

Originalism in Australia

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Abstract: *L'originalismo in Australia* – The idea that originalism is a uniquely modern and American approach to constitutional interpretation is false. The traditional approach of common law courts to the interpretation of statutes was originalist, and it has been applied by the High Court of Australia to the interpretation of the Australian Constitution. This article describes that traditional approach and its operation in Australia, its renovation by the High Court in 1988, some complications to which it gives rise, and also explains the High Court's reluctance to acknowledge that it is, indeed, originalist.

Keywords: Australia, Originalism, Constitutional Interpretation.

It is sometimes suggested that originalism is a peculiarly modern and American approach to the interpretation of a written constitution. That is the opposite of the truth; the only aspect of originalism that is distinctively modern and American is the name “originalism”. The traditional approach of common law courts to the interpretation of statutes was originalist, and it was applied to written constitutions in the United States in the 19th Century, Canada also in the 19th and for most of the 20th Century, and Australia throughout the 20th Century and until today. Grant Huscroft and I have recently shown this to be true of Canada and Australia; here I will set out the Australian experience.¹

The Australian Constitution was drafted and endorsed by colonial lawyers and politicians, before being formally enacted by a statute of the United Kingdom Parliament: the *Commonwealth of Australia Constitution Act* 1900 (UK).² When courts started to interpret it, they were naturally guided by traditional British principles of statutory interpretation that would now be called originalist. British courts were firmly wedded to the core thesis of originalism: that until they are formally amended, statutory provisions continue to mean what they meant when they were enacted.³ That principle had been endorsed in Sir Edward Coke's

¹ J. Goldsworthy, G. Huscroft, *Originalism in Canada and Australia: Why the Divergence?*, in R. Albert, D. Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution*, New York, forthcoming. The remainder of this article is adapted from that book chapter.

² The Australian Constitution was also approved by voters in referenda prior to its enactment.

³ See generally D.J. Hurst, *The Problem of the Elderly Statute*, 3 *Legal Studies*, 1983, 21.

Institutes in the early Seventeenth Century.⁴ In 1883, Maxwell stated that “the language of a statute, as of every other writing, is to be construed in the sense which it bore at the period when it was passed.”⁵ This was presumably because otherwise, Parliament’s statutes would be, in effect, vulnerable to amendment by extra-parliamentary means.⁶

A second thesis embraced by most versions of originalism is that the meaning of a law depends partly on the intentions of those who made it. For centuries, the common law had recognized that the object of all interpretation “is to determine what intention is conveyed either expressly or by implication by the language used,” or in other words, “to give effect to the intention of the [law-maker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed.”⁷ Tindall C.J. said in 1844 that this was “the *only rule*” for the construction of statutes.⁸

Occasionally, textualist judges insisted that “we are not...concerned with what Parliament intended, but simply with what it has said in the statute.”⁹ That was one reason why British courts traditionally refused to consult legislative history.¹⁰ But it would be wrong to infer that they did not take seriously the principle that interpreters should seek the law-making intentions that statutes convey, expressly or by implication.¹¹ They distinguished between whatever intentions individual legislators may have expressed, and the intention manifested by the words of the statute given readily available contextual knowledge of its purpose.¹² As Lord Blackburn explained in 1877:

In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used.¹³

⁴ “[T]hose ancient acts and graunts must be construed and taken as the Law was holding at that time when they were made”: 2 Co Inst 2.

⁵ P.B. Maxwell, *On the Interpretation of Statutes* (2nd ed), London, 1883, 75; also 366.

⁶ Condemned at *id.*, 6–7.

⁷P.B. Maxwell, *On the Interpretation of Statutes* (2nd ed), London, 1875, 1; *Attorney-General v. Carlton Bank*, 2 Q.B. 158, 164 (1899) (Lord Russell). For other early authorities see J. Goldsworthy, *Originalism in Constitutional Interpretation*, 25 Federal Law Review, 1997, 1–50.

⁸ *Sussex Peerage Case*, 8 E.R. 1034, 1057 (1844) (Tindall C.J.).

⁹ *R v. Hertford College*, 3 Q.B.D. 693, 707; 47 L.J.Q.B. 649, 658 (1878).

¹⁰ There were additional reasons, including the need for the meanings of laws to be reasonably open to the public, or at least their legal advisers, the unreliability of extrinsic evidence, and the costs in terms of time and money of investigating it.

¹¹ This mistaken inference badly mars the arguments made in H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harvard Law Review, 1985, 885–90 at 895–6, 903–6, 948.

