Interpretation and Change in Constitutional Law; A Reply to Jeffrey Goldsworthy

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Introduction

The "freedom of speech cases"[1] in the High Court have raised difficult questions about how the Constitution should be interpreted and, in particular, the weight which should be given to the intentions of the framers. Jeffrey Goldsworthy has addressed these issues in a recent article, "The High Court, Implied Rights and Constitutional Change".[2]

Goldsworthy criticises the decisions in the freedom of speech cases as being an unjustified usurpation of power. The cases decided that the Constitution contains an implied guarantee of freedom of political speech because it establishes a system of representative democracy and freedom of speech is necessary for representative democracy to work properly. Goldsworthy does not criticise the conclusion that freedom of speech is necessary for democracy. What he criticises is the Court's unargued assumption that the only effective way to guarantee free speech in a democracy is by means of a legally enforceable right to free speech; he points out

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1. "MP to cut off clinics from lesbians", *The Australian*, 14 February 1997, *Nationwide News v Wills* (1992-3) 177 CLR 1, *Australian Capital Television v Commonwealth* (1992-3) 177 CLR 106, *Theophanous v Herald and Weekly Times* (1993-94) 182 CLR 104, *Stephens v West Australian News* (1993-94) 182 CLR 211 and *Cunliffe v Commonwealth* (1993-94) 182 CLR 272. These cases appear to have established a right to freedom of political communication which not only limits the power of governments to place limits on the rights of the people to communicate with each other about politics, but also overrides the common law in areas such as defamation. The right has been variously based on sections of the Constitution which guarantee a free informed choice by the people of their representatives, such as ss 7 and 24 or on the principle of representative democracy which is said to underlie the Constitution. Comments in recent cases suggest that the Court may adopt a narrower view of the implied right to freedom of political communication; see *McGinty v WA* (1996) 134 CLR 289 and *Langer v Commonwealth* (1996) 134 ALR 400.
2. *Quadrant*, March 1995, 46.

that free speech can be protected reasonably effectively by political means rather than by legal guarantees.[3]

Goldsworthy does not deny that a strong case can be made for the view that the best way to guarantee free speech is by means of a legally enforceable right, although he is clearly not convinced of that argument. He argues that even if the case for a legally enforceable guarantee of free speech is overwhelming, the Constitution does not contain such a guarantee and the Court is not the proper body to impose one.[4] In his opinion, the Court would only have the authority to imply such a right if it were clear that the framers had intended that there be such a right or if it was unclear what their intentions were; as we know that the framers did not intend that the Constitution should contain such a right, the High Court was wrong to imply one. By imposing one, the Court has, in his opinion, exercised a power to change the Constitution which it does not possess and has usurped that power from the people in whom it is vested by s 128 of the Constitution.[5]

In summary, Goldsworthy's criticism is that the High Court's duty as interpreter of the Constitution limits its power to innovate and that the High Court has ignored these limits on its power. He claims that the traditional approach of the High Court to constitutional interpretation, which he calls "legalism", led the Court to respect the limits on its power. However, he argues that legalism is under threat as the dominant philosophy of the Court from more radical American theories of the role of a constitutional court, which he calls "realism". He argues that realism is dangerous not only because it may encourage the courts to change the law and the Constitution but also because it may lead to a situation similar to that in America where major policy and social issues are decided by judges rather than elected legislators.[6]

Legalism and Realism

It is not completely clear what Goldsworthy means by these terms or whether a change from legalism to realism will lead to more political and social issues being decided by the courts rather than the legislature. The term "legalism" in

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3. Ibid at 48-50.
4. He accuses the court of adding the implied rights to the Constitution and therefore changing it; ibid at 47.
5. Ibid at 47-8.
6. Ibid at 48.

constitutional law suggests firstly, that the Constitution is law and therefore binds the High Court. It follows that the decisions of the High Court differ from ordinary political decisions in that the judges are under a duty to apply the law and are not free to take into account the types of policy arguments which governments and parliaments regularly consider. Therefore, the judges do not have any authority to alter the Constitution or to make policy either openly or under the guise of applying the Constitution.[7] Secondly, the idea of legalism suggests that the meaning of the Constitution is sufficiently clear in enough cases to give substance to the claim that judges are under a duty to apply it. If the Constitution were so vague that reasonable judges could never agree about its meaning it would be meaningless to claim that judges have a duty to apply it as law.

Realism does not necessarily deny that the Constitution ought to be treated as law or that in an ideal world judges would be under a duty to apply the Constitution. All that realism needs to claim is that, in practice, most laws, and the Constitution in particular, are so vague that they do not require any particular interpretation but leave the judge with a free choice among competing interpretations. In exercising that choice, judges are forced to make law and are inevitably influenced by their own ideas and preferences about policy. Realists therefore encourage judges to make policy openly and state clearly the policy arguments on which their judgments are based so that there can be rational debate about the soundness of those policies.[8]

If the realist view is correct, the powers of judges are not limited by a duty to apply the law and the High Court exercises political power which is essentially no different in its nature from the power exercised by parliament. Therefore, according to realists, the duty of judges is to produce sensible decisions in line with current community ideas rather than to attempt to divine the meaning of the Constitution. Realists argue that judges who are charged with interpreting the Constitution have a responsibility to modernise it, where necessary, and to ensure that it is given a meaning which reflects modern attitudes and values.

