New Day Rising? Non-Originalism, Justice Kirby and Section 80 of The Constitution

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In *R v Cheng*,[1] Justice Kirby has again argued that the Australian Constitution should be read and interpreted as a living document, a 'text set free'[2] from the subjective intentions of its framers.

> It is my opinion that the framers of the Constitution did not intend, nor did they enjoy the power to require, that their subjective expectations, wishes or hopes should control all succeeding generations of Australians who live under the protection of the Constitution.[3]

Cheng is another salvo in Justice Kirby's seemingly lone crusade to have non-originalism take root as the preferred method for the High Court to resolve cases raising novel constitutional questions or involving textual ambiguity or uncertainty.[4] I will call these cases 'hard constitutional cases'. In *Cheng*, Kirby J, through a construction of the Constitution he claimed to be non-originalist, sought to transform s80 from a 'mere procedural provision'[5] into a substantive constitutional right.

Justice Kirby has stated that when interpreting the Australian Constitution:

> a consistent application of the view that the *Constitution* was set free from its founders in 1901 is the rule that we should apply ... Our *Constitution* belongs to the 21st century, not to the 19th.[6]

Professor Jeffrey Goldsworthy has labelled Justice Kirby's theory 'radical non-originalism'.[7] Part 1 of the paper will assess the validity of 'radical non-originalism'

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1 (2000) 203 CLR 248 (hereinafter *Cheng*).

2 *Re Colina: Ex parte Torney* (1999) 200 CLR 386 (hereinafter *Re Colina*) at 423 (Kirby J).

3 Above n1 at 321 (Kirby J).

4 *Re Wakim: Ex parte McNally* (1999) 198 CLR 511 at 599–600; *Re the Governor, Goulburn Corrections Centre; Ex parte Eastman* (1999) 200 CLR 322 (hereinafter *Eastman*) at 354–356; *Re Colina*, above n2 at 422–423; *Grain Pool of Western Australia v Commonwealth* (2000) 170 ALR 111 (hereinafter *Grain Pool*) at 139–142; *Brownlee v The Queen* (2001) 180 ALR 301 (hereinafter *Brownlee*) at 332–343; Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *MULR* 1.

5 *Spratt v Hermes* (1965) 114 CLR 226 at 244 (Barwick CJ).

6 Kirby, above n4 at 14.

7 Jeffrey Goldsworthy, 'Interpreting the *Constitution* in its Second Century' (2000) 24 *MULR* 677 at 679.

as a theory of interpretation and the merits or otherwise of non-originalism in general. It will examine some of the main arguments made against non-originalism by Australian lawyers and philosophers and argue that these criticisms are unpersuasive and overstated or, in the alternative, are equally applicable to their own theories. In addition, and by way of retort, I will briefly critique two theories of interpretation that have emerged in Australia that claim fidelity to the original, intended meaning of the Constitution as their core value. Consequently, it will be submitted that non-originalism, if applied in a manner that is faithful to the text and structure of the Constitution, is an appropriate and legitimate way to resolve hard constitutional questions in Australia.

Part 2 of the paper will focus on the recent s80 jurisprudence of the High Court and, in particular, the dissenting judgments of Justice Kirby in *Re Colina* and *Cheng*. In these two cases Kirby J stated that reading s80 'with the eyes of the present generation'[8] directed a construction of s80 that endorsed elements of the dissenting judgments of Brennan and Deane JJ in *Kingswell v The Queen*.[9] It will be argued that in *Re Colina* and *Cheng*, Kirby J failed to apply non-originalism in a manner faithful to the text of s80 and its own methodology. It will therefore be submitted that his construction of this component of s80 must, as a matter of interpretative logic, be rejected. However, when called upon in *Brownlee* to resolve two of the more procedural issues arising from s80, Kirby J applied non-originalism in an appropriate and rigorous manner. Moreover, when one compares the logic and intellectual honesty of his judgment in *Brownlee* with the 'faint-hearted originalism'[10] of the rest of the Court, a compelling argument can be made for non-originalism as a legitimate theory for interpreting the Constitution to resolve hard constitutional cases in Australia.

Part 3 of the paper will outline what I consider to be the outer limit of the constitutional guarantee provided by s80. In addition, I will suggest that there could be an alternative method of indirectly rejuvenating the s80 guarantee consistent with the text and structure of the Constitution and established principles of constitutional interpretation.

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8 Above n1 at 322.

9 (1985) 159 CLR 264 (hereinafter *Kingswell*).

10 *Brownlee*, above n4 at 337 (Kirby J) quoting from *Eastman*, above n4 at 68 (McHugh J). This term was originally coined by Justice Antonin Scalia to refer to 'a small but hardy group of judges and academics ... [who] believe that the Constitution has a fixed meaning, which does not change: it means today what it meant when it was adopted, nothing more nothing less': Justice Antonin Scalia, 'The Role of a Constitutional Court in a Democratic Society' (1995) 2 *The Judicial Review* 141 at 142. This is what Goldsworthy calls the 'more extreme versions of originalism' — see text following n11–13, below. However, in *Eastman* it was clear that McHugh J was not referring to extreme originalism but something closer to moderate originalism. At 45–46 his Honour stated: 'In one very important respect, judicial practice in Australia has departed from Justice Scalia's view of constitutional interpretation and the notion that the meaning of constitutional provisions is fixed as at 1900 .... The reason for the court's interpretation is that the relevant intention of constitutional provisions is that expressed in the Constitution itself, not the subjective intention of its framers or makers. It is an intention that is determined objectively.'

1. Non-Originalism

First, it should be noted that in Australia common ground exists between the main protagonists in the interpretation debate. Both sides concede that hard constitutional cases cannot in the majority of situations be satisfactorily resolved by resorting to 'intentionalism'[11] or what Goldsworthy has called the 'more extreme versions of originalism'.[12] This theory states that 'if the meaning of the words of a constitution is not clear, the words should bear the meaning which the founders understood them to mean.'[13] But as Goldsworthy has noted, 'resort to the founders' intentions cannot answer all, or probably even most, interpretative disputes of the kind which appellate courts are required to resolve.'[14] Similar criticisms of extreme originalism have been made by Sir Anthony Mason,[15] David Tucker[16] and, of course, Justice Kirby.[17] Jeremy Kirk has also pointed out that seeking to discern the collective intent of the founders is fraught with uncertainty:

> A parallel source of uncertainty in intentionalism relates to the question of the appropriate generality of meaning (as opposed to generality of evidence) ... This does not mean there can be no limit on stating what level of meaning was likely to have been intended; just that finding where that limit lies is intrinsically uncertain ... The indeterminacy of intentionalism undermines its claims to having substantially greater legitimacy than forms of non-originalism.[18]

In addition, to characterise the debate as being between two, self-contained and completely separate interpretative theories would be misleading. There is some overlap between non-originalism and the modern originalist theories in their theoretical underpinnings and practical application. This is neither surprising nor controversial as the primary aim of any modern theory of constitutional interpretation is to articulate a methodology that allows a Constitution to evolve

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11 For a discussion on intentionalism and its relevance to originalism see Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford & Kim Preston (eds), *Interpreting Constitutions* (1996) at 13.

12 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Fed LR* 1.

13 Above n11 at 15; see further Robert Bork, *The Tempting of America — The Political Seduction of the Law* (1990) at 143–160.

14 Above n12 at 20.

15 Above n11 at 15–16.

16 David Tucker, 'Textualism: An Australian Evaluation of the Debate between Professor Ronald Dworkin and Justice Antonin Scalia' (1999) 21 *Syd LR* 567 at 575–576. Although it should be noted that Tucker agrees with Justice Scalia's claim that '[w]ithout some understanding of what may have been intended at the time of enactment, no full account of the context that secures meaning to a text can be provided' (at 577).

17 Kirby, above n4 at 8.

18 Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Fed LR* 323 at 357. Similar concerns in the Australian context have attracted both judicial and academic comment. See *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1 at 17 (Barwick CJ); Sir Daryl Dawson, 'Intention and the Constitution — Whose Intent?' (1990) 6 *Australian Bar Review* 93 at 95; Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Fed LR* 133 at 151–154.

and adapt to new and unforseen social, economic and political circumstances without compromising the integrity of its text and structure. For example, both non-originalism and the modern originalist theories provide a principled explanation for the High Court's decision in *Sue v Hill*.[19]

The primary difference between non-originalism and modern originalist theories is the relevance and/or bindingness of the framers' intentions in the resolution of hard constitutional cases: in other words, the differing importance each theory attaches to the framers' intentions in determining the scope of legitimate constitutional evolution. However, as Professor Greg Craven has correctly noted, the debate 'is unlikely to be quite as fierce in Australia as it has been ... in the United States'.[20] He states that:

> [t]he reason for this is clear. The originalism debate in the United States has largely been fought over the interpretation of the Bill of Rights, with its broad, sweeping guarantees of fundamental human rights. It is in this highly emotive context, the stalking-ground of rights to abortion and freedom from racial discrimination, that the performance of the Supreme Court has been vilified or defended according to the stance of commentators upon the question of original intent. The Australian Constitution does not include a bill of rights, and so the High Court has not been called upon to deploy its interpretative armory in so controversial a field.[21]

No doubt there are strong arguments on both sides of the debate. However, hard constitutional cases necessitate judicial choice. It is in these situations that Justice Kirby advocates non-originalism as the preferred theory of constitutional interpretation. Although the scope of this paper will not permit an exhaustive critique of every relevant issue, I will endeavour to outline and assess what I consider the main arguments made against non-originalism by Australian constitutional lawyers and philosophers.

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19 (1999) 199 CLR 462. See further Goldsworthy, above n7 at 694–695.

20 Greg Craven, 'Original Intent and the Australian Constitution — Coming Soon to a Court Near You?' (1990) 1 *PLR* 166 at 169. The debate in the United States with respect to how their Constitution, and in particular the Bill of Rights, should be interpreted has generated a voluminous amount of judicial and academic commentary. A very small selection includes: Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 *Boston U LR* 204; Richard Kay, 'Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses' (1988) 82 *Northwestern U LR* 226; Leonard Levy, *Original Intent and the Framers' Constitution* (1998); Justice Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 *UCinLR* 849; Bork, above n13; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996); Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); David Zlotnik, 'Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology' (1999) 48 *Emory LJ* 1377.

21 Craven, id at 169.

A. Professor Greg Craven

(i) Textual infidelity and constitutional indeterminacy

Professor Craven has suggested that non-originalism:

> if taken to its logical conclusion ... proffers a vision of an Australian constitutional system which to a very significant extent will not really be founded on a written document. The Constitution would become merely a starting-point for the reasoning of the Justices, and the bulk of the true "law of the Constitution" would lie for practical purposes in their decisions and pronouncements.[22]

To the extent that the decisions of the High Court in hard constitutional cases make up the true 'law of the Constitution', I would have thought this uncontroversial. The very nature of having to interpret and adapt a Constitution to resolve these kinds of cases makes those decisions and pronouncements the true 'law of the Constitution': not at the expense of the text, but as the necessary consequence of having to interpret that text. In any event, such a criticism (if indeed it really is one) applies to both originalism and non-originalism, as Craven later admits.[23] However, the nut of Craven's argument seems to be a milder version of Justice Scalia's claim that non–originalism is a 'philosophy which says that the Constitution *changes* ... For the evolutionist ... every question is an open question, every day a new day.'[24]

It is hard to understand the logic of this notion: that to be a non-originalist is to be a textual infidel. The great majority of High Court cases cannot be resolved by simple recourse to the text. The text of the Constitution itself does not change, but interpreting the text to resolve hard constitutional cases will necessarily expand the scope and meaning of that text. The claim against non-originalism of textual infidelity is a red herring. Both originalists and non-originalists agree that the text and structure of the Constitution must always prevail.[25] But the resolution of hard constitutional cases requires fresh constitutional judgments. As Professor Ronald Dworkin has noted, in these situations the Constitution 'must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says'.[26] Similarly, in *Re Colina*, Justice Kirby stated that the language of the Constitution should be read with the eyes of the current generation, 'to fulfil (*so far as the words and structure permit*) the rapidly changing needs of their times'.[27] [Emphasis added.]

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22 Id at 174–175.

23 Id at 175.

24 Scalia, *A Matter of Interpretation*, above n20 at 45.

25 On a number of occasions Justice Kirby has stated that non-originalism must be faithful to the text and structure of the Constitution. See *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (hereinafter *Kartinyeri*) at 399–400; *Re Wakim; Ex parte McNally*, above n4 at 600; above n2 at 423; *Grain Pool*, above n4 at 139–140.

26 Scalia, *A Matter of Interpretation*, above n20 at 122.

27 Above n2 at 423.

B. Professor Jeffrey Goldsworthy[28]

(i) Based on an obvious falsehood or recognising popular sovereignty?

Goldsworthy claims that non-originalism is 'based on an obvious falsehood'.[29] To the non-originalist approach that a Constitution should be interpreted as if just agreed upon by the citizenry at a referendum,[30] Goldsworthy replies that 'the Constitution did not come into force this morning by a sovereign act of today's Australians. To base the interpretation of laws on obvious falsehoods would be a dubious enterprise, to say the least.'[31]

As a historical observation, the above statement is no doubt true. However, as Goldsworthy points out:

> [T]his objection can probably be overcome. Non-originalists could reply that it is not a matter of falsely pretending that the Constitution really has just been enacted, but merely of recognising that the Constitution owes its continuing authority to its being accepted by today's Australians, and consequently of interpreting it in the light of their beliefs and values — as they understand it, or would understand it, if they read it.[32]

However, in addition, I think the response to this argument, when taken to its logical conclusion, provides a strong normative justification for non-originalism. The High Court has recognised that the Constitution derives its authority from the Australian people.[33] Consequently, as a matter of constitutional theory and (maybe more importantly) political reality, the legitimacy of our Constitution stems from its continued acceptance, express or implied, by the Australian people. The fact that most Australians are probably unaware of the Constitution's existence and/or significance, and have never consciously contemplated or acknowledged its authority is not decisive.[34] The great majority do accept and respect (sometimes begrudgingly) a system of constitutional government that permits and protects, amongst other things, relatively free speech and peaceful protest, the ability to vote, the opportunity to obtain employment, the provision of welfare benefits to

28 Goldsworthy, above n12, outlines two versions of non-originalism. At 36 he states that '[a]ccording to one, the meanings of a statutory or constitutional provision are exhausted by the literal meanings of its words, determined by current dictionary definitions and rules of English grammar.' At 37 he defines the 'second, non-literalist version of non-originalism' as one that 'holds a statute, or constitution should be interpreted "as if" it has only been just enacted by the legislature, or the electors in a referendum.' My analysis is concerned with the second, non-literalist version of non-originalism which more closely corresponds with the interpretative methodology of Justice Kirby.

29 Id at 37.

30 Goldsworthy, id at fn199, notes this approach to statutory and constitutional interpretation was outlined by T Alexander Aleinikoff in 'Updating Statutory Interpretation' (1988) *Michigan LR* 20 at 21, 46.

