

## ALL-EMBRACING APPROACHES TO CONSTITUTIONAL INTERPRETATION & ‘MODERATE ORIGINALISM’

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*This short paper considers some questions regarding constitutional interpretation. It is separated into two parts. First, the author examines some of the normative considerations for and against judges openly articulating and consistently applying all-embracing approaches to constitutional interpretation — a development that Justice Kirby has previously advocated. In this regard, the author also recounts a number of recent and historical examples of the, at times, seemingly inconsistent approaches applied in interpreting the Commonwealth Constitution. Secondly, the author turns to examine some of the alternative methods of constitutional interpretation. The author argues that a form of ‘moderate originalism’ is the most justified of these approaches. In this regard, the author draws on the contributions of various theorists, as well as responding to some recent criticisms made of originalism.*

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## I INTRODUCTION

In 2000, Justice Kirby proclaimed that ‘[t]here is no task performed by a Justice of the High Court which is more important than the task of interpreting the Constitution’.<sup>1</sup> In *Eastman v The Queen*,<sup>2</sup> a case decided that same year, his Honour proffered curially the supposed desirability of adopting a single interpretive approach ‘lest the inconsistencies ... of whichever result produces a desired outcome’ perpetuate.<sup>3</sup> Gummow J and others have disagreed.<sup>4</sup> To date, single, unifying approaches have not been embraced in the High Court of Australia.

This paper is separated into two parts. First, the author critically examines Justice Kirby’s suggestion that judges should adhere to a single, unified approach to constitutional interpretation — the primary claim. Arguments for and against are evaluated. Ultimately, it is argued that the articulation of, and adherence to, single all-embracing approaches would be a positive development. Or at least, judges openly articulating why a particular approach has been used in a particular matter. Secondly, the author turns to examine some alternative interpretive approaches, including the non-originalism that Justice Kirby has himself propounded — the secondary claim. It is argued that a form of ‘moderate originalism’<sup>5</sup> is the most justified of these competing

<sup>1</sup> Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review* 1, 8.

<sup>2</sup> (2000) 203 CLR 1.

<sup>3</sup> *Ibid* 79-81

<sup>4</sup> See, eg, *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 [41]-[42] which is discussed in greater detail below. See further, by way of introduction, eg, Greg Craven, ‘Original Intent and the Australian Constitution – Coming Soon to a Court Near You?’ (1990) 1 *Public Law Review* 166, 167.

<sup>5</sup> Professor Jeffrey Goldsworthy has used the term ‘moderate originalism’ to describe his preferred method of constitutional interpretation. I use the phrase here to describe that same method. The approach will be examined further below, however, I could not claim that this article is any way a substitute for Goldsworthy’s, and others, prodigious contributions to the field. Other writers have also advanced a similar approach to that put forward by Goldsworthy: see, eg, Craven, above n 4; Lawrence B Solum, ‘*District of Columbia v Heller* and Originalism’ (2009) 103 *Northwestern University Law Review* 923, 933; Keith F Whittington ‘The New Originalism’ (2004) 2 *Georgetown Journal of Law and Public Policy* 599, 605. Some have questioned whether this new approach really differs from traditional iterations of originalism: see, eg, Richard S Kay ‘Original Intention and Public Meaning in Constitutional Interpretation’ (2009) 103 *Northwestern University Law Review* 703, 704-9. The contribution of Kay and others on this point is beyond the scope of this paper. Another iteration of moderate originalist interpretation can be found in Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 *Federal Law Review* 323. Again, a fuller discussion of

alternatives. ‘Moderate originalism’, at least in this paper, refers to an interpretive approach sitting between strict versions of originalism and versions of non-originalism. The approach does not exclude the use of other interpretive techniques, unlike stricter versions of originalism. Rather, moderate originalism requires that judges have regard to the objectively ascertained, or ascertainable, original intentions of the constitutional framers before resorting to alternative meanings. The content of this approach is described in greater detail below. The paper also examines perceived methodological issues with originalism, including some criticisms and obstacles advanced in the recent literature. It is submitted that these criticisms, while justified, are not fatal to the approach proposed. The author does not purport to comprehensively catalogue the already considerable body of literature devoted to these difficult questions.

## II THE PRIMARY CLAIM

### A *An All-Embracing Approach?*

This Court should adopt a single approach to construction of the basic document placed in its care. Constitutional elaboration, above all, should be approached in a consistent way, lest the inconsistencies of an *originalist* approach here and a *contemporary* approach there be ascribed to the selection of whichever approach produces a desired outcome.<sup>6</sup>

Are these apparent criticisms justified? Would the adoption of a single, unified approach to constitutional interpretation be a positive development?

In this Part, the author first attempts to provide some possible answers to these questions. First, the possible meaning and implications of Kirby J’s statement are examined by drawing on his Honour’s extra-curial contributions on this topic. Secondly, the author considers three examples of the, at times and with respect, varying or perhaps even ad hoc approaches adopted in constitutional adjudication. In this respect, the author concludes that Kirby J’s apparent criticism is indeed justified. Finally, the author turns to examine arguments for and against the adoption of all-embracing approaches to constitutional interpretation. It is argued that the consistent use of a stated interpretive approach — or at least open acknowledgment of why a particular approach has been used in a particular matter — would engender greater coherency and consistency which is, indeed, a good thing. In this respect also, the author agrees Kirby J’s observations.

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Kirk’s contribution is beyond the scope of this paper. Though, I would refer to some brief comments made by Goldsworthy, ‘Interpreting the *Constitution* in its Second Century’, below n 16, 704-9. That article also includes a detailed discussion of, among other things, the various iterations of moderate originalism (see at 704-8).

<sup>6</sup> *Eastman v The Queen* (2000) 203 CLR 1, 81 [245] (Kirby J) (emphasis in original).

1 *Justice Kirby's View*

It is not immediately clear, at least in the context of his Honour's judgment in *Eastman*, what Kirby J specifically meant by the above quoted passage. In the preceding paragraphs, Kirby J briefly recounts the reasons of the majority in *Mickelberg v The Queen*<sup>7</sup> and the then accepted meaning of 'appellate jurisdiction'<sup>8</sup> — the meaning of that term being relevant to the decision in *Eastman*. His Honour then turns to note Deane J's criticism of the *Mickelberg* decision along with the cases preceding it.<sup>9</sup> Kirby J then states the general principle that '... it is to misconceive the role of this Court in constitutional elaboration to regard its function as being that of divining meaning of the language of the text in 1900, whether as understood by the founders, the British Parliament, or ordinary Australians of that time.'<sup>10</sup> In support of this non-originalist approach, his Honour cites the contributions of Andrew Inglis Clark and Deane J. His Honour indicates that Clark 'acknowledged the "living force" of the Constitution which otherwise would be a "silent and lifeless document"'.<sup>11</sup> Kirby J then cites a number of decisions that his Honour suggests support this non-originalist approach. The cases cited include *Cheatle v The Queen*,<sup>12</sup> which concerned the essential features of a jury trial for the purposes of s 80 of the *Commonwealth Constitution*, *Sue v Hill*,<sup>13</sup> which held that the reference to 'subject or a citizen of a foreign power' in s 44(i) was applicable to the United Kingdom; and finally *Cole v Whitfield*,<sup>14</sup> which concerned the meaning of s 92. The author will return to the decisions in *Cheatle* and *Cole* later, albeit for a different purpose. With that said, it is convenient to observe at this juncture that the decisions in *Cheatle*, *Sue v Hill*, and *Cole* have also been cited as examples where the High Court has favoured an originalist approach.<sup>15</sup> (What is the broader point here?)

Ultimately then, it is not clear from Kirby J's judgment in *Eastman* whether his Honour is indicating that the Court itself should adopt a single, unified approach to which all Justices should adhere. Or instead, that each Justice should articulate their

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<sup>7</sup> (1989) 167 CLR 259.

<sup>8</sup> (1989) 167 CLR 259, 270 (Mason CJ).

<sup>9</sup> *Eastman v The Queen* (2000) 203 CLR 1, 79, quoting *Mickelberg v The Queen* (1989) 167 CLR 259, 288 (Deane J).

<sup>10</sup> *Ibid* 79.

<sup>11</sup> *Ibid* 79-80, quoting Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Harston, Partridge & Co, 1901) and *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171-3 (Deane J). See further *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 400-1 (Kirby J); *Abebe v The Commonwealth* (1999) 197 CLR 510, 581-2, 586 (Kirby J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 599-600 (Kirby J); *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479, 522-7 (Kirby J).

<sup>12</sup> (1993) 177 CLR 541.

<sup>13</sup> (1999) 199 CLR 462.

<sup>14</sup> (1988) 165 CLR 360.

<sup>15</sup> See, eg, Goldsworthy, 'Originalism in Constitutional Interpretation', below n 16, 15, 18-9, citing *Cheatle v The Queen* (1993) 177 CLR 541, 562 (Toohey and Gaudron JJ) and Goldsworthy, 'Interpreting the Constitution in its Second Century', below n 16, 694.

own preferred approach which they themselves would come to consistently apply in all constitutional cases.

Justice Kirby's earlier remarks at the 1999 Sir Anthony Mason Honorary Lecture are instructive in this respect. These comments reveal that his Honour, rather than suggesting that the Court declare a single approach to be applied into the future by all Justices, appears instead to favour that 'each Justice (indeed each reader of the *Constitution*) should have a theory of constitutional interpretation' that they themselves apply in a uniform and consistent way.<sup>16</sup> It is to this development that we may now turn.

