Originalism: Why Some Things Should Never Change - Or at Least Not Too Quickly

MIRKO BAGARIC*

Originalism is the theory that the constitution should be interpreted to give effect to the framers' intentions.[1] The originalism debate has generated a mountain of literature in the United States over the past few decades - in the process inciting an enormous amount of passion. Originalists have labeled alternative methods of constitutional interpretation as 'heresy',[2] while their opponents have claimed that originalism should be stored away 'with phlogistonism and bogeyman'.[3] Many have been prepared to firmly dismiss originalism: 'within the scholarly community originalism is in disrepute and ... anyone seeking to defend the theory must do so with trepidation'.[4]

Until recently, the originalism issue remained virtually dormant in Australia. However, since the High Court ended its self imposed ban on referring to the Convention Debates[5] about a decade ago,[6] the

* BA, LLB (Hons), LLM, PhD (Monash), Senior Lecturer, Faculty of Law, Monash University.

1 There are broadly two forms of originalism: strict originalism and moderate originalism. The differences between the theories are discussed below. When the originalist methodology is applied in the context of normal statutes, it has been labelled intentionalism: see D Lyons, 'Original Intent and Legal Interpretation' (1999) 24 *Australian Journal of Legal Philosophy* 1.

2 R Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 159.

3 R Dworkin, 'Bork's Jurisprudence' (1990) 57 *The University of Chicago Law Review* 657, 674.

4 E Maltz, 'The Appeal of Originalism' (1987) 4 *Utah Law Review* 773. For an overview of the state of the debate in the context of the United States Constitution, where it is perceived that non-originalists have the upper hand, see J Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 21-25.

5 A complete record of the Convention Debates has always been available. More recently a fully indexed version has been published: G Graven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986, 6 vols).

6 The High Court has always, theoretically, been free to use any extrinsic aids it wished to assist it in interpreting the Constitution: see H Burmester, 'The Convention Debates and the Interpretation of the Constitution' in ibid 25, 26. However, in *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 108, the High Court imposed a ban which lasted until *Cole v Whitfield* (1988) 165 CLR 360. The curious feature of the Court's resolve not to use the Convention Debates is that when it found history relevant it had no hesitation in referring to Quick and

landscape has quickly changed,[7] and for good reason. Although, the Australian Constitution[8] does not contain a bill of rights,[9] given that the originalism debate concerns the meaning that should be attributed to the nation's most important legal document, the outcome of the debate has potentially enormous political and social consequences.

There have been two broad criticisms of originalism. First, at the theoretical level, it has been argued that originalism involves 'being ruled by the dead hand of the past rather than the living present',[10] and amounts to ancestor worship. This has proved the most damaging criticism of the doctrine - perhaps due to its emotive overtones. Secondly, it has been claimed that originalism is pragmatically untenable because the concept at its core - the framers' intent - is either unintelligible or unascertainable.

Michael Kirby labels the opposing approach to originalism as the 'living force'[11] interpretive method and neatly encapsulates the tension between the methodologies:

> [One view is] that a constitution is anti-evolutionary. The other is that it must be evolutionary. The one that it is necessary to anchor a constitutional text and its meaning in the ascertainable fact of the intentions of the drafters in an earlier century. The other, that this involves a primi-

Garran (*The Annotated Constitution of the Australian Commonwealth* (1901)), which in effect summarises the intentions of the drafters. Not surprisingly, this approach has been persuasively criticised: if history is relevant it 'should be as complete as practicable, not the kind of half hearted history which the Court has indulged in over the years': M Coper, 'The Place of History in Constitutional Interpretation' in G Craven (ed), ibid 1015. See also *R v Pearson; Ex parte Sipka* (1983) 45 ALR 1, 14-15 (Murphy J).

7 For example, see G Craven, 'Original Intent and the Australian Constitution - Coming Soon to a Court near You? (1990) 1 *Public Law Review* 166; D Tucker, 'Textualism: An Australian Evaluation of the Debate between Professor Ronald Dworkin and Justice Antonin Scalia' (1999) 21 *Sydney Law Review* 567; S Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133; J Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, M Kirby, 'Constitutional Interpretation and Original Intent: A form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1; J Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323; 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211.

8 Henceforth, referred to as the Constitution.

9 Hence, it may be argued that the debate in Australia will never be as ferocious as that in the United States: see Craven, above n 7, 166.

10 D Farber, 'The Originalism Debate: A Guide for the Perplexed' (1989) 49 *Ohio State Law Journal* 1085.

11 Kirby, above n 7, 11.

> tive form of ancestor worship, inappropriate to constitutional interpretation in a modern state. The one believing that legitimacy can be found, and found only, in legal history. The other believing that a constitution is a living tree which continues to grow and to provide shelter in new circumstances to the people living under its protection.[12]

An often-unstated premise in the originalism debate is that the words of the Constitution are often unclear or ambiguous and that, therefore, there is a need for an interpretative methodology that transcends mere literalism. The enormous amount of constitutional litigation over the past century appears to confirm this proposition and it is one that I assume is correct.[13]

The purpose of this paper is to argue that neither of the main criticisms of originalism are insurmountable and that ultimately originalism is the most justifiable method of constitutional interpretation. Before dealing with these issues, first an overview of the status of the doctrine in contemporary constitutional interpretation.

Overview of the High Court's Approach to Originalism

Originalism has received a mixed reception by the High Court. Given that the focus of this paper is on evaluating the persuasiveness of originalism, as opposed to analysing its current level of endorsement, a detailed descriptive analysis of the High Court's approach to originalism would be unhelpful. In any event, Jeffrey Goldsworthy has already comprehensively and systematically undertaken such an analysis.[14] However, a brief overview of the High Court's approach provides an appropriate backdrop to the discussion and sheds some light on the central issues in the debate.

Eastman v The Queen[15] is the most recent decision in which some members of the High Court considered the originalism doctrine. In *Eastman*, the most extensive discussion of originalism was by Kirby J, who used the case as an opportunity to reinforce his strong disapproval of the doctrine.

12 Ibid.

13 Also, see J Goldsworthy, 'Marmor on Meaning and Interpretation' (1995) 1 *Legal Theory* 431, 445-50, who persuasively argues that any attempt to read a text literally, will confront problems of absurdity and indeterminacy because an understanding of any text depends partly on understanding unexpressed assumptions.

14 Goldsworthy, above n 7. See also Kirby, above n 7.

15 [2000] HCA 29 (25 May 2000).

> It is to misconceive the role of this Court in constitutional elaboration to regard its function as being that of divining the meaning of the language of the text in 1900, whether as understood by the founders, the British Parliament, or ordinary Australians of that time.[16]

Kirby J advocates the following approach to constitutional interpretation: 'the Constitution is to be read according to contemporary understandings of its meaning, to meet, so far as the text allows, the governmental needs of the Australian people'.[17]

McHugh J was more sympathetic to originalism. He noted that the traditional approach to constitutional interpretation in Australia is

> probably best described as textualism or semantic. It is not literalism, if literalism is meant no more than a statute is to be interpreted by reference to its words according to their natural sense and in the context of the document. ... The Court has frequently taken into account the consequences of particular provisions in determining the meaning of constitutional provisions, as well as the history and circumstances of their making.[18]

While noting that the objective intentions of the makers of the Constitution are relevant to the meaning that should be attributed to a Constitutional provision,[19] he ultimately adopts a middle course. `Our Constitution is constructed in such a way that most of the concepts or purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the *current* understanding of those concepts or purposes'.[20] Somewhat more pointedly, he states that:

> To deny that the events following federation and experiences of the nation can be used to see more than the Constitutional Convention participants or the 1901 audience saw in the particular words ... is to leave us slaves to the mental images and understandings of the founding fathers

16 Ibid para 241 (Kirby J).

17 Ibid para 242 (Kirby J). He makes the same point in *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839, 878; *Grain Pool of Western Australia v The Commonwealth* (2000) 170 ALR 111, 139-42.

