Constitutional Commitments not Original Intentions: Interpretation in the Freedom of Speech Cases

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1. *Introduction*

The Constitution embodies political decisions made by Australians over ninety years ago. Therefore, a decision by the courts to invalidate actions of the current government on the grounds that they are inconsistent with the Constitution appears to entail that a political decision made ninety years ago and embodied in the Constitution is to be preferred over one made much more recently. There is no obvious justification for giving this preference to decisions made in the past by people who have long since died. Even if there were such a justification, it is often not clear what the Constitution means; that is it is not clear exactly what the decision was which was taken ninety years ago and which is to be given preference over a relatively clear decision taken far more recently.

In spite of these difficulties, most people, including lawyers and judges, believe that we are bound by the political decisions embodied in the Constitution in the sense that they limit the power of our parliaments, and hence our power, at least by ordinary political means, to adopt policies which are inconsistent with the Constitution. This common belief raises difficult philosophical questions about why the Constitution binds us and about how, if we are bound, we discover the content of the Constitution and of the limitations which it imposes on us. These two questions are closely related in that our answer to the one has implications for our answer to the other.

One popular answer to these questions is that given by a theory which I shall call intentionalism. Intentionalism argues that the Constitution is binding on us because it is fundamental law imposed by a superior law-giver such as the United Kingdom parliament or resulting from a social contract embodying the popular will. According to theories of this type, it is the duty of the courts in interpreting the Constitution, in cases where the words are not clear, to attempt to discover the intentions of the superior law maker and to give effect to those intentions.

The two recent cases in which the High Court found an implied guarantee of freedom of political discourse in the Constitution, *Nationwide News v Wills*[1]

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1 (1992) 66 ALJR 658.

and *Australian Capital Television v Commonwealth*[2] justified that guarantee by interpreting the Constitution as a commitment to certain fundamental political values, such as representative democracy and federalism. In this article, I shall argue that this approach is inconsistent with intentionalism because it may require the Court to reject the clear intentions of the founders.[3]

The High Court's adoption of ideas which are inconsistent with intentionalism is important because the supporters of intentionalism claim that it provides the only objective method of determining the meaning of the Constitution so that to reject intentionalism is to give the judges unlimited power to make policy under the guise of constitutional interpretation. If the intentionalists are right, the High Court has, in the freedom of speech cases, made a grab for policy-making power. As the High Court is an unrepresentative body and is not responsible to the electorate and as that grab for power can only be at the expense of elected parliaments, the cases may indicate that the High Court is becoming a threat to parliamentary democracy in Australia.

This article examines the claim that intentionalism provides the only objective basis for determining the meaning of the Constitution and argues that that claim cannot be accepted. It then examines the theory of why the Constitution is binding on us which lies behind intentionalism and concludes that intentionalism is based on an unacceptable theory of the nature of the Constitution and of law in general. Finally, it suggests an alternative understanding of the Constitution which offers a more powerful explanation of why it binds than does intentionalism and which offers a justification for the High Court's approach to interpretation in the freedom of speech cases. However, first it is necessary to examine intentionalism's continuing claim to be the only objective basis for constitutional interpretation and to consider why the High Court's approach to interpretation in the freedom of political discourse cases is inconsistent with that theory.

2. *Intentionalism and the Freedom of Political Discourse Cases*

Intentionalism is the claim that if the meaning of the words of the Constitution is not clear, the courts are bound to give those words that meaning which the founders intended them to have. Intentionalism claims to be able provide an objective basis for judicial review which can be used to distinguish judicial review of the Constitution from policy making and which can be used to fetter the discretion of the courts.

The basic claim of intentionalism is that it alone can provide objectivity in constitutional interpretation. Constitutional interpretation, like the interpretation of any document, is an attempt to discover what it means. We can look at a document and determine what that document means to us. How can we know that the interpretation which appeals to us is correct or is based on anything more than our own prejudices? What tests or criteria can we use to answer that question?

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2 (1992) 66 ALJR 695.
3 See Part 2 below.

According to the intentionalist, if a document is reasonably open to more than one interpretation, there can be no textual basis for preferring one available interpretation to another. Therefore, the only way to avoid interpretations based on our own personal preferences and to resolve disputes about the interpretation of a document is to accept someone's opinion as authoritative with respect to its meaning. The intentionalist argues that, normally, the only authoritative interpretation available is that of the drafters of the document. As they drafted the document, they must have known what it was intended to mean. If we accept their actual historical intentions, we have a solid factual foundation for our interpretation. If we do not accept their interpretation, we are left with no basis for an objective interpretation.

However, there is another option in the interpretation of legal documents. Courts are able to give authoritative interpretations by virtue of their position of power in the legal system. Therefore, we could allow Courts a discretion to interpret documents according to their preferences and to use their authority to impose their preferred interpretations on the community. The intentionalists reject this option because of the great policy making power which it confers on the judges.[4] Instead, they argue that the proper role of the judges in a democracy is to interpret the law, including the Constitution. As the only other interpretation with claims to be authoritative is that of the framers, the intentionalist argues that the proper role of the courts is to discover and implement the intentions of the framers.

To support this argument, the intentionalist points out that the justification of constitutional review of legislation and government action is more dependent on the possibility of objective interpretation than are the justifications of other functions of the courts. The Constitution is the basic source of the powers of the institutions of government, including the powers of the courts. Therefore, the Constitution is the most likely source of the courts' power of judicial review. The more objective the basis of the courts' interpretation of the Constitution, the easier it will be for the courts to show that they have been granted the power of judicial review by the Constitution. On the other hand, if it can be shown that constitutional interpretation is largely dependent upon the values of the interpreter, it will be easier to argue that judicial review is a policy of the courts adopted to increase their power rather than a requirement of the Constitution. The courts do not face this difficulty in justifying their actions in other areas of the law in which they are required to interpret texts because, in most other areas, the texts which they are called upon to interpret are not the source of their authority. For example, when the courts interpret contracts or legislation, they derive their authority to interpret these texts from the general law or from the Constitution, not from the texts themselves.

If constitutional review of the government is merely a device adopted by the courts to increase their own power, its existence is inconsistent with some of the most basic values which the courts are under an obligation to uphold, such as the rule of law. The rule of law draws a distinction between government according to law, in which the legal rules are known in advance and bind the

4 This power is not completely unfettered because problems only arise in those cases in which the document is reasonably open to more than one interpretation. However, it still gives judges considerable power, especially in constitutional law, because of the broad terms in which constitutions are usually drafted.

government, and the rule of men, in which officials have the power to decide each case as they see fit without being bound by rules laid down in advance. This distinction collapses in constitutional law if there is no objective basis for interpreting constitutional rules, which are usually expressed in the most general terms and which, as noted above, are the source of the courts' own power. If judges have no objective basis for constitutional interpretation they will be free to remake the Constitution and redefine their powers in the light of their own values. Arbitrary decision making will replace the rule of law. That arbitrariness will be doubly odious in that the men making those decisions are appointed for life and are not democratically elected or politically responsible. Better to abandon judicial review for unrestricted popular democracy where at least the persons making the arbitrary decisions are democratically elected and removable.