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7. Goldsworthy clearly believes that judges have no such power and that it is expressly denied to them by s 128 of the Constitution, which requires a referendum to change the Constitution: ibid at 48.

8. For a particularly clear exposition of the realist position that judges cannot avoid political and moral responsibility for the value judgments which they are forced to make; see Kennedy, "Legal Formality" (1973) 2 *Journal of Legal Studies* 351.

Legalism, Realism and Deference to Elected Legislators

Goldsworthy claims that the High Court's flirtation with implied rights is the result of the decline of legalism and the growing influence of realism. However, legalism does not necessarily entail judicial restraint or deference to the decisions of other organs of government nor realism judicial activism. In fact, there is a strong case for the view that realism developed in America in reaction to a legalist judiciary which was seen as using the Constitution to impose its own economic and social agenda and to invalidate legislation inconsistent with that agenda.

In America, the realists criticised judicial activism by legalistic judges by arguing that the "law of the Constitution", to which the judges appealed, was nothing more than their own policy preferences dressed up as law. The realists also stressed that judicial decision-making was no different in kind from the decision-making of politicians and legislators, in order to support their argument that judges should defer to the decisions of legislators on questions of social and economic policy rather than impose their own values. If judges had no clear constitutional duty to invalidate legislation and if their decisions were based on the same considerations of policy as those of the legislature, democratic theory required that the decisions of democratically elected legislatures be preferred to those of appointed judges. The realists aimed to modernise the American Constitution, not by introducing new limitations on legislative power which were more in tune with modern thought but by encouraging the courts to defer to the decisions of elected officials. These decisions were seen as the best guide as to what a modern system of government required.

Realism is not a licence for judicial activism. Its claim that judges make policy provides strong arguments for judges deferring to legislatures by undermining the argument that judges have an apolitical power emanating from the law to determine the validity of legislation. The real believers in judicial activism are not the realists but legalists of various types, especially those who believe that there are fundamental values such as justice and inalienable rights which must be taken into account in interpreting the Constitution. Although no judge of the High Court has relied on such natural law views in any of the implied rights cases, some judges have adopted the related view that the Constitution assumes and entrenches basic

common law values such as equality before the law.[9] The belief that the Constitution must be interpreted in the light of such values gives these legalists a way of distinguishing the decision-making of judges from that of politicians and legislatures, and justifies their intervening to overrule the decisions of democratically-elected officials. Why then does Goldsworthy concentrate his attack on the realists rather than the theory of fundamental inalienable rights?

Goldsworthy's Attack on Realism

There are a number of reasons why Goldsworthy directs his attack to realism rather than theories of fundamental rights. Firstly, the High Court in the implied rights cases has not appealed to fundamental and inalienable rights to support its decisions. Instead, it has appealed to rights which it has argued are implied by the system of representative democracy which the Constitution establishes.[10] The controversial feature of those decisions was not the finding that freedom of speech is fundamental to representative democracy but the conclusion that the Constitution requires the courts to guarantee that freedom by invalidating laws which are inconsistent with it. Goldsworthy believes that although a theory of representative democracy justifies free speech, it does not entail that free speech be enforced by the courts. In Goldsworthy's view, that was a policy decision which does not flow from the need to guarantee free speech in a democracy. As judicial enforcement is not an essential feature of free speech, the court's decision to enforce it could not be justified by any theory of democracy implicit in the Constitution. Therefore, it

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9. See the judgment of Deane and Toohey JJ in *Leeth v Commonwealth* (1991) 174 CLR 455. Toohey J is also of the opinion that it may be possible to imply a bill of rights into the Constitution by arguing that, as legislation, the Constitution is to be interpreted as not intended to infringe or alter the common law, especially basic common law values, except where its express terms allow of no other interpretation. In particular, he suggests that the grants of power in the Constitution should not be interpreted as giving power to take away fundamental common law rights unless the terms of the power clearly extend to such rights: Toohey, "A Government of Laws and Not of Men?" (1993) 4 *PLR* 158, 168-70.

10. *Nationwide News v Wills* (1992-3) 177 CLR 1, *Australian Capital Television v Commonwealth* (1992-3) 177 CLR 106, *Theophanous v Herald and Weekly Times* (1993-94) 182 CLR 104, *Stephens v West Australian News* (1993-94) 182 CLR 211 and *Cunliffe v Commonwealth* (1993-94) 182 CLR 272.

could only be justified on the basis that the courts have the power to make new law on policy grounds and to insert that law into the existing Constitution.[11]

Secondly, even if the High Court had based its decision on a theory of fundamental rights, that argument would not have defended it against Goldsworthy's criticism that the decision to grant a judicially enforceable right of freedom of speech was unwarranted policy-making. Basing the decision on a theory of inalienable rights is open to the same objection that a fundamental right to freedom of speech does not necessarily entail that the right be enforced by the courts, rather than enforced in some other way. As the decision to impose judicial review could not be justified by a theory of implied rights, it can only be justified by a claim that the courts are entitled to make policy of the type which Goldsworthy criticises.