18 *Eastman v The Queen*, ibid para 148 (McHugh J). For a good discussion of the High Court's approach to constitutional interpretation, see Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy', in C Sampford and K Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, where he highlights the rather erratic manner in which the Constitution has been interpreted - ranging from strict literalism to deriving implications from the Constitution.

19 *Eastman v The Queen*, ibid para 154 (McHugh J).

20 Ibid.

> and their 1901 audience, a prospect which they almost certainly did not intend.[21]

In summary, McHugh J seems to be stating that the intentions of the framers of the Constitution are a relevant consideration in interpreting the Constitution, but they should not be decisive when it is perceived that social circumstances have relevantly changed in the past century.[22]

This is perhaps the least preferable approach to constitutional interpretation: it permits principle to be traded for expedience and leaves the door open for precisely the interpretive approach which Kirby J declared was the most unsatisfactory:

> This Court should adopt a single approach to the 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.[23]

Unfortunately, given the oscillating manner in which the High Court has approached the originalism doctrine there is little confidence that the 'desirable result' approach has not played a prominent role in the Court's interpretation of the Constitution - certainly a survey of the Court's approach to originalism would do little to trouble legal realists.[24]

For example, in *Cheatle v The Queen* the Court said that despite the fact that, in 1900, juries were encompassed exclusively of men, s 80 of the Constitution required juries to be representative of the broader community and that 'contemporary standards and perceptions'[25] were relevant to the determination of this. Accordingly, women were fit to sit as jury members.

However, in the same case the Court held that 'in the context of the history of criminal trial by jury, one would assume that s 80's directive that the trial to which it refers must be by jury was intended to

21 Ibid para 155 (McHugh J).

22 However, see *Re Wakim* (1999) 73 ALJR 839, 848, where McHugh J expressley states that in interpreting the constitution the Court should 'give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention'.

23 *Eastman v The Queen* [2000] HCA 29 (25 May 2000) para 245.

24 For a fuller account of the ambivalence displayed by the High Court towards originalism, especially in relation to cases decided in the early to mid-nineties, see Goldsworthy, above n 7, 2-7.

25 (1993) 177 CLR 541, 560-61.

encompass the requirement of unanimity'.[26] Similarly, in *Brown v The Queen*, which also concerned the interpretation of s 80, Wilson J stated that 'in interpreting the Constitution it is necessary to determine the meaning of the words as they were understood at the time the statute was passed'.[27]

This view can be reconciled with the decision reached in *Re the Governor, Goulbourn Corrections Centre; Ex parte Eastman*,[28] where the majority of the High Court refused to overrule previous decisions[29] that held that a court created by the Commonwealth Parliament for the government of a territory is not a federal court created under s 72 of the Constitution. Kirby J, dissenting, held that in light of contemporary standards, it is unacceptable to regard the Australian Capital Territory and Northern Territory as non-federal and to view their court systems as outside the constitutionally protected right of appeal to the High Court.

However, in the case of *Sue v Hill*,[30] the High Court, in deciding that for the purposes of s 44 of the Constitution the United Kingdom was a 'foreign power', reached a conclusion that was plainly untenable at the start of the last century.[31] Although, the majority in this case ostensibly justified their determination on the basis of the connotation[32] and denotation[33] distinction, Kirby J argued that the conclusion in this case was a particularly clear instance of 'the way in which Australian constitutional jurisprudence has freed itself from the doctrine of original intent'.[34]

The ambivalence displayed by the Court towards originalism has no doubt been perpetuated by the uncertainty concerning the validity of

26 Ibid 552.

27 (1986) 160 CLR 171, 189-90 (Wilson J).

28 (1999) 73 ALJR 1324.

29 *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

30 (1999) 73 ALJR 1016.

31 See Kirby, above n 7.

32 The connotation of a word is the criteria that define it. For example, the connotation of the word adult is something along the lines of 'a mature person'.

33 The denotation of a term comprises all the things that are referred to by the term. The denotation of a word can change. For example, at the turn of the last century an adult was a person over 21 years of age, but this has now been reduced to 18 years of age. For a discussion of the connotation/denotation distinction and its relevance to constitutional interpretation, see Goldsworthy, above n 7, 31-2.

34 Kirby, above n 7.

the theory. The remainder of this paper examines the coherency and persuasiveness of originalism.

Dead Hand of the Past Argument

Non-originalists contend that the

> Constitution belongs to succeeding generations of the Australian people. That it is bound to be read so as to achieve the purposes of good government which the Constitution was designed to promote and secure. Our Constitution belongs to the 21st century, not to the 19th.[35]

Thus, it is claimed that the Constitution should be read in light of contemporary values and principles rather than those of past generations. The 'dead hand of the past' argument has obvious intuitive appeal. There is little question that each generation likes to think it is a little more enlightened than the previous generation and we naturally rebel against living our lives by the standards of yesterday. However, the view that today's values should mould the principles by which we live, appears to be of dubious relevance in the context of the rules governing constitutional interpretation. Followed to its logical conclusion it is not simply an argument in favour of a living force interpretive methodology, but one against having a constitution at all.

The values, principles and beliefs of the framers culminated to produce *every* provision of the Constitution. If their sentiments and predispositions can be cast aside when they manifested into non-fashionable constitutional rules and principles then there is no logical foundation for continued allegiance to other sections of the Constitution. This is a point not missed by Goldsworthy:

> A constitution laid down by a founding generation empowers as well as restricts subsequent generations, by providing them with the incalculable benefits of an established and accepted set of procedures for making collective decisions binding on all their members. The empowerment conferred by such procedures is inseparable from the restrictions which they impose: they are two sides of the same coin. If some attempt to evade the restrictions, others may be tempted to follow suit, leading eventually to the collapse of the Constitution and the loss of the empowerment it provided.[36]

[35] Ibid.

[36] Goldsworthy, above n 7, 27 (references omitted).

Political Ideology at the Heart of the Debate

Ultimately, the 'dead hand of the past' argument relies on a utilitarian theory of political morality:[37] interpreting the Constitution in light of contemporary standards will supposedly make for a more livable and prosperous community. It is illuminating that the above counter to the dead hand of the past argument does not seek to challenge this utilitarian approach. Rather it (effectively) invokes the thin end of the wedge (or slippery slope) argument and urges that whatever short term benefits are derived by making constitutional rules harmonious with perceived contemporary standards, they are likely to be more than offset by the detriments in the form of a reduced level of political and legal stability.

In my view, the debate will not be resolved by either of these arguments because as a matter of empirical fact it is indeterminate which view will result in the greatest amount of community satisfaction and happiness. The number and type of variables that are relevant to such a calculus are simply too large and nebulous. Given the intractable difficulties involved in such a calculus it is not surprising that so many, no doubt well intentioned, scholars and judges so passionately espouse diametrically opposed views. They are in fact all adopting the same principle, pushing the theory that they believe will maximise community happiness, but ultimately all are unprepared to yield since it is almost impossible to produce persuasive evidence that conflicts with their respective views.

Goldsworthy considers the example of whether the intention of the framers of the Constitution is consistent with the right of women to vote, and concludes that it is not. By contemporary standards this is obviously an abhorrent outcome. However, rather than viewing this as a reason to abandon originalism, he maintains that, if such a situation did arise, it ought to be addressed by resort to the referendum procedure in s 128 of the Constitution.[38] He notes that:

> General Legal Principles apply to a large range of cases - an infinite range, if imaginary as well as real cases are included - and cannot be expected to produce optimal results in every one of them. This is particularly true of principles of interpretation which are applied in every area of law. Unpalatable results of applying such principles in a handful of cases ... may be the price which has to be paid for satisfactory results in

[37] See J Bentham, *Principles of Morals and Legislation*, in J H Burns and H L A Hart (eds), (1970 ed). For a more recent discussion of such a theory, see A Brown, *Modern Political Philosophy: Theories of the Just Society* (1986).

