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

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This paper is separated into two parts. First, the author examines some of the normative considerations for and against judges openly enunciating 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 inconsistent and ad hoc approaches applied when interpreting the Constitution. Second, the author turns to examine some of the alternative methods available in constitutional interpretation. The author argues that a form of ‘moderate originalism’ is the most useful and justified of these approaches. In this respect the author draws on the contributions of various theorists, as well as responding to some recent criticisms made of originalist theory.

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In 2000 Kirby J 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’.\(^1\) In *Eastman v The Queen*, a case decided that same year, his Honour proffered curially the supposed desirability of adopting a single approach to constitutional interpretation ‘lest the inconsistencies… of whichever result produces a desired outcome’ perpetuate.\(^2\) Gummow J and others have disagreed with this view.\(^3\) To date the High Court has not taken heed of Kirby’s advice. Single unifying approaches have not been embraced.

This paper is separated into two parts. First, the author critically examines Kirby’s assertion that judges should adhere to a single, coherent approach to constitutional interpretation - the primary claim. Arguments for and against such a development are evaluated. Ultimately it is argued that the enunciation of, and adherence to, single all-embracing approaches would be a positive development. Second, the author turns to examine some possible alternative interpretive approaches, including the non-originalism that Kirby has advocated - the secondary claim. It is argued that a form of ‘moderate originalism’\(^4\) is the most useful and

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\(^1\) Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 Melbourne University Law Review 1, 8. As our fundamental law the Constitution allocates and regulates government power, as well as affording some rights protections. Therefore, interpretation can have profound consequences. (Mis)interpretation cannot be easily ‘corrected’ through the formal amendment procedures in s 128.

\(^2\) (2000) 203 CLR 1, 79-81


\(^4\) The learned writer 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 in the succeeding pages, however I could not claim that this essay is any way a substitute for Goldsworthy’s prodigious contribution to the field. Other writers have also advocated a similar approach to that put forward by Goldsworthy. See also, e.g., Craven, above n 3; 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 e.g., Richard S Kay ‘Original Intention and Public Meaning in
justified of these alternatives. By ‘moderate originalism’ the author refers to an interpretive approach sitting between strict versions of originalism and versions of non-originalism. This moderate approach does not exclude the use of other interpretive techniques, unlike other 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 new and alternative meanings. The content of this approach is described in greater detail below. The author also examines some perceived methodological issues with the originalist approach – including this moderate originalism. It is submitted that the arguments advanced in this regard, while merited, are not fatal to the approach proposed in this article.

II THE PRIMARY CLAIM: AN ALL-EMBRACING APPROACH

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 inconsistences of an originalist approach here and a contemporary approach there be ascribed to the selection of whichever approach produces a desired outcome.5

What did Kirby J mean by this? Are these criticisms justified? Would the adoption of a single, unified approach to constitutional interpretation be a positive development? In this section the author attempts to provide some possible answers to these question. First, the meaning of Kirby J’s dictum is examined by drawing on his Honour’s extra-curial contributions to this topic. Second, the author provides three examples of the at times, and with respect, varying and ad hoc approaches adopted when resolving constitutional disputes. In this respect, the author suggests that Kirby J’s criticisms are indeed justified. Finally, the author turns to examine arguments for and against the adoption of all-embracing approaches to constitutional interpretation. It is ultimately argued that a satisfactorily comprehensive methodology does now exist, and that the greater coherency engendered by consistent use of this approach, is indeed a good thing. In this respect also, the author agrees with Kirby J.

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5 Eastman v The Queen (2000) 203 CLR 1, 81 [245] (Kirby J) (emphasis in original).
Kirby J’s view

In the context of his Honour’s judgment in Eastman the above quoted passage appears, with respect, almost desultory. In the preceding paragraphs Kirby J briefly recounts the reasons of the majority in Mickelberg v The Queen and the then accepted meaning of ‘appellate jurisdiction’, the meaning of that term being relevant to the question before the Court in Eastman. His Honour then turns to note Deane J’s criticism of the Mickelberg decision along with the cases preceding it. Kirby J then enunciates 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.’ In support of the non-originalist approach that Kirby J is well known as having favoured, his Honour cites the contributions of Andrew Inglis Clark and Deane J, arguing that Clark ‘acknowledged the “living force” of the Constitution which otherwise would be a “silent and lifeless document”’. Kirby J then cites a number of decisions that his Honour suggests support a non-originalist reading. The cases cited include Cheatle v The Queen, which concerned the essential features of a jury trial for the purposes of s 80 of the Constitution; Sue v Hill, which held that the reference to ‘subject or a citizen of a foreign power’ in s 44(i) of the Constitution was applicable to the United Kingdom; and finally Cole v Whitfield, which concerned the meaning of s 92 of the Constitution. The author will return to the decision in Cole later in this article, albeit for a different purpose. With that said, the author wishes to note as an aside that the decisions in Cheatle, Sue v Hill, and Cole can equally be used as examples where the Court has favoured an originalist approach, as Professor Goldsworthy has elsewhere suggested.