Hence, Goldsworthy attacks realism because, although it may be used to justify judicial deference to the decisions of elected officials, in Australia it has led judges to substitute their own decisions for those of the parliament. Besides, to a formalist, the realist arguments for judicial deference may appear only to offer flimsy barriers to judicial policy-making. Once it is conceded that judges are necessarily policy-makers, it may be difficult to persuade them to exercise restraint. If it is widely accepted that judges have a duty to apply the law, judges may be slow to impose their own policy preferences on the Constitution. However, if it is accepted that judges have no such duty, judges with a strong social conscience or other strong beliefs may feel that those beliefs justify their intervention to modify the Constitution so as to allow them to overrule laws which they believe are bad or unjust.[12]

Besides, the realist arguments for judicial restraint may not be strong enough to discourage courts from substituting their own policy decisions for those of the legislature. Realists do not believe that judges are under a duty to apply the law and hence do not believe that judges are duty-bound to accept policy decisions which are embodied in legislation. Instead, they justify judicial restraint by arguing that

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11. *Quadrant*, March 1995, 48-50.

12. Goldsworthy argues that, in America, the courts have usurped a broad discretion to make policy under the guise of interpreting the Constitution and fears that Australian courts will follow suit, resulting in a "massive transfer of authority from elected legislators to judges, with grave consequences for the way in which social policy is debated and decided": ibid at 46.

judges ought to defer to the decisions of elected parliaments and executives. However, most realists do not argue that judges have a duty to defer to the decisions of elected officials. If judges had such a duty, it would be impossible to justify allowing the courts to enforce the Constitution because, for the realist, the Constitution is not a source of fundamental legal duties which could override a duty to defer to the decisions of elected officials. Instead, judges would have to defer to the interpretations of the Constitution adopted by elected officials.

There are strong arguments for allowing elected parliaments and governments rather than judges to interpret the Constitution. However, few realists have supported this view. They have accepted that the courts should be entrusted with enforcing the constitutional limits on the powers of government and have been concerned with how that power ought to be exercised. Therefore, they do not argue that judges are bound to defer to the decisions of elected officials but that judges should always remember the wisdom of doing so. In other words, judges should always remember that there are good reasons for deferring, even if they decide not to do so.

The realists' critics fear that if judges are not under a duty to defer to the decisions of elected officials, judges are likely to decide whether to invalidate laws as unconstitutional by weighing the arguments for deference against the injustice of the law under consideration. If judges decide cases in this way, it is clear that even deferential judges may often decide that the arguments for invalidating laws outweigh the arguments for deference. As a result, realist judges who are committed to a policy of deference may still be led to overrule many decisions of elected officials on policy grounds.

Besides, legalists such as Goldsworthy do not entirely reject the right of the judges to make policy. He believes that there are gaps in the law, especially in the Constitution, and that faced with such gaps, the courts have no option but to make policy.[13] His argument with the realists is over the breadth of the gaps. In his opinion, gaps exist only when the meaning of the Constitution is not clear.[14] Where the law is clear, judges are bound by the law and have no authority to make policy.

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13. Ibid at 51.
14. Id.

If the meaning is clear but the result is unjust or undesirable in some other way, in Goldsworthy's opinion the judge has no right to refuse to apply that result.[15]

Realists do not accept these restraints on judicial policy-making. The realists argue that there are few cases in which the meaning of the Constitution is so clear that there is only one interpretation reasonably open to the judge. Therefore, in most cases where the obvious interpretation leads to an unjust or undesirable result, there is room for the judge to choose another better interpretation. As judges have a choice, they cannot disclaim responsibility for the decisions which they make or blame unjust results on the law, but instead have an obligation to make what appears to them to be the best decision.

Legalists do not deny that in many cases there are alternatives to the obvious interpretation of the law. Nor do they deny that in some cases these alternatives will lead to results which appear to the judge to be better than those to which the obvious interpretation leads. However, they argue there are legally correct interpretations in many cases and deny that judges have the authority to search for alternatives when the correct interpretation leads to bad results.

Legalism, Realism and the Duties of Judges

The dispute between legalists and realists is a dispute about the moral and political duties of judges as much as it is about the extent of gaps in the law. The realist argues that, as there is almost always more than one reasonable interpretation of the law open to the judges, they are morally and politically responsible for the interpretation which they adopt and cannot escape that responsibility by arguing that the decision was required by the law. If the judge adopts the obvious interpretation, although that interpretation is unjust, the judge is morally responsible for that injustice. Therefore, the proper response is to look for an alternative interpretation which is not unjust.

Goldsworthy rejects this argument because in a democratic society there are likely to be few laws which are indubitably unjust.[16] Instead, in most cases, as in

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15. Ibid at 52. Goldsworthy allows an exception in the case of extremely unjust laws. Faced with such laws, judges should do all that decent people can, including refusing to recognise the validity of the law. However, he argues, correctly, that legal principles should not be distorted by fear of extreme cases.
16. Ibid at 49.

the *ACTV Case*,[17] where the law restricted political advertising, opinions will differ as to its justice. The judges' duty in such cases is to apply the law, not substitute their opinions about what the law ought to be, under the colour of the law.