Often, in their search for an objective basis for interpretation which they can use as the foundation for a justification for constitutional review, the courts have turned to intentionalism. The close connection between the possibility of objective interpretation, intentionalism and the justification of judicial review can be seen in the classic justification for judicial review offered in Marbury v Madison.[5] In that case, Marshall CJ argued that the Constitution represents the principles by which the people have chosen to be governed and is the highest expression of the popular will. In the Constitution, the people have set down the limits which they imposed on the powers of government and have given those limits the status of law. Therefore, the role of the court is to enforce those limits. To the extent that it implements the decisions and policy choices of the people rather than its own policy choices the court is the ally of the people and the defender of democracy.

This argument collapses if there is no objective basis for constitutional interpretation. The courts can only enforce the policy choices of the people which are embodied in the Constitution if they can determine what those choices are. To do that, they need a technique of interpretation which enables them to discover the intentions of the people, especially in those cases in which the words of the Constitution do not make those intentions clear. Therefore, the argument in *Marbury v Madison* entails an intentionalist theory of interpretation able to provide objectively correct answers to constitutional issues.

In adopting an approach to interpretation which was inconsistent with intentionalism in the freedom of political speech cases, the High Court did not intend to reject a long tradition of constitutional interpretation. Nor did it argue that intentionalism was misconceived. Instead, as courts usually do, it adopted those arguments which seemed most cogent in the case at hand. In the freedom of political speech cases, the Court implied a guarantee of freedom of political speech from those provisions of the Constitution which establish representative government in Australia. The majority argued that the Constitution embodied representative democracy and that as representative democracy required that the people be free to discuss politics and have access to the information necessary to enable them to exercise an informed vote, the Constitution's incorporation of representative democracy contained by implication a guarantee of freedom of political speech.[6]

5 5 US 137 (1803).

6 *Nationwide News v Wills*, above n1 at 668–72 and 680–81 per Brennan J and per Deane

It was not the fact that the guarantee was implied rather than express which was inconsistent with intentionalism. Intentionalism does not rule out implications as long as they are inherent in the Constitution. Nor does it require that implications be limited to those which are unarguably part of the Constitution. However, it provides a test for determining whether controversial implications are part of the Constitution; a controversial implication can only be part of the Constitution if the founders intended that it be part of the Constitution or, if the founders did not have a clear intention one way or the other, it is consistent with the founders' general intentions.

The implied guarantee fails that test. It cannot be doubted that the founders accepted that freedom of speech was necessary for the proper working of representative democracy. However, they believed that the parliamentary system provided better protection for basic rights than did allowing the judiciary to enforce them. As Mason CJ pointed out, the founders did not embody guarantees of individual rights in the Constitution because they believed that "the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy".[7] However, in his opinion, the views of the founders on the need for judicially enforceable guarantees of free speech were not conclusive:

> In the light of this well recognised background, (the framers' belief that the political process provided the best guarantee of basic rights) it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.
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> However, the existence of that sentiment when the Constitution was adopted and the influence which it had on the framing of the Constitution are no answer to the case which the plaintiffs now present. Their case is that a guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provision which the Constitution makes for a system of representative government. The plaintiffs say that, because such a freedom is an essential concomitant of representative government, it is necessarily implied in the prescription of that system.[8]

This argument does not claim that the intentions of the framers are irrelevant in interpreting the Constitution. Where those intentions are reflected in the content of the Constitution, the Court is in general bound by them. For example, the Court is not entitled to imply a comprehensive Bill of Rights into the Constitution because the founders deliberately did not include such a bill,

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and Toohey JJ respectively and *Australian Capital Television v Commonwealth*, above n2 at 703–5, 733–6 and 742–4 per Mason CJ and Gaudron and McHugh JJ respectively.

7 Above n2 at 702. See also Dawson J at 722. There is little doubt that this view is historically more accurate than that advanced in *Leeth v Commonwealth* (1992) 66 ALJR 529 at 541 by Deane and Toohey JJ that the founders saw no need to adopt an express bill of rights because judicially enforceable basic rights were necessarily implicit in the Constitution; see for example the discussion of the need for a guarantee of due process in the Official Record of the Debates of the Australasian Federal Convention, Melbourne 8 February 1898, esp 688–90.

8 Above n2 at 702.

but left basic rights to be protected by political processes. However, where the founders' intentions conflict with a necessary implication, the implication prevails even if the founders would not have recognised the necessity of that implication. Therefore, although the founders did not intend to provide a guarantee of free speech, one had to be implied by the Court because it was essential to the proper working of the representative democracy which the Constitution establishes.

It is clear that Mason CJ considers that the Court is justified in rejecting the intentions of the framers whenever an implication is 'necessary'. From the context of the case, an implication will be 'necessary' whenever there is a compelling argument in favour of it. As the Constitution contains the ground rules for the operation of the Australian political system, that argument will necessarily be political. Therefore, Mason CJ's argument is that the Court is justified in rejecting the intentions of the founders with respect to implications and presumably with respect to the interpretation of particular provisions when, in the opinion of the Court, there are compelling reasons for the view that the founders made an error of political judgment with respect to the way in which the Australian political system works or ought to work.

Intentionalists would not accept this argument for rejecting the intentions of the framers on the grounds that it is merely a claim that the Court has the power to reject the political judgments of the framers for its own opinions whenever it believes that the framers were wrong. Intentionalists would claim that this would replace the objective basis of constitutional law with the subjective policy choices of the particular judges. To evaluate this claim, it is necessary to examine the intentionalist thesis that intentionalism provides the only objective basis for constitutional adjudication.

3. *Intentionalism and Objectivity*

Intentionalism's claim to objectivity is based on a distinction between fact, which it sees as objective because it is demonstrably true, and value, which it sees as undemonstrable and hence inherently subjective. Because of the subjective nature of values, intentionalists argue that judges should avoid making value judgments when interpreting the Constitution. Instead, they should keep to the facts. The constitutional text is one set of facts. Where its words are clear, that is the end of the matter and judges have no reason to depart from those words even if they do not like the results. However, often the words are not clear. As argued above, intentionalists are committed to the view that when two or more interpretations are reasonably open, the matter cannot be resolved by reference to textual considerations but only by accepting the opinion of one interpreter as authoritative. In those cases, intentionalism argues that the judge should accept the intentions of the framers as authoritative. Along with their other advantages, decisions based on these intentions may be objective because they are based on facts; facts about the intentions of the framers with respect to the provision in question. Once judges take into account matters other than these facts, they have no standards to guide them other than their own subjective preferences.

Intentionalism's critics claim that it is incapable of providing the objective basis for interpretation which is the basis of its popularity. Criticisms of original intention as an objective basis for interpretation fall into three categories; the philosophical, the pragmatic and the institutional.

A. *Philosophical Criticisms*

The basis of intentionalism's claim to objectivity is the claim that original intention is discoverable as a matter of historical fact. Philosophical criticism is sceptical with respect to the possibility of discovering historical facts. According to this criticism, historical facts, apart from the discoveries of archaeology, are not discoverable. In particular, facts about the motives and intentions of historical actors cannot be discovered. All we can do is offer interpretations of their intentions from the available evidence. We are handicapped in this attempt by the fact that we cannot understand their actions as they understood them but can only look at them from the point of view of our own culture. If this argument is accepted, the enterprise of searching for the original intention as a matter of fact is doomed to failure. I do not wish to pursue this objection. For the rest of the paper, I will assume that it is in principle possible to discover the intentions of historical actors if we have sufficient evidence.