[38] Goldsworthy, above n 7, 47-50.

> the vast majority of cases which are likely to arise. That is the meaning of the maxim "hard cases make bad law".[39]

Non-originalists would presumably gasp at Goldsworthy's conclusion. Rather than risking the vagaries of a referendum on the matter, they would simply opt for the 'quick fix' of interpreting the Constitution in light of contemporary standards.

The telling point that this example underlines is that both parties are motivated by the same ultimate aim, but are at loggerheads regarding the means of achieving it. Unfortunately, no amount of armchair speculation is likely to lead to an ultimate victor. If the High Court flatly rejected the demonstrable intentions of the framers in this *one* case, it is not possible to calculate with any degree of precision the extent to which this would weaken its resolve to adhere to the framers' intentions in other (less justifiable) cases. On the other hand, if the framers' intentions were honoured, the amount of community happiness that this would cause is just as immeasurable.

In my view, both parties are correct to (implicitly) adopt a utilitarian ethic as the fundamental moral and political principle that ought to govern our moral and legal system.[40] However, as it transpires, due to the incalculable nature of the variables that are relevant to the utilitarian calculus in this case, the solution to the appropriate approach to constitutional interpretation lies in the evaluation of subordinate principles[41] that are relevant to the discussion.

The Authority of the Constitution

Michael Moore has argued that the approach to the interpretation of the Constitution must be consistent with the source of its authority.[42] This argument has considerable merit - it seems almost axiomatic

39 Ibid 48.

40 For a counter to many of the objections that have been levelled against utlitarianism, see my comments in *Punishment and Sentencing: A Rational Approach* (2000) ch 4; 'The Errors of Retributivism' (2000) 24 *Melbourne University Law Review* 124; 'In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights' (1999) 24 *Australian Journal of Legal Philosophy* 95.

41 The cardinal principle is the utilitarian claim that the right action is that which will maximise happiness. Subordinate principles are those that experience has shown that if followed, will generally promote the cardinal principle. In the moral sphere, examples of such principles are the proscriptions against lying and killing.

42 For example, see M S 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).

that an interpretive approach inconsistent with the authority of the Constitution may put at risk its legitimacy. Non-originalists have argued that although the purpose of the Constitution is to maintain stability, its authority and legitimacy stems from its acceptance by today's people. This entails that it ought to be interpreted in a manner that reflects their values[43] - support for the Constitution requires approval by current, not past, majorities.[44]

However, this claim misses the point that as a matter of political and legal reality, the authority of the Constitution has precious nothing to do with its continued acceptance by today's community. Short of a George Speight style revolution,[45] irrespective of how determinedly we collectively resolved to disavow the Constitution, we must still comply with it. Sure a referendum could remedy this; but this would not be to disobey the Constitution, but rather to observe the process that *it mandates* for change. Even if the whole Constitution was repealed pursuant to a referendum, we would still be adhering to it - in the same way that a pupil who is granted permission to have a 'spare class', while overtly doing as he or she wishes, is effectively still following the instructions of his or her teacher.

The authority of the Constitution stems simply from the fact that as a community we abide by the central tenets of the rule of law.[46] The Constitution is a law that was validly passed. Unless the community decides henceforth to `tear up the Constitution', it is bound by it. Theoretically, such an option is open, but it is not one that is even useful to contemplate. We would simply be thrown into a state of anarchy, in which case not only is the correct theory of constitutional interpretation meaningless, but so too is the concept of a legal sys-

[43] See also Kirby, above n 7, who states that 'the foundation for the Constitution must affect approaches to the ascertainment of its meaning'.

[44] P Best, 'The Misconceived Quest For Original Understanding' (1980) 60 *Boston University Law Review* 204, 225. See also S Freeman, 'Original Meaning, Democratic Interpretation, and the Constitution' (1992) *Philosophy and Public Affairs* 3.

[45] George Speight was the leader of a group that executed a civil coup, supposedly, on behalf of the indigenous people of Fiji that resulted in the imprisonment and overthrow of the Labour-led coalition government in Fiji in May 2000. His speech detailing his reasons for the coup is reported at: *The Age* (Melbourne), 19 May 2000, 1.

[46] Moore, above n 42, argues that the authority of the constitution lies in its rights-protecting function. However, this view has little relevance in the context of the Constitution. Moore concedes that a constitution would need to include a bill of rights before authority can stem from this basis. See also L G Simon, 'The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified' (1985) 73 *California Law Review* 1482, 1523.

tem. Given that the authority of the Constitution does not depend on the support of the present generation, it is erroneous to argue that its on-going legitimacy is tied to a living force interpretative approach.

The fact that the authority of the Constitution depends on the rule of law does not necessarily commit us to originalism. All agree that the Constitution binds us; the argument is about how it ought to be interpreted. To this end, one must look at the fundamental nature and purpose of the legal instrument in question.

The Purpose of a Constitution

When developing rules of conduct for any practice, the content of the rules (and the standard by which they will ultimately be evaluated) is contingent upon the purpose of the practice. Thus the rules that govern the conduct of business are inapposite to (amateur) sporting organisations. The aim of business is to make money, hence business organisations develop norms and standards designed to facilitate this end. The business world is hard-nosed, driven by economic rationalist considerations, and concerned only with making money. This means that it is almost a totally achievement-based practice, with the only relevant currency being money. There is little room for acknowledging human effort and endeavour. If an organisation or employee is not making money it is simply not to the point that they have 'tried really hard'. However, effort and application are precisely the sort of virtues that are admired in the sporting domain. Winning here is also desirable, but not central. Thus sporting coaches and clubs persevere, and indeed, encourage application and endeavour even if they do not necessarily translate into scoreboard results.

Accordingly, we see that the appropriateness of rules is context-sensitive - depending upon the institution under consideration. In the context of the constitutional interpretation debate, we have two different approaches (or rules, if you like) which have been suggested: one being that constitutions should be interpreted to reflect the intentions of the founders; the other that modern day values are the appropriate interpretive standard. The rule that should prevail is simply the one which will best secure the objective or purpose of the Constitution. This requires an analysis of the nature of a constitution.

It has been suggested that a constitution has several components. Sartori believes that a constitution means 'fundamental law, or a fun-

damental set of principles'[47] and a plan of government. He further contends that such a nominal definition[48] fails to capture the *telos* of constitutionalism, which is *garantisme*: the establishment of an institutional arrangement, which restricts arbitrary power and protects fundamental interests.

The minimum definition of a constitution, as the foundation of law, entails that a constitution must establish the conditions necessary for a legal system to exist. H L A Hart identifies the following rules as being necessary to convert a pre-legal world into a post-legal society:[49]

(a) A rule of recognition, which sets out the criteria by which a rule becomes a law;[50]

(b) A rule of change, which confers powers on a body to introduce new law;[51] and

(c) A rule of adjudication, which defines the body that can authoritatively decide if a law has been broken.[52]

In light of this, Satori's further (minimalist) requirement that a constitution must also prescribe a plan of government also seems uncontroversial. This is a necessary incident that follows once the above three pre-conditions are established. There is no end to the different styles and types of government; however, the sole distinguishing feature of government from every other body or organisation in the community, such as a sporting club, a professional body, or a group of friends, is that only governments have the ability to turn a rule or norm into a law. The rule of recognition will necessarily identify the body that can make law, and accordingly a constitution will necessarily establish a process of government.

The *garantisme* requirement, however, is more controversial. As an empirical fact, there is a discernible trend for protections, normally in the form of a bill of rights, to be incorporated into constitutions.

47 G Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *American Political Science Review* 853, 855.

48 He also distinguishes between what he calls a nominal constitution or a facade (fake) constitution: ibid 857-862.

49 H L A Hart, *The Concept of Law* (1961) 89-97.

50 In the Federal System, the rule of recognition essentially requires that for a rule to become a law it must be passed by both houses and assented to by the Governor-General.

