

COUNTERFACTUALS IN INTERPRETATION: THE CASE AGAINST INTENTIONALISM

REPORTS of the demise of intentionalism have been greatly exaggerated. In the 1960s, ED Hirsch Jr offered a classic defence of intentionalism for literary interpretation.¹ More recently, the legal theorists Larry Alexander, Jeffrey Goldsworthy and Andrei Marmor, among others, have again proposed intentionalism as a theory of statutory or constitutional interpretation.²

Intentionalism is the doctrine that the meaning or interpretation of texts is the author's intended meaning. It is a version of *originalism* about textual meaning, namely of the idea that the meaning of a text is the original meaning, the meaning at the time that the text was written.³ There are many varieties of intentionalism. Some analyse intentions as mental

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1 Hirsch, *Validity in Interpretation* (Yale University Press, New Haven 1967) and Hirsch, "Counterfactuals in Interpretation" in Levinson & Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* (Northwestern University Press, Evanston 1988) pp55-69.

2 Alexander, "All or Nothing at All? The Intentions of Authorities and the Authority of Intentions" in Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (Oxford University Press, Oxford 1995) pp357-404; Goldsworthy, "Implications in Language, Law and the Constitution" in Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, Sydney 1994) pp150-185; Goldsworthy, "Marmor on Meaning, Interpretation and Legislative Intention" (1995) 1 *Legal Theory* 439; Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1; Marmor, *Interpretation and Legal Theory* (Clarendon Press, Oxford 1992) Chapter 8. Note that Marmor concludes that intentionalism in statutory interpretation would be appropriate only if it is justified for judges to rely on the legislators' authority: p176ff. For him, intentionalism will be appropriate only in a very restricted set of circumstances.

3 Some writers use "intentionalism" interchangeably with "originalism". However, as I understand it, intentionalism is a *kind* of originalism. Originalism is the doctrine that the meaning of a text is its original meaning. Since there are basically two categories of meaning relevant to the interpretation of texts - speaker meaning and conventional meaning - there are correspondingly two versions of originalism: speaker meaning, which is determined by the "original" intentions of the speaker or author, and original conventional meaning, which is the conventional meaning of the words of the text at the time of writing. For discussions of originalism and intentionalism, see Bassham, *Original*

states of actual legislators or authors, while others rely on fictitious or ideal authors. Some are “strict” intentionalists, and others are “moderate” intentionalists.

My targets in this paper are intentionalists who rely, or need to rely in some instances, on counterfactuals in order to answer interpretive questions. One way of employing counterfactuals is to introduce the notion of counterfactual intention, an intention that authors *would have had* had they thought about it. Intentionalism would be a very limited doctrine indeed if answers to interpretive questions were available only by reference to the actual specific intentions of authors. In order to expand the scope of their theory, many intentionalists adopt the device of counterfactual intention. A second way of employing counterfactuals is to use a counterfactual *test* in order to justify the reliance on a certain kind of intention. Often cases of intentionalist interpretation are controversial because evidence about authors’ intentions is scant, or because authors have different intentions which conflict with each other in the circumstances of a particular case. Even if certain kinds of intentionalists do not have to rely on the device of counterfactual intention, they may require a counterfactual test as the only available neutral means of resolving controversies about evidence for or priority of different kinds of intention.

I argue that the use of counterfactuals leads to interpretive indeterminacies, and hence is unhelpful for intentionalists. Even though work in the semantics of counterfactuals elucidates how counterfactual statements can be true and false, this does not rule out the vagueness of some counterfactuals.⁴ The specific types of counterfactuals required to support intentionalism - those referring to authors’ or legislators’ mental states, and those attempting to transport historical authors into the present - are particularly problematic in this respect. For such counterfactuals, either there is no fact of the matter as to their truth or falsity, or, if there is a fact of the matter, it is inaccessible to us. The use of counterfactuals therefore does not strengthen intentionalism. Rather, as with vagueness in ordinary language, vagueness in the operation of counterfactuals suggests that interpretation must be “constructive”, in some sense.⁵ Of course, this is not to say that

Intent and the Constitution: A Philosophical Study (Rowman and Littlefield, Savage, Md 1992); Brest, “The Misconceived Quest for the Original Understanding” (1980) 60 *Boston UL Rev* 204; Mason, “The Interpretation of a Constitution in a Modern Liberal Democracy” in Sampford & Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, Sydney 1996) p13. Fred Schauer points out that originalism can be characterised as a doctrine about law as well as a doctrine about meaning in Schauer, “Defining Originalism” (1995) 19 *Harv JL & Publ Pol* 343. Here I understand it as a doctrine about meaning.

4 Lewis, *Counterfactuals* (Blackwell, Oxford 1973); Stalnaker, “A Theory of Conditionals” in *Studies in Logical Theory* (American Philosophical Quarterly Monograph Series, No 2, 1968) pp98-112.

5 In using the word “constructive”, I have in mind Ronald Dworkin’s theory of constructive interpretation, in which interpreters “[impose] purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong”: Dworkin, *Law’s Empire* (Belknap Press, Cambridge, Mass 1986) p52. I characterise Dworkin as endorsing, at least in his major work on interpretation, *Law’s Empire*, a kind of

judges who invoke framers' or legislators' intentions in adjudication are deluded. The use of intentions in particular cases could be justified as a component of a pragmatic, "eclectic" approach.⁶ But the failure of the resort to counterfactuals suggests that intentionalism should not be adopted as a general theory of legal interpretation, or as a method of interpretation having priority over others.

INTENTIONALISM AND COUNTERFACTUALS

Counterfactuals are contrary-to-fact conditionals of the following sort:

- (1) If the Labor party had won the 1996 election, Paul Keating would have been Prime Minister of Australia.
- (2) If Cheryl Kernot had not resigned her seat, she would be a Senator today.

