

‘Odious and Outmoded’? Race and Section 25 of the Constitution.

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This chapter is concerned only indirectly with the scope of the Commonwealth franchise in the early years of the twentieth century. Rather it focuses on the obscure, puzzling, contested but largely neglected Section 25 of the constitution which mandates not who should have the vote but how many House Representatives’ divisions each state shall be entitled. Both the academic literature and the proceedings of the Constitutional Conventions of the 1890s throw only limited light on the motives for its inclusion in the constitution and its political effects (if any). Many of the standard texts on Australian constitutional politics cope with S25 by ignoring it altogetherⁱ.

On the plain meaning of the words (always a hazardous way to interpret a constitution) S 25, read as it must be in conjunction with S24, (See Box 1) means that if a state disqualifies ‘all persons of any race’ from voting for the larger of the local parliamentary chambers (in practice the lower house) then the number of such persons so disqualified will be excluded from the calculus employed to allocate House of Representative places among the states.

Pursuant to S24 a ‘quota’ (not to be confused with the *quota* of votes required for election to the Senate since 1948) is determined by dividing the total number of people of the Commonwealth (but until 1967 S127 defined out Aborigines despite their *ius soli* status as British subjects) by twice the number of Senators and then dividing the population of each state by that quota to arrive at the number of Representatives—but note that S26 set the number of Representatives among the states for the 1901 election.

At first glance then S25 appears racist but on second glance one cannot be so sure. The section certainly seems to permit the states to exclude potential voters on the grounds of *race*ⁱⁱ, but also to penalise states that do so by reducing the number of federal electorates to which they might otherwise be entitled. Under this

contemporary reading of the section, the constitutional framers emerge as progressive inclusionists: an interpretation, however, which is not borne out by the historical record. Notwithstanding a few dissidents,(see Chapter x) even those as liberal minded as Alfred Deakin held ethnocentric and social-darwinistic views about aborigines and feared ‘Asiatic and African aliens’ would corrupt Australian cultureⁱⁱⁱ. These views were soon put into practice via such early Commonwealth legislation as the Immigration Restriction Act (1901) and the Franchise Act (1902). It defies credibility to believe that the racialist consensus among the federationists was suspended to insert just one anti-discriminatory clause in the constitution. What then was the origin and intended purpose of S25?

ORIGINS OF SECTION 25

All the standard authorities^{iv} rightly inform us that, like so many other sections, S 25 derives from the constitution of the United States; in this case the Fourteenth Amendment which was ratified in 1868 (see Box 2). The 14th and its companion the 15th were part of the “Reconstruction” of the Union of the United States after the Civil War 1861-65. While they appeared to embed a range of civil rights in the constitution and to extend the franchise to all African-American males, a combination of narrow and in some cases destructive Supreme Court rulings and chicanery by former Confederate states rendered them impotent. One can use the words of the framers of the Australian constitution to gain understanding of S25- while heeding the the warnings of Burmeister and others not to rely too heavily on the verbatim transcripts of the 1890s Constitutional Conventions to discover motive^v.

A version of S25 appeared in the 1891 draft of the constitution but the text confirmed in the *Commonwealth of Australia Constitution Act(1901)* was quite different. The clause was the subject of a very brief debate in Adelaide in 1897 where Carruthers of New South Wales warned that the current draft could be interpreted ‘to include females and children’^{vi}. Barton was not convinced but “‘ made a note of the suggestion, and will bear it in mind’^{vii}. Earlier in the Convention when debating whether ‘aboriginal natives’ should be counted in the census of the Commonwealth (they were not until 1967), it was claimed that if aborigines were to be counted some states would have to make higher *per capita* payments to the Commonwealth^{viii}.