51 In the context of the Constitution, see s 128.

52 In the context of the Constitution, it is the High Court.

However, the fact that certain constitutions, such as the British,[53] do not contain any substantive protections logically rebuts the claim that a constitution *must* guard certain key interests.

In any event, an illuminating aspect about constitutions is that while there may be some uncertainty concerning their necessary and sufficient features, there is no limit to the range of matters that can be included in them. Theoretically, the framers of the Constitution could have included provisions dealing with relatively trivial matters, such as banning dogs from parks, design specifications for kitchens and rules of etiquette. Despite this, the 'additional extras' found in constitutions do not deal with trivial matters, but are invariably confined to matters that the authors perceive as being of fundamental importance, such as human rights or establishing a nation.

Irrespective of the precise definition of a constitution one adopts, it is clear that the purpose of a constitution is to establish and circumscribe *fundamental* legal, political and (perhaps) moral principles. A constitution by its very nature is supposed to put certain principles beyond the whims of transient majorities.

As is noted by Justice Antonin Scalia, of the Supreme Court of the United States:

> It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change - to embed certain rights in such a manner that future generations cannot readily take them away.[54]

It follows that the claim by non-originalists that the purpose of a constitution is to facilitate change or that its genius lies not in its static character, but in its ability to adapt to new situations,[55] is untenable. In fact the opposite is true. 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 be beyond alteration by transient majorities, 'or more precisely, to require society to devote to the subject the long and hard consideration required for a constitutional amendment, before those particular val-

[53] Which albeit is an unwritten constitution. However, more recently the United Kingdom has enacted the *Human Rights Act* 1998 (UK). The purpose of the Act is to give effect to the rights and freedoms guaranteed under the European Convention of Human Rights.

[54] A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) 47.

[55] For example, see W Brennan, 'The Constitution of the United States: Contemporary Ratification' (1986) 27 *South Texas Law Review* 433.

ues can be cast aside'.[56] A democratic society does not need a constitution to facilitate change or ensure that its laws reflect contemporary values – 'elections take care of that quite well'.[57]

Other (Second Order) Subordinate Principles - Democracy

There are other, what I term, second order subordinate principles[58] that are relevant to the originalism issue. The one that is most regularly invoked is the notion of democracy. Not surprisingly, both sides have attempted to gain considerable mileage from the democratic ideal. Originalists point to the fact that the drafters were the chosen representatives of the democratically elected Colonial Parliaments. The drafters expressed their intentions in the Constitution, which were ratified by the people of Australia. It is undemocratic, so the argument goes, to interpret the Constitution in a manner that subverts the intentions of the founders. As is alluded to above, non-originalists counter that for an institution to have democratic support requires approval of current, not past majorities:[59] 'we did not adopt the Constitution and those who did are dead and gone'.[60] In response, originalists appeal to the tacit consent argument[61] - that the Constitution does in fact enjoy the support of today's community, because they have not chosen to repeal it. The rejoinder to this comes in the form that lack of revolution hardly signifies consent or approval - given the conservativeness of Australian voters, at most 'forced acquiescence' can be claimed.[62] And so the thrust and parry continues.

It is unlikely that democracy-based arguments will resolve the originalism issue. As the above discussion illustrates, both sides get much from the democracy argument, but in the end neither is likely to secure a knock-down blow with it. This is largely due to the logically indeterminate nature of democracy and the ranking of this ideal

56 A Scalia, 'Originalism: the Lesser Evil' (1989) 57 *Cincinnati Law Review* 849, 862.

57 Ibid.

58 The purpose and authority of the Constitution are first order subordinate principles because they relate directly to the Constitution, which is the key subject matter of the debate. Other principles that are contingently related to the Constitution are one step removed and hence are termed second order subordinate principles. See, further, the discussion below.

59 For example, see Freeman, above n 44, 9.

60 Best, above n 44, 225.

61 For a discussion of the pre-conditions for tacit consent, see H L A Hart, *The Concept of Law* (1961) 47.

62 Freeman, above n 44, 9.

against other virtues.[63] Even if it is possible to settle on a meaning of democracy, there are still other considerable obstacles that would need to be overcome. For example, there is the paradox of whether it is permissible to secure democracy by undemocratic means. Even if one approaches this from a utilitarian perspective and answers affirmatively, it is incalculable whether the possible enhancement to democracy that may stem from activist judges (interpreting the Constitution to reflect contemporary values) is outweighed by the reduction in democracy that follows from enhanced judicial power.

The debate regarding the appropriate method of constitutional interpretation has focused heavily on secondary order subordinate issues relevant to the Constitution, such as democracy and the separation of powers.[64] To some extent, this has been misguided. In order to evaluate properly any institution or issue pertaining to it, both eyes must be firmly kept on the intractable features of the institution in question. For example, when considering how best to run a school, secondary issues such as how to increase its profitability, should rarely be elevated to cardinal status. The only indispensable aspect of constitutionalism is the existence of a constitution and it is principally with regard to this fact that one should approach the meaning that should be attributed to it. Constitutionalism does not necessarily entail democracy or a commitment to the separation of powers doctrine; hence these ideals should not automatically assume centre stage in the debate. Secondary issues generally[65] only serve a 'tie breaking' role where there are equally persuasive arguments concerning an aspect of the institution under consideration. However, where it is clear that

[63] For a discussion of the nature of democracy, see Freeman, ibid, who asserts that democracy is not simply majoritarianism, but instead involves a principle he labels 'Democratic Sovereignity or the Social Contract Theory of Democracy'. See also T Campbell, *The Legal Theory of Ethical Positivism* (1996) 32-6.

[64] For a discussion of the separation of powers issue in the context of the debate, see Goldsworthy, above n 7, where he argues that non-originalist interpretations involve judges making law and hence exceeding their power. A similar point is made by A Scalia, above n 56, 863: 'the main danger in judicial interpretation of the Constitution ... is that judges will mistake their own predilictions for the law'. Non-originalists have responded by pointing out that the process of finding the framers' intent is so vague that there is plenty of scope for a judge to adopt his or her own values: Best, above n 44, 280-1. In any event, the separation of powers is not central to the debate. The main reason against judges making law is that it is undemocratic, but as is discussed below the democracy argument is not decisive of the originalism debate.

[65] There are exceptions where, for example, the secondary institution is all-important and decisively pulls in a particular direction; but as we have seen this is not the case in the originalism debate.

one position is superior when viewed in light of the indispensable aspects of the practice, we do not even get to the tiebreak. For example, if one of two schools must be closed and the first school produces on average 'A' students and the second 'C' students, it is simply not to the point that the second school is better at raising money or has a stronger history of sporting achievement - such (secondary) considerations carry weight only in event of 'all things being equal'. Given that democratic virtues, and the like, are not only indeterminate, but are also peripheral to the discussion at hand, first order subordinate considerations are decisive of the normative question concerning which theory of constitutional interpretation ought to be adopted. As we have seen, originalism emerges trumps on this account. However, before originalists can claim victory it is necessary to overcome the criticism that their theory is unworkable. It is to this that I now turn.