## 2 *Some Examples*

The primary claim outlined above is comprised of two elements. First, what might be termed a *positive* claim: that is, whether it is in fact the case that Justices have brought ad hoc approaches to constitutional adjudication and interpretation? Secondly, a *normative* claim: that is, whether this is a problem.

It is submitted that the criticism implicit in the first, positive claim is justified. It is convenient to observe three examples. First, the decisions of Mason CJ on the meaning of s 92 of the *Commonwealth Constitution*. Secondly, the interpretation and application of 'representation' by Dawson J with regards to s 80 and later with regards to equality of representation in state parliaments. Thirdly, the 2013 decision of the High Court of Australia regarding the meaning of 'marriage' and s 51(xxi). These are not the only such examples.<sup>17</sup>

<sup>16</sup> Kirby, above n 1, 8.

<sup>17</sup> Another example can be taken from the judgments of Deane J in various cases over the period of time that his Honour was a Justice of the High Court. For example, in *Cole v Whitfield* (1988) 165 CLR 360 (at 385-92) and in *Breavington v Godleman* (188) 169 CLR 41 (at 132-3), Deane J relied extensively on the Convention Debates when construing meaning. Whereas only two years later his Honour cast doubt as to the permissibility of relying on the 'intentions or understanding of those who participated in or observed the Convention Debates': see *New South Wales v Commonwealth* (1990) 169 CLR 482, 511. Finally, in *Theophanous v The Herald & Weekly Times* (1993) 182 CLR 104 Deane J denies that the Convention Debates are at all relevant because the *Commonwealth Constitution* is a living document. All cited by Justice Selway, below n 66. Still a further example is to be found in the reasons of Windeyer J in various cases. Windeyer J expressed at various times the need to consider the present-day consequences of one interpretation or another when construing meaning. For example, in *Jones v The Commonwealth (No 2)* (1965) 112 CLR 206 (at 237), his Honour urged that 'the very nature of the subject-matter makes it appropriate for Commonwealth control regardless of State boundaries'. Further, in *Spratt v Hermes* (1965) 114 CLR 226 (at 227) and in *Bonser v La Macchia* (1969) 122 CLR 177 (at 224), his Honour emphasised the importance of reading the *Commonwealth Constitution* to meet 'national needs'. These passages can be contrasted to his Honour's reasons in a number of other cases. For example, in the earlier case of *Ex parte Professional Engineers' Association* (1959) 107 CLR 208, his Honour (at 267) expressed that '[i]n the interpretation of the *Constitution* the connotation or connotations of its words *should remain constant*' (emphasis added). See further, eg, Justice J D Heydon, 'One Small Point About Originalism' (2009) 28 *University of Queensland Law Journal* 7, 7. For a very good exposition see Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 1-19. See also, Kirby, above n 1. For another good article on the High

(a) *Section 92 and Cole v Whitfield*

Section 92 of the *Commonwealth Constitution* guarantees free movement of goods between the states and territories. In the 1988 decision of *Cole v Whitfield*,<sup>18</sup> the High Court articulated a test for invalidity under s 92. That test was derived from an expansive review of, and in order to give effect to, the drafting history of that section. This included detailed reference to the *Convention Debates*.<sup>19</sup> The test has been affirmed in several subsequent cases.<sup>20</sup>

For present purpose, we can observe that this approach marked a clear departure from the then settled rule that the *Convention Debates* were not admissible for the purposes of interpreting the constitutional text.<sup>21</sup> While in *Cole*, the Court articulated an approach that permitted the use, albeit limited, of historical sources including the *Convention Debates*:

Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers *subjectively intended* the section to have, but for the purpose of identifying the *contemporary meaning* of language used, the *subject to which that language was directed* and the *nature and objectives* of the movement towards federation from which the compact of the *Constitution* finally emerged.<sup>22</sup>

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Court's, arguably and with respect, inconsistent approach, see Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (The Federation Press, 1996) 13. See generally also, Jeffrey Goldsworthy, 'Interpreting the *Constitution* in its Second Century' (2000) 24 *Melbourne University Law Review* 677 and Jeffrey Goldsworthy, 'Constitutional Interpretation: Originalism' (2009) 4 *Philosophy Compass* 682; James Thomson, 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' (1982) 5 *University of New South Wales Law Journal* 309, especially 322-3; Mirko Bagaric 'Originalism: Why Some Things Should Never Change – Or at Least Not Too Quickly' (2000) 19 *University of Tasmania Law Review* 173. For a comprehensive exposition of the approaches taken by Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ, the 'flexible five', see Justice Selway, below n 66, 246-9.

<sup>18</sup> (1998) 165 CLR 360.

<sup>19</sup> See especially (1998) 165 CLR 360, 385.

<sup>20</sup> See especially *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 and *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

<sup>21</sup> See, eg, *Strickland v Rocla Pipes Ltd* (1971) 124 CLR 468; *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1, 17 (Barwick CJ), 47 (Gibbs J); *Attorney-General (Cth) v T & G Mutual Life* (1978) 144 CLR 161, 176 (Stephen J); *DOGS Case* (1981) 146 CLR 559, 578 (Barwick CJ), 603 (Gibbs J). However *contra*, eg, *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254, 262 (Gibbs CJ, Mason and Wilson JJ), cited in *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 572 (Kirby P); see also *Commonwealth v Tasmania* (1983) 158 CLR 1, 255 (Deane J); *Re the Marriage of Cormick; Salmon, Respondent* (1984) 156 CLR 170, 178 (Murphy J); *Kingswell v The Queen* (1985) 159 CLR 264, 313 (Deane J); *R v Brown* (1986) 160 CLR 171, 189 (Wilson J), 214 (Dawson J); see especially *Nile v Wood* (1988) 167 CLR 133, 139, 140 (Brennan, Deane and Toohey JJ). See generally, Carl McCamish, 'The Use of Historical Materials in Interpreting the Commonwealth Constitution' (1996) 70 *Australian Law Journal* 638, 644-8.

<sup>22</sup> *Cole v Whitfield* (1988) 165 CLR 360, 385 (emphasis added).

The Court here draws a distinction between legitimate and illegitimate uses of these historical sources. According to this approach, reference to historical sources is permissible for three purposes. First, in order to discover what a word or phrase meant at the time of federation. Secondly, to identify the subject that a particular provision was directed towards. Thirdly, to illuminate the general objectives of the federation movement. It follows that it is legitimate to construe meaning consonant with these bases. On the other hand, the use of historical sources to discern what the founders *subjectively intended* a provision to mean — or the effect that they subjectively intended it to have — is not permissible. The author will return to this distinction later.<sup>23</sup> For present purposes, it is only necessary to contrast the *per curiam* decision in *Cole* — the Court lead by Mason CJ — from his Honour's earlier judgments concerning reference to the *Convention Debates*.

A brief summary suffices. In *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales*<sup>24</sup> — a case decided some 13 years before *Cole* — Mason J held that the 'freedom guaranteed by s 92 [of the *Constitution*] is not a concept of freedom to be ascertained by reference to the doctrines of political economy which prevailed in 1900; it is a concept of freedom which should be related to a developing society and to its needs as they evolve over time'.<sup>25</sup> Four years later in *Permewan Wright Consolidated Pty Ltd v Trehitt*,<sup>26</sup> his Honour cited the earlier judgment in *North Eastern Dairy Co* and observed further: '... it is incorrect to confine the application of the language of a constitutional provision by reference to the meaning which it had in 1900. But, quite apart from this... we should recognise that the organised society which s 92 assumes is not the society of 1900 but the Australian community as it evolves and develops from time to time.'<sup>27</sup> Respectfully, these passages seem, for the reasons outlined, difficult to reconcile with the later judgment in *Cole*. Yet, his Honour did not elaborate on why recourse to the *Convention Debates* was permitted in *Cole* but not in those earlier cases.

(b) *Dawson J, s 80 and McGinty*

Section 80 of the *Commonwealth Constitution* requires that trials on indictment for a Commonwealth offence shall be by jury.<sup>28</sup> In *Cheatle v R*,<sup>29</sup> the Court — constituted by Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ — held *per curiam* that an essential feature of a jury is that it be representative of the

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<sup>23</sup> See discussion from below n 89.

<sup>24</sup> (1975) 134 CLR 559.

<sup>25</sup> *Ibid* 615.

<sup>26</sup> (1979) 145 CLR 1.

<sup>27</sup> *Ibid* 35.

<sup>28</sup> Cf a 'right': *Brown v The Queen* (1986) 160 CLR 171, 197 (Brennan J), 207 (Deane J), 214-6 (Dawson J).