B. *Pragmatic Criticisms*

The second argument rejects intentionalism as an objective guide to constitutional interpretation on the grounds that, whether or not there is a theoretical justification for appealing to original intention, in practice it gives little assistance in most cases. First, it points out that even if we have evidence as to the intention of the founders, that evidence is often conflicting; for example the founders may have been divided as to the meaning of a particular provision. Secondly, the evidence may provide no help because it may be clear that the founders did not consider the problem in question. Thirdly, difficult problems arise if an interpretation which is inconsistent with the intentions of the founders has been adopted and acted upon so that the original intention is now irretrievable. Robert Bork[9] gives the example of the decision of the American founders not to allow the government to issue paper money. That intention was rejected and the government and community have acted upon that rejection for so long that it is now impossible to return to the original intention. It is not clear what the judge who is seeking the original intention of the Constitution should do in these cases.

In all of these cases the original intention gives no guidance. The critics claim that they are so numerous that they fatally weaken the usefulness of original intention as an objective basis for interpretation.

C. *Institutional Criticism*

One major source of difficulty with intentionalism is the relationship it assumes between the Constitution and precedent in that it requires an attitude to precedent which in no way reflects the realities of the courts' operations, in particular the weight they give to precedent. The intentionalist claim that the meaning of the Constitution ought to be determined by reference to historical facts about the intentions of the framers is counter-intuitive in that it would turn lawyers into historians and destroy the authority of precedent. This is not in itself a reason for rejecting the theory. However, a theory which bases its

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9 Bork, R H, *The Tempting of America: The Political Seduction of the Law*, (1990) at 168–9.

appeal in part on a claim that it is consistent with traditional views about the rule of law and the role of the courts in a democracy but which requires radical changes in the way the courts operate ought to be viewed with some suspicion.

The basic premises of intentionalism force it to reject the authority of precedent. I have argued that intentionalism is based on the assumption that the only way to resolve disputes about the meaning of a document is to accept some one interpreter as having authority to determine the text's meaning. There are two possible choices for authoritative interpreter of the Constitution, the framers and the courts. Intentionalists argue that the framers, not the courts, ought to be accepted as the authoritative interpreters. Having rejected the courts as authoritative interpreters, intentionalists are committed to rejecting the authority of precedent, because a court's interpretation can only be an authoritative precedent if that interpretation is accepted as authoritative and binding.

Besides, the fact that intentionalism bases constitutional interpretation on the actual intentions of the founders entails that it cannot accept decisions of the courts as binding precedents. An earlier decision of the court can only be an opinion about that intention. As that intention is a matter of fact, the earlier opinion cannot be law which binds a later court because a later court must be free to consider the evidence as to the founders' intentions for itself. Taken seriously, this leads to the conclusion that constitutional law consists solely of the Constitution as understood by the framers. Such a theory leaves no room for the basis of the doctrine of precedent which is the idea that an interpretation can be authoritative in the sense that it determines the law for the future. Interpretations cannot be authoritative if the meaning of the Constitution is determinable, at least in principle, as a matter of fact. In one sense, facts are open to interpretation, but those interpretations cannot be authoritative because they must be reviewed as more information becomes available. If all the facts are known, there is no room for interpretation. Another person's opinion as to those facts cannot be evidence as to what those facts are, so that an interpretation of the facts cannot be accepted as authoritative regardless of who the interpreter was.

Therefore, intentionalism is inconsistent with the doctrine that precedents can be authoritative in that they determine the law. This does not represent the current practice of the courts which place great weight on precedents not as a mere opinion of what the Constitution means but as being part of the law.[10]

For judicial decisions to be authoritative in the sense of determining the law for the future, the meaning of the Constitution cannot be a matter of fact which is in principle discoverable. If the meaning of the Constitution were not a matter of fact, the idea of an authoritative interpretation would make sense because such an interpretation would not be refutable by evidence in the way that an interpretation of facts is. As a result, we are likely to be faced with competing interpretations with no set procedure for deciding between them. In

10 Precedents may have greater status in intentionalism if there are gaps in the Constitution which cannot be filled by looking to the clear meaning of the words or to the intention of the parties. In these cases, precedents may actually gain the status of law on the basis that they are an authoritative determination of the law in the gap; a type of delegated legislation. However, even in these cases, the authority of precedent is liable to be undermined by a later claim to have discovered an expanded historical intention which covers the case. Such a claim destroys the basis for treating the precedent as authoritative.

such a situation, it makes sense to allow an institution to make authoritative interpretations of the Constitution for reasons of clarity and consistency, and it makes sense to adhere to those interpretations unless there is good reason for abandoning them.

If the meaning of the Constitution is not seen as a matter of fact, there is no great distinction between the constitutional document and the cases which interpret it. To the intentionalist who believes that the meaning of the Constitution is discoverable as a matter of fact, the Constitution is sacred and has a completely different status to the cases which are mere opinions as to what it means. Once the meaning of the Constitution is seen as a matter of interpretation, this distinction breaks down because the cases can now be seen as authoritative interpretations adding to the meaning of the constitutional text. This makes it possible to understand why the court treats them with so much respect.

Therefore, the normal practice of the courts with respect to precedent seem to be based on a theory of interpretation other than intentionalism. This is not in itself a reason for rejecting intentionalism because the practice of the courts may be based on a mistake. However, it does require us to examine the claims of intentionalism with great care.

4. *Can Intentionalism be Defended Against these Criticisms?*

Intentionalists have considered the pragmatic criticisms at length. Intentionalism may be defended against the first pragmatic criticism, the criticism that the founders' intentions often will not provide an objective basis for interpretation because the founders did not always agree on the meaning of a section, by arguing that intentionalism is not concerned with the actual intentions of the founders. It may be argued that those intentions, like the actual intentions of a person who signs a contract, are irrelevant to the law. In both cases, what counts is the way the document would have been understood at the time by other persons; that is, the intentions of the parties to a document are what reasonable persons would have understood them to have intended at the time the document was signed rather than what they actually intended.

Canons of interpretation which were commonly accepted at the time the document was drafted may be a guide in determining how the document would have been understood at that time. For example, if at the time the Constitution was adopted, it was accepted that the words were to be taken as conclusive evidence of the intention of the founders to the exclusion of evidence as to their actual intentions, then an intentionalist would have good reason to be a literalist in the style of the *Engineers Case*.[11] The intentionalist would be able to claim that these canons provide an objective basis for interpretation regardless of the differing intentions of the founders.

This defence, although it may make it easier to discover what is to count as the intentions of the founders, changes the basis of intentionalism. Once the focus changes from the actual intentions of the parties to the way in which a reasonable person at the time would have understood those intentions, the basis

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11 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129.

of intentionalism ceases to be facts about the actual intentions of the founders and becomes a search for the most plausible interpretation of the document at the time it was adopted.

