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EXPANSION OR CONTRACTION? SOME REFLECTIONS ABOUT THE RECENT JUDICIAL DEVELOPMENTS ON REPRESENTATIVE DEMOCRACY

INTRODUCTION

> The High Court cases of *Australian Capital Television Pty Ltd v The Commonwealth (No 2)*[1] and *Nationwide News Pty Ltd v Wills*[2] have established a precedent for constitutional implications based on representative democracy ... In my view the constitutional implications that can reasonably be based on representative democracy are the following: freedom of political communication, freedom of assembly for political purposes, freedom of association, freedom of movement related to political matters, access to government, and regular, free and fair elections. ... The most controversial of the implications I suggest are undoubtedly those of a universal franchise and of equal voting weight. These aspects would not have been seen as indispensable to the operation of democracy in 1900.[3]
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> However, the technique of developing new propositions of law gives some indication of the nature of future work on the Court. In recent years, earlier authority has been analysed and overarching principles have emerged to explain them. Then the instant case has been held to fall within or without the overarching principle. But the full content of that principle may need to be spelt out in future cases, and that is as much a part of the process of developing the law as the revelation of the principle itself. I do not suggest that the Court will change its interests, but it will not be surprising if future cases are seen as consolidating the advances that have been made or giving to those advances a more finely honed expression.[4]

THE first passage quoted above drew attention to the establishment and potential implications of the principle implied from the partial recognition of representative

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1 (1992) 177 CLR 106.

2 (1992) 177 CLR 1.

3 Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *Fed L Rev* 37 at 75-76.

4 Brennan, "Looking to the Future" in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, Sydney 1996) p265.

democracy under the Australian Constitution. Not long before the retirement of Sir Anthony Mason from the High Court, the Court subsequently decided, even if somewhat controversially and by a narrow majority, that the same principle had a significant limiting effect on Australia's defamation laws.[5] The second passage offered an indication of what the Court might do with this and other newly established principles after the departure of Sir Anthony Mason as Chief Justice.

The decisions of the Court in 1997 provide a timely opportunity to reflect upon the subsequent judicial developments on representative democracy which have occurred since that departure and, in particular, to see whether the views and predictions contained in the passages quoted above have been realised during the same period of time.

THE ELECTORAL PROCESS

(i) Background

I should at the outset declare that my treatment of this section of the paper is necessarily affected by my participation as junior counsel for the unsuccessful plaintiffs in *McGinty v Western Australia*[6] and, in particular, the assistance I was able to render in the framing of the written argument in that case. I approached that task with mixed feelings.

My long-standing interest in the role which courts can play in the enforcement of basic guarantees of electoral equality has never been easily reconciled with my, at best, lukewarm attitude to the adoption of a judicially enforceable Bill of Rights.

Any attempt to involve the courts in the judicial enforcement of *implied* electoral guarantees was not one which was likely to succeed in *earlier* times as was illustrated by the rejection of such an attempt in *McKinlay*.[7] The essential and underlying reason for that rejection can be found in the well known remarks of Barwick CJ in that case when he stressed the contrast in the approaches to the interpretation of the American and Australian Constitutions given the absence of a Bill of Rights in the latter Constitution.

> The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the Parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers.

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5 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211.

6 (1996) 186 CLR 140. I should like to pay a tribute to my colleague, Mr Peter Johnston, Visiting Fellow at the University of Western Australia, who was, as one of the other junior counsel in the case, largely responsible for much of the inspiration and hard work which went into this challenge.

7 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

> Thus, discretions in parliament are more readily accepted in the construction of the Australian Constitution.[8]

Nevertheless, and however attractive as a general theory, the asserted absence of any need to imply limits on the discretion of the Parliament in the present context overlooks the vested interest which some electors and their representatives may have in retaining electoral divisions of unequal size.[9] Moreover the judicial enforcement of electoral guarantees need not be inconsistent with the rejection of a general and judicially enforceable Bill of Rights even if one is not in favour of such an instrument. The former guarantees may reinforce confidence in the outcomes of the parliamentary process by providing an assurance of the democratic nature of the processes which result in those outcomes.

Even so, it was most unlikely that the challenge in *McGinty* and the attempt to re-open *McKinlay* would have been undertaken had it not been for the encouragement provided by the High Court's landmark decision in the *ACTV Case* in 1992 and the subsequent cases in 1994. This is especially so when those developments are read against the background of the High Court's new found willingness to discover and give effect to restrictions on legislative powers (which are not founded on federalism or the doctrine of the separation of powers).

(ii) *McGinty*

The plaintiffs in *McGinty* were members of the Western Australian Parliament who sought to challenge in the High Court the validity of the laws of that State which governed the distribution of electorates for both the Legislative Assembly and the Legislative Council in the State.

At the time the challenge was launched the Assembly consisted of 57 members who represented single member electoral districts.[10] The relevant legislation divided the State into a Metropolitan Area which was required to contain 34 electoral districts and the remaining area which was required to contain 23 electoral districts. The electoral districts were established by Electoral Distribution Commissioners who were required to fix the boundaries of the districts in each of the two areas so that they comprised an equal quotient of enrolled electors plus or minus 15% (23 000 electors for the Metropolitan Area and

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8 At 24.

9 This observation was also made by the author in Zines & Lindell (eds), *Sawer's Australian Constitutional Cases* (Law Book Co, Sydney, 4th ed 1982) p722.

10 The plaintiffs challenged the validity of s6 of the *Constitution Acts Amendment Act* 1899 (WA) and ss2A(2), 6 and 9 of the *Electoral Distribution Act* 1947 (WA). The description of the laws which governed the distribution of electorates for both Houses of the Western Australian Parliament contained in the text was taken from the description contained in *McGinty* in the judgments of Brennan CJ, Toohey, Gaudron and McHugh JJ: (1996) 186 CLR 140 at 164-167, 190-192, 216-217 and 224-227, respectively.

12 000 electors for the Non-Metropolitan Area). The 15% tolerance from the average quotient and shifts in population had the effect of producing some large divergences in the number of electors enrolled for districts in the two areas for the 1993 elections. The leading example relied on by the plaintiffs was the difference in the number of electors enrolled in an electoral district in the Metropolitan Area, namely, Wanneroo with 26 988 electors and the number of electors enrolled in an electoral district in the Non-Metropolitan Area, namely, Ashburton with 9 135 electors. The quotient in both areas was 21 988 and 11 702 electors, respectively. This meant that the ratios between the highest numbers of electors in one electoral district and the lowest in another was 2.91:1. A further result of the legislation was that 74% of the electors elected 60% of the members and 26% of the electors elected 40% of the members.

A wide disparity also prevailed in the size of electoral regions which returned the members of the Legislative Council. The latter House contained 34 members elected from 6 regions determined by the State Electoral Distribution Commissioners. Three of the regions were required to be located in the Metropolitan Area (one of which was to return 7 members and the other two, 5 members, making a total of 17 members). The remaining three regions included areas which were remote from the capital and where land was used primarily for mining and pastoral purposes. (One of the regions returned 7 members while the other two returned 5 members, also making a total of 17 members.) This produced even greater disparities than existed in relation to the size of electoral districts for the Legislative Assembly. Thus the quotient for one of the regions in the Metropolitan Area (North) was 34 161 electors as compared with the quotient in a region outside the Metropolitan Area (Mining and Pastoral) which was 9 097 electors, ie a ratio of 3.76:1. The result of the relevant legislation was that 74% of the electors in the Metropolitan Area elected 50% of the members and 26% of the electors outside that area elected the remaining 50% of the members of the Legislative Council.

