Chapter Four

Work Choices: A Betrayal of Original Meaning?

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Originalism stipulates that a search for the original meaning of constitutional terms upon enactment is the only legitimate interpretive method. By its very nature, this is an historical exercise. In particular, it requires a thorough evaluation of Australia's transition from a collection of independent colonies to a federated Commonwealth. It necessitates taking the temperature as it then was, and giving the attitudes and values of the time a sympathetic ear.

A difficult task, it is none the less an enjoyable one. It involves, for a start, immersing oneself in the former British colonies, a time when border duties were paid, travel occurred on three different types of railway gauge, and men with waistcoats and whiskers were elected to office. These peculiar looking gentlemen, of course, became our nation's founding fathers. Amongst their ranks were such luminaries as Barton, Parkes, Clark and Griffith, all of whom contributed in some way to the Commonwealth Constitution, and whose understanding of that document remains especially crucial.

Also involved was Sir George Reid, perhaps the most intriguing of them all. One reason is that it remains incredibly difficult to decipher whether Reid was for the federation project or against it. On 28 March, 1898 hundreds of New South Welshmen crammed into the Sydney Town Hall to hear their Premier's views on the federation question. Two hours later, they left none the wiser. The bemused commentariat labeled him "Yes-No Reid", an epithet he carried for the rest of his life.[1]

A second reason was his love-hate relationship with the Australian people. During one address, a female interjector cried out, "If I were your wife, I'd put poison in your coffee". The response, often attributed to Sir Winston Churchill, was in fact Reid's: "If I were your husband, I'd drink it," he quipped.[2]

There was more. Whilst delivering an address from a hotel balcony at Newcastle, a young male in the audience pointed up at Reid's immense and unwieldy jelly-like stomach as it threatened to spill over the balustrade on which it was resting, and asked, "What are you going to call it, George?". There are certainly no attempts to implicate Mr Churchill in the response on this occasion as Reid, adjusting his monocle and loosening his waistband, bellowed at his heckler:

> "Well, if it's a boy, I'll call it after myself. If it's a girl, I'll name it Victoria. But if, as I strongly suspect, it's nothing but piss and wind, I'll name it after you".[3]

The larrikin nature of Australian politics, however, belies the serious message of the federation movement. In 2001, Don Watson, after lamenting the fact that the Commonwealth Constitution was soldered together through a protracted series of lawyers' meetings, concluded that Australia's originating documents were entirely without poetry, inspiration, or even an overriding principle.[4] That view is not only denigratory, it is false. Unfortunately, it is increasingly widespread. Hence, it is important to uphold the originating principles of our nation. This is a task for many, including lawyers charged with constitutional interpretation. The most natural way for them to do so is to respect the original meaning of the Commonwealth Constitution. What follows is an explanation of how that might occur.

The search for original meaning

The originalism I speak of regards the discoverable meaning of a constitution at the time of its initial enactment as authoritative for the purposes of present day constitutional interpretation.[5] The focus is not on the subjective intention of the drafters or ratifiers of a constitution, but rather the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.[6] This prohibits us from relying on esoteric information such as private correspondence and the like.[7] It does allow us, however, to rely on certain secondary materials, such as the debates at constitutional conventions, to the extent that they assist us in ascertaining how intelligent and informed people of the time

originally understood the constitution.[8]

In operation, originalism is textualist. A fundamental characteristic of a constitution is that it is a written document, and like all written legal documents, we must respect that text for evidentiary, cautionary and clarificatory reasons.[9] Yet this is not an invitation to embark upon extreme literalism. Rather than construing legal text strictly, or leniently for that matter, we ought to give the text the meaning it most reasonably bears. As Justice Felix Frankfurter observed, legislative ideas are both explicit and immanent, rendering the problem thus: "What is below the surface of the words and yet fairly a part of them?".[10]

In order to answer that puzzle, one cannot approach the task of constitutional interpretation with some kind of "astral intelligence, unprejudiced by any historical knowledge".[11] Instead, the answer requires an appreciation of the context, purpose, circumstances and historical facts surrounding the formation of each constitutional term, not to mention grander considerations such as the object and design of the constitution as a whole. Because constitutions are necessarily broad and general in terms, in many circumstances a strict or literal reading of the language will offend the principle that it is not permissible to adopt a construction which is demonstrably one not intended by those who drafted a constitution.[12] That is why it is acceptable, as with all legal instruments, to utilise extrinsic material which helps supplement, but does not contradict, the relevant language at hand by gleaning the manifestations of the drafters' intent at the time of enactment.[13]

Yet whilst the literal meaning of constitutional words may need to give way to values, intentions or purposes not expressly stipulated in the text, at all times the focus remains the original meaning of the constitution. Any values, intentions or purposes relied upon must belong to those responsible for the words at the time they expressed or ratified them, and must fairly be open given the confines of the express stipulations that the drafters ultimately chose to reduce to writing. It is not legitimate to have recourse to some other set of values, intentions or purposes,[14] whether such recourse is dressed up as "the needs and goals of our present day society",[15] the need for consistency with "universal and fundamental rights",[16] or a determination of what is the "right thing to do".[17]

Before proceeding, a word of caution is worth mentioning. As it is conducive to the scholarly analysis of judicial method to employ terminology such as "originalism", it is important to refrain from appropriating such terms for polemical or rhetorical purposes, particularly given the baggage hitherto carried over from the United States in this field of discourse.[18] Moreover, opinions about whether a particular method is more conducive to "conservative" or "progressive" political agendas should not affect the evaluation and assessment of interpretative technique.[19] We must also be ever vigilant to resist the temptation, within the sphere of originalism, to make dogmatic assertions about what was, or was not, originally intended by our constitutional framers.[20] In all legal controversies, constitutional or otherwise, decisions must ultimately rest on reasoning and analysis that transcend any immediate result at hand.[21]

Original meaning and the rule of law

It is not the purpose of this paper to extol the virtues of originalism. In any event, there is very little one can add to what is perhaps the finest intellectual presentation of these issues by Professor Jeffrey Goldsworthy.[22] That said, a brief point is worth mentioning.