That we are no longer looking for facts can be shown by the fact that no particular person's interpretation can count as the reasonable interpretation. That interpretation is derived by applying canons of interpretation to the available evidence. According to some theories of interpretation, such as literalism, that evidence does not include any evidence as to the intentions or beliefs of the founders as to the meaning of the section but limits the evidence to the actual words of the section. Other theories of interpretation are more liberal, and take into account the views and statements of people at the time. They do this not because they are seeking the actual intentions of the draftsmen but because views expressed at the time, especially by those involved in the drafting, would have affected the interpretation which a reasonable person would adopt.

However, the recognition that intentionalism requires interpretation rather than the discovery of historical facts does not necessarily entail a loss of objectivity. Consider the case of the law of contract, where to attain greater objectivity, the courts adopt the standpoint of the reasonable person rather than of the party who made the promise in order to determine the meaning of the promise. Greater objectivity may be obtained in this way in the interpretation of the Constitution as well as in the interpretation of contracts as long as we have clear canons of interpretation because applying those canons may lead to greater certainty than discovering the conflicting viewpoints of the founders.

Besides, if there is a reasonable case for arguing that the canons of interpretation we have adopted were those which the founders expected to be applied, the intentionalist can still claim to be true to the intentions of the founders. The founders, particularly those who were lawyers, may have intended that the Constitution be interpreted according to the prevailing canons of interpretation even if that led to their own views as to the meaning of particular sections being rejected. Therefore, as long as canons of interpretation are clear and are those which the founders and others at the time expected to be applied, we can abandon the search for the actual intention of the founders for the way in which those intentions would have been understood by reasonable observers with a gain in objectivity and certainty and without any loss of fidelity to the historical text.

Although this change does not necessarily entail a loss of objectivity it does weaken the philosophical foundations of intentionalism. Intentionalism is based on the claim that if there are two or more reasonable interpretations of a document, there is no textual basis for asserting that one is better than the other so that the only objective way to determine disputes with respect to the document's meaning is to accept the interpretation of the framers as authoritative. If intentionalism is forced to abandon basing interpretation on the actual intentions of the framers, it abandons that philosophical basis. At the same time, if it claims that interpretation can be based on how a reasonable person would have understood the Constitution at the time it was adopted and if the reasonable person's interpretation is to be discovered by applying canons of interpretation to the Constitution rather than by seeking the actual understanding of any historical person, it is conceding that it is possible, with the aid of appropriate canons of interpretation, to determine which is the best of

competing reasonable interpretations. That concession makes it more likely that intentionalism is not the only approach to interpretation which is capable of generating objective answers.

Despite these problems, intentionalism can retain a degree of objectivity and historical fidelity to the text by adopting the interpretation which the reasonable person would have assumed to be that intended by the founders rather than that which the founders actually intended. However, it can only do so if there were, at the time the Constitution was adopted, accepted canons of interpretation which the reasonable person would have been expected to use in its interpretation and if those canons of interpretation are known to us. If the founders disagreed as to the appropriate canons to be used and if there were no generally accepted canons which the reasonable person would have been expected to use, appealing to that interpretation which would have been adopted by the reasonable person will not help the intentionalist because there will be no acceptable method for determining what that interpretation would have been. It is not possible to resolve the dilemma by agreeing now as to the canons of interpretation to be used. All that would produce is an agreed approach to interpreting the document now. There would be no historical basis for claiming that the interpretations which such an approach would generate are those which a reasonable person would have accepted at the time the document was drafted.

The second pragmatic objection, the objection that knowledge of the founders' intentions may be of no help because the founders may not have considered the issue, also presents difficult problems for the intentionalist. The second pragmatic objection covers four different situations:

i. technological changes leading to problems which the founders could not have contemplated;

ii. situations which the founders did not consider;

iii. the problem of applying old values to changing social and legal circumstances;

iv. perceived inconsistency between the values which the founders adopted and their interpretation of those values.

The first of these problems is the easiest for the intentionalist to deal with. It is usually possible to draw an analogy between new technology and technology existing at the time the Constitution was drafted. Once the analogy has been drawn, it can be assumed that the founders would have intended the Constitution to apply to the new technology in the same way as it applies to the analogous old technology. In these cases, argument can be limited to the aptness of proposed analogies.[12]

The second type of case, situations which the founders did not consider, poses more difficult problems. Many modern constitutions, including the Australian

12 The leading cases of this type in Australia are *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 and *Jones v Commonwealth [No 2]* (1965) 112 CLR 206, where the High Court decided that radio and television, which had not been invented when the Constitution was drafted, are sufficiently similar to postal, telegraphic and telephonic services to fall under pl 51(v) of the Constitution.

Constitution, balance representative democracy against other values by limiting the range of political decisions which can be taken by democratic institutions. The intentionalist justification for judicial review limits the role of the courts to that of enforcing the limits which the founders imposed on political decision-making. Prima facie, if we find that the Constitution is silent on a particular issue, that may seem to suggest that the founders have left that issue to be determined by political choice. However, evidence which we have as to their intentions may show that they did not make a deliberate decision to leave that matter to be decided politically; they may simply have failed to consider it.

There is a clear distinction between deciding to leave a matter to be determined politically and not considering the matter at all. It would be a crude form of intentionalism which left all matters not considered by the founders to be determined by political choice because logically it is equally open to exclude all matters which the founders did not make the subject of political choice from the realm of political choice.

The question cannot be determined by a simple catch-all approach such as a rule that all matters not placed outside political control by the founders may be dealt with by the political process or the reverse, that all matters not placed within political control are outside that control because such rules embody sweeping political judgments rather than a reasonable view of the founders' intentions.[13] Therefore, the only approach to this problem consistent with intentionalism is an approach familiar to contract lawyers; consider what the founders would have decided if they had considered the matter. Given the general terms in which Constitutions are written, that usually involves an attempt to determine the values which the founders embodied in the Constitution and to work out the decision which is most consistent with those values. In other words, we construct an intention by extrapolating from the values which are inherent in the Constitution and impute that intention to the founders on the basis that they were consistent, rational political theorists.

Bork adopts this approach to cases which were not considered by the founders and to the problem of applying constitutional values to circumstances which were not foreseen by the framers. He gives the example of laws of libel in the context of the American First Amendment, which guarantees freedom of speech. He quotes from one of his own decisions with respect to libel in which he said:

> We know very little of the precise intentions of the framers .... But we do know that they gave into the judges' keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of these clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom. I may grant that, for the sake of the point to be made. But if, over time, the libel action evolves so that it becomes a threat to the central meaning of the

13 It is worth pointing out in this respect that a case can be made both in USA and Australia for the view that all matters not specifically listed as subject to political control are outside such control. Both Constitutions define the powers which have been granted to government. It is arguable that any matter with respect to which power was not granted is therefore outside political control. Support for this view can be can be found in the words of the American Constitution, which reserves powers not granted to the States and the people.