¹² For analysis of the “objective” nature of such a “manifested intention”, see R. Ekins, J. Goldsworthy, *The Reality and Indispensability of Legislative Intention*, 36 Sydney Law Review, 2014, 39, 46–51.

¹³ *River Wear Commissioners v. Adamson*, 2 A.C. 743, 763(1877); see also his remarks in *Edinburgh Street Tramways v. Torbain*, 3 A.C. 58, 68 (1877).

The courts therefore took into account the legal and social circumstances when the law was made, and what it was intended to achieve, when these were, at least when the law was made, commonly known.¹⁴ These principles can be found in Maxwell's 1875 treatise on statutory interpretation.¹⁵ In 1904 they were accurately summarized by O'Connor J of the Australian High Court:

[O]ur duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Statute ... The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances - to the history of the law ... [and] historical facts surrounding the bringing [of] the law into existence.¹⁶

Agreement on these general principles did not prevent disagreement about their implementation, between judges of a textualist bent and those of a more purposive inclination. The former were attracted to the approach of the Judicial Committee of the Privy Council, in Westminster, to the interpretation of the Canadian Constitution, while the latter were attracted to the American Supreme Court's supposedly broader, more purposive methodology.¹⁷ That disagreement split the Australian High Court for two decades, in cases concerning the legitimacy of implied intergovernmental immunities, which its first three judges – influenced by American case-law – discerned within the Constitution. When the Privy Council criticized the High Court's approach as an "expansion" of orthodox interpretive principles,¹⁸ it received a scathing rejoinder criticizing the quality of its interpretation of Canada's Constitution.¹⁹

But in 1920, the Privy Council's approach prevailed when a majority of the High Court overruled the doctrine of implied intergovernmental immunities, and strongly affirmed British rather than American interpretive principles. The majority judgment laid down a more textualist or legalist approach that has dominated constitutional interpretation in Australia ever since.²⁰

Yet even the Court's first three judges had insisted that ordinary principles of statutory interpretation, which they expounded with copious citations of British precedents, were applicable.²¹ One of them, O'Connor J., accurately summarized those principles in the passage previously cited.²² They had insisted that these

¹⁴ See, e.g., Maxwell (1875), *above* note 7, 20–1.

¹⁵ Maxwell (1875), *above* note 7, 1, 5–6, 18–23, 49.

¹⁶ *Tasmania v. Commonwealth*, 1 C.L.R. 329, 358–60 (1904).

¹⁷ G. Craven, *Heresy as Orthodoxy: Were the Founders Progressivists?*, 31 Federal Law Review, 2003, 87, esp. 104, 107–8, 116–121, 108–9, 113–15, 117–18.

¹⁸ *Webb v. Outtrim* (1906) 4 CLR 356 (PC), 359–61.

¹⁹ *Commissioners of Taxation (NSW) v. Baxter* (1907) 4 CLR 1087, 1110; see also 1111.

²⁰ J. Goldsworthy, *Australia: Commitment to Legalism*, in J. Goldsworthy, *Interpreting Constitutions, a Comparative Study*, 2006, 106, 119–20.

²¹ *Tasmania v. Commonwealth* (1904) 1 CLR 329, 338–39 (Griffith CJ).

²² *Id.*, 359 per O'Connor J., cited *above* at n. 16.

principles required the special nature of a constitutional statute to be taken into account.²³ It was special in two main respects. First, it was not a detailed code, like a Tax Act, so some powers and rights were conferred by implication rather than expressly.²⁴ Secondly, it was intended to establish an abiding system of government able to cope with unpredictable future developments, so legislative powers should be construed broadly.²⁵ But neither consideration was thought to warrant a departure from more fundamental interpretive principles.

Those principles were often acknowledged to require that, until a statute is amended, its words continue to mean what they meant when they were first enacted.²⁶ As Barton J explained, “[t]o attempt to give [the words] a larger meaning is to attempt to alter the Constitution,” which could be legitimately achieved only by referendum.²⁷ Orthodoxy also held the Constitution’s meaning to depend on the context in which it was drafted and enacted, including pre-existing laws and general historical facts. The judges often referred to the intention of the legislature, but also to what was in “the minds of the framers” and of “the people” who had approved the Constitution before its enactment.²⁸ They studied earlier drafts of the Constitution to infer reasons for its final wording.²⁹ They also examined the meanings of words in prior colonial legislation, on the ground that they would have been “in the minds of” the framers.³⁰

Although the Court held that the original meaning of a provision was fixed, it accepted that a provision could apply to novel objects not envisaged by the founders.³¹ The Court borrowed, from John Stuart Mill, the terms “connotation” and “denotation” to designate, respectively, the meaning of a word, and the objects to which it refers. The distinction helps explain many of its decisions. For example, in 1900 people born in Britain were not subject to Parliament’s power with respect to “aliens,” but due to Australia’s later transition to independence, their status changed. The meaning of “aliens” did not change, but its application necessarily changed when the facts changed.³²

The role of historical considerations after 1920 should not be exaggerated. In many cases they played little role. Until 1988, the Court was willing to infer the founders’ intentions and purposes only from a very limited range of material. It often preferred not to gloss the ordinary or natural meaning of the text, especially

²³ E.g. *Attorney-General (NSW) v. Brewery Employees Union of NSW* (1908) 6 C.L.R. 469, 612.

