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# THE CONSTITUTIONALISATION OF THE COMMON LAW

## I INTRODUCTION

The common law is 'constitutionalised' if it is made immune from legislative change by reason of the Constitution. That will occur when the content of some aspect of the common law is determined by the Constitution, as was the case in *Lange v Australian Broadcasting Corporation* ('*Lange*').[1] This 'constitutionalisation' process has been the subject of some confusion, perhaps because it appears to invert the usual hierarchy of legislation and the common law. In this article we seek to resolve that confusion. We therefore begin by describing the relationship between the Constitution and the common law as developed by the High Court. In the next part of the article, we provide our analysis of that relationship. We explain that, although there might be prudential reasons to avoid the constitutionalisation of the common law where there is a satisfactory alternative,[2] the 'constitutionalisation' process is consistent with conventional understandings of the common law.

In the final part of the article, we consider the institutional factors that might cause Australian courts to develop the common law by reference to the Constitution. In Australia, unlike some other countries, the way in which the relationship between the common law and the Constitution is defined does not affect the appellate jurisdiction of the highest court in constitutional cases: the High Court is the highest court of appeal for all cases, regardless of subject-matter. Instead, we will argue, the institutional factors influencing the constitutionalisation of the common law in Australia vary, depending on the available alternatives to that approach. When the alternative is developing a purely constitutional rule, the High Court may constitutionalise the common law because this approach encourages gradual,

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1 (1997) 189 CLR 520.

2 As is argued in Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219.

incremental development of the law. By contrast, when the alternative is developing a purely common law rule, it appears that the Court may constitutionalise the common law in order to give itself a reason to re-examine its earlier decisions. We will suggest, however, that constitutionalising the common law should not give the High Court free rein to overrule an earlier decision that it disagrees with on substantive, non-constitutional grounds.

## II DISCUSSION BY THE HIGH COURT

### A *Sir Owen Dixon*

Interest in the relationship between the common law and the Constitution is not new. It was a frequent subject of Sir Owen Dixon, who described the common law as 'an ultimate constitutional foundation.'[3] He emphasised the Constitution's common law origins: the Australian Constitution is a statute of the Parliament at Westminster, whose powers are themselves conferred by the common law, and thus the Australian Constitution exists by virtue of the common law. Further, as his judgment in *Australian Communist Party v Commonwealth* (the '*Communist Party Case*')[4] makes clear, Dixon believed that in certain cases the powers of government are limited by fundamental common law doctrines,[5] a controversial idea that, nonetheless, has some modern adherents.[6] Less controversially, Dixon observed that the common law provides the content for certain provisions of the Constitution (such as the reference to 'jury' in s 80,[7] or the executive power conferred by s 61[8]) and also provides some rules of interpretation.

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3 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in *Jesting Pilate* (1965) 203.

4 (1951) 83 CLR 1.

5 See generally Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Federal Law Review* 57, 67–8.

6 See nn 174 and 175 below.

7 See eg *Cheatle v The Queen* (1993) 177 CLR 541, 549 (the Court): '[t]he reference to "trial … by jury" in s 80 was to [the] common law institution [adopted in all the Australian Colonies as the method of trial of serious criminal offences]'.

8 The non-statutory powers of the British executive government at federation may illustrate the scope of Commonwealth executive power. See eg *Barton v The Commonwealth* (1974) 131 CLR 477, 494–8 (Mason J, with McTiernan and Menzies JJ agreeing on this point: 491), 506 (Jacobs J); see also 484 (Barwick CJ) (considering the non-statutory power to request extradition of fugitive criminals), and *Ruddock v Vadarlis* (2001) 183 ALR 1, 47–8 [176]–[180], 49 [183] (French J, with Beaumont J agreeing: 25 [95]); see also 7 [9], 11 [26] (Black CJ, dissenting) (considering the non-statutory power to prevent non-citizens from entering Australia).

### B *Lange: The Constitution and the Common Law of Defamation*

The High Court's judgment in *Lange* sparked a renewed interest in the relationship between the common law and the Constitution. The Court stated:

> Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds. The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution.[9]

The interaction between the common law and the Constitution described here is of a different order than that considered by Dixon. The finding in *Lange* that 'the common law must conform with the Constitution' seems to mean that there are cases in which the Constitution *drives* or *determines* the content of the common law. As is well known, in that case the Court reviewed the common law of defamation and revised the common law defence of qualified privilege to conform to the requirements of the freedom of political communication. The defence of qualified privilege, as it existed before *Lange*, was not usually available with respect to publications to the world at large. In the Court's view, that doctrine was unduly restrictive of freedom of expression in its application to political discussion. The Court recognised that each Australian 'has an interest in disseminating and receiving information ... concerning government and political matters that affect the people of Australia' and, as a corollary, a duty to disseminate this information.[10] Accordingly, the common law defence was extended so as to conform to the requirements of the freedom of political communication.[11]

### C *Pfeiffer: The Constitution and Common Law Choice of Law Rules*

This form of interaction between the common law and the Constitution has also arisen in the choice of law rules applicable to intra-national torts. In *John Pfeiffer Pty Ltd v Rogerson*,[12] the High Court (after several attempts[13]) finally overturned the so-called 'double actionability' rule derived from *Phillips v Eyre*.[14] Six judges

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9 (1997) 189 CLR 520, 566.

10 Ibid 571.

11 See ibid 571–5. See n 113 below.

12 (2000) 203 CLR 503.

13 See *Breavington v Godleman* (1988) 169 CLR 41; *McKain v R W Miller & Co (SA)* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433; *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463.

14 (1870) LR 6 QB 1.

held that the choice of law rule applicable to intra-national torts was the substantive law of the place of the wrong (the *lex loci delicti*).[15] However, although the *lex loci delicti* governs 'substantive' laws, 'procedural' laws continue to be governed by forum law. More significantly for the outcome in *Pfeiffer*, the Court also redefined 'substantive' laws to include matters such as limitation laws and laws for assessing damages,[16] while 'procedural' laws were limited to laws directed to governing or regulating the mode or conduct of court proceedings.[17]

The joint judgment was clearly affected by constitutional concerns: in particular, sections 117 and 118 of the Constitution, the structure of the federal court system (with federal jurisdiction exercised by state and federal courts, overseen by the High Court), and 'the nature of the federal compact' including the territorial concerns of the states and the territories.[18] However, these judges expressly left open the question of whether their conclusions were dictated as a constitutional imperative.[19]

## III MAKING THE COMMON LAW 'CONFORM' TO THE CONSTITUTION: FURTHER ANALYSIS

### A *Legislation Cannot Alter the Constitutionally-Required Aspects of the Common Law*

The aspect of *Lange* and *Pfeiffer* that has attracted most disagreement among commentators is the consequences of the common law being developed so as to 'conform' to the Constitution. Our view is that this development of the common law would be immune from interference by the legislature. Elsewhere, one of us has described two possible ways of understanding the Constitution's interaction with the common law:

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15 (2000) 203 CLR 503, 540 [87] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 562-3 [157] (Kirby J); cf 576 [201] (Callinan J, who did not decide this issue).

16 Ibid, 543 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ): substantive laws are those which 'affect the existence, extent or enforceability of the rights and duties of the parties to an action'; see also 554 [133]–[134] (Kirby J), 574–5 [193]–[200] (Callinan J).

17 Ibid, 543-4 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 554 [133], 563 [161] (Kirby J), 574 [192] (Callinan J).

18 Ibid, 535 [67].

19 Ibid, 535 [70]. Both Kirby J and Callinan J, by contrast, stated that their conclusions did not depend on constitutional factors: ibid, 557 [141], 576 [201], respectively.

(1) *The 'Mandatory Effect' Model*: Under this conception, the *Constitution* requires that the common law change in certain ways. As a result, where a change is made to the common law in response to some aspect of the *Constitution*, those changes are 'constitutionalised' and immune from subsequent legislative restriction.[20]

(2) *The 'Guidance' or 'Mere Influence' Model*: Under this conception, the *Constitution* is a guide to the direction of the common law but does not require change. Accordingly, where a change is made to the common law in response to some aspect of the *Constitution*, the Parliament remains free to change the new doctrine even where it has been developed to conform to the *Constitution*.[21]

1 *Lange: Constitution Lays Down Minimum Level of Protection*

*Lange*, we argue, provides a clear example of the former. As already noted, the Court held that the previous common law did not provide sufficient protection for discussion of political matters, and extended the defence of qualified privilege to provide more protection. If a legislature sought to restrict the new defence of qualified privilege, that law would violate the freedom of political communication and thus be invalid.[22] We reject, therefore, an alternative analysis that suggests that, in circumstances such as those described in *Lange*, the Constitution has merely guided or influenced the direction of the common law but leaves legislatures free to change the new doctrine that was developed to conform to the *Constitution*.[23] Although it is conceivable that the Constitution and the common law might sometimes interact in this way, it is not the form of interaction envisaged in *Lange*. Parliament could, however, modify the common law by providing even *more* protection to political communication.[24] Accordingly, in circumstances like these, the Constitution operated like a boundary or a fence around an aspect of the common law, preventing movement beyond the boundary but allowing movement

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20 This leaves open the possibility that the legislature could confer more generous protection of rights than the Constitution requires. The legislature simply cannot act in a way that derogates from the minimum constitutional requirement: see the text accompanying nn 24 and 74 below.

21 Adrienne Stone, 'The Common Law and the Constitution – A Reply' (2002) 26 *Melbourne University Law Review* 646, 648.

22 For a full analysis of this point, see ibid, Part II(A).

23 As has been suggested by Greg Taylor in 'Why the Common Law Should be only Indirectly Affected by Constitutional Guarantees: A Comment on Stone' (2002) 26 *Melbourne University Law Review* 623.