The Intention of the Framers

Ronald Dworkin argues that the difficulties involved in ascertaining the framers' or drafters' (the words are used interchangeably) intentions are so overwhelming that in reality 'there is no intention, in such a body, even in principle, only one waiting to be invented'.[66] Conceptually, the main criticism relating to the framers' intentions concerns the difficulties associated with the ascertainment of a 'group intention'. The condition that must be satisfied for the ascription of an intention to a law-making body is labeled by David Lyons as an 'intentional consensus'.[67] As is discussed below, there have also been numerous other criticisms of the concept of a group intention. Cumulatively they are thought to be so compelling that McHugh J in *Eastman v The Queen* stated that '*no doubt* the notion of constitutional intent, like legislative intent, is fictitious'.[68]

Overview of Response to Arguments against Group Intention

Before detailing and dealing with these criticisms, first a cursory overview of my response. In defending the concept of a group intention, I am not suggesting that ontologically such a concept exists. Rather, it is argued that (a group of) individuals can have similar or identical intentions in relation to a particular activity or subject mat-

66 R Dworkin, 'The Forum of Principle' (1981) 56 *New York University Law Review* 468.

67 D Lyons, 'Original Intent and Legal Interpretation' (1999) 24 *Australian Journal of Legal Philosophy* 1, 17.

68 *Eastman v The Queen* [2000] HCA 29 (25 May 2000) para 146 (McHugh J).

ter. More aptly, the relevant state of mind which originalists espouse is probably best described as a collective or shared intention[69] - although, I shall stick with orthodox taxonomy and continue to use the phrase 'group intention'. Viewed in this light, the metaphysical oddity disappears:

> It seems obvious that there really is collective intentional behaviour as distinct from individual intentional behaviour. You can see this by watching a football team execute a pass or hear it by listening to an orchestra. Better still, you can experience it by actually engaging in some group activity in which your actions are a part of the group action.[70]

John Searle argues that collective intentions cannot be reduced to individual intentions supplemented with mutual beliefs. He suggests that each actor 'we-intends' to achieve the collective aim by having an individual intention to perform his or her role.[71] The point I wish to make is that, while group intention cannot be reduced to individual intentions, in a *meaningful* sense group intention is closely analogous to individual intention. By meaningful I mean that it is *logically* possible to extend the concept of an individual intention to a group setting. The model suggested will not allow us to reach back in time to find the actual intentions of the founders concerning every constitutional provision. However, this does not significantly detract from my model. Many of the criticisms against the concept of group intention are highly theoretical, denying the very plausibility of such a concept. My response is aimed primarily at rebutting these.

The more pragmatic difficulties associated with group intention in the context of the Constitution are not as acute as has been claimed. The intentions of the framers concerning many constitutional issues are recorded in the Convention Debates and where a particular matter was not broached by them, it will quite often be possible to make reasonably informed judgments concerning what they would have intended. The framers were from a homogeneous group (white upper-class Anglo-Saxon middle-aged men living a century ago).[72] For

69 The phrase 'shared intention' is used by A Marmor, *Interpretation and Legal Theory* (1994 ed) 162.

70 J Searle, 'Collective Intentions and Actions' in P R Cohen *et al* (eds), *Intentions in Communications* (1990) 401.

71 Ibid.

72 The notion of what a person or group would have intended when a rule was enacted with respect to unadverted problems that eventually arise has been labelled 'inchoate intent': L Alexander, 'Interpretation' (Paper presented at the Conference on Legal Interpretation, Judicial Power and Democracy, Melbourne, 12-14 June 2000).

example, one can be reasonably confident that the framers did not intend for the Commonwealth's marriage power to extend to same-sex marriages. Although, it has been claimed that courts do not make good historians,[73] ascertaining the framers' intentions is no more complex than other inquiries that courts regularly undertake, such as determining the prevailing community sentiment on particular issues or discovering the values or beliefs of a different cultural group centuries ago[74] or the values of a Muslim father.[75] Against this background, I turn to consider the relevant criticisms in more detail.

Outline of Criticisms

The more telling criticisms are as follows:

(a) Whose intention is relevant? There is a range of possibilities, including the framers of the Constitution, the people of Australia or the United Kingdom Parliament.[76] More generally, there is also the issue of whether the intentions of those who voted against the provisions[77] or who influenced the drafters are relevant?[78]

(b) There is the question of the relevance of the framers' interpretive intent - the manner in which the framers' desired the Constitution to be interpreted - as opposed to their substantive intent - the effect and application they believed the relevant provisions would have. The prevailing interpretive methodology at the time of federation was literalism, hence, it is probable that the founders intended that the Constitution should be interpreted in such a manner and did not intend that their intentions should be relevant in interpreting the Constitution.[79]

(c) What is to be done where a provision is passed which lacks a majority of 'intention votes'? Best claims that in such circumstances the originalist is committed to the unworkable conclusion that the provision is not valid.[80]

73 See R McQueen, 'Why High Court Judges Make Poor Historians' (1990) 19 *Federal Law Review* 245.

74 See *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

75 See *R v Dincer* [1983] VR 450.

76 See Donaghue, above n 7, 151.

77 This point is raised by Dworkin, above n 66, 484.

78 Ibid 483.

79 For example, see M McCMathias, 'Ordered Liberty: The Original Intent of the Constitution' (1987) 47 *Maryland Law Review* 174, 177.

80 Best, above n 44, 213.

(d) Which of the relevant individual's mental states constitute an intention? In particular are we interested in their hopes or expectations concerning how a provision will operate?[81]

(e) In ascertaining intent, what is the appropriate level of generality of abstractness that is relevant?[82] In relation to each particular provision the framers may have had a concrete, or narrow, intention regarding the specific application of the provision and a more general intention concerning the purpose of the provision. Not only may there be a conflict between these intentions, but Shauer argues that there is potentially an infinite regress of intentions regarding a particular provision.[83] Dworkin claims that originalists must choose between different levels of intentions and that it is impossible to choose the 'true' intention because each level of intention is held with the same degree of convictions and importance.[84]

Many of the above difficulties are highlighted by the following example, which will serve as a useful paradigm for responding to some of them.[85] A five member legislature is considering ways to increase safety in parks. A new provision is enacted into the constitution by a three to two majority banning dogs from parks. Only one member of the legislature was actually in favour of the ban. Two other members voted in favour of the law as a trade off for the first member's support for laws they are proposing to pass in the near future. Following the enactment of the law, a court is required to determine whether the ban extends to guide dogs. The legislator who initiated the law hoped that guide dogs would also be banned, but expected that they would not given the drafting of the relevant section - she accepted the drafting of the provision to secure its approval. All of the legislators assumed that the provision would be interpreted in a literalistic fashion. As a result of the law being enacted, dog walkers desert the parks, making the parks far less populated. This results in an unprecedented spate of robberies and sexual assaults on park users.

It is argued that such examples illustrate the vacuousness of the originalist's theory. In particular, it is claimed that there is no intentional consensus because there are 'too few intention-votes'[86] and that the

81 Donaghue, above n 7, 152.

82 Dworkin, above n 3, 667.

83 F Shauer, 'Formalism' (1988) 97 *Yale Law Journal* 509, 533-4.

84 Dworkin, above n 3, 667.

85 The example is similar to ones used by Best, above n 44; Lyons, above n 67, 20.

86 Lyons, ibid 19.

problem is 'so fundamental that until the concept of a group intention is reasonably justified and revised accordingly, [originalism] cannot responsibly be used in legal interpretation'.[87]

Despite the ostensible persuasiveness of such criticisms, in my view, the concept of a coherent group legislative intention remains tenable. A step-wise defence is necessary. Before considering the (more complex) issues regarding group intention I will first address the issue of whose intention is relevant and the relevance of the drafters' interpretative intent.

Whose Intention is Relevant?

To this question, there are three tenable possibilities. First, there is the intention of the framers or drafters who drafted and debated the provisions of the Constitution at the various Constitutional Conventions. Second, there is the intention of the voters who endorsed the Constitution. Finally, there is the intention of the United Kingdom Parliament that enacted the Constitution.[88] In the case of standard legislation the only relevant intention is that of the legislators. However, in the case of the Constitution, it is necessary to depart from this model. The Parliament of the United Kingdom had no meaningful input into the content of the Constitution and played essentially a formal role. The House of Commons was told by the Secretary of State for the Colonies 'that as far as the parts affecting Australia were concerned not a line of it [the Constitution] was to be altered'.[89] Goldsworthy correctly notes that the role of the United Kingdom Parliament 'was analogous to that of the monarch in assenting to Bills: to rubber stamp proposed laws prepared by other people to serve their purposes, and therefore embodying their intentions'.[90]

The intention of the voters is also not a tenable foundation for the originalist's thesis. The people voted on the Constitution as a whole, and political and social realities dictate that few of them had positive intentions regarding most provisions of the Constitution. As is alluded to above, although it has been claimed that the authority of the Constitution stems from its adoption by the people at referendum, the link between the Constitution and the voters is preserved by the

87 Ibid 22-3.

88 For a detailed discussion of the process leading to the enactment of the Constitution, see Quick and Garran, above n 6.