"value-maximising" account of interpretation, namely an account in which laws, especially the United States Constitution, are to be interpreted so as to promote the political morality which is implicit in the history of the practice of which they are a part. The political morality implicit in the practice is the "purpose" of the practice referred to in the above quote. Other writers, such as Goldsworthy and Bassham, characterise Dworkin as a moderate intentionalist, that is, as claiming that the reason that interpreters are licensed to theorise about the content of abstract moral principles is that the framers *intended* to enact clauses referring to abstract concepts: Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 21-22 and Bassham, *Original Intent and the Constitution: A Philosophical Study* p72ff. This is an implausible interpretation of Dworkin's earlier work, even if Dworkin has recently seemed to adopt, in retrospect, moderate intentionalism. His earlier work contains critiques of intentionalism both explicitly - for instance, in "The Forum of Principle" in *A Matter of Principle* (Harvard University Press, Cambridge, Mass 1985) pp33-71 - and implicitly in his development of the theory of constructive interpretation in *Law's Empire*. If Dworkin is committed to intentionalism in those works, it is at most to a conception in which interpretation is determined by the structural intention (or purpose) implicit in a practice or work, that is, by an hypothetical intention of a postulated author. Dworkin's theory of interpretation as developed in those works does not commit him to the claim that interpretation is determined by actual intentions of actual authors. Moderate intentionalists on the other hand are committed to the claim that *actual* enactment or abstract intentions determine the interpretation of laws. Characterising Dworkin as a moderate intentionalist committed to the existence of actual abstract intentions considerably weakens his theory. Such a position relies on the historical fact that the framers intended to enact abstract moral principles. Yet, as Bassham points out, the empirical case that the framers had such intentions is weak: Bassham, *Original Intent and the Constitution: A Philosophical Study* p73.

6 Goldsworthy suggests that anti-intentionalists are implicitly claiming that judges who use intentions are deluded: Goldsworthy, "Implications in Language, Law and the Constitution" in Lindell (ed), *Future Directions in Australian Constitutional Law* p166. Bassham defends pragmatism in Chapter 6 of *Original Intent and the Constitution*.

In this section, I argue that there are four situations in which intentionalists either recognise or ought to recognise the need for counterfactuals in their theory of interpretation. First, strict intentionalists use counterfactual intentions in addition to actual intentions in order to expand the application of their theory to situations that were not envisaged by the author. Secondly, intentionalists exploit the notion of counterfactual intention to “accommodate” the original intended meaning to the present. Thirdly, in cases in which there are a number of conflicting intentions, intentionalists require a counterfactual test in order to decide which is the dominant intention. And fourthly, moderate intentionalists require a counterfactual test to decide in difficult cases what kind of intention the available evidence is evidence *of*. Let me elaborate each of these possible uses of counterfactuals in turn.

Strict Intentionalism

In general, strict intentionalists hold that the relevant intentions are the specific intentions of the authors. Paul Brest defines strict intentionalism as the requirement to “determine how the [framers] would have applied a provision to a given situation, and apply it accordingly”.⁷ Gregory Bassham notes that Brest is defining strict intentionalism using the framers’ “counterfactual scope beliefs” as well as their “actual scope beliefs”. Counterfactual scope beliefs are “beliefs about the specific legal implications or effects of (correctly interpreted) ... provisions that the framers would have held, if, contrary to fact, they had considered the question at issue”.⁸ Many strict intentionalists invoke counterfactual intentions.⁹

Consider two examples from the Australian Constitution, those of the race power (s51(xxvi)) and the external affairs power (s51(xxix)). Before the referendum of 1967, the race power enabled the Commonwealth to legislate with respect to:

the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws.

Since the phrase “people of any race” did not refer to Aboriginal peoples, we can suppose that the founders did not consider the issue of current concern in the interpretation of the power, namely whether the power authorises legislation which is detrimental to Aboriginal peoples.¹⁰ In order to answer the question of what the founders intended about the

7 Brest, “The Misconceived Quest for the Original Understanding” (1980) 60 *Boston UL Rev* 204 at 222.

8 Bassham, *Original Intent and the Constitution: A Philosophical Study* p29.

9 At p30.

10 The interpretation of the race power was considered by the High Court in *Kartinyeri v The Commonwealth* (The *Hindmarsh Island Bridge Case*) [1998] HCA 22. For a range of legal opinions about the interpretation of the race power, see for example Fajgenbaum & Moshinsky, *Submission to the Senate Legal and Constitutional Legislation Committee Re Native Title Amendment Bill 1997* (1997); Rose, *Submission to the Senate Legal and Constitutional Legislation Committee Re Native Title Amendment Bill 1997* (1997); and

application of the power to Aboriginal peoples, intentionalists must posit a counterfactual intention of the founders.

Similarly, counterfactual intentions must be posited about the application of the external affairs power in the circumstances of the *Tasmanian Dam* and *Koowarta* cases.¹¹ Let us assume that the founders did not consider the possibility of international treaties on the environment, or on racial discrimination, and hence that they had no beliefs about whether the meaning of the phrase “external affairs” included matters arising under such treaties.¹² In the absence of actual intentions as to the meaning of the external affairs power, and in order to decide whether the power refers to matters arising under international treaties on the environment or international treaties in general, intentionalists must ask the counterfactual question: if the founders had considered the example of international treaties on the environment or on racial discrimination, would they have intended the phrase “external affairs” to extend to any matter arising under such a treaty?

The counterfactuals in the examples above are counterfactuals about the legislators’, authors’ or founders’ *mental* states. They do not assume that the authors are transported into the present, but simply that, at the time that the authors were deliberating, they had different mental states from those that they in fact had. Such counterfactuals are to be contrasted with counterfactuals supposing that historical figures like the founders of the Constitution are operating in contemporary circumstances. These are discussed in the following section.

Accommodating Historical Texts to the Present

ED Hirsch Jr articulates a second possible role for counterfactuals in intentionalist interpretation. He argues that:

Interpreters sometimes need to imagine what a text from the past *would* mean if it were being reauthored in the present. If they could not conceive such a possibility, they could not conduct responsible interpretations of texts. By “responsible” interpretations I mean ones that remain true both to the spirit of older texts, and to the realities of the present time as well. ... The problematics of textual interpretation arise chiefly from this counterfactual yoking of historical moments that do not in reality coexist.