24 *Lange* (1997) 189 CLR 520, 566: 'The common law rights of persons defamed may be diminished by statute but they cannot be enlarged so as to restrict the freedom required by the Constitution'.

within it. It precludes certain common law rules without determining the precise content of the new common law rule.[25]

We advance this interpretation of *Lange* even though there are some statements in the judgment that might seem to be inconsistent with it. For example, the statement that the freedom of political communication 'preclude[s] the curtailment of the protected freedom by the exercise of *legislative or executive power*'[26] might be taken to suggest that the freedom of political communication does not apply to the common law. However, the Court effectively retracts that statement, firstly by stating that the common law must nonetheless conform to the *Constitution*, and also by indicating that some legislative revisions of the modified common law test would be precluded.[27] Those statements are made quite emphatically in *Lange*, and were explicitly confirmed in *Pfeiffer*.[28]

### 2 *Pfeiffer: Removal of Double Actionability is Constitutionally Required, but Lex Loci Delicti Rule is Not*

In *Pfeiffer*, the extent of the Constitution's influence on the particular common law rule at issue is much less clear than was the case in *Lange*. Although constitutional features played an important role, the joint judgment expressly refrained from stating whether the particular choice of law rule adopted (the *lex loci delicti*) was required by the Constitution.[29] Some commentators have argued that *Pfeiffer* is an example of the Constitution merely influencing, without dictating, the development of the common law.[30] We disagree. Although the Court is not as clear on the matter as it was in *Lange*, in our view, a better reading of *Pfeiffer* is that *some*

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25 See *Pfeiffer* (2000) 203 CLR 503, 558 [143] (Kirby J). Similarly, in Canada there is some scope for Parliaments to alter the balance struck by the common law between competing constitutional rights, provided the legislation is consistent with the constitutional standards outlined by the courts (see *R v Mills* [1999] 3 SCR 668, 711–3 [56]–[60]). Adopting the *Mills* approach, there could be a range of permissible regimes that meet the constitutional standards set out by the courts (say, the two-stage test set out in *Lange* (1997) 189 CLR 520, 567), and Parliaments would not necessarily be confined to the specific common law rule adopted by the courts (see *Mills*, ibid, 712 [59]).

26 *Lange* (1997) 189 CLR 520, 560 (emphasis added).

27 Ibid 566.

28 (2000) 203 CLR 503, 535 [70] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ): 'It may be that [the constitutional factors] operate constitutionally to entrench [the *lex loci delicti*] rule, or aspects of it concerning such matters as a "public policy exception". *If so, the result would be to restrict legislative power to abrogate or vary that common law rule.*' (emphasis added)

29 See n 19 above.

30 See for example Greg Taylor, 'The Effect of the Constitution on the Common Law as Revealed by *John Pfeiffer v Rogerson*' (2002) 30 *Federal Law Review* 69.

aspects of the joint judgment's reasoning are constitutionally entrenched, although other aspects (including the *lex loci delicti* rule) are not.

To explain this point, we will analyse how the Constitution affects the three doctrinal changes made in *Pfeiffer*. As already mentioned, *Pfeiffer* rejected the former 'double actionability' rule, concluded that the choice of law rule for intra-national torts should be the *lex loci delicti*, and expanded the meaning of 'substantive' laws to include matters like limitation laws. The reasoning in the *Pfeiffer* joint judgment contained the following constitutionally-affected steps that led to the first two doctrinal changes:

(1) the outcome of a matter in federal jurisdiction should not depend on where in Australia proceedings are brought;[31]
(2) there should be the same choice of law rule for matters in federal and State jurisdiction;[32]
(3) it is inconsistent with a federal system (in particular, the full faith and credit requirement in s 118 of the Constitution) to have a 'public policy' exception to the courts of one State giving effect to the laws of another State;[33]
(4) a rule that applies the *lex loci delicti* gives effect to the expectations of the parties, and reflects the fact that the predominant concern of the State and Territory legislatures is with events and things within their respective geographical areas.[34]

*(a) Double Actionability and Uniform Outcomes in Federal Jurisdiction*

Of these, we consider that step (3) is the most likely to be constitutionally entrenched. The joint judgment confirmed that the first limb of *Phillips v Eyre* was part of a choice of law rule, rather than going to the court's jurisdiction.[35] On this approach, the only apparent role for the requirement that the conduct be 'wrongful' under the law of the forum (in addition to the *lex loci delicti*) was to act as a 'public

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31 (2000) 203 CLR 503, 532 [59]; see also 526 [38].

32 Ibid 532–3 [60], 535 [68].

33 Ibid 533 [63], 541 [91]. The joint judgment also refers to s 117 of the Constitution. However, it is doubtful whether double actionability is contrary to s 117, because any difference in outcome resulting from the application of the rule does not arise from the inter-state residence of one of the parties, but rather the inter-state location of the events being litigated.

34 Ibid, 536–7 [75]; see also 533–4 [64], 540 [86]–[87].

35 Ibid, 520–1 [23]–[26]; see also *McKain* (1991) 174 CLR 1, 39 (Brennan, Dawson, Toohey and McHugh JJ, citing Brennan J's formulation of *Phillips v Eyre* in *Breavington* (1988) 169 CLR 41, 110-1).

policy' filter that ensured that the courts of the forum would not be called upon to enforce foreign causes of action that were considered repugnant.[36]

Once the first limb of *Phillips v Eyre* was characterised in this way, the conclusion that it was contrary to s 118 of the Constitution was all but dictated by the High Court's earlier decision in *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd*.[37] In *Merwin*, the High Court rejected an argument that a Victorian court could refuse to apply a New South Wales statute (the *Moratorium Act 1930* (NSW)) to a contract governed by New South Wales law if the Victorian court considered that the statute contravened notions of morality or the fundamental policy of the law.[38] A majority held that, not only was such an approach not supported by common law authority, it was also contrary to s 118 of the Constitution.[39] Accordingly, of the three doctrinal changes made in *Pfeiffer*, we think it is clearest that the overruling of the double actionability rule has been constitutionalised and therefore could not be reintroduced by legislation.

Justice Gaudron (who was party to the *Pfeiffer* joint judgment) would also consider that the conclusions following from step (1) should be immune from legislative amendment. In previous cases, Gaudron J held that an essential aspect of federal jurisdiction was that the outcome of cases could not be affected by where in Australia the proceedings happened to be instituted.[40] Deane J took a similar view.[41] In *Pfeiffer*, however, the joint judgment stated only that it would be 'odd or

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36 See *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 515 [60] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). In *Phillips v Eyre* itself, the House of Lords cited *Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v Bentham (The 'Halley')* as authority for the first limb ((1870) LR 6 QB 1, 28-9), where the Privy Council stated ((1868) LR 2 PC 193, 196):

> [a]n English Court of law will not entertain a cause of action arising in a Foreign country which would not lie here. Suppose that by the law of a Foreign country an insulting gesture, or defamation of an Official personage, is considered an assault, both of which are punished by fine or forfeiture, or again, until lately, by American law, in the Southern States, for harbouring a Slave; could an English Court administer here such remedy as is given by the Foreign law? It is absurd on the face of the proposition.

37 (1933) 48 CLR 565.

38 See the argument as described in ibid, 577 (Rich and Dixon JJ).

39 Ibid 577 (Rich and Dixon JJ); 587–8 (Evatt J). Starke and McTiernan JJ did not refer to s 118. But see *Loucks v Standard Oil Co of New York* 120 NE 198, 202 (Cardozo J) (1918), discussed in *Pfeiffer* (2000) 203 CLR 503, 541 [91].

40 See eg *Breavington* (1988) 169 CLR 41, 88 (Wilson and Gaudron JJ); *Stevens v Head* (1993) 176 CLR 433, 466 (Gaudron J, dissenting); *Commonwealth v Mewett* (1997) 191 CLR 471, 524 (Gaudron J).

41 See eg *Breavington* (1988) 169 CLR 41, 125. See further the analysis of Deane J's judgment in the text accompanying nn 122 to 133 below.

unusual'[42] for the outcome of cases in federal jurisdiction to vary, depending on where they were instituted. One reading of this statement (consistent with the views of Gaudron J) is that the Court would find invalid any legislation enacting a choice of law rule that led to non-uniform outcomes. Another reading, however, is that uniform outcomes for cases in federal jurisdiction are *desirable*, but not constitutionally required.

Any uncertainty on this point seems to have been resolved by the later case of *Blunden v The Commonwealth* ('*Blunden*').[43] The question in that case was what limitation legislation, if any, applied to a suit against the Commonwealth arising out of a collision on the high seas. The Court held that the plaintiff's cause of action was subject to the limitation legislation of the forum (in that case, the *Limitation Act 1985* (ACT)). Significantly for present purposes, the Court's conclusion meant that the 'substantive' law of a matter in federal jurisdiction could vary, depending on where proceedings were instituted.[44] Moreover, the Court rejected a test proposed by the Commonwealth (the law of the forum with the closest connection) that would have led to uniform outcomes. Admittedly, *Blunden* was an unusual case, because the cause of action arose in a place where there was no *lex loci delicti* (at least for domestic purposes). The Court also observed that the Commonwealth, unlike other defendants, can overcome any problems of 'forum shopping' by enacting its own limitation legislation.[45] However, these matters only go to the merits of the choice of law rule adopted. The result in *Blunden* is squarely inconsistent with any constitutional requirement that a case in federal jurisdiction must lead to the same outcome, regardless of where in Australia it is instituted.[46]

Admittedly, *Blunden* did not explicitly address the argument that the outcome of a case in federal jurisdiction must be uniform. However, we consider that (contrary to the views of Deane and Gaudron JJ) this argument should not be accepted. It is true that 'the source of the power to decide is constant' for cases in federal jurisdiction;[47] it does not follow, however, that a case in federal jurisdiction must result in the same outcome, regardless of where in Australia it is instituted. As

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42 *Pfeiffer* (2000) 203 CLR 503, 532 [59] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

43 (2003) 203 ALR 189.

44 *Blunden* concerned limitation periods, which *Pfeiffer* established were part of the 'substantive' law. The proceedings were in federal jurisdiction, because the Commonwealth was a party (see s 75(iii) of the Constitution).

45 See *Blunden* (2003) 203 ALR 189, 200 [44] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 213 [99] (Kirby J), 215 [108] (Callinan J).

46 On this view, federal jurisdiction was a constitutional feature that merely 'guided' or 'influenced' the development of the common law in *Pfeiffer* (see the text accompanying n 21 above).

47 See *Pfeiffer* (2000) 203 CLR 503, 532 [59] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

Kitto J noted in *Anderson v Eric Anderson Radio & TV Pty Ltd*,[48] '[t]he concept of federal jurisdiction does not imply the existence of a single body of law in force throughout the Commonwealth'. For example, federal courts in the United States have long applied the choice of law rule of the State in which they are situated, even though that potentially leads to different outcomes for matters in federal jurisdiction, depending on which state the proceedings are commenced.[49] The view of Deane and Gaudron JJ on this point depends either on a particular, and contestable, view of the nature of federation,[50] or on an equally contestable view of the nature of judicial power.[51]

In any event, to return to the choice of law context, the link between step (1) and the double actionability rule is less clear than might appear at first. As a practical matter, the real cause of forum shopping was the High Court's previous expansive view of 'procedural' laws,[52] rather than the double actionability requirement.[53]

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48 (1965) 114 CLR 20, 30.

