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DEAD HANDS OR LIVING TREE? STABILITY AND CHANGE IN CONSTITUTIONAL LAW

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Geoffrey Lindell has been a leading figure in Australian constitutional law for more than 20 years. He and I have been close friends and colleagues for even longer. I believe that each of us has been a strong influence on the other in our thinking on constitutional law and on the way we taught it. That does not mean we agree on everything. Differences of personality inevitably affect perceptions and convictions. But Geoffrey's clear writing style and straightforward, logical form of argument are such that you usually know exactly where the point of disagreement lies. I have said of him from time to time (as I once heard H L A Hart say of John Austin): 'He may be clearly wrong, but at least he is wrong clearly'. In fact, we are usually on the same wavelength.

Geoffrey Lindell's work covers a wide range of matters within constitutional law. My first acquaintance with his work was in supervising his thesis on justiciability of constitutional questions, which was a pioneering effort. Since then he has been our leading authority on that subject. [1] His article on the effect of independence on the binding force of the Constitution became a classic. His idea of popular sovereignty as a legal doctrine was later taken up by High Court judges, but for a purpose, and with results that he did not intend or entirely approve.[2]

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1 See, eg, Geoffrey Lindell, 'Duty to Exercise Judicial Review' in Leslie Zines (ed) *Commentaries on the Australian Constitution* (1977) 150; Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 180.

2 Geoffrey Lindell, 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137–8 (Mason J); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 180 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).

Geoffrey's work has also covered many other areas, such as the principles of interpretation in respect of powers and limitations on powers,[3] responsible government and electoral and parliamentary matters.[4] He has also contributed to constitutional reform through his work for the Constitutional Conventions and on the Distribution of Powers Committee of the Constitutional Commission.

All of these subjects illustrate the theme of this Conference, and I shall be referring to some of them in this address.

I DEAD HANDS OR LIVING TREE?

A syntactic analysis of the title of the conference would indicate that a choice is being offered. But the metaphors used seem designed to elicit only one answer. Nobody but a psychotic would want a dead hand (let alone a plurality of them), but almost everyone rejoices in a living tree. 'Dead hands' is designed to elicit disapproval or aversion, while 'living tree' clearly signifies something attractive and desirable.

'Dead hands' entered our constitutional law, I believe, in the judgment of Deane J in *Theophanous v Herald and Weekly Times Ltd*,[5] where he expressed opposition to construing the Constitution 'on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions'. He contrasted what he called the 'dead hand theory of construction' with Inglis Clark's description of the Constitution as a 'living force',[6] which is, I suppose, for his purpose, equivalent to a living tree.

So far as I can see, 'living tree' has not caught on as a phrase in Australian constitutional law. Its origins lie, I think, in the Privy Council's interpretation of the *British North America Act 1867*. Lord Sankey introduced the phrase in order to justify the Court's radical decision, in 1930, (which overruled the Canadian Supreme

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3 Geoffrey Lindell, 'The Australian Constitution: Growth, Adaptation and Conflict' (1999) 25 *Monash University Law Review* 257, 262–6; 'A Legal Perspective' in Brian Galligan (ed) *Australian Federalism* (1989) 180.

4 Geoffrey Lindell, 'Responsible Government' in Paul Finn (ed) *Essays on Law and Government* (1995) Vol 1 75; 'Judicial Review and the Composition of the House of Representatives' (1974) 6 *Federal Law Review* 84; 'Proportionate Representation of States in the House of Representatives and Associated Issues' (1988) 11 *University of NSW Law Journal* 102; Review Article (1983) 6 *University of NSW Law Journal* 261; Parliamentary Inquiries and Government Witnesses (1995) 20 *Melbourne University Law Review* 383.

5 (1994) 182 CLR 104, 171.

6 A Inglis Clark, *Studies in Australian Constitutional Law* (1901) 21.

Court) that women were 'persons' for the purpose of the privilege of being appointed to the Senate.[7] He said that the *British North America Act* 'planted in Canada a living tree capable of growth and expansion within its natural limits'. Within a few years, however, the Privy Council refused to follow that precept. Their Lordships, instead, likened the Canadian constitutional system to a ship of state which 'still retains the watertight compartments which are an essential part of her original structure'.[8] By use of this metaphor the Canadian Parliament was denied the independent power to legislatively implement treaties binding on Canada, which it possessed before Canada achieved sovereignty.

Nevertheless the living tree metaphor occasionally surfaced later,[9] and it has come back into full vigour in the interpretation of the Charter of Rights and Freedoms. In *Re B C Motor Vehicles Act*,[10] the Charter was described as a living tree which is required to have the possibility of growth and adjustment over time. The court said it was necessary to ensure that historical materials did not stunt its growth.[11] I should add, by the way, that that is the reason the *travaux preparatoires* of the Treaty of Rome setting up the European Economic Community have not been made public.