31 Above n12 at 37.

32 Ibid.

33 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137–138 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 176 (Deane J); *Leeth v Commonwealth* (1992) 174 CLR 455 at 484 (Deane & Toohey JJ).

the needy, the right to have criminal and civil litigation determined by an independent judiciary and the freedom to live a largely peaceful and private life, free from unlawful State interference. The Constitution established and, through its institutions and principles, maintains this system of government. It is certainly at least then arguable that the document that sources these institutions, principles, rights and freedoms should be interpreted (so far as the text and structure permit) in a manner consonant with the values and aspirations of those people from whom its authority is ultimately derived.[35]

It is not to suggest that the constitutional sky would fall in should the Constitution be given an originalist interpretation. In contrast, the modern versions of originalism have proffered near apocalyptic constitutional visions as the likely consequence of adopting non-originalism as an interpretative theory. It is submitted that these visions are at best overstated and at worst designed to 'spook' those who harbour non-originalist sympathies.[36] In any event, if the application of modern originalist theories tends to stray from its core principle in an effort to facilitate constitutional evolution (as will later be argued) then a non-originalist reading of the Constitution, faithful to its text and the common law method, is a legitimate theory of interpretation and appropriate to a system of constitutional government grounded in popular sovereignty.[37]

(ii) Horror Hypotheticals

The utility of non-originalism as a theory of interpretation does not depend on its ability to resolve a small number of 'horror hypotheticals' as Goldsworthy would have us believe.[38] However, as Goldsworthy notes, it would probably provide a

34 The following statistics were compiled from a national civics survey conducted by ANOP Research Services Pty Ltd: Only 18% of Australians knew something about the content of the Constitution, 60% lacked knowledge on how the Constitution could be changed, 19% had some understanding of what a federal system of government entailed, 50% knew the High Court was the pinnacle of the Australian judicial system — see Report of the Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (1994) at 19–20.

35 Compare Kirk, above n18 at 347. For further discussion of popular sovereignty and its possible ramifications for constitutional government in Australia see Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government (Volume 1) Principles and Values* (1995) at 1–31; Leslie Zines, 'The Sovereignty of the People' in Michael Coper & George Williams (eds), *Power, Parliament and the People* (1997) at 91; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Fed LR* 1; Haig Patapan, *Judging Democracy* (2000) at 24–33.

36 For example, above n12 at 27 where Goldsworthy, in retort to the argument that contemporary Australians should not be ruled be the 'dead hand of the past' states that '[t]aken to its logical extreme, it is an argument not only that judges should ignore the law, but also that everyone else should ignore the judges, who owe their authority to laws laid down by "the dead hand of the past".'

37 For a detailed examination of the common law method see Justice Michael McHugh, 'The Judicial Method' (1999) 73 *ALJ* 37.

38 Above n12 at 39–48. Goldsworthy examines the 'horror hypotheticals' of a Parliament seeking to prevent women being able to serve on juries and vote and whether such legislative action would now be constitutionally prohibited. He concedes at 47–49 that moderate originalism would not provide 'just' solutions to these 'horror hypotheticals' but states that '[i]t would be foolish to abandon well-established principles of interpretation in order to enable the judges to meet a non-existent danger, especially given the powerful objections to the alternative principle of non-originalism.'

'just' resolution to his 'horror hypotheticals' and *now* constitutionally mandate that women be entitled to vote and serve on juries.[39] The important thing is that nothing in the text of these provisions or the structure of the Constitution *prohibits* such conclusions. It simply acknowledges that in contemporary Australia trial by jury and the content of representative democracy (with the mandate in ss7 & 24 of the Constitution that parliamentarians be 'directly chosen by the people') is inclusive of women. In any event, at least with respect to s80, it is arguable that the framers never intended its content be frozen in the common law of 1900. There is a parallel here with the debate that occurred in the United States between Justice Antonin Scalia and Professor Ronald Dworkin as to whether the content of the abstract concepts of political morality contained in the US Bill of Rights were 'rooted in the moral perceptions of the time' (Scalia) or 'succeeding generations' (Dworkin).[40] Far from spooking doubters with imaginary examples and then sacrificing principle for the sake of judicial expediency, non-originalism provides a coherent theory to resolve, not only hard constitutional cases, but even the (hopefully) imaginary ones that Goldsworthy proffers.

(iii) An invitation for massive and unprincipled judicial creativity?

Goldsworthy argues that

> [I]f we were to discard all the contextual, historical evidence of what the provisions of the Constitution were originally intended to mean, we would often be left with something quite insubstantial and indeterminate, and the scope, and indeed the need, for judicial creativity would be massive. Many provisions would be turned into putty, able to be interpreted by the judges to mean whatever they would prefer them to mean.[41]

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39 Id at 48.

40 See Scalia, *A Matter of Interpretation*, above n20 at 37–47, 119–127, 144–149. With respect to the Eighth Amendment's prohibition of cruel and unusual punishment, Dworkin argued persuasively that 'it is near inconceivable that sophisticated eighteenth-century statesmen, who were familiar with the transparency of ordinary moral language, would have used "cruel" as shorthand for "what we think cruel" ... If they intended a dated provision, they could and would have written an explicit one': Ronald Dworkin, 'Comment' (on Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws') in Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997). In the Australian context it is clear that when the framers incorporated s80 into the Australian Constitution they sought to guarantee the right to jury trial as it existed at common law in 1900 — *R v Snow* (1915) 20 CLR 315 at 323 (Griffith CJ), *Brown v The Queen* (1986) 160 CLR 171 at 201–202 (Deane J). By this time the institution of trial by jury at common law had evolved considerably from its inquisitorial origins in the 13th century. The framers of the Constitution intimately understood and placed great faith in the evolutionary nature of the common law. It would then seem odd to suggest that they intended the content of the s80 guarantee be frozen in the common law of 1900. For further discussion on the history of trial by jury in the United Kingdom, Australia and s80 of the Australian Constitution see Sir Patrick Devlin, *Trial by Jury* (2nd ed, 1966); Justice Herbert Evatt, 'The Jury System in Australia' (1936) 10 *ALJ* (supplement) 49; Clifford Pannam, 'Trial by Jury and Section 80 of the Australian Constitution' (1968) 6 *Syd LR* 1.

41 Above n12 at 39; see also Kirk, above n18 at 348–350.

These fears were no doubt heightened by Justice Kirby's declaration that our Constitution was 'set completely free in 1901 from the intentions, beliefs and wishes of those who drafted it'.[42] It is submitted that Justice Kirby's approach unnecessarily closes off to non-originalism the convention debates and other important historical evidence of our constitutional heritage. It is also hard to square with his claim that the decision of the High Court in *Cole v Whitfield*,[43] to permit recourse to the convention debates, was 'legal history [coming] to the rescue of constitutional interpretation'.[44] It is submitted that one draws a long bow to suggest *Cole v Whitfield* provides implicit support for non-originalism by doing away with '[t]he pretence that constitutional interpretation required nothing but a close and prolonged study of the text of the Constitution'.[45] I agree with Goldsworthy that the original, intended meaning of the Constitution is not 'irrelevant to its current interpretation. An attempt to ascertain that meaning must be, at the very least, the starting point for interpretation.'[46] In this sense, originalism is a legitimate and appropriate method for elucidating constitutional meaning, at least where clear and objective evidence of the original, intended meaning of a constitutional provision exists.[47] Unfortunately, the situations where this kind of evidence is available do not, for the most part, result in hard constitutional cases.[48] On the other hand *Kartinyeri v Commonwealth*[49] is a rare, recent hard constitutional case where clear and objective evidence of the original, intended meaning of the relevant provision was available. It could, therefore, have provided the High Court with the information needed to give the race power an originalist reading.[50] In these situations the original, intended meaning of the race power is not irrelevant to non-originalism, but a non-originalist would 'decline to view them as necessarily determinative'.[51] It is, as Goldsworthy states, at least 'the

42 Kirby, above n4 at 4.

43 (1988) 165 CLR 360.

44 Kirby, above n4 at 10.

45 Ibid.

46 Above n7 at 710.

47 Donoghue has questioned the artificiality and uncertainty of searching for the original intended meaning of the Constitution: above n18 at 151–154; Kirk has expressed similar doubts in a more circumscribed manner: above n18 at 354–357; Compare Goldsworthy, above n12 at 25–27.

48 Goldsworthy accepts this proposition: above n12 at 20.

49 *Kartinyeri*, above n25.

50 In *Kartinyeri*, five of the six justices disposed of the case without having to determine the scope of s51(xxvi). However, Gaudron J stated at 367 that 'it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid.' On the other hand, Gummow and Hayne JJ stated at 381–383 that s51(xxvi) is not confined to laws that do not discriminate against a race. Kirby J, at 411, did invalidate the *Hindmarsh Island Bridge Act* 1997 (Cth) because he 'concluded that the race power ... does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race'. See further Alexander Reilly, 'Reading the Race Power: A Hermeneutic Analysis' (1999) 23 *MULR* 476; For a discussion of moderate originalism and the race power see above n7 at 701–704.

51 Above n7 at 679. Although as Goldsworthy points out, in a hard constitutional case, whether one applies radical non-originalism or some (theoretically) less extreme version of non-originalism, the outcome is likely to be the same.

starting point for interpretation'.[52] But if the text and structure of the Constitution permits an interpretation that comports more closely with the values and aspirations of contemporary Australians then that interpretation is legitimate and to be preferred.

However, it begs the question of whether it is possible, or even desirable for the High Court to assess the values and aspirations of contemporary Australians in order to resolve a hard constitutional case. It is submitted that *any* modern theory of interpretation that permits a constitution to evolve and adapt to changed circumstances must articulate what, in fact, those changed circumstances are before deciding whether the constitution can ultimately be read in a manner that accommodates them. This applies to both modern originalist theories and non-originalism. The articulation of changed circumstances requires a court to assess the contemporary state of a society, its characteristics, values and aspirations in order to make a meaningful comparison with a society from an earlier time. It is no doubt a difficult and sometimes controversial task but one that a court inevitably faces when called upon to determine a hard constitutional case involving novel circumstances. For example, after assessing the impact the successful 1967 referendum had on the scope of the race power from an originalist perspective, Goldsworthy made the following comments:

> The power expressly excluded 'the aboriginal race of any state' until 1967, when those words of exclusion were deleted by constitutional amendment. But the words defining the power were not otherwise changed, and therefore, although the purpose of the amendment was to enable the Commonwealth Parliament to legislate for the benefit of Aboriginal people, the power may support legislation discriminating adversely against them. That conclusion would be regrettable, because the inclusion in a constitution of a provision expressly authorising the enactment of laws discriminating against the members of a particular race is undeniably incompatible with *contemporary values*.[53] [Emphasis added.]

The important point is not that Goldsworthy thought an originalist reading of the race power was incompatible with contemporary values but that his analysis necessarily involved an assessment as to *what those contemporary values actually were*. Whether it is desirable or not, or even undemocratic for an unelected institution like the High Court to discharge this role is not to the point.[54] They have no choice. It is the duty of the High Court to resolve hard constitutional cases when they properly arise for determination. The issue then becomes how the High Court can best assess the values and aspirations of contemporary Australians without individual judges projecting their own idiosyncratic and subjective notions of what those values and aspirations *ought* to be. It is no doubt a burdensome task but one that is consistent with and a consequence of the Constitution deriving its ultimate authority from its continued acceptance by the Australian people.

52 Id at 710.

53 Id at 701.

54 Compare id at 686.

It is submitted that the High Court's intimacy with the common law method provides it with the analytical tools necessary to discharge this difficult constitutional role in a principled manner. The consequence of the High Court being the final court of appeal in Australia is that a significant part of its work is the determination of appeals that 'involve arguments that the common law should be changed'.[55] As Chief Justice Gleeson has noted:

> Although deficiencies in the common law are sometimes remedied by legislation, *it is also necessary for judges to develop and refine the principles of law in order to clarify them or to keep them relevant and responsive to changing social conditions.*[56] [Emphasis added.]

Similar urging for change characterises hard constitutional cases and a similar process of reasoning can be invoked by the High Court to assess the values and aspirations of contemporary Australians in order to facilitate their resolution. That reasoning process, embodied in the common law method, has been honed in its appellate jurisdiction where:

> [t]he modern High Court now has a much greater number of cases that involve attempts to alter the law, or develop principle beyond the position reached by established precedent, and fewer cases that can be decided by applying long-settled authority.[57]

Moreover, the notion of evaluating and applying a general community standard to the resolution of legal questions is nothing new for the High Court. They have been doing so for some time and largely without controversy in other areas of the law, in particular the tort of negligence and the criminal law, where the concept of the reasonable or ordinary person plays such an important role. Whilst the values and aspirations of contemporary Australians are not and cannot be a hypothetical construct of the law like the reasonable or ordinary person, they do have significant common traits. The evaluation and application of these standards to legal controversies requires the Court to objectively consider how the wider community thinks and behaves. In addition, they are not immutable standards but are informed by and reflect the cultural, economic and scientific changes occurring in the wider community.

But *how* can the High Court objectively evaluate and apply the values and aspirations of contemporary Australians in the resolution of a hard constitutional case? If we consider the issue that was raised but not resolved in *Kartinyeri* regarding the scope of the race power, Goldsworthy states that 'the enactment of laws discriminating against the members of a particular race [would be] undeniably incompatible with contemporary values.'[58] It is submitted that the

55 Chief Justice Murray Gleeson, *The Rule of Law and the Constitution* (2000) at 78.

56 Id at 79.

57 Id at 78.

58 Above n7 at 701.

High Court would agree with this conclusion. Importantly, such a conclusion could be supported by a consideration of the following materials:

- Legislation. Possibly the best guide to the values and aspirations of contemporary Australians is the examination of already existing legislation. For example, there is legislation at Commonwealth, State and Territory level that expressly prohibits the discrimination of a person based on race, colour, descent or national or ethnic origin which impairs the enjoyment of any human right and fundamental freedom.[59]
- International treaties and conventions. The Commonwealth Minister for Foreign Affairs signs and ratifies these international legal instruments on Australia's behalf. The Minister is democratically elected and responsible to the Parliament and ultimately the Australian people. In this way international treaties and conventions provide some indication of the values and aspirations of contemporary Australians. For example, Australia is a party to a number of treaties that prohibit racial discrimination. They include the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.
- Customary international law. This is a less definitive but still helpful guide to the values and aspirations of contemporary Australians as evidenced by the consistent behaviour of the Commonwealth. '[I]t is that law which has evolved from the practice and custom of states.'[60] In other words, the consistent 'activities of states in the international arena may give rise to binding law'.[61] Racial discrimination is clearly prohibited under customary international law[62] and may even constitute a rule of *jus cogens*.[63] That is, it may be a customary law rule that is so fundamental and widely accepted that 'no derogation [is] permitted either in the treaty relations or practice of states.'[64]

In addition, these further resources, where relevant, could assist the High Court in evaluating and applying the values and aspirations of contemporary Australians to the resolution of hard constitutional cases:

- Law Reform Commission reports.
- Parliamentary Committee reports.
- *Amici Curiae* (friends of the court). The Court can grant leave to a non-party to make a submission that may be of assistance.
- Results from past referenda and plebiscites.

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59 *Racial Discrimination Act* 1975 (Cth); *Discrimination Act* 1991 (ACT); *Anti-Discrimination Act* 1977 (NSW); *Anti-Discrimination Act* 1992 (NT); *Anti-Discrimination Act* 1991 (Qld); *Equal Opportunity Act* 1984 (Vic); *Equal Opportunity Act* 1984 (WA).

60 Martin Dixon, *International Law* (4th ed, 2000) at 28.

61 Id at 28–29.

62 *Belgium v Spain (Barcelona Traction case)* [1970] ICJ Reports 3 at 32.

