S Elliott, Debates (1881) at 380.
69 Ibid. at 483.
70 An interesting illustration of a situation in which the matter of a general definition was raised was that in which Mr. King asked what was the precise meaning of direct taxation. Mr. Madison took the pains to report that no one answered him. See Sutherland's dissent in Bromley v. McCaughn, supra note 40, at 139.
71 A case in which the convention debates and proceedings indicate with reasonable clarity the meaning of a technical term is that of the occurrences in respect to the meaning of "ex post facto laws." See supra note 27.
the purpose of the individual speakers themselves. Those who do not speak, usually a majority, may disagree with the speaker, and among themselves. Those who do, are interested in the adoption of the provision in question, and accordingly they will utilize such arguments as appear most convincing but which may not disclose their real motives or their primary reason.\textsuperscript{72} Cooley contended that "Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and a part in another."\textsuperscript{73}

More reliable than the convention debates is the history of the proceedings, that is, motions, votes, amendments, etc., of the Convention. But at best, they may only be evidence on the question of apparent intent as distinguished from actual purpose, and consequently many of the arguments which tend to diminish the value of the debates are equally applicable to the proceedings.

But if, in any case, the extrinsic circumstances should so combine as make absolutely clear the actual intention of the Constitutional Convention, we have not yet decided the question of the intent of a particular provision.\textsuperscript{74} "The convention which framed the constitution," said Chief

\textsuperscript{72} See dissent by Justice Field in the Legal Tender cases, \textit{supra} note 61, at 655-656.

\textsuperscript{73} \textit{COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS} (Carrington's 8th ed. 1927) at 143.

The same view was expressed by C. Stuart Patterson in his book \textit{UNITED STATES AND THE STATES UNDER THE CONSTITUTION} (2d ed. 1904) at 236: "The reported proceedings of the convention which framed the Constitution, and of the several state conventions which ratified it, though frequently referred to in the discussions of questions of constitutional construction, are not of binding authority. The views expressed in the debates are merely the views of the individual speakers, and do not necessarily express the view of the subject which induced the federal convention to insert the particular provision in the Constitution as framed by them, or which led the convention of one state to ratify the Constitution. The votes of the convention on the details of the Constitution are of no greater importance, for an affirmative vote approving a particular section of the Constitution, throws no light on the meaning of the words of the section; and a negative vote rejecting a proposed constitutional provision may with equal propriety be regarded as an expression of opinion to the effect that the proposed provision is unnecessary because adequately supplied by other provisions of the Constitution, or as a refusal to adopt the particular provision because in the opinion of the convention such a provision ought not to be inserted in the Constitution."

\textsuperscript{74} \textit{PATTERSON, ibid.} at 237: "It must be remembered that the Constitution derives its whole force and authority from its ratification by the people, and when-
Justice Marshall, "was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. . . . The government proceeds directly from the people; . . ." This has been the prevailing theory of the basis of the Constitution. Thus, accepting the intent doctrine on its face value, the intent to be sought is that of the people who adopted the instrument and gave it force. If the analogy of congressional debates and proceedings in matters of statutory construction were applicable to constitutional cases, as the almost unbroken usage of the Supreme Court would tend to indicate it is, we should have to compare the framers' Convention to a lobby or a legislative council, or whatever person or organ happens to prepare a bill in a particular case. As the thing assertedly sought in statutory cases is the will of the body giving the instrument force, so in constitutional cases the intent of a given clause must be that of the adopting electorate. Of course, this is manifestly indeterminable. If, however, it were the actual object of judicial search, some credence would have to be given the oft reiterated pronouncement of the United States Supreme Court that the language of the Constitution is to be taken in its most natural and obvious sense, for that alone would most ever it becomes necessary to determine the meaning of any clause in the Constitution, the real question for decision is, not what did the federal convention, or any member thereof, understand that clause to mean when that convention ratified the Constitution, but what did that clause really mean as ratified by all the conventions, and that meaning can only be determined by the application of the established rules of judicial construction." See also H. C. Black, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (1st ed. 1895) 65: "It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people, who adopted it."

76 McCulloch v. Maryland, supra note 42, at 403.

76 E. S. Corwin, COMMERCE POWER v. STATES RIGHTS (1936) 28: "Finally, it does not appear that Madison even in 1829 regarded his theory of the negative purpose of the interstate commerce clause as stating a really authoritative canon of constitutional construction. Thus in a letter to N. P. Trist, written in December 1831, he says, 'Another error has been in ascribing to the intention of the Convention which formed the Constitution, an undue ascendancy in expounding it. Apart from the difficulty of verifying that intention, it is clear, that if the meaning of the Constitution is to be sought outside of itself, it is not in the proceedings of the body that proposes it, but in those of the State Conventions, which gave it all the validity and authority it possess.'" Corwin says in a footnote hereto, "In just what way it would be easier to ascertain the intention of the numerous ratifying conventions than that of the Convention which framed the Constitution is unfortunately, a point upon which Madison does not enlighten us." It should be noted that Corwin here places a misconstruction upon Madison. Madison, as is plainly indicated by the words above used, fully recognized the difficulty of discovering the intention of the ratifying conventions. But so far as a rational approach to the basis of constitutional authority goes, his desire to shift the emphasis from the intention of the framers to the intention of the adopters comes closer to accuracy than the view generally prevailing in the Supreme Court, even if it can be said that he stopped before the end of the process had been reached.
nearly approximate the understanding of the voters. Since the Constitution was adopted by conventions in the states, their proceedings, upon some theory of agency, would come much closer to revealing actual constitutional intent than would the proceedings of the framers' Convention. Accordingly, counsel have frequently utilized them in argument before the United States Supreme Court, but the latter body has never been disposed to give them as much weight as the same aspects of the history of the Constitutional Convention. Moreover, the arguments against relying on convention debates and proceedings apply with equal force to both framing and ratifying conventions. Consequently, in both instances, convention debates and proceedings are fundamentally unsound instruments wherewith to rationalize a decision rendered.

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78 No case has been found in which the Court relied to any appreciable degree upon debates or proceedings in the ratifying Conventions.