Ultimately, it is not clear from Kirby J’s judgment in Eastman whether his Honour is advocating that the Court adopt a single, unified approach to which all
Justices adhere, or whether his Honour is suggesting that each Justice should develop their own approach that they themselves would come to consistently apply in all constitutional cases.

Kirby J’s earlier remarks at the 1999 Sir Anthony Mason Honorary Lecture are instructive in this respect. These comments reveal that, rather than suggesting that the Court enunciate a single method or rule of interpretation to be applied into the future, his Honour instead favours 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.\(^\text{15}\) It is this development that the author now turns to evaluate.

2 Some examples

The primary claim delineated above is comprised of two elements, each requiring some closer consideration. First, what might be termed a positive claim: that is, whether it is in fact the case that Justices have brought varying and ad hoc approaches to constitutional adjudication and interpretation? Second, a normative claim: whether this is a problem.

The author turns first to examine the positive claim. It will be shown that this particular criticism is well grounded. The author briefly recounts three examples. First, the decisions of Mason J – later Mason CJ – with respect to the meaning of s 92 of the Constitution. Second, the interpretation and application of ‘representation’ by Dawson J with respect to s 80 and later with respect to equality of representation in state parliaments. Third, the 2013 decision of the High Court with respect to the meaning of marriage and s 51(xxi). The author notes that these are not the only such examples.\(^\text{16}\)

\(^{15}\) Kirby, above n 1, 8.

\(^{16}\) 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. 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’: 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 Constitution is a living document. All cited by Justice Selway, below n 58. 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 constructing 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 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
(a) **Section 92 and Cole v Whitfield**

Section 92 of the *Constitution* guarantees free movement of goods between the states and territories. In the 1988 decision of *Cole v Whitfield*, the High Court attempted to devise a definitive test of invalidity under s 92. The test, which has been affirmed in a number of subsequent cases, was deduced from an expansive review of the drafting history of the section including, critically, the *Convention Debates*.

This approach marked a clear departure from the settled rule that the *Convention Debates* were not admissible for the purposes of interpreting the text of the *Constitution*. Whereas in *Cole* the Court *per curiam* enunciated a formula that adopted the (limited) use 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

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18 See especially *Castlemaine Tooeys Ltd v South Australia* (1990) 169 CLR 436 and *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.
20 See, e.g., *Strickland v Rocla Pipes Ltd* (1971) 124 CLR 468; *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1, 17 (Barwick CJ); *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, e.g., *Re the Marriage of Cormick; Salmon, Respondent* (1983) 152 CLR 254, 262 (Gibbs CJ, Mason and Wilson JJ) later 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); *Re 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).
nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.\(^{21}\)

As can be seen, the Court in Cole draws a distinction between legitimate and illegitimate uses of historical sources. According to this formula, 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. Second, to identify the subject that a particular provision was directed towards. Third, 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 when examining the moderate originalist approach that this paper advocates. For present purposes, it is only necessary to contrast the per curiam decision in Cole – lead by Mason CJ – from his Honour’s earlier decisions concerning resort to the Convention Debates.

In North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales – a case decided some 13 years before Cole – Mason J (as he then was) 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’.\(^{22}\) Four years later in Permewan Wright Consolidated Pty Ltd v Trewhitt, his Honour cited his earlier judgement in North Eastern Dairy Co and commented 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 recognize that the organized society which s 92 assumes is not the society of 1900 but the Australian community as it evolves and develops from time to time.’\(^{23}\) This dictum is, respectfully, difficult to reconcile with his Honour’s later judgment in Cole.

(b) Dawson J, s 80 and McGinty

Section 80 of the Constitution confers an obligation that trials on indictment for a Commonwealth offence shall be by jury.\(^{24}\) In Cheatle v R\(^{25}\) the Court – constituted of 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 wider

\(^{22}\) (1975) 134 CLR 559, 615.
\(^{23}\) (1979) 145 CLR 1, 35.
\(^{24}\) Cf a ‘right’: Brown v The Queen (1986) 160 CLR 171, 197 (Brennan J), 207 (Deane J), 214-6 (Dawson J).
\(^{25}\) (1993) 177 CLR 541.
community. Significantly, the Court held that elements of this concept varied according to ‘contemporary standards and perceptions’. On this basis the Court held that a constant element of this feature is the random or impartial selection of jurors.\(^{26}\)

The per curiam judgment of the Court in Cheatle – of which Dawson J was a member – is to be contrasted with, for example, his Honour’s judgment in the case of McGinty v Western Australia.\(^{27}\) 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 comprising Brennan CJ, Dawson, McHugh and Gummow JJ rejected these arguments. Dawson J’s judgment in McGinty is cast in what might be described as ‘originalist’ terms, that is, as giving primacy to the meaning and intentions ascribed to the words of the text at the time of enactment: ‘[T]he 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’.\(^{28}\) His Honour then cites with approval the decision of Barwick CJ in McKinlay v The Commonwealth (1975) 135 CLR 1 when 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.’\(^{29}\) 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.’\(^{30}\) On this basis inter alia Dawson J joined with the majority in rejecting the challenge.

