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"EXPANSION OR CONTRACTION?": A COMMENT

THE "consolidation" which Mr Lindell's paper so ably describes still leaves some gaps in the edifice of the new constitutional law. These comments mention two areas in which the recent cases raise, but, it is submitted, do not properly resolve, fundamental issues.

MCGINTY: DIRECT CHOICE BY THE PEOPLE

One of the main obstacles to success for the plaintiffs in *McGinty v Western Australia*[1] was the fact that equality of voting power was not regarded as an essential element of representative government by the colonial political elites from which the framers were drawn.[2] Mr Lindell recounts how they chose to approach it by arguing that equality of voting power has become a requirement of representative government since 1901.

Another approach, which would also have avoided "rewriting history", might have been to argue that the framers' subjective intentions simply are not reflected in the words of the document they created. On this argument, direct choice of legislators by "the people", especially when read with the provisions for responsible government, implies a measure of equality.[3] Contrary to recent trends, this argument would leave out of account remarks of the framers which form historical evidence of their intentions.

These alternative approaches raise basic and difficult questions about constitutional interpretation. They bring to the fore controversies about the role of original intention in the Constitution. These issues are thrown into stark relief by the contradiction which Mr

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1 (1996) 186 CLR 140.

2 Eg at 185 per Dawson J, 240-243 per McHugh J, 260-261, 284-285 per Gummow J. For present purposes I leave to one side the difficulty of translating requirements of representative democracy into State constitutions.

3 If it followed that early Commonwealth parliaments, or State parliaments, had been chosen on the basis of electoral laws later shown to be invalid, the consequences are not necessarily cataclysmic. *Victoria v Commonwealth and Connor* (1975) 134 CLR 81 at 120 per Barwick CJ, 157 per Gibbs J, 178 per Stephen J shows the potential for overcoming deficiencies in the formation of a parliament. If the reasoning in that case were not applicable, the Court could in extremis adopt the broad "de facto doctrine" embraced by the Supreme Court of Canada in *Re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th) 1 at 27-28 (the Court) and *Bilodeau v Attorney-General of Manitoba* (1986) 27 DLR (4th) 39 at 43 per Dickson CJC (Beetz, Estey, McIntyre, Lamer and Le Dain JJ agreeing). See also Lindell, "Judicial Review and the Composition of the House of Representatives" (1974) 6 *Fed L Rev* 84 at 104-105.

Lindell identifies between acceptance that universal suffrage has become a constitutional requirement since 1901[4] and denial that equality of voting power has achieved the same status.[5]

I have elsewhere expressed views critical of the use of material extracted from the Convention Debates in deciding the meaning of constitutional provisions.[6] In the same article I suggested, as does Dr Pether,[7] that like any other text the Constitution has only the meanings its readers give it.[8]

In his recent article Associate Professor Goldsworthy mounts a very strong argument for what he terms a "moderate originalist" position.[9] If language (including texts) is seen as communication, it seems to follow that any act of reading a text is an act of being communicated with by someone. At this conceptual level I tend to agree with Goldsworthy that the "speaker" whose "meaning" is at issue in constitutional interpretation must be the founders.[10] To choose any other candidate is fraught with difficulty. If the "speaker" were a disembodied voice of the people, expressing intentions in some ambulatory way, there would not be any reference point for the attribution of meanings to the text, other than the subjective impressions of the judges.[11]

It is at a less profound level that I see some hope for resolving these apparently contradictory positions. It remains the case that the meaning of the Constitution is the meaning that the High Court sees in it. To say that the words of the Constitution are the words of the founders is merely to propose a methodological constraint on the Court's search for authoritative meaning. The questions which matter in practice are what kinds of

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4 *McGinty v Western Australia* (1996) 186 CLR 140 at 166-167 per Brennan CJ, 201 per Toohey J, 221-222 per Gaudron J, 287 per Gummow J. See also *Langer v Commonwealth* (1996) 186 CLR 302 at 342 per McHugh J.