Section 25 was the subject of a major, if rambling, debate in Melbourne in 1898 with Isaacs, Barton and O'Connor prominent^{ix}. They and others showed themselves generally well informed on US precedents and the Civil War circumstances of the 14th. Being aware of the US constitution did not imply universal support for all of its elements. In general the representatives from the smaller colonies were impressed by the coordinate nature of the USA federation, in which many powers devolved to the states; whereas those from New South Wales and Victoria inclined to the more centralist Canadian model. Isaacs (Victoria) and Cockburn (South Australia) clashed heatedly in Melbourne over the constitutionality of the 14th, with the latter angrily declaring that: 'it was simply forced on a recalcitrant people as a punishment for the part they took in the Civil War. We are not going to have a civil war here over a racial question'. He denied that the 14th had ever been legally ratified and declaimed that it had to be imposed by federal martial law.^x

Other delegates were more concerned with the citizenship references in Section I. of the 14th, while others feared for the integrity of Factory Acts which restricted Chinese involvement in furniture manufacturing. The Baron of Bunbury (Forrest) worried about its impact on the legal profession whereas Glynn (South Australia) thought it all unnecessary because 'Races have been provided for already[in what became S51xxvi and S127]. Honourable members have races too much in their heads, I think'^{xi}.

Isaacs, for one, was fully aware that by the 1890s the South had vitiated the anti-discriminatory aspects of the 14th by a battery of contrivances such as 'literacy tests, grandfather clauses, property and tax qualifications, poll taxes, "good character" tests' and 'white-only primaries'^{xii}

What is not so clear from the 1898 debate is whether or not the framers were aware that the 14th constituted a defeat for the Congressional radicals. As Benedict explains, the progressive reconstructionists were prepared to hold the rebel southern states at bay until 'loyalty and democracy would grow slowly and naturally in the south'. Conservatives, by contrast, wanted swift reintegration to restore 'civil law and civil order' even if that compromised the insistence on black enfranchisement implied in the 14th and 15th.^{xiii} He argues that while Congress set conditions for the Confederate states' re-entry to the Union, 'they created no machinery to oversee the process of their acceptance'^{xiv}. Not for the last time states' rights triumphed over black rights.

THE IMPACT OF SECTION 25.

Assuming, for argument's sake, that S25 was intended to encourage the Australian states not to construct their franchise laws in a discriminatory manner, we may ask did it work? The quick and correct answer is no. This is hardly surprising in a Commonwealth which did not universally enfranchise its indigenous population ('Indians not taxed', 14th S2) until 1962 and retained a racially discriminatory immigration policy until the early 1970s. Even if the Commonwealth had attempted to enforce the section, any state so inclined could easily have evaded its obligations. Despite Barton's 1898 denial that there was any difference between the phrases 'the people of any race' and 'all persons of any race',^{xv} the latter constituted a loophole whereby a state could achieve a generally discriminatory objective by drafting laws so as not to disfranchise 'all' the members of a targeted racial group. If that were to fail then all the tried and true US devices mentioned above could be utilised—as New South Wales achieved by denying certain classes of indigents (and indigenies) the right to vote.

A related question is had the Commonwealth displayed the political will and the required administrative skill would the 'strict' application of S 25 have made a difference? Again the answer is no – but with a very important caveat. First to the answer and then the caveat. Using the Australian population recorded at the 1911 Census the three states returning the largest number of 'non-European aliens' (exclusive of 'full blood Aborigines') were New South Wales, Queensland and Western Australia of which the last two had discriminatory electoral laws of the sort anticipated by S25 (NSW was more cunning—see above). If the calculations provided for in S24(i) & (ii) are employed then Queensland would have been entitled to 9.79 Representatives and if the 'aliens' (we have to assume that they were not State enfranchised) were excluded then the figure would reduce to 9.54; the equivalent figures for Western Australia would have been 4.55 and 4.53. Noting the 'remainder' clause of S24(ii) [see Box 1] a strict application of S25 would have wrought no change—but it was a close run thing. In the event Western Australia had five federal divisions at the 1910 election whereas Queensland was short changed by one—but had its deserved tenth by 1913.

The caveat, of course, is what might have been the case had S127, not specified that ‘aboriginal natives shall not be counted’ in the census. We will probably never know for sure, but if the estimation of the aboriginal population at 93 333 in 1901 is accurate^{xvi}, this is eight times more than the 11 554 aliens the Statistician identified in 1911 and would have added divisions to New South Wales, Queensland and Western Australia at the expense of Victoria and South Australia(remembering that the Northern Territory was excised from South Australia to become a federal territory in 1909 thereby reducing the latter’s aboriginal population).Of equivalent interest is the question that, if aborigines and aliens had effective access to the federal franchise, would Neville Bonner (elected 1971) not been Australia’s first indigenous federal politician? For the House of Representatives it is quite possible that there would have been a *de facto* (as distinct from the *de jure* Maori seats established in the New Zealand parliament in 1867) aboriginal seat in each of Queensland and Western Australia in 1903, but as the white population grew and the black declined they both would have been shortlived phenomena^{xvii}.