In sum, the plaintiffs complained that the vote of non-metropolitan electors had a greater value than those of electors in the metropolitan area and that this was to some extent mandated by the challenged legislation. The plaintiffs argued that the legislation in question was inconsistent with either:

(a) the Commonwealth Constitution; or

(b) the *Constitution Act* 1889 (WA) s73(2)(c).

The plaintiffs' argument, as originally conceived, sought to establish a requirement of either practical equality in the size of electoral divisions (with a margin of tolerance not exceeding about 15%) or a prohibition against serious malapportionment. The argument in favour of these requirements was based on:

(i) the need for members of both Houses of the Western Australian Parliament to be "chosen directly by the people" in s73(2)(c) of the *Constitution Act* (WA); or, alternatively

(ii) an implication drawn from representative democracy recognised by the same provision.

A further argument was advanced, but in the end not pressed, based on a modified doctrine of equality propounded by Deane and Toohey JJ in *Leeth*.[11] Similar arguments were based on the Commonwealth Constitution except that reliance was placed on the need for members of the House of Representatives to be "directly chosen by the people of the Commonwealth" in s24 of that Constitution. The case was subsequently argued in reverse beginning with the argument based on the Commonwealth Constitution.

It is perhaps not out of place to stress that at the time the challenge was conceived it was expected that it would be heard by the same bench which had decided *Theophanous* with the exception of one new member of the Court to replace the anticipated retirement of Sir Anthony Mason. By the time the case was finally heard Sir Anthony had departed from the Court and Sir William Deane was unavailable to hear the case because of his announced resignation from the Court.

(a) The Commonwealth Constitution

Step 1

The first key step in the plaintiffs' argument in regard to the Commonwealth Constitution was that by 1995 the Constitution recognised the principle of universal adult suffrage even if it had not done so in 1900 at the time of its enactment. This argument stressed the dynamic character of the Constitution and had the advantage of not asking the High Court to re-write history, given the obvious historical fact that the principle had yet to be established at the time the Constitution was enacted. An attempt was made to rely on the difference between connotation and denotation either in relation to the words "directly chosen by the people" in s24 or the concept of representative democracy which was thought to have been recognised by the Court by a process of implication in the cases which began with the *ACTV Case*.

The distinction was more commonly applied by the Court in the context of interpreting the scope of Commonwealth legislative powers rather than restrictions on those powers. There is of course no reason in principle for denying its operation in that context especially if the Court is prepared, as is apparently now the case, to give full and broad effect to constitutional restrictions on power. A striking illustration of its application would have been provided if our Constitution contained a guarantee against cruel and unusual

11 *Leeth v Commonwealth* (1992) 174 CLR 455 at 486-487.

punishment, given the different forms of punishment which can be devised and the changes in community values that can occur over time.

The argument involved a rejection of the view expressed by Stephen J in *McKinlay* to the effect that universal adult suffrage could not be regarded as an essential feature of representative democracy.[12] Reliance was also placed on the following remarks of a unanimous Court in *Cheatle v R* in interpreting the meaning of "jury" in s80:

> Neither the exclusion of females nor the existence of some property qualification was an essential feature of the institution of trial by jury in 1990. The relevant essential feature or requirement of the institution was, and is, that the jury be a body of persons representative of the wider community. ... The restrictions and qualifications of jurors which either advance or are consistent with it may, however, vary with contemporary standards and perceptions. The exclusion of women and unpropertied persons was, presumably, seen as justified in earlier days by a then current perception that the only true representatives of the wider community were men of property. It would, however, be absurd to suggest that a requirement the jury be truly representative requires a continuation of any such exclusion in the more enlightened climate of 1993. To the contrary, in contemporary Australia, the exclusion of females and unpropertied persons would itself be inconsistent with such a requirement.[13]

The argument bore some similarity with developments described by Professor Chaim Perelman regarding Article 6 of the Belgian Constitution which provides that "all Belgians are equal before the law." After pointing out that for a nearly a century women were denied access to the bench, the bar and the right to vote, despite the existence of that provision, he said:

> But what constitutes a good reason justifying an inequality of treatment varies with the society and the age. Though it seemed natural to the Supreme Court of Belgium, in its verdict of 11 November 1889, to exclude women from the bar on the grounds that legislators "regarded it as

12 (1975) 135 CLR 1 at 57.

13 (1993) 177 CLR 541 at 560-1. The same passage was also quoted in Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 41. As Associate Professor Goldsworthy emphasised, the remarks were only obiter dicta and, as will be seen later, he was critical of the general approach which underlies them. By contrast the remarks were supported by Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *Fed L Rev* 37 at 50 and Zines, *The High Court and the Constitution* (Butterworths, Sydney, 4th ed 1997) pp397-399 and 405, where it is pointed out that the case seems to hold (perhaps for the first time) that a law which conformed to a provision in the Constitution in 1900 would not do so today, because of a change in contemporary perceptions.

> an axiom too obvious to require stating that the administration of justice was reserved for men", such an argument would appear to us today not merely unacceptable, but even completely unreasonable.[14]

Although the argument did not meet with the approval of all judges,[15] it did receive an acceptance of sorts by four and possibly five judges. Without the principle being treated as a right in the traditional sense, some judges stressed its status as a restriction on the ability of the legislature to provide for elections which deprived persons of the ability to vote based on gender, race or property qualifications.[16] This was also the view espoused by McTiernan and Jacobs JJ in *McKinlay*.[17]

Step 2

This, however, does not mean that *McGinty* can be treated as having established the principle in question and I will return to criticism made of the underlying technique which was used by the judges who accepted it later. For the present, the important point to grasp was not so much the fate of the principle itself but its place in leading to the next and less successful step in the plaintiffs' argument. That step was that if every legally capable adult has the vote, then, for that vote to be effective and meaningful, each person's vote must be equal to that of every other person.

This argument necessarily involved an application to have the Court reconsider *McKinlay*, where a majority of the Court had rejected the view that s24 of the Commonwealth Constitution required the number of people or electors in electoral divisions to be equal. The rejection did not prevent a number of judges from adverting to the possibility of gross

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14 Perelman, *Justice, Law and Argument: Essays on Moral and Legal Reasoning* (D Reidel Publishing Co, Dordrecht, Netherlands 1980) p85.

15 In the course of oral argument Dawson J had occasion to remark to the Commonwealth Solicitor-General that the dicta in *Cheatle* demonstrated, "perhaps, the dangers of having regard to political correctness in constitutional interpretation": *McGinty*, Transcript, 13 September 1995, p122. Perhaps in response to the indication by the Chief Justice (at p123) that it should not be assumed that this was a view held by all other members of the Court, Dawson J later conceded that perhaps he should not have used the term "political correctness" although he did not appear to resile from his objection to the use of current or contemporary values in determining the essential meaning of terms used in the Constitution as at 1900 (at p124).