<sup>29</sup> (1993) 177 CLR 541.

wider community. Significantly, the Court held that elements of 'representative', at least as required by s 80, varied according to 'contemporary standards and perceptions'. On this basis, the Court held that the requirement in s 80 requires the random, impartial selection of jurors.<sup>30</sup>

The judgment in *Cheatle* — of which Dawson J participated — may be contrasted with, for example, his Honour's judgment in the case of *McGinty v Western Australia*.<sup>31</sup> The plaintiffs in *McGinty* challenged a number of provisions of Western Australian electoral legislation on the basis that the legislation failed to provide for substantially the same number of electors in each electorate. The plaintiffs argued that these disparities violated the principle of representative democracy and political equality inherent in the *Commonwealth Constitution* and, or alternatively, the principle of voting equality embodied in the *Constitution Act 1889* (WA). A majority, of which Dawson J was a member, rejected these arguments. Dawson J's judgment in *McGinty* is cast in what might be described as 'originalist' terms. That is, his Honour appears to give primacy to the meaning and intentions ascribed to the words of the text at the time of enactment: '... the qualifications of electors are to be provided for by Parliament under ss 8 and 30 and may amount to less than universal suffrage, however politically unacceptable that may be today'.<sup>32</sup> His Honour then cites, with apparent approval, the decision of Barwick CJ in *McKinlay v The Commonwealth*<sup>33</sup> in pointing out that 'no Australian colony at the time of federation insisted upon practical equality in the size of electoral divisions and the view was then plainly open... [to] justify different numerical sizes in electoral divisions.'<sup>34</sup> Dawson J suggests that 'it would be unwise to freeze into a constitutional requirement a particular aspect of an electoral system the attraction of which might vary at different times, in different conditions and to different eyes.'<sup>35</sup> On this basis, along with others, Dawson J joined with the majority in dismissing the challenge.

We should recall the different subject matter, and different language, falling for consideration in each these cases: *Cheatle* concerned the meaning of an express provision in the *Commonwealth Constitution*, while *McGinty* concerned a challenge to electoral laws based on implications drawn from the constitutional text. Nonetheless, we might equally observe the, respectfully, apparent incongruity between Dawson J's judgment in *McGinty* as compared to that in *Cheatle*. *Cheatle* evidences a willingness to construe a text in light of contemporary meaning and standards, even where that interpretation is opposite to the meaning as understood at the time of enactment: 'some aspects of trial by jury, as it existed in the Australian Colonies, at the time of Federation,

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<sup>30</sup> *Cheatle v R* (1993) 177 CLR 541, 560 (emphasis added).

<sup>31</sup> (1996) 186 CLR 140.

<sup>32</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 183 (emphasis added).

<sup>33</sup> (1975) 135 CLR 1.

<sup>34</sup> *Ibid* 185 (emphasis added).

<sup>35</sup> *Ibid* 186.



are inconsistent with both the *contemporary institution*, and generally accepted standards of *modern democratic society*.<sup>36</sup> Critically, his Honour arrived at this conclusion in *Cheatle* even where the implication was not apparent from the constitutional text, nor necessary to give content and meaning. Whereas in *McGinty*, his Honour rejected the contention that new meaning should be imbued on the basis of contemporary expectations or standards where such an implication is ‘neither apparent nor necessary’.<sup>37</sup>

(c) *The Marriage Power and Same-Sex Marriage*

The final example is more recent. In *Commonwealth v Australian Capital Territory*,<sup>38</sup> the Court held *per curiam* that the entirety of the *Marriage Equality (Same Sex) Act 2013* (ACT) was inconsistent with the *Marriage Act 1961* (Cth) and therefore of no effect. Professor Anne Twomey has described the reasons in this decision as ‘surprising’, or unconventional, in two respects, First, although not strictly necessary to do so,<sup>39</sup> the Court chose to consider the scope of the marriage power in s 51(xxi) of the *Commonwealth Constitution*. Secondly, and most relevantly for present purposes, the approach taken in interpreting the marriage head of power was seemingly incongruous to the more orthodox canons of interpretation that have been adopted by the Court from time to time. In construing the meaning of the term ‘marriage’, the Court explicitly eschewed consideration of both the original intended meaning and also the contemporary meaning.<sup>40</sup> Instead, the Court resolved to interpret the power as a “‘topic of juristic classification’” interpreting the power by reference to ‘laws of a kind “generally considered, for comparative private law and international law, as being the subjects of a country’s marriage laws”’.<sup>41</sup> That is, the scope of the marriage power was interpreted by reference to the laws of other countries. And further, that that interpretation should not ‘fix either the concept of marriage or the content and application of choice of law rules according to the state of the law at federation’.<sup>42</sup>

As Professor Twomey has noted, interpreting the constitutional text as a ‘juristic concept’ or ‘topic of juristic classification’, the content of which is identifiable by reference to the laws of other countries, ‘is not a familiar one.’<sup>43</sup> Perhaps the Court felt that this approach was open — or even to be preferred — as it had been earlier

<sup>36</sup> *Cheatle v R* (1993) 177 CLR 541, 560 (emphasis added and footnotes omitted).

<sup>37</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 186.

<sup>38</sup> (2013) 250 CLR 441.

<sup>39</sup> *Ibid.* Neither party regarded it as necessary to determine the scope of the marriage power because the validity of the *Marriage Act 1961* (Cth) was not in question. See also *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 454-5.

<sup>40</sup> *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 455.

<sup>41</sup> *Ibid.* 459, quoting *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529, 579 (Windeyer J).

<sup>42</sup> *Ibid.*

<sup>43</sup> Twomey, ‘Same-sex Marriage and Constitutional Interpretation’ (2014) 88 *Australian Law Journal* 813, 615.

adopted by Windeyer J in dissent in *Attorney-General (Vic) v The Commonwealth*.<sup>44</sup> In this respect, we should also observe the application, or at recognition, of this approach in earlier cases. For example, in *Grain Pool of Western Australia v The Commonwealth*<sup>45</sup> where a majority comprising Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ cited with apparent approval the various passages from the previously cited judgment of Windeyer J. With this said, it is arguable that all Windeyer J had meant in *Attorney-General (Vic) v The Commonwealth* was that in identifying the meaning of 'marriage' as at federation, one discovers that the terms settled legal meaning 'derived from that European Christian inheritance, particularly from the United Kingdom'.<sup>46</sup> If this reading of Windeyer J's judgment is preferred, it leaves the approach taken in *Commonwealth v Australian Capital Territory* — interpretation informed by the meaning as presently prescribed in other countries — on a more tenuous footing.

As this paper and others have identified, interpretation of the text in light of historical context and usage is an established canon of construction. Similarly, attributing a contemporary interpretation as that meaning is presently understood in Australia is a well-established approach. However, identifying the content and scope of a constitutional term by 'reference to changes in the law in other countries... is unusual.'<sup>47</sup> This exposition is included as the last of three examples. These three examples, along with the others cited above,<sup>48</sup> seem to support Kirby J's view.

### 3 *Arguments For and Against*

Justice Selway, writing extra-curially in 2003, suggested that over the High Court's recent history only Kirby J and McHugh J have sought to articulate and consistently apply their own identified approaches to constitutional interpretation.<sup>49</sup> The paper now turns to consider normative arguments for and against doing so.

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<sup>44</sup> Ibid, 455, quoting *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529, 578. Professor Twomey suggests that the High Court 'developed its own new method of interpretation': see above n 43, 614. To the extent that the approach adheres to that taken of Windeyer J in the earlier case, and also a number of other cases, we might say that the approach is not 'new'. In this regard see also the cases cited by the Court in the 2013 case: *Attorney-General (NSW) v Brewery Employees' Union (NSW)* (1908) 6 CLR 469, 610-2 (Higgins J); *Grain Pool* (2000) 202 CLR 479, 492-5 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See further H Burmester, 'Justice Windeyer and the Constitution' (1987) 17 *Federal Law Review* 65.

<sup>45</sup> (2000) 202 CLR 479.

<sup>46</sup> See Twomey, above n 43, 615.

<sup>47</sup> Ibid.

<sup>48</sup> See especially above n 17 and cases therein.

<sup>49</sup> Justice Selway, below n 66, 244 and generally. Justice Selway cites as an example of the possible non-fulfilment by McHugh J in this regard, see *McGinty v Western Australia* (1995) 186 CLR 140, 232 cf *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 118-9. With regards to the other Justices see, by way of example, Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 *Adelaide Law Review* 49, 49.

(a) *Arguments For*

Justice Kirby offers several justifications for Justices adopting single, all-embracing approaches to constitutional interpretation. His Honour, in the extra-curial remarks discussed above, first emphasises the importance of constitutional adjudication within the wider context of the work undertaken by the High Court of Australia. This, as his Honour describes it, carries with it an obligation ‘to do more than to stumble about looking for a solution to the particular case.’<sup>50</sup> Against this background, his Honour argues that it is vital that ‘each Justice (indeed each reader of the *Constitution*) should have a theory of constitutional interpretation’. And, that ‘... [i]n the absence of [such] a theory, inconsistency will proliferate.’<sup>51</sup> Justice Kirby also warns that ‘[t]he Justice will be castigated, perhaps correctly, for saying incompatible things at different times and construing the same words at different times in inconsistent ways.’<sup>52</sup> From these passages, it is possible to identify two primary reasons favouring the adoption of a single, coherent approach. First, that such a development would ensure a degree of consistency that in turn engenders certainty. Secondly, that consistency and certainty will enhance institutional integrity and public confidence in the judicial process.