49 *Klaxton Co v Stentor Electric Manufacturing Co* 313 US 487 (1941); subsequently applied in cases such as *Van Dusen v Barrack* 376 US 612, 628 (1964) and *Ferens v John Deere Co* 494 US 516, 519 (1990).
Of course, unlike Australia, the United States does not have a unified common law. However, like Australia, the *source of power* of federal courts in the United States to decide cases is constant (ie Article III of the United States Constitution). Therefore, while the *Klaxton* doctrine would not apply in Australia, *Klaxton* demonstrates that there is no necessary link between the constant source of power to decide in federal jurisdiction and uniformity of outcome.

50 Cf Graeme Hill, 'Revisiting Wakim and Hughes: The Distinct Demands of Federalism' (2002) 13 *Public Law Review* 205, 225 (arguing that *Pfeiffer* takes a 'cooperative' view of federation, whereas cases like *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 and *R v Hughes* (2000) 202 CLR 535 take a 'co-ordinate' view). *Blunden* does not alter this analysis of the *Pfeiffer* joint judgment, although it does suggest that this cooperative view of federalism may have influenced only matters of common law, rather than constitutional, reasoning.

51 In *Leeth v The Commonwealth* (1992) 174 CLR 455, Gaudron J held (in dissent) that a differential operation of Commonwealth laws in different law areas may be contrary to an implied constitutional guarantee of 'equal justice' (ibid 501–3). Later cases, however, confirm that provisions such as s 68 of the *Judiciary Act 1903* (Cth) (which pick up the law of the State or Territory where a court is exercising federal jurisdiction) 'violat[e] no constitutional imperative' (*Gee v The Commonwealth* (2003) 212 CLR 230, 255 [64] (McHugh and Gummow JJ); see also 241 [7] (Gleeson CJ), 270 [116] (Kirby J); see further *Putland v The Queen* (2004) 204 ALR 455, 462 [25] (Gleeson CJ), 470–1 [60] (Gummow and Heydon JJ, with Callinan J agreeing on this point: 486 [122]).

52 Especially the conclusions that limitation laws (*McKain* (1991) 174 CLR 1) and laws for assessing damages (*Stevens v Head* (1993) 176 CLR 433) were 'procedural'.

53 The additional requirement that the defendant's conduct be actionable under forum law could only *disadvantage* the plaintiff (who of course gets to choose which forum

Whatever weight can be attached to the constitutional considerations underlying steps (1) and (3), it is important to realise that, even if constitutionally entrenched, they would have a limited effect on the common law. They would require change to the existing law (and thus the changes would fit the 'mandatory influence' model discussed above), but would not compel any particular choice of law rule as a replacement.

*(b) State Jurisdiction and Lex Loci Delicti Rule*

Although it is strongly arguable that the conclusions underlying step (1) of the *Pfeiffer* joint judgment are constitutionally entrenched, we consider that there would be scope for legislation to alter the conclusions that follow from steps (2) and (4).

The constitutional force of step (2) can be tested by considering a choice of law rule that (a) permitted different outcomes for a matter in State jurisdiction, depending on where proceedings were instituted, but (b) chose a reason for not applying the law of another State that did not depend on notions of public policy (which would be contrary to s 118 of the Constitution), or the residence of the parties (which would be contrary to s 117[54]).

To take a frivolous example, suppose Queensland law provided that the choice of law rule applicable to intra-national torts in State jurisdiction was either the law of the State where the wrong occurred, or the law of Queensland, depending on which State's name came first in the alphabet.[55] The rule would not always lead to the application of Queensland law: for example, Queensland courts would apply the *lex loci delicti* to accidents that occurred in New South Wales, but would apply the law of the forum to accidents that occurred in Victoria. No doubt the law would be bad policy, but would it be unconstitutional simply because it created the possibility that the outcome of an action in State jurisdiction could vary, depending on where the

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to institute proceedings in) because, if an action could not be maintained under the *lex loci delicti*, it would fail the second limb of the *Phillips v Eyre* test too.

54 See *Goryl* (1994) 179 CLR 463 (s 117 rendered inapplicable a Queensland law that discriminated against an inter-State resident in the calculation of damages); see also Douglas Laycock, 'Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law' 92 *Columbia Law Review* 249, 265 (1992) (arguing that '[c]hoice-of-law rules that prefer local litigants *prima facie* violate the Privileges and Immunities Clause [in Art IV, § 2 of the United States Constitution]', which is broadly equivalent to s 117). As already noted, however, the double actionability requirement was not contrary to s 117 (see n 33 above).

55 James Stellios referred us to this example, taken from Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963), 608–9.

action was brought? We would argue no.[56] In our view, the application of a uniform choice of law rule to matters in State jurisdiction is like the application of the extended defence of qualified privilege to purely State and Territory and foreign political matters in *Lange*: desirable common law reasoning, but not constitutionally required.[57] As a practical matter, however, if the States enacted a choice of law rule that could only validly apply to matters in *State* jurisdiction, there could be an incentive for litigants to plead their case in such a way that brought the case within *federal* jurisdiction.[58]

Similarly, we would argue that in certain circumstances it would be permissible to alter the *lex loci delicti* rule (step (4)). Once it was held that a choice of law rule should lead to uniform outcomes in federal jurisdiction (step (1)), the choice of the *lex loci delicti* was perfectly sensible as a matter of common law reasoning. In our view, however, the reasons in the joint judgment for this step carry far less constitutional weight in their own right. The expectations of parties are probably unknowable, and of questionable relevance even if they could be determined.[59] It is true that one generally expects that events occurring in a State will be governed by the laws of that State, rather than another State. On the other hand, it is also clear that the States possess power to legislate with extra-territorial effect.[60] Moreover, the predominant territorial concerns of State and Territory legislatures appear to be of most significance in the case of a true *conflict* of laws, rather than in the case of a *choice* of law.[61]

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56 The fact that, by hypothesis, this choice of law rule would only affect matters in State jurisdiction means that it would not be subject to the full rigours of any implications drawn from Chapter III of the Constitution, but only implications of the kind drawn in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

57 See *Lange* (1997) 189 CLR 520, 571–2.

58 A proceeding otherwise in State jurisdiction could be brought within federal jurisdiction by raising a non-colourable claim under federal law (see eg *Fencott v Muller* (1983) 152 CLR 570), even as a defence (*Felton v Mulligan* (1971) 124 CLR 367, 373 (Barwick CJ), 403 (Walsh J)).

59 Gary Davis, '*John Pfeiffer Pty Ltd v Rogerson*: Choice of Law at the Dawning of the 21st Century' (2000) 24 *Melbourne University Law Review* 982, 999–1001.

60 See eg *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 (the Court); see also s 2(1) of the *Australia Act 1986* (Cth).

61 See *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 374 (the Court). It is necessary to distinguish between a conflict of laws and a choice of law (see *Pfeiffer* (2000) 203 CLR 503, 527–8 [43]). A *choice* of law is when, because of the inter-state element, the law of *neither* State applies in its terms to a facts situation. The choice of law rule therefore determines which law will apply. A *conflict* of laws is when the laws of two or more States are both expressed to apply to a facts situation. In this situation, there is an inconsistency between the laws, leading to the invalidity of one of those laws to the extent of the inconsistency. For that reason, we doubt whether a true conflict between laws of different States could be resolved by a common law rule (cf

Significantly, the reason the joint judgment rejected the so-called 'proper law of the tort' approach (which also would lead to uniform outcomes, at least in theory) was because of the practical difficulties in determining the proper law.[62] That conclusion seems to appeal to common law, rather than constitutional, values, and does not seem to rule out the possibility that another choice of law rule — such as the proper law of the tort — would be consistent with the Constitution. Accordingly, we would argue that there is no compelling constitutional reason that would prevent the States from legislating cooperatively to alter the *lex loci delicti* rule.[63] The same arguments would apply to any choice of law legislation enacted by the Commonwealth.[64]

*(c) 'Substantive' and 'Procedural' Laws*

As mentioned previously, *Pfeiffer* made a third doctrinal change: the scope of 'substantive' laws was expanded to include limitation laws and laws for assessing damages. The reasoning of the joint judgment on this point did not explicitly appeal to constitutional considerations. However, the earlier conclusion that the outcomes of cases in federal jurisdiction should not vary depending on where the proceedings are instituted (step (1)) would support taking a relatively narrow view of 'procedural' laws and a correspondingly broader view of 'substantive' laws.[65]

We acknowledge that our analysis of which aspects of the *Pfeiffer* joint judgment are constitutionally entrenched is a matter of interpretation. However, any interpretation of this aspect of *Pfeiffer* must be somewhat speculative, given that the joint judgment deliberately avoided deciding the question.[66] A further wrinkle is added to the matter by the later case of *Regie National des Usines Renault SA v*

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Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31 *Federal Law Review* 131, 163–4).

62 (2000) 203 CLR 503, 537–8 [76]–[80], especially 538 [79].

63 For example, Queensland and New South Wales have legislated so that cross-border workers' compensation claims involving those States are governed by the law of an employee's home State: see Chap 5A of the *WorkCover Queensland Act 1996* (Qld); ss 9AA to 9AC and Div 1A of Pt 5 of the *Workers Compensation Act 1987* (NSW).

64 It has been suggested that the Commonwealth could enact choice of law legislation under s 51(xxv) of the Constitution ('the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States'): *Breavington* (1988) 169 CLR 41, 79 (Mason CJ).

65 As noted, *Blunden* indicates that step (1) is not constitutionally entrenched either (see nn 43 to 46 above).

66 For a critical comment on the Court's failure to clarify this aspect of its reasoning, see Adrienne Stone, 'Choice of Law Rules, the Constitution and the Common Law' (2001) 12 *Public Law Review* 9.

*Zhang*.[67] In *Zhang*, the High Court adopted the same choice of law rule for international torts (the *lex loci delicti*) without referring to the constitutional considerations that were influential in *Pfeiffer* (because they were inapplicable) and, apart from Kirby J,[68] without referring to the desirability of having the same rule for international and intra-national torts. Accordingly, it appears that the Court could have reached exactly the same conclusions in *Pfeiffer* relying only on the common law considerations explained in *Zhang*.[69] That does not change the fact that the joint judgment in *Pfeiffer did* rely on constitutional considerations.