Williams, *Submission to the Senate Legal and Constitutional Legislation Committee Re Native Title Amendment Bill 1997* (1997).

11 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

12 Jeff Goldsworthy has pointed out to me that there is evidence that founders considered the possibility of treaties on the environment. See the majority’s discussion in *Victoria v Commonwealth* (1996) 138 ALR 129 at 141 (*ILO Case*). I am grateful to Jeff Goldsworthy for this reference.

The only way we can bridge these two historical moments is through counterfactual thinking.¹³

As a literary theorist, Hirsch is primarily concerned with literary examples. However he offers a general theory of interpretation which is in principle applicable to legal interpretation as well. A common justification for intentionalism, and the one adopted by Hirsch, is an *argument from communication*. Hirsch argues that the relation between interpreter and author can reflect one of two models: an exploitative model, or a communicative model. Interpretation guided solely by the interpreter's beliefs and expectations is exploitative of the author, and hence is morally inadequate. The exploitative model should be rejected in favour of the communicative model, which requires the "yoking together" of two historical worlds through the application of the "spirit" of a text to the present context.¹⁴ For Hirsch, two historical worlds can be joined by asking counterfactual questions such as: if Caesar were in command in Korea, would he use the atom bomb? Or: if Blake were writing the poem "London" in 1998, would he think that marriage is a mind-forged manacle?

Legal theorists who both defend the communication argument for intentionalism and invoke counterfactuals may wish to follow Hirsch's suggestion that counterfactuals allow communication between two historical worlds.¹⁵ For example, intentionalists interpreting the race power might ask whether, if the power had been rewritten after the 1967 referendum, the founders would have intended it to enable the Commonwealth to legislate for the detriment of Aboriginal people. Further, Hirsch's notion of yoking together historical worlds is a plausible way of capturing the *originalism* in intentionalism. Even moderate intentionalism, Goldsworthy points out, "is not in principle different from the approach of arch-originalists such as Robert Bork [and Justice Antonin Scalia]".¹⁶ The key element of originalism is that "old constitutional values must be projected on new physical realities".¹⁷ For example, Bork claims that "[i]t is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they

13 Hirsch, "Counterfactuals in Interpretation" in Levinson & Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* p55.

14 Larry Alexander defends a different version of an argument from communication for intentionalism. While Hirsch's is a moral argument, Alexander's is what I call an "object of interpretation argument". He claims that statutes are certain types of object: they are speech-acts, or, more precisely, acts of communication. It follows from the nature of acts of communication that their meaning is the speaker's or author's intended meaning: Alexander, "All or Nothing at All? The Intentions of Authorities and the Authority of Intentions" in Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* pp357-404 and Alexander, "Originalism, or Who is Fred?" (1995) 19 *Harv JL & Publ Pol* 321.

15 As above.

16 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 34.

17 As above.

knew, apply to the world we know".¹⁸ In order to preserve both the commitment to originalism and the commitment to intentionalism, one approach available to intentionalists is to join historical worlds through the device of counterfactual intention. (There may be other ways of doing this.¹⁹)

Conflicting Intentions and the Counterfactual Test

A third way in which counterfactuals are required is to determine which intentions are dominant in cases of conflicting intentions. The possibility of conflicting intentions is brought out by an example of Ronald Dworkin:

Imagine a congressman who votes for a statute declaring combinations in restraint of trade illegal, and whose psychological state has the following character. He believes that combinations that restrain trade should be prohibited, and this is, in general, why he votes for the bill. But he also believes that a forthcoming merger in the chemical industry does not restrain trade, and he expects that no court will decide that it does. What is his "legislative" intention with respect to this merger?²⁰

Dworkin's legislator has two intentions. They are an intention to prohibit combinations in restraint of trade, which is "relatively abstract", and an intention not to prohibit a chemical merger, which is "concrete".²¹ When the law is first passed, they do not conflict with each other because of the legislator's concrete beliefs about the application of the abstract concept. However, consider a situation in which it turns out that the merger does in fact restrain trade. The congressman has both an abstract intention to prohibit combinations in restraint of trade and a concrete intention not to prohibit the merger. Thus, in the

18 Bork, *The Tempting Of America: The Political Seduction of the Law* (Free Press, New York 1990) pp168-169.

19 For example, Hirsch's notion of originalism seems close to Laurence Lessig's theory of "translation". See Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 33-34 for a discussion of Lessig. An alternative way of yoking the past to the present would be to employ the distinction between connotation or "sense" and denotation or "reference" (at 31-32). However, more would have to be said by an originalist to make this convincing. The sense (connotation) of a word is often understood as the set of descriptions conventionally associated with a word by speakers. Moreover, sense *determines* reference, or denotation. Only those things satisfying the set of descriptions associated with a word are denoted by the word. So, if, in 1900, the set of descriptions associated with "external affairs" did not include the description "the issues covered by international treaties on human rights", neither the original connotation nor the original denotation would allow "external affairs" to refer to issues covered by international treaties on human rights. The connotation could not be used to yoke the original meaning to present circumstances, as on this understanding of "connotation" the original meaning does not apply to present circumstances.

20 Dworkin, *A Matter of Principle* p48.

21 The terms "abstract" and "concrete" are Dworkin's: pp48-49.

circumstances of the example, the two intentions which had been compatible at the time of the formulation of the law, come into conflict with each other.

One way of articulating the difference between strict and moderate intentionalism is in terms of Dworkin's distinction between concrete and abstract intentions. For strict intentionalists, the relevant intentions are the authors' specific intentions about the *application of the language of the text*, or their concrete intentions. For moderate intentionalists, they are intentions about the *meaning of the principles or provisions enacted* in the text, or their abstract intentions.²² The notion of abstract intention is close to the notion of an *enactment* intention articulated by Goldsworthy in his defence of moderate intentionalism. Enactment intentions are contrasted with *application* intentions, namely the authors' beliefs about the set of things to which the provision they have enacted applies. To explain the difference between application and enactment intentions, Goldsworthy uses the example of a provision in a United States law which prohibits entry into the United States of any person with a "psychopathic personality".²³ The legislators believed that homosexuality was a psychopathic condition, and hence while their *enactment* intention was to prohibit persons with a psychopathic personality, one of their *application* intentions was to prohibit homosexuals. Since contemporary medical opinion does not consider homosexuality to be psychopathic, there is a conflict between the legislators' enactment and application intentions when applying the provision to homosexuals wishing to enter the United States in 1998.