Without intending to reflect on the merits or otherwise of these decisions, the author wishes to respectfully note the apparent incongruity between Dawson J’s judgment in McGinty as compared to Cheatle. The author also appreciates the different subject matter (and different language) falling for consideration in each case: Cheatle concerned the meaning of an express conferral of an obligation by the Commonwealth Constitution; and McGinty, a challenge to electoral laws based on implications drawn from constitutional texts. Nonetheless, Cheatle evidences a willingness on the part of his Honour to construe a text in light of contemporary meaning and standards, even where that interpretation is antithetical to the understood

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\(^{26}\) Cheatle v R (1993) 177 CLR 541, 560 (emphasis added).

\(^{27}\) (1996) 186 CLR 140.

\(^{28}\) McGinty v Western Australia (1996) 186 CLR 140, 183 (emphasis added).

\(^{29}\) Ibid, 185 (emphasis added).

\(^{30}\) Ibid 186.
meaning at the time of enactment: ‘some aspects of trial by jury, as it existed in the Australian Colonies, at the time of Federation, are inconsistent with both the contemporary institution, and generally accepted standards of modern democratic society.’\(^{32}\) Critically, his Honour arrived at this conclusion in *Cheatle*, even where the implication is 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’\(^{32}\).

(c) **The marriage power and same-sex marriage**

The final example is a more recent iteration. In *Commonwealth v Australian Capital Territory*\(^{33}\) the Court held *per curiam* that the whole of the *Marriage Equality (Same Sex) Act 2013* (ACT) was inconsistent with the *Marriage Act 1961* (Cth) and was therefore of no effect. As Professor Anne Twomey has noted, the judgment was ‘surprising’\(^{34}\) in a number of respects. This is despite the Court reaching what might be considered the conventional *conclusion*. The reasoning was, Professor Twomey considers, unconventional in two respects. First, although not strictly necessary to do so,\(^{35}\) the Court chose to consider the scope of the marriage power contained in s 51(xxi) of the *Constitution*. Second, and relevantly for present purposes, the approach taken in construing the head of power was incongruous to the conventional interpretive approaches 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 contemporary meaning.\(^{36}\) Instead the Court resolved to interpret the power as a “‘topic of juristic classification’” and interpreted 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”’.\(^{37}\) That is, the scope of the marriage power is to be interpreted by reference to the laws of other countries and 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’\(^{38}\).

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31 *Cheatle v R* (1993) 177 CLR 541, 560 (emphasis added and footnotes omitted).
32 *McGinty v Western Australia* (1996) 186 CLR 140, 186.
33 (2013) 250 CLR 441.
35 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.
36 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 455.
38 Ibid.
As Professor Twomey has noted, construing 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.’\(^39\) Perhaps the Court felt that this approach was open – or even to be preferred – as it had been earlier adopted by Windeyer J in his Honour’s dissenting judgment in *Attorney-General (Vic) v The Commonwealth*.\(^40\) In this respect, the author notes also the sporadic application of this approach in earlier cases. For example, in *The Grain Pool of Western Australia v The Commonwealth*\(^41\) 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’.\(^42\) 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 an even more tenuous footing.

As this paper and others have explained, construction of meaning in light of historical context and usage is an established canon of construction. Similarly, attributing present day meaning as that meaning is 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.’\(^43\)

Again, the author is not intending to comment on the normative attraction or otherwise of the approach taken by the Court in this case, or to make comment on the merits of the decision itself. Rather, this exposition is included as the last of three examples proffered to illustrate Kirby J’s observations.

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\(^39\) Twomey, above n 34, 615.
\(^40\) 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: above n 34, 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, the author argues, with respect, 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.

\(^41\) (2000) 202 CLR 479.

\(^42\) Ibid.

\(^43\) Ibid.
3 Arguments For and Against

The late Justice Selway, writing extra-curially in 2003, suggested that over the High Court’s recent history only Kirby and McHugh JJ have sought to articulate and at least attempted to consistently apply their own identified approaches to constitutional adjudication.\footnote{Justice Selway, below n 58, 244 and that paper generally. Justice Selway cites as an example of the possible failing of 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 respect to the other Justices see by way of example Sir Anthony Mason, ‘Constitutional Interpretation: Some Thoughts’ (1998) 20 Adelaide Law Review 49, 49.} The paper now turns to consider normative arguments for and against all members of the Court following that path.

(a) The Kirby view

Kirby advances a number of propositions when extolling the virtues of Justices adopting single, all-embracing approaches to constitutional disputes. His Honour first stresses the importance of constitutional adjudication in the wider context of the work undertaken by the High Court. This, his Honour contends, carries with it an obligation ‘to do more than to stumble about looking for a solution to the particular case.’\footnote{Kirby, above n 1, 8.} With 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 only such a development will ‘afford a steady guide to a consistent approach to the task. In the absence of a theory, inconsistency will proliferate.’\footnote{Ibid.} 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.’\footnote{Ibid.} From these passages it is possible to identify two primary reasons favouring the adoption of a single, coherent approach. First, such a development would ensure a degree of consistency that in turn engenders certainty. Second, it is argued that this consistency and certainty will enhance institutional integrity and public confidence in the judicial process.