In any event, any disagreement about our substantive interpretation of *Pfeiffer* does not undermine our methodological point. However *Pfeiffer* is applied in future cases, it is likely that the Constitution will require some change to the common law (which consequently becomes immune from legislative alteration to that extent) but will leave other aspects of the law open to subsequent legislative alteration.[70] Some light may be shed on these issues by *BHP Billiton Ltd v Schultz*,[71] although that

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67 (2002) 210 CLR 491, subsequently applied in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 596 [9] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 623 [106]–[107] (Kirby J).

68 *Zhang* (2002) 210 CLR 491, 536 [126].

69 In general terms, the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ concluded: (1) the first limb of *Phillips v Eyre* could only operate as a technique of forum control based on public policy considerations, and it was appropriate that these considerations be addressed directly, rather than through the application of an arbitrary rule (ibid, 515 [60]); (2) the choice of the *lex loci delicti* promotes certainty, and is consistent with comity among nations and increased travel between nations (ibid, 516–7 [64], [66]); (3) subject to 'several caveats', there was no need for a 'flexible exception', because that too was concerned with public policy concerns that should be addressed directly (ibid, 519 [73]); (4) the possible caveats were (a) whether *all* questions about the means of assessing damages would be determined by the *lex loci delicti*, (b) the proper choice of law rule for disputes over the title to immovable property located outside the forum, and (c) the choice of law rule for maritime and aerial torts (ibid, 520 [76]).

70 In particular, it is most unlikely that legislation reimposing a 'double actionability' rule would be valid (see the text accompanying nn 35 to 39 above).

71 [2003] HCATrans 512 (4 December 2003), [2004] HCATrans 159 (18 May 2004); judgment reserved. In that case, BHP applied to have proceedings in the NSW Dust Diseases Tribunal transferred to the Supreme Court of South Australia under ss 5 and 8 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW). The NSW Supreme Court refused that application, referring (among other things) to the 'comparative evidentiary advantages' available in Tribunal proceedings (*BHP Billiton Limited v Schultz* [2002] NSWSC 981 (22 October 2002), [33] (Sully J)). In the High Court, BHP argued that these comparative advantages were not available, because the Constitution required the application of the substantive law of South Australia (the *lex loci delicti*).

case may turn on the proper construction of the transfer provisions of the cross-vesting scheme.

### 3 *Constitution's Effect is Partial*

Thus, we argue that both *Lange* and *Pfeiffer* operate to constitutionalise certain aspects of the common law but the effect of the Constitution on the common law is only partial.[72] By that, we mean that the Constitution renders only those aspects implicated by the relevant constitutional doctrine immune from legislative alteration.[73] In other words, although the Court may legitimately choose to develop the common law beyond what is required by the Constitution, the common law is only immune from legislative change *to the extent that it reflects the requirements of the Constitution*. 'Constitutionalising' the common law does not elevate the common law above legislation; it simply reflects the fact that legislation (including legislation that seeks to alter the common law) is subject to the Constitution.

So, in *Lange*, the Constitution required that the discussion of political matters relevant to Commonwealth government be protected. However, legislation could alter the common law to give less protection to the competing value (protection of reputation), which does not have a constitutional dimension, or to give less protection to discussion of political matters that do not come within the coverage of the freedom implied from the Commonwealth Constitution.[74] In *Pfeiffer* (we have argued), the better reading of the joint judgment is that the Constitution only requires that the choice of law rule for intra-national torts does not act as a 'public policy' filter and does not discriminate against inter-state residents. In our view, the legislatures are free to implement another choice of law rule, provided the new rule meets the requirements just specified.

Thus, the objection that constitutionalisation removes the desirable flexibility of the common law entirely overstates the effect of the process. The partial constitutionalisation of the common law does remove some flexibility from the law

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72 See A Stone, above n 21, Part II(C).

73 The constitutionalisation process need not give rise to the 'freezing' of large tracts of common law as feared by some critics. See G Taylor, above n 23.

74 There seems to be a division of opinion in more recent cases about whether the freedom implied from the Commonwealth Constitution applies to discussion of purely State political matters (see *Roberts v Bass* (2002) 212 CLR 1, 29 [73] (Gaudron, McHugh and Gummow JJ), 58 [159] (Kirby J); contra *Levy v Victoria* (1997) 189 CLR 579, 595–6 (Brennan CJ), 626 (McHugh J)). Further, there is a question whether the Court's attempt to narrow the 'coverage' of the implied freedom is consistent with the doctrine's underlying rationale (see A Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 377-90).

and for that reason ought to be approached carefully.[75] However, it also leaves Parliament freedom to revise other parts of the common law. Parliament's freedom arises because the Constitution is not concerned with many aspects of the common law — not because, as a general matter, the Constitution does not control the common law.[76]

So far, we have been considering the *consequences* of that control (namely, that legislation cannot alter certain aspects of the common law). We turn now to consider the *nature* of that control.

### B *Why Must the Common Law Conform to the Constitution?*

#### 1 *Constitutional Doctrines Limit Power to Develop the Common Law*

Although the Court stated clearly in *Lange* and *Pfeiffer* that the common law must 'conform' to the Constitution, it was less clear in explaining *why* it must conform. The simplest explanation is that the relevant constitutional doctrine (in *Lange*, the implied freedom of political communication) limits the development of the common law. In fact, we believe that it limits judicial power in general, in the same way that it limits legislative and executive power.[77] For the moment, however, we will focus on judicial development of the common law.

Of course, this explanation, though simple, is not advanced in *Lange* in those terms.[78] Nonetheless, the Court's conclusion that the common law must 'conform' to the Constitution cannot be explained any other way. In our view, the judicial enforcement of the common law is a form of government action. If the implied freedom constrains the development of the common law (which is what occurs when the court develops the common law to 'conform' to the Constitution), then that must be because the implied freedom limits the power of judges to develop the common law, just as it limits legislative and executive power.

Thus, in part, our point is simply descriptive. The High Court actually is applying the Constitution to the common law in a way that constrains judicial choice (and subsequent legislative revision of those choices). The only way to explain that is to regard the judicial development of the common law as an aspect of governmental power.

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75 A Stone, above n 2.

76 We would argue, however, that where the court does engage in the constitutionalising of the common law, it 'ought to recognise the significance of its decisions, pay careful attention to underlying values, and justify its choice of contested positions'. A Stone, above n 66, 12.

77 See n 83 below.

78 See the passage accompanying n 9 above.

We would add, however, that this is a persuasive analysis of the common law since it is sensitive to the insights of legal realism, which demonstrated the judge-made nature of the common law. The heart of that argument is that when courts develop the common law, they are making law, and thus engaging in the act of governing as much as any legislature or executive.[79] Indeed, we believe that our argument can only be resisted if one considered that the common law is not a product of sovereign power, but has some independent existence. That position relies, however, either on an entirely discredited pre-realist notion of the common law (which would hold that answers to common law questions, like the treasures of Aladdin's cave, are 'things' are waiting to be found[80]) or on a controversial view of common law rights as 'natural rights' that pre-exist that state. That latter view, which has sometimes been advanced in relation to property rights in particular,[81] is a controversial and, in our view, unpersuasive analysis of the common law.[82]

The conclusion that courts exercise government power when they develop the common law is further supported by the fact that most courts in Australia do not have any truly non-statutory powers, as their jurisdiction (even if generally expressed) derives from legislation.[83] Of course, in the case of State and Territory courts, the provisions conferring jurisdiction are not Commonwealth laws, but obviously the Commonwealth Constitution (including implications such as the implied freedom of political communication[84]) can limit State and Territory legislative power, as well as Commonwealth legislative power. If legislation cannot confer *specific* powers on courts that are contrary to a constitutional doctrine

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79 See generally A Stone, above n 21, Part III(A).

80 See Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

81 See eg Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) 3–6, 12–4.

82 See further, A Stone, above n 21, Part III(A).

83 See A Stone, above n 74, 408 (n 183). It is true that the High Court has some jurisdiction conferred directly by ss 73 and 75 of the Constitution. In our view, however, constitutional doctrines (including implications drawn from representative and responsible government) are capable of qualifying even these constitutional grants of jurisdiction. The intersection might arise if, for example, an application were made for a High Court judge to disqualify himself or herself from a case on the grounds of apprehended bias due to the judge's political associations (cf *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119).

84 *Lange* (1997) 189 CLR 520, 566–7. The constitutional considerations discussed in *Pfeiffer* would also appear to limit the power of State and Territory legislatures, as well as the Commonwealth.

such as the implied freedom, it follows that legislation cannot confer *general* powers (namely, the grant of jurisdiction) that are contrary to that doctrine either.[85]

2 *Effect of a 'Negative' and 'Vertical' Right on the Common Law*

Even so, the question remains: if the High Court in *Lange* meant that the common law must conform to the Constitution because the Constitution limits judicial power to develop the common law, why didn't it just say so? Indeed, there are passages where the Court seems to go out of its way to suggest that judicial power (and the development of the common law) is different in a relevant respect from legislative and executive power.[86]

The Court's hesitation stems from a concern (a concern that we do not share) that if the implied freedom limited judicial power, the freedom would be a 'personal' right. That concern appears from the following passage:

> Those sections [from which the freedom is implied] do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative and executive power.[87]

In this context, the Court seems to be using the term 'personal' right to mean two things. First, it seems to mean that a 'personal right' would be a 'positive' right. Almost immediately after the passage just quoted, the Court quoted the following passage from Justice Brennan's judgment in *Cunliffe v Commonwealth*:

> The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control.[88]

Thus, by distinguishing the freedom of political communication from a positive right, the Court is making the point that it is only a freedom *from* interference with political communication, rather than a guarantee of a right to communicate. The

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85 See, by analogy, *AMS v AIF* (1999) 199 CLR 160, 176 [37]-[38] (Gleeson CJ, McHugh and Gummow JJ), 214 [158] (Kirby J), 233 [221] (Hayne J); see also 193-4 [102]-[103] (Gaudron J) (general statutory powers to prevent custodial parents from re-locating do not authorise the making of orders contrary to the freedom of intercourse guaranteed by s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) (which corresponds to s 92 of the Constitution)).

86 See the passage accompanying n 26 above.

87 *Lange* (1997) 189 CLR 520, 560.