²⁴ *Tasmania v. Commonwealth* (1904) 1 CLR 329, 338 (Griffith CJ).

²⁵ *Jumbunna Coal Mine, No Liability v. Victorian Coal Miners’ Association* (1908) 6 C.L.R. 309, 343, 356.

²⁶ *Attorney-General (NSW) v. Brewery Employees Union of NSW* (1908) 6 C.L.R. 469, 501, 521; see also *R v. Barger* (1908) 6 C.L.R. 41, 68, 116.

²⁷ *Brewery Employees Union*, above n. 26, 521.

²⁸ *Tasmania v. Commonwealth*, above n 24, 343–44 (Griffith CJ), 348 and 351–52 (Barton J), 360 (O’Connor J.). See also *Deakin v. Webb* (1904) 1 C.L.R. 585, 630–31 (O’Connor J.).

²⁹ *Tasmania v. Commonwealth*, above note 24, at 333.

³⁰ *Brewery Employees Union*, above note 26, at 522 (Barton J).

³¹ Stated clearly in Sir G. Barwick, *Foreword* to P.H. Lane, *Lane’s Commentary on the Australian Constitution*, 1986, vii.

³² See J. Goldsworthy, *Original Meanings and Contemporary Understandings in Constitutional Interpretation*, in H.P. Lee, P. Gerangelos (eds), *Constitutional Advancement in a Frozen Continent*, 2009, 245, esp 250, 255–62, 265–66.

when interpreting Commonwealth powers.³³ Sometimes the attribution of a purpose to a provision was little more than dogmatic assertion.³⁴ Nevertheless, as Professor Lane observed in 1979, “the High Court has frequently grubbed around the historical roots of a constitutional term in order to unearth its content.”³⁵

The prohibition on the use of most legislative history in interpreting the Constitution led to some interpretive errors with unfortunate consequences. For example, unwilling to admit historical evidence of the intended meaning of s 92’s elliptical guarantee of “absolute” freedom of interstate trade and commerce, the Court “embarked on an abstract exercise of giving an almost context-free meaning to the words of the section.”³⁶ This turned s 92 into a partial guarantee of *laissez-faire*, rather than the more limited prohibition of state protectionism intended by the founders. Consequently, it became the most litigated provision of the Constitution, an obstacle to the democratic regulation of business by all political parties, a source of bitter political controversy, and the subject of continual judicial disagreement, instability and uncertainty.

In 1988 the Court in *Cole v. Whitfield* restored the section’s historically intended meaning.³⁷ To do so, it reversed its long-standing refusal to consult the published Convention Debates and other historical evidence. But it also insisted that such material could not be used “for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have.” It could only be used to identify “the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement toward federation from which the compact of the Constitution finally emerged.”³⁸ This is tantamount to the adoption of an “original public meaning”, as opposed to an “original intentions”, version of originalism.³⁹ In other words, it is very similar to the position advocated by contemporary American originalists such as Larry Solum.

This decision led to a substantial increase in judicial enquiries into the original meanings of constitutional provisions.⁴⁰ These are relatively easy to undertake in Australia because of the quantity and quality of historical records of the founders’ deliberations.⁴¹ Overall, the High Court has been more rather than less originalist since 1988, although this has provoked dissent.

³³ P.H. Lane, *The Australian Federal System* (2nd ed), 1979, 1113–14.

³⁴ L. Zines *The High Court and the Constitution* (4th ed), 1997, 450–51.

³⁵ Lane, *The Australian Federal System*, above 33, 1110.

³⁶ M. Coper, *Interstate Trade and Commerce, Freedom of*, in T. Blackshield, M. Coper, G. Williams (eds), *The Oxford Companion to the High Court of Australia*, 2001, 356.

³⁷ *Cole v. Whitfield* 165 C.L.R. 360 (1988).

³⁸ *Id.* at 385.