Lord Sankey's metaphor, however, does not point to a clear way out of what the Conference title refers to as a 'conundrum' because it speaks of growth and expansion of the Constitution 'within its natural limits'. That part of the metaphor can provide a lot of scope for disagreement among what might be called conservatives, liberals or radicals in interpretation. The language could probably be embraced by supporters of originalism, at any rate of the Australian variety.

Lord Sankey's principle was briefly introduced into Australian constitutional law by Evatt J in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*[12] for the purpose of urging a large and liberal construction. He regarded the Canadian principle as the same as that adopted by Isaacs J in *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* ('the *Wooltops* Case'),[13] who said that:

> It is the duty of the Judiciary to recognise the development of the Nation and apply established principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community . . . .

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7 *Edwards v Attorney-General (Can)* [1930] AC 124, 136.

8 *A-G (Can) v A-G (Ont)* [1937] AC 326, 354.

9 *A-G (Que) v Blaikie* [1979] 2 SCR 1016, 1028–30; *Re Residential Tenancies Act* [1981] 1 SCR 714, 723.

10 [1985] 2 SCR 486, 509.

11 Following *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357, 366.

12 (1931) 46 CLR 73, 115.

13 (1922) 31 CLR 421, 438–9.

Apart from that reference 'living tree', as a metaphor, does not seem to have been significant in our constitutional law. It can, however, as I have said, be regarded as the same as (or transformed into) 'living force' as used by Deane J, following the language of Inglis Clark.

Deane J's clear purpose was to move away from tying the interpretation of the Constitution to the intention of the framers. He quoted Inglis Clark at some length, but the quoted passage is not unambiguous. It could just as easily be read as requiring the meaning of the text to be that which it had in 1900. Clark is quoted as saying that unless the Constitution was changed the language must be interpreted by the judiciary consistently with the historical associations from which particular words and phrases derive the whole of their meaning in juxtaposition with their context.[14] Elsewhere Clark seemed to express as a rule of interpretation that one must 'follow the intention of the makers as they have disclosed it in the language in which they have declared the law'.[15] As Goldsworthy has said, Inglis Clark appears to have been 'a kind of originalist'.

II THE FRAMERS

There is evidence that some of the framers of our Constitution saw it as an organic or evolving instrument that was intended to apply to situations in the future that they could not imagine. This is certainly manifested in Deakin's famous second reading speech introducing the *Judiciary Bill* in 1902 where he spoke of the High Court as being able from time to time to transfuse into the Constitution 'the fresh blood of the living present'. The Court would ensure that the Constitution was 'adapted to the changeful necessities and circumstances of generation after generation'. It would, he said, be 'interpreted in accordance with the needs of the time'.[16]

Whether or not other delegates saw future judicial activity as treating the Constitution as an organic instrument, a number of them were aware that the courts could construe it in unexpected and unintended ways. At the 1898 Convention Isaacs pointed out that while the delegates were taking infinite trouble to express what they meant the judges would, as occurred in America, have just as much to do in shaping the Constitution as the members of the Constitutional Conventions.[17]

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14 A Inglis Clark, above n 6, 21–2; *Theophanous v Herald Weekly Times Ltd* (1994) 182 CLR 104, 171–2 (Deane J). See Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 17.

15 J Goldsworthy, ibid 17, fn 106.

16 Commonwealth Parliamentary Debates, House of Representatives, 18 March 1902, 10967–8 (Alfred Deakin).

17 Official Record of the Debates of the Australasian Federal Convention, 28 January 1898, 283 and see also Melbourne 2 March 1898, 1727–8 (Isaac Isaacs).

During the debate on making reference to God in the preamble, Higgins, relying on supposed United States authority, pointed to the possibility of the court making implications that were unintended unless the delegates took care.[18] The late and sudden desire of some delegates to make the High Court the final and conclusive interpreter of the Constitution, and so exclude the Privy Council, was not based merely on local pride. Some delegates expressed the view that interpretation might be affected by social conditions, and those conditions would be better known and understood by Australians than by the lords of the Privy Council.

When Dr Quick asked why we should be afraid of submitting the interpretation of the Constitution to the highest court of the Empire, Dr Cockburn replied: 'Because they do not live under the same conditions and do not understand them'. That was too much for Dr Quick, who said:

> Surely we do not expect that the men who are going to interpret this Constitution are going to exercise legislative functions. Will they not have to interpret the Constitution according to the English language in which it is expressed?