89 T C Brennan, *Interpreting the Constitution* (1935) 13.

90 Goldsworthy, above n 7, 25.

view that the drafters were the representatives of the people who endorsed their intentions concerning the Constitution.

The drafters wrote the Constitution and fiercely debated its terms, and accordingly expressly considered each provision. Their intentions are evidenced by their comments during the Convention Debates and are forever enshrined in the records of these debates. It follows that the relevant intentions are theirs.

The Relevance of the Drafters' Interpretive Intent

The interpretive intention issue is also not a strong argument against originalism. Nevertheless, Kirby J in *Eastman* used this as a basis for rejecting originalism:

> That a different [non-originalist] approach would be necessary for the construction of the Constitution was recognised as early as 1901 by one of its founders, Andrew Inglis Clark. He declared, at the outset of the new Commonwealth, that the document had to be read and construed "not as containing a declaration of the will and intentions of men long since dead ... but as declaring the will of and intentions of the present inheritors and possessors of sovereign power".[91]

The manner in which the drafters intended the Constitution to be interpreted is irrelevant. They did not have authority to prescribe an interpretive methodology. Their mandate was confined to writing the substantive terms of the Constitution. As Dworkin points out, originalism must be justified on a basis independent to what the founders intended, and it begs the question to use the drafters' interpretive intention one way or another.[92] Even if they felt that their mandate included developing an interpretive technique, they did not see fit to incorporate their ideology on this matter into the Constitution, and hence it does not form part of the Constitution.

Group Intentional Consensus

The group intention issue is conceptually the most perplexing. To deal with this, the first point that needs to be emphasised is that irrespective of the (admittedly almost infinite) number of contingencies which could have resulted in a provision being passed, an indispensable feature of any (valid) legislative provision is that it was in fact passed. The legislature, however constituted, and for whatever rea-

[91] *Eastman v The Queen* [2000] HCA 29 (25 May 2000) para 242 (Kirby J) (references omitted). See also McHugh J at para 156.

[92] Dworkin, above n 66, 497.

son, ultimately decided in the exercise of its law-making authority to pass the provision.

Means and Ends

This seemingly innocuous observation, serves as a partial counter to the criticism that some provisions may have been passed without the requisite number of intention votes. The claim that the originalist is committed to the view that provisions are invalid if passed primarily as a result of a political compromise (or for some other reason did not enjoy the express approval of a majority of legislators) rests on the flawed assumption that decisions made, or acts performed, which are not ends in themselves, but rather are means to promote some further ends, are not intended. Most of the decisions we make and actions we perform are a means to further a particular end. The reason we drive our car each morning is not because of the intrinsic joy of driving, but rather in order to get work. It is nonsensical in such circumstances to assert that we have no intention to drive. In all other respects, this is a fact accepted by the law. For example, it would be farcical for an accused charged with murder to assert that he or she did not 'intend' to kill the victim that was shot in the head because he or she 'only' did it as a means to rob the victim. Hence, legislators who vote in favour of a law are properly regarded as being in favour of it, even though they may be indifferent or even hostile to it.

Intentions and Desires

The claim that a person or group can cause a certain outcome (such as enacting a law) without properly intending that result also stems from a failure to distinguish intentions from desires.

Desires and intentions are often used interchangeably. For example, when a person commits murder, the mental state of the agent immediately preceding this act is often characterised as either an intention to kill or a desire to kill. But the concepts are in fact different. Desires are representations of how the world is to be; they are our wants, the states that move us to act. Desires are often contrasted with beliefs. Beliefs are copies or replicas of the way we believe the world to be. On their own, beliefs can never provide a source of motivation; 'they are perfectly inert, and can never either prevent or produce any action'.[93] It is only our desires that can motivate us. Beliefs are mere

[93] D Hume, *A Treatise of Human Nature* (First published 1738, 1978 ed) 458. For a discussion of the relevance of the belief/desire distinction in moral philosophy, see my comments in M Bagaric, *Punishment and Sentencing: A Rational Approach*

replicas of the way we believe the world to be. We can assess beliefs for truth and falsehood - a true belief being one that is a copy of the way the world actually is. In order for an action to occur we need a desire that prompts us to effect a certain change in the world and a belief informing us how this change can be achieved.

An intention is a special type of desire: it is a mental predicate;[94] a *commitment* to achieving a state of affairs or action.[95] Put differently, it is the result or outcome an agent wants to achieve in order to satisfy all of his or her desires which are relevant to the particular matter, and which has resulted from the weighing, conflating and prioritising all of the agent's relevant desires. Even though the agent ultimately kills the victim, there may be *countless* desires that are relevant to this decision, some of which may be conflicting. For example, a potential murderer may be moved by the desire to obtain revenge or money, while at the same time also desiring not to harm others and to avoid being punished. Despite the conflicting nature of these desires, there is no difficulty in accepting that they can co-exist simultaneously. Where such desires do exist, whether or not the agent ultimately kills the victim, depends on the number and intensity of the relevant desires. However, in the end, despite the large number of desires that may exist, in respect to any particular decision that must be made, there will be only one intention. The agent will either form an intention to kill or not to kill.

It follows that intentions cannot conflict (they cannot be inconsistent): it is incoherent to assert that an agent can be both committed and uncommitted to the same matter - it is nonsensical to claim that an agent both intends to kill and not to kill the victim. There is no such absurdity in the assertion that an agent both desires to eat a chocolate bar and desires not to eat it. In such a case, the agent is in a 'pre-intention' state of mind and going through the mental exercise of weighing and evaluating the relevant desires.

Analogy between Individual and Group Intention

The observation that individuals often have a number of different (and often conflicting) desires in relation to any particular matter, and

(2000); 'The Errors of Retributivism (2000) 24 *Melbourne University Law Review* 124.

94 Marmor, above n 69, 161.

95 For a discussion of the content of an intention and an overview of the philosophical debate in this area, see P R Cohen *et al*, 'Persistence, Intention, and Commitment' in Cohen *et al* (eds), above n 70, 32. Readers are also directed to a series of other papers in the book.

yet are still capable of forming an intention concerning the matter can be used as a basis for explaining the concept of group intention. The key to ascribing a group intention is to 'personify' the group and treat all of the different desires of each member of the group relating to the relevant decision in the same way as if they were found in an individual. In a group there will no doubt normally be a larger range of desires in respect to any particular matter and there will invariably be more conflicting desires, but this is only a difference in degree, not nature - as we saw, in order for an intention to be ascribed, there is logically no limit to the number and type of desires which can relate to the subject-matter of the intention.

More fully, the concept of a group intention can be rationalised in the following way. The text of the constitution identifies the subject matter, and the desires which are relevant are all those which relate to the relevant subject-matter. All of the intentions of the individual drafters concerning the relevant subject-matter are pooled together. Each of the drafter's intentions is then accorded the same status as a normal desire within an individual. The only difference from the individual context is that the intention of each individual is no longer treated as an 'intention' (ie, a commitment to achieving a certain outcome), because the intention of any particular individual is not necessarily decisive, but rather it is treated as a penultimate desire in an individual. The intentions of each of the framers are then evaluated for content and weight, and the group intention is then the outcome that an individual with all of the intentions (now penultimate desires) of the group would seek to achieve after weighing and conflating all of the intentions of the group. While ontologically it is obviously beyond the realms of human experience to ascertain with certainty the result of such a process, logically the analogy is valid.[96]

The above model can be used to counter the criticisms advanced concerning the concept of a group intention. There is no need for a majority of legislators expressly to support a provision for it to have the backing of an intentional consensus. It is not simply a matter of stacking up the numbers, otherwise it would be open for an accused to resist a murder charge by asserting that the intention to kill was absent because he or she had two desires against killing and only one (albeit strong) desire in favour of killing. In the context of the no dogs in parks example, the sentiments of the four legislators who are not in

[96] For example, if a computer could be developed to measure desire content and intensity, group intention could be determined by the same program that ascertains individual intention.

favour of the law are equivalent to four weak desires, which are trumped by the strong desire of the legislator who supports the law, thereby ultimately resulting in an intention to pass the law. It is therefore flawed to claim that provisions are passed which lack a majority of intention votes. The intentions of those who voted against the law are not relevant in a meaningful sense - they have been outweighed by the intention of the legislator in favour of the law.