One of the primary arguments supporting originalism is that it is the approach most respectful of the democratic process.[23] Yet the nature of democracy is indeterminate, meaning that proponents of non-originalism can just as easily invoke democracy-based arguments.[24] If anything, the major thrust of justifications for originalism resides not at the more abstract level of democracy *per se*, but at the more material level of asserting the desirability of majoritarianism.[25] Either way, there remains the outstanding jurisprudential issue of how the drafters and ratifiers of a constitution may legitimately bind those who took no part in the democratic polity which initially established the document.[26]

Instead, a more persuasive argument justifying originalism is its consistency with notions of the rule of law,[27] in particular the virtues of constitutional stability, predictability, equality of treatment and neutrality in application.[28] The moment one departs from the text and history of a provision, and the fair implications derived therefrom, it becomes extraordinarily difficult not only to construct a principled way of determining an approach to constitutional interpretation, but to construct an approach that can attract sufficient consensus.[29] Invariably there will be differences as to how a court should approach a matter and what criterion they may invoke, as the judicial task descends into substantial indeterminacy and complexity. The result is judicial decisions that conflict with prior precedent, and the reaching of results that were once unthinkable.

This is not to say that originalism solves all potential conflict. Reasonable minds committed to originalism may well reach divergent opinions from time to time, disagreeing on the original meaning of a provision, or the application of the original meaning to the situation before a court; but at least the originalist always knows what he or she is looking for, namely the original meaning of the text.[30]

For an illuminating example of just how originalists claim that their method promotes the rule of law in constitutional adjudication, and how originalism operates in context more generally, one may look to the experience in the United States, one of the countries to which our founding fathers looked for inspiration when constructing our federation.

Original meaning in context: an American example

Allegations of illegitimate judicial activism, past and present, plague the United States' judiciary in its constitutional jurisprudence. The result has been a hardening of originalist thought. The *United States Constitution*—particularly the *Bill of Rights*—lies replete with instances where originalists argue that the current approach by the judiciary contradicts, or in no way reflects, the original meaning of key constitutional terms. According to originalists, this has led to an unwarranted politicisation of the judiciary and the Constitution itself.

To take just one example, there is no need to look further than the very first sentence of the *Bill of Rights*:

"Congress shall make no law respecting an establishment of religion".[31]

This is not to suggest that the Establishment Clause has generated decisions any more erratic than other constitutional clauses. It is, however, one of the few clauses explicitly replicated in the *Commonwealth Constitution*.[32]

Leave aside the issue of whether the Establishment Clause applies to give rights to individual citizens as against the legislatures of the States.[33] The crucial point for originalism is to ascertain what the prohibition against the *establishment* of religion originally meant. According to originalists, this task remains relatively free from difficulty. At the time of enactment, there were still a number of established religions throughout the States. The hallmark of these establishments was the coercion of religious orthodoxy and of financial support by force of law and threat of penalty.[34] Examples would include the mandatory payment of taxes to support ministers, religious qualifications for office, laws prohibiting the breaking of the Sabbath, and so forth.[35]

Lurking in the background also was the grandest established religion of them all, and the impetus of both the American and Australian establishment clauses: the Church of England. With that in mind, it is clear that the real object of the amendment was to prevent an establishment that vested in an ecclesiastical hierarchy the exclusive patronage of the national government.[36] The original meaning was not to rid the nation of religion, or even to ensure the separation of religion and government more generally, but to prevent perpetual strife and jealousy on the subject of ecclesiastical ascendancy.

For a considerable time, the Establishment Clause served its intended purpose, attracting little controversy. Like so many other clauses, however, its original meaning eventually became lost. The shift commenced in 1947, when the Supreme Court held that the Establishment Clause applied to State as well as federal action, and that it could be construed to prohibit not only the establishment of a religion, but also lesser forms of aid and support, including those directed towards religion more generally (as opposed to a particular denomination).[37] It was the beginning of the Court's injunction that it was necessary to construct a "wall of separation" between church and State.

Despite judicial remonstrations that it was a metaphor "based on bad history" and "useless as a guide to judging",[38] the "wall of separation" continued to underpin Establishment Clause jurisprudence. The result was both inevitable and predictable. It led to a series of tests and counter-tests, qualifications and exceptions, distinctions and contradistinctions, as the Court attempted to grapple with the new direction in which the "living constitution" was taking it. At various points in time, it summoned courts to declare unconstitutional a picture of a crucifix printed on a temporary sign informing the public that a courthouse was closed for Good Friday;[39] the teaching of "creation-science" alongside "evolutionary-science" in Louisiana schools;[40] the delivery of a non-sectarian prayer by a local rabbi at a middle school graduating ceremony;[41] a crèche displayed in a Pittsburgh courthouse during the Christmas season;[42] a minute silence at the start of each school day in Alabama for a moment of "meditation or voluntary prayer";[43] government funding for the teaching of secular subjects in parochial schools;[44] a cross erected in the Mojave Desert Preserve to honour World War I

veterans;[45] and, the decision by a student council to deliver a prayer before their high school football games.[46] It is not yet clear whether the Pledge of Allegiance itself is constitutional.[47]

Hopes for the resolution of this large-scale uncertainty were pinned on the final day of the October, 2004 Term when the Supreme Court handed down its decisions on two cases concerning the display of the Ten Commandments. Unfortunately, these hopes were short lived. In the first case, the display of the Ten Commandments (one of nine framed documents that also included the *Bill of Rights*, the Magna Carta, the Declaration of Independence and the Mayflower Compact, all in a courthouse hallway as part of a "Foundations of American Law and Government" exhibit) was unconstitutional.[48] By contrast, in the second case, the display of the Ten Commandments (one of 17 monuments and 21 other historical markers on the grounds surrounding the Texas State Capitol, commemorating the "people, ideals and events that compose the Texan identity") was constitutional.[49]

In holding both displays to be constitutional, Thomas J explicitly urged a return to the original meaning of the Establishment Clause, noting that such an approach would reflect the intention of the constitutional framers.[50] That intention was to prohibit the legislature from coercing its citizens into supporting an established religion; it was not to prohibit actions as benign as the displaying of text on a wall or stones in the ground.

Thomas J also reflected the views of other originalists on the Supreme Court, that the systematic departure from the original meaning of the Establishment Clause had produced decisions that rested upon the "changeable philosophical predilections" of judges, rather than the "historic practices" of the American people.[51] This departure was also responsible for turning the Court into some form of "theological commission"[52] which "bristles with hostility to all things religious",[53] and invents manipulable tests as the "bulldozer of its social engineering".[54] According to these originalists, a return to the original meaning of the Establishment Clause would therefore bring much needed certainty and simplicity to the jurisprudence in this area.