Justice Kirby is not alone in offering these justifications. For example, Professor Adrienne Stone has argued, in the context of disagreement regarding the foundation and scope of express and implied constitutional rights, that ‘readings of the *Constitution* which rely on controversial modes of constitutional interpretation or which seem to run contrary to one of the established modes will be much less secure.’<sup>53</sup> With specific reference to the implied freedom of political communication, Professor Stone argues that controversy amongst members of the High Court as to the existence, and later the application, of the implied freedom has inspired controversy and doubt around the freedom.<sup>54</sup> We might observe the comparison between these controversies — specifically disagreement *between* judges — and the perhaps inconsistent approaches adopted by various members of the High Court. One might argue that the same vulnerabilities that Professor Stone has identified are equally applicable here. A similar comparison may be drawn with concerns expressed by McHugh J in *Theophanous v The Herald & Weekly Times*: ‘[i]f this Court is to retain the confidence

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<sup>50</sup> Kirby, above n 1, 8.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretive Disagreement’ (2005) 27 *Sydney Law Review* 29, 41.

<sup>54</sup> With respect to doubts as to the implication itself see, eg, *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106, 186 (Dawson J) and with respect to the application of the implied right see, eg, *Theophanous v The Herald & Weekly Times* (1993) 182 CLR 104; *McGinty v Western Australia* (1996) 186 CLR 140, 235-6 (McHugh J), 291 (Gummow J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566. And, more recently, *Monis v The Queen* (2013) 249 CLR 92, 179-84 (Heydon J). This is all despite unanimous affirmation of the implied right by the High Court in *Lange* its existence is not beyond question: see, eg, *Lenah Game Meats v Australian Broadcasting Corporation* (2001) 208 CLR 199, 331 (Callinan J).

of the nation as the final arbiter of what the *Constitution* means, no interpretation of the *Constitution* by the Court can depart from the text of the *Constitution* and what is implied by the text and the structure...<sup>55</sup> This dicta can be separated into two discrete elements: first, his Honour puts forward his preferred approach to constitutional interpretation, albeit in very broad and general terms. Secondly, his Honour appears to be indicating that failure to consistently adhere to that approach risks undermining the integrity of, and confidence in, the Court. Putting aside the merits or otherwise of the particular approach advocated by McHugh J, this basis claim seems to accord with the concerns expressed by Justice Kirby.

(b) *Arguments Against*

Questions of construction of the *Constitution* are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation. Nor are they answered by the resolution of a perceived conflict between rival theories, with the placing of the victorious theory upon a high ground occupied by the modern, the enlightened and the elect.<sup>56</sup>

This dicta, appearing in the judgment of Gummow J in *SGH Ltd*,<sup>57</sup> was recently cited with approval *per curiam* in the previously discussed *Commonwealth v Australian Capital Territory*.<sup>58</sup> Underpinning this approach appears to be his Honour's view that the 'provisions of the *Constitution*, as an instrument of federal government, and the issues which arise thereunder... are too complex and diverse' for an all-embracing theory — or resolution between rival theories — to satisfactorily discharge 'the mandate which the *Constitution* itself entrusts to the judicial power of the Commonwealth'.<sup>59</sup> In his 2007 Sir Maurice Byers Lecture, Justice Heydon appears to have expressed agreement with Gummow J on this point.<sup>60</sup>

Other arguments against the adoption of an all-embracing approach might also be made. For instance, identifying a particular Justice as 'originalist' or 'progressive', or by any other label, might well invite a species of 'partisanship' which has not previously manifested in the High Court of Australia, at least relative to in other jurisdictions. For instance, speaking in 2009, Chief Justice French alluded to this phenomenon: '[c]hanges in the composition of the Court are sometimes scrutinised to ascertain whether a change of methodology or a particular balance of methodologies will follow. That kind of scrutiny.... gives rise to far more acute debates in connection

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<sup>55</sup> (1993) 182 CLR 104, 197-8.

<sup>56</sup> *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J).

<sup>57</sup> *Ibid.*

<sup>58</sup> (2013) 250 CLR 441, 455. See also, *Wong v The Commonwealth* (2009) 236 CLR 573, 582 (French CJ and Gummow J); *Brownlee v The Queen* (2001) 207 CLR 278, 285 (Gleeson CJ and McHugh J).

<sup>59</sup> *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75.

<sup>60</sup> Justice J D Heydon, 'Theories of Constitutional Interpretation', below n 66, 76.

with the selection process for Supreme Court judges in the United States'.<sup>61</sup> The implication appears to be that such a development is undesirable.

One of the primary arguments advanced favouring the adoption of single, all-embracing approaches is the integrity and confidence that doing so, it is said, would yield. Conversely, others have argued — consistent with Gummow J's view — that the very nature of the constitutional text and the multifarious issues that arise from time to time necessitates a degree of flexibility. Critically, and as Justice Selway notes, no consensus — in Australia or elsewhere — has yet been reached as to any single interpretive approach. Rather, each of the approaches developed to date has been subject to criticism. Thus, the argument can be persuasively put that rigid adherence to a single approach — and the attendant inflexibility that would surely result — would in fact undermine legitimacy and confidence. And therefore, adherence to one approach would at this time not be a positive development.

(c) *Conclusions*

The 'flexible' approach that has been adopted by most<sup>62</sup> Justices of the High Court is, as is apparent from the preceding, open to some criticism. The critical issue in this regard is, perhaps, one of degree: some flexibility is needed given the multifarious issues that arise in constitutional law,<sup>63</sup> while greater adherence to a particular approach promotes consistency, certainty, and transparency. Following, it is no doubt critical that no single approach has been considered comprehensive and cohesive enough<sup>64</sup> to satisfactorily embrace the competing values and demands which the constitutional text must accommodate. A similar point was observed immediately above, and again, this has been identified Justice Selway.<sup>65</sup> We now turn to evaluate a theory of interpretation labelled 'moderate originalism'. For the reasons that follow, it is argued that this approach can best accommodate the flexibility that many have identified as critical in constitutional adjudication — not least Gummow J. The approach also anchors meaning in a way that provides a degree of certainty and consistency along with according to the other important principles identified. We might observe, as above, that perhaps this controversy is less about rigid adherence to one approach over another, than in articulating why a particular approach has been applied

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<sup>61</sup> Chief Justice Robert French, 'The Future of Australian Constitutionalism' (Speech delivered at the 21<sup>st</sup> Anniversary Celebration for the Centre for Comparative Constitutional Studies, Melbourne, 27 November 2009) 14.

<sup>62</sup> Since at least the Gleeson court, Justice Selway has identified only McHugh J and Kirby J as attempting to articulate and consistently apply a single approach to interpretation: see Justice Selway, below n 66.

<sup>63</sup> Some might include 'undesirable', however that word trespasses very close into a territory many would hasten not to enter.

<sup>64</sup> See discussion at above n 4.

<sup>65</sup> See generally Selway and discussion accompanying below n 66.

in a particular case. To this extent, engagement with the precepts of a particular approach is of importance.

### III THE SECONDARY CLAIM

This Part begins by introducing three very broad concepts: 'literalism', 'originalism', and 'non-originalism'.<sup>66</sup> It then turns to examine in greater detail the approach identified in this paper as 'moderate originalism'.

In the simplest of terms, originalists argue that meaning should be anchored in 'ascertainable facts of the intentions of the drafters...'.<sup>67</sup> Or, put another way, that constitutions mean what they originally meant unless subsequently amended.<sup>68</sup> This very broad idea is to be contrasted to non-originalism. Non-originalist approaches are underpinned by the conception that a constitution is, as Justice Kirby eloquently put it, '[a] living tree which continues to grow and to provide shelter in new circumstances...'.<sup>69</sup> That is, constitutions should be interpreted in light of, or to meet, contemporary meaning, needs, and expectations.<sup>70</sup> Of course, these competing claims represent the ends of a spectrum. For example, there would be many 'non-originalist' that may not subscribe to the 'living tree approach'. Nevertheless, the author submits that these two viewpoints provide a useful analytical lens through which to further investigate the issues.

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<sup>66</sup> Of course, there are countless more approaches to constitutional interpretation — some conforming closely to these three broad ideas, others less so. The content of these labels has elsewhere been discussed under different names. Of course, these three general terms do not encompass the broad gamut of interpretive approaches from time to time employed in the High Court. Of Australia Indeed, the author does not attempt to cover the entire gamut of interpretive theories. Rather, these terms are used only as a framework through which to scrutinise certain concepts before then moving to a more detailed discussion about 'moderate originalism'. With this said, see for example, along with the other sources cited, Justice Bradley M Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Craven, above n 4, 167-8; Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (2008) 30 *Sydney Law Review* 5; Justice J D Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (Speech delivered at the Sir Maurice Byers Lecture, New South Wales Bar Association, 3 May 2007).

<sup>67</sup> Kirby, above n 1, 11; see also Goldsworthy, 'Constitutional Interpretation: Originalism', above n 16, 685.

<sup>68</sup> And, continuing the theme, those amendments would then be taken to mean at the time of their enactment. See generally, Goldsworthy, 'Interpreting the *Constitution* in its Second Century', above n 16, 678. See also, eg, Lael K Weis, 'What Comparativism Tells Us About Originalism' (2013) 11 *International Journal of Constitutional Law* 842, 845-8.

<sup>69</sup> Kirby, above n 1, 11.

<sup>70</sup> See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 600 (Kirby J).

## A Questions

For present purposes, two questions arise:<sup>71</sup> first, whether meaning should be determined by the words of the text alone; secondly, whether provisions should be interpreted as having the same meaning as when first enacted. If so, whose meaning is relevant? These questions, of necessity somewhat over simplistic, again provide a useful framework for the analysis.