A friend and former colleague of mine, and of Professor Lindell's, Dr Gary Rumble, once sent me that passage, adding a note which said that it 'tends to indicate that Quick was a bit slow'.[19]

Of course the framers expected their words to have effect and they struggled over many phrases. The drafting was not regarded as a relatively useless enterprise. This is indicated by Higgins's effort to insert s 116 into the Constitution to prevent the court making inferences that were unintended. Higgins was one of the delegates who paid great attention to the detailed wording of provisions. The draft insurance power, for example, initially read: 'Insurance, including state insurance extending beyond the limits of the State concerned'. Higgins said that an excluding rather than an including clause was required because 'insurance' covered all types of insurance. He convinced the other delegates, and the clause was changed to exclude State insurance except that extending beyond the State. The former draft might have given rise to an implication that State activities were not embraced by a Commonwealth power unless expressly included. The early court, of course, adopted that view anyway,

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18 Ibid 1734–5. On the framers' views, generally, see Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87.

19 See Sir Robert Garran, *Prosper the Commonwealth* (1958) 137. Sir Robert Garran set out an extract from a newspaper article giving personal reminiscences of John Quick. The writer said: 'There was something elemental, physically and in his mental processes, about Dr Quick, whose name was indeed a misnomer. He was like the mills of God grinding slowly and exceeding small.'

applying the then doctrine of inter-governmental immunities, with strong dissents from Isaacs and Higgins.[20]

One would not expect the issue of original intent or organic growth to arise in the earlier years of federation. Yet, almost immediately, members of Parliament were arguing about and puzzling over what the framers had intended. As a number of the framers were not dead hands, but living members of Parliament, they were asked.

An amendment was made to the *Conciliation and Arbitration Bill* to extend its provisions to disputes involving State railways and their employees. Questions were directed to former delegates as to their intentions regarding such disputes. One member, Glynn, said that 'it was never for one moment contemplated'.[21] Deakin said that 'there was no allusion to the matter' so far as he could remember. Forrest, who said he had been persuaded by Higgins to support the arbitration clause (and whose vote and that of his Western Australian followers were vital to its success) said that he never contemplated that the power would extend to disputes between a State and its employees. He asked Higgins if at the time he thought it would do so. When Higgins said he could not distinguish between coach drivers and train drivers, Forrest's reproachful response was 'if he knew why did he not mention it?'. Higgins, he believed, had led him astray.[22] So much for the framers' actual intentions. The issue of inter-governmental immunities, which has been such a prominent issue for the court at various times, does not seem to have been considered at the Conventions. If, in respect of this matter, any 'dead hands' are reaching from their graves, they are those of past judges.

III THE CONSTITUTION AS A LIVING TREE

Although the judges, with few exceptions, have adhered to the principle that the meaning of the text of the Constitution remains constant, no one could reasonably conclude that the general progress of the Australian union has been stunted by the 'dead hands' of the framers or the electors of the 1890s. Most of the changes that have occurred can reasonably be described as those that one should expect of an organic instrument. Judicially they have been accomplished by the adoption of rules and presumptions which reflect a policy of ensuring that, so far as possible, the Constitution is interpreted to take into account social and technological change.

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20 Official Record of the Debates of the Australasian Federal Convention, Adelaide 17 April 1897, 779–82.

21 Commonwealth Parliamentary Debates, House of Representatives, 8 September 1903, 4768 (Patrick Glynn).

22 Commonwealth Parliamentary Debates, House of Representatives, 14 April 1904 1034, 1142 (Sir John Forrest).

In his Lucinda Lecture in 1999, Geoffrey Lindell said that the rules of statutory interpretation were (and should be) applicable to the Constitution despite[23] R T E Latham's description of them as 'crabbed' and 'one of the sorriest features of English law'. Much of the force of Lindell's view is blunted by a proviso that proper account must be taken of the different nature of the Constitution. This proviso, he states, may have avoided the necessity for devising entirely separate principles of interpretation.[24] For my part, the proviso is so general that it compels the formulation of special principles that are quite often very different from those applied to the proverbial Dog Act.

One such principle, or perhaps presumption, is that wherever possible a broad interpretation is to be preferred. This was the view that O'Connor J propounded, and it has frequently been followed.[25] But it was Sir Owen Dixon who stated most clearly the policy behind the rule, which is obviously in the 'living tree' category. He emphasised that the Constitution should be interpreted having regard to the fact that it is an instrument of government meant to endure and containing powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.[26]

Of course to say that one should adopt a liberal progressive or dynamic approach does not necessarily lead to a conclusive result. In the words of Lord Sankey growth and expansion of the tree must be 'within its natural limits'. On that, minds can differ. This is illustrated by the history of the marriage and divorce powers, as analysed by Geoffrey Lindell, showing a failure of judicial techniques to accommodate the change in the concept of a family unit, giving rise to sharp disagreements in the court.[27]

The dichotomy of connotation and denotation has enabled the court to exercise a great deal of choice in determining whether a particular activity comes within a legislative subject matter or limitation on power. It has assisted the court in maintaining that it is following the original meaning while adjusting the Constitution to new or evolving situations. The indeterminate nature of the concepts of connotation (or meaning) and denotation ensures that a judge is rarely forced, for that reason, to a particular conclusion. At times the statement that in 1900 a

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23 Geoffrey Lindell, 'The Australian Constitution: Growth, Adaptation and Conflict' (1999) 25 *Monash University Law Review* 257, 264; R T E Latham, The Law and the Commonwealth (1949) 510, 563.