Constitutional examples of the difference between abstract and concrete intentions, and enactment and application intentions, appear in both the Australian and United States Constitutions. In *Koowarta*, Mason J said that:

Doubtless the framers of the Constitution did not foresee accurately the extent of the expansion in international and regional co-operation which has occurred since 1900. Extradition and the repatriation of fugitive offenders and customs and tariff agreements probably represented the type of treaties which were then thought to call for domestic legislation by way of implementation. It is that expansion, rather than any change in the meaning of "external affairs" as a concept, that promises to give the Commonwealth an entree into new legislative fields.²⁴

22 I have paraphrased Bassham's way of articulating the distinction between strict and moderate intentionalism. Bassham says that "while strict intentionalists look to the framers' beliefs regarding the *reference* or *extension* of constitutional language, moderate intentionalists look, instead, to the intended *meaning* or *sense* of that language": Bassham, *Original Intent and the Constitution: A Philosophical Study* p51. See n19 above for a discussion of the difference between sense and reference.

23 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 30.

24 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 228. I do not mean to imply that Mason J is endorsing intentionalism in this passage.

The founders had the intention to enact a provision enabling legislation on external affairs. They also had a series of concrete application intentions about the areas to which the concept of “external affairs” applies. For example, if Mason J is right, we can suppose that they believed it applied to international agreements on extradition and the repatriation of fugitive offenders, and customs and tariff, but not to agreements on racial discrimination or the environment. While in 1900 there was no conflict between abstract and concrete intentions, in the circumstances of the *Tasmanian Dam*²⁵ and the *Koowarta*²⁶ cases conflicts arose.

A paradigm example of an abstract intention is an intention to enact a moral principle, for instance, the intention to enact the equal protection clause of the United States Constitution. When this clause was enacted, the framers believed that racial segregation was consistent with the protection of equality articulated in the clause. In other words, they believed that “separate but equal” was a permissible interpretation of the concept of equality.²⁷ Goldsworthy suggests that the 1952 decision of the United States Supreme Court of *Brown v Board of Education*,²⁸ in which it was determined that “separate but equal” was unconstitutional was “not necessarily wrong just because it was inconsistent with the application intentions of those who adopted the [equal protection] clause”.²⁹ Thus, for Goldsworthy, in the circumstances of the *Brown* case, there was a conflict between the enactment intention that equality and due process be upheld in the Constitution and the specific belief that racial segregation was compatible with equality.

When conflicts between intentions occur, intentionalists must decide which intention takes priority. There are a number of ways of doing this. One alternative is to decide on empirical grounds. For example, suppose there is an *interpretive* intention of legislators that, in cases of conflict, abstract intentions always take priority; or suppose that prioritising enactment intentions produces a better fit with the history of interpretations in some area of law.³⁰ A second alternative is to decide the priority of intentions *normatively*, namely by arguing that preferring a certain kind of intention better enhances some desirable end. Both the empirical and the normative routes, however, are likely to be controversial. There is in most cases little or no evidence of higher-order intentions such as interpretive intentions, the evidence supporting a particular explanation of the history of

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

26 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

27 In *Plessy v Ferguson* 163 US 537 (1896), the Supreme Court held that “separate but equal” was a permissible interpretation of the equal protection clause of the Fourteenth Amendment.

28 397 US 483 (1954).

29 Goldsworthy, “Originalism in Constitutional Interpretation” (1997) 25 *Fed L Rev* 1 at 31.

30 This is Goldsworthy’s conclusion: as above at 19. He suggests that moderate intentionalism is the theory which best fits the history of Australian constitutional law because the best explanation of the decisions of the High Court is to take the judges as endorsing moderate intentionalism. He also claims that moderate intentionalism is normatively justified.

judicial interpretations may be conflicting or weak, and the normative reasons for a particular position may be limited.³¹ So it is preferable for intentionalists to offer a neutral test. A counterfactual test is the only available neutral test on offer. In order to answer the question of which intention is dominant for the legislators or founders, we ask the appropriate counterfactual question: had the Congressman believed that the chemical merger was in restraint of trade, would he have voted for the amendment? Would the founders have enacted the external affairs power had they known that “external affairs” applied to matters arising under international agreements on human rights or the environment? Would the founders have enacted the equal protection clause had they know that it rendered racial segregation unconstitutional? If the answer is “yes”, the abstract intention takes priority; if the answer is “no”, the concrete intention takes priority.

Moderate Intentionalism and a Counterfactual Test

Suppose that an intentionalist decides on empirical or normative grounds that enactment intentions take priority. For example, suppose that a moderate intentionalist endorses enactment intentions because they promote the separation of powers.³² Goldsworthy acknowledges an epistemological difficulty facing moderate intentionalism, namely, whether the available evidence is evidence of an enactment intention or of an application intention only.³³ He says that “well-known application intentions can also serve as enactment intentions, when they clarify the meaning of an utterance. They can clarify ambiguities, or make it obvious that a word or phrase has been used in a non-literal, special or somewhat loose sense”.³⁴ Consider Goldsworthy’s example of the provision prohibiting entry into the United States of persons with a psychopathic personality. We know that the legislators thought that homosexuals had psychopathic personalities and hence that they wanted homosexuals excluded. Does this evidence count as evidence of an enactment intention or of an application intention only?

I argue in this section that the only *prima facie* neutral test for deciding whether *evidence* of intentions should count as evidence of an enactment intention is a counterfactual test. If I am right, the counterfactual test may be necessary to solve the epistemological problem described by Goldsworthy. Consider the counterfactual question in the psychopathic personality case: if medical experts had told the legislators that homosexuality was not pathological, would they have changed the clause to add them in? The answer is “no”, as the legislators would not have wanted homosexuals to be excluded under that clause had they known that homosexuality was not a psychopathic personality. Hence the

31 Marmor’s normative argument for intentionalism provides an excellent example of how normative arguments may have restricted application: Marmor, *Interpretation and Legal Theory* p176ff.