The problem which Goldsworthy faces is that in constitutional law, at least, the gaps appear to be wider than in other areas. The Constitution is a short document drafted in general terms and therefore gives rise to more disputes about its meaning than other pieces of legislation. In the many constitutional cases in which there are gaps, it appears that the courts have no option but to make a new rule and that that rule will inevitably reflect the policy preferences of the judges.[18] To limit the cases in which the judges have to make new rules, theorists such as Goldsworthy have suggested techniques which the judges can use in difficult cases to limit their discretion. These techniques enable judges to supplement the rules laid down by the legislature from agreed sources, thus limiting the number of cases in which they have to fill in gaps, by imposing their own substantive policy preferences.

To a great extent, a theory such as that of Goldsworthy, which claims that judges are bound by law but rejects the idea of any absolute rights or other legal standards, stands or falls on the adequacy of these gap-filling techniques. If they do not provide a way of fleshing out legislation, especially the Constitution, there will be so many cases in which the judge has no guidance from the law and will be forced to make a rule based on policy that it will be impossible to deny that judges are forced to make policy in most cases.

Goldsworthy relies on two of these techniques although he is aware of their problems. The first is the doctrine of *stare decisis* and the second is that of original intention. *Stare decisis* is the doctrine that once a point has been decided, later courts should accept that decision even if they believe that it is wrong, rather than substituting their own decision for that of the earlier court. Original intention can be used as an aid to interpretation of documents such as the Constitution and requires that where the meaning of the document is not clear from the words used,

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17. *Australian Capital Television v Commonwealth* (1992-3) 177 CLR 106.
18. This fact does not of course justify the judges in making new rules where there is no gap. Goldsworthy charges the High Court with having done this in the freedom of speech cases. However, the claim that there was no gap in the freedom of speech cases loses its bite if it is conceded that the Constitution is full of gaps which can only be filled by judicial legislation.

the original intention – that is, the intention of the framers of the document – ought to be used as a guide to its meaning.

The doctrine of *stare decisis*, as understood by Goldsworthy, assumes that judges have power to make policy which they exercise whenever they make a new rule; the doctrine operates as a fetter on that power, limiting its exercise to those cases in which there is no pre-existing rule. It is essentially a self-denying ordinance which the judges have imposed on their own powers to make policy, under which they all accept each other's earlier decisions as embodying the law, even if they believe that another decision is preferable.[19] The crux of the doctrine is the notion that the fact a decision has been made on a point is, in itself, an argument for deciding the next case on the point in the same way, whether or not the earlier decision was right. The doctrine adds nothing to the duty of judges if it only imposes a duty on judges to follow earlier decisions which they believe to be right and not those which they believe to be wrong. This is because a duty to follow only those cases which were rightly decided would not differ from a duty to decide each case on its merits.

Because the doctrine of *stare decisis* assumes that judges have the power to make policy, it is not easy to reconcile with Goldsworthy's understanding of the nature of the Constitution. Goldsworthy sees the Constitution as embodying decisions by the people as to the system of government under which they are to be governed. He also argues that the people are the only authority vested with the power to change its terms.[20] The doctrine of *stare decisis* is difficult to reconcile with this understanding of the Constitution because, if judges have no power to alter the Constitution, their duty is always to apply the Constitution, not their previous decisions. It follows that where the decisions of the court are not consistent with the Constitution, the judges must ignore their earlier decisions and apply the Constitution. If they apply the doctrine of *stare decisis* and follow decisions which they know are wrong, they are taking the power to change the Constitution from the people. This is difficult to justify, especially as – if the earlier decision is wrong – it may ignore sound policy as well as the terms of the Constitution. It is a strange theory which denies the judges the power to make policy deliberately but allows them to do so by mistake.

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19. *Quadrant*, March 1995, 51.
20. Ibid at 46.

It may seem that *stare decisis* can be reconciled with the theory that the meaning of the Constitution was fixed by the people at federation, by limiting it to cases where the Constitution fails to provide clear answers. In those cases, it may seem that the people have failed to speak so that by default the matter has been left to the judges. Once the judges have spoken and filled the gap, there is good reason for later judges accepting their decisions, even if they believe that those decisions were wrong or unwise. However, it is impossible to limit *stare decisis* to those cases in which the judges were required to fill in gaps. Courts give weight to earlier decisions in all cases, not just those in which it is clear that the earlier court was gap-filling. Therefore, to argue that *stare decisis* ought to be limited to cases in which there are gaps to fill, is to imply either that all cases which come before the courts are cases in which it may be fairly said that there are gaps, or that the present practice of the judges is wrong. If all cases which come before the courts are cases in which there are gaps to be filled, it is impossible to deny that judges are not bound by law in most of the cases which they decide and that therefore they have a major policy-making role. If it follows from Goldsworthy's theory that the current practice of the judges is wrong, Goldsworthy cannot claim to be the defender of orthodoxy.