24 Compare Higgins J in *A-G (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469, 611.

25 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367–8.

26 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81.

27 B Galligan (ed), above n 3, 150–7.

particular factor came within the connotation of the words, or otherwise, is simply stated as a dogmatic assertion. Occasionally it is said that the connotation encompasses anything that the term may mean at any particular time.[28] A few years ago I expressed the opinion that it is doubtful whether the rule that the meaning of a term is that which it had in 1900 has had very much effect. In other words, the rule is not usually a barrier to giving a term any reasonable modern meaning.[29]

The same is no doubt true of the interpretative approach expounded by McHugh J in *Re Wakim; Ex parte McNally*,[30] where he appears to rely on Dworkin's distinction between 'concept' and 'conception' — the former retaining its original meaning while the meaning of the latter may change. However, the difficulties I have with McHugh J's view are such that I am not sure I fully understand it.[31]

Another way in which the 'living tree' has been allowed to grow is by treating constitutional terms as related to the changing social or political context. Defence is an obvious example, as is the expansion of the content of the executive power as a result of the development of Australian sovereignty. Similarly 'Queen' and 'subject of the Queen' in the Constitution clearly referred to an Imperial Queen and Crown. That institution disappeared with the empire. That fact, without more, would have placed our Constitution and our institutions in peril. That was regarded as necessitating a new and different reference to a national crown, as reflected in *Nolan v Minister for Immigration and Ethnic Affairs*[32] as to the meaning of 'alien' and *Sue v Hill*[33] in respect of 'foreign power'.

It is at this point that one can get impatient at a description of what happened as a change of application, denotation, or facts, but not a change of meaning. For all except lawyers, and possibly only constitutional lawyers, it would be reasonable to say that the meaning of these expressions has, indeed, changed. The Imperial monarch and Crown had powers such as ss 58 and 59 (reservation and disallowance), s 74 (requiring the Queen's assent to a further limitation on Privy Council appeals) and s 2 (power to grant new powers to the Governor-General), which were suited to an Imperial Queen and Government. That position has gone

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28 See *Davis v Commonwealth* (1988) 166 CLR 79, 96 regarding 'trade marks' and *R v Federal Court of Australiia; Ex parte W A National Football League* (1979) 143 CLR 190, 233 regarding 'trading corporations'.

29 Leslie Zines, 'Characterisation of Commonwealth Laws' in H P Lee and G Winterton (eds), above n 1, 35–9.

30 (1999) 198 CLR 511, 511–54.

31 See Arthur Glass, 'Making the Constitution Work' (1999) 2 *Constitutional Law and Policy Review* 28–31; Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 705–8.

32 (1988) 165 CLR 178.

33 (1999) 199 CLR 462.

and we have someone in a different position for whom some of the powers are inappropriate, ridiculous or positively harmful. We have only to contemplate the Prime Minister advising the Queen to disallow an Act of Parliament passed by an earlier Parliament because the Senate will not agree to its repeal. The change, however, has come about because it is the only way to make sense of our institutions in the light of political and international events.

Such a situation could arise in respect of s 2 of the *Australia Act*, which provides that references to the Queen extend to her heirs and successors in the sovereignty of the United Kingdom. There are some, unlike myself, who regard this provision as meaning we are stuck with whoever is monarch of the United Kingdom;[34] even if, despite the *Australia Act*, it is a result of future changes to the British law of royal succession.[35] That is all very well until we contemplate the breakup of the United Kingdom or that country becoming a republic before we do. On either supposition our Constitution would break down in the absence of fairly speedy constitutional amendment or legal revolution. The very possibility of that result might lead to the conclusion that s 2 is merely intended to make clear that the references to the Queen extend to her legal successors. I have in any event agreed with a 1938 opinion of Professor Kenneth Bailey (as did the Constitutional Commission) that the latter interpretation is in accordance with the intention of the framers and the British Parliament.[36]

Another manner in which constitutional change has been allowed to take place is reflected in the tendency to recognise that some terms were in a fluid or evolving state at the time of enactment. Growth or development are thus seen as an inherent part of their nature. In *Re Refugee Review Tribunal; Ex parte Aala*[37] it was argued that a denial of natural justice was not a ground of review in respect of the writs in s 75(v) of the Constitution, because that was the position in 1900. Gaudron and Gummow JJ made an extensive examination of this issue in the cases decided in the nineteenth and early twentieth centuries and concluded that

> [t]he law was in a state of development. The doctrinal basis for the constitutional writs provided for in s 75(v) should be seen as accommodating that subsequent development when it is consistent with the text and structure of the Constitution as a whole.[38]

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34 George Winterton, *Monarchy to Republic: Australian Republican Government* (1986) 21; 'The Evolution of a Separate Australian Crown' (1999) 19 *Monash University Law Review* 1, 2.