## B Application

### 1 Literalism

The author argues that a strict, or bare, literalism alone is deficient. Put briefly, it is self-evident that the *literal* and *intended* meaning of communication can be different.<sup>72</sup> Critically in the context of interpretation, giving effect to the intentions of the lawmaker has been variously recognised as central to the interpretive process.<sup>73</sup> As Lord Russell put it: ‘[the purpose of interpretation is] to give effect to the intention of the [law-maker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed.’<sup>74</sup> This maxim has been described as ‘the only rule’,<sup>75</sup> ‘the paramount rule’,<sup>76</sup> ‘the cardinal rule’,<sup>77</sup> and ‘the fundamental rule of interpretation, to which all others are subordinate’.<sup>78</sup> In the context of statutory interpretation, Mason CJ and Wilson J in *Cooper Brookes (Wollongong) Pty Ltd v FCT* put it: ‘[t]he fundamental object of statutory construction in every case is to ascertain the legislative intention’.<sup>79</sup> More recently in *Wilson v Anderson*, Gleeson CJ put it: ‘... the object of a court is to ascertain, and give effect to, the will of Parliament.’<sup>80</sup> In limiting the sources of meaning to the bare text itself, strict literalism (in the sense that the word is used here) is unable to account for authorial intention. This maximises indeterminacy and frustrates the intentions and purpose behind the

<sup>71</sup> Again, a number of other questions might be asked, however these two questions provide a useful framework through which to analyse the issues for relevant purposes. Academic and judicial commentary in this field proliferates. For a more detailed discussion of these and other issues in constitutional interpretation see, eg, Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16; Goldsworthy, ‘Interpreting the *Constitution* in its Second Century’, above n 16.

<sup>72</sup> See generally John R Searle, ‘Literary Theory and Its Discontents’ (1994) 25 *New Literary History* 637.

<sup>73</sup> See especially Richard Ekins and Jeffrey Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36 *Sydney Law Review* 39.

<sup>74</sup> *Attorney-General v Carlton Bank* [1899] 2 QB 158, 164 (Lord Russell).

<sup>75</sup> *Sussex Peerage Case* (1844) 8 ER 1034, 1057 (Tindall CJ).

<sup>76</sup> *Attorney-General (Canada) v Hallet & Carey Ltd* [1952] AC 427 (Lord Diplock).

<sup>77</sup> *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J).

<sup>78</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161 (Higgins J).

<sup>79</sup> (1981) 147 CLR 297, 320.

<sup>80</sup> (2002) 213 CLR 401, 418.

law.<sup>81</sup> Therefore, for this reason, the first question is answered in the negative — meaning should not, or perhaps *cannot*, be determined from the mere words of the text alone.<sup>82</sup>

## 2 'Collective Legislative Intention'?

Before turning to a more detailed comparison between originalist and non-originalist theory, it is necessary to confront some doubts expressed from time to time regarding the existence and identification of, what might be described, 'legislative intention'.<sup>83</sup> It is necessary to deal with these doubts here because legislative intention is a critical component of this 'moderate originalism' discussed below.

In a 2014 paper on this topic, Professor Richard Ekins and Professor Jeffrey Goldsworthy persuasively account for the existence of a legislature's 'objective' intention. Professors Ekins and Goldsworthy argue — in that paper and elsewhere — that identifying and giving effect to these intentions should be the primary object of statutory. Those authors, as have other, also argue that this same objective should underpin constitutional interpretation.<sup>84</sup> It is unnecessary to recite here each of the aspects covered in that paper. Rather, it is enough for present purposes to recite the following critical passage:

Hence, when reasonable legislators vote for or against a Bill, they understand what is before them not to be a text with a sparse literal meaning, but a complex and reasoned plan to pursue a particular means to achieve certain ends... when they vote for or

<sup>81</sup> See, eg, Goldsworthy, 'Constitutional Interpretation: Originalism', above n 16, 682, 684-5, 695; see further, eg, Jeffrey Goldsworthy, 'Marmor on Meaning and Interpretation' (1995) 1 *Legal Theory* 431, 445-50.

<sup>82</sup> Some may suggest that the dominant interpretive approach of the High Court has been a literalist one, at least since the decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. Other illustrative examples can be taken from *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 230-1 (Brennan J); *Richardson v The Forestry Commission* (1988) 164 CLR 261, 307 (Deane J). Though of course, as Professor Saunders has noted, '[e]ven in the heyday of strict legalism judges clearly made choices which were policy driven and sometimes quite dramatic ones, as a range of cases show...': Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289. Two examples are *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 and *Parton v Milk Board (Vic)* (1949) 80 CLR 229. See further, Craven above n 4, 171-3, 175; Weis, above n 68. See also Goldsworthy, 'Interpreting the Constitution in its Second Century', above n 16, 688-9. Finally, for a critique of the literalist approach, also see, Ruth Sullivan, 'Statutory Interpretation in the Supreme Court of Canada' (1999) 30 *Ottawa Law Review* 175, 181. See also McCamish, above n 21, 639.

<sup>83</sup> See, eg, *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 345-346 (McHugh J) and *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 (Lord Reid). Though cf 600-9 (Heydon J).

<sup>84</sup> See Ekins and Goldsworthy, above n 73. See further, eg, Richard S Kay, 'Adherence to the Original Intentions in Constitutional Interpretation: Three Objections and Responses' (1988) 82 *Northwestern University Law Review* 226. See also, John R Searle, 'Collective Intentions and Actions' in Philip R Cohen, Jerry Morgan, and Martha E Pollack (eds), *Intentions in Communication* (MIT Press, 1990) 401, 401.



against it, they vote for or against not only the text, but the plan that the text has been designed by their colleagues to communicate. The plan is “open” to them; in that they could learn more about it if they wanted to, by using much the same methods as subsequent interpreters, who infer the plan from its text and publicly available contextual evidence of its purpose...<sup>85</sup>

Ultimately, these intentions are not fictions or the mere product of judicial explication. Instead, what is meant by the relevant legislative intention ‘is what the legislature as a whole is reasonably taken to have intended, due to the supporting structure of interlocking individual intentions that constitute the legislature’s secondary or standing intentions.’<sup>86</sup> In that sense, this concept is a discernible, static result of legislative action. And, it is a concept equally available and applicable in interpreting a constitution. It is against this background that we can turn to originalist and non-originalist theory.

### 3 *Originalism and Non-Originalism*

Given then that judges should look beyond the mere words of the constitutional text, we need to ask what sources should be considered? Are these considerations to be only the historical, or is interpretation ‘cut wholly adrift from historical context’?<sup>87</sup> Again, these two questions are of necessity somewhat simplistic, yet they do provide a framework for analysis.

#### (a) *Moderate Originalism*

The balance of this paper advances a ‘moderate’ form of originalism. This approach is preferable to ‘orthodox’ or strict versions of originalism in several respects.<sup>88</sup>

First, this moderate approach requires meaning be derived from the founders’ publicly known intentions as opposed to subjective intention.<sup>89</sup> As alluded to above, an originalist will generally demand that *Commonwealth Constitution* be understood in the context of the purposes for which it was enacted.<sup>90</sup> With this said, as a matter of legal theory, law can operate usefully and justly if its meaning is publicly known, or at least readily ascertainable by persons subject to these rules. Conversely, imposing

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<sup>85</sup> Ekins and Goldsworthy, above n 73, 67.

<sup>86</sup> Ibid.

<sup>87</sup> A phrase borrowed from Kirk, above n 5, 364.

<sup>88</sup> Originalism can take, and has taken, multiple forms. As previously indicated, the purpose of this paper is not to examine in great detail the many approaches that originalist theory has taken. Again however, a good discussion of these many iterations can be found in, as well as in the other sources, Mitchell N Berman, ‘Originalism is Bunk’ (2009) 84 *New York University Law Review* 1, 14.

<sup>89</sup> Along with the other sources cited, see Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 8-20.

<sup>90</sup> See ‘literalism’ above.

penalties for breaches of unknowable law is clearly unjust.<sup>91</sup> Therefore, interpretation must surely be guided principally by its publicly understood or *understandable* meaning. In this respect, legal interpretation is much like everyday communication. For these reasons, knowledge of the lawmakers' publicly knowable intentions, along with conventional semantic content, is a legitimate and useful interpretive aid under the moderate originalist approach. Conversely, interpretation cannot depend on the unknown subjective intentions that some stricter forms of originalism recognise.<sup>92</sup> Further to this, evidential limitations mean recourse to subjective intentions is often futile. The arguments put forward here regarding subjective intention have been approved by the High Court of Australia. For example in *Pape v Federal Commissioner of Taxation*, Heydon J noted that '[r]eference to history is not permitted for the purpose of substituting for the meaning of the words in the Constitution the scope and effect which the framers *subjectively intended* the Constitution to have.'<sup>93</sup> This observation sits comfortably within the framework articulated by the High Court in *Cole v Whitfield*.<sup>94</sup> In this respect, the moderate approach suggested in this paper lies between stricter forms of originalism that hold meaning must be directly anchored in subjective intention, and strict non-originalism which holds that interpretation is cut adrift from original meaning. The author notes at this point some, what might be termed, 'methodological' issues in applying this distinction.<sup>95</sup> We return to these issues later.