88 (1994) 182 CLR 272, 327.

freedom does not allow the citizen to demand 'what is needed to facilitate or permit its full enjoyment.'[89]

In addition, the Court in *Lange* implicitly drew another conclusion. The point of the Court's statement that the freedom of political communication applies only to legislative and executive action was to stress that the right applies only to the actions of the state, and does not protect people from the actions of private parties. In this respect, the freedom can be described as a 'vertical' rather than a 'horizontal' right. So, the effect of the Court's statement in *Lange* that the freedom of political communication is not a personal right is that the freedom is both a 'negative' and a 'vertical' right. Its real concern is to ensure that the freedom is understood only to prevent interference with political communication (rather than guaranteeing a right to participate in political discussion) and to apply only to the action of government.

If this is the Court's concern, however, it need not lead to the conclusion that the Constitution does not apply to the common law. Once it is recognised, as we have just argued, that the judicial power to develop the common law is governmental in nature, then the application of the constitutional freedom of political to the common law fits comfortably with the idea of a negative and vertical right. It is negative in the sense that it prevents interference by the common law. It is vertical because it operates as a limit on government action, *including the judicial power to develop the common law.*

### 3 *'State Action' and the Common Law*

The analysis we advance has much in common with the 'state action' doctrine of United States constitutional law. The rights protected under the United States Constitution are generally conceived of as 'negative' and (with the exception of the prohibition against slavery and the constitutional right to travel[90]) are 'vertical', applying only where the state (and not a private party) is responsible for violation of the right. Nonetheless, constitutional rights apply to the judicial development of the common law.

However, as United States doctrine has shown, accepting that 'state action' is a requirement for the application of a constitutional right raises a difficult question: when is the state responsible for the alleged violation? As the state's role modern society has become more and more pervasive, the task of limiting 'state action' has

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89 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 148 (Brennan J); see also *McClure v Australian Electoral Commission* (1999) 163 ALR 734, 740–1 (Hayne J).

90 See eg *Civil Rights Cases* 109 US 3, 20 (1883); *Griffith v Breckenridge* 403 US 88, 105 (1971); *Bray v Alexandria Women's Health Clinic* 506 US 263, 297 (1993).

become more and more difficult. It is possible to identify some 'state action' in just about any kind of case, even if the state action consists only in providing the legal framework in which a private party acts.[91] Even so, it is well accepted that judicial development of the common law falls into that category. Indeed, although there are difficult cases, the basic insight that judicial enforcement of the common law is 'state action' is regarded in America as entirely obvious.[92]

'State action' doctrine therefore has led to much controversy. Clearly, one consequence of *Lange* is that constitutional doctrines will sometimes intrude when the courts settle ordinary disputes between citizens. For example, it is now more difficult for a plaintiff who is a politician to succeed in defamation actions. Moreover, it is also clear that, unless the distinction between private and public is to collapse completely, there should be some disputes between citizens to which the implied freedom does *not* apply. Thus there must be some limit to the concept of 'state action'. The difficulty is determining what disputes are *not* subject to the implied freedom, given that every court decision seems to involve the exercise of government powers (if nothing else in enforcing the decision). For example, should the implied freedom prevent a landlord from enforcing a restrictive covenant under which he or she refuses to allow the tenants to use the property for purposes connected with a Commonwealth election?[93]

The difficulty of limiting the 'state action' doctrine has lead at least one commentator to argue that our analysis is mistaken.[94] Our response is two-fold. First, we think that our analysis is the best explanation of *Lange*. We accept that there should be some areas of private activity that are not governed by the Constitution. We also accept that it becomes difficult to draw the line between public and private if one concludes that courts are exercising state action when they apply the common law. Nonetheless, unless it were entirely to abandon the idea that the Constitution is a limit on government power, we do not see how the High Court can conclude that the common law must conform to the Constitution without importing ideas of state action. If the common law did not involve the exercise of government power, then there would be no need for it to conform to constitutional

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91 See eg Laurence Tribe, *American Constitutional Law* (2nd ed, 1988) 1689, discussing controversial state action cases: 'In these cases it is not so much the basic government action to which litigants object … Rather, the litigants objecting to the acts of private parties, sought to portray as support or tacit approval what might be characterized as mere governmental acquiescence in certain acts'.

92 Ibid 1711.

93 Cf *Shelley v Kraemer* 334 US 1 (1948), where the Supreme Court of the United States held that enforcing a common law restrictive covenant prohibiting the occupancy of residential property by non-whites violated the 14th Amendment's equal protection requirement.

94 G Taylor, above n 23.

requirements. Accordingly, unless one is prepared to argue for a dramatic revision of the current state of the doctrine, the appropriate response is to determine the limits of state action rather than to refuse to acknowledge that courts are state actors. We should emphasise here that the conclusion that courts are state actors in no way compromises the independence of the judiciary from the legislative and executive branches of government.[95] The state action issue concerns the nature of judicial power (whether it is governmental), whereas the judicial independence issue concerns the grounds on which courts exercise their powers (whether they can act without interference from the other branches of government).

Secondly, we would point out that a failure to recognise the governmental nature of the common law (and to apply constitutional limitations to it) has its own dangers. If we are serious about the protection of constitutional rights,[96] we should want them to apply to the common law. Given that courts create law and determine the nature of rights, they must be recognised as governmental and subject to the Constitution or there is a risk of under-protecting rights. The protection of constitutional rights requires that courts, no less than any other institution of government — and the development of the common law, no less than any other lawmaking activity — should be subject to constitutional requirements.

### C *Summary*

In our view, constitutional doctrines such as the implied freedom of political communication limit the development of the common law in the same way as they limit the exercise of legislative and executive power. However, that effect will usually be partial, so that the common law is only 'constitutionalised' to the extent that it reflects the requirements of the Constitution. Outside these constitutionally-

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95 As apparently suggested by the Supreme Court of Canada in *Retail, Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573, 600 (McIntyre J) and relied on by Taylor, above n 23. However, the Canadian position viewed as a whole does not undermine our analysis. While the Charter does not directly apply to common law actions between private parties, the common law must nonetheless conform to 'Charter values' (see eg *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, 1169–72 [91]–[99] (La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ); *Pepsi-Cola Canada Beverages (West) Ltd v RWDSU, Local 558* (2002) 208 DLR (4th) 385, 395–6 [18]–[22] (the Court)). Significantly, conforming to 'Charter values' does not subject the common law to any less scrutiny than the direct application of the Charter, and therefore this doctrine is entirely consistent with our view that judicial development of the common law is government action that must conform with constitutional requirements.

96 In making this point, we are not arguing that Australian constitutional doctrine should be developed (or the Constitution reformed) to include more individual rights. Our point, rather, is that if constitutional rights are part of Australian constitutional law, they should be applied to *all* government action.

protected aspects, parliaments are free to change the common law in the usual way. Thus, though the significance of constitutionalising some aspects of the common law should not be ignored,[97] it should also not be overemphasised.

This conception of the relationship between the common law and the Constitution is consistent with constitutional freedoms being limitations on power, and operating only against governments (what can be called 'negative' and 'vertical' rights, respectively). A corollary of that conclusion, however, is that the courts are state actors when they develop the common law. Consequently, it may be difficult to articulate clearly the situations in which the Constitution (and doctrines such as the implied freedom) do *not* apply to the enforcement of the common law, even though intuitively it seems that there should be some areas of conduct that are private and beyond the reach of the Constitution. The task of finding that limit is, however, the inescapable consequence of the way the High Court has developed the doctrine.

Having spent some time analysing the theoretical basis of the requirement that the common law must conform to the Constitution, we will now examine the institutional features of the Australian judicial system that might cause the courts to 'constitutionalise' the common law.

## IV THE INSTITUTIONAL FEATURES OF CONSTITUTIONALISING THE COMMON LAW

From an institutional perspective, the slightly unusual feature of the High Court's recent statements that the common law must conform to the Constitution is that this change does not seem to assert any power that the High Court did not already have. The Australian High Court is the final court for both common law and constitutional matters. Accordingly, there was never any question that the Court could both develop the common law, and declare invalid any legislation that is contrary to the Constitution (including legislation that alters the common law).

By contrast, in other countries, the way in which the relationship between the common law and the Constitution is defined can have a significant practical effect on the scope of the appellate jurisdiction of the highest court in constitutional cases. Perhaps the most familiar example is the Supreme Court of the United States, which does not have any general jurisdiction over common law cases.[98] Consequently, 'constitutionalising' the (otherwise State) common law can have the effect of

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97 A Stone, above n 66.

98 United States federal courts may sometimes have jurisdiction over State common law matters (for example, in the exercise of 'diversity' jurisdiction), but in these cases federal courts merely predict State common law and do not develop it (*Eerie Railroad Co v Tompkins* 304 US 64 (1938)). There is also a discrete *federal* common law, such as in matters where the United States is a party.

bringing a case within the Supreme Court's appellate jurisdiction, as famously occurred in *New York Times v Sullivan*.[99] Similarly, in South Africa, the Constitutional Court only has jurisdiction over 'constitutional matters, and issues connected with decisions on constitutional matters'.[100] Therefore, that court's jurisdiction over a common law case depends on whether the common law issue is held to be 'connected with' decisions on constitutional matters.[101] Once the Constitutional Court has jurisdiction, however, it may decide a case on either constitutional or common law grounds.[102]

In Australia, however, the High Court's views on the relationship between the common law and the Constitution neither expands nor confines the extent of its appellate jurisdiction.[103] At most, there might be an incentive for *litigants* to frame issues in constitutional rather than common law terms, in order to maximise their chances of obtaining special leave to appeal.[104] Even then, the High Court is not bound by the parties' choice whether to rely on constitutional or common law arguments.[105] The Court will usually not determine a constitutional issue if it is

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99 376 US 254 (1964). See A Stone, above n 2, 227–8.

100 Section 167(3)(b) of the 1996 South African Constitution. In all other matters, the highest court is the Supreme Court of Appeal (s 168(3)).

101 Broadly, some decisions *protect* the jurisdiction of the Constitutional Court (see *In re Pharmaceutical Manufacturers Association of SA; Ex parte President of South Africa* 2000 (2) SA 674 (CC)), while other decisions *confine* the Court's appellate jurisdiction to areas within its institutional competence (see *S v Boesak* 2001 (1) SA 912 (CC)).