Therefore, Goldsworthy is wedded to the doctrine of *stare decisis* in constitutional law, not just in those cases in which the judges have to fill in gaps but in all cases. He defends it by arguing that it is necessary to maintain stability in constitutional interpretation.[21] However, it is only needed to maintain stability if the Constitution is inherently vague, so that there are no clear answers to most questions of constitutional interpretation. If the meaning of the Constitution is clear in most cases, mistakes in interpretation will occur infrequently and be easily recognisable, so that there will be no need to perpetuate them. When they are discovered, they may be reversed with no great damage to the fabric of government. *Stare decisis* is only needed to maintain stability if mistakes are likely to be common and are not easily identified so that it is often a matter of argument whether or not a decision is mistaken. If mistakes are so common and so controversial that the damage to the constitutional fabric caused by perpetuating them – by means of the doctrine of *stare decisis* – is likely to be less than the damage caused by the instability which would follow from an attempt to correct them, it suggests that the meaning of the Constitution is so obscure that it is difficult to identify the correct interpretation. If that is the case, the only way to

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21. Ibid at 51.

limit the scope for different interpretations may be to adopt a rule that once the judges have interpreted a provision in a particular way, they should continue to accept that interpretation even if they believe that it is wrong. If this is correct, it concedes the realist claim that in constitutional cases at least, there is no law other than that the judges themselves make. Once that is conceded, the justification for imposing a duty on judges to leave policy to the people or to their representatives collapses because – if judges have no option but to make policy by default – they have a duty to exercise their policy-making powers responsibly.

In spite of these difficulties, it would not have been plausible for Goldsworthy to reject the doctrine of *stare decisis* in constitutional law. The doctrine of *stare decisis* has always been important in constitutional law and to have denied it a role would have left Goldsworthy open to the charge of eccentricity. As he claims to defend the mainstream theory against American innovations, this was a charge which he could not tolerate. Therefore, he had to allow for it in his theory. However, it does not fit comfortably, especially as most constitutional lawyers view decided cases as a part of constitutional law.

The view that decided cases are part of constitutional law is not easy to reconcile with Goldsworthy's view that the meaning of the Constitution was fixed by the people when they adopted it, because it assumes that the Constitution owes its meaning at least in part to the interpretations which judges have given to it. That implies that judges have added to the meaning of the Constitution and, according to Goldsworthy, usurped a power which belongs to the people.

The second technique which Goldsworthy relies on, that of original intention, is more easily reconciled to his understanding of the Constitution as having its meaning fixed by the people when they adopted it. Goldsworthy's understanding of the Constitution entails that the people had the power to determine the meaning of the Constitution and that they have the sole power to change that meaning. If that is accepted, a sensible way of resolving doubts about the interpretation of the Constitution is to consider how the people who adopted it would have understood it. If we can discover what it meant to them, we are bound by that meaning until we the people decide to change it.

However, there are other problems with the idea of original intention. Firstly, there are few cases in which a clear original intention is discoverable. In most cases, because the interpretations of the drafters of the Constitution differed, it is impossible to discover one original intention. Where there is no clear original intention, the search for the original intention can become a cloak for covert policy-

making by the interpreter.[22] Secondly, in many cases the drafters did not consider the problems which the courts have to solve. In these cases, there is no original intention to be discovered. All the courts can do is manufacture an original intention. Courts frequently do this when interpreting legislation by asking what is the most rational interpretation of the legislation and imputing that interpretation to the framers on the basis that the framers must be assumed to have been rational.

There is nothing objectionable in this procedure which, like much of the law, interprets peoples' behaviour by asking how a reasonable person would understand it rather than asking what the actor intended by it. However, it does undermine Goldsworthy's reliance on the original intentions of the framers because it requires the interpreter to construct the original intention of the framers from what they did, rather than seeking evidence as to what they intended to do. In constructing an interpretation based on what the framers did, the interpreter will be forced to rely on assumptions about what the framers ought to have done. These assumptions will be based on the interpreter's values so that the interpreter will be making policy as much as discovering the framers' intentions.

Besides, the search for the framers' intentions is dogged by more fundamental difficulties which relate to both what the framers believed that they were doing when they drafted the Constitution, and how those beliefs affect the weight which ought to be given to their intentions. Goldsworthy makes some fundamental assumptions about what the Australian people did when they adopted the Constitution. These assumptions explain why in his view we are bound by their intentions. If he is wrong, their intentions ought to be given far less weight.

Legalism Democracy and the Social Contract

Goldsworthy's belief that judges should use the original intentions of the drafters of the Constitution as a guide to interpreting it, is based on a particular theory of democracy – a theory which claims that the people not only have the right to choose who will govern them but also to choose the principles on which their government will operate. Hence he regards the Constitution as binding, not because it embodies fundamental values such as democracy or equality, but because it

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22. For an analysis of the ways in which we may be forced to make judgments of policy while searching for the original intention, see the author's article, "Constitutional Commitments, not Original Intentions" (1994) 16 *Sydney Law Review* 250.

embodies policy choices made by the people at federation.[23] Those choices bind the judges who, therefore, have no authority to take moral responsibility for the substantive justice of their decisions because to do so is to substitute their own value judgments for those of the people.

To the extent that Goldsworthy sees the Constitution as binding because it embodies the principles by which the people have chosen to be governed, his argument is akin to social contract theories – such as that of Hobbes – which assume that the ultimate source of all value is choice. Such a theory adopts a contractual view of the Constitution. A contract is a method for arranging cooperation between people which limits the extent of cooperation to that which is agreed upon by the parties. It is particularly well suited for arrangements between parties whose reason for cooperating is to further their own ends. After the parties have completed their undertakings, their relationship ceases, leaving each free to pursue other aims.