Secondly, only the founders' 'enactment intentions' are relevant in the moderate originalist approach. We need to make the distinction here between intentions concerning what provisions were anticipated to mean and 'expectation' or 'application' intentions, which concern the intended interpretation and application to a particular matter.<sup>96</sup> The object of interpretation is to uncover 'the meaning of the norms the founders enacted, not to discover their beliefs about how those norms ought to be applied'.<sup>97</sup> Professor Kay expressed the distinction thus: 'intentions about the extent

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<sup>91</sup> See generally T S R Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 *Cambridge Law Journal* 111, 122-4; see also Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell, 2013) 248; Lon Fuller, *The Morality of Law* (Yale University Press, 1977) 41.

<sup>92</sup> Goldsworthy, 'Marmor on Meaning', above n 73. See also Jerrold Levinson 'Intention and Interpretation: A Last Look' in Gary Iseminger (ed), *Intention and Interpretation* (Temple University Press, 1992) 221, cited in Goldsworthy, 'Constitutional Interpretation: Originalism', above n 16, 686. Of course, constitutional provisions may have technical legal meanings. For this reason, courts have treated lawyers as the intended audience when ascertaining public meaning under this approach: see, eg, *XYZ v The Commonwealth* (2006) 227 CLR 532, [153] (Callinan and Heydon JJ); see generally, Justice Ronald Sackville, 'The 2003 Term: The Inaccessible Constitution' (2004) 27 *UNSW Law Journal* 66.

<sup>93</sup> (2009) 238 CLR 1, 148 (emphasis added).

<sup>94</sup> (1988) 165 CLR 360, 385. See the discussion above.

<sup>95</sup> See, eg, McCamish, above n 21.

<sup>96</sup> Ronald Dworkin, 'Comment' in Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 115, 119.

<sup>97</sup> Goldsworthy, 'Constitutional Interpretation: Originalism', above n 16, 685. Goldsworthy also elucidates on this point in 'Originalism in Constitutional Interpretation', above n 16, 20. See also, Paul Schoff, 'The High Court and History: It Still Hasn't Found(ed) What It's Looking For' (1994) 5 *Public Law Review* 253, 254.

and consequences within the legal system of the rule that the constitution-makers were creating [are the relevant intentions]. They are not intentions about the resolutions of specific controversies.<sup>98</sup> There are several reasons for applying this distinction. First, concepts of separation of powers and judicial independence are at the centre of the constitutionally-prescribed system of government. And, admitting ‘application intention’ as an interpretive guide, it is argued, violates this separation. Further to this, the lawmakers’ intentions concerning how law should apply may be erroneous, especially in the context of contemporary problems and needs that were not envisaged at the time of the movement to federation.<sup>99</sup> To this extent, direct application carries attendant risks that should be avoided by eschewing any such an approach.

Finally, and as further discussed below, judicial ‘flexibility’ has a legitimate role to play in moderate originalism. It is argued that stricter forms of originalism leave insufficient scope for this necessary flexibility. Justice Kirby has suggested the High Court of Australia ‘has, for a long time, turned its back on originalism’.<sup>100</sup> That observation has been criticised.<sup>101</sup> The above discussion has broadly outlined what is meant by ‘moderate originalism’ as understood within the existing body of literature.<sup>102</sup> We can now turn to examine justifications for this approach over non-originalist theory.

(i) *Dead Hand of the Past?*

Non-originalists argue ‘[o]ur *Constitution* belongs to the 21<sup>st</sup> century, not the 19<sup>th</sup>’<sup>103</sup> and that it should be read accordingly. This conception has been criticised. And, as the fundamental precept for non-originalist approaches, it is convenient to recount some of these criticisms. First, and as Professor Goldsworthy has argued, this argument

<sup>98</sup> Richard S Kay, ‘Original Intentions, Standard Meanings, and the Legal Character of the Constitution’ (1989) 6 *Constitutional Commentary* 39, 40, cited in Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 20. See also Kay, ‘Adherence to the Original Intentions’, above n 84.

<sup>99</sup> See, eg, *Hilder v Dexter* [1902] AC 474, 477 (Lord Halsbury): ‘[The drafter of the statute is the worst person to construe it because] he is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.’

<sup>100</sup> Kirby, above n 1, 1.

<sup>101</sup> See, eg, Kirk, above n 5, 329, citing *Gorham’s Case* extracted in *Assam Railways and Trading Co v Commissioners of Inland Revenue* [1935] AC 445, 458; *Eastman Photographic Materials Company v Comptroller-General of Patents, Designs and Trademarks* [1898] AC 571, 575 (Lord Halsbury LC); Patrick Brazil, ‘Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular (1961-4) 4 *University of Queensland Law Journal* 1, 4-14. See especially Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 12-15. See further Henry Burmester, ‘The Convention Debates and the Interpretation of the Constitution’ in Gregory Craven (ed), *The Convention Debates 1891-1898 with Commentaries, Indices and Guide* (Pearson, 1996) 25, 30; Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Harston, Partidge & Co, 1901) 19-22 both cited in Goldsworthy, ‘Interpreting the *Constitution* in its Second Century’, above n 16, 691. Goldsworthy, in the same article, goes on to explain why the cases of *Sue v Hill* (1999) 199 CLR 462 and *R v Brislan; Ex parte Williams* (1935) 54 CLR 262, both cited by Kirby to support his claim, can equally be cited as cases applying an originalist approach.

<sup>102</sup> See preceding and various sources cited therein.

<sup>103</sup> Kirby, above n 1, 14.

— when taken to its logical extreme — might well be characterised as an argument against having a constitution altogether.<sup>104</sup> Professor Goldsworthy's argument is that constitutions empower by providing an established charter under which the political compact is arranged, and laws are made. Corollary to this, is that constitutions restrict decisions and decision-making — it is the essence of the particular constitutional system that decisions today are regulated by those norms and rules laid down previously (in the particular constitution). A non-originalist approach, so the argument goes, seeks to evade these very restrictions. To say we should not be ruled by the 'dead hand of the past' suggests that these established norms and rules could, or should, be disregarded or updated in order to establish new rules. In doing so, the compact of the constitutional system of government is undermined leading, ultimately, to the 'collapse of the *Constitution* and the loss of the empowerment it provided'.<sup>105</sup> The originalist might well ask the non-originalist, if the *Constitution* should change with new interpretation, why enact one in the first place? Secondly, we might note that the *Commonwealth Constitution* can be altered by popular referendum through s 128. One might therefore argue whether we are in fact bound by the 'dead hand' of the past in any invidious sense as proponents of non-originalism seek to suggest.

Professor Bagaric has suggested that both sides of what might be labelled 'the dead hand debate' rely on utilitarian logic that cannot, in and of itself, validate one approach over the other. That is, non-originalists argue interpretation 'in light of contemporary standards will supposedly make for a more liveable and prosperous community'.<sup>106</sup> Whereas originalists argue 'whatever short term benefits are derived... they are likely to be more than offset by the detriment in the form of a reduced level of political and legal stability'.<sup>107</sup> It is, in reality impossible, to quantify which of these approaches — some form of non-originalism or some form of originalism — can yield a greater social utility. This is, if nothing else, because of the incalculable nature of these considerations. Following, we might evaluate 'subordinate principles'.

(ii) *Subordinate Principles*

The author argues, as have others, that an originalist approach — whether strict or moderate — better reinforces the ultimate source of legal authority underpinning the

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<sup>104</sup> See, eg, Bagaric, above n 17, 179. See also, eg, Goldsworthy, 'Constitutional Interpretation: Originalism', above n 16, 687: '... it is the essence of law that decisions are governed by norms laid down in the past. Taken to its logical extreme, it is an argument not only that judges should ignore the law, but also that everyone else should ignore the judges, since they owe their authority to the laws laid down by the "dead hand of the past"': Goldsworthy, 'Originalism in Constitutional Interpretation', above n 16, 27.

<sup>105</sup> Goldsworthy, 'Originalism in Constitutional Interpretation', above n 16, 27.

<sup>106</sup> Bagaric, above n 17, 180.

<sup>107</sup> *Ibid.*

*Commonwealth Constitution*.<sup>108</sup> That is, to put it ineloquently, the ‘thing’ that makes the *Commonwealth Constitution* ‘binding’. In exploring this argument, we might turn first to the non-originalist position. Those favouring non-originalism have elsewhere suggested that the ultimate source of legal authority for the *Commonwealth Constitution* is its continued acceptance in, or by, contemporary society.<sup>109</sup> Corollary to this, is that constitutional interpretation should primarily be directed to our contemporary understanding, needs, expectations, and other such imperatives. We might wonder though if this actually misidentifies the actual ‘thing’ that underlies a particular constitutional instrument. For instance, others have advanced the idea that this source of authority derives from the community’s continued abidance to, what might best be described albeit vaguely, the rule of law. By this the author means: one, we accept that validly made law is ‘binding’ until it is validly changed or repealed; two, we accept that a validly made law can only be changed or repealed through the mandated amendment or repeal process; three, we also accept that the *Commonwealth Constitution* is such a valid law. From this it follows that the *Commonwealth Constitution* cannot be changed except through the mandated amendment process — being s 128. One might argue that the originalist approach better respects this reality. As Professor Goldsworthy argues: the ‘prescribed amending procedure should not be evaded by lawyers and judges disguising substantive constitutional change as interpretation’.<sup>110</sup> While the non-originalist might respond that changing the meaning of words is not to amend the *Commonwealth Constitution* this is, surely, begging the question. To change the meaning of law is surely to change the law.<sup>111</sup> And, this brings us to the classic criticism deployed by originalists: using interpretation to achieve such change circumvents the constitutionally-prescribed amendment procedure and, in so doing, subverts the rule of law.<sup>112</sup> The late Justice Antonin Scalia put it: ‘[a constitution’s] whole purpose is to prevent change — to embed certain rights in such a manner that future generations cannot readily take them away.’<sup>113</sup> While our own

<sup>108</sup> It has been argued that a constitution should be interpreted consistent with the source of its authority. To interpret the document otherwise risks delegitimising it: see, eg, Michael Moore ‘Natural Rights, Judicial Review, and Constitutional Interpretation’ (Paper presented at the Conference on Legal Interpretation, Judicial Power and Democracy, Melbourne, 12-14 June 2000) cited in *Ibid* 181. See also, Kirby above n 1, 7: ‘... [the *Constitution*’s foundation] must affect approaches to the ascertainment of its meaning’.