16 *McGinty v Western Australia* (1996) 186 CLR 140 at 200-201 per Toohey J, 221-222 per Gaudron J, 286-287 per Gummow J and 166-167 per Brennan CJ, who thought that the matter was at least arguable. McHugh J expressed support for the view referred to in the text in *Langer v Commonwealth* (1996) 186 CLR 302 at 341-343.

17 (1975) 135 CLR 1 at 36.

malapportionment being so serious as to raise a question whether members chosen by such electors would cease to be described as members "directly chosen by the people".[18]

It was argued on behalf of the plaintiffs that the decision in *McKinlay* was no longer authority on the meaning of s24 of the Constitution because it had been overtaken by the decisions of the Court which held that the principle of representative democracy was inherent in the Constitution independently of the terms of any particular provisions of that Constitution.[19] As with the question of the right to vote, and by parity of reason, the dynamic notion was invoked to explain why either the notion of representative democracy or the words "directly chosen by the people" in s24 required some equality in the size of electoral division by 1995, even if they would not have done so in 1900. In addition, and especially in the light of the Court's approach in *Street v Queensland Bar Association*,[20] the Court should be prepared to read restrictions on legislative power broadly as befits the interpretation of most constitutional provisions. This would complement the approach adopted by the Court to interpret provisions which define the scope of legislative powers.

Once again an attempt was made to avoid asking the Court to re-write history. But for this argument to succeed much depended on being able to show that there was consensus, especially amongst political scientists, that substantial or practical equality had by that time become an essential feature of representative democracy.[21] Sadly for the plaintiffs, and as surprising as it may seem to some, that did not prove to be the case. The consensus did not exist despite generalisations about the minimal definition of democracy as consisting

> of the majority principle ... and a number of civil and political rights, to freedom of speech and association *and one vote per citizen, which guarantee rough political equality between voters* and a choice between real alternatives at elections.[22]

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18 Per Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ; Murphy J dissenting. The judges who recognised the possibility of some limits were McTiernan, Stephen, Mason, Jacobs and Murphy JJ.

19 Such was the confidence of the senior counsel for the plaintiffs and the Commonwealth (appearing as an intervener) that it was put to the Court during oral argument that it was for the defendants to show why the Court should continue to follow *McKinlay* despite the developments referred to in the text.

20 (1989) 168 CLR 461.

21 See Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *Fed L Rev* 37 at 75 where the Court was rightly urged to be cautious in the face of disagreement in the ranks of political scientists and historians on what is thought to be essential for the working of democracy.

22 Bellamy, "Introduction" in Bobbio, *The Future of Democracy: A Defence of the Rules of the Game* (Griffin, trans) (University of Minnesota Press, Minneapolis 1987) p5 (emphasis added). For an example of recent political science writing which did not support the plaintiffs' case see Lijphart, *Electoral Systems and Party Systems: A Study of Twenty Seven Democracies 1945-1990* (Oxford University Press, New York 1994) pp124-130, referred to by McHugh J: (1996) 186 CLR 140 at 248 n485.

These arguments failed to gain acceptance by a majority of the Court. Strictly, there was no decision, and nor, as matters eventuated, was there required to be any decision, on whether the Constitution required electoral divisions for the House of Representatives to be equal. However three judges did re-affirm the correctness of *McKinlay*.[23] At the very least it can be safely asserted that the *McGinty* case offered little if any real encouragement for the view that *McKinlay* should be overruled.

Even the two judges who found in favour of the plaintiffs, Toohey and Gaudron JJ, did not accept the existence of a constitutional requirement of either strict or practical equality. It is true that this presumably leaves open the possibility of a Court intervening in the kind of cases of gross malapportionment which were left open by four of the majority judges in *McKinlay* but the modern significance of this is not likely to be great given the present statutory requirements which adopt a maximum margin of tolerance of 10%.

Much was made by the judges who rejected the need to overrule *McKinlay* regarding the history of electoral distribution, the different traditions of constitutional interpretation between Australia and the United States, as well as the intention of the framers to leave such matters to the discretion of Parliament, eg the legislative powers which attract the operation of s51(xxxvi) of the Constitution. Obviously the desirability of leaving such problems to be resolved by politicians rather than the courts was another major factor which militated against the adoption of the plaintiffs' arguments. One member of the Court also pointed to the rejection of guarantees of equality in voting power in 1988.[24]

Step 3

Perhaps the most difficult aspect of the argument based on the Commonwealth Constitution was the third and last step in that argument. That step was that, if the equality requirement operated at the federal level of government as an essential aspect of representative democracy, the latter concept applied to the States as well, either because of s106 of the Constitution or because of what the plaintiffs referred to as the "organic unity" of the Australian polity. Both possibilities seek to establish that the Commonwealth Constitution assumes the existence of and entrenches the system of representative democracy for both levels of government in Australia. Under the first of these possibilities some judges had shown a willingness to hold that, because the State Constitutions operated

23 Dawson, McHugh and Gummow JJ. The latter member of the Court did, however, stress his agreement with the view expressed by McTiernan and Jacobs JJ in *McKinlay* regarding the possibility of the Court intervening in cases where there are grossly disproportionate variations in the size of electoral divisions ((1975) 135 CLR 1 at 36). He also indicated that, if the relevant legislation established a system which requires a specialised body or tribunal to define the electoral divisions in a manner which conformed to the principles he supported, the same legislation would not be open to challenge as denying the constitutional requirement for representative government: (1996) 186 CLR 140 at 286-289. Brennan CJ found it unnecessary to decide the issue.

24 *McGinty v Western Australia* (1996) 186 CLR 140 at 245-246 per McHugh J.

by virtue of the Commonwealth Constitution, at least some requirements of the latter Constitution should apply to the States.[25] The second possibility seeks to rely on the inappropriateness of allowing the States to escape the application of non-federal restrictions on Commonwealth legislative power.

Essentially both arguments involve a denial of the diversity implicit in a federal system. They are not arguments which I would normally support, even for forensic purposes. However given the modern trends in constitutional litigation and the increasing willingness of the High Court to depart from a more literal interpretation of the Constitution, the Court can hardly be surprised if litigants exploit possible lines of argument of this kind. Ironically the one area which could be advanced to refute them, the separation of judicial power, is now the very area which has, somewhat surprisingly, yielded the potential for their application essentially because of the possibility of vesting the judicial powers of the Commonwealth in State courts.[26]

That said, the arguments were decisively rejected in *McGinty* in relation to the composition and powers of State legislatures, as distinct from the judicial system of the States.[27]

(b) The Constitution Act 1889 (WA)

In 1978 the Western Australian Parliament inserted s73(2) in the *Constitution Act* 1889 (WA). This had the effect, amongst other things, of requiring any Bill which

> expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people

to be passed by an absolute majority of both Houses of that Parliament and also that it be approved by the electors at a referendum. The same requirement applied to a Bill which sought to impliedly or expressly affect the provisions which contained that requirement. In

25 See Murphy J eg in *Western Australia v Wilsmore* (1982) 149 CLR 79 at 86 and Deane J in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 164-167 as regards representative democracy. The plaintiffs also pointed to s15 and other provisions which emphasise the interrelationship between the Commonwealth and the States (ss51(xxxvii) and (xxxviii), 96, 111, 123 and 128).