Intentions - Hopes or Expectations

The criticism concerning the distinction between hopes and expectations is weak. In normal usage, intention is clearly synonymous with expectation. For example, it is clearly not to the point for an accused charged with murder to assert that even though he or she expected that shooting the victim twice in the head would kill the victim, he or she hoped it would not. Thus, according to accepted linguistic analysis it is clear that intentions are determined by reference to one's expectations, rather than one's hopes. In other contexts philosophers have often gone to great lengths to emphasise that intentions are very narrow and particular mental states. The concept of an intention has a rich intellectual history in the context of the doctrine of double effect, which provides that it is morally permissible to perform an act having two effects, one good and one evil, where the good consequence is *intended* and the bad *merely foreseen* (ie, not hoped for), and there is proportionality between the good and bad consequences, and those consequences occur fairly simultaneously.[97]

The doctrine is frequently appealed to as a purported justification for acts or practices that produce foreseen undesirable consequences. The basis for this is that agents do not intend, and therefore are not responsible for, events they only foresee. For example, this is the reason why it is, supposedly, permissible to bomb an enemy's ammunition factory in wartime, even though it will result in the certain death of civilians, and why it is justifiable to kill an unborn baby where this is necessary to save the mother, and why self-defence is legitimate.[98] In the case of euthanasia, it is employed as a justification

[97] It is also sometimes contended that a further condition is that the act must not be intrinsically bad: see H T Engelhardt and J Kenny, 'Principle of Double Effect', in B Brody and H T Engelhardt (eds), *Bioethics* (1987) 160. However, given that the doctrine is commonly applied to very grave cases involving things such as the killing of innocent people and it is on the basis of the doctrine itself that such acts are sought to be justified, it begs the question to make such a condition an internal part of the doctrine. See also T Nagel, *The View From Nowhere* (1986) 179, whose formulation of the doctrine of double effect essentially accords with the above.

[98] Although there are also other justifications for excuse of self-defence.

for alleviating pain by increasing doses of pain killers even when it is known that this will result in death - the intention is to reduce pain, not to kill.[99]

Previously, I have criticised the doctrine of double effect as being unable to provide a general account of the distinction between what is intended and what is merely foreseen which applies in all circumstances.[100] This is because in some circumstances the doctrine maintains that one is not responsible for horrible acts which one is certain will occur. However, if the doctrine is confined to circumstances where the bad consequences are merely incidental and, from the agent's understanding of the situation, were unlikely to occur (ie, they were the converse of one's hopes) the doctrine would have a far more coherent foundation. This is because our hopes do not equate to a commitment to achieving a certain state of affairs. In the context of the dogs in parks example, this means that guide dogs, too, are banned from parks.

The Appropriate Level of Generality

The last issue concerns the level of generality of the intentions of the drafters that is relevant. The drafters no doubt had a concrete, or narrow, intention regarding the precise effect that they believed many provisions of the Constitution would have and a more abstract level of intent (or purpose) concerning the objective of each provision. As Shauer notes, there is potentially an infinite regress of intentions concerning each provision.[101] The no-dogs-in-parks law illustrates this. Although the concrete intention was to prohibit dogs in parks, there was a more abstract intention to increase safety. Even more abstract levels of intention may have been held, for example to increase the

[99] For example, see P Mullen, 'Euthanasia: An impoverished Construction of Life and Death' (1995) 3 *Journal of Law and Medicine* 121, 127. The legal status of the doctrine is unclear. In *Nedrick* [1986] 1 WLR 1025, 1028, the House of Lords held that foresight, even of near certainty, was not the same as intention, whereas in *Hyam* [1975] AC 55, 75, Lord Hailsham was of the view that one who blows up an aircraft in order to obtain money intends to kill. However in relation to euthanasia the courts have endorsed the doctrine. In *Adams* [1957] *Crim LR* 365, 375, it was held that it is permissible to relieve suffering even if the measure incidentally shortens life. This has, at least implicitly, been endorsed in subsequent cases: *Cox* (1992) 12 BMLR 38, 39; *Airedale NHS Trust v Bland* [1993] 789, 867; *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235, 248; *Re J (Wardship: Medical Treatment)* [1991] Fam 33, 46.

[100] See my comments in 'In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights', above n 40.

[101] Shauer, above n 83, 533-4.

happiness of the community and to pass laws that would secure electoral support.

It has been noted that intentions at different levels may conflict. Where a conflict occurs between one's different levels of intention, this is due to the existence of a mistaken belief, which sets in train an inappropriate causal process for achieving the desired objective. For example, prohibiting dogs in parks in fact frustrated the broader intention of increasing park safety, due to the legislature's failure to foresee the effect that de-populating parks would have on the safety of park users.

As I noted earlier, opponents of originalism claim that originalists must choose among these levels of intention and in doing so cannot merely select the 'true' intention, for each level of intention is held with the same degree of conviction.[102] It has been further claimed that if a very narrow level of intention is selected that this would make the Constitution unworkable, due to limits of framers' foresight. Still further, it is argued that where it transpires that there is conflict between the drafters' concrete and abstract intentions, that it would be 'mindless' to adhere to the former since they were only desired to further a more abstract level of intention.[103]

The key to meeting this dilemma requires the abandonment of labels, such as concrete and abstract intentions. The level of specificity of the drafters' intentions varied from provision to provision. The appropriate level of intention is not fixed, but varies according to the particular section in issue. In the no-dogs-in-parks example, if the subject matter is dogs and parks, the intention is to exclude them from parks. If the focus is on safety, the intention is to increase it, and so on. In the case of the Constitution, the intentional consensus concerning some provisions, such as external affairs, was quite abstract (as is evidenced by the fact that there was no endeavour to delineate the issues falling within the subject matter). However, the intention concerning the excise tax power was narrow - to secure the Commonwealth's control of tariff policy. Originalism requires that the Constitution be interpreted in a manner that the evidence discloses is consistent with the drafters' intention, at whatever level of generality it was held. Thus to answer the question whether the legislature intended to exclude dogs from parks, even in light of the fact that this has resulted in decreased safety, the answer is yes. The answer to the

[102] Dworkin, above n 3, 667.

[103] L Alexander, 'Law Without Mind' (1989) *Michigan Law Review* 2444, 2447.

question, whether the legislature wanted to increase safety in parks is also yes, but this is not a legally relevant question, unless the words of the constitution reflect this intention.

Strict Originalism versus Moderate Originalism

This account leads to an extreme position, and is normally termed strict originalism. The softer form of the theory is called moderate originalism. There are several distinctions between the two theories.[104] The most important is that moderate originalists are prepared to substitute the framers' concrete intentions for their purposes. The advantage of this is that it allows the Constitution to keep pace (at least to some extent) with social and technological advances. To illustrate the advantages of moderate originalism, Goldsworthy uses the example of Article 1, Section 8 of the United States Constitution, which provides that Congress has power to raise and regulate 'Armies' and 'a Navy'. There is no mention of air forces, which did not exist at the time the United States Constitution was created. Fidelity to the framers intention would mean that Congress would be denied the power to raise and regulate an air force.[105] Goldsworthy contends that given that the founders' purpose is to give Congress power to raise and regulate all military forces of the United States that this should be reflected in the interpretation of the section.