35 But see *Sue v Hill* (1999) 199 CLR 462, 502.

36 Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 313–7.

37 (2000) 204 CLR 82.

38 Ibid 97.

Gleeson CJ and Hayne J agreed.

The *Plant Variety Rights Act 1987* (Cth) was upheld under the patents power on similar reasoning. The joint judgment examined the evolution of the concept of 'patents of invention' which showed that it was a developing area in 1900. The power was therefore seen as, in this respect, similar to s 51(v), which has express terms ('other like services') pointing to future technological development.[39]

All of the judicial rules, presumptions and methods of interpretation I have referred to tend to be accepted by those in Australia who are concerned with 'original intent', at any rate if they are followers of the moderate version of originalism as expounded by Jeffrey Goldsworthy.[40] I am not concerned with that issue here, except to point out that the use of all these methods and principles has had the result that, if the past has a hold on our Constitution, it seems to me to be a rather loose hold in many respects.

To the reasonable observer the living tree metaphor seems very apt. That does not mean that it is a tree which everyone likes in its present shape and detail. For some it has become misshapen because of what they regard as interference with its natural growth. For some the development of, say, the financial powers, the external affairs power, implied rights and freedoms and the crippling of co-operative federalism have produced, not organic growth, but a partial destruction of the organism. These results, however, have not arisen in any obvious way from any dead hands reaching from their graves. The complaints are often based on the reverse argument; but in the ultimate they are, in my opinion, inspired by the values or policies of the critics.

In recent years the court has gone beyond new applications of constitutional provisions or even extensions of meaning. In two cases, at least, the High Court seemed to suggest that a term or phrase should not be given the meaning it clearly had in 1900 where it is contrary to our present day perceptions or values. The result is that a statutory provision could be valid in 1901 and invalid today, without any relevant change in social facts, other than our values or the way we understand things. It is at this point that at least some originalists part company.

In *Cheatle v The Queen ('Cheatle')*[41] a unanimous judgment of the court held that in 1900 it was an essential feature of trial by jury that conviction needed agreement of all the jurors, and that requirement governed the meaning of s 80 of the Constitution.

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39 *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479.

40 J Goldsworthy, above n 14; 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 150.

41 (1993) 177 CLR 541.

On the issue of qualification for jurors the Court said it was an essential requirement that the jury be a body of persons representative of the community. It was noted that in 1900 the exclusion of women and unpropertied persons was justified by the then current perception that men of property were the only true representatives of the wider community. The judges went on to say that the exclusion of women and unpropertied persons would be inconsistent with the requirement of trial by jury 'in the more enlightened climate of 1993'.[42]

A similar approach has been referred to in respect of representative government. We know as a matter of historical fact that the reference to the 'people' of the five colonies in the preamble and 'chosen by the people' in ss 7 and 24 did not necessarily refer to women, nor were they necessarily excluded. Only two colonies had female suffrage in 1900. Subject to s 41, the issue of the franchise was without doubt left to the Commonwealth Parliament, which gave electoral qualification in 1902 to non-Aboriginal adult men and women who were British subjects, with some exceptions.

In *A-G (Cth); Ex rel McKinlay v Commonwealth*,[43] McTiernan and Jacobs JJ said that it was doubtful if anything less than universal suffrage could now be described as a choice by the people. Toohey, Gaudron and Gummow JJ in *McGinty v Western Australia*[44] took the same view.[45] In *Langer v Commonwealth*[46] McHugh J agreed with that view, as did Kirby J in *Kartinyeri v Commonwealth*.[47] As was the case with *Cheatle*, this is to say that what the framers intended is no longer included in the meaning of the relevant terms because it does not conform to our present views or values.

These decisions and judicial statements have been attacked from an originalist point of view by Jeffrey Goldsworthy.[48] He said that as the repeal of women's franchise is not even a remote possibility '[i]t would be foolish to abandon well-established principles of interpretation' in order to ensure its entrenchment. He pointed out that if the time ever came when abolition of female suffrage was attempted it would show that Australia's values were very different and, on the non-originalist argument, the repealing law should be upheld. Nevertheless it is undoubtedly the case that a proposed constitutional amendment to ensure universal suffrage would be successful, and his point is that that is more desirable than engaging in what is from his perspective a breach of the proper principles of interpretation.