26 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The key provision is s77(iii) rather than s106 of the Constitution.

27 (1996) 186 CLR 140 at 175-176 per Brennan CJ; 189 per Dawson J; 206-210 per Toohey J; 293 per Gummow J. McHugh J did not find it necessary to deal with them because of his rejection of the second step in the argument. Gaudron J took the view that, having regard to the system of representative democracy which inhered in the text and structure of the Commonwealth Constitution, s106 operated to require that the States, as constituent bodies of the Constitution, be and remain essentially democratic. But that requirement fell short of requiring the principle of practical equality to be followed in the election of members of the State Parliaments: at 216.

other words, this was a manner and form requirement which was doubly entrenched. In *Stephens* a majority of the Court accepted that the requirement gave rise to a freedom of communication about political matters in that State similar to that which was implied from ss7 and 24 of the Commonwealth Constitution.[28]

The plaintiffs argued that the amendment of s73 had the effect of introducing a principle of practical equality for the electoral divisions of both Houses either because of the implication of representative democracy or the requirement that members were to be "chosen directly by the people." One of the main advantages of relying on the 1978 amendment to the *Constitution Act* (WA), from the plaintiffs' point of view, was that the relevant time for ascertaining the content of the concept of representative democracy was not 1900 but, instead, the year in which the amendment was passed.

However this argument was also not without its difficulties. The most important of these was that there was no evidence to suggest that the amendment was intended to deal with the question of electoral boundaries, and in fact such discussion as there was during the parliamentary debates which attended its enactment suggested that the opposite was the case. Even more critical was the fact that the application of the equality principle could, at least on one view of justiciability, have rendered invalid the composition of the parliament which had enacted the amendment.

It was therefore perhaps not surprising that a majority of the Court rejected this argument as well. For those judges, the aim of the 1978 amendment was the narrower purpose of entrenching the system of popular selection of legislators by direct vote rather than by indirect methods.[29] But this did not prevent a minority from dissenting. They accepted that equality of voting power was an aspect of representative democracy and that the latter concept was to be judged in the light of current and contemporary democratic standards. In their view, one of the vices of the State's electoral distribution laws was that it inevitably produced serious malapportionment between metropolitan and non-metropolitan electors. They also thought that the malapportionment could not be justified as reasonably capable of being seen as appropriate and adapted for furthering a legitimate end, namely, facilitating the representation of those who live in remote areas.

(iii) *Langer* and *Muldowney*

On the same day that the Court handed down its decision in *McGinty* it also decided the case of *Langer v Commonwealth*,[30] in which it dismissed a challenge to the validity of the provision which made it an offence to encourage persons to vote otherwise than in

28 (1994) 182 CLR 211 at 232-4 per Mason CJ, Toohey and Gaudron JJ, and at 236 per Brennan J.

29 The majority consisted of Brennan CJ, Dawson, McHugh and Gummow JJ. Toohey and Gaudron JJ dissented.

30 (1996) 186 CLR 302.

accordance with the system of (optional) preferential voting which applied to elections for the House of Representatives. In other words, the offence was that of encouraging electors not to express alternative preferences for all candidates even though the failure to do so did not have the effect of making such a vote informal or ineffective.[31]

A majority of the Court upheld the provision as an exercise of the power of the parliament to make laws which governed the method of choosing members of the House of Representatives under ss31 and 51(xxxvi).[32] The Court affirmed the power of the parliament to prescribe any method of election or voting as long as it permitted a genuine free choice having regard to the provisions in s24 of the Constitution which required members to be "directly chosen by the people". It was also held that the parliament could enact any measure which was reasonably appropriate and adapted to the protection of the method of voting prescribed by the parliament, which was in this case optional or selective rather than full preferential voting. The offence in question was seen as coming within this category even though it prevented the encouraging of something which was legal and effective, and also despite its tendency to require a voter to choose by allocating preferences among candidates for whom the voter may not have wished to vote.

According to the majority the offence in question did not prevent voters making an effective choice, contrary to the view taken by the sole dissentient in the case. Neither was it held to breach the implied freedom of political communication. It was emphasised that the challenged provisions did not prohibit:

- discussion about the operation or desirability of the method of voting prescribed by the parliament;
- voters utilising an available alternative method of voting;
- a person informing electors of the state of the law.

What the majority seemed to affirm, however, as Dawson J in dissent emphasised, was an extremely "thin line" between imparting information with an intention to encourage its use and doing the same thing with an intention merely to inform. I and others have not found the distinction persuasive.[33]

Nevertheless the decision rightly accords to the parliament a wide power to prescribe methods of election for the parliament, as long as those methods allow for a genuine free choice of candidates by the electors. At the same time there seems little encouragement for the view that compulsory voting would be treated as invalid on the ground that it fails

31 The challenged provision was s329A *Commonwealth Electoral Act* 1918 (Cth), inserted by s27 *Electoral and Referendum Amendment Act* 1992 (Cth).

32 Per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; Dawson J dissenting.

33 See Zines, *The High Court and the Constitution* p383.

to conform with the essential features of representative democracy or government. Although not without difficulty, it is possible to view the task of electing candidates as something in the nature of a public duty rather than a mere right of the citizen and one which, moreover, encourages, rather than impedes, the operation of the political process.[34]

The Court subsequently upheld similar State provisions on the assumption that representative democracy or government could be implied as a requirement of the relevant State Constitution.[35]

(iv) Evaluation

The developments canvassed above largely bear out a pattern of consolidation rather than expansion. Although they may be thought by some to give a weak operation to the implied freedom of political communication, they do not signal any reversal of that freedom. As with the other developments to be dealt with in this paper, they also bear out Sir Anthony Mason's view regarding the absence of a general basis for implying a Bill of Rights in Australia.[36]

But in my view the consolidation is somewhat in the nature of a patchwork quilt. As has been seen, a number of judges seem prepared to recognise that the Constitution now recognises the operation of universal adult franchise even if that principle has yet to be formally established as the ratio of any decision.

Associate Professor Jeffrey Goldsworthy has subjected the dicta on the evolving right to vote under the Commonwealth Constitution to an impressive and searching analysis.[37] The concern expressed by him is the lack of a reasoned and principled justification for reaching a conclusion which goes beyond a desire to reach just results, at least when matters are viewed from the perspective of what he refers to as "moderate originalism". I have considerable sympathy with Associate Professor Goldsworthy's general approach and his criticisms of the argument we helped to fashion for the plaintiffs clearly troubles me. It will be apparent that my desire to avoid asking the Court to re-write history means that I too have some concerns about the Court interpreting the Constitution in a way that is completely divorced from the original meaning which that document was intended to have.

I cannot in this paper do full justice to his systematic and comprehensive analysis of the problem of originalism. However I will attempt to refine the argument in support of the constitutionally recognised "right" to vote in response to some of his concerns. The essential weakness identified by him was the failure of those who accepted the argument to

34 Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *Fed L Rev* 37 at 60.

35 *Muldowney v South Australia* (1996) 186 CLR 352.

36 *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 at 136.