> Unless the nation is to be forced to formally amend the Constitution, which is a time-consuming and expensive business, the only way to reach the result which is obviously consistent with the founders' clearly expressed purpose is to interpret the words according to their spirit rather their belief.[106]

However, in my view the advantages sought to be achieved by honouring the framers' purposes, instead of their actual intentions, comes at too high a price. In a well argued paper, Goldsworthy claims that the interpretative theory employed by Ronald Dworkin, which is perhaps the leading contemporary non-originalist theory, collapses into a form of originalism.[107] However, unless Goldsworthy is able to find a

[104] See H M Hurd, 'Living in the Past: Burkean Conservatism and Originalist Interpretation' (Paper presented at the Conference on Legal Interpretation, Judicial Power and Democracy, Melbourne, 12-14 June 2000); Goldsworthy, above n 7.

[105] An argument cannot be made that air forces come within the connotation of the words 'Armies' or 'Navy'.

[106] Goldsworthy, above n 7, 33

[107] See J Goldsworthy, 'Dworkin as an Originalist' (2000) 17 *Constitutional Commentary* 49.

logical basis for excluding the intentions of the framers beyond a certain threshold of generality, his theory risks becoming so removed from what the framers intended that he could be charged with similar disloyalty. This is because in relation to any specific provision, 'at the most general level of intent ... the law-giver might be said to have intended that interpreters should "do good", at which point intent evaporates as an interpretive guide'.[108] At its most general level, the intentions of the framers of the Constitution are reducible to something like 'to establish a federal system of government that preserves some degree of autonomy for the States'. This is hardly instructional. Once intention is abandoned for purpose, originalism turns into a compromise theory and, as with many such theories, becomes unstable[109] - moderate originalism, becomes indistinguishable from 'moderate non-originalism'; both of which amount to the theory of allowing judges to interpret the Constitution in a manner which achieves the best social outcome. Once concrete (or actual) intentions are rejected, and broader intentions are invoked, there is no logical reason for stopping at a certain threshold of generality, in which case intentions in any real sense vanish. Viewed in this light, the potential drawbacks of moderate originalism are obvious. Not only is it inconsistent with the purpose and authority of the Constitution, but it places too much faith in judges, who have no basis for claiming to have any expertise in matters of social policy.

There is another reason for preferring the framers' intentions instead of their purposes. In many cases, the drafters' intentions have manifested into legal rules. Clearly defined and transparent rules are necessary in order to secure the rule of law virtues of consistency,

[108] M Schwarzschild, 'Mad Dogmas and Englishmen: How Other People Interpret and Why' (Paper presented at the Conference on Legal Interpretation, Judicial Power and Democracy, Melbourne, 12-14 June 2000) See also, Hurd, above n 104, 13-14. The distinction between the framers' purposes and concrete intentions is similar to the distinction employed between 'enactment intentions' and 'application intentions'. The former refer to the meaning of the provisions when they were enacted, whereas the later refer to how the provisions ought to be applied: Goldsworthy, above n 7, 20, 30-1. As Goldsworthy notes, this distinction is sometimes illusory since application intentions often serve as enactment intentions when they clarify the meaning of a law. Goldsworthy argues that we should defer only to enactment intentions: 'the law consists of the provision which the lawmakers actually enacted, not their possibly mistaken beliefs about its meaning and proper application': at 30. However, it was possibly the very same mistaken beliefs that resulted in the enactment intentions, which Goldsworthy accepts as being binding.

[109] See my views on compromise moral theories, in Bagaric, 'In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights', above n 40.

fairness and freedom from arbitrary interference.[110] 'Thus the rule itself becomes a reason for action, or a reason for a decision',[111] independent of the content of the rule, and in fact 'it is a rule's rigidity, in the face of applications that would ill serve its purpose, that renders it a rule'.[112] The Constitution is the most fundamental legal document in our community and hence the need for fidelity to it is even firmer than in the case of 'stock in trade' legislation.

This is not to advocate an unwavering form of blind rule worship. However, given the importance of constitutional stability, clear and pressing reasons would need to exist to justify adoption of the drafters' purposes in preference to their actual intentions. This is unlikely to occur in the context of the Australian Constitution. The main objective of the Constitution is to set in place the power sharing arrangement between the States and the Commonwealth: unlike the United States Constitution, our Constitution 'is concerned almost entirely with structures and procedures, rather than with substantive principles'.[113] A mistaken belief by the framers about the best method to achieve this balance will result in either the Commonwealth or the States having additional power. Given that there is no evidence that one level of government is more competent than the other, it is unlikely that in the context of the Australian political system a crisis will be reached as a result of inordinate power being conferred to one level of government, at the expense of the other.

It follows that the objections that have been leveled against the concept of a group intention have been over-stated. At the theoretical level, it is possible to construct a model of group intention that is logically analogous to individual intention. The pragmatic criticisms are even less persuasive. The intentions of the framers are documented in the Convention Debates. Where the relevant intentions are not evinced, it is possible to make an informed judgment regarding the likely intentions of the framers from the desires and beliefs that are recorded in the Convention Debates. This is similar to the approach adopted by Mason J in *Attorney-General for Victoria; ex rel Black v Commonwealth*.[114] After noting that 'a constitutional prohibition must be applied in accordance with the meaning which it had in 1900', Mason J then deferred to the meaning that was 'in the minds

[110] P Atiyah and R Summers, *Form and Substance in Anglo American Law* (1987) 24-6.

[111] Shauer, above n 83, 537.

[112] Ibid.

[113] Goldsworthy, above n 7, 22.

[114] (1981) 146 CLR 559.

of the citizens of the Australian colonies at the end of the nineteenth century'.[115]

Conclusion

Originalism is the soundest method of constitutional interpretation. It is the only interpretative theory that is consistent with both the purpose and authority of the Constitution. In addition to this, we have seen that the most pervasive theoretical objection to originalism - the purported illusory nature of group intentions - is surmountable. The living force method of constitutional interpretation is indefensible because followed to its logical conclusion it is an argument for not having a constitution at all.

An originalist construction of the Constitution will to some extent no doubt impair the capacity of our legal system to evolve with time. However, this is not a persuasive reason for rejecting such an interpretive technique. If the Constitution is shown *actually* to retard significantly the capacity of the law to reflect contemporary needs, it can always be changed pursuant to s 128. Opponents will charge that the long line of referendum failures[116] reveals that s 128 is not an appropriate vehicle for achieving constitutional reform. The counter to this is simple: the reason that referenda keep (by and large) failing is that there was no *actual* problem in the first place. A good example, is the recent Republican referendum. The near hysteria generated by some parts of the community and media, elevated this issue to one of seemingly enormous social and political importance. A year down the track, and another constitutional 'reform' failure later, and the question must be asked: How much worse off are we?

It cannot be denied that at some point there might be an important constitutional change that is blocked by referendum. However, even in such circumstances this is not so much an argument against originalism, as evidence that perhaps the terms of the Constitution are too expansive and that the document was poorly drafted after all. In which case it is ultimately an argument for either not having a written constitution, or for making constitutions as minimalist as possible (for

[115] Ibid 616. At the time the case was decided the High Court felt constrained to resort to the Convention Debates (see above). For other examples of a similar approach, see Goldsworthy, above n 7, 14-15.

[116] Only eight of 44 proposals to change the Constitution have been passed by the Australian people. For a discussion of the voting patterns for each of the proposals, see T Blackshield and G Williams, *Australian Constitutional Law and Theory* (2nd ed, 1998) 1183-88.

example, limiting them to the rule of recognition). This is an argument that the originalist may well accept. However, what is unacceptable is the hypocrisy of having a fundamental legal document that is only transient in nature - depending on what is fashionable at the time.