Whilst the Commonwealth Constitution also contains an establishment clause, it is worth pointing out that the existence of a *Bill of Rights* is a basal difference between the constitutional arrangements of the United States and that of Australia.[55] This may lead some to argue that a debate about originalism as witnessed above has little application to Australian constitutional jurisprudence.[56] To the extent that the Commonwealth Constitution contains purely procedural arrangements, this may be true. Such an observation does not apply, however, to s. 51. Whilst that section does not contain abstract moral principles, and therefore does not invite the imposition by judicial decision of social values, it does confer legislative power upon the federal Parliament in abstract and imprecise terms. The originalism debate has just as much, if not more, relevance in these circumstances than in any other. What follows demonstrates how this is so.

The *Work Choices Case* and originalism

Under the Commonwealth Constitution, the federal Parliament has the power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" ("the Corporations Power").[57] It also has the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" ("the Industrial Relations Power").[58]

It was pursuant to the Corporations Power that the federal Parliament passed the *Workplace Relations Amendment (Work Choices) Act* 2005 ("*Work Choices Act*"). At the risk of simplicity, but most relevantly to this paper, the *Work Choices Act* was aimed at governing completely the employment relationship between corporations and their employees.

Each of the States challenged the constitutional validity of the *Work Choices Act*. In *New South Wales v. Commonwealth*,[59] five members of the High Court joined in dismissing the challenge. The joint reasons held, again at the risk of undue simplicity, that laws prescribing the industrial rights and obligations of corporations and their employees, and the means by which they are to conduct their industrial relations, are laws that fall within the Corporations Power.[60] The joint reasons also held that the Industrial Relations Power did not contain a positive prohibition or restriction upon what would otherwise be the ambit of that power, and therefore the Corporations Powers was not subject to it.[61]

Some initial observations

It is worth noting from the outset that only the dissenting reasons of Callinan J expressly endorse originalism as the most suitable interpretive method in the *Work Choices Case*.[62] This may lead some to the premature

conclusion that an application of originalism would destine one to rule in favour of the States, whilst an application of non-originalism would lead the other way. Yet things are not so simple. Kirby J also upheld the States' challenge, but his Honour's reasons are not necessarily originalist ones.[63] As Ben Jellis has demonstrated, if one travels beyond Kirby J's avowedly anti-originalist rhetoric, one discovers a more nuanced approach that incorporates a somewhat complex attitude towards the concept of original meaning.[64] Kirby J's reasons in the *Work Choices Case* illustrate this thesis, relying just as much upon notions of "industrial fairness" and preserving the "national ethos of the fair go", as considerations of history, purpose and the content of the convention debates.

Conversely, the joint reasons are not completely dismissive of the search for original meaning, supporting the earlier observation that reasonable minds may well differ from time to time in their assessments of original meaning. One of the principal submissions of the States centred on the claim that the Corporations Power would only support a law with respect to the relationships between a corporation and members of the general public (therefore excluding employees). The joint reasons rejected such a distinction, arguing it attracted no support in the convention debates, the drafting history, learned texts written at the turn of the century, or early judicial decisions.[65] Similarly, the joint reasons also rejected the various submissions of the States pertaining to the Industrial Relations Power because "the contemporary meaning in 1900 of the language used" did not support the submissions.[66]

Whilst the joint reasons, at least in some part, rely upon notions of original meaning in rejecting certain submissions, there are other passages where the search for original meaning is seemingly abandoned. A perception that the search for original meaning can be both impossible and futile appears to lie at the heart of this approach:

> "[T]he absence of any extended debate about this power does no more than show that, like so many of the legislative powers ultimately granted to the federal Parliament in s. 51, the power with respect to corporations was not politically controversial at the time the Constitution was framed. But it also follows that it is impossible to distil any conclusion about what the framers intended should be the meaning or the ambit of operation of s. 51(xx) from what was said in debate about the power, or from the drafting history of the provision.
>
> "To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates".[67]

This passage reflects the extra curial comments of Chief Justice Murray Gleeson that the subjective beliefs of our constitutional founding fathers are irrelevant, largely because these beliefs were far from unanimous.[68]

To the extent that these observations focus on the subjective thoughts, intentions and beliefs of each constitutional framer, they are irrefutably correct. Such a concession, however, does not present an insurmountable obstacle to originalism, which is a search for objectivity, not subjectivity, in original meaning. As recently alluded to by Heydon J, when we speak of the intentions of the framers of the Constitution, what we should really be referring to is what the language drafted by the framers meant.[69]

Bearing in mind the nature of an objective inquiry, we should acknowledge that the search for original meaning might be difficult at times, but also put in perspective the kind of problems that may arise. This is not, after all, an inquiry into the machinations of lawmakers in some ancient Babylonian empire. The framers of the constitution lived on the same land, spoke the same language, worked within the same basic legal and governmental structure, and shared many of the same values and aspirations that we do today.

There is also a great deal of reliable written information left behind from the period of constitutional formation, information which goes to the problems with which the constitutional framers were concerned and how they proposed to address them.[70] From that information, we may also draw inferences. That there was scant debate on the Corporations Power could be just as telling as if there was debate, particularly when assessing the claim that the power incorporates a further power that was very controversial at the time and would have attracted much debate. Ultimately, the task of ascertaining original meaning can be difficult, but no more so than the myriad of other difficult tasks that often confronts a court, including ascertaining the meaning of contemporary legislation upon which there is often scant information.