> first amendment, why should not judges adapt their doctrines? ... To say that such adjustments must be left to the legislature is to say that circumstances must be permitted to gradually render constitutional guarantees meaningless .... Judges must never hesitate to apply old values to new circumstances .... A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, it is worth repeating, is to ensure that the powers and freedoms the founders specified are made effective in today's altered world. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint.[14]

Although there is no other obvious way of handling such problems, this solution undermines the basis of intentionalism. The initial plausibility of intentionalism is that it views the Constitution as a document with a determinate historical meaning and argues that the role of the judge is to enforce the limits the document imposes on the political process. That view of judicial review involves a recognition that the Constitution is not a perfect blueprint for a perfect society and a commitment to accept its imperfections. If it is to mean anything, it must recognise that the Constitution was itself the result of a political process and embodies political compromises, some of which were neither rational or consistent.

Any attempt to work out the intentions which the founders would have had if they had considered a matter which uses principles of rationality and consistency is inconsistent with the intentionalist view that we are committed to a constitution which has a fixed, historically determined meaning and which may embody irrational political compromises. Once we are committed to reconstructing the intentions of the founders according to principles of rationality and consistency, the actual intentions of the founders become largely irrelevant. If we discover that their actual intentions and beliefs are inconsistent with a rational reconstruction of their intentions, we have no option but to discard the former.

In his examples, Bork concedes as much. According to Bork, a new understanding of a principle may require the court to apply the principle in a way which is inconsistent with the way in which the framers of the Constitution would have applied that principle. With respect to *Brown v Board of Education*[15] he said:

> *Brown v Board of Education* was more generally an example of the Court applying an old principle according to a new understanding of a social situation.
>
> It is not that a court may apply an old principle in new ways because its or the society's views on race have changed but ... because it became evident over time that the racial separation the ratifiers of the fourteenth amendment assumed was completely inconsistent with the equal protection of the laws they mandated.[16]

The use of a rational, consistent reconstruction of the founders' intentions to interpret the Constitution breaks down the distinction between intentionalism and other more radical theories of constitutional interpretation. Consider the debate between intentionalists such as Bork and more radical theorists over

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14 Above n9 at 168–9 quoting with slight adaptations *Ollman v Evans* 750 F 2d 970 (1985) at 995–996.

15 347 US 483 (1954).

16 Above n9 at 169.

the American privacy cases, such as *Griswold v Connecticutt*[17] and *Roe v Wade*.[18] Intentionalists have criticised these cases on the basis that the American Constitution does not confer a right to privacy and that it was not the intention of the founders to grant one. Therefore, they conclude that recognition of the right is the result of unwarranted judicial policy making.[19]

However, if intentionalism can construct the founders' intentions using principles of rationality and consistency, it is easy to develop an intentionalist argument for a right to privacy from the American Constitution. That Constitution contains a Bill of Rights designed to protect individuals from some government actions. The founders intended that, to ensure that the rights were observed, the courts were to have the power to enforce them. In interpreting those rights, an intentionalist court will be forced to develop a rational, consistent reconstruction of the intentions of the founders. If the most rational and consistent reconstruction of the intentions of the framers of the Bill of Rights requires that those rights include a right to privacy, an intentionalist could argue that the founders intended that the protected rights include a right to privacy. The facts that the Constitution does not mention such a right and that the founders did not consider the matter is no more a bar to the existence of such a right than are the facts that the Constitution does not state and the founders did not consider whether the guarantee of free speech extends to the law of libel a bar to holding that some libels are protected by free speech.

In conclusion, once intentionalism uses principles of political theory such as principles of rationality and consistency to construct the intention of the framers in cases where that intention is not clear, it can no longer claim to be using the actual intentions of the framers to interpret an historical document with a fixed and discoverable meaning. Instead, it is interpreting the document in the light of rational political principles. This frees intentionalists from the constraints which would flow from a search for the actual historical meaning and leaves them free to remake the document. It is a small step from reconstructing the intentions of the framers according to principles of rationality and consistency to reconstructing the Constitution itself according to those principles. Therefore, we may conclude that intentionalism does not provide a more objective basis for interpretation than does other theories.

However, it is not clear what other approach the intentionalist could adopt in those classes of case in which there is no evidence as to the intentions of the founders. If they do not use principles of rationality and consistency to reconstruct the intentions of the founders they will be forced to make irrational guesses as to those intentions. Such an approach is completely unjustifiable.

5. *Intentionalism and Constitutional Theory*

Our consideration of the pragmatic objections leads to the conclusion that intentionalism provides no guidance in many cases unless it is supplemented by political principles such as those of rationality and consistency in order to

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17 381 US 479 (1965).
18 410 US 113 (1973).
19 Above n9 at 95–100 and 110–126.

reconstruct the intentions of the founders. If that is done, intentionalism loses its claim to provide a uniquely objective basis for constitutional interpretation based on facts about the historical intentions of the framers.

The third objection, the institutional objection, raises more fundamental difficulties. I have argued that the intentionalist is committed to the view that precedents do not have any authoritative status. This does not reflect our intuitive understanding of the authoritative status of precedents as additions to the Constitution. This failure suggests that there is something wrong with the intentionalist vision of the Constitution which may lead us to reject it even if it could be shown that it was capable of providing an objective basis for constitutional interpretation.

To understand the intentionalist vision of the Constitution it is necessary to examine the intentionalist approach to interpretation in greater detail. Intentionalism cannot be defended on the basis that difficult problems of interpretation cannot be resolved from the text but can only be resolved by accepting one interpretation, that of the framers, as authoritative, because in practice that view is unworkable.[20] It is not clear that intentionalism can be defended on any other basis. The claim that the purpose of all interpretation is to convey accurately the intentions of the framers of a document to the reader or interpreter appears to provide such a basis.[21] However, it is not obvious that the interpretation of documents is necessarily concerned with discovering the intentions of the persons who drafted them. Such an approach to interpretation is most appropriate where the document is a communication between one person and another. Documents which convey information or instructions are documents of this type. The intentions of the author may not be so important in other documents, such as works of literature or art. For example, a painting by a four year old child recently received critical acclaim at an art exhibition. When it was discovered who had painted the picture, there was a dispute as to the artistic merits of the painting. Some claimed that it did not affect the painting's merits because it still was aesthetically pleasing. Others claimed that it was not a work of art because artistic merit was inextricably related to the success of the work of art in conveying the intentions of the painter and in this case, the artist had no specific intentions. The example shows that our understanding of a work is not necessarily dependent upon our understanding of the intentions of its maker.

It may be objected that a painting is not a document and that different principles apply to the interpretation of paintings. However, arguments about the importance of intention can arise in the interpretation of poetry as illustrated by the Ern Malley hoax. In that hoax, the hoaxers parodied the style of avant garde poetry and submitted their work to a literary magazine as the work of an untutored bush poet, Ern Malley. The "author", Ern Malley, a non-existent person, was accepted by some avant garde critics as a great poet until the hoax was revealed.[22] Although the intention of the authors was to mock the pretensions of

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20 The practical problems associated with this view are discussed above in Part 3.

21 For a general discussion on the role of intention in interpretation, see Dworkin, R, *Law's Empire* (1986), esp at 49–65. My account of the place of intention in interpretation has been heavily influenced by his work, my distinction between the importance of intention in interpreting documents which are primarily communications and other documents roughly parallelling his distinction between conversational and constructive interpretation.