<sup>109</sup> See, eg, Kirby above n 1. See also, eg, Paul Brest, ‘The Misconceived Quest for the Original Understanding’ (1980) 60 *Boston University Law Review* 204, 225; Samuel Freeman, ‘Original Meaning, Democratic Interpretation and the Constitution’ (1992) 21 *Philosophy and Public Affairs* 3. See further, eg, *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 167 (Deane J): ‘a theory of construction of the Constitution which unjustifiably devitalizes its provisions by effectively treating its long dead framers rather than the living people as the source of its legitimacy.’

<sup>110</sup> Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 688.

<sup>111</sup> See, eg, Goldsworthy, ‘Interpreting the *Constitution* in its Second Century’, above n 16, 684-5; Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 38; Weis, above n 68, 846.

<sup>112</sup> On this point, see especially Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 10 *Otago Law Review* 493.

<sup>113</sup> Scalia, *A Matter of Interpretation*, above n 96, 40. See also, Bagarich, above n 17, 185: ‘The purpose of a constitution is to prevent change. It aims to prevent departure from certain principles and values that its authors deem to be so basic that they should go beyond alteration by transient majorities...’. See also,

constitution and that of the United States innumerable differ, not least with respect to substantive rights protections, this underlying principle is perhaps common to both. Justice Scalia went on: '[b]y trying to make the *Constitution* do everything that needs doing from age to age, we shall have caused it to do nothing at all.'<sup>114</sup> This is what is meant by better reinforcing the fundamental rationale for a constitution in itself.

Similarly, originalism — again, whether in a stricter or moderate form — perhaps better respects democratic and federalist principles. It has been recognised judicially that the founders envisaged a federal structure far more 'state-centric' than the one that has developed since federation.<sup>115</sup> Section 128 requires consent by electors with special majority requirements. These special requirements were designed to protect state interests.<sup>116</sup> In this sense, and as indicated above, a constitution empowers as well as restricts.<sup>117</sup> As others have argued, effecting constitutional change through the interpretative process risks usurping these foundation principles.<sup>118</sup> This is illustrated by the centralisation of legislative and executive power that has occurred in Australia since 1901. This has taken place despite such developments being anathema to the federal compact envisioned during the movement to federation.<sup>119</sup>

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Helen Irving, 'Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning' (2015) 84 *Fordham Law Review* 957, 965-6.

<sup>114</sup> Scalia, *A Matter of Interpretation*, above n 96, 47.

<sup>115</sup> See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 126 (Mason J).

<sup>116</sup> See s 128 of the *Commonwealth Constitution* and the commentary.

<sup>117</sup> See, eg, Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1995), cited in Goldsworthy, 'Constitutional Interpretation: Originalism', above n 16, 688; Goldsworthy, 'Interpreting the *Constitution* in its Second Century', above n 16, 683. Interestingly on this point, some have viewed the s 128 amendment procedures as manifestly unable to secure the changes needed to the *Constitution* as Australia has developed. See eg, Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208. If one accepts this proposition it is only a small step to then argue that these deficiencies should be redressed through revised interpretation. Consider, eg, *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J).

<sup>118</sup> See, eg, Goldsworthy, 'Interpreting the *Constitution* in its Second Century', above n 16, 683, 690-1.

<sup>119</sup> Originalism, it is argued would realign the federal balance. On these points see, eg, Goldsworthy, 'Interpreting the *Constitution* in its Second Century', above n 16, 684; see further, eg, James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245; Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, and the sources referenced therein. See also, eg, Craven, above n 4, 170, 174, 176. These are by no means the only contributions on this point.

*(iii) Flexibility?*

Originalist theory has been criticised elsewhere because it is seen as unable to accommodate changing circumstances.<sup>120</sup> The author submits, respectfully, that these criticisms are not justified. It is convenient to briefly examine four points.

First, moderate originalism recognises the need for changing interpretation.<sup>121</sup> We might turn to the proverbial ‘hard case’. In such cases, hypothetical or real, original meaning does not provide enough answers in order to settle the case. In these instances, the moderate originalist approach recognises that ‘general legal doctrines and principles, public policy, and [notions of] justice...’ serve a legitimate function.<sup>122</sup> All that is required is that when judges are still ‘finding’ meaning<sup>123</sup> they exhaust, and be guided by, the original public meaning before recourse to these additional considerations.<sup>124</sup>

Secondly, the moderate originalist accepts that it is legitimate to overrule a prior case when it is later considered to have been wrongly decided.<sup>125</sup>

Thirdly, the moderate approach recognises that departure from the literal meaning may well be necessary to fulfil original purpose. Professor Goldsworthy argues that ‘courts may stray from the literal meaning of such a provision, without violating the constitution’s amendment procedure, provided they do so only in an incremental fashion necessary to achieve the provision’s *original* purpose.’<sup>126</sup>

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<sup>120</sup> See, as examples and by no means the only ones, Daniel A Farber, ‘The Originalism Debate: A Guide for the Perplexed’ (1989) 49 *Ohio State Law Journal* 1085, 1095; Larry G Simon, ‘The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified’ (1985) 73 *California Law Review* 1482, 1531-5.

<sup>121</sup> As pointed to in the preceding section.

<sup>122</sup> Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 20.

<sup>123</sup> That is, before meaning has been exhausted in the hard case: see, eg, Goldsworthy, ‘Interpreting the Constitution in its Second Century’, above n 16, 681.

<sup>124</sup> Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 21. See also Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 694.

<sup>125</sup> A good example can be taken from the United States of America. In *Plessy v Ferguson* (1896) 195 US 138, the Supreme Court of the United States upheld the constitutionality of state laws requiring segregation in public (Harlan J in dissent). Later, in *Brown v Board of Education* (1954) 347 US 483, the Court, in a *per curiam* decision, overruled the earlier decision declaring that state laws establishing separate public schools were unconstitutional. Though, even this case has been repudiated by some originalists: see, eg, Weis, above n 68, 850 and the sources cited therein.

<sup>126</sup> Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 690 (emphasis added). Goldsworthy gives the example of *United States Constitution* art I s 8, which vests exclusive power in the Congress to raise and maintain ‘Armies’ and ‘Navies’. As Goldsworthy observes, the provision’s original purpose would have been frustrated if courts had denied Congress power to raise and maintain an air force after aircraft were developed. See also, Craven above n 4, 168.

Fourthly, the distinction between 'enactment' and 'application' intentions, discussed in the preceding part,<sup>127</sup> functions to accomplish this necessary constitutional adjustment. An example is illustrative. The original meaning of the external affairs power<sup>128</sup> likely extended to implementing treaties ratified by the government.<sup>129</sup> At the time of federation the few treaties entered into meant this power was very limited. As the number and scope of treaties has increased the power has evolved into one with a far greater ambit. This is despite the fact the interpretation of this aspect of the external affairs power, as a constitutional expression, has (arguably) not changed significantly.<sup>130</sup>

(b) *Methodological Issues for the Originalist*

In this final section, we evaluate some of the objections directed at originalist theory, including in the recent literature.<sup>131</sup> The objections discussed here are primarily directed towards perceived limitations inherent in the use of historical sources. For this reason, this author refers to them as 'methodological'.

(i) *Can Judges 'Do' History?*

That judges are not well equipped to analyse competing historical accounts is not a novel concern.<sup>132</sup> Those who object to originalism on this basis argue that judges are not well trained in historical research and that, therefore, judges necessarily rely on secondary accounts written by historians possessing varying degrees of competency. Professor William Novak, for example, writes that 'if one does not have any previous independent experience with a substantial range of primary sources' it is not possible to know which account is most 'accurate, convincing, and authoritative.'<sup>133</sup>

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<sup>127</sup> Also labeled 'expectation' intentions in the preceding section.

<sup>128</sup> *Commonwealth Constitution* s 51(xxix).

<sup>129</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, cited in Goldsworthy, 'Constitutional Interpretation: Originalism', above n 16, 690.

<sup>130</sup> This distinction is discussed in the preceding part. See further Goldsworthy, 'Constitutional Interpretation: Originalism', above n 16, 690-1. See also, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 216-7, 229 (Stephen J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 640-1 (Latham CJ). Though on this point, obviously and it is trite to suggest otherwise, the external affairs power also provides a useful illustration of how the High Court has expanded the scope of Commonwealth legislative power beyond original meaning.