The historic practices of the Australian people

The requirement of objectivity also leads to the aphorism that "a page of history is worth a volume of logic".[71] Again, the originalist critique of Establishment Clause jurisprudence in the United States proffers an illuminating example. In 1970, Brennan J held that the existence of a practice since the beginning of the United States, whilst not conclusive of its constitutionality, was a "fact of considerable import" when it came to the issue of constitutional interpretation.[72] This explains why Scalia J, when upholding the constitutional validity of a rabbi delivering an invocation at a middle school graduation ceremony, catalogued an extensive list of examples to prove a long-established American practice of prayer at public events. These included the inaugural addresses of Presidents from George Washington onwards, the establishment of a national day of thanksgiving and prayer the day after proposal of the Establishment Clause, not to mention the presence of prayers at public high school graduation ceremonies from at least 1868.[73]

The dissenting reasons in the *Work Choices Case* reveal a similar approach at play. Both Callinan and Kirby JJ refer to the fact that from 1901 onwards the courts, industrial tribunals, members of the legal profession, academics, the business community, politicians and legislators alike, all commonly accepted that the federal Parliament did not have the power to legislate with respect to industrial relations beyond the limits of the Industrial Relations Power. This was true even of those who wished that the federal Parliament did have such power.[74]

Callinan J, in particular, also referred to the fact that the Commonwealth tried, on four separate occasions, to give the federal Parliament a broad industrial relations power by way of referenda:

> "Part of the history … of s. 51 that the Commonwealth has had to accept, and had generally accepted until 1993, is that it has no general industrial power, other than the power found in s. 51(xxxv). It has long, from 1910 at least, been understood by the Parliament that it could only exercise general, almost exclusive, legislative powers, and with respect to corporations as well, for industrial affairs, if the Constitution were amended. To effect these amendments the Parliament sought changes on four occasions by referenda, in, respectively, 1911, 1913, 1926 and 1946. The speeches in Parliament regarding the Bills for these are more even than the polemics of referenda … having regard particularly to the experience, eminence, legal qualifications and knowledge of the speakers, [these speeches] throw much light on the founders' intentions and the understanding of the meaning of the Constitution of informed, legally qualified, politically astute, responsible people. The meaning of the words of the Constitution may not change following, and as a result of the failure of a referendum, but it is a distortion of reality to treat the failure as other than reinforcing the received meaning of the words which prompted the attempt to change or enlarge them".[75]

Returning to the extra curial reflections of Chief Justice Murray Gleeson, his Honour there urged resistance against the temptation to "test a proposition of constitutional interpretation by asking whether it would come as a surprise to the Founding Fathers".[76] There can be no doubt that a general test incorporating "surprise" as the yardstick of constitutional validity would divert attention away from the central interpretive task, which is to discover the meaning of the enacted text. Nothing in those remarks, however, signifies permission to pursue constitutional interpretation completely oblivious to history.

The method of originalism places much store on history. To that end, it would receive the views of learned persons at the time of enactment or shortly thereafter, and would greatly respect any judicial decisions handed down in temporal proximity to the time of enactment that bear on the issue at hand: *contemporanea expositio est optima et fortissima in lege*.[77] It would also examine the surrounding circumstances of referenda, successful or not, throughout our constitutional history. In essence, originalism would see all information that goes to the historic practices of the Australian people as relevant to the issue of constitutional interpretation.

The following example is apt. Assume the presentation of the same case, involving the same legislative question and cast at the same level of abstraction, to the High Court at intermittent intervals across time. If the ruling is not consistent, if the States continue to win this hypothetical appeal, only to then lose unexpectedly, it is demonstrative of the kind of illegitimate constitutional change that the search for original meaning aims to prevent. Thus, if history demonstrates that the *Work Choices Act* would not have been constitutionally valid had its passage been secured much earlier in time, then this is demonstrative of the fact that a subsequent meaning has replaced the original meaning.

The relationship between original meaning and precedent

The joint reasons regard the repeated attempts at constitutional amendment by way of referenda as providing

no interpretive assistance. In the context of this case, such dismissal is not consistent with the search for original meaning. By contrast, the joint reasons rely upon the accumulation of High Court precedent, consistent with the command that "close and detailed attention must be given to the previous decisions of the Court in which s. 51(xx) has been considered".[78] This included relying upon previous concessions and absences of critique, as well as any prior overruling, any authorities that had expanded the Corporations Power over time (and the failure of the States to question them), and case law pertaining to the Industrial Relations Power and the construction of the powers in s. 51 more generally.[79] The joint reasons culminated in the approval of a statement by Gaudron J in *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union*,[80] that the Corporations Power:

> "… extends to law prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations".

This is despite her Honour's remarks coming in *obiter*, in dissent, on a point not argued, and subject to significant qualification.[81]

Just like the search for original meaning, reasonable minds differ from time to time on the principle to be distilled from precedent. Callinan J reached the conclusion that there was neither firm authority, nor compelling *dicta*, that required his Honour to hold for the Commonwealth.[82] Kirby J noted two distinct strands of authority that tore in different directions.[83]

That issue aside, the interrelationship between originalism and the doctrine of *stare decisis* is a vexed one, and it is beyond the scope of this paper to explore all the antecedent complexities. There is clearly the potential, however, for discontinuity between original meaning and developed constitutional jurisprudence. As Justice Antonin Scalia has observed of the American experience:

> "If you go into a constitutional law class, or study a constitutional law casebook, or read a brief filed in a constitutional law case, you will rarely find discussion addressed to the text of the constitutional provision that is at issue, or to the question of what was the originally understood or even the originally intended meaning of that text. The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding".[84]

Consequently, some may suggest irreconcilability between the doctrine of *stare decisis* and a commitment to originalism.[85] Others may suggest a compromise path, one that is only prepared to discard precedents of recent vintage or precedents that buck core constitutional values.[86] Either way, a commitment to originalism will countenance the possibility of overruling precedents, and will command such an outcome if a previous decision is inconsistent with the original meaning of the text. Such an approach is consistent with the thinking behind the following statement by Callinan J in the *Work Choices Case*:

> "[E]ven if those of a different mind could, or do, point to past decisions or *dicta* of this Court which in their opinion might appear to compel a different conclusion from mine, there is a clear line of thinking of members of the Court that departures may legitimately and conscientiously be made. In my view they are not merely permissible, but obligatory when the issue is, as here, as significant as the continuing role and integrity of the States. The Commonwealth has conceded that no other case governs this one. That must mean that not even that monument to the demolition of State power, the *Engineers' Case*, does so. If, however, I am wrong about that, the cases to which I have referred in this section of my reasons would provide precedents entitling me to depart from it".[87]

The "federal balance"

Another point of difference between the joint reasons and those of the dissentients inheres in notions of the "federal balance". Understanding the relevance of this balance, if any, to our constitutional arrangements is crucial to any attempts to ascertain original meaning. If one recalls Justice Felix Frankfurter's question set out above, the federal balance is precisely the kind of context, purpose, circumstance and historical fact that aids in the answering of that inquiry.