22 For a complete account of the hoax, see Heyward, M, *The Ern Malley Affair* (1993).

modern poetry, some of those who were fooled still claim that the poetry had merit. It is clear that their theory of interpretation of poetry places little weight on the artistic merits of the intentions of the author or the success of the poem in conveying those merits because the intentions of the authors was to perpetrate a hoax. This raises issues about the weight to be attached to the author's intentions in interpreting other documents, including constitutions.

It may be objected that understanding a poem is different from interpreting a constitution. Of course, there are differences. However, there are fundamental similarities in that poems and constitutions are both documents and we interpret documents in order to understand them. I have suggested above that the search for the original intention is most important in those cases where the primary aim of the document is as a communication from one person to others. Intentionalism may be less relevant in understanding works of art than in interpreting some other types of documents because it is not clear that works of art are primarily communications from the artist or author to the viewer or reader.

This suggests that intentionalism is an appropriate method of interpreting the Constitution if the Constitution is or should be treated as a communication, for example, a communication between the founders and some other group, most likely later generations. Not all theories of the Constitution view it in this way. However, there are two theories of the nature of law which see law, including the Constitution, as a form of communication between one person or group and another and hence would provide support for an intentionalist approach to the Constitution's interpretation. The first and most obvious is the will theory of law which sees law as resulting from an act of will of some person such as the sovereign. The second is a contract theory, which sees the Constitution as the result of a social contract.

Will theories see the law as a set of commands or instructions given by a law maker to the community. In other words, laws communicate the intentions of the law makers to their subjects. Therefore, the point of interpretation is to determine the law makers' intentions. However, a will theory of law is inappropriate to a written constitution such as that of the USA or Australia. Inevitably, in such constitutional systems, the sovereign will has to be equated with the will of the people because the Constitution owes its origins or continued existence to an exercise of that will.[23] As the popular will can only be exercised by agreement, the will theory, when applied to the Constitution, collapses into the contract theory.

It is not so obvious that the contract theory sees law as a communication to be interpreted by ascertaining the intentions of the parties. Contractual documents are agreements rather than communications. However, communication lies at the heart of contract. This is reflected in ordinary contractual language, which requires that offers and acceptances be communicated to the other party. Communication is also central to the point of contract. Contract is a way of organising cooperation. Its cardinal features are that it gives the parties the opportunity to limit by agreement the extent of their cooperation to the

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23 See, eg, Austin, J, *The Province of Jurisprudence Determined* (Hart, H L A (ed), 1954) at 246–51.

pursuit of defined goals. They agree on terms and cannot be required to do more than the terms stipulate. When they have carried out the terms, the contractual relationship between them ceases.

To achieve their goal of defining the terms on which they are prepared to cooperate, the parties to a contract must communicate their intentions to each other accurately. Interpretation of contractual documents is the interpretation of these communications or of a document formalising the agreement to which these communications lead. In either case, the aim of interpretation is to determine the intentions of the parties so as to give effect to their agreement.

If the Constitution is regarded as a contract, it makes sense to treat interpretation of the Constitution as an attempt to discover the intentions of the parties to that contract, the founders. However, we should not adopt the view that the Constitution is a contract because it entails an unattractive and inaccurate view of political society. Contracts are a way of organising a limited degree of cooperation in order to regulate peoples' private affairs. Because they enable the parties to determine exactly the extent to which they are willing to cooperate by giving them the power to define the scope of their mutual obligations, contracts are suited to the pursuit of private interests. To treat the Constitution as a contract is to draw an analogy between public political cooperation and private cooperation. It suggests that political society is the result of an agreement to set up a government which was entered into for limited, private reasons. That agreement resulted in a contract, the Constitution, which defines the limited aims of the parties and limits the powers of government to the pursuit of those aims. This results in a static view of the Constitution in which its meaning was fixed at federation and can only change by means of a new agreement. Changes except by a new agreement are unjustifiable because they alter the limited scope of cooperation to which the parties agreed.

This model of the Constitution is wrong. The Constitution is not a private agreement limiting the extent of social cooperation by means of a government.[24] However, the contract model does highlight some fundamental features of our constitutional system. First, our constitutional system, like the terms of a contract, was chosen from numerous available options and secondly, we are committed to it by the acceptance of its terms. However, there other fundamental features which the contractual model cannot explain. It is unable to explain the way in which we are bound by the choice of the terms of the Constitution even though it was an earlier generation, not us, who chose to be bound by those terms and we have not personally accepted them. Our acceptance cannot be implied from the facts that the Constitution gives us the power to change its terms and we have not exercised that power. Acceptance of the terms of a contract could not be implied from a failure to exercise such a power. According to the normal rules of the law of contract, it is impossible to impose contractual obligations on a person by treating a failure to reject its terms as an acceptance. Such a failure only amounts to silence and silence is not acceptance.[25]

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24 I have dealt at length with the reasons why the Constitution is not a social contract in "Is the Constitution a Social Contract?" in (1990) 12 *Adel LR* 249.

25 See Greig, D W and Davis, J L R, *The Law of Contract* (1987) at 301–2.

It may seem misleading to apply the principles of the law of contract to the contract model of the Constitution because the law of contract is merely the result of decisions of the courts and could have been otherwise. However, although we can imagine a system of contract in which silence constituted acceptance, that system would not be consistent with our understanding of the nature and purpose of contract. As argued above, contract is an institution by which individuals can define and limit the extent of their cooperation with each other. It is essential to that institution that the parties be able to determine for themselves the scope of the obligations which they are prepared to undertake. It is inconsistent with this to allow one party to impose terms on the other without the other's express consent. Therefore, the rule that silence cannot constitute consent is not a choice by the courts of one possible rule but reflects our basic understanding of the nature and purpose of the law of contract. The fact that we accept that we are bound by the Constitution although we have not specifically accepted its terms shows that the contractual model of the Constitution is not able to explain all of its fundamental features.

Furthermore, the contractual model is unable to explain how constitutional interpretation can change over time. Most judges and commentators would agree that the meaning of the Constitution is not the same now as it was in 1900. The extent of the change is too great to explain on the basis that those interpretations which were adopted in the early years and which have since been rejected were mistakes which have merely been corrected.[26]

If the Constitution was a contract, its meaning could not change over time. Contracts are designed to enable the parties to bind themselves by agreement to limited obligations the scope of which is determined by the agreement. It is inconsistent with this form of cooperation to change the scope of the obligations of the parties other than by a new agreement. Therefore, even if the contract is a continuing one, the meaning of its terms cannot evolve over time because such evolution strikes at the power of the parties to fix the scope of their obligations in advance.