5 (1996) 186 CLR 140 per Brennan CJ, Dawson, McHugh and Gummow JJ, Toohey and Gaudron JJ dissenting.

6 Kennett, "Constitutional Interpretation in the *Corporations* Case" (1990) 19 *Fed L Rev* 223 at 239-241. In that article I conceded legitimacy to some uses of historical material which, in the light of Schoff, "The High Court and History: It Still Hasn't Found(ed) What It's Looking For" (1994) 5 *PLR* 253 at 261, 268, I am now inclined to think was mistaken.

7 Pether, "Pursuing the Unspeakable: Toward a Critical Theory of Power, Ethics, and the Interpreting Subject in Australian Constitutional Law" (1998) 20 *Adel LR* 17.

8 Kennett, "Constitutional Interpretation in the *Corporations* Case" (1990) 19 *Fed L Rev* 223 at 241.

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

10 In referring to the "founders" here I intend to encompass both the "framers" and other groups responsible for bringing the Constitution into effect (the colonial parliaments, the electors of the various colonies and the Imperial Parliament) and to avoid for the moment the task of defining who is "speaking" to us through the Constitution with any greater precision.

11 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 37–38.

intentions should be accepted as relevant and what tools are legitimate for ascertaining them.

Even though statutory interpretation is commonly understood as a search for legislative intention, the courts have for good reasons regarded legislators as generally bound by what they put in an Act: extrinsic materials are referred to only to confirm facial meanings or resolve ambiguities, and even then cannot displace the statutory text itself.[12] "Speaker's meaning" is ascertained in a stylised, almost notional way. The arguments for excluding the remarks of individual framers are at least as strong in relation to the Constitution, given the patchy quality of the Convention Debates and the roles played by groups other than the framers in bringing the Constitution into effect. Thus, if the Constitution is properly regarded as embodying the intentions of the founders, it by no means follows that the Convention Debates should be mined for information as to what the Constitution means.

Next, it is necessary to distinguish between what Goldsworthy terms "application" and "enactment" intentions.[13] The former, the framers' intentions or understandings as to how the provisions they were adopting would apply in particular situations, have no constitutional status, while the latter may be relevant to understanding the meaning of constitutional provisions.

These considerations explain why the "dead hand" of the founders should be understood as lying but lightly on the Constitution (and the hands of individual framers not at all). However, they do not provide a rationale for reading the constitutional provisions entrenching representative government as requiring in 1996 a greater degree of representativeness than was required in 1901. Nor, as Goldsworthy demonstrates,[14] do the concepts of purposive interpretation or of connotation and denotation provide a rationale for concluding that that which was allowed in 1901 is now prohibited.

The judgments which suggest changes in the requirements of ss7 and 24 seem to assume that social change always leads to higher, better forms of democracy.[15] However, examples abound to confirm that our liberal notions of democracy are not universally shared and will not necessarily prevail forever. What happens if mainstream Australian values change to a point where parliament, with a popular mandate, proposes that women (or men for that matter) should no longer be allowed to vote? If the answer is that ss7 and 24 continue to adapt to contemporary understandings of representative government, and thus no longer preclude such a change, then the guarantees they embody do not count

12 Eg *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 confirms that, even where recourse to extrinsic materials is expressly allowed, the intention expressed in a Second Reading Speech cannot override the meaning which the statutory language bears when read in the light of normal presumptions of interpretation.

13 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 30-31.

14 At 40-44.

15 Eg (1996) 186 CLR 140 at 221 per Gaudron J.

for much. If the answer is that ss7 and 24 henceforth entrench late twentieth century values, and thus preclude "regressive" change, the question arises why those values are more worthy of entrenchment than those of some other era.

A constitution is, in a sense, a means by which a generation attempts to set out those of its values which it thinks should endure and to impose those values on later generations.[16] A constitution is, in that sense, an inherently conservative document. The conclusion may be inescapable that the core values entrenched in the Australian Constitution are those of a late nineteenth century colonial elite, until modern Australians can be persuaded to support change.