63 Ibid. For further discussion on rules of *jus cogens* see above n60 at 34–38.

64 Donald W Greig, 'Sources of International Law' in Sam Blay, Ryszard Piotrowicz & Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997) at 69.

- Other extrinsic materials. The Court may invite the submission of extrinsic materials such as academic texts, parliamentary debates and published surveys.

Of course, once the High Court has evaluated the values and aspirations of contemporary Australians they can only be applied to the resolution of hard constitutional cases so far as the text and structure of the Constitution permit. They are not of themselves determinative.

In any event, the core claim that non-originalism invites massive and unprincipled judicial creativity (as it necessarily involves textual infidelity) is erroneous.[65] For example, Goldsworthy suggests that a non-originalist reading of the opening words of s51, which grants Parliament power to make laws for the 'peace, order and good government' of the Commonwealth, would have radical consequences.

He states that:

> It would seem to follow that any judge who believes that the governmental needs of today's Australians would best be served if judges could invalidate legislation inconsistent (in their opinion) with important human rights, should interpret the words 'peace, order, and good government' as authorising them to do so. After all, their current literal meaning either directly supports that conclusion, or is ambiguous.[66]

This argument assumes that the meaning of 'peace, order and good government' is ambiguous or uncertain, but it is not. 'The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established.'[67] As Goldsworthy notes, when the words 'peace, order and good government' were incorporated in the Constitution in 1900 they had an accepted meaning derived from English case law.[68] In 2002 as in 1900, these words embody a legal principle — "that the words for the peace, order and good government" are not words of limitation.'[69] The *content* of this principle originates from and is informed by case law. Consequently, the meaning of the words 'peace, order and good government' were not frozen for all time in 1900. Although, one might reasonably reply that this is exactly what the framers originally intended! In any event, is Goldsworthy correct when he states that a non-originalist interpretation of the words 'peace, order and good government' makes them 'empty husks, able to be filled with whatever content the judges think best serves "the governmental needs of contemporary Australians"'?[70] I would argue no. The principle of stare decisis controls the meaning of the words 'peace, order and good

65 See text following n25–27, above.

66 Above n7 at 681.

67 *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 509 at 521 (Latham CJ).

68 Above n7 at 681. As Goldsworthy notes, the High Court has endorsed the Privy Council view that 'peace, order and good government' are not words that limit the legislative powers of either the Commonwealth or States: see *D'Emden v Pedder* (1904) 1 CLR 91 at 110–111 (Griffith CJ); *Union Steamship Co. of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9–10 (per curiam).

69 *Union Steamship Co. of Australia Pty Ltd v King*, id at 10 (per curiam); *Polyukhovich v Commonwealth* (1991) 171 CLR 501 at 529–530 (Mason CJ), 605–606 (Deane J), 635–636 (Dawson J), 695 (Gaudron J), 714 (McHugh).

70 Above n7 at 687.

government' not the original intended meaning of the framers. But as Goldsworthy correctly points out, if this is the case, then it is possible, at least in theory, for later judges to reject that meaning if they consider the earlier decisions were fundamentally wrong.[71] However, the practice employed by the High Court before it overrules an earlier decision makes the likelihood of a later Court rejecting the accepted meaning of 'peace, order and good government' remote at best. As Tony Blackshield and George Williams have noted, this practice is strongly informed by considerations of stare decisis:

> First, no party is now permitted to challenge the correctness of a prior decision unless leave is given to do so (*Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311). Secondly, the question of overruling is now approached in two stages (or what Stone in the above articles calls the Upper and Lower Purgatory), stated in varying ways. Typically, the Upper Purgatory considers whether the question of overruling will be entertained; the Lower Purgatory considers how that question should be answered. At neither level is it sufficient to show that the impugned decision is "wrong". The arguments in favour of adherence to precedent thus get two bites at the cherry.[72]

Moreover, the Court in *Lange v Australian Broadcasting Corporation*[73] (hereinafter *Lange*) stated that:

> [It] should reconsider a previous decision only with great caution and for strong reasons. In *Hughes & Vale Pty Ltd v New South Wales*, Kitto J said that in constitutional cases "it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason". However, it cannot be doubted that the Court will re-examine a decision if it involves a question of "vital constitutional importance" and is "manifestly wrong".[74]

Would then the passage by the Commonwealth of an extreme law that seriously undermined human rights in Australia be likely to meet the *Lange* threshold and result in a later Court rejecting the accepted meaning of 'peace, order and good government'? I would again submit no. If this issue formed the sole basis for the challenge, it implicitly assumes the law could otherwise be sourced to a head of power. If the law was properly enacted, in essence it is the unjust or oppressive nature of the law that is being challenged. If, as I have suggested, 'peace, order and good government' has an accepted and long established meaning that for reasons of stare decisis is unlikely to change, then such a law raises a question of *political* not constitutional or legal importance.

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71 Id at 682.

72 Tony Blackshield & George Williams, *Australian Constitutional Law and Theory* (2nd ed, 1998) at 512. Interestingly in *Brownlee*, above n4, Kirby J at 326–328 rejected the holding in *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 that a party must secure leave of the Court to reargue a constitutional decision. His Honour stated at 327 that '[i]t is incompatible with the constitutional function of the Court to impose on a party a procedural obstacle that might impede that party's submissions to the Court.'

73 (1997) 189 CLR 520.

74 Id at 554 (per curiam).

> If ... the question would be whether the law is for the peace, order and good government of the Commonwealth ... that question is not for the court to answer; that is a political question for the Parliament.[75]

The power of judicial review does not extend to the invalidating of laws that, in the opinion of the Court, fail to secure the welfare of its citizens.[76] 'This conclusion does not leave our citizens unprotected from an oppressive majority in Parliament. The chief protection lies in the democratic nature of our Parliamentary institutions.'[77] In any event, even if a later Court considered a question of 'vital constitutional significance' was raised by the passage of such a law, it does not make its previous decisions on the meaning of 'peace, order and good government' 'manifestly wrong'. These earlier decisions were based 'upon a principle that has been carefully worked out in a significant succession of cases'[78] and the High Court has recently considered and approved that principle in *Union Steamship Co. of Australia Pty Ltd v King*[79] and *Polyukhovich v Commonwealth*.[80] As Professor Zines has noted, a further constraint is that:

> judges, while accepting the duty of a judge [is] to interpret the Constitution, have expressed concern about the instability that may result from each judge construing the Constitution individually without sufficient regard for past decisions, principles and doctrines created and developed by those decisions. *One might add that the authority of the court as an institution may also be at stake.*[81] [Emphasis added.]

These factors, informed by considerations of stare decisis, strongly militate against the possibility of a later High Court discarding its long established and principled construction of the words 'peace, order and good government'.

In addition, the application of non-originalism is further guided, and in this way constrained, by a number of other factors. As earlier stated, fidelity to the text and structure of the Constitution is paramount; a theory that ignores this fundamental principle forfeits its legitimacy. Moreover, the inherent conservatism of the common law method engenders judicial restraint in the application of non-originalism, as it does for any theory of constitutional interpretation.[82]

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75 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 320 (Brennan J).

76 *Union Steamship Co. of Australia Pty Ltd v King*, above n68 at 9–10 (per curiam); see further above n55 at 124–138.

77 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 405 (Kirby P).

78 *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56 (Gibbs CJ). The principle is that the words 'peace, order and good government' are not words that limit the legislative power of the Commonwealth.

79 Above n68 at 9–10 (per curiam).

80 Above n69 at 529–530 (Mason CJ), 605–606 (Deane J), 635–636 (Dawson J), 695 (Gaudron J), 714 (McHugh).

81 Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) at 433.

82 For a discussion on the common law method and the principles of judicial restraint see above n55 at 124; see further above n37.

(iv) The relevance of the retreat of non-originalism in the United States

Goldsworthy states that '[g]iven its fatal flaws, it is not surprising that in the United States, radical non-originalism is now being repudiated even by eminent erstwhile proponents.'[83] He assembles an impressive cast of American lawyers and philosophers who have seen the light and now embrace originalism and its modern variants as the only appropriate and legitimate theory of constitutional interpretation.[84] Consequently, Goldsworthy laments the unfortunate timing of 'Justice Kirby's advocacy of radical non-originalism. He is jumping on the bandwagon just as everyone else is jumping off.'[85]

First, this is a strange angle of attack when one considers that Goldsworthy spent a good deal of effort in an earlier article distinguishing the United States and Australian Constitutions for the purposes of our own interpretation debate.[86] He did so to correct those Australian lawyers and philosophers who had 'gained the impression that the non-originalists [had] won the [American] debate, and discredited originalism'.[87] For Goldsworthy, the main arguments made in the United States against originalism and in favour of non-originalism were 'either aimed at ... extreme originalism, rather than moderate originalism, or [we]re *inapplicable to the Australian context*'.[88][Emphasis added.] Why? Because, as Goldsworthy then noted, '[o]ur Constitution lacks anything like [the Ninth Amendment] or the other famous "open ended" clauses of the American Constitution.'[89] This accords with Craven's earlier comments.[90]

What has occurred in the four years since the publication of Goldsworthy's first originalism article that now warrants considering the United States Constitution and its interpretation debate as an instructive guide to our own? Of significance to the debate, it is submitted very little.[91] Consequently, the retreat of non-originalism in the United States has marginal if any relevance to the interpretation debate in Australia. The only clauses or implications in the Australian Constitution that might be considered 'open ended' are sections 92, 116 and 117 and the implied right to freedom of political speech.[92] Past experience would strongly suggest that their interpretation is unlikely to ever stir the emotions or polarise public opinion in a manner that has accompanied the interpretation of the US Bill of Rights.

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83 Above n7 at 695.

84 Id at 695–697.

85 Id at 697.

86 Above n12 at 21–24.

87 Id at 21.

88 Ibid.

89 Id at 22–23.

90 See text following n20–21, above.

91 The only difference compared with 1997 is that we now have a robust interpretation debate in Australia and a key participant in that debate is a current member of the High Court, Justice Kirby. However, this difference does not change or temper the key distinguishing factor between the interpretation debates in the United States and Australia — the absence of a Bill of Rights in the Australian Constitution.

(v) Circumvention of Section 128?

The main thrust of Goldsworthy's latest attack on non-originalism is its potential to effectively circumvent s128, and in doing so threaten the principles of democracy, the rule of law and federalism. He writes:

> Originalism is concerned to ensure that their [the electors of Australia and their elected representatives] authority is not usurped by a small group of unelected judges, who are authorised only to interpret the *Constitution*, and not to change it. It is concerned to ensure that if the *Constitution* is to be changed, the consent of a majority of the electors must first be directly and expressly obtained, and not taken for granted by a presumptuous elite purporting to read their minds or speak on their behalf. In this respect, originalism is also motivated by respect for the rule of law. Section 128 should not be evaded by lawyers and judges disguising substantive constitutional change as interpretation.[93]

In contrast, Goldsworthy states that '[a]ccording to Justice Kirby, the meaning as well as the application of the *Constitution* can change without any formal amendment.'[94] In doing so, he argues that s128 is circumvented and 'the Constitution [is] changed by creative "interpretation".'[95] For non-originalism, 'although the words of the *Constitution* can be changed only by referendum, their meanings can be changed by other means, except insofar as they are fixed by the rules of the English language ... [I]n s 128, "this Constitution" denotes only the words of the *Constitution*, shorn of all content other than their standard meanings in English.'[96] For reasons that I have already discussed, to suggest that non-originalism treats the words of the Constitution as mere 'empty husks' is erroneous.[97] But, in any event, the text of s128 and the 44 occasions Parliament has sought to utilise it, indicate that it is only changes to the *wording* of the Constitution that requires satisfaction of the formal amendment procedure. In simple terms, if non-originalism does not effect changes to the *wording* of the Constitution then s128 is not relevant. But clearly Goldsworthy is arguing that non-originalism *in effect* changes the meaning of the Constitution and does so without a referendum. I agree. Many important decisions of the High Court have borne this out, largely without controversy. But what is Goldsworthy really proposing here? If we take this argument to its logical conclusion, he is arguing that any interpretation of the Constitution that, *in effect*, changes its meaning can only legitimately be achieved through a referendum.

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92 In *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (hereinafter *Nationwide*) and *Australian Capital Television Pty Ltd v Commonwealth*, above n33, six members of the High Court found that ss7 and 24 of the Australian Constitution contained an implied freedom of communication with respect to political matters. For a detailed discussion see Anthony Blackshield, 'The Implied Freedom of Communication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: essays in honour of Professor Leslie Zines* (1994) at 232.

93 Above n7 at 683–684.

94 Id at 680.

95 Id at 686.

96 Id at 690.

97 See text following n25–27, above.

Consequently, the fundamental (not minor) changes to the meaning (not just the application) of the Constitution effected by many High Court decisions (including *Engineers*,[98] *Tasmanian Dams*,[99] *Street v Queensland Bar Association*,[100] the implied rights cases[101] and arguably even *Grain Pool of Western Australia v Commonwealth)*[102] have circumvented s128 and similarly threaten the principles of democracy, the rule of law and federalism. To this, Goldsworthy claims that his theory of moderate originalism provides a method of interpretation and explanation for how the Constitution can legitimately 'evolve and be adapted to contemporary circumstances' without the need for a referendum.[103] But is Goldsworthy true to his own rhetoric? In the next section of the paper I will examine moderate originalism and demonstrate that, as a theory of interpretation, it too effects change to the application and *meaning* of the Constitution without a formal s128 amendment.

(vi) Moderate Originalism

Professor Goldsworthy states that non-originalism changes 'the *meaning* as well as the *application* of the Constitution'.[104] [Emphasis added.] In contrast, he states that although '[t]he *application* of a constitution necessarily changes as society changes' the original, intended *meaning* of the framers remains the same.[105] Originalism mandates that the only legitimate way to *change* the *meaning* of the Constitution consistent with the rule of law, federalism and democracy is through s128. So the great challenge for originalism is to offer a coherent theory of interpretation that allows the Constitution to '*evolve* and be *adapted* to contemporary circumstances' while remaining faithful to its original, intended meaning.[106] [Emphasis added.] Goldsworthy has attempted this by developing a theory of moderate originalism.[107] It draws a fine but crucial distinction between his method of interpretation, which he claims *adapts* rather than *changes* the Constitution. Is this a valid distinction or does it 'disguise rather than clarify the

98 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. Indeed, Greg Craven has noted that the Convention debates reveal that the framers of the Constitution envisaged a strongly State-orientated federalism: Greg Craven, 'The Convention Debates — Still More Sinned against Than Sinning' (1998) 1 *The New Federalist* 67 at 69.

99 *Commonwealth v Tasmania* (1983) 158 CLR 1.

100 (1989) 168 CLR 461 (hereinafter *Street*). In *Street* the High Court overruled *Henry v Boehm* (1973) 128 CLR 482, which was a 4/1 decision that involved the same issue with respect to s117 of the Constitution. For further discussion of *Street* and its effect on the construction of s117 see George Williams, *Human Rights under the Australian Constitution* (1999) at 119–127.

101 For a detailed examination of the High Court's implied rights jurisprudence see Williams, id at 155–226.

102 Above n4. For a discussion of *Grain Pool*, the change it effected to the meaning of the Constitution and the inability of the connotation/denotation distinction to adequately explain the decision see Geraldine Chin, 'Technological Change and the Australian Constitution' (2000) 24 *MULR* 609 at 630–634.