32 Goldsworthy, personal correspondence.

33 Goldsworthy, “Originalism in Constitutional Interpretation” (1997) 25 *Fed L Rev* 1 at 31.

34 At 45-46.

counterfactual test shows that the evidence that they wanted homosexuals excluded is evidence of an application intention only and not of an enactment intention.

In order to explore the question further, let us examine Goldsworthy's discussion of whether the Australian Constitution guarantees the "one vote, one value principle" and hence requires women to vote.³⁵ One question is whether the clause "directly chosen by the people" in ss7 and 24 of the Constitution includes women. Goldsworthy argues that the founders had an enactment intention and not merely an application intention that the word "people" exclude women. He claims that:

To treat the founders' understanding ... as a mere "application intention", which should now be ignored because it amounted to a misunderstanding of the meaning of the words they enacted in ss 7 and 24 ..., is to attribute to them an elementary mistake which would have been obvious at the time. Even in 1900, women were regarded as people. The founders did not stupidly overlook this fact when they adopted the words of ss 7 and 24; rather, they used those words in a loose and non-literal, but idiomatic, sense. The same would be true if those words were re-enacted today: they would not be understood literally, as guaranteeing the right of children to vote, even though children are people. ... but in the light of current democratic principles and electoral arrangements, just as they were understood in 1900.³⁶

In other words, the evidence that the founders intended to exclude women from the scope of "people" was evidence of their beliefs about the meaning of the word "people", not merely evidence of their beliefs about how the word "people" applies. This conclusion contrasts with Goldsworthy's discussion of the *Brown* case. He claims that it is at least possible that the founders' intention to permit racial segregation is a mere application intention, and hence is compatible with the decision in *Brown* that segregation is unconstitutional.

A counterfactual test is required to distinguish the two kinds of cases. Would the founders of the Australian Constitution have enacted the provision "directly chosen by the people" had they thought "people" referred to women? Since the answer is "no", we can assume that the meaning of "people" that they intended to enact was indeed the special "loose and non-literal meaning" described by Goldsworthy.³⁷ That is to say, the evidence available to

35 At 2ff and at 39-47. Goldsworthy discusses this issue through an analysis of judgments in *McGinty v Western Australia* (1996) 186 CLR 140.

36 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 46.

37 I would argue that the founders intended a technical, not a loose, meaning of "people". Goldsworthy's own discussion suggests that they intended to use "people" to refer to politically recognised people or citizens, in the same way that John Stuart Mill and Abraham Lincoln used the word: as above.

us is evidence of an enactment intention as well as of an application intention. However, if Goldsworthy is right in claiming that *Brown* was correctly decided, the counterfactual question about that case must be answered in the affirmative. Would the framers have enacted the equal protection clause had they realised that segregation was incompatible with equality? Since the framers were concerned to entrench the moral principles of equality and due process, one can argue that the answer was “yes”. Thus, the evidence available to us that the framers intended to permit segregation is evidence of an application intention only, and not of an enactment intention.

The preceding discussion has shown that intentionalism does and should employ counterfactuals in four kinds of cases. Strict intentionalism is usually expanded to include counterfactual intention; counterfactual intentions are posited to transport original intentions into contemporary circumstances; a counterfactual test has the advantage over other tests in adjudicating the priority of intentions; and, finally, in order to solve an epistemological problem for which there would otherwise be no solution, moderate intentionalism must invoke the counterfactual test.

ARE THERE DETERMINATE ANSWERS TO COUNTERFACTUAL QUESTIONS?

Hirsch argues that using counterfactuals will achieve “validity” in interpretation. That is, it will achieve the desirable result that answers to interpretive questions are determinately true or false.³⁸ If he is right, intentionalists will be able to answer questions of interpretation using counterfactuals about authors’ intention. On the other hand, if there is no fact of the matter about the truth of counterfactual questions about authors’ intention, or no fact of the matter which is accessible to us,³⁹ then intentionalists will be unable to employ counterfactuals to answer the interpretive questions outlined in the previous section. They will have to move to eclecticism (pragmatism), constructive interpretation, or some other interpretive doctrine.

Whether counterfactuals are determinately true or false depends on the success of work in the semantics of counterfactuals elaborating the truth-conditions of counterfactuals.⁴⁰ In general, this work seeks to vindicate our intuitions that some counterfactuals, at least, are capable of being true or false. Suppose that, contrary to fact, I dropped a pen I was holding

38 Hirsch, “Counterfactuals in Interpretation” in Levinson & Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* p63.

39 On some accounts of counterfactuals, “no fact of the matter” and “no fact of the matter which is accessible to us” will amount to the same thing. I make the distinction having in mind David Lewis’ conception of the semantics of counterfactuals. The foundations of his theory are realism about possible worlds (modal realism) and realism about the similarity structure in which possible worlds are embedded: Lewis, *Counterfactuals* Chapter 4. I thank Richard Holton for clarification on this point.

40 Lewis, *Counterfactuals*; Stalnaker, “A Theory of Conditionals” in *Studies in Logical Theory* (American Philosophical Quarterly Monograph Series, No 2, 1968) pp98-112.

while writing a letter. Intuitively, it is true that "If I had dropped the pen, it would have fallen to the ground". Philosophers have explained how such a statement could be true using the device of "possible worlds". Imagining that I dropped the pen requires imagining a tiny revision in the physical events occurring today. We need imagine no (or negligible) change in background conditions and no change in the laws of nature governing events in the world. This kind of imagining is the imagining of "another possible world". In this case, in order to ask whether the counterfactual is true, I imagine another possible world in which (nearly) everything is as it is in this world, except that I dropped the pen, and it fell to the ground. The truth-value of the counterfactual depends on the state of affairs in a possible world which is almost exactly similar to ours in all relevant respects except for the contrary to fact event and the direct consequences of that event. Since in the possible world in which I drop the pen, it falls to the ground, the counterfactual is true.