102 The 1996 South African Constitution confers express powers on the Constitutional Court to develop the common law: see s 8(3)(b) (application of the Bill of Rights to a natural or juristic person), s 39(2) (general obligation to develop the common law consistently with the Bill of Rights) and s 173 (Constitutional Court's inherent power to develop the common law in the interests of justice). The potentially far-reaching implications of s 39(2) are discussed in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

103 It is true that the High Court's views might conceivably expand its *original* jurisdiction (see s 76(i) of the Constitution and s 30(a) of the Judiciary Act). However, given that fact-finding would normally be required, the Court would almost certainly remit this type of matter to a lower court.

104 The High Court will consider, among other things, whether the judgment below involves an issue of public importance (s 35A(a)(i) of the Judiciary Act).

105 There is a related question of whether the parties are bound in the High Court by the way in which they argued their case in lower courts. In *Roberts v Bass* (2002) 212 CLR 1, a majority of the High Court held that the appellant's express abandonment of the so-called '*Lange* defence' in the court below did not relieve that court from the obligation of determining whether the common law was consistent with the Constitution (see Helen Chisholm, '"The Stuff of which Political Debate is Made": *Roberts v Bass*' (2003) 31 *Federal Law Review* 225, 235–9).

possible to resolve the case on other grounds;[106] conversely, the Court may ask the parties to address constitutional issues if they are relevant.[107] Thus, the High Court has some leeway in deciding whether to make an ordinary common law decision or to decide on constitutional grounds.

In this final section, we consider the institutional factors that might influence the exercise of this discretion. We should stress that we are not taking any position on how much weight these considerations *should* be given. We are suggesting, however, that a proper understanding of constitutional doctrine cannot be divorced from the institutional setting in which that doctrine is made. We will argue that, from the High Court's perspective, there are different reasons for constitutionalising the common law, depending on whether constitutionalisation of the common law is an alternative to a wholly constitutional rule (as was the case in *Lange*), or an alternative to a wholly common law rule (as was the case in *Pfeiffer*).

### A *Lange*: *'Constitutionalising' vs Constitutional Rule*

In *Lange*, the constitutionalised qualified privilege defence replaced the wholly constitutional defence set out in *Theophanous v Herald & Weekly Times Ltd.*[108] In our view, there can be advantages for the courts in relying on a constitutionalised common law rule, rather than formulating a new constitutional rule.

At first sight, there might appear to be no difference at all. The defence of qualified privilege formulated in *Lange* is in very similar terms to the test enunciated by the joint judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous*. The *Theophanous* test applied in relation to the 'discussion of government and political matters',[109] and specifically provided that the defence of qualified privilege would be available to a defendant sued by a public official or candidate for public office for publication of false material if the defendant could prove (1) it was unaware of the falsity and not reckless with regard to its truth and (2) the publication was reasonable in all the circumstances.[110] In *Lange*, the Court held that the freedom of political communication applied in relation to matters of 'government and

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106 See for example the authorities referred to by Gummow and Hayne JJ in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 473–4 [250]–[252]. Accordingly, if the Court decided that the common law should be changed in the way suggested by the parties, but for non-constitutional reasons (which was an option in *Pfeiffer*: see the text accompanying n 69 above), it would not be necessary to determine whether those changes were also required by the Constitution.

107 For example, in *Breavington*, the High Court asked the parties to address on whether the choice of law rule was affected by s 118 of the Constitution (see (1988) 169 CLR 41, 49).

108 (1994) 182 CLR 104.

109 Ibid 121–2.

110 Ibid 136–7.

politics',[111] though that concept was understood more narrowly.[112] Turning to the specifics of the new defence of qualified privilege, *Lange* required (1) the defendant to show that the publication was reasonable in the circumstances, although (2) the defence would be defeated if the plaintiff could demonstrate that the publication was actuated by malice or improper motive.[113]

The difference between the cases is, therefore, principally one of method. In *Theophanous*, the joint judgment purported to be formulating a new constitutional defence that qualified a common law cause of action, whereas in *Lange*, the Court stressed that it was developing the existing common law. However, once the 'constitutionalising' effect of *Lange* is understood, there is no serious conceptual gap between the two approaches. In each case, the High Court created a specific defence to an action in defamation, which has constitutional status and is immune from legislative revision.[114]

However, this difference in judicial technique may, as a practical matter, produce different results. The *Lange* method encourages incremental and modest development of the constitutional freedom of political communication. The High Court's preference for a rule based on the existing common law may better preserve the 'accumulated wisdom' of the common law. Where the High Court is making only incremental changes to a well-developed body of law, it has a greater chance of predicting the practical effects of its new rule and, when it comes to further development of the rule by later and lower courts, those judges will have the benefits of greater interpretative resources of common law reasoning. Consequently, though the Court in *Lange* kept the 'reasonableness' standard (a

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111 (1997) 189 CLR 520, 559.

112 The Court stressed that the freedom of political communication protects only certain institutions of federal government mentioned in the text, rather than a general concept of 'representative and responsible government' (ibid, 556-7). Thus, discussion that could be described as 'political' in a general sense but which did not relate to *federal* politics may not be covered (but see n 74 above).

113 Ibid 571–3. The *Lange* reasonableness requirement only applies to publication to mass audiences, and does not apply to a publication to 'a limited class of persons' (*Roberts v Bass* (2002) 212 CLR 1, 28 [69] (Gaudron, McHugh and Gummow JJ); see also 59 [161] (Kirby J)). Gleeson CJ stated in *Roberts v Bass* that it was difficult to reconcile the need for the common law to conform to the Constitution with the co-existence of two different tests of qualified privilege applicable to political discussion (ibid, 9 [3], with Callinan J agreeing on this point: 102 [285]).

114 Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (Law and Policy Paper No 13, Centre for International and Public Law, The Australian National University, 1999) 24.

troublingly open-ended feature of the constitutional defence in *Theophanous*), the future development of that standard will be guided by existing law.[115]

Further, in a manner typical of common law development, there is no ambitious or wide-ranging justification of the Court's view in *Lange* that a particular extension of the common law is required by the freedom of political communication. The Court simply stated that the privilege must be extended to meet the Constitution's requirement that '"the people" ... be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of ministers of State and the conduct of the executive branch of government'.[116] Thus, particular circumstances are the focus. By contrast, in *Theophanous*, the joint judgment referred less to the operation of the existing common law and was more influenced by the constitutional law of the United States. As argued elsewhere, the joint judgment's enthusiasm for the America law of freedom of speech risked the uncritical importation of a highly contested theory of freedom speech.[117]

Of course, we do not suggest that greater judicial caution and incremental development of the common law is a *necessary* result of the *Lange* method of constitutionalising the common law. After all, incrementalism and reference to pre-existing common law standards could all influence a court that followed the *Theophanous* approach of formulating a new constitutional rule. The common law has long been a source of constitutional understanding and common law incrementalism is an accepted (indeed in some quarters much praised) method of constitutional interpretation. We are suggesting, however, that this more cautious approach is more likely under the *Lange* method, which specifically directs judges to the common law.

Moreover, we do not argue that gradual change is always a desirable method of constitutional interpretation. The values of incrementalism must be weighed against the need for clear articulation of principle to guide litigants, legislators and lower courts. However, we believe that a period of common law incrementalism is desirable, particularly in the early stages of developing a new, complex and controversial doctrine like the freedom of political communication.[118]

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115 See generally A Stone, above n 2, 242–3. See also *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, 257–8 [130], [132], where Gummow and Hayne JJ indicated a preference for extending or adapting existing common law doctrines, rather than creating a 'loosely defined generalised cause of action'.

116 (1997) 189 CLR 520, 571.

117 A Stone, above n 2, 229–35.

118 Ibid, 246–9.

### B *Pfeiffer: 'Constitutionalising' vs Common Law Rule*

The institutional incentives for the High Court are different, however, when the Court adds a constitutional component to what was previously a common law rule. One conceivable reason for the High Court to constitutionalise the common law in this situation would be to give Parliaments an early indication of the limits on their power. However, this possible reason is at least in tension with (if not contradicted by) the High Court's general practice of avoiding constitutional issues that do not require resolution.[119]

Instead, one reason that emerges from *Pfeiffer* is that constitutionalising the common law gives the High Court a reason to re-consider its earlier decisions. While the High Court is free to overrule its earlier decisions, it will not do so without good reason.[120] Modifying the common law so that it complies with the Constitution provides such a reason. In a sense, that is obvious: the High Court is unlikely to refer to the Constitution if it has no effect on the content of the common law. On the other hand, we would suggest that there should be limits. The fact that there is an intersection between the Constitution and the common law should not provide the Court with a free hand to overrule earlier decisions that it disagrees with on substantive, non-constitutional, grounds.

#### 1 *Earlier Consideration of Choice of Law and the Constitution*

Looking again at *Pfeiffer*, it is not altogether clear that the joint judgment relied on any constitutional arguments that had not already been considered, and rejected by a majority of the High Court, in earlier cases. As we noted earlier, there were several attempts to overrule the double actionability requirement before *Pfeiffer*.[121] The judgments of Deane and Gaudron JJ in those cases relied heavily on constitutional arguments. For example, Deane J made the following arguments in *Breavington v Godleman*[122] in concluding that the *lex loci delicti* applied to intra-national torts:

(A) The Constitution creates a national 'unitary system of law', in the sense that all conduct in Australia gives rise to a single predictable outcome that does

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119 See n 106 above.

120 The factors considered by the High Court in determining whether to overrule its decisions are set out in cases such as *John v Commissioner of Taxation* (1989) 166 CLR 417, 438-9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

121 See the cases referred to in n 13 above.

122 (1988) 169 CLR 41. These arguments were essentially repeated in *McKain* (1991) 174 CLR 1, 45–6 (Deane J); *Stevens* (1993) 176 CLR 433, 461–2 (Deane J); *Goryl* (1994) 179 CLR 463, 476–7 (Deane and Gaudron JJ).

not vary depending on where legal proceedings were instituted.[123] The constitutional features supporting this implication included:[124]

(i) the conferring of original jurisdiction on the High Court (ss 75 and 76) and the provision for federal jurisdiction to be conferred on other courts (s 77).[125] Federal jurisdiction was national in character, even when exercised by a State court, and left no room for the operation of private international law rules;[126]

(ii) the uniform common law in Australia;[127] and

(iii) the High Court's role under s 73 of the Constitution as the final and conclusive appeal court in all matters from both State and federal courts.[128]

(B) The double actionability requirement was contrary to this unitary system of law.[129] The courts of one State could not refuse to give effect to the laws of another State on the basis of a public policy objection.[130]

(C) The 'full faith and credit' requirement in s 118 of the Constitution was intended to provide the means for resolving any competition or inconsistency between State laws.[131]

(D) The legislative powers of the States were understood at the time of federation to be 'fundamentally territorial in their content and operation'.[132]

(E) The combination of steps (C) and (D) meant that State law (including State legislation modifying choice of law rules) was required to give effect to the substantive law of the State which had the 'predominant territorial nexus' with the conduct in question.[133] In the case of intra-national torts, that meant giving effect to the *lex loci delicti*.