103 Above n7 at 678.

104 Id at 680.

105 Id at 678.

106 Ibid.

107 See above n12 at 19–21, 28–35, 39–50.

real reasons why one choice is preferred in a particular case and another is rejected'?[108]

Firstly, one might object that in practical (and possibly linguistic) terms, and for the purposes of constitutional interpretation, the distinction between the meaning of the words 'adapt' and 'change' may be so fine as to be illusory.[109] It is submitted that when a constitution evolves, by adapting to contemporary circumstances, the meaning of the text (and ultimately the Constitution) is modified. To modify is 'to *change* or *alter* somewhat'[110] the meaning of the text and therefore the Constitution. [Emphasis added.] For example, Goldsworthy argues that, in contrast to extreme originalism,[111] moderate originalism could permit the Commonwealth Parliament to make laws for same-sex marriages.[112]

> It requires adopting what I previously called a non-literal, purposive approach to interpretation. If, because of developments unanticipated by the founders, the words of the Constitution fail to give effect to their intended purpose, and the words can be expanded or contracted in a simple and obvious way in order to remedy the failure, then a court might be justified in doing so.[113]

However, it is submitted that to expand or contract a word, even 'in a simple and obvious way', is to change the meaning of the word, however slightly.[114] Interpreting the word 'marriage' in s51(xxi) to now encompass same-sex marriages changes the constitutional meaning of that word. The fact that it might only be a small contraction or expansion is not to the point. Although, in this instance, it is submitted that moderate originalism effects a fundamental (rather than simple and obvious) change to the meaning of 'marriage'. In outlining this aspect of moderate originalism in an earlier article, Goldsworthy stated that:

> 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 than their letter.[115]

Is Goldsworthy suggesting that it was the 'founders' clearly expressed purpose' that at some point in time s51(xxi) would permit the Commonwealth Parliament to make laws for any kind of marriage, including same-sex marriages?

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108 Kirby, above n4 at 13.

109 Adapt is 'to make suitable to requirements; adjust or modify fittingly'. Change is 'to make different, alter in condition, appearance' — *The Macquarie Dictionary* (3rd ed, 1997) at 22, 368.

110 Id at 1382.

111 See above n12 at 20 where Goldsworthy states that 'extreme originalism .... holds that the Constitution means whatever the founders intended it to mean.'

112 *Australian Constitution* s51(xxi) gives the Commonwealth Parliament the power to make laws with respect to 'marriage'.

113 Above n7 at 699. For a discussion of what Goldsworthy calls the 'non-literal, purposive approach to interpretation' see above n12 at 33–35.

114 Above n7 at 699.

115 Above n12 at 33.

No evidence exists or could even be optimistically extrapolated from the convention debates to suggest that such an interpretation accords with the 'founders' clearly expressed purpose'. To the contrary, if 'marriage' had one defining, core meaning to the founders, it was the legal union of a man and woman.[116] Consequently, the 'founders' clearly expressed purpose' of s51(xxi) was to permit the Commonwealth Parliament to legislate for the legal union of men and women. As Goldsworthy correctly notes, 'an [extreme] originalist must interpret the word ['marriage'] today as excluding Commonwealth power to legislate for same-sex marriages. *And that might seem to be an undesirable conclusion.*'[117] [Emphasis added.] True enough; some may consider it practically undesirable that the Commonwealth Parliament is denied the power to provide for the uniform national regulation of all legal unions. Although, if this be the original, intended meaning and purpose of s51(xxi), it does not preclude the States from regulating same-sex marriages. And, in the future, should the States seek national regulation of all legal unions, s51(xxxvii) provides the constitutional mechanism to facilitate such an arrangement.

It is submitted that if Goldsworthy is to remain faithful to his originalist roots, he must accept that an interpretation of 'marriage' today denies the Commonwealth Parliament power to regulate same-sex marriages. In his effort to develop an originalist theory that permits the Constitution to 'evolve and be adapted to contemporary circumstances', Goldsworthy has unwittingly cut moderate originalism adrift from its core principle — its proclaimed fidelity to the original, intended meaning or purpose of the founders.[118] Ironically, as a consequence, this non-literal, purposive aspect of moderate originalism attracts the very criticism he levels at non-originalism. That is, it effects changes to the meaning of the text of the Constitution without a referendum. In this example, his own theory of moderate originalism does 'not meet the objections from democracy, the rule of law, and federalism' aimed at non-originalism.[119] It has fallen upon its own sword. Goldsworthy is aware of the dilemma:

> This purposive argument is admittedly dangerously slippery. Stricter originalists than I might object that it is the thin edge of such a broad wedge that it threatens to collapse originalism into non-originalism.[120]

And it explains why he states that moderate originalism 'add[s] a great deal of flexibility to our constitutional law, without going to the extreme of permitting the Court to change the *essential meaning* of the *Constitution* itself.'[121] [Emphasis

116 See Sir John Quick & Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (3rd ed, 1995) at 608 where the authors state that 'a marriage is a union between a man and woman on the same basis as that on which the institution is recognized throughout Christendom, and its essence is that it is (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others. (*Bethell v Hildyard*) 38 Ch. D. 220.'

117 Above n7 at 699.

118 Id at 678.

119 Id at 686.

120 Id at 700.

121 Id at 694.

added.] Here Goldsworthy implicitly acknowledges that moderate originalism *does* change the meaning of the Constitution, though not its essential meaning. My above analysis of same-sex marriages, through the eyes of a moderate originalist, strongly suggests otherwise.

Moderate originalism contains two further methods 'by which the Constitution can be given a flexible operation'.[122] Goldsworthy describes them in the following way:

> Method 1. *Application and enactment intentions*: In deciding what a statutory or constitutional provision means, the law-makers' enactment intentions may be critical. But once its meaning has been determined, and the question is how it applies in a particular case, their further intentions are irrelevant. The law consists of the provision which the law-makers actually enacted, and not their possibly mistaken beliefs about its meaning or proper application.[123]

> Method 2. *Connotation and denotation*: The High Court has often said that the "connotation" of a constitutional provision must stay the same, although its "denotation" can change ... The denotation, reference or extension of a term is comprised of all the things in the world which the word refers to; its connotation, sense or intension [sic] consists of the criteria which define it, and thereby determine its denotation.[124]

Do these methods resurrect moderate originalism as a coherent theory of interpretation, providing for constitutional evolution while remaining faithful to its original, intended meaning? Although the scope of this paper precludes detailed analysis, it is submitted that they do not. To be sure, as a matter of theory, the connotation/denotation distinction is more faithful to the original, intended meaning of a constitution.[125] But its practical value is significantly diminished by the complexity and uncertainty of its application. The High Court's use of the connotation/denotation distinction has, on occasion, been confused and methodologically unsound.[126] No doubt because, as Goldsworthy admits, 'in many cases the connotation/denotation distinction can be very difficult, and perhaps in some cases impossible, to apply.'[127]

The High Court's use of the application/enactment intentions distinction has also been unsatisfactory.[128] But its methodological flaws run deeper. It assumes that the Court, when interpreting a provision, can, as the basis for its analysis, make a valid distinction between the founders' application and enactment intentions. As Goldsworthy has noted, 'enactment and application intentions are

122 Above n12 at 29.

123 Id at 30–31.

124 Id at 31–32.

125 This of course assumes that the original, intended meaning of constitutional provisions is ascertainable. I have earlier argued to the contrary. See text following n47–48, above.

126 See, for example, Goldsworthy's comments regarding *McGinty v Western Australia* (1996) 186 CLR 140, above n12 at 40–44.

127 Id at 32.

128 Id at 44–47.

not mutually exclusive, and the distinction between them may be very difficult to apply, and perhaps in some cases illusory.'[129] It also assumes that the Court *can* draw objective and identifiable conclusions about the founders' application and enactment intentions from the convention debates and the constitutional text. Even if this were possible, (and in most cases I seriously doubt that it is) could not a constitutional provision contain more than one enactment intention? If so, what then? In any event, the inevitability of the Court having to exercise a degree of judicial choice to 'discover' an enactment intention from an incomplete and often ambiguous historical record drags moderate originalism further and further away from its core principle — proclaimed fidelity to the original, intended meaning of a constitution.[130] It disguises or at least seeks to discount the degree of judicial choice necessitated by this aspect of moderate originalism to resolve hard constitutional cases.

C. *Jeremy Kirk*

(i) Evolutionary Originalism

Jeremy Kirk has also sought to develop a theory of interpretation that allows a Constitution to 'evolve and be adapted to contemporary circumstances' while remaining faithful to its original, intended meaning.[131] Kirk's theory of evolutionary originalism offers a test that seeks to define the outer limit of constitutional evolution through judicial interpretation.[132] He states:

> Put simply, the meaning of the text is to be understood as originally intended, with some potential for evolution from this, subject to the outer constraint of being within the realm of what can reasonably be characterised as the original idea or concept.[133]

Goldsworthy wonders '[w]hether this differs significantly from my own version of moderate originalism'.[134] I would query whether its practical application differs at all from Justice Kirby's brand of non-originalism.[135] Justice Kirby states that 'judges have choices to make' and that the Constitution 'is bound to be read in changing ways as time passes and circumstances change'.[136] Kirk states that evolutionary originalism 'involves some judicial choice, taking account

129 Id at 31.

130 For an excellent recent discussion on the difficulty of resolving hard constitutional cases through recourse to the Convention Debates see Amelia Simpson & Mary Wood, ' "A Puny Thing Indeed" — *Cheng v the Queen* and the Constitutional Right to Trial by Jury' (2001) 29 *Fed LR* 95 at 107–111.

131 Above n7 at 678.

132 See Kirk, above n18 at 358–366.

133 Id at 359.

134 Above n7 at 709.

135 Kirk has acknowledged the similarity between evolutionary originalism and non-originalism. 'Evolutionary originalism overlaps with the interpretational approach of Kirby J.' See Kirk, above n18 at 364.

136 Kirby, above n4 at 13, 14.

of changes in the needs, nature, preferences and values of the community'.[137] Justice Kirby states that '[t]he words remain the same. The meaning and content of the words take colour from the circumstances in which the words must be understood and to which they must be applied.'[138]

With respect to the Constitution, Kirk says '[w]ithin evolutionary originalism, the accepted meaning itself may change, within limits.'[139] As Goldsworthy rightly points out '[it] is not clear how this claim can be reconciled with [Kirk's] insistence that "[j]udges should be limited to giving effect to original ideas."'[140] If, as Goldsworthy suggests, 'the answer lies in [Kirk's] statement that "*substantial* deviation from the original understanding of these ideas is not permitted" ... so small changes to the original ideas or concepts are permissible, but not large ones'; then evolutionary originalism falls upon the same sword as the non-literal, purposive approach of moderate originalism.[141] It effects changes to the meaning of the text of the Constitution without a referendum. It too fails to 'meet the objections from democracy, the rule of law and federalism'.[142]

D. Conclusion

It has not been my intention to suggest that modern originalist theories are intellectually incoherent or fatally flawed. But I have endeavoured to show that such theories do not entirely succeed in providing a system of interpretation that allows the Constitution to '*evolve* and be *adapted* to contemporary circumstances' [emphasis added] while remaining faithful to its original, intended meaning.[143] It seems that only what Goldsworthy calls 'extreme originalism' can legitimately claim, in most situations, some kind of fidelity to the original, intended meaning of the Constitution.[144] This should come as no surprise. Unlike moderate and evolutionary originalism, 'extreme originalism' feels no compulsion to incorporate a method for constitutional evolution in its interpretative theory. For the extreme originalist a Constitution does not suggest 'changeability; to the contrary, its whole purpose is to prevent change'.[145] However, in the Australian context, Goldsworthy notes that '[e]xtreme originalism is incompatible with the rule of law and the separation of powers.'[146] Kirk argues that 'the people's intentions are arguably what is relevant', not the founders, and its 'very rigidity ... represents one powerful reason against adopting it'.[147] To this I would add that extreme originalism's insistence that the contemporary meaning of a Constitution is controlled by the subjective intentions of its long since departed framers is

137 Kirk, above n18 at 359.
138 Kirby, above n4 at 11.
139 Kirk, above n18 at 365.
140 Above n7 at 709.
141 Ibid.
142 Id at 686.
143 Id at 678.
144 See text following n12–13, above.
145 Scalia, *A Matter of Interpretation*, above n20 at 40.
146 Above n12 at 49.
147 Kirk, above n18 at 342.

incompatible with our Constitution deriving its legitimacy from its continued acceptance by the Australian people. In addition, it 'provides little illumination'[148] in the great majority of hard constitutional cases. As Sir Anthony Mason has noted, '[extreme] originalism is deceptive in that it claims very much more than it can deliver.'[149] In the end, it too attempts to disguise rather than explicate the choices faced by the High Court in hard constitutional cases.

As earlier discussed, I do not endorse Justice Kirby's theory of 'radical non-originalism' to the extent that it regards the original, intended meaning as totally irrelevant to current constitutional interpretation.[150] However, Goldsworthy correctly points out that the distinction in practical terms between the application of 'radical non-originalism' and non-originalism, when faced with a hard constitutional case, may be academic.[151] Notwithstanding this reservation, it is submitted that non-originalism is an appropriate and legitimate theory for interpreting the Australian Constitution. It is consistent with and gives practical content to the notion of popular sovereignty. It acknowledges that judges have choices to make when resolving hard constitutional cases and the need to meet the changing values and aspirations of the community will influence how those choices are made. In this important respect, non-originalism promotes and is consistent with open and accountable government. As Professor Zines has noted, it is 'not a policy that can be confined to the workings of the legislature and the executive.'[152]

However, the health and legitimacy of non-originalism will depend on its rigorous application. It will be an appropriate and legitimate interpretative theory to the extent that, in the resolution of hard constitutional cases, it remains faithful to the text and structure of the Constitution. It is not a licence to treat 'words [as] almost empty husks, able to be filled with whatever content the judges think best serves "the governmental needs of contemporary Australians"'.[153] Non-originalists do well to remember that it is popular sovereignty that makes their theory appropriate and legitimate. Consequently, it is the changing values and aspirations of the *people*, not the judges, that must inform the resolution of these cases. As a theory of constitutional interpretation, non-originalism will die a quick death (as it should) if judges choose to use it to further their own idiosyncratic political and social ideals. In Part 2 of the paper, I will examine the recent section 80 jurisprudence of the High Court, critique Justice Kirby's application of non-originalism in these cases, and then outline what I consider to be the appropriate methodology for resolving hard constitutional cases.