If the Constitution is a contract to which the parties are the people of Australia, it would be wrong for any court or other institution to change the terms of that contract because the contract defines the extent to which the people of Australia have agreed to cooperate with each other. They are only bound to the extent to which they have agreed to cooperate until they change the terms of the agreement. This allows them to tailor their cooperation to suit their needs. If the judges change the Constitution, they are defeating the purpose of the scheme of cooperation which the people have established.

However, there are good reasons for not accepting the assumption that the Constitution is a contract. Firstly, unlike a contract, the Constitution binds us although we were not parties to it and have had no opportunity to consent to its terms. Our failure to exercise the power given by the Constitution to change its terms by referendum cannot be taken as a consent, at least as consent is understood in the law of contract. To be bound by a contract, it is necessary to expressly agree

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23. Goldsworthy argues more strongly for the right of the people to choose the extent to which they wish to adopt a particular system of government and to compromise particular principles in "Implications in Language, Law and the Constitution" in Lindell (ed), *Future Directions in Australian Constitutional Law*, especially 179-82.

to its terms; otherwise we do not have the opportunity, which is central to contract, to tailor its terms to meet our needs.[24]

Even if the Constitution could be regarded as a special sort of contract, which, unlike normal contracts, was binding on persons who were not parties to it and have not expressly consented to it, the fact that it binds people who were not parties to it destroys the argument for judicial restraint which the contract model provides. That argument claims that it is wrong for the judges to alter the terms on which the people of Australia have agreed to be governed, because to do so is to impose on them a system of government to which they have not agreed. As the Constitution binds persons who have not agreed to any of its terms, it is inevitable that the people will be subjected to a system of government to which they have not agreed. The judges cannot prevent that no matter how they decide constitutional cases. Therefore, the argument does not provide a good reason for judges not to make policy in constitutional cases.

Defenders of the social contract may try to avoid these difficulties by suggesting that it is the people as a corporate body who have consented to the Constitution. The corporate body remains bound although its members change over time. We, as part of that corporate body, are bound by its consent although we were not members at the time it gave its consent. This argument cannot be accepted because the obligations we owe to government – such as obligations to obey the law, to pay taxes and to perform other civic duties – are owed as individuals, not as a corporate body of citizens. If the obligations we have as individuals are justified by our consent, we must have consented as individuals, not as a corporate body.

Besides, if it is accepted, the contractual argument proves too much because it claims that the people are not bound by any changes to the Constitution unless they have consented to them. We know that the Constitution and the governments which it established, especially the federal government, do not operate as they did at federation. It is probable that the framers of the Constitution would be astonished at the extent to which power has been concentrated in the hands of the federal government. To be consistent, the contract model must condemn the growth of federal power as an unjustified change to the agreement of the people, and argue

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24. Hence, consistently with contract principles, the courts have decided acceptance of a contractual offer must be express and that silence does not equal consent: *Felthouse v Bindley* (1862) 11 CB (NS) 869, 142 ER 1037; *Empirnall Holdings v Machon Paull Partners* (1988) 14 NSWLR 523.

that fidelity to the Constitution requires us to restore the system of government as at federation.

Supporters of the contract model cannot defend their position by arguing that the Constitution was designed to allow for growth and change because to do so is to concede that the Constitution is not a contract. Contracts are designed to rule out growth and change. Their purpose is to fix the obligations of the parties as at the date of the agreement so that the parties can tailor the agreement to meet their ends. Contractual obligations do not evolve over time because to allow them to evolve would prevent contracts from being used for this purpose.

Consent, Commitment and the Constitution

The contract model of the Constitution recognises that choice plays an important role in determining the content of the Constitution. Ours is not the only reasonable system of government. In 1900, we could have reasonably adopted a different system and, if we had done so, we would now be bound by that system. However, the contract model distorts the role which choice plays and is unable to explain other features of our Constitution. Contracts are normally used for determining the basis of limited cooperation between self-interested individuals who are pursuing their own private ends. As contracts enable the parties to limit the extent of their cooperation by the terms of the agreement, contractual relationships do not evolve over time unless the parties change the terms of the contract. Viewing the Constitution as a contract suggests that it is an agreement between self-interested individuals to set up a government for their own private ends. This vision of government as a private organisation set up to serve the limited ends of private individuals ignores two fundamental intuitions about the nature of government. The first is that governments are established for public rather than private purposes. The second is that governments evolve over time so that, although the Commonwealth is different from what it was at federation, there is an organic unity between it and the Commonwealth established at federation.

Constitutional theory needs to reconcile the role of choice in determining the content of the Constitution with the intuition that the Constitution deals with public, not private, purposes, and establishes a system of government which has the capacity to grow over time without losing its essential unity. The contract model is unable to do this for reasons dealt with above. Realism fails even more dramatically. The realist view that judges are not bound by the Constitution but are free to make policy in order to achieve a just solution in the particular case is inconsistent with both the notion that the Constitution grows organically and with

the claim that popular choice has a role to play in determining the content of the Constitution.