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

identify the fixed concept which enabled the concept to evolve differently over time. That is, they fail to identify the content of the connotation which enabled the concept to have a changing denotation that was wide enough to embrace a right of women and others to vote by 1995 when they did not possess that right in 1900, the relevant time for determining the essential meaning of terms used in the Constitution.

One answer to that criticism may be to argue that representative democracy (either as an independent concept or as recognised by the words in s24 which refer to members being directly chosen by the people) requires the right to vote to be extended to all *legally capable persons* so as to ensure that legislators are chosen by persons who are "truly representative" of the community at any given time. A similar argument was advanced unsuccessfully in relation to the meaning of "adult person" in s41 of the Constitution. I believe that the rejection of that argument meant that the Court failed on that occasion to give the word "adult" an interpretation which was more in keeping with its constitutional context.[38] Having said that, I would be surprised if this answer either did or will satisfy Associate Professor Goldsworthy or indeed others who have a more fundamental objection to the use of the connotation and denotation dichotomy in constitutional interpretation. The reason for this is the relativist nature of the concept as redefined by me, although the standards operating in Australia and around the world may go some of the way to alleviate concerns of that kind.

A more persuasive approach is to rely on other principles of progressive interpretation. The defence power contained in s51(vi) of the Constitution only refers to the "naval and military defence of the Commonwealth" but this has not prevented those forms of defence being treated as only *examples* of the kind of defence referred to in that power. As was borne out during the course of two world wars, events can of course generate other legislative measures which can be taken to meet the emergency of war even if they are of an economic rather than military character. Similarly, the content of the executive power of the Commonwealth in s61 of the Constitution has been seen to have an operation which expanded once Australia attained its independence so as to include such matters as the power to enter into treaties and to declare war and peace. Perhaps the same will be recognised regarding the operation of the power of constitutional amendment under s128 in relation to the amendment of the Covering Clauses without there being any need for Australia to seek the assistance of its former constitutional parent, especially when that assistance can no longer be forthcoming as a result of s1 of the *Australia Acts* 1986 (Cth) and (UK).

In his minimal definition of democracy, Norberto Bobbio had occasion to observe:

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38 *King v Jones* (1972) 128 CLR 221. However the practical significance of that view is largely hypothetical because I support the transitional interpretation given to that section by the majority in *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.

> What number of individuals must have the vote before it is possible to start talking of democracy cannot be established in terms of an abstract principle, ie leaving out of account historical circumstances and the need for a yardstick to make any judgment. All that can be said is that a society in which the ones to have the vote are adult male citizens is more democratic than one in which only property owners have the vote, and less democratic than one in which women also have the vote. The statement that in the last century there occurred in some countries a continuous process of democratization means that the number of those entitled to vote steadily increased.[39]

It is therefore perhaps more realistic to acknowledge that the Constitution as originally framed only provided *a partial instalment of democracy*. But in the same way that we are generally prepared to leave to judges the task of filling the gaps created by changing conditions as long as we are clear about the general underlying concept intended by the framers, at least when it comes to the examples given above, why should we not be prepared to apply the same approach to *constitutional restrictions on power*? The reason we are prepared to leave such matters to judges without invoking the amendment procedure is similar to the reason which existed in relation to the interpretation of the postal power in s51(v) of the Constitution. This may arguably be seen to fall within what Associate Professor Goldsworthy regards as the third legitimate method by which the Constitution can be interpreted progressively and flexibly. He referred to this method as the "non-literal, purposive interpretation". To use his own words:

> Unless the nation is to be forced to formally amend the Constitution, which is a time-consuming and expensive business, the only way to reach the result which is obviously consistent with the founders' clearly expressed purpose is to interpret the words according to their spirit rather than their letter.[40]

The willingness of some judges to recognise the "right" to vote contrasts with the Court's lack of enthusiasm to deal with questions affecting the weight of that vote and also its tolerance of legislative provisions which restrict a person's right to persuade voters on how

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39 Bobbio, *The Future of Democracy* pp24-25.

40 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 33. Associate Professor Goldsworthy refers to the power of Congress to raise "Armies" and "a Navy", and to regulate "the land and naval Forces" under Article I s8 of the US Constitution to illustrate this method of interpretation. The approach I favour provides grounds for arguing that the Commonwealth's powers over marriage and divorce in ss51(xxi) and (xxii) should be seen as *examples* of the power of the Commonwealth to deal with *family relationships*. Although those relationships were based on *marriage* in 1900, arguably they should now be seen to be wide enough to encompass those relationships which are *not based on marriage*. Needless to say, such a view has yet to be accepted by the High Court.

they should lawfully cast their vote. I agree with the criticism advanced by Associate Professor Goldsworthy that some of the members of the Court who were prepared to adopt a dynamic notion of representative democracy in relation to the right to vote were not prepared to adopt the same approach in relation to the weight of a person's vote.[41] Much was made by those judges of the importance of not freezing into the Constitution any particular stage in the evolution of that aspect of representative democracy. One advantage of this approach is to make it easier for the parliament to make provisions for rectifying the under-representation of particular groups in society such as women and persons of the Aboriginal race. The latter advantage overlooks however that any restriction on the legislative power to provide for electoral distribution is unlikely to be absolute in character. As the minority in *McGinty* illustrated, even if the Constitution requires some form of equality in the size of electoral divisions it is still possible to countenance departures from that equality in the interests of furthering other legitimate and competing public interests, providing that those measures are no more than are reasonable and adapted to furthering those ends. So far as remoteness and the importance of facilitating the representation of persons who live in such areas are concerned, this can be accommodated by allowing for some margin of tolerance and also providing generous travelling and other allowances payable to members who represent electors in those areas. In any event, the acute nature of those problems must surely be less in the light of modern methods of communication.

While *McGinty* did not represent a reversal of the implication based on representative democracy, it certainly marked a refusal to extend the scope of its operation as a judicially enforceable principle under the Commonwealth Constitution.

The weakness of the majority view in *Langer* was exposed in the dissenting view of Dawson J. As he pointed out he did not support, at least at that time, the existence of a constitutional freedom of political communication. But, assuming that freedom did exist, it was difficult to see how political discussion could be confined to the mere imparting of information and why it should not extend to the furnishing of information with the intention that it should be used. He rightly treated the exhortation or encouragement of electors to adopt a particular course in an election to be of the very essence of political discussion. His Honour was able to conclude that the challenged provisions in that case were invalid because they interfered with the requirement of genuine choice which he derived from the wording of s24 of the Constitution.[42]

All this leads me to conclude that the Court seems, on the whole, to be more concerned with matters which could influence the vote cast by the electors rather than the vote itself. By matters influencing the vote I have in mind the inability of the Parliament to ban political advertising. It seems odd in retrospect that the same inability can be justified as being essential to the working of representative democracy because it is seen as a

41 Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1 at 4-7.
42 (1996) 186 CLR 302 at 324-327.

necessary adjunct to the electoral process, but matters which go to the heart of the nature and quality of the vote cast in that process seem to assume a lesser importance.

I would not be surprised if, apart from the shadow cast by the absence of a Bill of Rights, there are concerns here about the ability and appropriateness of courts to play a role in this area. Freedom of political discussion may, on the other hand, be thought by some to lend itself more easily to judicial application and enforcement.