148 Above n11 at 15.

149 Ibid.

150 See text following n46, above.

151 Above n7 at 679.

152 Above n81 at 483.

153 Above n 12 at 10.

2. *Justice Kirby's Interpretation of Section 80: A Non-Originalist Reading?*

A. Re Colina; Ex parte Torney[154]

The relevant part of s80 examined in *Re Colina* and *Cheng v the Queen*[155] states that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury.' The orthodox position of the High Court is that '[i]f a given offence is not made triable on indictment at all, then s80 does not apply.'[156]

In *Re Colina*, Kirby J endorsed (radical) non-originalism as the appropriate method for interpreting the Australian Constitution.[157] Importantly, he reiterated that the Constitution can only be given a non-originalist interpretation 'so far as the words and structure permit'.[158] It led Kirby J to the view that 'the proper construction of s80 of the Constitution is that favoured by Deane J in *Kingswell*.'[159] Necessarily, the dissent of Deane J in *Kingswell v The Queen must* then be consistent with (radical) non-originalism.[160]

Deane J construed s80 in the following way:

> [T]he guarantee of the section is applicable in respect of any trial of an accused charged with an offence against a law of the Commonwealth in circumstances where the charge is brought by the State or an agency of the State and the accused will, if found guilty, stand convicted of a "serious offence". As has been said, a particular alleged offence will, for the purpose of characterizing a particular trial as a "trial on indictment", be a "serious offence" if it is not one which could appropriately be dealt with summarily by justices or magistrates in that conviction will expose the accused to grave punishment. It is unnecessary, for the purposes of the present case, to seek to identify more precisely the boundary between offences which are not and offences which are capable of being properly so dealt with. I have, however, indicated the tentative view that that boundary will ordinarily be identified by reference to whether the offence is punishable ... by a maximum term of imprisonment of more than one year.[161]

The crux of Deane J's dissent is the conclusion that 'there lies at the heart of the concept of "trial on indictment" in s80 the notion of the trial of a "serious offence".'[162] Examination of colonial legislation at the time of Federation leads Deane J to conclude that a 'serious offence' exposed a convicted person to a term

154 Above n2.
155 Above n1.
156 *R v Bernasconi* (1915) 19 CLR 629 at 637 (Isaacs J). The High Court has endorsed the orthodox position in a series of subsequent cases including *Kingswell*, above n9, and most recently in *Re Colina*, above n2, and *Cheng*, above n1.
157 Above n2 at 422–423.
158 Id at 423.
159 Id at 422.
160 Above n9 at 296–322.
161 Id at 319.
162 Id at 310.

of imprisonment of one year or more.[163] For the following reasons, it is submitted that Deane J's dissent, and its endorsement by Kirby J in *Re Colina*, is inconsistent with non-originalism.

Firstly, non-originalism only has a role to play in the resolution of hard constitutional cases when the text and structure of the Constitution permits an interpretation of a provision that comports more closely with the values and aspirations of contemporary Australians. It is submitted that the words 'trial on indictment' are not constitutionally ambiguous, notwithstanding that it is a mode of prosecution usually reserved (not constitutionally mandated) for more serious criminal offences. I have not overlooked the famous dissent of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* where their Honours stated that a 'trial on indictment' had two substantive components:

> [T]he first of them would be ... that some authority constituted under the law to represent the public interest for the purpose took the responsibility of the step which put the accused on his trial; the grand jury, the coroner's jury or the coroner, the law officer or the court. A second element ... would be found in the liability of the offender to a term of imprisonment or to some graver form of punishment.[164]

This interpretation of what constitutes a 'trial on indictment' would rejuvenate s80. In effect, it would guarantee a jury trial for any person charged with a Commonwealth offence that carried with it the possibility of a prison term. However, it is respectfully submitted that the better view, and the one that accords with a natural reading of the words and the great weight of judicial opinion, is that a 'trial on indictment' means '[a]ny prosecution which is commenced by a written accusation signed by a Law Officer of the Crown or a Crown Prosecutor appointed for that purpose; or ... brought in the name of the Crown irrespective of how or by whom it is instituted'.[165] The written accusation is termed an indictment. It is 'the formal document, filed in either the intermediate criminal court or in the Supreme Court, *charging the accused with an offence triable before a jury*'.[166] [Emphasis added.] As Clifford Pannam has noted, 'the conception of "trial by indictment" in s 80 ... [is] concerned with form and not substance.'[167] An indictment is the *procedural* step that initiates a trial. Consequently, 's 80 applies only when there is an indictment' and what constitutes an indictment is clear enough.[168] It is not, therefore submitted, a hard constitutional case.

Secondly, the text of s80 precludes an interpretation that makes '*trial on indictment of any offence* against any law of the Commonwealth shall be by jury'

163 Id at 309.

164 (1938) 59 CLR 556 at 583.

165 Pannam, above n40 at 11.

166 Mark Aronson & Jill Hunter, *Litigation, Evidence and Procedure* (6th ed, 1998) at 231.

167 Pannam, above n40 at 10.

168 *Brown v The Queen*, above n40 at 181 (Gibbs CJ) citing with approval *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Kingswell*, above n9.

come to mean '*trial of any serious offence* against any law of the Commonwealth shall be by jury'. It is submitted that 'trial on indictment' cannot be interpreted to mandate that all 'serious' Commonwealth offences must be tried by jury. Such an interpretation smuggles the word 'serious' into the text of s80 and permits the court to define what offences fit this category. Justice Kirby has failed to heed his own warning — that a non-originalist reading of the Constitution is permissible only 'so far as the words and structure permit'.[169] By disregarding the text of s80 he has crossed the line that separates legitimate constitutional interpretation from constitutional amendment.[170]

In any event, even if non-originalism had a role to play in the construction of this aspect of s80, it is submitted that Kirby J's endorsement of Deane J's dissent in *Kingswell* is at odds with such an interpretation. For Deane J, what the founders intended when they chose the words 'trial on indictment' was the cornerstone of his argument that s80 required all 'serious offences' to be tried by jury.

> It would also seem plain enough that the framers of the Constitution used the words "on indictment" in s. 80 to ensure that the guarantee of trial by jury was not applicable to the type or class of less serious offences which were generally seen, in the last decade of the nineteenth century, as appropriate to be dealt with by justices or magistrates.[171]

It is inconsistent with non-originalism for Justice Kirby to endorse an argument, central to his s80 construction, that relies on what the founders of the Constitution subjectively intended for its efficacy. For Justice Kirby to remain faithful to the methodology of non-originalism he cannot endorse the approach used by Deane J in *Kingswell* to argue that s80 requires all 'serious' Commonwealth offences to be tried by jury. An alternative basis for this argument must be proffered lest Justice Kirby concede that the intentions of the founders are not only relevant but crucial to the construction of s80. That would be an untenable situation for one who eschews the relevance and legitimacy of the founders' intentions in constitutional interpretation.

B. Cheng v The Queen[172]

In *Cheng*, the High Court was asked to reconsider the constitutionality of the sections in the *Customs Act* 1901 (Cth) found not to offend s80 in *Kingswell.*

169 Above n2 at 423.

170 Compare above n130 at 111 where Simpson & Wood argue that the meaning of 'trial on indictment' is ambiguous and 'may be viewed in either of two ways — as having some degree of fixed, objective meaning, or as being entirely subjective'. They further state at 106 that the reasoning of the majority judgments of Gleeson CJ, Gummow & Hayne JJ and Callinan J evince a mistrust of judges being able to 'develop rational, principled tests' to determine an objective concept of 'trial on indictment'. It is submitted that no such conclusion can be gleaned from these majority judgments. Indeed it appeared that these judges somewhat reluctantly endorsed the orthodox view as to the scope of s80, but felt compelled to do so based primarily on the text and precedent.

171 Above n9 at 309.

172 Above n1. For a detailed critique of *Cheng*, see above n130.

Section 233B creates a number of offences relating to the importation of illegal narcotics and their possession. Section 235 provides for four levels of maximum penalty, ranging from a $2000 fine and two years imprisonment to life imprisonment. The penalty imposed on a s233B conviction depends on a sentencing judge being satisfied that a certain quantity of narcotics was involved and that the person has a prior conviction or has previously committed a serious offence involving narcotics.

Again, the issue was whether 's80 of the Constitution invalidates a law of the Commonwealth which makes liability to a greater maximum penalty for an offence prosecuted on indictment depend upon findings of fact made by a judge'.[173] By prescribing different maximum penalties upon judicial satisfaction of additional facts, had s235 created new offences and thus attracted the s80 guarantee? In his dissenting judgment, Kirby J answered in the affirmative. Before reaching this conclusion, he again advocated the merits and legitimacy of non-originalism and admonished those who seek to give effect to the intentions of the founders when interpreting the Constitution. Such an approach has, according to Justice Kirby, rendered the important constitutional guarantee in s80 worthless.[174]

Consequently, Kirby J stated that the 'Court should adopt the approach to the requirement of "any offence" in s 80 of the Constitution which Brennan J expressed in *Kingswell*'.[175] It is submitted that the Brennan/Kirby interpretation of the word 'offence' is correct. I am unsure if non-originalism had any meaningful role to play in reaching this conclusion. To be fair, Kirby J's endorsement and exposition of non-originalism in *Cheng* may have been in response to the Attorney-General who 'laid much emphasis upon the intention of the framers of the Constitution'.[176] His Honour's analysis did not appear to draw upon the values and aspirations of contemporary Australians but instead drew on established principles of the common law and how they have come to define what constitutes a criminal offence.

In any event, the health and legitimacy of non-originalism will turn on its rigorous application. For example, it is submitted that the just and principled resolution of a hard constitutional case in 2002 involving the interpretation of the race power must evaluate and apply the values and aspirations of contemporary Australians. But the methodology the Court employs to arrive at a *just resolution* must conform to the common law method and the orthodox canons of statutory construction lest such an approach become itself a dangerous invitation to massive judicial creativity.[177] It is submitted that just (and legitimate) resolutions to hard constitutional cases will be provided if the Court's interpretation of the Constitution is informed by the following considerations:

173 Above n9 at 288 (Brennan J).
174 Above n1 at 321.
175 Id at 325.
176 Id at 321.
177 See text following n41, above.

- that the efficacy of popular sovereignty depends on the High Court evaluating and applying the values and aspirations of contemporary Australians so far as the text and structure of the Constitution permits;
- that at common law, legislation is presumed not to violate the rules of international law[178] (including Australia's obligations under international treaties) or infringe common law rights;[179]
- that where the Constitution is ambiguous, the Court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights.[180]

Common law principles directed the judgment of Brennan J in *Kingswell*. It was not a case of adapting the Constitution to meet the changing values and aspirations of the Australian people to provide a just resolution. His Honour stated:

> The code provisions and the prima facie rule of construction merely exemplify the common law principle that a conviction on indictment, whether by plea or verdict, determines the extent of the offender's liability to punishment. The question is whether s. 80 denies the Parliament power to abrogate that principle .... Section 80 is expressed as a constitutional guarantee of trial by jury and the issues to be so tried must be elements of what constitutes a criminal offence. But the term "offence" is not left to be defined by Parliament; in s. 80 it has the meaning which it bears in the criminal law.[181]

When Justice Kirby endorsed the view of Brennan J, he acknowledged that its foundation was the common law.

> *This was a view informed by a basic presumption deeply entrenched in the common law that preceded, and has followed, the adoption of the Australian Constitution.* That presumption is stated in *R v Courtie*. Where a legislature has provided in a statute that an accused person's liability to punishment varies, depending upon whether the prosecution is successful in establishing the existence of a particular factual ingredient, that legislature is thereby ordinarily taken to have created distinct offences. It is not ordinarily taken to have created different species of a single offence.[182] [Emphasis added.]

My argument here, that non-originalism has no meaningful role to play in defining what constitutes an 'offence' for the purposes of s80, is similar to my earlier comments refuting Goldsworthy's suggestion that radical consequences would result from a non-originalist interpretation of the words 'peace, order and good government'. As Kirby J notes above, the meaning of 'offence' is sourced to

178 See *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 (O'Connor J). See further Dennis Pearce & Robert Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) at 136–137.

179 See *Coco v R* (1994) 179 CLR 427 at 436–439 (Mason CJ, Brennan, Gaudron & McHugh JJ), 446 (Dawson & Deane JJ). See further Pearce & Geddes, id at 141.

180 See *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657 (Kirby J).

181 Above n9 at 291–292.

182 Above n1 at 325.

and informed by the common law, which 'preceded, and has followed, the adoption of the Australian Constitution'.[183] This is not a criticism of Justice Kirby's use of the common law as an aid to constitutional interpretation. Indeed, as Sir Owen Dixon recognised, it is important that 'constitutional questions should be considered and resolved in the context of the whole law'.[184] In the words of Booker, Glass and Watt, this means that 'common law principles and doctrines can be used to give content to, and to control the understanding of constitutional notions.'[185] But I am not sure that reading the Constitution against the background of the common law in order to resolve a textual ambiguity or uncertainty is necessarily part of non-originalism, if indeed that is what Kirby J was suggesting. Surely, it is a long established and free-standing principle of constitutional interpretation informed by a body of case law and considerations of stare decisis. Of course, if the text and structure of the Constitution read against the background of the common law fail to resolve a textual ambiguity or uncertainty then non-originalism has a meaningful role to play. In these circumstances the values and aspirations of contemporary Australians should be evaluated and applied in the resolution of that hard constitutional case.

If non-originalism is to establish itself in Australia as an appropriate and legitimate theory of interpretation then its proponents must exercise restraint. In the context of interpreting a Constitution that, for the most part, is free of the open-ended phrases that characterise the US Bill of Rights, the opportunities for its application will be more limited. It is submitted that in *Re Colina*, Justice Kirby failed to apply non-originalism in an appropriate and rigorous manner. Moreover, it was the principles and doctrines of the common law rather than non-originalism that facilitated the resolution of the s80 issue raised in *Cheng*.

C. R v Brownlee[186]

In *Brownlee* the High Court unanimously held that s80 did not invalidate legislation that permitted a jury reduced from 12 to 10 members from giving a verdict. In addition, the Court unanimously rejected the argument that legislation permitting the separation of the jury at any time after they have retired to consider their verdict offended s80.[187] It is submitted that *Brownlee* was a hard constitutional case where non-originalism had a legitimate role to play in resolving

183 Ibid.

184 Owen Dixon, *Jesting Pilate* (1965) at 212.

185 Keven Booker, Arthur Glass & Robert Watt, *Federal Constitutional Law: an Introduction* (2nd ed, 1998) at 286.

186 *Brownlee*, above n4.

187 The case concerned provisions in the *Jury Act* 1977 (NSW) that applied to the applicant in his trial for a Commonwealth offence by virtue of s68 of the *Judiciary Act* 1903 (Cth). Section 22(a)(i) of the *Jury Act* provided that where, in the course of a trial, any member of the jury dies or is discharged by the court as being incapable of continuing to act, either through illness or for any other reason, the jury shall be considered as remaining for all purposes of that trial properly constituted if, in the case of criminal proceedings, the number of its members is not reduced below 10. Section 54(b) of the *Jury Act* provided that the jury in criminal proceedings may, if the court so orders, be permitted to separate at any time after they retire to consider their verdict.

both issues and, in this instance, its application by Kirby J was appropriate. The text of s80 provided no guidance while the aspiration of contemporary Australians to have a system of jury trial that is civilised, fair and cost-effective was relevant in seeking a just, principled and appropriate resolution.