Kirby is not alone in these respects. 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.’\footnote{Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretive Disagreement’ (2005) 27 Sydney Law Review 29, 41.} With specific reference to the implied freedom of political communication, Stone argues that controversy among members...
of the High Court as to the existence, and later the application, of the implied freedom has inspired controversy and doubt. A comparison can be drawn between these controversies – specifically disagreement between judges – and the ad hoc or inconsistent approaches adopted by various members of the Court that Kirby identifies. This author would argue that the same vulnerabilities identified by Professor Stone are equally applicable to the latter. A similar comparison can be drawn with concerns expressed by McHugh J in Theophanous v The Herald & Weekly Times: ‘[i]f this Court is to retain the confidence 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…’. This dicta can be separated into two discreet elements: first, his Honour puts forward his preferred approach to constitutional interpretation, albeit in very broad and general terms. Second, his Honour suggests that failure to adhere to this approach risks undermining the integrity of, and confidence in, the Court.

Putting aside the supposed merits of the particular approach advocated by McHugh J, the basis claim accords with the concerns expressed by Kirby that have been outlined above.

(b) Gummow J and others

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.

This strong dictum, appearing in the judgment of Gummow J in SGH Ltd, was recently cited with approval per curiam in the previously cited Commonwealth v Australian Capital Territory. Underpinning Gummow J’s view was 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

49 With respect to doubt as to the implication itself see 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 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; despite unanimous affirmation of the implied right by the High Court in Lange its existence is not beyond question: see, e.g., Lenah Game Meats v Australian Broadcasting Corporation (2001) 208 CLR 199, 331 (Callinan J).
51 SGH Ltd v Commissioner of Taxation (2002) 210 CLR 51, 75 (Gummow J).
Commonwealth’.

In his 2007 Sir Maurice Byers Lecture, Justice Heydon expressed agreement with Gummow J on this point. Doubtlessly others have, too.

Other arguments against what this author has termed the ‘Kirby view’ can also be made. Identifying a particular Justice as ‘originalist’ or ‘progressive’, or any other label, invites a species of partisanship that has not previously manifested in the High Court of Australia, at least relative to in other jurisdictions. Speaking in 2009, Chief Justice French (as he then was) alluded to this phenomenon: ‘Changes 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 with the selection process for Supreme Court judges in the United States’.

The implication of his Honour’s remarks was that such a development is undesirable. To that extent this author agrees.

As outlined above, one of the primary arguments advanced favouring the adoption of single, all-embracing theories of interpretation is the integrity and confidence that doing so would yield. Conversely, others have argued – consistent with the aforementioned views of Gummow J – that the very nature of the constitutional text and the multifarious issues that arise from time to time necessitates a degree of flexibility. Critically, 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 yet developed has been subject to criticism. For this reason, along with the other considerations outlined above, the argument can be persuasively put that rigid adherence to a single approach – and the attendant outcomes that would result from this – would undermine institutional integrity and confidence. And therefore, adherence to one approach would at this time not be a positive development.

(c) An approach meriting all-embracing application

The ‘flexible’ approach that has been adopted by most Justices of the High Court is vulnerable to criticism. That much is self-evident from the preceding discussion. The critical issue, as this author sees it, is one of degree: some degree of

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56 Since at least the Gleeson court, Justice Selway has identified only McHugh J and Kirby J as attempting to enunciate and consistently apply a single approach to interpretation: see, Justice Selway, below n 58.
flexibility is needed to avoid plainly absurd or unworkable outcomes;\(^{57}\) however a level of adherence to a particular method promotes consistency, certainty, and openness. Perhaps critical to the preceding discussion, as Justice Selway has identified, is that no single approach has yet been developed that is comprehensive and cohesive enough to satisfactorily accommodate the competing values and demands placed on the custodians of our constitutional text. For the remainder of this paper the author advocates for a theory of interpretation labelled ‘moderate originalism’. For reasons outlined below, it is argued that this approach can satisfactorily accommodate the flexibility that many have identified as critical in constitutional adjudication – not least Gummow J. With this said, the approach also anchors meaning in a way that provides a degree of certainty and consistency, and accords to the other important principles in constitutional jurisprudence. To this extent, the author argues that ‘moderate originalism’ is an approach meriting all-embracing application.

### III The Secondary Claim: Non-Originalism and Alternative Methods

This section begins by introducing three broad ideas: literalism, originalism, and non-originalism.\(^{58}\) It then turns to examine in greater detail the approach identified in this paper as ‘moderate originalism’.