ASSESSING AND REFORMING SECTION 25

Recent descriptions of S25 have ranged from ‘a mild deterrent to discrimination on racial grounds’ to ‘odious and outmoded’^{xviii}. In 1980 Justice Deane of the High Court included S25 as one of those in the constitution guaranteeing direct suffrage and equal voting rights; a view Peter Hanks has described as ‘unorthodox’^{xix}. While the *Final Report of the Constitutional Commission* concluded that while the section ‘ does not have the sinister implications suggested in the Report of the Advisory Committee[of the Commission]’, it concurred with the 1959 Parliamentary Joint Committee on Constitutional Review and the Constitutional Conventions 1973-85 that it be removed.

There are at least two good reasons for doing so: First, Justice Gibbs held in *McKinlay’s case* (1975)^{xx} that S25 could be interpreted in such a manner as to deny the franchise to certain people on the grounds of race. Second, ‘race’ is now such a discredited biological and social construct that its citation in a democratic constitution

is undesirable. However, to assume that the Section has been voided by the passage of legislation deeming discrimination on the grounds of race illegal would be false for the simple reason that such legislation may be repealed or amended by parliament. Furthermore, the right to vote is not explicitly enshrined in the constitution and Section 30 has been interpreted as giving to the Commonwealth parliament the authority (subject to the constitution) to determine its electoral procedures. We can only speculate as to whether any future legislation restricting the right to vote on grounds of race, gender, class etc would be held by the High Court to be in breach of the 'directly chosen by the people' words of Sections 7 and 24. Given that uncertainty, a case can be mounted that Section 25 should be retained until the right of citizens to vote is unambiguously guaranteed in the written constitution or firmly embedded by judicial review in the unwritten one.

CONCLUSION.

In the USA the vote is seen as a right verging on a privilege, whereas in Australia it is a duty (cf. compulsory enrolment and voting) verging on a right. The former looks more appealing but the latter is decidedly more democratic. The two systems' treatment of prisoners and the franchise illustrates the point. According to *The Sentencing Project*^{xxi} no fewer than 46 US states deny prisoners convicted of a felony the right to vote; 32 of them even if the person is on parole; while 10 states disfranchise all ex prisoners. Almost 4 million US citizens have currently lost their civil rights, of whom 1.4 million have served their sentences. Thirteen percent of black men are disfranchised—seven times the national average. It has been estimated that three in ten of the next generation of black males will lose their civil rights at some point in their lifetime. The USA takes civil death seriously, especially for Democrat voting black males.

Contrast with Australia where the only prisoners denied the vote are ones convicted and under sentence for an offence punishable by imprisonment for 5 years or more. At the 1891 Convention James Munro (Victoria) made a vain attempt to deny felons their civil rights for all time. He pontificated that to allow such people to be elected to parliament would be a 'disgrace to the federation'^{xxii}. Later the same year Premier Munro secured the passage of the *Voluntary Liquidation Act* through the Parliament

of Victoria; the purpose of which to protect failed landboomers such as himself from legal action by creditors.

Yet, over a century later, the federal government announced in early 2001 that it intended to amend the Commonwealth Electoral Act to deny all prisoners the vote. The Australian Bureau of Statistics reported in June 2001 that the prison population had increased by 50 percent to 22 458 over the previous decade^{xxiii}. It is well known that the prison population is not reflective of the nation as a whole. Most prisoners are male (94 percent) and aged between 20 and 35 (56 percent). Imprisonment rates are influenced by socio economic status and race in ways which could be electorally salient. For example, the imprisonment rate for aborigines is fourteen times the national average. If the results of Prison Mobile Teams at the 2001 federal election in the seats of Kalgoorlie and Lingiari are examined , it is revealed that in the four booths the Labor vote averaged 83.5 percent.^{xxiv} Disenfranchising all prisoners, while incompatible with Australia's culture of inclusive democracy, probably would not alter the outcome in any federal seat; it could do so if combined with other exclusionary options such as closing the electoral roll on the day the Prime Minister calls the election (which would have denied about 80 000 young people the vote at the 2001 federal election .) Conservative parties in Australia appear to be following the lead of the US Republicans in seeking to limit the scope of the franchise, thereby abandoning a longstanding bipartisan consensus.