For example, as Kirby J noted, the ability of a jury reduced from 12 to 10 members to deliver a verdict has become increasingly important with the increasing length, cost and complexity of modern trials:[188]

> [G]iven that contemporary trials, particularly of federal offences, can be extremely complex and lengthy, the inconvenience to the community, to jurors and the cost to the parties should not needlessly be incurred by unnecessary termination and relitigation of jury trials where (as will inevitably happen from time to time) jurors die, fall ill or are otherwise incapable of continuing to act.[189]

After detailing those aspects of trial by jury that he considered 'constitutionally essential',[190] Kirby J correctly observed that '[w]hatever may have been the assumptions and "intentions" of the framers of the Constitution in 1900, viewed in terms of the function that "trial ... by jury" in s 80 of the Constitution fulfils, the provision of s 22(a)(i) of the Jury Act meet contemporary notions of that mode of trial.'[191]

Similarly, the application of non-originalism by Kirby J to resolve the jury sequestration issue was appropriate and principled. Permitting the separation of jurors after retiring to consider their verdict is consistent with 'contemporary Australian standards'[192] that require juries to be treated with civility and respect[193] and importantly, '[n]othing expressly stated, nor implied or inherent in s 80 of the Constitution forbids such an evolution.'[194]

In addition, it is submitted that the unsatisfactory route which the rest of the Court took to reach the same conclusions as Kirby J further strengthens the case for non-originalism as a legitimate and appropriate theory of constitutional

188 In certain circumstances a verdict can be delivered by a jury with less than 12 members in all Australian State and Territory jurisdictions. See *Jury Act* 1977 (NSW) s22, *Juries Act* 2000 (Vic) s44, *Jury Act* 1929 (Qld) s17, *Criminal Code* (Qld) s628, *Juries Act* 1957 (WA) s18, *Criminal Code* (WA) s646, *Juries Act* 1927 (SA) ss6 & 56, *Jury Act* 1899 (Tas) s39, *Criminal Code* (Tas) s378, *Juries Act* 1967 (ACT) ss7 & 8, *Juries Act* (NT) s6, and *Criminal Code* (NT) s373.

189 *Brownlee*, above n4 at 340.

190 Ibid.

191 Id at 341.

192 Ibid (Kirby J).

193 *Brownlee*, above n4 at 341, 342. As Kirby J noted at 341–342, '[i]n earlier times, at least in the estimation of some judges, jurors were "comparatively ignorant, subject to the control of their superiors and easily led astray." In such times, it was easier for the authorities to leave jurors "'without meat or drinke(sic), fire or candle' until they were starved or frozen into agreement" ... Such notions are completely incompatible with the treatment of a jury of Australian citizens today.' A jury is permitted to separate after they have retired to consider their verdict in New South Wales and Victoria. See *Jury Act* 1977 (NSW) s54, and *Juries Act* 2000 (Vic) s50.

194 Id at 342 (Kirby J).

interpretation in Australia. Though separate judgments were written by Gleeson CJ and McHugh J, Gaudron, Gummow and Hayne JJ and Callinan J, I would argue that all employed a method of interpretation that most closely resembled moderate originalism. Unfortunately, as will be later discussed, Kirby J failed to properly address the methodology used by his brethren by conveniently characterising the interpretation debate in *Brownlee* as a battle between extreme originalism and non-originalism.[195] It clearly was not. While the other members of the Court thought it 'appropriate ... to have regard to the position in the colonies at Federation ... [i]t was not undertaken for the purpose of psychoanalysing the people who were involved in framing the Constitution. It was undertaken because the exercise upon which the court was embarked involved ascertaining the meaning of an instrument which came into being in a certain manner, at a certain time, and for a certain *purpose*.'[196] [Emphasis added.] In other words, the majority sought the framers' enactment rather than application (subjective) intentions for s80 — the aspect of moderate originalism that Goldsworthy has argued allows for constitutional evolution while remaining faithful to its original, intended meaning.[197] According to Gleeson CJ and McHugh J, 'it would be wrong to attribute to its reference to the procedure of trial by jury a meaning which treated as frozen in time all the incidents of the procedure as they were known at Federation.'[198] It was therefore imperative to employ a method that proclaimed fidelity to the original, intended purpose of s80 while providing room for constitutional evolution.

In order to ascertain the original, intended purpose of s80, the judgments of Gleeson CJ and McHugh J, Gaudron, Gummow and Hayne JJ and Callinan J cited historical evidence to indicate that before Federation there was State legislation that permitted both the delivering of a verdict from a jury with fewer than 12 members and the separation of jurors upon retiring to consider their verdict.[199] Presumably this was done in the belief that an understanding of the purpose of s80 in 1900 enabled the court to objectively identify the essential characteristics of trial by jury that were fixed for all time at Federation.[200] This is despite the concession that 'all the incidents of the procedure as they were known at Federation' were not

195 Kirby states that '[e]ither one adheres to the historical notions of 1900, and takes the mind back to what the framers knew and understood about jury trial, or one accepts that the constitutional expression must be given a "contemporary" meaning, as befits a "modern democratic society".' Id at 333. See further paragraphs 333–338 and 341–342 where Kirby J arrives at his conclusions by examining each issue from the perspective of an extreme originalist and a non-originalist.

196 *Brownlee*, above n4 at 346 (Callinan J), 304 (Gleeson CJ & McHugh J). See also Gaudron, Gummow & Hayne JJ at 315

197 See text following n123, above.

198 *Brownlee*, above n4 at 304.

199 On the issue of a reduced jury delivering a verdict see id at 306 (Gleeson CJ & McHugh J), 316–317 (Gaudron, Gummow & Hayne JJ), 347–349 (Callinan J). On the issue of jury sequestration see 307–308 (Gleeson CJ & McHugh J), 315–316 (Gaudron, Gummow & Hayne JJ), 350 (Callinan J).

200 The analysis undertaken in the judgments of Gleeson CJ & McHugh J, Gaudron, Gummow & Hayne JJ and Callinan J sought to ascertain those aspects of s80 that were essential (that is, unchangeable) and those that were non-essential (that is, capable of evolving). See id at 304 (Gleeson CJ & McHugh J), 314, 315 (Gaudron, Gummow & Hayne JJ), 346, 350 (Callinan J).

'frozen in time' in 1900.[201] In other words, the non-essential characteristics of s80 were capable of evolving 'to respond to changing circumstances and conditions over time'.[202] But engaging in this kind of deductive reasoning from the historical record is problematic. The historical record of colonial legislation and convention debates is incomplete and provides little if any instructive guidance as to what the framers might have objectively intended to be the essential and inessential characteristics of the institution of trial by jury.[203] However, despite what Kirby J argued, the problem is not, for example, that the pre-federation legislation and historical evidence were fashioned to pretend 'that the framers of the Constitution would have contemplated separation during deliberation as a feature of jury trial as they conceived it.'[204] The other members of the Court did not search for or treat as determinative the subjective intentions of the framers.[205] Instead, they sought the framers' objective intent or purpose, and there is the rub. It is a method of interpretation that involves an artificial process of reasoning, one that requires a series of judicial choices to be made based on an incomplete and ambiguous historical record before a hard constitutional case can be resolved. However it may be characterised, it cannot reasonably be denied that determining the original intent or purpose of s80 and those characteristics essential to trial by jury as guaranteed under the Constitution from an incomplete and ambiguous historical record involves judicial choice. Although this cannot be avoided it should neither be denied nor disguised as dispassionate and objective legal analysis.

An unfortunate aspect of the judgment of Kirby J is his unwillingness to directly address the methodology of the other members of the Court that, as earlier submitted, most closely resembled moderate originalism. He posited that:

> Either one adheres to the historical notions of 1900, and takes the mind back to what the framers knew and understood about jury trial, or one accepts that the constitutional expression must be given a "contemporary" meaning, as befits a "modern democratic society".[206]

201 Id at 304 (Gleeson CJ & McHugh J).

202 Ibid.

203 See above n130 at 107–111.

204 *Brownlee*, above n4 at 336 (Kirby J).

205 See id at 304 (Gleeson CJ & McHugh J), 317 (Gaudron, Gummow & Hayne JJ). In this part of the judgment their Honours endorse Grove J's passage from the Court of Criminal Appeal judgment in *R v Brownlee* (1997) 41 NSWLR 139 at 145–146: 'In my view an understanding and construction should be given to the words in s 80 that the framers of the constitutional guarantee *intended* that a jury exercise its function without fear or favour and without undue influence in the context of community standards and expectations as current from time to time.' [Emphasis added.] It is submitted that the judgment of Gaudron, Gummow & Hayne JJ can only be satisfactorily explained if we assume that they were referring to the objective rather than subjective intentions of the framers. If they were in fact referring to the subjective intentions of the framers (extreme originalism) I would argue that their conclusions were erroneous for the reasons outlined by Kirby J in *Brownlee*, above n4 at 338–343.

206 Id at 333.

The extent of Kirby J's response to the modern forms of originalism as a theory of constitutional interpretation was his claim that 'a hybrid approach is intellectually incoherent.'[207] To effectively dismiss the reasoning of his brethren in this manner is not particularly instructive. Moderate originalism is not intellectually incoherent. Indeed, the conclusions reached in *Brownlee* can be explained by the distinction drawn by moderate originalism between the framers' application and enactment intentions; notwithstanding that such an approach reasons from the dubious assumption that the framers' enactment intention can be identified. As my discussion in Part I of the paper highlighted, the real problem is that the utility of moderate originalism as a theory of interpretation is significantly diminished by the complexity and uncertainty of its application and the difficulty of reconciling a theory that provides for constitutional evolution without forsaking fidelity to the original, intended meaning of the framers. In addition, as I have endeavoured to show through the analysis of the judgments of Gleeson CJ and McHugh J, Gaudron, Gummow and Hayne JJ and Callinan J in *Brownlee*, the resolution of hard constitutional cases using moderate originalism (or any other modern form of originalism) cannot disguise that these decisions *necessarily involve judicial choice.* Gleeson CJ and McHugh J were correct when they stated that the 'only power of the judiciary, which has its source in the Constitution, is to give effect to the meaning of the Constitution.'[208] But that meaning cannot be *objectively* discovered by fusing diligent historical analysis with contemporary legal principle. At some point it requires judicial choice. What informs that choice is the hallmark of a theory of constitutional interpretation. As I have earlier stated, non-originalism at least acknowledges these choices and, when applied appropriately and with rigour, can resolve hard constitutional cases in a manner consistent with the common law method, popular sovereignty and the text and structure of the Australian Constitution.

In summary, it is submitted that an appropriate and defensible methodology for resolving hard constitutional cases is as follows:

- When faced with a novel constitutional question or textual ambiguity or uncertainty, the text of the Constitution should be given a natural reading in light of its history and structure. Importantly, this structure includes federalism, responsible government, representative democracy, the rule of law and the implied constitutional rights. Moreover, the Constitution must be read against a backdrop of the whole law. This includes the principles and doctrines of the common law and relevant statutory pronouncements. Notwithstanding that the High Court is not bound by its earlier decisions, the stability of our constitutional arrangements and its continuing authority as a fundamental institution of government depends on the High Court giving appropriate weight to considerations of stare decisis in its constitutional jurisprudence.
- If such an approach proves inconclusive then non-originalism has a legitimate and appropriate role to play. The values and aspirations of contemporary

207 Id at 334.
208 Id at 305.

Australians should be evaluated and applied in the resolution of that hard constitutional case. I have earlier outlined possible ways for a court to evaluate those values and aspirations.[209]

- In addition, if the text of the Constitution permits an interpretation that comports more closely with the values and aspirations of contemporary Australians, that interpretation is to be preferred even when at odds with the intentions of the framers.

3. *Indirectly Rejuvenating The S80 Guarantee*

> Having regard to the history of indictments and to the purpose intended to be served by s80, that section has certainly been given a very narrow interpretation, so narrow that the safeguard may be rendered illusory at the will of the very Parliament whose action it was intended to restrict by safeguarding the rights of the citizen. If anyone is possessed of an ambition to fill up "gaps" in the Constitution by restoring safeguards to the people, he [sic] may start by endeavouring to secure that the right of trial by jury in serious cases should be made effective.[210]

It is submitted that, so far as the text permits, the dissenting judgment of Brennan J in *Kingswell* represents the outer-limit of the constitutional guarantee that s80 can provide. For the reasons I have discussed in Part 2, the hurdle posed in s80 by the words 'trial on indictment' and the absence of the phrase 'serious offence' cannot legitimately be overcome by constitutional interpretation.[211] But the judgment of Brennan J is small consolation to those who seek a construction of s80 that provides Australians with a substantive constitutional right and a fetter on the legislative power of the Commonwealth when determining how its criminal offences are to be prosecuted. For as Gibbs CJ, Wilson and Dawson JJ noted in *Kingswell*:

> To understand s80 as requiring the Parliament to include in the definition of any offence any factual ingredient which would have the effect of increasing the maximum punishment to which the offender would be liable would serve no useful constitutional purpose; indeed the Parliament might feel obliged to provide that some offences, which would otherwise be made indictable, should be triable summarily.[212]

It is therefore submitted that we must turn elsewhere to seek possible methods of rejuvenating the s80 guarantee.

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209 See text following n58–65, above.

210 Evatt, above n40 at 65.

211 Compare above n130 at 107–113. Simpson & Wood suggest that, based on the Convention Debates, textual ambiguity and the need to give s80 a rights-protective construction, the terms 'trial on indictment' and 'offence' may have some fixed, objective meaning.

212 Above n9 at 277.

A. Offences against the Customs Act, *characterisation and the role of proportionality*

(i) Offences against the Customs Act

In *Redfern v Dunlop Rubber Australia Ltd*, Menzies J outlined the power conferred on the Commonwealth Parliament by s51(1):

> It is a power to make laws with respect to overseas trade and commerce and, subject only to express limitation, it extends to forbidding inter-state or overseas trade or commerce itself or anything occurring in or directly affecting such trade or commerce.[213]

When asked to consider the constitutionality of the offence created by s233B(1)(ca) of the *Customs Act* 1901 (Cth) in *Milicevic v Campbell*, the High Court endorsed the view of Menzies J regarding the scope of the trade and commerce power: 'Section 51 (i) of the Constitution is the source of the Commonwealth power to prohibit the importation of goods into Australia.'[214]

However, for three of the four judges in *Milicevic* the actual offence created by s233B(1)(ca) was sourced to the incidental aspect of the trade and commerce power:

> It is a valid exercise of the legislative power incidental to the power granted by s51(i) to make the possession in Australia without reasonable excuse of narcotic goods an offence punishable under the Customs Act 1901-1971. That clearly is an appropriate means of excluding narcotic substances, as defined in s4 of the Customs Act 1901-1971 (as amended by the Customs Act (No. 2) 1971), from the channels of trade and commerce with other countries.[215]

Consequently, through parity of reasoning, it would prima facie appear that the incidental aspect of s51(i) similarly supports ss233B and s235 of the *Customs Act*, the provisions challenged in *Kingswell* and *Cheng*. This is consistent with the view that '[t]he constitutional basis of the *Crimes Act 1914* and offence provisions in other Commonwealth legislation is found in the express incidental power in s 51(xxxix) of the Constitution, or in the implied incidental powers contained within other heads of power.'[216] But how does the court determine that a law is supported by the implied incidental aspect of a power? This has been the subject of robust judicial debate in recent times.

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213 (1964) 110 CLR 194 at 219–220.

214 (1975) 132 CLR 307 at 309 (McTiernan ACJ), 313 (Gibbs J), 320 (Mason J), 321 (Jacobs J).

215 Id at 309 (McTiernan ACJ). See also 320 (Mason J), 321 (Jacobs J). Gibbs J did not expressly decide the issue. However, it is submitted that his endorsement of *Williamson v Ah On* (1926) 39 CLR 95 implicitly acknowledged that s233B(1)(ca) was sourced to the implied aspect of s51(i). The impugned provision in *Williamson* was s3(k) of the *Immigration Act* 1901 (Cth). It deemed certain persons to be prohibited immigrants who had entered Australia contrary to the Act until the contrary was proven. Gibbs J drew a parallel between s233B(1)(ca) and s3(k). At 316 he approved the decision in *Williamson* which held that s3(k) was validly enacted under the immigration power (s51(xxvii)) and the express incidental power (s51(xxxix)). Consequently, Gibbs J found s233B(1)(ca) was constitutional.