On the analysis of counterfactuals suggested by David Lewis, the key idea is the idea of "comparative overall similarity" of possible worlds. A counterfactual is true if, at the closest world (or set of worlds) in respect of comparative overall similarity to ours in which the antecedent of the conditional is true, the consequent of the conditional is also true. This suggests that, in order for a counterfactual to be determinate, there must be a unique world (or set of worlds) which is closest to the actual. As Lewis acknowledges, the relation of comparative overall similarity is vague. This does not imply that no counterfactuals have determinate truth values, but only that counterfactuals are vague along with similarity. Lewis writes:

[T]he limited vagueness of similarity accounts nicely for the limited vagueness of counterfactuals. It accounts for the fact that some sensitive counterfactuals are so vague as to be unsuitable for use in serious discourse; that others have definite truth values only when context serves to narrow their range of vagueness; and that many more have quite definite truth values (in worlds of the sort we think we inhabit), insensitive to small shifts in our standards of comparative similarity.⁴¹

Many counterfactuals, for instance, counterfactuals of the sort "If I dropped the pen, it would fall to the ground", are insensitive in Lewis' sense. However, I will argue that the kinds of counterfactuals required by intentionalists are of an intermediate sort. They will be rendered determinate only when considered relative to a context, either because there is no fact of the matter (no unique closest world to ours in which the antecedent and the consequent are true), or for the epistemological reason that the fact of the matter is inaccessible to us. Moreover, I will consider counterfactuals about the authors' mental states, counterfactuals transporting historical figures into the present and, finally, counterfactual tests.

41 Lewis, *Counterfactuals* p94.

Mental State Contexts

Strict intentionalists use counterfactuals of a certain sort, namely those whose antecedents posit that the authors had mental states which they in fact did not have. The minimal revisions required in order to imagine worlds in which the antecedents are true are revisions in the beliefs of the authors. Consider again the example from the Australian Constitution of the race power. In enacting the power, the founders believed that the clause “people of any race” did not apply to Aboriginal peoples. After the 1967 referendum, however, the power was amended to delete the words “other than the Aboriginal race in any State”. It now enables the Commonwealth to make laws with respect to:

the people of any race for whom it is deemed necessary to make special laws.

The interpretive question which has recently been considered by the High Court is the question of whether the power enables legislation which is *detrimental* to Aboriginal people, in addition to enabling legislation which is beneficial.⁴² It is reasonable to assume that in 1900 the founders intended to enable Parliament to legislate both for the detriment and for the benefit of people of particular races.⁴³ However they themselves intended to exempt the Aboriginal people from the scope of the clause. The counterfactual question is: if the founders had included Aboriginal people in the scope of the race power, would they have intended that the power be exercised for the detriment of Aboriginal people as well as for their benefit?

I claim that the answer to the question is indeterminate both for epistemological reasons and for reasons suggesting that in fact there is no determinate answer to the counterfactual question. Imagine a possible world which is as close to Australia in 1900 as it can be, in which the founders believed Aboriginal people were within the scope of the power. We cannot posit a change in this belief in isolation. To accommodate this belief, we have to posit changes in connected beliefs. For example, the belief that the purpose of the power was to regulate people of “alien” races, as opposed to members of the “general community” could be assumed to be held in this possible world because it is inconsistent with the belief that the power extends to Aboriginal people.⁴⁴ The required rejigging causes a profound epistemological problem as we have to imagine that the founders’

42 See n10 above. Note that for an intentionalist, the words of the power are at most *evidence* of the framers’ intentions. Thus, although the “plain meaning” of the words “for whom” is arguably “in relation to whom” rather than “for the benefit of whom”, an intentionalist can treat the words as *prima facie* evidence which is capable of being overruled by other evidence of intention.

43 Coper, “The People and the Judges: Constitutional Referendums and Judicial Interpretation” in Lindell (ed), *Future Directions in Australian Constitutional Law* p83.

44 Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, Sydney 1901) p622.

beliefs were very different from what they in fact were, and, as Dworkin points out, “this [has] the effect of sharply reducing the amount of historical evidence that can be relevant to answering the counterfactual”.⁴⁵

The problem is more than epistemological, however. The counterfactual will be genuinely indeterminate if there are at least two possible worlds which are equally similar to our world, in which the antecedents of the counterfactual are true, yet in which the consequents are, respectively, true and false. To imagine these two worlds, imagine two different mental state contexts which I will call the *limited concern* context and the *unconcerned* context. In the former, as in the actual world, they believe that Aboriginal people are a special group among races in Australia because they are a race in danger of dying out. The founders’ belief that Aboriginal people are a “dying race”, combined with their limited concern about this fact, has a different consequence from the consequence it has in the actual world. In the actual world, they believe that since Aboriginal people are a “dying race” their regulation can safely be left to the States.⁴⁶ In our limited concern world, they intend Aboriginal people to have special status with respect to the race power. They intend the power to be used to supplement State legislation for the *protection* of what they perceive as a “dying race”,⁴⁷ and hence not for the detriment of Aboriginal people. (This is a limited concern world only because their concern does not extend to outlawing discrimination.) Therefore, relative to this world, the counterfactual, “If the founders had intended Aboriginal people to be within the scope of the power, they would have intended to power to be used only for the benefit of Aboriginal people”, is true.

Now consider the *unconcerned* context. As in the actual world, they believe that Aboriginal people are a “dying race” and that the protection and regulation of Aboriginal people, such as it is, can safely be left to the States. Unlike in the actual world, however, they have no particular concern for Aboriginal people, and consider that they should be treated, at the Commonwealth level, on a par with all other races. They do not think that regulation of Aboriginal people should be the *exclusive* province of the States, and hence they do not exempt Aboriginal people from the scope of the power. Relative to this world, the counterfactual is false, because in this world, while they intend the power to include Aboriginal people, they do not intend Aboriginal people to have any special protection.