In simplest terms, originalists argue that meaning should be anchored in ‘ascertainable facts of the intentions of the drafters…’.\(^{59}\) Or, put another way, that constitutions mean what they originally meant unless subsequently amended.\(^{60}\) This broad idea is to be contrasted to non-originalism. Non-originalist approaches are

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\(^{57}\) Some might include ‘undesirable’, however that word trespasses very close into a territory many jurists would hasten not to enter.\(^{58}\) 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 have elsewhere been labelled under different names. The author does not contend that these three general terms encompass the broad gamut of interpretive approaches from time to time employed in the High Court. The author does not attempt to cover the entire gamut of interpretive theories. Rather, the author intends to use these terms as a framework to scrutinize to introduce and analyse certain concepts before 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 3, 167-8; Justice Michael McHugh, ‘The Constitutional Jurisprudence of the High Court: 1989-2004’ (2008) 30 Sydney Law Review 5; Justice J B Heydon, ‘Theories of Constitutional Interpretation: A Taxonomy’ (Speech delivered at the Sir Maurice Byers Lecture, New South Wales Bar Association, 3 May 2007).\(^{59}\) Kirby, above n 1, 11; see also, Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 685.\(^{60}\) 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, Lael K Weis, ‘What Comparativism Tells Us About Originalism’ (2013) 11 International Journal of Constitutional Law 842, 845-8.
underscored by the conception that a constitution is a ‘living tree which continues to grow and to provide shelter in new circumstances...’ That is, a constitution should be interpreted in light of contemporary meaning, needs, and expectations.

A Questions

For presently relevant purposes, two questions must be answered: firstly, 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?

B Application

1 Literalism

The author argues that strict or bare literalism alone is deficient as a method of constitutional interpretation. The arguments supporting this proposition are straightforward. It is self-evident that the literal and intended meaning of communication can be different. Critically in the context of legal disputes, giving effect to the intentions of the lawmaker has been – and is still – recognised as central to the interpretive process. 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.’ This maxim has been described as ‘the only rule’, ‘the paramount rule’, ‘the cardinal rule’, and ‘the fundamental rule of interpretation, to which all others are subordinate’. 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’. More recently in Wilson v Anderson Gleeson CJ put it: ‘… the object of a

61 Kirby, above n 1, 11.
62 See, e.g., Re Wakim; Ex parte McNally (1999) 198 CLR 511, 600 (Kirby J).
63 Again, a number of other questions might be asked, however these two questions provide a useful framework through which to analyse the issues for the relevant purposes of this paper. Academic and judicial commentary in this field proliferates. For a more detailed discussion of these and other issues in constitutional interpretation, see e.g., Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16; Goldsworthy, ‘Interpreting the Constitution in its Second Century’, above n 16.
67 Sussex Peerage Case (1844) 8 ER 1034, 1057 (Tindall CJ).
68 Attorney-General (Canada) v Hallet & Carey Ltd [1952] AC 427 (Lord Diplock).
70 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 161 (Higgins J).
court is to ascertain, and give effect to, the will of Parliament. 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 law. Therefore, the first question is answered in the negative – meaning should not, or perhaps cannot, be determined from the words of the text alone.

2 ‘Collective Legislative Intention’

Before turning to a more detailed comparison between originalist and non-originalist theory it is necessary to dispense with doubts expressed from time to time regarding the existence and identification of ‘legislative intention’. It is necessary to deal with these doubts here because legislative intention is a critical part of the ‘moderate originalism’ advocated 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. Ekins and Goldsworthy argue – in that paper and elsewhere – that identifying and giving effect to these intentions should be the primary object of statutory (and the author suggests constitutional) interpretation.

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, 141-2 (Knox CJ, Isaacs, Rich, and Starke JJ). Other 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. Some examples include, Melbourne Corporation v Commonwealth (1947) 74 CLR 31 and Parton v Milk Board (Vic) (1949) 80 CLR 229. See further, Craven above n 3, 171-3, 175; Weis, above n 60. 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 20, 639.


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 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…

Ultimately, these intentions are not ‘fictitious’ 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. In that sense this concept is a discernible, static product of legislative action. It is a concept equally available and applicable in interpreting a constitution.

3  **Originalism and non-originalism**

Given then that judges should look beyond the words of the constitutional text it is necessary to ask what sources should be considered? Are these considerations to be only historical ones, or is interpretation ‘cut wholly adrift from historical context’?

(a)  **Moderate Originalism**

The balance of this paper advocates a ‘moderate’ form of originalism. This approach is superior to ‘orthodox’ or strict versions of originalism in a number of respects.

First, the moderate approach requires meaning be derived from the founders’ publicly known intentions as opposed to subjective intention. As argued above, the **Constitution** must be understood in the context of the purposes for which it was enacted. With this said, law can only provide a useful and fair framework of social rules if its meaning is publicly known, or least readily ascertainable. Similarly,

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77 Ekins and Goldsworthy, above n 65, 67.
78 Ibid.
79 A phrase borrowed from Kirk, above n 4, 364.
80 Originalism can and has taken multiple forms. As previously warned the purpose of this paper is not to examine in great detail the many approaches that originalist theory has taken. 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.
81 Along with the other sources cited, see Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 8-20.
82 See ‘literalism’ above.
imposing penalties for breaches of unknowable law is clearly unjust.83 Therefore, the interpretation of a legal term should 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 necessary to draw meaning. However, interpretation cannot depend on the unknown subjective intentions that stricter forms of originalism recognise.84 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. 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.’85 This obiter sits comfortably within the framework enunciated by the Court in Cole v Whitfield,86 that framework having been considered earlier in this paper. In this respect, the moderate approach advocated for in this paper lies between stricter forms of originalism that hold meaning must be anchored in subjective intention, and non-originalism which holds interpretation is cut adrift from original meaning. The author notes at this point some, what might be termed, ‘methodological’ issues in applying this distinction.87 These issues are discussed in Part III.