216 Deborah Sweeney & Neil Williams, *Commonwealth Criminal Law* (1990) at 34. See *R v Bernasconi*, above n156 at 635 (Griffith CJ); *R v Kidman* (1915) 20 CLR 425, at 433–434 (Griffith CJ).

(ii) Characterising the scope of implied incidental powers

Dixon CJ defined the scope of implied incidental powers in the following way:

> [E]verything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power over the subject matter.[217]

However, later statements made by the court have suggested that matters contained in a law need not be *necessary* to be supported by the implied aspect of a power:

> [T]o bring a law within the reach of the incidental scope of a power, it is enough that the provision is *appropriate* to effectuate the exercise of the power; one is not confined to what is necessary for the effective exercise of the power.[218] [Emphasis added.]

When considering whether an impugned law is sourced to the implied incidental aspect of a power, the difficult task for the court is to determine those matters that are appropriate to effectuate the exercise of that power. In *Nationwide News Pty Ltd v Wills*, Mason CJ proposed a test involving the notion of proportionality to assess constitutional validity:

> First, that, even if the purpose of a law is to achieve an end within power, it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to the pursuit of an end within power, ie, unless it is capable of being considered to be reasonably proportionate to the pursuit of that end. Secondly, in determining whether that requirement of reasonable proportionality is satisfied, it is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in doing so, causes adverse consequences unrelated to the achievement of that object. In particular, it is material to ascertain whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common law, such as freedom of expression.[219]

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217 *Burton v Honan* (1952) 86 CLR 169 at 177 (Dixon CJ).

218 *Nationwide*, above n92 at 27 (Mason CJ).

219 Id at 30–31. The notion of reasonable proportionality was first used in this manner by Mason CJ, Deane & Gaudron JJ in *Davis v Commonwealth* (1988) 166 CLR 79. In *Davis* at 100 they held that the express incidental power did not support a statutory regime established to protect the commemoration of the Bicentenary: 'Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. *This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.*' [Emphasis added.] For further discussion on the role of proportionality in the characterisation process and Australian constitutional law see Brian Fitzgerald, 'Proportionality in Australian Constitutionalism' (1993) 12 *U Tas LR* 263; H P Lee, 'Proportionality in Australian Constitutional Adjudication' in Lindell, above n92 at 126; J J Doyle, 'Common Law Rights and Democratic Rights' in Finn, above n35 at 160–162; Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *PLR* 212; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *MULR* 1; above n81 at 53–54.

Dawson J rejected the Mason approach and denied that proportionality had any role to play in the characterisation process when implied incidental powers were involved:

> [T]he concept of reasonable proportionality is of limited assistance where purposive powers are not involved and the danger in employing it is that it invites the court to act upon its view of the desirability of the impugned legislation rather than upon the connexion of the legislation with the subject-matter of the legislative power.[220]

In *Cunliffe v Commonwealth*[221] and *Leask v Commonwealth*[222] the court continued to debate the role (if any) of proportionality in the characterisation process when a law depends on the implied incidental power for validity. However, in *Leask* the court accepted the view of Dawson J that only one test existed for characterising Commonwealth laws:

> [I]t is my view that the relevant test of the validity of a law made under one of the substantive heads of power in s51 of the Constitution is that of sufficiency of connection with its subject matter. That is so whether or not in characterising the law it is necessary to invoke the implied incidental power.[223]

Notwithstanding its acceptance of a single test, it is difficult to draw definitive conclusions from *Leask* on the role of proportionality in the characterisation process as the impugned law in that case (at least for a majority of the court) did not rely on the implied incidental power for its validity. However, Brennan CJ, Toohey and Gummow JJ favoured the view of Dawson J[224] while Gaudron, McHugh and Kirby JJ indicated support for the characterisation technique used by Mason CJ in *Nationwide*.[225]

Justice Kirby seemed to advocate a role for proportionality in the characterisation process far broader than anything proposed by Mason CJ in *Nationwide*:

> It is difficult, in principle, to embrace the proposition that proportionality might be an appropriate criterion for some paragraphs of s51 of the Constitution yet impermissible in respect of others. The same basic question is in issue in every case: namely where the boundary of federal constitutional power lies.[226]

In any event, the issue as to the role of proportionality in the characterisation process remains far from settled. Especially with Brennan CJ, Dawson and Toohey JJ having left the court since *Leask*. It is, however, submitted that problems exist

220 *Nationwide*, above n92 at 89 (Dawson J).
221 Above n75.
222 (1996) 187 CLR 579.
223 Id at 605 (Dawson J). See also 593 (Brennan CJ), 616 (McHugh J), 633 (Kirby J).
224 Id at 599–605 (Dawson J), 593–595 (Brennan CJ), 612–616 (Toohey J), 624 (Gummow J).
225 Id at 616 (McHugh J), 616 (Gaudron J), 634–637 (Kirby J).
226 Id at 635 (Kirby J).

with the characterisation approach of Dawson J when implied incidental powers are involved. In *Leask* he stated:

> No doubt as one moves closer to the outer limits of a power, the purpose of a law which lies at "the circumference of the subject [matter of the power] or can at best be only incidental to it" [*Bank Nationalization Case*] becomes important, because "by divining the purpose of a law from its effect and operation, its connection with the subject of the power may appear more clearly" [*Cunliffe*]. "Purpose" in that connection is merely an aspect of what the law does in fact and the test remains one of sufficient connection. If that connection is established, it matters not how ill-adapted, inappropriate or disproportionate a law is or may be thought to be [*Cunliffe*].[227]

I understand this to mean that, for example, with respect to the *Customs Act*, it is a law that regulates goods imported into and exported from Australia. This clearly falls within the subject matter of s51(i). The offences created by ss233B and 235 are part of the means chosen by the Commonwealth to implement this constitutionally permissible purpose. Therefore, it matters not to the constitutionality of ss233D and 235 if they be measures considered ill-adapted, inappropriate or disproportionate to this purpose. If a sufficient connection between the law and s51 is established 'the proportionality or appropriateness of the means selected by the Parliament to achieve the end in view are matters for it alone.'[228] But this provides no answer to the characterisation problem for implied incidental powers, it merely restates the question. It tells us nothing of how that sufficient connection is *in fact* established when considering a law (or provisions in a law) that rely on the incidental aspect (or circumference) of a power for validity. I have similar difficulty with his Honour's later observation that 'the disproportion of a law to an end asserted to be within power may suggest that the law is actually a means of achieving another end which is beyond power.'[229] I understand this to mean that in some circumstances the circumference of the subject matter of a power can be located by identifying measures that are disproportionate. But this simply begs the same question: how does one in the first place determine when measures are disproportionate? Some criterion of validity is required to assess proportionality. For it is answering this difficult question that will ultimately determine whether a law is 'appropriate to effectuate the exercise of the power'[230] and is consequently supported by the implied incidental power. In addition, the later observation of Dawson J may be hard to reconcile with his earlier claim that for the purposes of characterisation 'it matters not how ill-adapted, inappropriate or disproportionate a law is or may be thought to be.'[231] But in some circumstances, on his own reasoning, it clearly does matter. With respect, it is submitted that the basic flaw in the approach of Dawson J is to *apply* the

227 Id at 602–603 (Dawson J).

228 Id at 604 (Dawson J).

229 Id at 605 (Dawson J).

230 *Nationwide*, above n92 at 27 (Mason CJ).

231 Above n222 at 603 (Dawson J). See also *Cunliffe v The Commonwealth*, above n75 at 351–352.

characterisation test in the same manner 'whether or not in characterising the law it is necessary to invoke the implied incidental power'.[232] Although each 'head of power is but one grant of power'[233] and though 'the relevant test of the validity of a law ... is that of sufficiency of connection with its subject matter',[234] an additional consideration comes into play when a law seeks to invoke the implied incidental power for its validity. In these circumstances there can only be a sufficient connection with a law and the subject matter of a power when the matters contained in the law *are appropriate* to effectuate the head of power.[235] The determination of what ultimately is appropriate is not a matter for the Parliament alone. No doubt the characterisation of 'incidental' laws takes the court into uncomfortable terrain. But it is terrain that cannot be avoided and must be traversed, for it goes to the heart of the court's duty to determine 'where the boundary of federal constitutional power lies'.[236]

The role of proportionality and purpose in this difficult characterisation process remains unresolved. However, it is submitted that McHugh J in *Leask* best explains their relevance:

> Where ... the dominant subject matter of an impugned law is not itself a head of federal power, but that law has ostensibly been passed to achieve some purpose falling within a subject of Commonwealth power, the sub-test of proportionality may sometimes prove helpful in determining whether the subject matter of the impugned law is sufficiently connected to the subject of federal power.[237]

For example, the dominant subject matter of ss233B and 235 — making it a criminal offence to be in possession of narcotic goods — is not itself a head of federal power. But these laws have ostensibly been passed to achieve a purpose falling within a subject of Commonwealth power. In this case, that purpose is to ensure there is a regime of criminal sanctions to prohibit and punish the importation of narcotic goods into Australia, a subject that falls within the trade and commerce power.[238] The test of proportionality is invoked to determine whether these laws are appropriate and adapted to achieve that purpose.

It is in this context that the role of proportionality in the characterisation process regarding implied incidental powers should be understood. It is not an invitation for 'the court to act upon its view of the desirability of the impugned legislation'.[239] Although, no doubt the further one moves away from the core subject matter of a power the more difficult the characterisation process becomes. As Kirby J explains:

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232 Id at 605 (Dawson J).
233 Id at 602 (Dawson J).
234 Id at 605 (Dawson J).
235 *Nationwide*, above n92 at 27 (Mason CJ).
236 Above n222 at 635 (Kirby J).
237 Id at 616 (McHugh J).
238 See text following n215, above.
239 *Nationwide*, above n92 at 89 (Dawson J).

> Unavoidably, such decisions involve an exercise of judgement. It is futile to pretend that words and phrases are sufficient, without more, to yield the solution in every case ... Disagreement exists because different judicial minds see the boundaries of constitutional power differently located.[240]

Proportionality is 'offered in the hope of supporting a principled, consistent and predictable decision in a disputed case of constitutional characterisation'.[241] To be sure, having to determine when a law is appropriate to effectuate a purpose within the subject matter of a power involves the court in a difficult balancing process. But the court is no stranger to the notion of proportionality in the process of characterisation. It has acknowledged its role when it is asserted that a law is sourced to a purposive power[242] or when 'a law is said to fall foul of a constitutional limitation on legislative power'.[243] For these reasons it is submitted that proportionality is a legitimate and *necessary* tool for testing the validity of a law that lies at the circumference of a power.

It is submitted that the approach employed by Mason CJ in *Nationwide* is to be preferred. It remains the most detailed and principled exposition of what the court should consider when determining the scope of implied incidental powers. But, as Jeremy Kirk has pointed out, this notion of proportionality

> involves the reconciliation of principles and interests which are in conflict or in tension. In this context the interests being balanced are the achievement of a legitimate government purpose (which must be sufficiently connected to the relevant power) and the adverse effects on particular identified interests.[244]

In *Nationwide*, Mason CJ stated that part of the proportionality test involved assessing the adverse consequences of a law unrelated to the achievement of a legitimate object. 'In particular ... whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common law, such as freedom of expression.'[245]

But as Kirk has correctly noted:

> The protection of rights and interests involved in the concept is not a necessary part of testing the link, but nor is it inconsistent with doing so. Such a significant shift should have been carefully considered and justified, however.[246]

240 Above n222 at 636 (Kirby J).

241 Ibid.

242 Id at 591 (Brennan CJ), 605–606 (Dawson J), 616 (Gaudron J), 616 (McHugh J), 624 (Gummow J).

243 Id at 606 (Dawson J). See also 593 (Brennan CJ), 614 (Toohey J), 616 (Gaudron J), 616 (McHugh), 624 (Gummow J).

244 Kirk, above n219 at 27.

245 *Nationwide*, above n92 at 30.

246 Kirk, above n219 at 35.

While the scope of this paper precludes a detailed treatment of this important issue, it is submitted that the Mason concept of proportionality can be justified for the following reasons:

- The Mason approach is peculiarly suited to the characterisation of laws seeking to invoke the implied aspect of a power. These laws must be appropriate and adapted to the achievement of a purpose that falls within the subject matter of a power. It is submitted that for a law to be appropriate and adapted to the achievement of a purpose it must be both *effective* and *reasonable*. The first part of the inquiry — whether a law is effective in achieving its purpose — is straightforward enough, but assessing whether it has done so reasonably is more problematic and question begging. How can a law's reasonableness be measured in a principled manner? A law will be reasonable if the measures it adopts for achieving its desired end are sensible, logical and not excessive. Such an inquiry lends itself to the balancing process that characterises the Mason concept of proportionality. Importantly, balancing the benefit of a law against its cost in terms of whether it infringes any fundamental values traditionally protected by the common law is entirely consistent with the view that 'common law principles and doctrines can be used to give content to, and to control the understanding of constitutional notions.'[247] This is not an attack on parliamentary supremacy nor a constitutionalising of common law rights. We do well to remember that the legislative options available to the Parliament at the circumference of a power are not unlimited. Only those laws that are appropriate and adapted to achieve their purpose are constitutional. In this context, assessing the appropriateness of a law against the backdrop of the principles and doctrines of the common law provides a principled *guide* to assist in this difficult process of characterisation.
- Moreover, in addition to being consistent with the established approach to constitutional interpretation detailed above, the Mason concept of proportionality at least acknowledges and explicates the *judicial choice* that is, for the most part, inherent in the concept of proportionality. When a court is asked to determine whether a law is appropriate and adapted to achieving its ends, its characterisation task requires the reconciliation of competing interests. Such a process necessarily involves some qualitative assessment of the law. It is not say that a court makes a subjective judgment as to the virtue or integrity of a law as might a Senate Committee or Law Reform Commission. However, it is submitted that deciding whether a law reconciles the competing interests in a manner that is effective and reasonable *is* to make some assessment of that law's quality.[248] The challenge is to make that assessment in a manner that is structured and principled. It explains and, it is submitted, justifies why Mason CJ opted to measure the law's effect against concepts and notions peculiarly within the province and expertise of the judiciary — fundamental common law rights. This concept of proportionality provides a structured and

247 Above n185 at 290.

248 Compare Kirk, above n219 at 4–9, 26–27.

principled method for making that difficult qualitative assessment. Moreover, its articulation of the factors that influence that assessment promotes a more open and accountable exposition of the judicial function involved in characterising laws that invoke the incidental aspect of a power for validity.

- Sarah Joseph and Melissa Castan have suggested that the increased prominence of proportionality in Australian constitutional law may be a judicial reaction to the inability of traditional common law safeguards such as responsible government to adequately protect the citizenry from governmental excess.[249] They argue that 'the High Court may perceive that a greater degree of judicial scrutiny of governmental legislation is necessary to safeguard the interests of the governed.'[250] If this is the case then it is logical and justified for the court to consider the impact a law may have on fundamental common law rights in determining whether it is appropriate and adapted to achievement of a purpose within the subject matter of a power.