<sup>131</sup> See, eg, Saul Cornell, 'Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism' (2013) 82 *Fordham Law Review* 721, 722. For a rigorous examination of the perceived problems in the Australian jurisprudence see Helen Irving, 'Constitutional Interpretation, The High Court, and the Discipline of History' (2013) 41 *Federal Law Review* 95. See also Schoff, above n 97. I raise some of these objections in this section because they must be considered when assessing whether originalism continues to be a useful approach.

<sup>132</sup> See, eg, Haywood Jefferson Powell, 'Rules for Originalists' (1987) 73 *Virginia Law Review* 659, 661.

<sup>133</sup> William Novak, 'Constitutional Theology: The Revival of Whig History in American Public Law' (2010) *Michigan State Law Review* 623, 642.



Professor Helen Irving, conversely, argues that these criticisms misidentify the principal ‘problem’ with originalist approaches.<sup>134</sup> Professor Irving argues instead that the primary issue is whether, as a matter of disciplinary legitimacy, ‘judges have the right to apply history in resolving legal disputes’.<sup>135</sup> That is, that the supposed differences between the concerns and inquiries of law and history render the judge unable to undertake the judicial task while at the same time engaging with the historical one. We might ask then, what ‘is’ history in this context? Is the historical task really inimical to judging? We need then to proceed with a closer examination of these arguments.

Professor Irving observes that the task of the judge and the historian differ in a number of respects. The judge is responsible for deciding the legal dispute. She or he must do this based on authority.<sup>136</sup> Judges do not choose the questions to pursue. They cannot answer the questions based on their own historical research or theory. Meanwhile, historical inquiries, dissimilarly, are animated by contemporary and individual concerns. The historian seeks to explain why the past and the present differ. They answer these questions through research and their unique interpretive lenses. History, it has been said, is a ‘sceptical discipline’:<sup>137</sup> ‘[a] range of possible meanings [may have existed at a particular point in history]’.<sup>138</sup> Following, and while it is important to recognise that the existence of alternative historical interpretations does not render every historical account questionable,<sup>139</sup> the reality is that history is an indeterminate field.<sup>140</sup> The use of history as the basis for determining questions of law is at odds, the argument runs, with these realities: judges must provide conclusive resolutions to a dispute and, therefore, a range of ‘historical meanings’ can only help so much. Likewise, history demands time and resources beyond which the judge can devote.<sup>141</sup>

Other arguments have also been raised. For instance, surveys of the decided cases suggest reliance on historical accounts has been largely uncomprehensive.<sup>142</sup>

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<sup>134</sup> Irving acknowledges that judges might well be capable of engaging with ‘history’ stating that ‘[t]here is nothing about being a historian that is beyond the capacity of a judge.’: Irving, ‘Outsourcing’, above n 113, 959.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid* 960, citing Frederic William Maitland, *Why the History of English Law is Not Written* (Cambridge University Press, 1888).

<sup>137</sup> *Ibid* 961: ‘[the historian] must be on the alert for tendentiousness and particularly wary of any historical claims of which politically interested parties, either in the past or the present, have made use.’

<sup>138</sup> See, eg, Cornell, above n 131, 728.

<sup>139</sup> See, eg, Novak, above n 133, 628.

<sup>140</sup> See, eg, Brest, above n 109, 237.

<sup>141</sup> Irving, ‘Outsourcing’, above n 113, 961. For example, disputes must be resolved as expeditiously as possible. Judges cannot devote many years to a historical inquiry before deciding a case.

<sup>142</sup> Not least in the United States, see eg, Martin S Flaherty, ‘History “Lite” in Modern American Constitutionalism’ (1995) 95 *Columbia Law Review* 523; Alfred H Kelly, ‘Clio and the Court: An Illicit Love Affair’ (1965) *Supreme Court Review* 119.

And, judges have on occasion reached flawed historical conclusions.<sup>143</sup> Professor Irving goes further contending that judges effectively outsource judging when they draw on secondary sources to reach interpretive conclusions.<sup>144</sup>

(ii) *Responses*

In this final section, some possible responses to the above are briefly put forward. With regards to suggested 'outsourcing' of the judicial function, it cannot be said — it is submitted — that the originalist judge in effect substitutes herself or himself for the historian. This is so whether reliance is placed on primary or secondary sources. Rather, the historical account merely forms the, or part of the, basis for a decision. To this extent, history is a legitimate interpretive aid. Further, we might observe that Professor Irving's characterisation surely undermines non-originalist approaches as much as it does originalist approaches. It could well be argued that the non-originalist approach 'outsources', at least parts of, the judicial function when reference is made to policy and other such considerations.<sup>145</sup> On a similar note, the non-historical source can be equally hard to engage with as the historical one.

Secondly, even where several competing meanings exist as a matter of historical fact, it is possible to distil those meanings specific enough to aid in the interpretative process. Professor Goldsworthy, for instance, points out that 'it will *always* be possible to rule out at least some other meanings...'<sup>146</sup> In this way, history does help the interpretive caravan travel along its route.

Finally, objectors themselves accept that history can play a useful and legitimate part in constitutional interpretation. For instance, Professor Irving indicates this when warning that 'if judges are to use historical accounts to reach their legal conclusions, they should do so carefully ... They should say why they have chosen particular historians over others and on what basis they have found a particular historical account more persuasive than others'.<sup>147</sup> Given the preceding discussion, this

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<sup>143</sup> Irving, 'Outsourcing', above n 113, 961. See, eg, the opinions in *District of Columbia v. Heller*, 554 US 570 (2008) each robustly 'originalist' in approach but reaching divergent conclusions on the meaning of the Second Amendment. Surely all of the (conflicting) conclusions cannot be 'correct', at least as a matter of historical fact.

<sup>144</sup> *Ibid* 961, 965.

<sup>145</sup> Craven above n 4, 179: '[i]t is true that members of the Court are not trained historians: but an originalist might equally rejoin that they are not trained political scientists or economists either.' See also, Weis, above n 68, 842: '... This suggests that the... cultured and cultivated patricians of the progressive judiciary — our new philosopher kings and enlightened despots — are in truth applying the values which they hold, and which they think the poor simpletons of the vile multitude — the great beast, as Alexander Hamilton called it — ought to hold even though they do not', quoting Heydon, 'Judicial Activism', above n 112, 505, 514. And, Bagaric, above n 17, 201: '... judges, who have no basis for claiming to have any expertise of social policy.' See also, Justice Selway, above n 66, 242.

<sup>146</sup> Goldsworthy, 'Originalism in Constitutional Interpretation', above n 16, 26.

<sup>147</sup> Irving, 'Outsourcing', above n 113, 965. See also, Irving, 'Constitutional Interpretation' above n 131, 126.

author agrees with this point — the fundamental premise here being that the choices made, whether in broad interpretive approach or specific historical source, should be openly articulated along with the reasons for those choices.

(iii) *Objective and Subjective Intentions*

The seminal statement of the High Court in *Cole v Whitfield* permitting and regulating use of the *Convention Debates* has been referred to earlier.<sup>148</sup> The distinction between subjective and objective intentions was made again when outlining what is required by the moderate originalist approach. Despite this, criticisms have been made that this distinction is unworkable, illusory, or even meaningless.<sup>149</sup> Meanwhile, others argue that the distinction is logical, discernible, and rational.<sup>150</sup> For present purposes, it is enough to note that in applying the moderate originalist approach, the primary question is which historical materials may be referred to and which are not permissible.

#### IV CONCLUSION

This paper has advanced two arguments. First, identification and application of all-embracing approaches to constitutional interpretation by Justices – a development advocated by Justice Kirby – would be, on balance, positive. Or alternatively, at least a more open articulation of the reasons why particular interpretive choices are made. And in this regard, greater engagement with these competing approaches. Several examples have been recounted of the at times varying approaches applied.

Secondly, and related to this, the paper has argued that ‘moderate originalism’ provides a satisfactorily comprehensive and coherent method of interpretation. In doing so, we saw that strict literalism alone is deficient as an approach to constitutional interpretation. From this, it was argued that this moderate originalism is the approach most consistent with the way common law courts approach statutory interpretation, and further, which the High Court of Australia has regularly employed in interpreting the *Commonwealth Constitution*.<sup>151</sup> The observed objections, while justified, are not fatal to this moderate originalist approach. Instead, these objections serve as a reasoned warning that interpretation must be approached with care and caution, with the interpretive choices made clearly and openly identified and explained.

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<sup>148</sup> See discussion above.

<sup>149</sup> See especially McCamish, above n 21.

<sup>150</sup> See especially Ekins and Goldsworthy, above n 73.

<sup>151</sup> *Eastman v The Queen* (2000) 203 CLR 1, [140] (McHugh J): ‘Probably, most Australian judges have been in substance what Scalia J of the United States Supreme Court once called himself — a faint-hearted originalist. Speaking of the United States situation, Scalia J said that he was a member of “a small but hardy group of judges and academics . . . [who] believe that the Constitution has a fixed meaning, which does not change: it means today what it meant when it was adopted, nothing more and nothing less”’, citing Antonin Scalia, ‘The Role of a Constitutional Court in a Democratic Society’ (1995) 2 *The Judicial Review* 141, 142.