It is clear that the contract model of the Constitution cannot explain all of the features of the Constitution. However, although it may be the one with which we are most familiar, contract is not the only institution by which we can voluntarily bind ourselves for the future. Oaths, vows or informal commitments such as New Year's resolutions, by which people commit themselves to certain ideals or obligations for the future provide a better model for the Constitution. Vows can take many forms. They can entail an open ended commitment to cooperation regardless of the circumstances such as that of the traditional marriage vow, which is "for better or worse until death do us part". This clearly does not provide a model for the Constitution which places limits on the powers of government and hence on the terms on which citizens may be required to cooperate. Other vows, such as vows to live a life according to certain ideals, like the vows of a priest, provide a better model. Such vows, although they are usually communicated to others, are unlike an offer to enter a contract in that they do not

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26 This was recognised by Windeyer J in *Victoria v Commonwealth* (1970–71) 122 CLR 353 at 396, where he held that it would now be wrong to return to the pre-*Engineers* approach, although that approach was not wrong when adopted.

have to be communicated to anyone-else to be binding. The taking of a vow or the making of a commitment is not primarily a communication to others and need not be interpreted as such. Instead, it ought to be interpreted as a commitment we ourselves have made rather than as an agreement we have made with ourselves or with others. Unlike contracts, which stipulate exactly what is required as performance, such commitments require continual reinterpretation and re-evaluation to determine exactly what is required of us.[27]

For example, assume that as my New Year's resolution, I commit myself to honesty in my dealings with others. At the time, I exclude the tax collector from the scope of the commitment on the grounds that he is not human. Later events force me to reconsider my views on the humanity of the tax collector. If I take my commitment seriously as a commitment to honesty, I will be forced to reconsider my decision to exclude the tax collector from that commitment. I cannot rest content with the interpretation of that commitment which I adopted at the time that I made it because I have to consider the possibility that my understanding of what was required by a commitment to honesty was wrong. If I refuse to do this, I cannot claim to be committed to the ideal of honesty. In other words, my commitment to honesty is best understood as a commitment to the best interpretation of the ideal of honesty rather than to that interpretation which I held at the time I made the commitment.

If we interpret vows or commitments to ideals in the same way as we interpret contracts, that is, by reference to the intentions of the parties at the time the vow or commitment was made, we obscure the way in which their interpretation requires us to look for the best understanding of the ideals in question. For example, if my commitment to honesty is to be interpreted as an agreement with myself to be honest rather than a commitment to the ideal of honesty, I may appear to be justified in interpreting my commitment according to my intentions at the time I made it because my commitment did not extend beyond what I agreed to do. However, there is no justification for interpreting commitments and vows in this way. To do so is to assume that all voluntary commitments and all forms of cooperation must be based on agreement at the cost of ignoring the distinctive features of commitments and vows.

Once we reject the notion that all forms of cooperation must be based on agreement, it makes more sense to interpret the Constitution as a commitment to government in accordance with certain values, such as federalism, representative democracy and responsible government than as an agreement or contract. Such an approach can overcome the difficulties which dog an intentionalist approach based on the view that the Constitution is a contract. First, it can overcome the difficulties which the intentionalist approach faces in those cases in which it is not possible to discover the intention of the framers because they disagreed about the purpose of a provision or because they did not consider a particular type of case or because changing technology and social conditions have raised issues which they could not have foreseen. In all of

27 See Dworkin above n21, for a comprehensive discussion of the theory that commitment to an ideal or principle requires us to continually re-evaluate what the ideal requires of us in an attempt to determine the best interpretation of that ideal.

these cases, if the Constitution is viewed as embodying commitments to fundamental political principles, we can derive answers from it by asking what those principles require.[28]

Secondly, the view that the Constitution embodies commitments to political values can be used to explain how the interpretation of the Constitution may change over time. If the Constitution is interpreted as a commitment to a particular form of government, the purpose of interpretation will not be to discover the historical intentions of the founders, but to work out the implications of that commitment. That will be a gradual process over time. In that process we may find ourselves at variance with the ideas of the founders. However, that should no more worry us than it should worry me in my commitment to honesty if I discover that my ideas about honesty develop over time. Judges can no more adopt a view which they believe is wrong merely because it was held by the framers of the Constitution than I can adopt a view of honesty which I believe to be wrong merely because I held that view at the time at which I committed myself to being honest.

Thirdly, the theory that the Constitution is a commitment by society to a particular form of government helps explain the importance of precedents in constitutional interpretation. The Constitution consists of generalised commitments and precedent is a way of working out the exact content of those commitments. Some precedents will be rejected as mistaken, but others will be accepted as embodying progress in that process. These will be accepted as authoritative, as adding to our understanding of the Constitution. Besides, the fact that a constitutional commitment has been interpreted in a particular way in a given case is in itself a reason for adopting that interpretation in the next case. To adopt a different interpretation without good reason is unfair to those members of the community who may have relied on the previous decision.

Finally, the idea that the Constitution is a commitment provides a better explanation of why we are bound by the Constitution although we have not specifically accepted its terms than does the theory that it is an agreement or contract. As argued above, if the Constitution is a contract, we are not bound unless we have consented to it and a consent cannot be implied from the fact that we have not exercised the power to change it. An intentionalist may attempt to show that the Constitutional contract is binding on members of society who have not consented to it by arguing that the party to the constitutional contract is society itself rather than its members. Although the individual members may change over time, as long as the society remains in existence, it continues to be bound by the terms of the Constitution to which it has agreed.

There are obvious objections to this argument. First, it is not clear what the entity called "society" which the argument makes the party to the contract is. It is clear that the argument views society as an entity independent from its individual members to the extent that it can survive the death of those members and their replacement by the birth of others. It is also clear that it views society

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28 It is clear that Bork, above n9 adopts this view of the Constitution rather than the view that it is a contract in his discussion of cases which did not occur to the framers or cases in which the framers' own beliefs are inconsistent with the principles which they embodied in the Constitution; see the text accompanying nn11 and 12 above.

as having a personality distinct from the personalities of its members to the extent that it can enter into and be bound by agreements. There is no objection in principle to attributing identity and personality to society in this way. We are familiar with the notion that organisations such as corporations can have an identity and personality which is distinct from those of its members. There is no reason why society should not have such a personality.

However, any theory which personifies society must be able to offer a coherent account of the nature of society's personality. That is easily done in the case of corporations which are creatures of the law. We can account for their personality in terms of the legal provisions which establish them and define their capacity. It is not so easily done in the case of society as a whole. Society does not owe its existence to the law, at least not in the way that a company does. Nor can we point to any act by which it was created.

These features do not make it impossible to offer a theory with respect to the nature of the personality of society as a whole. An intentionalism which sees the Constitution as an agreement akin to a contract may be tempted to seek such a theory in the idea that society itself was created by a contract. However, there are obvious objections to such a theory. If we look on society as having an existence which is separate from that of its members, it is clear that membership of society is not optional. Members are born into a society and it is usually difficult for them to leave. Even if they are able to leave, it is difficult to infer their consent to membership from their failure to do so. Implying consent to membership in society in this way is open to the same objections as implying consent to the Constitution from a failure to change it.[29] Not only is membership of a society non-optional, but the obligations which its members owe to it arise independently of their consent. This indicates that these obligations do not owe their existence to contract.

Besides, if the Constitution is a contract, there must be other parties to it besides society. The other parties could be the members of society. On this view, the Constitution would be a contract between the society and its members with respect to the way in which that society is to be governed. Although initially attractive, it faces the same problem that all contract theories which make individuals members of the contract face; the contract cannot bind their descendents who were not parties to it. Therefore, the theory that the contract is between the society and its individual members is no more supportable than the theory that the contract is between the individuals themselves. There are no other plausible parties.