(iii) Sections 233B and 235 of the Customs Act

Now turning to the impugned provisions in *Kingswell* and *Cheng*, I will suggest that if one characterises ss233B and 235 using the approach of Mason CJ in *Nationwide*, there is an argument that casts doubt as to their validity. This argument may in turn indirectly rejuvenate the guarantee provided by s80 of the Constitution.

As earlier discussed, the main purpose of the *Customs Act* is to regulate goods imported into or exported from Australia. It is therefore necessary for the Act to contain criminal sanctions to facilitate effective regulation. As Jacobs J explained in *Milicevic v Campbell* in relation to s233B(1)(a):

> Importation is a part of trade and commerce with overseas countries. It appears to me that the purpose and effect of the paragraph is to deal with one aspect of that subject matter. It is a provision which is *recognizably ancillary* to the matter of importation. It gives practical effect in one important respect to the purpose of prohibiting the import of goods of the prohibited kind, namely, the prevention of the presence of such prohibited imports in Australia.[251] [Emphasis added.]

If the majority of the Court in *Milicevic* is correct and these criminal provisions are sourced to the incidental aspect of s51(i), then these measures must be appropriate and adapted to effect the purpose of the *Customs Act* — the regulation of goods imported into and exported from Australia.

Section 233B creates a number of narcotic offences. Section 235 establishes a penalty regime in relation to those offences with four levels of maximum penalties. Even if the High Court in *Cheng* was correct when it found that s235 created no new offences,[252] it cannot be disputed that the Parliament displaced a fundamental

249 Sarah Joseph & Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) at 377.
250 Ibid.
251 Above n214 at 321.
252 Above n1 at 266–267 (Gleeson CJ, Gummow & Hayne JJ), 301–303 (McHugh J).

rule of the common law; namely that it is the role of the jury to determine disputed facts.[253] As Kirby J noted in *Cheng*, the consequence of s235 is that a 'determination [by judge alone] can convert the "offence" from one carrying a maximum penalty of two years imprisonment to one carrying the highest penalty known to our law, namely life imprisonment'.[254]

Employing the Mason concept of proportionality, the relevant question becomes whether the measures adopted in s235 are reasonably and appropriately adapted to the regulation of goods imported into or exported from Australia? It is certainly arguable that s235 goes significantly 'beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in doing so, causes adverse consequences unrelated to that object'.[255] The adverse consequence of s235, unrelated to the regulation of goods imported into or exported from Australia, is the removal of certain facts from jury consideration, that if established, dramatically increase a person's sentence. It results in the infringement of a fundamental rule traditionally protected by the common law; that the role of the jury in the prosecution of indictable offences is to determine disputed facts.

As Kirby J noted in *Leask*:

> The law, or part of it, may lose the quality of sufficient connection with the constitutional head of power. Put another way, it may be so disproportionate to the legitimate attainment of the subject matter of the grant of power as to take it outside that grant. When that happens the boundary of constitutional validity will have been passed.[256]

On this reasoning it is at least arguable that s235 is not supported by the incidental scope of s51(i). Consequently, the guarantee provided by s80 could be indirectly rejuvenated by requiring that, in the prosecution of an indictable offence against the Commonwealth, any disputed fact is to be determined by the jury.

However, it begs the question: what would be within the incidental scope of the power conferred by s51(i)? On one, admittedly extreme view, it could be argued that removing any fact from jury determination that has the potential to increase a person's sentence would not be an appropriate and adapted legislative measure. The reaction of the Parliament to the High Court adopting such a view would be understandably hostile. For, in effect, it constitutionally prohibits the drafting

253 *Altham's Case* (1611) 8 Co. Rep. at f. 155: 'ad quaestionem facti non respondent judices: ita ad quaestionem juris non respondent juratores.'; In *Bushell's case* (1670) Vaughan Rep. 149, Vaughan CJ described the above maxim as 'that Decantatum in our books'; William Blackstone, *Commentaries on the Laws of England* (first published 1765, 1992), vol 3 at 379–381; William Forsyth, *History of Trial by Jury* (1852) at 259; *Metropolitan Railway Co v Jackson* (1877) 3 App Cas 193 at 197 (Lord Cairns LC); 'The facts are for you and the law is for me': Devlin, above n40 at 61. For a detailed discussion of the fact finding role of juries, see James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1969) at 183–262.

254 Above n1 at 323.

255 *Nationwide*, above n92 at 31 (Mason CJ).

256 Above n222 at 636 (Kirby J).

technique utilised in s235. Moreover, funding of the judiciary by the executive would have to increase with the longer trials that would most likely result.

So, in terms of protecting individual rights, would High Court endorsement of such a view do more harm than good? The Parliament would no doubt seek to combat the situation by drafting its criminal provisions to avoid these adverse consequences. For example, it would appear that if the ss233B and 235 offences[257] were only triable summarily, the adverse consequences to the Parliament and executive described would be avoided. The current infringement of the fundamental rule traditionally protected by the common law occasioned by s235 would no longer occur. Moreover, assuming the High Court continued to endorse the orthodox view of s80, Parliament could go significantly further using the same technique. It could, for example, amend s4J of the *Crimes Act* 1914 (Cth) to state that only Commonwealth offences punishable by life imprisonment cannot be tried summarily.[258] Such legislative action would, in effect, make s80 a dead letter.

However, it would be open to the court to employ the same approach outlined above to invalidate such extreme legislative action. In other words, it could reason in the following manner:

- The legitimate object of *any* Commonwealth offence is to regulate an area of activity through the provision of criminal sanctions should illegality arise from those activities.
- Making the overwhelming majority of Commonwealth offences *only* triable summarily is not a measure, for the most part, reasonably and appropriately adapted to that legitimate object. It goes 'beyond what is reasonably necessary or conceivably desirable' for the achievement of the legitimate object sought to be attained and, in doing so, causes adverse consequences unrelated to that object'.[259]
- The adverse consequences of such legislative action (unrelated to that object) is depriving of a jury trial all persons accused of Commonwealth offences, save those that carry a maximum penalty of life imprisonment.
- The adverse consequences result in the infringement of a fundamental rule traditionally protected by the common law: that is, the common law right to trial by jury for serious criminal offences.[260]

257 If the High Court were to adopt the approach that I have outlined above, in order to comply with s80 the Parliament would have to redraft s235 with the likely result that the conduct which currently attracts the four maximum penalty levels would become separate offences.

258 The gist of s4J in its current form is that, unless the contrary intention appears, Commonwealth offences punishable by more than 10 years imprisonment cannot be tried summarily.

259 *Nationwide*, above n92 at 30 (Mason CJ).

260 *Newell v The King* (1936) 55 CLR 707 at 711–712 (Latham CJ) cited with approval in *Cheatle v The Queen* (1993) 177 CLR 541 at 559 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron & McHugh JJ); *Kingswell*, above n9 at 299–300 (Deane J); *Brown v The Queen*, above n40 at 203 (Deane J), 211 (Dawson J); *Singer v US* (1965) 380 US 24 at 27 (per curiam); Blackstone, above n253, vol 3 at 379–381, vol 4 at 342–344; 'In the case of every indictable offence the accused has a right to trial by jury': Devlin, above n40 at 129.

At first blush both Parliament and the executive appear the big losers should the court employ this reasoning. However, for the following reasons it is submitted that this approach constitutionally protects the right to trial by jury for serious criminal offences *without* Parliament being denied the power to determine how *most* Commonwealth offences shall be prosecuted:

- The Mason concept of proportionality would constitutionally prohibit the drafting technique employed in s235. Consequently, the additional fact(s) that, if proven, currently attract the s235 penalty regime (four maximum penalty levels) would become offences in their own right, separate from s233B. This would constitutionally realign the criminal law with its fundamental principle that, in the prosecution of an indictable matter, it is the jury that determines disputed facts. Indeed, one might suggest that if Parliament were prevented from using the 's235 drafting technique' to circumvent the s80 guarantee the recent judicial disquiet over the provision might quickly subside. Let us not forget that in *Re Colina* and *Cheng*, members of the High Court other than Justice Kirby expressed varying levels of concern about the current state of the s80 guarantee.[261] And, notwithstanding claims by Barwick CJ in *Li Chia Hsing v Rankin*[262] and earlier in *Zarb v Kennedy*[263] that the construction of s80 must be considered settled, it is an issue that refuses to quietly exit the constitutional stage.[264]
- It leaves undisturbed the present legislative regime that permits, unless the contrary intention appears, Commonwealth offences that carry a maximum

261 Above n2 at 397 (Gleeson CJ & Gummow J). When asked to reconsider the correctness of *Kingswell*, their Honours stated that '*even if the Court were otherwise minded to do so*, the present would not be an appropriate case.' [Emphasis added.] 'The intention of the framers so clearly expressed, the long history of summary proceedings for contempt and the recent considered judgement of this Court in *Kingswell* bring me to the conclusion that s 80 of the Constitution does not require that the charge of contempt of the Family Court by scandalising it be tried by jury, *notwithstanding that I share some of the concerns expressed by Dixon and Evatt JJ in Lowenstein and by Brennan J in Kingswell*': at 439 (Callinan J). [Emphasis added.]; above n1 at 266 (Gleeson CJ, Gummow & Hayne JJ): 'If s 80 were to be re-interpreted as a constitutional requirement for trial by jury in the case of all serious Commonwealth offences, the occasion for doing so will be in a case, unlike the present, where there was a legislative denial of trial by jury and there arose in the conduct of the prosecution issues susceptible of trial by jury. Nor, in the events that happened, is this an appropriate occasion to reopen *Kingswell* for the purpose of establishing that, in the case of a defendant who pleads not guilty, the statutory scheme mandates a division of functions between jury and sentencing judge which is inconsistent with s 80'; 279–280 (Gaudron J): 'It is not in issue in this case that the offence with which the applicants were charged is an indictable offence to which s 80 applies. It is, thus, unnecessary to consider those authorities which hold that it is for parliament to decide what offences are to be tried on indictment.' Her Honour at 282–283 held that 's 80 operates to deny to the parliament the power to create a single offence with a range of different maximum penalties varying according to the circumstances of its commission which, if disputed, are to be determined by a judge and not the jury'; 344 (Callinan J): 'It is impossible not to feel disquiet about a proposition that might leave it entirely for the legislature to define what is, and what is not to be an offence charged on indictment, and its elements.'

262 Above n168 at 190–191.

263 (1968) 121 CLR 283 at 294.

penalty of between 12 months and 10 years imprisonment to be tried either by jury or summarily with the consent of the prosecutor and defendant.[265] Commonwealth offences that are punishable by less than 12 months imprisonment would still only be tried summarily.[266]

- Importantly, it is submitted that this approach does not threaten the power of the Commonwealth to maintain an effective national regime of corporate regulation. As Gleeson CJ, Gummow and Hayne JJ noted in *Cheng*:

> In the area of commercial fraud (an area which would be of particular importance if the regulation of the conduct of those concerned with the management of corporations were to become a matter of Commonwealth law) the capacity to prosecute some serious offences summarily, at least with the agreement of the accused, can contribute, on occasion, to the more effective administration of justice.[267]

That concern has become manifest with the passage of the *Corporations Act* 2001 (Cth). The Commonwealth is now responsible for the formation of companies, corporate regulation and the regulation of the securities and futures industries throughout Australia.[268]

In addition, such an approach would not prevent the Parliament from making many complex corporate offences *only* triable summarily. Although the common law right to trial by jury for serious offences would be infringed, it may be that justice would be better served if these complex and costly mega-trials were heard by an expert judge or panel of judges, sitting alone.[269] Consequently, such

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264 The orthodox view of s80 has attracted and continues to attract strong judicial criticism — see *R v Federal Court of Bankruptcy; Ex parte Lowenstein*, above n164 at 581–583 (Dixon & Evatt JJ); *Kingswell*, above n9 at 285–296 (Brennan J), 296–322 (Deane J); *Re Colina*, above n2 at 405–428 (Kirby J); *Cheng*, above n1 at 306–334 (Kirby J).

265 *Crimes Act* 1914 (Cth) ss4H & J.

266 Subsection 4H.

267 Above n1 at 270.

268 The *Corporations Act* 2001 (Cth) and other associated federal legislation came into effect on 15 July 2001. This followed the passage of State and Territory legislation referring to the Commonwealth their powers with respect to corporations and their regulation pursuant to s51(xxxvii) of the Constitution. The *Corporations Act* 2001 (Cth) replaces the *Corporations Act* 1989 (Cth) and the Corporations Law of the ACT, and the corresponding legislation of the States and the Northern Territory, as the statutory basis for the formation of companies, corporate regulation and the regulation of the securities and futures industries in Australia. It is interesting to note that in *Brownlee*, above n4 at 328–332 Kirby J declined to follow *Brown v The Queen*, above n40, a majority decision of the Court that held that an accused cannot waive the requirements of s80. If an accused could waive the s80 guarantee (as urged by Kirby J) it would allow for the summary trial of complex corporate crimes. This would also meet the concern expressed by Gleeson CJ, Gummow & Hayne JJ in *Cheng*, above n1.

269 For further discussion on the management and prosecution of complex criminal cases see Justice Jeremy Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism — Part II' (1995) 4 *JJA* 193; Justice Geza Santow, 'Corporate Crime: Complex Criminal Trials — A Commentary' (1994) 5 *CICJ* 280; Michael Rozenes, 'The New Procedures for the Prosecution of Complex Fraud: Will they Work?' paper delivered at the 28th Australian Legal Convention, Hobart, September 1993.

measures could be considered reasonably and appropriately adapted to the legitimate object of providing a fair and effective system of corporate regulation without going beyond what is reasonably necessary to achieve that object. Appropriately, in such situations, the court would, within reason, defer to the judgment of Parliament; an approach consistent with orthodox principles of characterisation.[270]

4. Conclusion

There are strong arguments on both sides of the interpretation debate and no theory of interpretation can claim a methodology that provides definitive solutions to the majority of hard constitutional cases. The very nature of these cases involves varying degrees of judicial choice. However, I have argued that if non-originalism is applied in a manner faithful to the text and structure of the Constitution, it is an appropriate and legitimate way to resolve hard constitutional cases. Moreover, non-originalism is consistent with and enhances the efficacy of popular sovereignty and open and accountable government in Australia.

However, for non-originalism to take root as a legitimate theory of constitutional interpretation, its proponents must apply it rigorously and with restraint. It is submitted that the dissenting judgment of Kirby J in *Re Colina* failed in this respect. Consequently, it leaves non-originalism in Australia open to the most serious criticism levelled by modern originalists; that it is an invitation to 'massive and unprincipled judicial creativity'.

In any event, as the discussion in Part 3 of the paper has suggested, there may be an alternative method of rejuvenating the essence of the s80 guarantee without having to engage in judicial invention. Should the High Court employ the approach that I have outlined, the indirect rejuvenation of s80 would be achieved in a manner faithful to the text and structure of the Constitution without jeopardising the ability of the Commonwealth to administer a flexible and effective regime of criminal justice.

270 See *Nationwide*, above n92 at 28–29 where Mason CJ stated that 'it has long been accepted that it is for the Court to determine whether there is a reasonable connection between the law and the subject matter of the power and that this is very often largely a question of degree. In other words, the question of degree is not merely a matter for the Parliament; although the Court will give weight to the view of the Parliament, it is a matter for the Court in determining whether a reasonable connection exists.'