We need a new model for the Constitution to explain our intuitions. That new model can be found in the idea of a commitment.[25] Commitments are of many different types. They are similar to contracts in that they are based on choice; no one has to make commitments and an involuntary commitment may be of little value. However, they differ from contracts in that a commitment is not an agreement. Imagine a dictator who commits "himself" to establishing democracy in "his" country in three years time. The dictator is bound by that commitment whether or not it is the result of an agreement. If the commitment was the result of an agreement, the agreement would provide additional reasons for honouring it. However, there are good reasons for concluding that such a commitment made without an agreement is binding. The fact that the commitment was not the result of an agreement may merely indicate that the people were too cowed to force the dictator to make concessions. In such a case, there is every reason to hold the dictator bound by the commitment. It is possible to interpret such a commitment as an agreement with oneself. However, that is a fiction which hides the reality that no agreement is necessary for a commitment to be binding.

The Constitution may be understood as a combination of two common types of commitment, a commitment to ideals and a commitment by a person with power to those who are subject to that power. Together, they explain many of the most puzzling features of the Constitution.

Viewing the Constitution as a commitment to ideals, such as the ideals of representative democracy and of federalism, can explain many of the puzzles surrounding its interpretation and implementation. Firstly, it explains the role of choice. Federalism and representative government are not the only reasonable principles on which a system of government could be based. However, in 1900 we committed ourselves to them by an act of choice. Having made that commitment, we are bound by it until we change it.

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25. The author has already suggested that the Constitution is a commitment to ideals of government in "Constitutional Commitments, not Original Intentions" (1994) 16 *Sydney Law Review* 250. The account offered here differs from that in that article by suggesting that the Constitution embodies two types of commitment, a commitment to ideals and a commitment by the government to the governed, rather than the one type of commitment, that of a commitment to ideals. The change is designed to overcome objections to the earlier theory outlined in the text.

We are not bound by our commitment in the same way as we would be by the terms of a contract. A contract is essentially an agreed compromise between the conflicting interests of the parties. Its terms are settled at the date of the agreement so as to embody the compromise and do not evolve over time. A commitment to an ideal is not an agreed compromise. Therefore, our understanding of what the commitment entails may develop over time. At any particular time, we are bound by our best understanding of the commitment at that time, rather than our understanding at the time we made the commitment. For example, I may commit myself to being honest. At the time I made the commitment, my understanding of honesty may not have extended to the taxation office and I may have considered that it was not a breach of the commitment to lie in my tax return. My understanding of honesty may develop over the years so that I realise that my commitment extends to the taxation office. My commitment then binds me to honesty to the tax office, although I did not interpret it as extending so far when I made it.

Viewing the Constitution as a commitment to ideals enables us to understand the approach of the courts to interpreting it. The courts are entrusted with interpreting the ideals embodied in the Constitution. As our understanding of those ideals has changed, the courts have modified their interpretation to embody that changed understanding. For example, it is clear that the understanding of representative democracy accepted by the framers of the Constitution allowed all adults who were not caucasian men to be denied the vote.[26] We now believe that understanding was mistaken so that the Constitution entitles all adult citizens regardless of sex or race to vote.[27] Similarly, our understanding of federalism is very different from that of the framers.

The role of the courts has not been limited to reflecting community understanding of the ideals embodied in the Constitution. They have developed a binding, official understanding of those ideals through their role as constitutional interpreters by building up a body of case law which is as much a part of the Constitution as the document itself. As a result of this case law, we now interpret the Constitution differently from the way it was interpreted in 1900. However, this

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26. The Constitution s 25 assumes that people can be denied the vote on the grounds of race while s 128 assumes that not all women will have the vote.

27. As early as 1975, a majority of the High Court were of the opinion that the Constitution granted all adult Australians the right to vote: *A-G (Comm); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

process of reinterpretation does not disrupt the essential unity of the Constitution as long as the judges remain committed to the ideals embodied in the original document.

Although viewing the Constitution as a commitment to ideals explains the way in which the Constitution can evolve through interpretation without losing its essential unity, it cannot explain why the judges are bound by the Constitution. Commitments to ideals are not used to organise society but tend to be personal commitments which do not impose obligations to other members of the community on the person making the commitment. If I make a commitment to be honest, the making of the commitment does not impose any additional obligation on me to be honest to others. Therefore, if I break the commitment, I have failed to live up to my ideals but I have not broken an obligation to other members of the community. Commitments to ideals retain this feature even when they are made in an institutional setting. For example, members of some religious orders may take vows of poverty, chastity and obedience. Although taken in an institutional setting, they do not impose obligations owed to other members of the community. Therefore, failure to live the vows may be seen as wrong but not as a breach of an obligation to others similar to a breach of contract.

The commitment of judges and other officials to accept the limits on their power flowing from the Constitution is not of this personal type. Clearly, judges have an obligation to the community to adhere to the limits on their power which the Constitution imposes. It may appear that the problem of relating, on the one hand, the personal nature of commitments to ideals to, on the other hand, the theory that the Constitution is such a commitment, can be overcome by viewing the community – rather than its individual members – as the person who made the commitment. If the community is seen as a person, judges and other officials are its mouthpieces. Therefore, if they ignore the commitments in the Constitution, the community can be said to have failed to live up to its ideals. As the judges speak for the community, they are responsible for that failure and hence have an obligation to adhere to the community's commitments.

Although the argument rightly stresses that the judges speak for the community in their dealings with individual citizens, it cannot be accepted because, if it imposes an obligation on the judges, that obligation is an obligation to the community, considered as a person, not to cause it to betray its ideals. Although judges may have such an obligation, it is not their primary obligation which is owed to the individual citizens who are subject to the power which they exercise. The theory that the Constitution is a commitment to an ideal cannot explain that

obligation because personal commitments to ideals do not generate obligations to others.