In the *limited concern* context, the founders’ belief that the Aboriginal people are a “dying race” has certain consequences, namely that they want the race power to be used only for the protection of the Aboriginal people. In the *unconcerned* context, the belief does not have these consequences precisely because the founders are unconcerned. The two worlds are equally similar to the actual world - or at the very least indistinguishable - although they are similar and different along different dimensions. For instance, in both the former world and the actual world the founders believe that Aboriginal people are “special”

45 Dworkin, *A Matter of Principle* p51.

46 Hanks, *Constitutional Law in Australia* (Butterworths, Sydney 1991) pp372-373.

47 At p373.

among the races. In the latter world, although the founders do not believe that they are “special”, they do believe, as in the actual world, that the regulation of Aboriginal people should be left to the States. If these suggestions are plausible, it follows that there is no determinate answer to the question of which world is closest to Australia in 1900, and hence no determinate truth-value of the counterfactual.

Historical Contexts

It has been suggested that detrimental legislation is unconstitutional as a result of the 1967 referendum. For example, in the *Koowarta* case, Murphy J said that the words “for whom” now mean “for the benefit of whom”.⁴⁸ One way for intentionalists to justify this conclusion is by arguing that the relevant intentions are those of the people of Australia in 1967, rather than those of the founders in 1900.⁴⁹ This is a plausible intentionalist, though not originalist, argument as it is based on identifiable actual intentions of the Australian people. It is not the kind of originalist intentionalism that we are discussing, that is, one whose aim is to preserve and project the founders’ values onto the present.

What would the founders have intended had they reauthored the Constitution after the 1967 referendum? Would the power have been intended to enable laws detrimental to Aboriginal people? This question is parallel to Hirsch’s question about the accommodation of the meaning of literary works to the present. For Hirsch, the interpretive principle of accommodation “requires a transposition of the writer’s intention from one world to another [and o]ne way of testing whether an interpretation is valid accommodation of the past to the present is to ask: ‘would [the writer] intend that sort of meaning in the present world?’”.⁵⁰ Using the example of Blake’s poem “London”, Hirsch argues that although Blake believed that marriage was a dispensable “mind-forged manacle”, this was not part of the trans-historical meaning - or spirit - of the poem. The spirit is rather that:

There *are* mind-forged manacles and there *are* enslaving institutions, which depress and debase people ... [A]ngry irony directed against avoidable human evils is a sentiment that transcends the circumstances of any particular historical era.⁵¹

Assuming that, in our epoch, marriage is not an enslaving institution, Blake would not have intended that marriage, as we know it, is a mind-forged manacle. Hence, Hirsch is claiming that the counterfactual, “If Blake had reauthored the poem in the present, he would not have intended that marriage is a mind-forged manacle”, is true.

48 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 242.

49 Williams & Braden, “The Perils of Inclusion: The Constitution and the Race Power” (1997) 19 *Adel LR* 95.

50 Hirsch, “Counterfactuals in Interpretation” in Levinson & Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* p62.

51 As above.

In order to evaluate Hirsch-style arguments, I will consider counterfactuals transporting historical figures into the present. Consider the counterfactuals:

- (1) If Caesar were in command in Korea, he would use the atom bomb.
- (2) If Caesar were in command in Korea, he would use catapults.

In a discussion of such counterfactuals, Lewis makes explicit that they have truth-values only relative to context.⁵² He says that one context might “resolv[e] the vagueness of comparative similarity in such a way that some worlds with a modernised Caesar in command come out closer to our world than any with an unmodernised Caesar. ...and [another] context [might resolve] the vagueness in the opposite direction”.⁵³ In other words, in one context the first counterfactual might be true, while the second might be false; in another, the second might be true and the first false; while in a third, both might be false.⁵⁴

Now consider our counterfactual questions about the race power. Suppose first a context in which the closest worlds contain modernised framers. Such framers hold the dominant beliefs of the time of the 1967 referendum, namely that the object of removing the references to Aborigines in the Constitution was to “remove words from our Constitution that many people think are discriminatory against the Aboriginal people” and that the “Commonwealth’s object will be to co-operate with the States to ensure that together we act in the best interests of the Aboriginal people of Australia”.⁵⁵ They intend that the race power be used only for the benefit of Aboriginal people (and other races) and hence the counterfactual “If the framers had rewritten the power after the 1967 referendum, they would have intended the power to enable only beneficial legislation” is true. Now suppose a context in which the closest world contains unmodernised framers. The framers in that world would have beliefs closely corresponding to those voting “no” in the referendum. Even if they believe that the exception should be dropped from the race power, they see nothing wrong in the Constitution permitting discrimination against Aboriginal people, and they do not intend to rule out that possibility. So the counterfactual in that context is false. It follows that the counterfactuals identified by Hirsch as important in historical interpretation are indeterminate, and that the attempt to achieve validity of interpretation through using these counterfactuals fails.

52 Lewis, *Counterfactuals* pp66-67.

53 At p67.

54 As above.

55 “Constitutional Alteration (Aboriginals) 1967: Argument in Favour of the Proposed Law: The Case for YES”, reprinted in Williams & Bradsen, “The Perils of Inclusion: The Constitution and the Race Power” (1997) 19 *Adel LR* 95 at 123-125. The referendum passed by a massive majority of 5 183 113 to 527 007: at 126.

The Counterfactual Test

I have argued that a counterfactual test should be adopted as the only available *prima facie* neutral test for resolving two questions: the question of the priority of intentions in cases of conflicting intentions, and the question of whether evidence of an intention counts as evidence of an enactment intention. It turns out that, for the same reasons as those developed above, a counterfactual test will encounter both epistemological difficulties and difficulties concerning the existence of a truth-value of the counterfactual. Consider again the external affairs power of the Australian Constitution. In enacting the power, the founders had both abstract (or enactment) intentions and concrete (or application) intentions. They intended to enable legislation in the area of external affairs and they believed that “external affairs” applied to treaties on extradition and the repatriation of fugitive offenders and customs and tariff. They either had no intentions about treaties relating to many contemporary areas of concern, or they had explicit intentions not to enable legislation in these areas. One indication that they may have had explicit intentions *not* to enable legislation on human rights is given by a description of their deliberations over a proposal to include an equivalent of the equal protection clause of the United States Constitution in the Australian Constitution. The founders concluded that it would “invalidate existing colonial legislation which discriminated against Asian and coloured labourers ... and the proposal lost”.⁵⁶ It is likely then that they intended that the external affairs power *not* permit legislation implementing anti-discrimination laws. In the circumstances of the *Koowarta* case, this application intention conflicts with the intention to permit legislation in the area of external affairs since external affairs now covers all international treaties including those on human rights.