³⁹ Accord, H. Irving, *Constitutional Interpretation, the High Court, and the Discipline of History*, 41 *Federal Law Review*, 2013, 95, 109; L.K. Weis, *What Comparativism Tells Us About Originalism*, 11 *International Journal of Constitutional Law*, 2013, 843.

⁴⁰ For data, see *id.* at 113–14.

⁴¹ Especially the Debates of various Constitutional Conventions in the 1890s, now available online at: www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s.

In 1994, Deane and Toohey JJ began to refer to the Constitution as a “living instrument” or “living force” that should not be constrained by the dead hands of the founders.⁴² From his appointment to the Court two years later, Kirby J mounted a sustained campaign against the principle that the contemporary meaning of the Constitution is the same as its original meaning.⁴³ Instead, “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.”⁴⁴ But a majority of the Court rejected Kirby J’s arguments. Gleeson C.J. said:

It is in the nature of law that rules laid down in the past, whether the past be recent or distant, bind conduct in the future. It is in the nature of a written, federal Constitution that a division of governmental power . . . agreed upon in the past, binds future governments. . . . [T]he role of a court is to understand and apply the meaning of the terms, not to alter the agreement.⁴⁵

McHugh J insisted that the function of the judiciary was not to “amend or modernise the *Constitution*,” but

to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention. That necessarily means that decisions, taken almost a century ago by people long dead, bind the people of Australia today even in cases where most people agree that those decisions are out of touch with the present needs of Australian society.⁴⁶

It was often observed that the proper method for keeping Constitution up-to-date was amendment by referendum.⁴⁷

Although the High Court seems committed to a version of public meaning originalism, it is wary of theories and, in a unanimous judgment, emphatically eschewed any “single all-embracing theory of constitutional interpretation.”⁴⁸ It added that:

Debates cast in terms like “originalism” or “original intent” (evidently intended to stand in opposition to “contemporary meaning”) with their echoes of very different debates in other jurisdictions are not to the point and serve only to obscure much more than they illuminate.⁴⁹

⁴² Goldsworthy, *Australia: Commitment to Legalism*, above note 20, 150–52.

⁴³ *Id.* See also The Hon Justice M. Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 Melbourne University Law Review, 2000, 1.

⁴⁴ *Eastman v. R.*, 203 CLR 1, 80 (2000) [242].

⁴⁵ *Singh v. Commonwealth*, 222 CLR 322, 330 (2004) [6]; see also *id.*, [295] (Callinan J.).

⁴⁶ *Re Wakim, e parte McNally* (1999) 198 CLR 511, 549–50 [35]–[39].

⁴⁷ E.g., *SGH Ltd v. Federal Commissioner of Taxation*, 210 CLR 51 (2002), 75 (Gummow J.).

⁴⁸ *Commonwealth v. ACT*, 250 CLR 441, 455 (2013) [14].

⁴⁹ *Id.*

In an earlier case, Gummow J observed that constitutional issues “are too complex and diverse” to be resolved by any one theory, and “are not determined simply by linguistic considerations which pertained a century ago.”⁵⁰

There are probably various reasons for this caution, one being a misunderstanding of what the term “originalism” means. Australian lawyers tend to associate the term with the approach of politically conservative American judges such as the late Antonin Scalia, with whom they prefer not to be associated.

A second reason involves difficulties in applying the established principle that while the meaning of the Constitution’s words cannot change, their application can.⁵¹ Many words cannot be precisely defined by a list of criteria that are necessary and sufficient for their correct application.⁵² Moreover, unexpected developments can reveal that previous beliefs about essential criteria were mistaken (as when the discovery of black swans showed that swans need not be white). Therefore, when a word enacted in 1900 must be applied to later developments unanticipated by the founders, it may be impossible to know what criteria they themselves – had they envisaged those developments – would have regarded as essential to the word’s correct application.⁵³ The solution must lie in their apparent purpose in using the word. Thus, in deciding whether or not modern reforms to jury trials are consistent with the constitutional requirement of “trial ...by jury,” the Court recognized that although the requirement “is referable to that institution as understood at common law at the time of federation,” its “essential features are to be discerned with regard to the purpose which [it] was intended to serve.”⁵⁴

A third reason for caution concerns the right to vote – unsurprisingly, given that judges required to protect rights are especially reluctant to be governed by the moral beliefs of past generations. Australian judges have struggled to reconcile orthodox interpretive principles with their strong intuitive sense that if Parliament were to abolish the right of women to vote, it would violate the constitutional requirement that members of Parliament be “directly chosen by the people.”⁵⁵ The question is not determined by the biological meaning of the word “people”: after all, children are also people in that sense, but cannot vote. The difficulty is that, in 1900, the founders deliberately left it to Parliament to decide whether or not women would be permitted to vote (it decided in 1902 that they could). They must have believed that the term “the people” had a non-biological meaning that permitted a choice either way. But if it did, how in the absence of amendment could it no longer do so today?