The Constitution imposes obligations on judges because it is not only a commitment to ideals but also a commitment made from a position of power. Commitments made by a person who has power over others are normally seen as imposing obligations. Hence the dictator who voluntarily promises to introduce democracy has an obligation to "his" subjects to honour the commitment whether or not the commitment was the result of an agreement with "his" subjects. Similarly, teachers who commit themselves to particular methods of assessment are under an obligation to their students to keep the commitment, whether or not the students agree to that assessment method.

The obligation in these cases arises from the imbalance of power between the parties and the relationship of dependence which it creates. The dependence of the less powerful party imposes an obligation on the party with the power to honour the commitment. It does not depend in any way on agreement because the less powerful party may be so powerless as not to be in a position to express an opinion on the matter, let alone negotiate an agreement. Nor is the obligation in any way reciprocal as is that which results from an agreement. Hence, the obligation which arises from an imbalance of power between the parties is an additional justification for condemning a morally obnoxious government which ignores the restraints that it itself has imposed on the way in which it exercises its powers, even though it is too evil for its citizens to owe it any obligations. At a more mundane level, the teacher's commitment to assess students in a particular way imposes obligations on the teacher but not on the students.

The Constitution ought then to be seen as a commitment by the community, acting through the organs of government, to govern the people in accordance with the principles contained in the Constitution. The imbalance of power between the government and the courts, on the one side, and the individual citizen, on the other, imposes a duty on the government and the courts to the people to abide by that commitment. As the Constitution commits the community and the government to certain principles which have been given the status of law, the High Court has a responsibility to adopt the best interpretation of those principles.

The idea that the Constitution is a commitment by government to particular ideals of government which is binding on the government and the courts because of the power imbalance between the government and the people, explains the

nature of the court's obligation to interpret the Constitution better than any theory that the Constitution is a social contract between the people and the government.

Firstly, as argued above, if the Constitution is a contract entered into by the people and government, its interpretation is fixed at the date of its adoption and can only be changed by the people agreeing to change its terms. On this view, the High Court is bound by the original meaning of the text and there is no justification for any of the changes of interpretation which it has introduced since 1900. On the other hand, the theory that the Constitution is a commitment to ideals can explain these changes consistently with the idea that the Constitution is law binding on the court, because it requires the High Court to interpret the Constitution in accordance with the best understanding of the ideals to which the Constitution commits it, whether or not the drafters would have accepted that understanding.

Secondly, as the Constitution is a commitment entered into by government, the difference in power between the government and the citizen imposes a duty on the government and the courts to abide by that commitment. Therefore, the courts are not free to make policy or to do substantive justice regardless of the terms of the Constitution, but owe a duty to the people to abide by it.

Thirdly, the claim that a government is bound by its commitments because of the power imbalance between it and the people – unlike the social contract theory – explains why a Constitution can be binding regardless of its origins. As a government acts in accordance with a Constitution and accepts the limits which it imposes on its powers, the Constitution gains the status of a commitment by the government to the people. As such, whatever its origins and whether or not the people had the chance to endorse it, it comes to impose obligations on the government and the courts. Therefore, our Constitution binds the government and the courts whether it is seen, as it was for many years, as an Act of the British Parliament or an expression of the will of the Australian people.

The theory can be used to explain the court's duty in cases such as the free speech cases. Those cases were decided on the basis that the Constitution establishes a representative democracy and that representative democracy requires a legally protected guarantee of free speech to operate effectively. Goldsworthy argued that the fact the founders did not adopt such a guarantee means that it is improper for the High Court now to imply one. On the contract view of the Constitution, this is correct. However, it does not follow if the Constitution is seen as a commitment to ideals, including the ideal of representative democracy. In 1900, the founders may have believed that the best interpretation of representative

democracy required that the protection of free speech be left to the parliament rather than the courts. At that time, given the nature of the courts and the parliament, they may have been correct. However, it is arguable that the changes which have taken place since, such as the growth of the party system and of the public service, have given the executive government so much control over parliament that it can no longer be relied upon to guard the right. The best protection today may be by means of a constitutionally guaranteed right enforceable by the courts.

These arguments do not necessarily mean that the High Court was right in the freedom of speech cases. The Court was too quick to jump from the premise that representative democracy requires free speech to the conclusion that the best way to protect free speech is by means of a guarantee enforced by the courts. This is not obvious and it needed to be argued. Even if it is accepted that such a guarantee is needed, the Court should not use it to justify substituting its own judgment for that of parliament in cases where it is not clear that the legislation is an unreasonable restraint of free speech. For example, there is a strong argument that the legislation in the political advertising case was a reasonable attempt to ensure that political debate was not reduced to the level of thirty-second jingles. Where there is such a justification for the legislation, it is wrong for the court to substitute its own judgment for that of the legislature.

However, the argument does show that the claim by the High Court that the Constitution contains a guarantee of free speech which the courts have a duty to enforce cannot be dismissed as an attempt by the Court to usurp power which the Constitution has not given it. Instead, it must be regarded as a serious attempt by the Court to do its duty as interpreter of the Constitution.