The absence of judicial intervention in this field is perhaps also justified by an assumption that these matters are best left to the political processes to resolve. The weakness in that assumption lies in the factor referred to earlier, namely, the vested interest which some electors and their representatives may have in retaining electoral divisions of unequal size. Nevertheless, the experience with the reform of electoral redistribution for the parliaments of the States, including, for example, the South Australian and Queensland Parliaments, though somewhat slow in eventuating, may suggest that the effectiveness of public opinion should not be underestimated in bringing about such reform without having to rely on the courts.

I intend later to deal further with the application to the States of restrictions implied from the Commonwealth Constitution. But at this stage it suffices to observe that *McGinty* seems to shut the gate on the use of s106 of the Constitution as the mechanism by which the aspects of representative democracy which bind the Commonwealth as a result of implications drawn from the Commonwealth Constitution can be made to apply to the States. This, I think, is in keeping with the federal nature of our Constitution. I find it difficult to draw the distinction drawn by Gaudron J under which s106 requires the States "to be and remain essentially democratic" and other aspects of representative democracy such as the equality of electoral divisions. Presumably the latter is not seen as sufficiently essential to come within the notion of "essentially democratic" for these purposes.[43]

By the time *Muldowney* was decided there were at least three members of the Court who seemed to be opposed to the operation of the freedom of political communication which was implied from the Commonwealth Constitution in relation to matters concerning the election and functioning of State Parliaments.[44] This opposition, if accepted by a majority of the Court, would seem to prompt difficult questions concerning the ability of State Parliaments to pass laws which place a ban on political advertising (absent any valid and inconsistent Commonwealth laws to the contrary) in relation to State parliamentary elections.

Both the *McGinty* and *Muldowney* cases also illustrate that it is possible that some States will be held to have incorporated the principle of representative democracy as a result of

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43 As above, n27.

44 *Muldowney v South Australia* (1996) 186 CLR 352 at 365-366 per Brennan CJ, 370 per Dawson J, and 373-374 per Toohey J.

the entrenchment of manner and form requirements in their own State Constitutions.[45] The effectiveness and degree of permanence of such requirements will then depend on the nature of the entrenchment mechanism.[46] This increases the importance of State Constitutions for these purposes.

It remains to mention that only one member of the Court found it necessary in *McGinty* to expressly reject the argument based on the doctrine of equality promoted by Deane and Toohey JJ in *Leeth*.[47] The failure of the Court to show interest in the notion of equality, even when limited and confined to the notion of *political equality*, serves as a clear indication that the doctrine in question, even if it ever existed, or indeed still exists, has been put into cold storage at least for the time being.

FREEDOM OF POLITICAL COMMUNICATION, ASSOCIATION AND MOVEMENT

(i) Background[48]

The significance of *McGinty* was by no means confined to the electoral processes. The views expressed by the various members of the Court in that case led Sir Daryl Dawson to assert in the course of oral argument in *Levy v Victoria*[49] that there was by then no longer a majority on the Court to support the propositions established in the *Theophanous* and *Stephens* cases. Those cases dealt with the validity of the defamation laws and, in particular, their consistency with the freedom of political communication. This ultimately led to the adjournment of proceedings in *Levy* and the removal of another case, *Lange v Australian Broadcasting Corporation*,[50] into the High Court, for the express purpose of enabling the parties to seek to have the correctness of the defamation cases re-opened. Whether either of the cases were appropriate vehicles for that purpose seems to me to have been highly doubtful.

The majority judges in *McGinty* had stressed the importance of grounding implications in the text and structure of the Constitution, a point emphatically made by some of them in their dissenting judgments in the defamation cases. They also preferred to use the term

45 These kinds of requirements must be observed as a result of the *Australia Acts* 1986 (Cth) and (UK) s6 and the Commonwealth Constitution s106. See also the discussion by Gummow J in *McGinty v Western Australia* (1996) 186 CLR 140 at 295-298.

46 See eg *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211 at 233-234.

47 *McGinty v Western Australia* (1996) 186 CLR 140 at 285 per Gummow J. Gummow J indicated that even if, contrary to what was decided in *Leeth*, there was a doctrine of the underlying equality of the people of the Commonwealth this would not have required a different outcome on the question of electoral distribution.

48 The background which follows in the text is more fully explained and sourced by me in "*Theophanous* and *Stephens* Revisited" (1997) 20 *UNSW LJ* 195.

49 (1997) 189 CLR 579.

50 (1997) 189 CLR 520.

representative "government" rather than "democracy". The same justices were also unhappy about using the concept as a free-standing principle which operated independently of the express provisions of the Constitution; that is, as a reason for invalidating legislation which does not otherwise breach the express provisions of the Constitution.

The High Court proceedings in *Levy* and *Lange* were to give the Court the opportunity to revisit the following important issues in the light of the views expressed in *McGinty*:

> (a) whether the freedom of political communication derived from the Commonwealth Constitution could be used to invalidate laws which dealt with *private rights and obligations*, such as the laws on defamation; and
>
> (b) the effect of the freedom in limiting the reach of *State legislative power*, especially as regards laws which limit or interfere with the freedom to discuss political matters which are only relevant to *State political affairs*.

(ii) *Lange*

The first of those issues arose for determination in *Lange*, where a former New Zealand Prime Minister sued the Australian Broadcasting Corporation (ABC) for defamation in the New South Wales Supreme Court in respect of allegedly defamatory material published about him in Australia while he was still in office. In answer to the plaintiff's claim, the ABC sought to rely on the "constitutional defence" based on the *Theophanous* and *Stephens* cases. Given the implications of the case for freedom of speech and expression, and in particular its impact on the media, it was not surprising that the case generated much public interest and discussion. A vast number of organisations also sought to intervene in the case.[51]

For a High Court which seemed so divided, the final outcome of the case proved quite remarkable, entailing as it did the delivery of a unanimous judgment. Contrary to the writer's expectation, the case was not decided (at least wholly) by reference to the usual principles of stare decisis. The Court was able to seize on the differences between the judges in the majority in the earlier defamation cases to conclude that the matter should be re-examined from the standpoint of principle and not previous judicial authority.

The result of that re-examination was to consist of a striking re-affirmation of the implied freedom of political communication. The freedom was referred to as a freedom of communication on matters of government and politics, which was once again seen as an indispensable incident of the system of representative government created by ss7 and 24

51 I should disclose that I assisted in the preparation of the friend of court brief filed with the Court by the Australian Press Council.

and other related provisions of the Commonwealth Constitution. The following passage in the judgment most succinctly encapsulates the nature of that freedom:

> Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation. While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections. ... Furthermore, because the choice given by ss7 and 24 must be a true choice with "an opportunity to gain an appreciation of the available alternatives", as Dawson J pointed out in *Australian Capital Television Pty Ltd v The Commonwealth*, legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.
>
> That being so, ss7 and 24 and the related sections of the Constitution necessarily protect the freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.[52]

The Court also made it clear that the presence of s128 and certain other provisions (ss6, 49, 62, 64 and 83) made it impossible to confine the operation of the freedom to an election period.[53] In addition, those other provisions were seen as giving rise to implications of their own. For example, s128 was seen as necessarily implying a limitation on legislative and executive power to deny electors access to information that might be relevant to the vote they cast in a referendum to amend the Constitution.[54] Furthermore, the content of the freedom to communicate and obtain information concerning the conduct of the executive branch of government was thought to extend beyond the conduct of ministers and the public service so as to include the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a minister who is responsible to the legislature.[55]

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52 (1997) 189 CLR 520 at 560 (citations omitted).
53 At 561.
54 As above.
55 As above.