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42 Ibid 560–1.
43 (1975) 135 CLR 1, 36.
44 (1996) 186 CLR 140.
45 Toohey J, 201; Gaudron J, 221–22; Gummow J, 287.
46 (1996) 186 CLR 302, 342.
47 (1998) 195 CLR 337, 400, n 271.
48 J Goldsworthy, above n 31, 698–9; above n 14, 37–8.

Others, however, who accept the position that as a general rule the Constitution should be interpreted in accordance with the likely intention at the time of enactment, believe that some change or evolution of the central idea of representative government and choice by the people is permissible, having regard to the expected and actual longevity of the Constitution. That is Jeremy Kirk's view, which he labels 'evolutionary originalism'.[49] I had expressed a similar opinion in *The High Court and the Constitution*.[50]

Accepting that the framers intended, from the terms of provisions such as ss 7 and 24 of the Constitution, a form of representative government, it would strike most people in the community today as ludicrous to suggest that voting qualifications limited to males or persons of property would satisfy that concept. The opposing view would mean that a clear object of the Constitution would lose significance for the community, becoming of only antiquarian interest. This in turn could have an effect on how the Constitution is regarded by the community.

It seems to me that where a constitutional institution such as representative government is at stake it is appropriate to say that the framers were wrong in their belief that members of Parliament could be 'chosen by the people' on the basis of a restricted franchise, even though 'wrong' here means, not wrong about facts that they were unaware of, but simply wrong according to how we see things through our modern values and understandings. That is not the same as interpreting 'banks' in s 51(xiii) to include stem cell banks, or construing 'bankruptcy' to include moral bankruptcy or confining 'aliens' to creatures from outer space.

Kirby J has shown impatience with all these attempts to reconcile the intention of the framers, as expressed in their language, with ensuring that the Constitution remains fit to govern a modern society. He expounded this view forcefully in *Grain Pool of WA v Commonwealth*.[51] In a lecture at Melbourne University on 9 September 1999, he referred to the search for original intention as a form of 'ancestor worship', adopting a phrase used by the Chief Justice of Canada to describe American originalism as propounded by Justice Scalia.[52] Kirby J declared that the Constitution was 'set free from its founders' in 1901 and should be read 'so as to achieve the purposes of good government which the Constitution was designed to promote and secure'.

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49 Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323.

50 L Zines, above n 36, 398.

51 (2000) 202 CLR 479, 522–30.

52 See Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1.

Nevertheless the tension implicit in the theme of this Conference is shown by his statement that the theory he is propounding 'is not to defeat the intention of the Constitution and its framers. On the contrary, it is to achieve its high and enduring governmental purposes.'

Justice Kirby's view has been trenchantly criticised by Professor Goldsworthy and has been labelled by him 'radical non-originalism'.[53] Certainly the judge's language can suggest that one must start with the text of the Constitution, construing its terms in any modern sense that would serve good government and giving little attention to its meaning or likely meaning at the time of enactment. Kirk has referred to some of Kirby's comments as perhaps venturing 'far into the dangerous drifting currents of non-originalism'.[54]

One of Goldsworthy's strong arguments is that Kirby J's view would allow him to interpret the phrase 'peace, order and good government' in s 51 as a substantive limitation on Parliament's powers, if it would, in his opinion, serve the purpose of good government. This gives no attention to the established principle that those words are intended to confer plenary power, which was undoubtedly the intention of the framers.

In fact, some judges of the Court of Appeal of NSW did construe a similar phrase in the *Constitution Act* of that State in a literal sense as a restriction on power.[55] Kirby, as President of the Court of Appeal, cast doubt on that view. That does not necessarily dispose of the point made by Goldsworthy as Kirby P may have been relying on policy considerations, as well as original meaning. However, he did say that: 'By their history, purpose and language these words may not be apt to provide a limitation on what the legislature may enact'.[56]

I doubt whether any case has been decided by the High Court on the basis that the meaning intended in 1900 should simply be ignored as totally irrelevant. There are occasions when it is impossible to determine any intention, and I have argued that in those circumstances it is a fiction to say one is seeking meaning in 1900. Also, the connotation-denotation distinction is often a shield for judicial policy choices and, at least at times, can be nothing else. The same may be true of the distinction between what the framers intended by the enactment and what they expected of its application. Even originalists such as Goldsworthy suggest that in such

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53 J Goldsworthy, above n 31, 679.

54 J Kirk, above n 49, 364.

55 *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 ('*Building Construction Case*'). The High Court rejected that interpretation in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

56 *Building Construction Case* (1986) 7 NSWLR 372, 406.

circumstances it is permissible to look at modern values and policies. Perhaps it would be more of an originalist position to require the court to determine what the framers would have decided if they had thought about the matter. But that could, as a practical matter, amount to the same thing.