Let us suppose that the founders had an application intention that “external affairs” did not extend to matters in international human rights treaties. Was this a mere application intention or is this intention evidence of an enactment intention as well? The counterfactual test should answer this question: if the framers had considered international treaties on human rights to fall under “external affairs”, would they have intended to enable legislation in the area of external affairs? If the answer is “yes”, the evidence of their intention is evidence of an application intention only, and if so, the decision in *Koowarta* is correct.

I will argue that there is an equivocation between two understandings of enactment intention. In order to yield determinacy, the counterfactual must be relativised to one of the two understandings. Recall Goldsworthy’s discussion of “directly chosen by the people”. He is right to argue that the founders intended to use the word “people” in a special sense. As he points out, “[t]hroughout the English-speaking world, elections by men only, and often men of property, had characteristically been described as elections ‘by

⁵⁶ O’Neill & Handley, *Retreat From Injustice: Human Rights in Australian Law* (Federation Press, Sydney 1994) p69.

the people”⁵⁷. In using the word “people”, the founders spoke in a moral or political sense, and not in a biological or metaphysical sense. Suppose then that their enactment intention was to enact a provision that the Commonwealth parliament should be directly chosen by the [political] people. Goldsworthy implicitly argues that they intended to enact a *conception* of political personhood that the founders in fact held themselves and thus women are excluded from the denotation of “people”.⁵⁸ Now consider Goldsworthy’s discussion of the *Brown* case. It is at least possible, he claims, that the case was correctly decided because the framers’ enactment intention was to enact a provision protecting equality, and the abstract moral principle of equality is incompatible with segregation.

There is an equivocation in Goldsworthy’s remarks between a *conception* context and a *concept* context. In the “duty to vote” case, he employs a conception context, while in the *Brown* case, he suggests the possibility of employing a concept context. The difference is between what the founders think a term means, and what a term means. For example, our best theory of the *concept* of political personhood, of what “political personhood” means, says that it includes women and unpropertied men (though not children). However, the founders’ *conception* of political personhood excludes women and unpropertied men. Similarly, our best theory of equality, of what “equality” means, says that it is incompatible with segregation. The framers’ conception of equality is not however incompatible with segregation. The conception context preserves the spirit of originalism in a way in which the concept context does not. As a moderate originalist, Goldsworthy argues that the meaning of “people” corresponds to the founders’ *conception* of people. An originalist interpreting the equal protection clause of the United States Constitution should draw the same conclusion, namely that what “equality” means in the clause corresponds to the framers’ conception of equality.

It is extremely important to distinguish both the intention to enact a concept and the intention to enact a conception from application intentions. Suppose for example that the founders believed that the conception of political personhood they were enacting excluded prisoners convicted of minor offences, and suppose they were wrong about this. Neither their intention to enact the concept of political personhood, nor their intention to enact their own conception of political personhood would exclude such prisoners from the requirement to vote, though their application intentions would exclude such prisoners. Thus, the distinction between concepts and conceptions reflects a distinction between different types of enactment intention. It is not another version of the enactment-application intention distinction.

The concept and conception contexts will yield differences in the answer to our counterfactual question. We are assuming that the founders believed that racial discrimination laws did not fall under “external affairs”. Is this evidence of an enactment

57 Goldsworthy, “Originalism in Constitutional Interpretation” (1997) 25 *Fed L Rev* 1 at 46.

58 For a development of the concept-conception distinction, see Dworkin, *Law’s Empire* p90ff.

intention or only of an application intention? The counterfactual question is: would the founders of the Australian Constitution have enacted the provision containing the words “external affairs” had they thought “external affairs” referred to international treaties on human rights? Relative to the conception context, the answer would probably be “no”. However, relative to the concept context, the answer would be “yes”. The same applies for the “duty to vote” case. Goldsworthy argues that the evidence that the founders intended to exclude women is evidence of an enactment intention, not merely of an application intention. The counterfactual question is: would they have used the provision “directly chosen by the people” had they realised that the term “[political] people” included women? If we assume that they intended to enact their conception of political personhood, the answer is “no”. On this basis we can conclude that the evidence available is evidence of an enactment intention - the intention to enact the conception of political personhood - as well as an application intention. On the other hand, if we assume the concept context, the answer is “yes”. The evidence is evidence of a mere application intention if we assume that they intended to enact a provision including the concept of political personhood.⁵⁹

CONCLUSION

Intentionalists often need to employ counterfactuals. Counterfactual intentions are required in circumstances in which there is no appropriate actual intention and when intentionalists wish to accomplish the originalist goal of “yoking together” different historical worlds. A counterfactual test offers a *prima facie* neutral test for ranking intentions in cases of conflict and when evidence of intentions is equivocal. Intentionalists have suggested that work in the semantics of counterfactuals shows that counterfactuals can have truth-values, and hence that intentionalist interpretation relying on counterfactuals can be *valid* in Hirsch’s sense. In response, I have proposed that the counterfactuals required to be used in intentionalist interpretation are sensitive to context, and hence are vague or indeterminate. If I am right, we cannot have recourse to intentionalism to solve interpretive problems when counterfactuals are required. We must look to some other theory of interpretation.

59 The point against moderate intentionalism can be made by bypassing the counterfactual test altogether. The claim that the application intention is also an enactment intention is subject to the charge of begging the question. It is only if you assume that the framers had a certain kind of enactment intention, that you can show that the evidence available is evidence of that intention, and hence that they had that intention.