It was emphasised however that the protected freedom did not confer personal rights on individuals, but, instead, operated to preclude only the curtailment of the freedom by the exercise of legislative or executive power, ie it operates as a restriction on those powers.[56]

Furthermore, and as was previously thought, the freedom is not absolute. Thus it was said that the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies the following two conditions:

> The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed and decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.[57]

The Court re-affirmed the impact of the freedom on the operation of the common law and also on laws which deal with defamation (common law and statutory). It was strongly emphasised that the common law has to conform with the Constitution, including the implied freedom of political communication. The Court also accepted a dynamic view of the balance struck by the common law of defamation between freedom of communication about government and political matters and the protection of personal reputation. In its view, the expansion of the franchise, the increase in literacy, the growth of modern political structures at the federal and State level and the modern development in mass communications, especially electronic media, now demanded the striking of a different balance from that which was struck in 1901.[58]

The earlier defamation cases were accepted as deciding that the common law rules of defamation in Australia did not, at least by 1992, conform with requirements of that freedom.[59] Those rules were seen as imposing an unreasonable restraint on the freedom of communication insofar as they required electors and others to pay damages or led to the grant of injunctions, for the publication of communications concerning government or political matters relating to the Commonwealth.[60] This was because

> the Constitution requires "the people" to be able to communicate with each other with respect to matters that could affect their choice in federal

56 At 560, 563

57 At 561-562. The Court found it unnecessary for the purposes of answering the stated questions in the case to explore the alternative formulations of the regulatory test based on the notion of proportionality.

58 At 565.

59 At 556.

60 At 568, 570.

> 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.[61]

The question that then arose was whether the common law of defamation and the statute law which regulated the publication of defamatory material were reasonably appropriate and adapted to the protection of personal reputation, having regard to the protected freedom.

It was accepted that those laws, as traditionally understood, failed to conform to the freedom in question. The way in which the laws on defamation were to be brought into conformity with the Constitution was supposed to be, notionally at least, different from the method used in the earlier defamation cases. It also resulted in the expansion of the defences to liability for defamation arising from the communication of the political matters covered by the freedom. It was notionally different because the vehicle used for this purpose was the new interpretation given to existing common law and statutory defences to liability in defamation. This avoided the appearance of locating the defences in the Constitution itself by not creating a constitutional private right of defence.[62]

Under the *Theophanous* and *Stephens* cases liability for defamation did not arise for the publication of statements of political matters if the defendant could establish that:

> 1) the defendant was not aware of the falsity of the material published;
>
> 2) the publication was not reckless (in the sense of not caring whether the material was false or not); and

61 At 571. This rationale for the freedom may raise questions about the scope of its operation in relation to communications about members of the *judicial* branch of government since they are not elected to office under our system. The reasoning used by the Court is mainly directed to communications which could affect the conduct of elections. Even on this basis, however, communications by electors and others about federal judges may be relevant to the role played by the *legislative* and *executive* branches of government in the constitutionally prescribed procedure for the removal of the same judges under s72 of the Constitution. The *Nationwide News Case* may have been one in which the freedom was applied to communications made about quasi-judicial officers (members of the Australian Industrial Relations Commission). It appears that the parties withdrew certain contentions based on the implied constitutional freedom of communication in the recent case which involved communications about a Territory magistrate: *Mann v O'Neill* (1997) 71 ALJR 903 at 928. I would be surprised if the freedom was not held to cover communications about the conduct of federal judges and indeed any governmental officials, given the operation of responsible government.

62 At 575.

> 3) the publication of the material was in all the circumstances reasonable.[63]

The Court in *Lange* departed from that approach by expanding the common law defence of qualified privilege. It declared that, for that purpose,

> each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter.[64]

This defence was, however, subject to a defence of reasonableness which was seen as sufficient to dispense with, and virtually subsume, the other two aspects of the constitutional test established in *Theophanous* and *Stephen*. It was also not available in cases of malice. However malice in this context was seen as signifying a publication made for some improper purpose and not for the purpose of communicating government or political information or ideas. It was pointed out that, for that purpose, neither the motive of causing political damage to the plaintiff, nor the vigour of an attack or the pungency of a defamatory statement, would be sufficient without more to deprive the defendant of the defence.[65]

The Court was conscious of the fact that the common law defence would in some respects extend beyond what was needed for it to be compatible with the freedom of communication required by the Constitution. This was because the common law defence might cover the discussion of certain political matters regardless of whether they illuminated the choice for the electors at federal elections or referendums to alter the Constitution, or throw light on the administration of the federal government. The two categories of matters which were cited as illustrations were the discussion of matters which concerned:

> (a) other countries and the United Nations; and

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63 This was the test adopted by Mason CJ, Toohey and Gaudron JJ in both of those cases and agreed to in the alternative by Deane J. Brennan, Dawson and McHugh JJ dissented.

64 At 571.

65 At 574.

(b) government or politics at State or Territory level and possibly also local government level as well.

Both these categories can come within the common law defence of qualified privilege so long as they also deal with matters which concern governmental and political matters that affect the people of Australia.[66]

This almost seems to suggest that the discussion of the same matters will not come within the constitutional freedom of political communication unless those matters *also bear upon matters at the federal (national) level of government.* If so, and as will be explained later, this contrasts with the view taken in the earlier defamation cases.

The unanimous judgment endorsed the view which had been stressed by the majority judges in *McGinty* and the minority judges in the defamation cases under which the Constitution is supposed to give effect to "representative government" (not "representative democracy") only to the extent that the doctrine is inherent or established in the text and structure of the Constitution. The whole Court said that:

> Under the Constitution, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?"[67]

The analysis of the system of representative and responsible government contained in the judgment may have other significant future implications. The theme of the accountability of the executive to the legislature as part of the mandated scheme of government provided by the Constitution, especially when combined with the explicit reference to parliamentary privilege and the coercive power of the Houses of Parliament to require the giving of evidence, lends strong support to the ability of those Houses to ignore claims of executive privilege.[68] Finally the emphasis placed on the provisions which are taken as formally establishing responsible government will continue to strengthen the possibility of the rules of responsible government being given the force of law to the extent that they are not already given that status by reason of existing and express constitutional provisions.

It might also be thought that the importance of electors having access to information that might be relevant to votes cast in federal elections and referenda may raise constitutional obligations in relation to freedom of information. But closer reflection may suggest that, although the tenor of the judgment lends strong support to such laws, the effect of the

66 At 571-572. It was for this reason that the Court remitted the action in this case to the Supreme Court of New South Wales in order to determine whether the discussion of the conduct of the plaintiff as the former New Zealand Prime Minister did have bearing on government or political matters in Australia: at 575-576.