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123 *Breavington* (1988) 169 CLR 41, 121.

124 Indeed, Deane J held that the fact of creating a nation, in itself, indicated that Commonwealth, State and Territory laws were intended to be 'internally consistent and reconcilable': ibid 122.

125 Ibid.

126 Ibid 125.

127 Ibid 123.

128 Ibid 124.

129 Ibid 125, although we would argue that the real cause of forum shopping was the expansive definition of 'procedural' laws (see the text accompanying nn 52 and 53 above). Consistently with that view, Deane J limited 'procedural' laws to laws directed to regulating court proceedings (ibid, 136; *McKain* (1991) 174 CLR 1, 52).

130 *Breavington* (1988) 169 CLR 41, 136–7.

131 Ibid 129–30. Section 118 therefore performed a role corresponding to that performed by s 109 of the Constitution in resolving any inconsistency between Commonwealth and State laws.

132 Ibid 128, although Deane J acknowledged that the courts had subsequently held that States could legislate with extra-territorial effect: ibid 128–9.

133 Ibid 135–6.

Clearly, there are differences between the approaches taken by Deane J and by the joint judgment in *Pfeiffer*. Deane J held that s 118 provided the means for resolving the competition between State laws, thus giving it a prescriptive or positive role.[134] By contrast, the *Pfeiffer* joint judgment gave s 118 a negative role, stating that it *prevented* certain choice of law rules being adopted (such as rules that refused to enforce the laws of another State on public policy grounds).[135] Moreover, Deane J's unitary system of law required that cases *must* lead to the same outcome regardless of where in Australia proceedings were brought,[136] whereas the *Pfeiffer* joint judgment treats uniformity of outcome as a desirable (but not necessary) objective.[137]

Even so, there are strong similarities between the two approaches. Each of the constitutional arguments made by the joint judgment in *Pfeiffer* had been made by Deane J,[138] although Deane J made additional arguments. The major difference is that Deane J held that the Constitution *required* a particular choice of law rule, whereas (on our analysis) the *Pfeiffer* joint judgment held that the Constitution *prohibited* certain choice of law rules. If, however, the High Court were to say in future cases that the *lex loci delicti* rule is constitutionally required, the difference between the two approaches would largely disappear. The fact that Deane J was in dissent in *McKain v R W Miller & Co (SA)*[139] and *Stevens v Head*[140] indicates that these constitutional arguments previously did not command the acceptance of a majority of the High Court.

That is not to say that *Pfeiffer* should have been decided differently. Its rejection of the 'double actionability' requirement in particular seems compelling.[141] However, in our view, *Pfeiffer* would be more accurately described as the Court overruling its earlier interpretations of the Constitution, rather than considering the common law anew in the light of constitutional considerations.[142] But, by stating that its object

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134 See the text accompanying n 131 above (step (C) in Deane J's judgment).

135 See the text accompanying n 33 above (step (3) in the joint judgment).

136 See the text accompanying nn 123 to 128 above (step (A) in Deane J's judgment).

137 See the text accompanying n 31 above (step (1) in the joint judgment), and nn 43 to 46 above (*Blunden* demonstrates that no constitutional requirement for uniform outcomes for a matters in federal jurisdiction). See also the text accompanying nn 55 to 58 above (arguing that having uniform outcomes for matters in State jurisdiction regardless of where they are instituted is not constitutionally required).

138 Adopting the taxonomy used earlier, step (1) in the *Pfeiffer* joint judgment is broadly similar to step (A)(i) in Deane J's judgment, step (2) is included in Deane J's unitary system of law (step (A)), step (3) equates to the second part of step B, step (4) equates to steps (D) and (E).

139 (1991) 174 CLR 1.

140 (1993) 176 CLR 433.

141 See the text accompanying nn 35 to 39 above.

142 See G Davis, n 59 above, 996–8.

was to examine cases such as *McKain* and *Stevens* 'to determine whether [they are consistent with the Constitution, in particular] Ch III of the Constitution and the integrated judicial system that it mandates',[143] the joint judgment avoided any criticism that might have followed from its overruling of earlier decisions. It may well be that the Court would not have been criticised on those grounds in this instance, because cases such as *McKain* and *Stevens* had themselves attracted strong criticism.[144] However, that will not always be the case. Moreover, even with controversial decisions, prudential factors such as maintaining the legitimacy of the courts and respect for the rule of law may be reason for retaining the existing doctrine, notwithstanding the criticism.[145]

### 2 *General Approach to Revising the Common Law to Conform with the Constitution*

*Lange* and *Pfeiffer* are not the only cases to have considered whether common law doctrines require alteration to conform to the Constitution. For example, a majority of the High Court has held that common law doctrines of governmental immunity from suit are inconsistent with Chapter III of the Constitution in their application to the Commonwealth.[146] There have also been suggestions that the *de facto* officers

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143 *Pfeiffer* (2000) 203 CLR 503, 524 [34], referring also to *Koop v Bebb* (1951) 84 CLR 629. No constitutional arguments were put in *Koop v Bebb*.

144 See eg the critics referred to by Kirby J in *Pfeiffer* (2000) 203 CLR 503, 546 [108] (n 210).

145 Indeed, it could be argued that severe criticism of a previous decision means, if anything, that the Court should be *more* cautious about overruling its earlier decision, lest its decision to overrule be seen as capitulating to political or social pressure (see *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 866–7 (1992) (O'Connor, Souter and Kennedy JJ)).

146 *Commonwealth v Mewett* (1997) 191 CLR 471, 545–51 (Gummow and Kirby JJ, with Brennan CJ agreeing generally: 491, and Gaudron J agreeing on this point: 531); *Blunden* (2003) 203 ALR 189, 200 [43] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 211 [90] (Kirby J). In *British American Tobacco Australia v Western Australia* (2003) 200 ALR 403, Gleeson CJ and Kirby J held that a corresponding constitutional implication could be drawn in constitutional suits against the States (ibid 408 [15]–[16] (Gleeson CJ), 442–3 [155] (Kirby J)), although McHugh, Gummow and Hayne JJ preferred to draw the implication from the federal legislation conferring jurisdiction (ibid 419–20 [60]–[62]).

doctrine cannot cure a constitutional defect in title to an office,[147] and that *res judicata* does not apply to constitutional cases.[148]

In our view, the High Court should be cautious before concluding that common law doctrines are inconsistent with the Constitution. Whenever there is an apparent tension between the Constitution and a common law doctrine, there will always be an argument that the Constitution was meant to operate against the background of the common law, rather than overriding it. For example, in *Re Macks; Ex parte Saint*,[149] a majority of the High Court held that the traditional common law rule that a decision of superior court is binding till set aside on appeal or by judicial review applied to the Federal Court, even when that Court lacked jurisdiction on constitutional grounds. The contrast between *Re Macks* and the suggestions that the *de facto* officer doctrine is incompatible with the Constitution is particularly striking.

Moreover, even when there is an inconsistency between the Constitution and existing common law doctrine, we would argue that the High Court should prefer ordinary development of the common law and make as few 'constitutionally driven' changes as possible.[150] That approach is consistent with the High Court's approach to drawing constitutional implications (which are generally limited to what is 'necessary'[151]) and is also broadly consistent with the High Court's general preference not to decide constitutional issues unless it is necessary to do so.

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147 See *Bond v The Queen* (2000) 201 CLR 213, 225 [34] (the Court); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 456 [200] (Gummow and Hayne JJ); see also *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 383–4 [155]–[157] (Kirby J).

148 *Wakim* (1999) 198 CLR 511, 565 [79] (McHugh J); cf 591–2 [162] (Gummow and Hayne JJ). See Graeme Hill, 'The Demise of Cross-Vesting' (1999) 27 *Federal Law Review* 547, 560–3.

149 (2000) 204 CLR 158, 177-8 [22]-[23] (Gleeson CJ), 185–6 [51]–[53] (Gaudron J), 235-6 [214]–[216] (Gummow J), 248 [255] (Kirby J, relying on his judgment in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 656–62 [67]–[81]); see also 277–9 [337]–[344] (Hayne and Callinan JJ); contra 211–4 [138]–[148] (McHugh J).

150 Of course, in some cases it may well be appropriate for the Court to go on and modify the common law beyond what is strictly required by the Constitution, as occurred in *Lange*. These comments are directed only to those changes to the common law that are said to be constitutionally required.

151 See eg *Lange* (1997) 189 CLR 520, 566–7; see also *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 67 [14] (Gleeson CJ, Gaudron, McHugh and Hayne JJ). One of us has argued that the courts have drawn implications that extend beyond what is strictly 'necessary' in protecting the role of the courts (G Hill, above n 50, 224).

Clearly, arguments about the proper approach to overruling common law decisions in the light of the Constitution will be strongly influenced by one's views on the role of precedent generally. We do not want to enter into that well-worn debate here, other than to state that precedent should impose at least some constraint on judicial choice in some cases. Instead, we offer two general observations on whether the courts' approach to precedent (whatever that is) should be different in constitutional cases, particularly constitutional cases that require overruling earlier High Court common law cases.

First, we are not persuaded by the argument that precedent carries less weight in the constitutional context because 'the Constitution prevails over the pronouncements of [the High] Court upon it'.[152] This argument seems to assume that there is some platonic, 'correct' Constitution that exists separately from interpretation of it, which we doubt. A prudential version of the argument is that constitutional precedent carries less weight because the High Court's errors cannot be corrected by Parliament, but only by constitutional amendment.[153] However, prudential concerns cut both ways. It could be argued, for example, that the fact that Parliament cannot amend the Court's views on the Constitution is a reason for giving precedent *more* weight in the constitutional context, because judicial choice is not subject to the discipline of being 'overruled' by Parliament. Moreover, there is no clear way of determining whether the 'error' is contained in the subsequent decision, rather than in the earlier decision being overruled.[154]

Those points are illustrated by recent decisions on whether a British subject can be an 'alien' for the purposes of s 51(xix) of the Constitution. In *Nolan v Minister for Immigration and Ethnic Affairs*[155] (decided in 1988), a majority of six Justices of the High Court held that a British subject who had not been naturalised was an 'alien'. However, in *Re Patterson; Ex parte Taylor*[156] (decided in 2001), a majority of four Justices overruled *Nolan*, essentially on the basis that *Nolan* was clearly incorrect.[157] Finally, in *Shaw v Minister for Immigration and Multicultural Affairs*[158] (decided in 2003), a differently constituted four-member majority

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152 See eg *Stevens* (1993) 176 CLR 433, 464–5 (Gaudron J), and the authorities cited; see also 461–2 (Deane J). Kirby J also takes this view (see eg *British American Tobacco Australia* (2003) 200 ALR 403, 437–8 [134]–[135]).