The Commonwealth Constitution is not a contract.[88] Neither the States nor the Commonwealth existed prior to its enactment, making it factually impossible for those entities to have been privy to such an arrangement. The colonies, however, did exist; a significant fact, at least to the extent that each of them was a geographical polity that bargained for its own interests,[89] and within which existed popularly elected governments and courts of law with the same powers as the ancient royal courts at Westminster.

As Sir Samuel Griffith was explaining in 1890, the colonies were *practically* sovereign states, and perhaps a great

deal more sovereign than the separate States of the United States.[90] This represented a key factual and institutional underpinning of federation as a concept. It meant each colony would seek to preserve the standing to which it had become accustomed, and would only surrender so much of its powers as was "necessary to the establishment of general government to do for them collectively what they cannot do individually for themselves".[91]

Such characterisation of the colonies informed the majority view of constitutional drafters, producing two main consequences. On the one hand, the constitutional arrangements of the federation would incorporate the normative presupposition that each colony was self-governing, separate, and supreme, if not sovereign. Each State (as the successor entities of each colony) would retain these core attributes, subject to the new federal Constitution, under which they would *surrender* particular and discrete legislative power to the federal legislature. By contrast, the minority view would have seen the creation of two new levels of government, State and federal, with legislative power *divided* between the two.[92]

On the other hand, drafting of the constitutional arrangements would occur with a particular conceptual vision of federation in mind. According to that vision, a defining characteristic of a federation was that the executive government of the federation had a direct relationship with each individual citizen, in contradistinction to the key characteristic of a confederation, whereby the federal executive's relationship rested primarily with each member state. Again, there was a minority view, which this time saw the issue of where sovereignty lay as the distinguishing feature between a confederation and a federation. Under the former, sovereignty inhered in the constituent states; under the latter, it lay in the federation as a whole and the people therein.[93]

The joint reasons play down the significance of these factors, referring to Windeyer J's statement in *Victoria v. Commonwealth* that the colonies were not sovereign bodies in any strict legal sense.[94] Upon federation, the colonies became mere components of a nation where the Commonwealth assumed legal supremacy. Consequently, the joint reasons opined that references to a "federal balance" not only carried a misleading implication of static equilibrium, but also introduced a concept ultimately devoid of meaning or utility. Such a concept also failed to take account of changes in constitutional doctrine primarily instigated by developments outside of the law courts, most particularly the experience of the First World War, which consolidated Australian nationhood. Finally, the joint reasons noted that the starting point of constitutional interpretation was the text, and not a particular characterisation of the States formed independently of the text.[95]

To the extent that this represents a view of the original meaning of the Commonwealth Constitution, it is a minority view, in the sense that it is better associated with the preferences of those whom John Stone once referred to as the "centralist quarter … defeated in the debates of the 1890s".[96] As noted above, it was the majority view that prevailed, and with it, certain consequences. These consequences, one might add, were far from theoretical. Without them, it is hard to imagine the current composition of the Senate, the express saving of State Constitutions,[97] and a referendum process requiring majority State approval.

On this last point, it is worth considering the final attempt in 1946 to give the federal Parliament power to legislate over industrial affairs by way of referendum. More Australians were in favour of the proposal than against it, but the referendum failed because a majority of Queenslanders, South Australians and Tasmanians rejected the move. There is no other way to describe this outcome than the constitutional enshrinement of a form of "static equilibrium" that not even the Second World War, let alone the First, could overcome. It is no coincidence then that Callinan J placed much store in the idea of a "federal balance",[98] arguing that to disregard the idea would be tantamount to disregarding the "object which, beyond all doubt, the framers intended, the people who voted in favour of federation adopted, and the Imperial Parliament implemented".[99]

It is also necessary to say something, from the perspective of originalism, about the suggestion in the joint reasons that the rightful "starting point" of constitutional interpretation is the text. Originalism is a textualist doctrine; it demands the interpreter rely primarily on the text. At the same time, the originalist understands that one cannot ascertain the meaning of a constitutional text with a dictionary in one hand and the constitution in the other.[100]

The legislative power of the Commonwealth is restricted to those powers enumerated in the Commonwealth Constitution, the majority of which are set out using general language in s. 51. In fact, so general is the language that a quick glance at s. 51 demonstrates that what we have before us is indeed "an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application".[101]

Of course, on the one hand these general propositions are necessary. Their generality ensures the legislature can, in its own wisdom, adopt its own means to effectuate legitimate objects, and to mould and

model the exercise of its powers, as required by the public interest from time to time.[102] Yet on the other hand, their generality also creates a danger, namely the potential for extraordinarily wide interpretations.

It is essentially left to the judiciary (assuming the futility of relying on central governments) to ensure that such liberty is not taken with any of the general propositions that will offend the central design and operation of the federation. This is where, from the perspective of originalism, notions of the "federal balance" are relevant, not as a starting point of interpretation, but as a relevant factor that helps supplement the otherwise perfunctory language of the federal Parliament's enumerated powers.

If the federal balance is relevant as an interpretive aid in the ascertainment of original meaning, then what precisely, to paraphrase the joint reasons, does it mean? Callinan J answers this query by defining it as the protection of the essential functions and institutions of the States (for example, internal law and order, their judiciaries, and their executives) from obstruction, impediment, diminishment, or curtailment.[103] Within an originalist framework, however, the definition of the federal balance can go further still, namely the denial of any legislative power to the Commonwealth that was within contemplation at the time of enactment but which the Commonwealth did not originally possess.

In a general sense, the application of originalism leads us to a simple and relatively uncontroversial point: the original meaning of the Commonwealth Constitution tilted the balance of power in the Australian federation much further towards the States than has come to be the case.[104] More specifically, pitched at that level of abstraction which says, either the federal Parliament's power to legislate with respect to corporations did, or it did not, extend to industrial affairs at the time of constitutional enactment, we can use that answer to articulate with greater precision the location of the "federal balance".