Second, only the founders’ ‘enactment intentions’ are relevant. A distinction is to be made between intentions concerning what provisions were anticipated to mean and ‘expectation’ or ‘application’ intentions, which concern the intended interpretation and application to a particular controversy.88 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’.89 Kay expressed


85 (2009) 238 CLR 1, 148 (emphasis added).


87 See, e.g., McCamish, above n 20.


the distinction as: ‘intentions about the extent 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.’

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: lawmakers (in this instance the constitutional framers) make law, while the judicial branch applies it. Admitting ‘application intention’ as a guide to interpretation clearly 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.

Finally, and as further discussed below, judicial creativity has a legitimate role to play in moderate originalism. It is argued that stricter forms of originalism leave insufficient scope for flexible interpretation.

Justice Kirby has suggested the High Court ‘has, for a long time, turned its back on originalism’. At the outset the author submits that this is, with respect, not supported by the decided cases. The arguments favouring moderate originalism over non-originalism will now be examined.

(i) Dead Hand of the Past?

Non-originallists argue ‘[o]ur Constitution belongs to the 21st century, not the 19th’ and that it should be read accordingly. The author, with respect, refutes this proposition. Firstly, this is an argument – when taken to its logical extreme – against

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91 See, e.g., 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.’
92 Kirby, above n 1, 1.
94 Kirby, above n 1, 14.
having a constitution altogether.\textsuperscript{95} Constitutions empower by providing an established and accepted framework through which binding laws are made. Corollary to this is that constitutions restrict decisions and decision-making. It is the essence of law that decisions today are regulated by norms and rules laid down previously. 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 changed in order to ‘discover’ and establish new rules. Non-originality, the author argues, seeks to evade these restrictions. 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’.\textsuperscript{96} The originalist might well ask the non-originalist, if the Constitution should change with new interpretation, why enact one in the first place? Secondly, the author notes that the Constitution can be altered by popular referendum through s 128. Therefore, the author argues that we are not bound by the ‘dead hand’ of the past in any invidious sense as proponents of non-originalism seek to suggest.

Bagaric suggests 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’. 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’.\textsuperscript{97} Given the incalculable nature of these considerations it is in reality impossible to quantify which of these approaches – non-originalism or some form of originalism – can yield greater utility. Therefore, ‘subordinate principles’ must be evaluated.

(ii) Subordinate principles

The author argues that an originalist approach – whether strict or moderate – better respects the source of legal authority of the Constitution.\textsuperscript{98} Non-originalists argue that the legal authority of the Constitution stems from acceptance by the people

\textsuperscript{95} See, e.g., Bagaric, above n 16, 179. See also, e.g., 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.

\textsuperscript{96} Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 27.

\textsuperscript{97} Bagaric, above n 16, 180.

\textsuperscript{98} 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, e.g., 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’.
living today.\(^99\) Corollary to this is that constitutional interpretation should primarily be directed to contemporary understanding, needs, expectations, and so on. This author argues, respectfully, that this is to misidentify the legal authority underlying constitutional instruments. Instead the author argues that the continued source of legal authority derives from the community’s continued abidance to, what can best be described as, the rule of law. By this the author means: one, we accept that validly made law binds us 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 Constitution is such a valid law. From this it follows that the Constitution cannot be changed except through the mandated amendment process (being s 128). This is the source of continued legal authority of the Constitution. The author argues that originalism better respects this fact. As Goldsworthy argues: the ‘prescribed amending procedure should not be evaded by lawyers and judges disguising substantive constitutional change as interpretation.’\(^100\) While the non-originalist might respond that changing the meaning of words is not to amend the Constitution this is, with respect, begging the question. To change the meaning of law is to change the law.\(^101\) Using interpretation to achieve this change circumvents the constitutionally-prescribed amendment procedure and, in so doing, subverts the rule of law.\(^102\) The late Justice 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 taken them away.’\(^103\) While our own constitution and that of the United States differ in a number of respects, not least with respect to substantive rights protections, this underlying principle is common to both. Justice Scalia went on: ‘By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.’\(^104\)

Similarly, originalism – again, whether in a stricter or moderate form – better respects the principles of democracy and federalism. The Constitution shares power


\(^{100}\) Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 688.


\(^{103}\) Scalia, A Matter of Interpretation, above n 88, 40. See also, Bagarich, above n 16, 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, Helen Irving, ‘Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning (2015) 84 Fordham Law Review 957, 965-6.