Therefore, an intentionalism based on contract gains nothing from the idea that the party to the constitutional contract is society as a whole, not the individuals who actually approved it. All that it does is transfer the problems of the contract model from the Constitution to the concept of society as a person distinct from its members. It can only explain why we are bound by a Constitution to which we have not individually consented by claiming that we are bound by the actions of a society which we did not agree to join.

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29 These objections are discussed in the text accompanying nn 21–22 above.

Most of these problems can be avoided if intentionalism is separated from the thesis that all cooperation must be based on contract or agreement. However, separating intentionalism from that thesis weakens intentionalism because if other forms of cooperation and social organisation are possible, there are few good reasons for treating the Constitution as a contract. If the Constitution is not a contract, there is little justification for intentionalism as an approach to interpretation other than a misguided belief in its objectivity.

These problems evaporate if we treat the Constitution as a commitment to a theory of government rather than an agreement. Treating the Constitution in that way recognises that social cooperation does not have to be based on agreement. Therefore, it can concede consistently that we may be bound by commitments which we did not make. All of the examples of commitments which I have considered are commitments which bind the person who made them. However, it may that we are bound by commitments which are made by others on our behalf or which arise from the fact of our involuntary membership of organisations such as the family or society.[30]

Once it is accepted that the Constitution is best considered as a commitment to ideals of government, it is possible to make sense of the notion that that commitment is made by society as distinct from the individuals of which it consisted at the time the commitment was made. If the commitment was made by the individuals living at the time rather than by society, there may be no good reason why we are bound by that commitment. We did not make it and did not authorise those persons to make it on our behalf. However, if it is accepted that the commitment was made by society rather than merely by the individuals who happened to live at the time, there are good reasons why we are bound by it.

Viewing the commitment to the Constitution as one made by the society rather than by the individuals who constituted the society at the time places the commitment in its context. If we view the commitment as one made by individuals, it is easy to assume that the commitment was one in which individuals conferred powers on government and subjected themselves to that government. This implies that individuals could have chosen not to form a government and that if they had not done so, they would have retained for themselves the powers which they conferred on it and remained completely autonomous and free of social constraints. This state of freedom has traditionally been referred to as the state of nature. If the adoption of the Constitution is viewed as a commitment by individuals who were free not to establish a government, it appears to be arguable that we are not bound by our ancestors' choice to be subject to government. If they had the choice between the state of nature and government, they should not be able to take that choice from us.

However, if the commitment is viewed as made by society, it is easier to see that it was not made in a social and political vacuum, the state of nature, but by members of an existing society which was subject to an existing form of government which had been inherited rather than chosen by its members and which they, as individuals, had not had the chance to accept or reject. They were already inextricably subject to government by their membership of

30 Above n21 at 195–216; Dworkin has named obligations which arise from involuntary membership in organisations associative obligations.

society. Their choice was not therefore one between a state of nature and government but between two systems of government. As members of a political society, they had the political and legal power to change the existing method of government and exercised that power.[31] Their responsibility was to create a system which would subject government power to political, legal and moral controls so that it would not be arbitrary. They were bound by the system which they adopted not because they accepted it but to the extent that it was fair and reasonable.

Understanding the nature of the choice which they made in adopting the Constitution throws new light on our commitment to the Constitution. We are in the same position as they were. Like them, we are, as members of society, inevitably subject to government in one form or another. We are also bound by a system of government which we have inherited and have not had the chance to accept or reject. However, it is wrong to look on that system as a set of essentially arbitrary limits on our autonomy which were imposed by our ancestors when they left the state of nature and which do not bind us until we accept them. Instead, it is a commitment by society not to exercise the governmental powers which it inevitably has over its members arbitrarily but in accordance with a set of legal and political principles embodied in the Constitution. When seen in this light, it is clear that the Constitution was designed, at least in part as a guarantee of our liberties rather than as a constraint on them. As the Constitution operates more as a constraint on government than as a constraint on us there are good reasons for treating government as bound by it although we have not accepted it.

This does not entail that we are bound by whatever system of government or whatever Constitution happens to exist. The fact that our ancestors may have designed the Constitution in part as a guarantee against arbitrary government does not entail that it imposes obligations on us. A system of government has to meet minimum standards of fairness and morality before its citizens owe it any obligations.[32] These standards impose limits on the extent to which one generation can commit other generations to a particular system. It is possible that our Constitution does not meet the minimum standards required to impose obligations on us. However, assuming that it does meet those standards, the best way of interpreting it is as a binding commitment by society to its members that government will be conducted in accordance with settled constitutional principles.

6. *Conclusion*

Most of the judgments in the freedom of political speech cases are based on the premise that the Constitution is a commitment to certain political principles,

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31 The ultimate legal power to make the change was vested in the UK Parliament. However, as that Parliament would not have contemplated rejecting a reasonable scheme of federation which had the support of the Australian people and which respected Australia's position in the British Empire, for the sake of simplifying the discussion, I am assuming that the Australian community had the legal power to make the change.

32 These standards are highly controversial. Dworkin, n21 above, suggests such standards in his theory of associative obligations. Although few other political philosophers would accept them without some change, they have the advantage over much political philosophy in that they are not the blue print for a perfect society but are designed to give standards for determining when we owe obligations by reason of our membership in a society which is imperfect and sometimes unjust.

such as federalism and representative democracy. That premise is used to justify the implication of a guarantee of political speech; the Constitution contains a commitment to representative democracy and as representative democracy cannot work properly without freedom of political speech, the best interpretation of the commitment to representative democracy requires that free speech be protected from government interference by the courts. Mason CJ, at least, in the passage quoted above,[33] recognised that interpreting the Constitution as a commitment to certain values required the courts to adopt what they considered the best interpretation of those values even if that led the courts to adopt views which are inconsistent with the intentions of the framers. For reasons given above, it is argued that he is correct, both in interpreting the Constitution as a commitment to fundamental political values and in rejecting the intentions of the framers as a guide to the interpretation of those values.

He was correct to reject the intentionalist approach to interpretation because in practice it provides little guidance to interpretation and the philosophical premises on which it is based are unsupportable. He was correct in interpreting the Constitution as a commitment to certain political values rather than as a contract because the view that the Constitution is a commitment to values provides better answers to questions about the nature of the Constitution and the reasons why it binds us than does the contract theory which underlies intentionalism. It is to be hoped that the High Court continues with this approach to interpretation because it is capable of explaining why we are bound by our ancestors' choice of a particular form of government and how the best interpretation of that form of government may change over time.

Does this mean that the intention is irrelevant as a guide to constitutional interpretation? No, but its role is limited to situations where it is not clear what commitment a particular section of the Constitution was intended to embody. For example, original intention was relevant in determining whether section 92 was a guarantee of free trade or of laisser faire. Once the broad principles to which the Constitution commits us have been determined, original intention has little part to play in the interpretation of those commitments. Because, for reasons dealt with above, the intentions of the framers usually provide little help in determining the exact meaning of a particular provision, and because those intentions are irrelevant in determining the best interpretation of a constitutional commitment, the language of intention often tends to obscure rather than elucidate the process of interpretation.

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33 Above n6.