The idea of a stagnant federal balance may ring alarm bells for those familiar with orthodox principles of constitutional interpretation. That is why it is important to bear in mind that such stagnation does not operate across the board. We are not here dealing with technological developments (such as aeroplanes and television), or the advent of new phenomena (such as the metamorphosis of the United Kingdom into a "foreign power",[105] or the need to defend Australia against Islamic terrorism).[106] Nor are we dealing with fluid moral principles, such as the right to free speech or the prohibition against cruel punishment, which remain largely absent from our constitutional arrangements in any event. In those matters, the debate between "moderate" and "extreme" originalism,[107] not to mention the distinctions between concepts and conceptions, connotations and denotations, application intention and enactment intention, may all come into play. In those matters, it may be perfectly consistent with originalism to regard a particular expression as subject to "dynamism",[108] just as it may be perfectly consistent to agree with the following statement by Lord Wright about the Commonwealth Constitution:

> "The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of their meaning".[109]

The issue of industrial affairs is different. It was just as much an issue in 1900 as it is now. It went to the very heart of the fault lines between those who stood for free trade and those who stood for protection. Nothing has changed. Over the past century, as the nation's two mainstream political forces have come closer and closer together, the issue of industrial relations remains the one issue that consistently defines the political divide. If the founding fathers could see us now, they would be astonished at so much before them: internet commerce, the multicultural nature of our society, native title. They would not be at all surprised, however, at the way we continue to argue about the employment relationship. They would stare in wonder at the plasma televisions within our homes, but nod with recognition at the current union and business group advertisements appearing on them.

The question then is a simple one: who had legislative competence in this area? Was this severe difference in opinion accommodated as much as possible, with the people of each State left to decide their own arrangements? Alternatively, was it better to contain this difference of opinion as much as possible, with over-arching standards imposed upon the diversity of autonomous views that would otherwise arise immanently out of the heterogeneity of political groupings and alliances extant in society?[110] Given the history and circumstances of the federation movement, not to mention the nature of industrial relations, it seems most likely that the colonies, when faced with a choice of keeping such power to themselves or surrendering them away, chose the former.

Subsequent developments

Given the foregoing, it is illegitimate, from the perspective of originalism, to allow subsequent developments to shape the judicial interpretation of certain constitutional puzzles, particularly those at the centre of the *Work Choices Case*. That Australia is now a more united nation than it once was, whether that be due to the waging of military campaigns or otherwise, has no impact on a constitutional situation, which should remain unchanged from 1900 until a majority of Australians and a majority of States determine otherwise.

Also irrelevant, from the perspective of originalism, are considerations about the changing nature of corporations in Australian society. It is true, as the joint reasons point out,[111] that there are now more corporations than there once were, and that they occupy many more industries and achieve many more things than they used to. Those factors may be relevant to determining the meaning of a "trading corporation". That may be an example of how the Commonwealth Constitution is not entirely static, and how the legislative power of the federal Parliament is not limited to the corporations, or the type of corporations, that existed in 1900.

The abstract issue, however, of whether the Constitution gives legislative power to the federal Parliament over industrial relations that occur within a corporation, is one that never grows without the say-so of the people. Even if the enormity of the place now occupied by corporations in today's society were relevant, it is not clear why it justifies the handing of power to the Commonwealth, instead of the other way around. The ruling in the *Work Choices Case* will probably demonstrate a direct correlation between the size of corporate activity and the potency of State legislative irrelevancy. Given the underlying federalist framework of the Commonwealth Constitution, one would have thought such economic developments, if at all relevant, assisted the States in their respective submissions.

Conclusion

Many potential approaches to constitutional interpretation exist.[112] The search for original meaning is just one of them. Whilst there is some High Court authority in support of originalism,[113] there currently exists no universally accepted method.[114] Indeed, some even question the appropriateness of having a universal interpretative method at all.[115] That hurdle aside, originalism is not everyone's preferred choice. To the contrary, vehement attacks on originalism are frequent.[116] Such attacks are sometimes legal or philosophical, but they are more often than not political, reflecting the perception that originalism is responsible for decisions sometimes at odds with popular norms of justice.[117] Moreover, there is no limit to the alternatives to originalism. There are probably even some who would praise Greaney J's 2003 decision in the Supreme Judicial Court of Massachusetts, that a particular result was mandated because it was "the right thing to do".[118]

This paper does not suggest the *Work Choices Case* was wrongly decided. As the saying goes, the joint reasons are final and therefore infallible. However, if one took the view that original meaning should govern constitutional interpretation generally, or at least should have governed the *Work Choices Case* more specifically, the observations raised in this paper become relevant. Indeed, they are relevant anyway. Originalism is an interpretive method supported by numerous normative grounds, including respect for particular notions of democracy and the rule of law. In Australia, notions of federalism also act as a principal motivator of originalism.[119] To that end, it is important that members of this Society are familiar with it.

Endnotes:

1. See Norman Abjorensen, *Reid and the Yes-No Speech*, (1999) 3 *The New Federalist: The Journal of Australian Federation History* 88.

2. Mungo MacCallum, *Australian Political Anecdotes*, (1994) xi.

3. Helen Irving, *Sir George Reid*, in Michelle Grattan (ed), *Australian Prime Ministers*, (2000) 66, 67.

4. Don Watson, *Rabbit Syndrome: Australia and America*, (2001) 4 *Quarterly Essay* 1, 33.

5. Keith Whittington, *The New Originalism*, (2004) 2 *Georgetown Journal of Law and Public Policy*, 599.

6. Randy Barnett, *An Originalism for Nonoriginalists*, (1999) 45 *Loyola Law Review*, 611, 620-621; cf, Whittington, *supra*, 603.

7. Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, (1997) 25 *Federal Law Review*, 1, 10.

8. Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (1997) 38; Robert Bork, *The Tempting of America*, (1990) 144.

9. Randy Barnett, *supra* 630-631. As Barnett points out, there is also a fourth reason for respecting constitutional text, namely that it performs an earmarking or channeling function whereby the populace are made aware of the formal requirements needed to amend the text legitimately.

10. Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes* (Benjamin Cardozo Lecture delivered to the Bar Association of New York, New York, 18 March, 1947).

11. *Baxter v. Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1106 (Griffith CJ, Barton and O'Connor JJ).

12. Sir Daryl Dawson, *Intention and the Constitution—Whose Intent?*, (1990) 6 *Australian Bar Review*, 93, 100.

13. Randy Barnett, *supra*, 631-634.

14. Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, (2005) 42 *San Diego Law Review*, 493, 518.