\(^{104}\) Scalia, A Matter of Interpretation, above n 88, 47.
and responsibility between the Commonwealth and the states. 105 Constitutional amendment requires consent by electors with special majority requirements. These special requirements were designed to protect state interests. 106 In this sense, and as alluded to above, a constitution empowers as well as restricts future generations. 107 Judges effecting constitutional change through new interpretations risk usurping these foundation principles. 108 This is illustrated by the fact successive reinterpretation by the High Court has, it is argued by this author and others, centralised legislative and executive power. This has taken place despite being anathema to the federal compact envisioned at federation. 109 This has taken place without engagement of s 128.

Finally, non-originalist interpretation arguably involves judges making law and hence exceeding their power within the separation of powers. As Justice Scalia writing extra-curially put it: ‘the main danger in judicial interpretation of the Constitution… is that judges will mistake their own predilections for the law’. 110

(iii) Flexibility?

Originalist approaches have been criticised as unable to accommodate the changing circumstances of the times. 111 The author submits, with respect, that these arguments are mislaid.

105 It has been recognised judicially that the founders envisaged a federal structure far more ‘state-centric’ than the one that has developed since federation. See, e.g., Commonwealth v Tasmania (1983) 158 CLR 1, 126 (Mason J).

106 See s 128 of the Commonwealth Constitution and the commentary.

107 See, e.g., Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy (1995, University of Chicago Press) 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 e.g., 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, see e.g., Victoria v Commonwealth (1971) 122 CLR 353, 396 (Windeyer J).


109 Justice Antonin Scalia, ‘Originalism: the Lesser Evil’ (1989) 57 Cincinnati Law Review 849, 863. Non-originalists have responded that discovering the framers’ intentions leaves sufficient scope for a judge to adopt their own values and, in that sense, originalism achieves little more than other methods of interpretation, see e.g., Brest, above n 99, 280-1. A discussion regarding whether judges do or should ‘make law’ is beyond the scope of this paper, save to say that where a statutory or constitutional scheme exists, the author would argue that the primary function is to give effect to that law—not supplant it.

Firstly, moderate originalism recognises the need for creative interpretation. In hard cases original meaning does not provide enough answers in order to settle the question at hand. In these instances ‘general legal doctrines and principles, public policy, and [notions of] justice’ serve a legitimate function. All that is required is that when judges are still ‘finding’ meaning that they exhaust, and be guided by, the original public meaning before recourse to these other considerations.

Secondly, flexible interpretation is supported by the principle of stare decisis. That is, moderate originalism accepts that it is legitimate to overturn a prior decision when a decision is considered to have been wrong.

Thirdly, the moderate approach recognises that departure from literal meaning may be necessary in order to fulfil original purpose. 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.’

Fourthly, the distinction between ‘enactment’ and ‘application’ intentions that has been discussed in the preceding part – that is, application of original intentions can allow for flexibility without changing meaning. For example, the original meaning of the external affairs power likely extended to implementing treaties ratified by the government. At the time of federation the few treaties entered into meant this power was limited. As the number and scope of treaties has increased the power has evolved into one with a greater ambit and impact. This is despite the fact

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112 As pointed to in the preceding section.
114 That is, before meaning has been exhausted in the hard case. See, e.g., Goldsworthy, ‘Interpreting the Constitution in its Second Century’, above n 16, 681.
116 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 for white and black students were unconstitutional. Though even this case has been repudiated by some originalists: see, e.g., Weis, above n 60, 850 and the sources cited therein.
117 Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 690 (emphasis added). Goldsworthy uses 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 rightfully notes, 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 3, 168.
118 Also labeled ‘expectation’ intentions in the preceding section.
119 Commonwealth Constitution s 51(xxix).
the interpretation of the power, as a constitutional expression, has (arguably) not significantly changed – at least in respect of presently relevant purposes.  

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(b) Methodological Issues for the Originalist

In this final section some of the objections pointed at the originalist theory are evaluated. \[\text{122}\] The objections discussed here are primarily directed towards 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. \[\text{123}\] Objectors argue judges are not well trained in historical research and that therefore, they must rely on secondary accounts written by historians possessing varying degrees of competency. 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.’ \[\text{124}\]

Helen Irving argues that these criticisms misidentify the chief ‘problem’ with the originalist approach. \[\text{125}\] Irving argues instead that the principal issue is whether, as a matter of ‘disciplinary legitimacy’, ‘judges have the right to apply history in resolving legal disputes’. \[\text{126}\] Irving’s argument, simply put, is that the judge acting as a historian ceases to be a judge. Or put another way, the supposed differences between the concerns and inquiries of law and history render the judge unable to fulfil the judicial

\[\text{121}\] 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, the external affairs power also provides a useful illustration of how the High Court has, arguably, expanded the scope of Commonwealth powers beyond its original meaning, see e.g., Commonwealth v Tasmania (1983) 158 CLR 1 and the related commentary.

\[\text{122}\] See, e.g., Saul ak, ‘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 89. I raise some of these objections in this section because they must be considered when assessing whether originalism continues to be a useful approach.


\[\text{125}\] 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 103, 959.

\[\text{126}\] Ibid.
task while at the same time engaging with the historical one. What then ‘is’ history? Is the historical task really inimical to judging?