Therefore, although the difference between Kirby J and other judges, as well as with other lawyers such as Goldsworthy and Kirk, is of theoretical importance, I have some doubt as to its practical significance. The tension between stability and change exists under either view. Most decisions could be consistent with either view. For example, Goldsworthy had admitted that most constitutional disputes may not be resolvable by resort to the original intention of the framers,[57] while Kirby J in the *Building Construction Case* did not regard the history of the words 'peace, welfare and good government' as irrelevant in determining its modern meaning. Similarly he looked to history and the Convention Debates as background for determining the meaning of s 47 of the Constitution relating to disputed elections.[58]

IV RESPONSIBLE GOVERNMENT

The issue of change and evolution is particularly applicable to the constitutional recognition of responsible government, on which subject Geoffrey Lindell is one of our leading authorities.[59] But the issue here is whether the rules should be kept away from the courts to preserve flexibility. Notwithstanding the paucity of detailed provisions, it has always been accepted that our constitutional system embodies the concept of responsible government. This was despite the doubts of some framers as to whether it was consistent with an American-style Senate.[60]

Many of the rules and principles of responsible government have been traditionally regarded as governed by unwritten constitutional conventions rather than as impliedly prescribed by the Constitution. Indeed it was regarded as improper (and likely to be treated in London as manifesting colonial ineptitude and ignorance) to expressly provide that prerogative powers should be exercised on the advice of Ministers.[61] The result was a constitution that on the surface seemed to give the Queen and the Governor-General powers that would not be out of place in Czarist Russia.

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57 J Goldsworthy, 'Originalism in Constitutional Interpretation', above n 14, 20.

58 *Sue v Hill* (1999) 199 CLR 462, 502.

59 See, eg, Geoffrey Lindell, 'Responsible Government' in P Finn (ed), above n 4.

60 Official Record of the Debates of the Australasian Federal Convention, Sydney, 4 March 1891, 23–8 (Sir Henry Parkes).

61 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 10 March 1898, 2254 (Edmund Barton).

Lindell favours a system under which the courts recognise, but do not enforce, the principles of responsible government.[62] That is to allow for change in the system, enabling it to adapt to altered circumstances. But in the light of decisions that hold that the Constitution embodies a system of representative government, such as *Australian Capital Television Pty Ltd v Commonwealth*[63] and *Lange v Australian Broadcasting Corporation*,[64] it may be that some of the central rules relating to responsible government are now to be regarded as rules of law. These include those relating to the duty of the Governor-General, in the normal course, to act on advice as to the choice of a prime minister and the duty of a prime minister to resign or be dismissed in the face of action by the House of Representatives.

Professor Winterton from an early date expressed the view that these rules were legally enforceable under the Constitution. In the last edition of *The High Court and the Constitution* I said that if the rules are not matters of law, one could hardly say that the Constitution provides, as the High Court has held, for representative government.[65] The discretion given to the Governor-General in exercising the reserve powers would, of course, remain; but he or she would, perhaps, be legally required to exercise them for the advancement of representative and responsible government.

In favouring conventional rules on the basis of adjustment to changing circumstances I think Lindell understates the extent to which law, particularly as a result of constitutional interpretation, adapts to new situations, but it does indicate that implied legal rules should not go beyond those clear rules that underpin our system of representative and responsible government, and which would obviously be prescribed in any formal amendment of Chapter II.

V JUDICIAL INTERPRETATION OR CONSTITUTIONAL AMENDMENT?

Another issue involved in the Conference is the role of judicial interpretation of the Constitution in the face of provision in s 128 for its formal amendment. That has been touched upon in respect of adult suffrage. There are of course limits to what the court can do in accordance with any of the theories of interpretation that have been suggested or applied to adjust a constitution to new conditions. While a judge nearly always has a choice, the choice is limited and fashioned by the instrument and what is regarded as legitimate legal methodology.

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62 G Lindell, above n 60, 82.

63 (1992) 177 CLR 106.

64 (1997) 189 CLR 520.

65 George Winterton, *Parliament, the Executive and the Governor-General* (1983) 2, 80, 273; L Zines, above n 37, 250–1.

That can give rise to different views and it does not always depend on whether the person evaluating or judging can be generally described as a progressive or a conservative. One example is Geoffrey Lindell, who is in matters of construction usually a careful gradualist, a strong supporter of the *Engineers Case*[66] and an opponent of increasing judicial power by use of implications or loose construction.[67] Yet in 1998 he expressed a view, contrary to that which he had stated 10 years earlier, that it was arguable that the marriage and divorce powers should be seen merely as examples of federal power to deal with family relations. Although those relationships were based on marriage in 1900, they could now be seen as encompassing those not based on marriage.[68] For some this might seem like a direct contradiction of the subject-matter of the marriage power. Whether it can be regarded as a proper application of a purposive approach to interpretation is an issue on which I suspect people will have differing views