15. William Eskridge, Jnr, *Dynamic Statutory Interpretation*, (1994) 50.

16. *Kartinyeri v. Commonwealth*, (1997) 152 ALR 540, 598 (Kirby J).

17. *Goodridge v. Department of Public Health*, 798 NE2d 941 (Mass, 2003).

18. Justice Kenneth Hayne, *Concerning Judicial Method—Fifty Years On* (Fourteenth Lucinda Lecture delivered to the Monash University Law School, Melbourne, 17 October, 2006), publication forthcoming in (2006) 32 *Monash University Law Review*; see also Greg Craven, *After Literalism, What?*, (1992) 18 *Melbourne University Law Review*, 874, 884.

19. Ben Jellis, *Justice McHugh, Justice Kirby, and the 'Loose Leaf' Theory of Constitutional Interpretation* (LLB Honours Thesis, Monash University, 2005) 6.

20. Leslie Zines, *The High Court and the Constitution*, (1997) 19.

21. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, (1959) 73 *Harvard Law Review*, 1; Sir Owen Dixon, *Concerning Judicial Method*, in Judge Severin Woinarski (ed), *Jesting Pilate and Other Papers and Addresses by the Right Honourable Sir Owen Dixon*, (1965) 152.

22. Jeffrey Goldsworthy, *Interpreting the Constitution in its Second Century*, (2000) 24 *Melbourne University Law Review*, 677.

23. Justice William Rehnquist, *The Notion of a Living Constitution*, (1976) 54 *Texas Law Review*, 693, 705-706; Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, (1986) 27 *South Texas Law Review*, 226, 465.

24. Mirko Bagaric, *Originalism: Why Some Things Should Never Change—Or at Least Not Too Quickly*, (2000) 19 *University of Tasmania Law Review*, 173, 186.

25. Earl Maltz, *The Failure of Attacks on Constitutional Originalism*, (1987) 4 *Constitutional Commentary*, 43, 45; Daniel Farber, *The Originalism Debate: A Guide for the Perplexed*, (1988) 49 *Ohio State Law Journal*, 1085, 1097-1099.

26. Randy Barnett, *supra*, 637; see also Jeremy Kirk, *Constitutional Interpretation and a Theory of Evolutionary Originalism*, (1999) 27 *Federal Law Review*, 323, 346-347.

27. Cf Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified*, (1985) 73 *California Law Review*, 1482, 1519, ff.

28. On this last point, see Robert Bork, *supra*, 146-153.

29. Robert Bork, *Neutral Principles and Some First Amendment Problems*, (1971) 47 *Indiana Law Journal*, 1, 8; Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, (1988) 82 *Northwestern University Law Review*, 226, 287-288.

30. Justice Antonin Scalia, *supra*, 45.

31. *United States Constitution*, amend I.

32. *Commonwealth Constitution* s. 116 states, *inter alia*, that:
    "The Commonwealth shall not make any law for establishing any religion".

33. The US Supreme Court has held that the Establishment Clause protects State citizens as against their respective State legislature by virtue of the *United States Constitution*, amend XIV, § 1 which states, *inter alia*:
    "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".
    There are suggestions, however, that the original meaning of the *United States Constitution*, amend I, and amend XIV, § 1 resist such incorporation: see *Elk Grove Unified School District v. Newdow*, 542 US 1, 46 (2004) (Thomas J, concurring); see also Daniel Conkle*, Toward a General Theory of the Establishment Clause*, (1988) 82 *Northwestern University Law Review*, 1113, 1136-1142.

34. *Lee v. Weisman*, 505 US 577, 640 (1992) (Scalia J, dissenting).

35. Leonard Levy, *The Establishment Clause: Religion and the First Amendment*, (1986), 3-4; Daniel Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State*, (2002) 32-33.

36. Adam Callinger, *Original Intent and the Ten Commandments: Giving Coherency to Ten Commandments Jurisprudence*, (2005) 3 *Georgetown Journal of Law and Public Policy*, 257, 269-270.

37. *Everson v. Board of Education of Ewing Township*, 330 US 1 (1947).

38. *Wallace v. Jaffree*, 472 US 38, 108 (1985) (Renhquist CJ, dissenting).

39. *Granzeier v. Middleton*, 955 F Supp 741 (ED Ky, 1997).

40. *Edwards v. Aguillard*, 482 US 578 (1987).

41. *Lee v. Weisman*, *loc. cit.*.

42. *County of Allegheny v. ACLU (Pittsburgh Chapter)*, 492 US 573 (1989). In the same case, however, the Court held that a Chanukkah menorah placed just outside the City-County building next to a Christmas tree and a sign saluting liberty was constitutional.

43. *Wallace v. Jaffree*, *loc. cit.*.

44. *Grand Rapids School District v. Ball*, 473 US 373 (1985).

45. *Buono v. Norton*, 371 F 3d 543 (9th Cir, 2004).

46. *Santa Fe Independent School District v. Doe*, 530 US 290 (2000).

47. *Newdow v. United States Congress, Elk Grove Unified School District, et al.*, 542 US 1 (2004).

48. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).

49. *Van Orden v. Perry*, 545 US 677 (2005).

50. *Ibid.*, (Thomas J, concurring).

51. *Lee v. Weisman*, *loc. cit.*, (Scalia J, dissenting).

52. *Van Orden v. Perry*, *loc. cit.*, (Thomas J, concurring).

53. *Santa Fe Independent School District v. Doe*, *loc. cit.*, (Renhquist CJ, dissenting).

54. *Lee v. Weisman*, *loc. cit.*, (Scalia J, dissenting).

55. Sir Owen Dixon, *supra*, 156.

56. Sir Daryl Dawson, *supra*, 95-96; Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, *op. cit.*, 22.

57. S. 51(xx).

58. S. 51(xxxv).

59. (2006) 231 ALR 1 ("*Work Choices Case*"). Note that at the time of presentation of this paper, the official reporting of this case in the Commonwealth Law Reports was not available.

60. *Ibid.*, 60.

61. *Ibid.*, 65.

62. *Ibid.*, 223-224.

63. *Ibid.*, 117, 118, 127, 130, 139, 147-148 (Kirby J).