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 relevant, correct and, current authority. Judges do not choose the questions to pursue. They cannot, Irving argues, answer the questions based on their own historical research or theory. 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 unique interpretive lenses. History, it has been said, is a ‘sceptical discipline’: a ‘range of possible meanings’ may have existed at a particular point in history. While it is important to recognise that the existence of alternative historical interpretations does not render every historical account questionable, the reality is that history is an indeterminate field. The use of history as the basis for determining questions of law is at odds, it is argued, with these realities – judges must provide conclusive resolutions to a dispute; a range of ‘historical meanings’ can only help so much. Likewise, history demands time and resources beyond which the judge can devote.

Other issues have also been raised. For instance, surveys of the decided cases suggest reliance on historical accounts has largely been incomprehensive and judges have on occasion reached flawed historical conclusions. Irving goes further contending that judges effectively outsource judging when they draw on secondary sources to reach interpretive conclusions.

(ii) Responses

There are not sufficient words here to deal comprehensively with every argument. Instead some possible rebuttals are briefly put forward.

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128 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.’
129 Cornell, above n 122, 728.
130 See, e.g., Novak, above n 124, 628.
131 See, e.g., Brest, above n 99, 237.
132 Irving, ‘Outsourcing’, above n 103, 961. For example, disputes must be resolved as expeditiously as possible. Judges cannot devote many years to a historical inquiry before deciding a case.
135 Ibid 961, 965.
Respectfully, it is argued that Irving’s ‘outsourcing’ argument is misdirected. Whether reliance is placed on primary or secondary sources, an originalist judge does not substitute himself or herself for the historian. Rather, the historical account merely forms part of the reasons behind a decision. Further, this characterisation undermines non-originalist interpretation as much as it does originalist approaches. It could well be rejoined that the activist judge ‘outsources’ at least parts of their function when reference is made to ‘policy’ and other considerations.\(^{136}\) Similarly, non-historical sources can be equally hard to engage with as historical ones.

Secondly, even where alternative meanings exist, it is possible to distil meaning specific enough to aid interpretation. Goldsworthy, for instance, points out that ‘it will always be possible to rule out at least some other meanings...’\(^{137}\) In this way, history does help the interpretive caravan travel along the road of ascribing meaning.

Finally, objectors themselves accept that history can play a useful and legitimate part in constitutional interpretation. Irving herself concedes as much 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.’\(^{138}\) Given the preceding discussion this author agrees.

\(\text{(iii) Objective and Subjective Intentions}\)

The seminal statement of the High Court in \textit{Cole v Whitfield} permitting and regulating use of the \textit{Convention Debates} has been referred to earlier in this article. The distinction between subjective and objective intentions was made again when outlining what is required by the moderate originalist approach that this author favours. Despite this, criticisms have been made that this distinction is unworkable, illusory, or even meaningless.\(^{139}\) Others have argued that the distinction is a logical, discernible, and rational delineation of legitimate and illegitimate interpretive aids.\(^{140}\) For current purposes it is enough to note that in applying the moderate originalist

\(^{136}\) Craven above n 3, 179: ‘It 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 60, 842: ‘... This suggests that the... cultured and cultivated patricians of the progressive judiciary- our new philosopher kings ad 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 102, 505, 514; Bagaric, above n 16, 201: ‘... judges, who have no basis for claiming to have any expertise of social policy.’ See also, Justice Selway, above n 58, 242.


\(^{138}\) Irving, ‘Outsourcing’, above n 103, 965. See also, Irving, ‘Constitutional Interpretation’ above n 122, 126.

\(^{139}\) See especially McCamish, above n 20.

\(^{140}\) See especially Ekins and Goldsworthy, above n 65.
IV CONCLUSION

This paper has advanced two primary ideas.

First, that the identification and application of all-embracing approaches to constitutional interpretation by Justices – a development previously advocated by Justice Kirby – would be, on balance, positive. Related to this, a number of examples have been recounted of the at times varying and ad hoc application of the numerous interpretive approaches by various Justices.

Second, and related to this, the paper has argued that ‘moderate originalism’ provides a satisfactorily comprehensive and coherent method of interpretation to be applied in matters arising for constitutional adjudication. In doing so, it was argued that strict literalism alone is deficient as an all-embracing method of constitutional interpretation. From this, it was then argued that this moderate originalism is the approach most consistent with the way common law courts approach statutory interpretation and which the courts, including the High Court, have regularly employed in interpreting the Constitution. This approach is also normatively persuasive, engendering consistency, along with better respecting democracy, the rule of law, and the functional purpose of the Constitution. Originalism also limits opportunity for activist interpretation in evasion s 128. With all this said, sufficient scope is left for flexible interpretation and the development of constitutional expressions where the evolution of meaning is necessary in light of changed circumstances. The observed objections, while merited, are not insurmountable. Instead they serve as a reasonable warning that interpretation must be approached with care and caution, and the interpretive choices made clearly and openly identified and explained.

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141 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.