The existence of S25 presents a dilemma and draws attention to unfinished constitutional business. Its origins are questionable, its basis (race) discredited and its 'mild deterrent ' sanction easily avoided. But until such time as all Australian citizens are guaranteed the vote free from partisan interference, S25 constitutes at least a moral barrier to a certain type of discrimination^{xxv}. Like a hundred years before, the 1990s was a decade of constitutional reflection (but not change) in Australia. Much of the discussion and debate centred narrowly on how a future republican head of state might be chosen/elected. Perhaps we need first to resolve the more fundamental problem of how to provide for an entrenched, inclusive franchise.

PART III – THE HOUSE OF REPRESENTATIVES

Part III House of
Representatives
Constitution of House
Of Representatives

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several states shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-

- (i.) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:
- (ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota: and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Provision as to races
disqualified from voting

ARTICLE FOURTEEN

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male members of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Endnotes

- i For example S Bennett , *The Making of the Commonwealth*, Melbourne, Cassell, 1973; J. McMillan et al, *Australia's Constitution: Time for Change?* Sydney, Allen & Unwin 1983; G S Reid & M Forrest, *Australia's Commonwealth Parliament 1901-1988*, Melbourne University Press, 1989.
- ii See P Hanks, *Constitutional Law in Australia*, 2ns ed, Sydney, Butterworths, 2000, p456.
- iii A 'good' example of the official acceptance of such views can be found in G H Knibbs *Official Year Book of the Commonwealth 1901-18*, Melbourne, 1919, p103.
- iv J. Quick & R R Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, Legal Books, 1901/1976 pp455-6; G Moens and J Trone, *Lumb and Moens The Constitution of the Commonwealth of Australia Annotated*, 6th ed, Sydney, Butterworths, 2001 p134.
- v H Burmeister, 'The Convention Debates, and the Interpretation of the Constitution in G Craven (ed), *The Convention Debates 1891-1898: Commentariess, Indices and Guide*, Sydney, Legal Books, 1986, p36.
- vi *Convention Debates*, Adelaide 1897, p453.
- vii *Ibid*, p454.
- viii *Ibid* , p1020.
- ix *Convention Debates*, Melbourne, 1898, pp665-714.
- x *ibid*, p685.
- xi *ibid*, p691.
- xii A J Bott, *Handbook of United States Election laws and Practices: Political Rights*, NY, Greenwood Press, 1990, p234.
- xiii M L Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction 1863-1869*, NY Norton, 1974, pp223f.
- xiv *ibid*, p229.
- xv *Convention Debates*, Melbourne, 1898, pp714f.
- xvi Australian Bureau of Statistics, *Population: Aboriginal and Torres Strait Islander Population*, <http://www.abs.gov.au/ausstats/abs>
- xvii This assumes, of course, that the indigenous population would choose to participate in the European ritual of voting and that they were appropriately concentrated in particular electorates.
- xviii Constitutional Centenary Foundation, *The Australian Constitution (Annotated)*, Melbourne, nd, p38; *Final Report of the Constitutional Commission 1988*, vol 1, Canberra 1989, pp155-172.
- xix Hanks, *Constitutional Law*

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- xx Gibbs J, H C of A, Attorney General (CTH); Ex Rel. McKinlay V. The Commonwealth, *CLR*, 135, 1975, p44.
- xxi The Sentencing Project, <http://www.sentencingproject.org/policy>, 16 November 2000, pp14 f.
- xxii *Convention Debates*, Sydney, 1891, p657
- xxiii ABS, *Media Release*, 26 March 2002
- xxiv The number of voters in each case is, of course, small.
- xxv See *Constitutional Commission 1988*, p128 f and particularly the discussion of the ramifications of the Queen v. Pearson: Ex Parte Sipka (1988) 152 CLR.