Various solutions have been proposed, including the “evolving meaning” gambit.⁵⁶ But the best solution does not require rejecting originalism. When

⁵⁰ *SGH Ltd v. Federal Commissioner of Taxation* 210 CLR 51, 75 (2002) [42].

⁵¹ Text to nn 31-32 above.

⁵² Goldsworthy, above note 32, 257–62.

⁵³ *Id.* 259–60.

⁵⁴ *Ng v. R.*, 217 CLR 521, 526 (2003); see also *Brownlee v. R* 207 CLR 278, 298 (2001).

⁵⁵ *Commonwealth of Australia Constitution*, ss 7 and 24.

⁵⁶ *Roach v. Electoral Commissioner* (2007) 233 CLR 162, 180 and 186 (Gummow, Kirby and Crennan JJ).

legislation gave women the right to vote in 1902, they became part of “the people” understood as those members of the community who are civically engaged and participate in public decision-making.⁵⁷ The original meaning of “the people,” thus understood, did not change, but its application did.⁵⁸ Moreover, legislation to reverse that development would now be inconsistent with these crucial social facts of membership and participation, which determine the current application of “the people.”

The complexities and subtleties of originalist approaches to constitutional interpretation can be seen in the way the High Court resolved the question of legislative power to authorize same-sex marriage. The national Parliament has power to make laws with respect to “marriage,” but in 19th Century ordinary usage that word surely meant a union of a man and a woman. If so, it might seem that Australian originalists would have to interpret the word today as excluding national power to authorize same-sex marriages. But the High Court identified a more abstract original meaning: the constitutional term “marriage,” even in 1900, was a “topic of juristic classification” that included “laws of a kind ‘generally considered, for comparative law and private international law, as being the subjects of a country’s marriage laws.’”⁵⁹ It was, in effect, a legal term of art that included legal relationships foreign to British common law, such as polygamy. This enabled Parliament to recognize such foreign relationships as marriages,⁶⁰ and to amend Australian law in accordance with changing mores – which is, after all, a principal purpose of conferring legislative power.⁶¹

It might be objected that the High Court’s attempt to show that its conclusion was consistent with original meaning was strained, barely concealing a desire to update the Constitution to accord with modern values. There are certainly other recent decisions at which that criticism could fairly be aimed.⁶² But in this case, the Court’s conclusion can be supported by an alternative form of originalist reasoning. If the Court was wrong about the original meaning of “marriage,” then the consequence of developments in social mores unanticipated by the founders would be to frustrate their purpose in enacting it. The purpose of granting power over “marriage” to the national Parliament was not to forbid same-sex marriages, and it could not have that effect on any interpretation. That is because if the constitutional term “marriage” were confined to heterosexual marriage, same-sex marriages could be authorized by State legislation. But that would defeat the founders’ purpose of enabling uniform national regulation of a vitally important legal relationship underpinning family life, child rearing and

⁵⁷ P. Emerton, *Political Freedoms and Entitlements in the Australian Constitution – An Example of Referential Intentions Yielding Unintended Legal Consequences*, 38 *Federal Law Review*, 2010, 169, 195–202.

⁵⁸ The meaning of “aliens”, discussed *above* at n 32.

⁵⁹ *Commonwealth v. ACT*, 250 CLR 441, 455 (2013), [14] and 458–59 [20] and [22], quoting Windeyer J in *Attorney-General (Vic) v. The Commonwealth (Marriage Act Case)* 107 CLR 529, 578 (1962).

⁶⁰ *Commonwealth v. ACT*, *above* n 59, 461–62 [32], [33] and [35].

⁶¹ *Id.* at 456–59 [16]–[21].

⁶² See J. Goldsworthy, *Kable, Kirk and Judicial Statesmanship*, 40 *Monash University Law Review*, 2014, 75.

social stability throughout the nation. A new legal relationship of the same kind as heterosexual marriage, sometimes involving custody of children, and its dissolution, would have to be governed by disparate State rather than uniform national laws.

That consequence would be prevented by a version of originalism that permits a word's original meaning to be incrementally extended to give effect to its original purpose. But that form of originalism would admittedly be open to abuse by pitching original purposes at a very high level of abstraction; it would therefore be difficult to confine, and is therefore controversial among originalists. It is no doubt partly due to such complications that the High Court has been wary of openly endorsing *any* particular theory of constitutional interpretation.