153 See *Queensland v The Commonwealth (Second Territories' Senators Case)* (1977) 139 CLR 585, 598–9 (Gibbs J).

154 J W Harris, 'Overruling Constitutional Interpretations' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 231, 243.

155 (1988) 165 CLR 178.

156 (2001) 207 CLR 391.

157 Ibid 421 [90] (McHugh J), 491 [300] (Kirby J), 518 [376] (Callinan J); see also 409 [40] (Gaudron J).

158 (2003) 203 ALR 143.

overruled *Patterson*, and returned to the position decided in *Nolan*. In *Shaw*, Kirby J stated:[159]

> it is normal for Justices of this Court to give effect to majority rulings on the Constitution, if only to avoid the spectacle of deliberate persistence in attempts to overrule recent constitutional decisions on identical questions on the basis of nothing more intellectually persuasive than the retirement of a member of a past majority and the replacement of that Justice by a new appointee who may hold a different view.

This comment, however, could apply equally to the majority in *Patterson* (who overruled *Nolan*), or to any future majority who heeded Kirby J's call to restore the view of the majority in *Patterson*.[160] The intrinsic 'correctness' or otherwise of competing views does not provide any basis for determining which interpretation is authoritative.

Secondly, we would support suggestions that, wherever possible, the judges of the High Court should approach overruling precedent collectively, rather than in an individual manner.[161] The role of precedent is of course to promote certainty in the law. At times overruling earlier decisions can actually *increase* certainty in the law, such as when it has become impossible to apply those earlier decisions in a coherent fashion.[162] However, given that (in our view) there is no way of determining an objectively 'correct' interpretation of the Constitution, we agree with Gummow J that the High Court should not generally overrule its earlier decisions unless the content of the new doctrine is 'readily discernible'[163] (namely, the new doctrine commands the support of a majority of the Court).

### 3 *Role of Lower Courts*

Finally, there is an unresolved question whether the task of determining whether earlier High Court common law decisions are consistent with the Constitution can only be performed by that Court, or whether lower courts also have a role in identifying cases of possible inconsistency.

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159 Ibid 162 [76].

160 Ibid 175 [127].

161 See K Mason, 'The Rule of Law' in Paul Finn (ed), *Essays on Law and Government* (1995) Vol 1, 114, 136–9.

162 See particularly the High Court's overruling of its earlier s 92 jurisprudence in *Cole v Whitfield* (1988) 165 CLR 360.

163 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 200 [136]. Indeed, if the content of the doctrine is not readily discernible by lower courts, there may even be a question whether the earlier decision can be taken to have been overruled (*Shaw* (2003) 203 ALR 143, 152 [36] (Gleeson CJ, Gummow and Hayne JJ, with Heydon J agreeing)).

Imagine, for example, a trial judge confronted with an argument that the common law 'newspaper rule' discussed by the High Court in *John Fairfax & Sons Pty Limited v Cojuangco*[164] requires modification in the light of the implied freedom of political communication, to provide greater scope for the media to refuse to disclose their sources.[165] On the one hand, the High Court has stated emphatically that only it can determine whether one of its earlier decisions requires overruling.[166] However, the High Court has also held that lower courts cannot take at face value the parties' assertion that their claim depends only on the common law, and is unaffected by constitutional doctrines.[167] From an institutional perspective, there are both benefits and costs of lower courts determining whether the common law requires modification to conform to constitutional requirements, rather than leaving that task exclusively to the High Court. The potential cost is fragmentation of the common law (at least until the High Court ruled upon the matter), as lower courts might take different views.[168] The potential benefit, however, is greater awareness of the consequences of modifying the common law, as the issue may have been considered by lower courts in a range of factual situations before it arises for resolution by the High Court.[169]

The position of intermediate appellate courts is similar to the position of the High Court, in the days when an appeal to the Privy Council was available.[170] As is well known, in *Hughes and Vale Pty Ltd v New South Wales*,[171] Dixon CJ set out his preferred view of the interpretation of s 92 of the Constitution, but made orders on

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164 (1988) 165 CLR 346.

165 Cf *NRMA v John Fairfax Publications Pty Ltd* [2002] NSWSC 563 (26 June 2002).

166 See eg, in a common law context, *Garcia v National Australia Bank* (1998) 194 CLR 395, 403 [17] (Gaudron, McHugh, Gummow and Hayne JJ) and, in a constitutional context, *Ravenor Overseas Inc v Redhead* (1998) 152 ALR 416 (Brennan CJ).

167 See n 105 above (discussing *Roberts v Bass*).

168 It might be possible to ameliorate this fragmenting effect by adopting an approach that lower courts will follow a decision of a co-ordinate court out of comity unless convinced that the decision is plainly wrong (see *Australian Securities Commission v Marlborough Gold Mines Ltd* (1992) 177 CLR 485, 492 (the Court), considering the former national corporations scheme). In addition, it may sometimes be desirable to develop the common law instead of developing constitutional doctrines (see Stone, above n 2).

169 For example, the conclusion that volunteers handing out pamphlets in an election campaign cannot reasonably be expected to check the truth of statements in those pamphlets seems entirely unobjectionable (*Roberts v Bass* (2002) 212 CLR 1, 40–1 [102], 44 [110] (Gaudron, McHugh and Gummow JJ), 62–3 [171]–[172] (Kirby J); cf 108 [305] (Callinan J)). There may, however, be other contexts where people who disseminate defamatory publications on political matters could be expected to take some steps to check the truth of those statements.

170 See s 74 of the Constitution.

171 (1953) 87 CLR 49, 67–75.

the basis of earlier binding authority with which he disagreed. The Privy Council then agreed with Dixon CJ's views and overruled that earlier authority.[172] Adopting that approach, an intermediate appellate court might make orders on the basis of the existing High Court authority on the common law (even if that authority is inconsistent with constitutional doctrines, in the view of the intermediate court), but include its preferred analysis of the interaction of the common law and the Constitution in *obiter dicta.*

## V CONCLUSION

In this article, we have considered the 'constitutionalisation' of the common law that occurs when the common law is developed to conform to the Constitution. The 'constitutionalisation' process consists of the courts applying constitutional doctrine in a manner that limits their powers to develop the common law (and equally the powers of legislatures to modify that common law). For that reason, the constitutionalisation of the common law in no way elevates the common law above legislation; rather, it simply reflects the fact that the Constitution prevails over both. Usually that doctrine has only a partial influence on the law, leaving some aspects of the common law amenable to legislative revision.

We also considered the institutional factors that might influence the High Court in deciding whether to 'constitutionalise' the common law. Unlike some other courts of final appeal, the High Court's appellate jurisdiction is not affected by the way in which the relationship between the common law and the Constitution is defined, because it is the highest court for both constitutional and common law cases. However, the High Court might 'constitutionalise' the common law in preference to developing a purely constitutional rule to promote incremental development of the law, as occurred in *Lange.* Alternatively, it appears from *Pfeiffer* that the Court may adopt the 'constitutionalisation' approach in preference to developing a purely common law rule in order to give itself reason to overrule its earlier decisions. We have suggested that the Court should proceed cautiously in the latter situation, as the Constitution should not be used as a reason to overrule decisions that the Court disagrees with on substantive, non-constitutional, grounds. There is an unresolved question about whether decisions about the consistency of existing common law doctrines and the Constitution should be made only by the High Court, or whether lower courts also have a role in identifying possible inconsistencies.

There is, however, another dimension to the 'constitutionalisation' of the common law that we have not discussed in this article. The common law may also become immune from legislative change when it informs the content of the Constitution,

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172 See *Hughes and Vale Pty Ltd v New South Wales [No 1]* (1954) 93 CLR 1, 32.

rather than the Constitution informing the content of the common law. That occurs most obviously when the 'connotation' of a constitutional term is determined by reference to the common law.[173] However, more controversially, common law principles might also be used to qualify the terms of express powers conferred by the Constitution.[174] An attempt to use common law doctrines to derive an implied constitutional guarantee of legal equality[175] has not attracted general support. More plausibly, the courts might develop the statement by Dixon J that the Constitution is framed against the assumption of the rule of law.[176] However, the protean nature of the rule of law means that any attempt to constitutionalise the rule of law is likely to be a 'large and controversial undertaking'.[177] Fortunately, that issue can be left for another day.

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173 See the text accompanying nn 7 and 8 above.

174 For the debate as to whether the common law might be a source of rights limiting government power, see T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001) and George Winterton, 'Constitutionally Entrenched Common Law Rights', in Sampford and Preston (eds), above n 154, 121.

175 *Leeth v The Commonwealth* (1992) 174 CLR 455, 485-6 (Deane and Toohey JJ). For a summary of the major criticisms of that approach, see for example Leslie Zines, *The High Court and the Constitution* (4th ed, 1997), 418–20.

176 *Communist Party Case* (1951) 83 CLR 1, 193. Recently, five members of the High Court quoted this statement with approval, and stated further that s 75(v) of the Constitution constituted a 'textual reinforcement' of this assumption (*Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)).

177 S Evans, 'Privative Clauses and Time Limits in the High Court' (2003) 5 *Constitutional Law and Policy Review* 61, 66. By way of comparison, the Supreme Court of Canada is developing the notion of 'unwritten constitutional principles' (see eg *Reference re Remuneration of Judges of Provincial Court of Prince Edward Island* [1997] 3 SCR 3 (judicial independence); *Reference re Secession of Quebec* [1998] 2 SCR 217 (federalism, democracy, constitutionalism, and respect for minority rights)). This approach is controversial, particularly when these unwritten principles are used to invalidate legislation (see eg J Leclair, 'Canada's Unfathomable Unwritten Constitutional Principles' (2002) 27 *Queen's Law Journal* 389, 431–2).