On the other hand, judges who had given new and very broad interpretations to the external affairs, corporations and arbitration powers, enunciated implied rights and freedoms, and decided *Mabo*,[69] baulked at interpreting the phrase 'trading and financial corporations formed within the limits of the Commonwealth' in s 51(xx) as merely contrasting with 'foreign corporations', mentioned in the same paragraph. They thus rejected the view that the Commonwealth could create corporations under that power. While they purported to rely on the intention of the framers, to many the evidence was flimsy, ambiguous and unconvincing.[70] Several of the problems relating to family law and corporations law have, of course, been dealt with by referral rather than constitutional amendment.

It would not have occurred to many until recent years that the pooling of powers by the Commonwealth and States in one body (at any rate a non-judicial one) would require a constitutional amendment, in the light of decades of practice, the decision in *The Queen v Duncan; Ex parte Australian Iron and Steel Pty Ltd*,[71] and what Professor Saunders once aptly called 'a genial jurisprudence about the constitutionality of co-operative schemes'.[72] As a result of *R v Hughes*,[73] it seems

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66 *Almagamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 LLR 129 ('*Engineers Case*').

67 See, eg, Geoffrey Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in G Lindell (ed), above n 40, Ch 1.

68 Geoffrey Lindell, 'Some Reflections About the Recent Judicial Developments on Representative Democracy' (1998) 20 *Adelaide Law Review* 111, 125 n 40.

69 *Mabo v Queensland* (No 2) (1992) 175 CLR 1 ('*Mabo*')

70 *NSW v Commonwealth* (the *Incorporation Case*) (1990) 169 CLR 482; L Zines, above n 36, 102–4.

71 (1983) 158 CLR 535.

72 Cheryl Saunders, 'Oration: Sir Daryl Dawson' (1998) 20 *Adelaide Law Review* 1, 4.

73 (2000) 202 CLR 535.

that a constitutional amendment may be needed to achieve that result. But would that be to overcome the result of the 'dead hands' of the framers or the living force of the High Court?[74]

This complex interrelationship of political considerations, judicial decisions and the issue of formal amendment can be seen in respect of another aspect of the corporations power. The expansion of the corporations power greatly increased the Commonwealth Parliament's role in nearly all matters of commerce and finance. There was no similar expansion of the commerce power, which was on a number of occasions given a somewhat restricted interpretation.[75]

This created a rather absurd situation in which all matters of commerce and finance conducted by trading and financial corporations could be regulated by the Commonwealth, while those same matters (other than banking and interstate and overseas transactions) were the exclusive preserve of the States when conducted by other persons. This had little regard to commercial reality. One possibility would have been for the Commonwealth to test the extent of the commerce power in areas of production and intra-State trade, which it has not done for a quarter of a century. It chose, however, the route of co-operative federalism. As I have mentioned, the court seems in the process of applying a scorched earth policy to that area.

Among various options then is whether an amendment should be sought to reinstate co-operative federalism, having regard to the fact that the court has not only rejected the path symbolised by the 'living tree'; it may be about to lop off the branch of joint intergovernmental co-operation that flourished for the best part of a century.

One interesting by-product of this development, involving Geoffrey Lindell, might be mentioned. As Professor Cheryl Saunders has shown,[76] the topic of responsible government has a bearing on this matter, as joint schemes often involve an administrator and executive government administering an Act which was enacted by the Parliament of another polity. Gaudron, Gummow and Hayne JJ in *Egan v Willis* referred to this as an example of where responsible government as we know it does

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74 Professor Lindell has persuasively argued that, in respect of non-judicial powers, s 51 (xxxviii) of the Constitution could be used to ensure the validity of such schemes. "National Competition and Tax Price Exploitation Codes – Post *Hughes*", Paper delivered on 10 September 2002 at a Seminar on Commercial Regulation and Administration – Recent Public Law Developments, jointly organized by the University of Western Australia Law School and the Australian Association of Constitutional Law.

75 *A-G (WA); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492.

76 For example, Cheryl Saunders, 'Administrative Law and Relations Between Governments: Australia and Europe Compared' (2000) 28 *Federal Law Review* 263.

not fully conform to the Westminster model,[77] and they cited the chapter written by Lindell on responsible government.[78] This seemed to show that they accepted such schemes as part of our system. One must now question that initial reaction in the light of recent cases.

VI CONCLUSION

Many of the matters I have dealt with are issues to which our guest of honour has made a remarkable creative contribution. I have no doubt that he will continue to do so in his formal retirement.

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77 *Egan v Willis* (1998) 195 CLR 424, 451.

78 See P Finn (ed), above n 4.