64. See Ben Jellis, *supra*.

65. *Work Choices Case*, *loc. cit.*, 24, 41.

66. *Ibid.*, 62, 65, 68-71.

67. *Ibid.*, 40; see also at 29.

68. Chief Justice Murray Gleeson, *The Constitutional Decisions of the Founding Fathers* (Inaugural Annual Lecture delivered to the University of Notre Dame School of Law, Sydney, 27 March, 2007).

69. *White v. Director of Military Prosecutions* (2007) 235 ALR 455, 516 (Heydon J).

70. See generally Richard Kay, *loc. cit.*, 253.

71. *New York Trust Co. v. Eisner*, 256 US 345, 249 (1921) (Holmes J).

72. *Walz v. Tax Commission of New York City*, 397 US 664, 681 (1970) (Brennan J, concurring).

73. *Lee v. Weisman*, *loc. cit.*, (Scalia J, dissenting).

74. For example, in 1903, Henry Higgins said:

> "Throughout the whole of the Convention debates, I felt that labour legislation should be exclusively vested in the Commonwealth Parliament…. There was a general belief in the Convention that factory legislation should be left to the States' Parliaments. It was utterly impossible to overcome that feeling".

75. *Work Choices Case*, *loc. cit.*, 196, 208.

76. Chief Justice Murray Gleeson, *supra*.

77. [Editor's Note] Which, as we all know, may be translated, "A contemporaneous exposition is the best and most powerful in the law".

78. *Work Choices Case*, *loc. cit.*, 19.

79. *Ibid.*, 17-18, 21-23, 46-55, 64-68.

80. (2000) 203 CLR 346.

81. *Work Choices Case*, *loc. cit.*, 132 (Kirby J).

82. *Ibid.*, 220 (Callinan J).

83. *Ibid.*, 162-163 (Kirby J).

84. Justice Antonin Scalia, *supra*, 39.

85. See Richard Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, (2001) 76 *New York University Law Review*, 570; Steven Calabresi, *The Tradition of the Written Constitution: Text, Precedent and Burke*, (2006) 57 *Alabama Law Review*, 635.

86. See generally Richard Brisbin, Jr, *Justice Antonin Scalia and the Conservative Revival* (1998) 89-92; see also *Work Choices Case*, *loc. cit.*, 151 (Kirby J):

> "This court needs to give respect to the federal character of the Constitution, for it is a liberty-enhancing feature. Federalism … is protective of the freedom of individuals in an age when the pressures of law, economics and technology tend to pull in the opposite direction".

87. *Work Choices Case*, *loc. cit.*, 220 (Callinan J) (footnotes omitted).

88. Sir John Latham, *Interpretation of the Constitution*, in Justice Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (1961), 1, 4-5.

89. Sir George Reid, *My Reminiscences* (1917), 181.

90. Nicholas Aroney, *The Griffith Doctrine: Reservation and Immunity*, in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court*, (2003) 219, 228; Nicholas Aroney, *Griffith's Vision of Australian Federalism*, in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution*, (2002) 179, 180-181.

91. *Official Report of the National Australasian Convention Debates*, Sydney, 4 March, 1891, 31 (Sir Samuel Griffith).

92. Nicholas Aroney, *Griffith's Vision of Australian Federalism*, *supra*, 180-181, 186.

93. *Ibid.*, 199-201.

94. (1971) 122 CLR 353, 395-396.

95. *Work Choices Case*, *loc. cit.*, 20, 57-60 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

96. John Stone, *Foreword*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 1 (1992), vii, vii.

97. S. 106.

98. *Work Choices Case*, *loc. cit.*, 224-234 (Callinan J); see also 44-151 (Kirby J).

99. *Ibid.*, 212 (Callinan J).

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

101. *Australian National Airways v. Commonwealth* (1945) 71 CLR 29, 81 (Dixon J).

102. Sir John Latham, *supra*, 9.

103. *Work Choices Case*, *loc. cit.*, 225 (Callinan J).

104. Greg Craven, *supra*, 891.

105. See, e.g., *Sue v. Hill* (1999) 199 CLR 463.

106. See, e.g., *Thomas v. Mowbray* [2007] HCA 33 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 2 August, 2007).

107. Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, *op. cit.*, 20, ff.

108. *XYZ v. Commonwealth* (2006) 227 ALR 495, 536-537 (Callinan and Heydon JJ), quoting *Grain Pool of Western Australia v. Commonwealth* (2000) 202 CLR 479, 496 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

109. *James v. Commonwealth* (1936) AC 578, 614 (Lord Wright).

110. See David Meale, *The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal*, (1992) 8 *Australian Journal of Law and Society*, 25, 54.

111. *Work Choices Case*, *loc. cit.*, 25, 40.

112. Paul Michell, *Just Do It! Eskridge's Critical Pragmatic Theory of Statutory Interpretation*, (1994) 41 *McGill Law Journal*, 713, 718-737; Sir Anthony Mason, *The Interpretation of a Constitution in a Modern Liberal Democracy*, in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions*, (1996) 13, 13-30; Justice Susan Kenny, *The High Court on Constitutional Law: The 2002 Term*, (2003) 26 *University of New South Wales Law Journal*, 210.

113. *Australian Steamships v. Malcolm* (1914) 19 CLR 298, 328 (Isaacs J); *Ex parte Professional Engineers' Association* (1959) 107 CLR 208, 267 (Windeyer J); *King v. Jones* (1972) 128 CLR 221, 229 (Barwick CJ); *Attorney-General (Vic); Ex rel Black v. The Commonwealth* (1981) 146 CLR 559, 614-15 (Mason J); *XYZ v. Commonwealth* (2006) 227 ALR 495, 536-537 (Callinan and Heydon JJ).

114. *Work Choices Case*, *loc. cit.*, 208 (Callinan J):

> "I search for consistency of interpretation of the Constitution by the Justices of this Court but cannot find it because it does not exist".

115. *SGH Limited v. Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J).

116. Earl Maltz, *supra*, 43-44.

117. Ken Foskett, *Judging Thomas: The Life and Times of Clarence Thomas*, (2004) 264.

118. *Goodridge v. Department of Public Health*, 798 NE2d 941 (Mass, 2003).

119. Jeffrey Goldsworthy, *Interpreting the Constitution in its Second Century*, *op. cit.*, 683-684.