LANGE: COMMON LAW RIGHTS

Possibly the most difficult aspect of the decision in *Theophanous v Herald & Weekly Times Ltd*[17] to reconcile with traditional understandings of the Constitution was the conclusion that the Constitution was capable of projecting itself into the common law so as to create a new defence to a private action by one citizen against another. The approach of the joint judgment in *Lange v Australian Broadcasting Corporation*[18] is different in terms of method, but reaches a similar end-point. Mr Lindell thus describes it as "notionally" different from the approach in *Theophanous*.

It is not difficult to understand how statutory defamation law, Commonwealth or State, is beyond the relevant legislative power if it impedes political communication in a way that is not appropriate and adapted to a non-infringing purpose. Nor is it difficult to understand how the Constitution may displace common law doctrines which formerly governed aspects of the relationship between the Crown and its subjects, such as Crown immunity from suit.[19] However, the means by which the Constitution gives rise to a general precept which becomes part of the law of the land, governing rights between individuals, does require some explanation.

In *Lange* the Court moves straight from the premise that the common law "must conform with the Constitution" (which is unarguable), to the conclusion that the common law's protection of personal reputation "must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution".[20] What is not explained is how the Constitution, which *prima facie* defines only governmental powers, gets into the same sphere as common law actions in defamation.

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16 Scalia, "Originalism: The Lesser Evil" (1989) 57 *Cincinatti LR* 849 at 869, quoted in Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 43.

17 (1994) 182 CLR 104.

18 (1997) 189 CLR 520.

19 Cf *Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1135-1138 per Gummow and Kirby JJ.

20 (1997) 189 CLR 520 at 566.

If the Court's view of the implied freedom prevents a statutory defamation regime operating according to its terms, the conclusion that the common law also must change is understandable. It would be incongruous if a statutory regime were to fall foul of a constitutional requirement while common law rules to substantially the same effect remained untouched.

However, it is not clear how this conclusion accords with what Mr Lindell describes as "continued homage" to the view that the Constitution does not incorporate a Bill of Rights. The Court goes out of its way to say that the implied freedom only operates in a negative way, as a constraint on power.[21] Yet, if the Constitution impliedly requires the common law to be developed so as to accord with principles of free political communication, why does that stop at defences? Why should not the Constitution require conduct which prevents a person communicating her views on a political issue to be made actionable at common law on that basis?

The explanation for the Court's view might possibly lie in the notion that the Constitution binds the courts as well as the other arms of government.[22] It arguably follows that, in deciding matters arising under the common law, the courts are bound by requirements implicit in ss7 and 24 just as are the legislature and the executive. However, this argument does not explain why the courts are bound to develop defences but not to develop causes of action.

Furthermore, such an argument is only tenable if the courts are understood as exercising a power to decide what the law is to be, even in cases where the common law is not consciously "developed". It is not necessary to hold to any declaratory theory of law in order to entertain doubt that the courts exercise a law-making power that is directly comparable to the powers of other arms of government. The courts are bound to find and apply existing common law rules, unless they have been modified by statute or there is a strong ground to conclude that a rule no longer accords with deep-seated community values.[23] The Constitution shows on its face no intention to interfere with that process of application and development, other than the creation of a new legislative power. It contains no equivalent to the United States' Fourteenth Amendment, and the Court in *Lange* therefore rightly declined to adopt the reasoning in the US decisions.[24] However, no other explanation is given for the conclusion that the Constitution requires the common law of defamation to take a particular shape.

This issue of the relationship between the Constitution and private common law rights is perhaps unlikely to arise outside the context of defamation law, where *Lange* has

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21 At 560.
22 Covering clause 5.
23 Eg *Dietrich v R* (1992) 177 CLR 292 at 318-320 per Brennan J.
24 (1997) 189 CLR 520 at 563.

apparently settled it. However, to me at least, it remains an unanswered question at the heart of the new constitutional law.