67 At 567.

68 At 558-559. See also the writer's discussion of this issue in "Parliamentary Inquiries and Government Witnesses" (1995) 20 *MULR* 383 esp at 399-404.

protected freedom was only intended to be negative and not positive in nature, ie restrictive of legislative power rather than placing a positive obligation upon its exercise. Although the freedom may affect the validity of secrecy provisions, it is doubtful whether it will be effective to cast an obligation on the parliament or the executive to enact or establish a freedom of information regime.

(iii) *Levy*

The plaintiff in the case was a celebrated opponent of duck shooting in Victoria who challenged the constitutional validity of the Victorian Wildlife (Game Hunting Season) Regulations 5 and 6 in their application to duck shooting in that State. Regulation 5 had the effect of excluding, under penalty, any person from a designated hunting areas at specified times unless the person held a valid licence to hunt or take game birds in the same area. Regulation 6 imposed a limit of 5 metres within which any person was not to approach a licensed hunter. One of the stated objects of the regulations was to ensure a greater degree of safety of persons in the hunting areas during the open season for hunting ducks in 1994 (reg 1). The plaintiff had entered one of the prohibited areas in an attempt to protest against duck shooting in the same year.

The plaintiff claimed that the regulations were beyond the legislative powers of the Victorian Parliament because their application to his activities effectively prevented him from publicly protesting against laws which permitted the killing of ducks in Victoria and so interfered with the freedom of political communication protected under both the Commonwealth and the Victorian Constitutions. Although all members of the Court dismissed his challenge and upheld the valid application of the regulations to his protesting activities, they did not see fit to join in a single and unanimous judgment on this occasion.

Despite the absence of such a judgment, the ground relied on for the dismissal of the challenge was essentially the same. That ground was that, to the extent that the regulations did burden the freedom of the plaintiff to communicate with other members of the Australian community, the regulations were no more than was reasonably appropriate and adapted to a legitimate and competing public interest, namely, the protection of public safety. It is difficult to quarrel with this conclusion and few would have been surprised by it. The ground was in fact the ground originally urged by counsel for the Victorian Government before the interventions of Dawson J which eventually led to a widening of the arguments placed before the Court and the reconsideration of the earlier defamation cases.

The treatment of this case can be brief since it seems to follow in broad outline the view adopted by the whole Court in *Lange* in regard to such matters as the nature and scope of the freedom of political communication, the regulatory exception to the freedom and the operation of the freedom as a mere restriction on legislative power. So far as the last point is concerned, as McHugh J emphasised, the current Court treats the freedom as not a

> freedom *to* communicate ... [but] a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided by the Constitution.[69]

What stands out however is the robust and wide view taken by most members of the Court on the content of the communications which come within the scope of the protected freedom. That view is also typified by the remarks of McHugh J when he stated:

> For the purpose of the Constitution, freedom of communication is not limited to verbal utterances. Signs, symbols, gestures and images are perceived by all and used by many to communicate information, ideas and opinions. Indeed, in an appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it.[70]

As he also stated:

> the constitutional implication does more than protect rational argument and peaceful conduct that conveys political or government messages. It also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications.[71]

This seems to me to be a welcome exposition of the freedom and the underlying spirit that lies behind it, once it is of course accepted that the Constitution does protect such a freedom. It also stands in contrast to the somewhat narrower attitude exhibited in *Cunliffe v Commonwealth*[72] regarding the application of the same freedom to representations made to federal government officials regarding the application of federal laws to persons on whose behalf the representations were made.

In the event it was unnecessary for the Court to rule on whether either the Commonwealth or the Victorian Constitutions limited the legislative power of the Victorian Parliament to interfere with the freedom to communicate about political matters which only seemed to be relevant to the State level of government.

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69 (1997) 189 CLR 579 at 622.

70 At 622-623.

71 At 623.

72 (1994) 182 CLR 272. Two out of the four justices in the majority in that case, Dawson and McHugh JJ, failed to acknowledge its application to such representations: at 360-366, 395. This is not to deny that such representations could not be effectively regulated in the interests of those on whose behalf the representation were made.

Only two members of the Court dealt with the position under the Commonwealth Constitution and they expressed conflicting views on the matter. Consistently with the view he adopted in earlier cases, Brennan CJ would have confined the freedom protected under the Commonwealth Constitution to the discussion of political matters which had a bearing on the federal level of government. Protesting against duck shooting was not seen as falling under this category despite the possibility of the Commonwealth legislating on the matter as an exercise of the external affairs power. By contrast Kirby J seemed to entertain the possibility of accepting the opposite view.[73]

The same members of the Court stressed the need for an appropriate entrenchment under the Victorian Constitution for the freedom to be protected under that Constitution. There is considerable doubt as to whether there is such an entrenchment and, even if there is, the nature of the entrenchment does no more than require the law interfering with the freedom to be passed by an absolute majority of both Houses of the Victorian Parliament.[74]

It only remains to mention that one member of the Court, Kirby J, has shown an awareness of the recent criticism levelled against the use of the "sovereignty of the people" or rights of the "sovereign people" as a factor in constitutional interpretation.[75] I will need to return briefly to that issue in the concluding remarks of this paper.

(iv) Evaluation

A number of points emerge from the foregoing analysis of *Lange* and *Levy*. The first and most important result of those cases must be the striking confirmation by a unanimous High Court of the existence of the implied freedom of political communication. It is true that leave was not sought to have the Court re-open the correctness of the decisions in *ACTV* and *Nationwide News* but, even if it had, the unanimity of the Court's pronouncement on the existence of the freedom hardly suggests any encouragement for those who might have hoped for any reversal of those decisions. Moreover, in my view, the author or authors of the judgment in *Lange* deserve considerable praise for bringing together the varied and discordant voices on the Court, even though my general support for developments based on implied freedoms remains somewhat lukewarm.

Secondly, the Court has confirmed the application of the freedom to laws which deal with private rights and obligations despite serious doubts expressed by some members of the Court on that point.[76] Once the Court accepted the existence of the implied freedom, it was difficult, although admittedly not impossible, for the Court to draw this kind of

73 (1997) 189 CLR 579 at 595-596 per Brennan CJ and at 642-644 per Kirby J.

74 At 599-600 per Brennan CJ and 642-644 per Kirby J. See also Lindell, "*Theophanous* and *Stephens* Revisited" (1997) 20 *UNSW LJ* 195 at 199.

75 (1997) 189 CLR 579 at 634 and 643.

76 Eg Dawson, McHugh and Gummow JJ. See Lindell, "*Theophanous* and *Stephens* Revisited" (1997) 20 *UNSW LJ* 195 at 198.

distinction. It would also have given the freedom an extremely weak operation to deny its impact on laws which can have a most serious impact on freedom of communication on political matters, as is illustrated by the trials for defamation which have taken place in Singapore recently. Awards of damages for civil liability can be equally as effective as the penal consequences for committing an offence when it comes to deterring freedom of communication.

As I have emphasised, the failure to locate a private right of defence in the Constitution seems purely notional. It seems designed to pay continued homage to the failure of the Constitution to incorporate a Bill of Rights. As the Court pointed out, the recovery of loss arising from conduct which breaches the Constitution has in Australia been dealt with under the rubric of the common law and, in particular, the law of torts.[77] This recalls the position which prevailed even in the hey day of the individual rights view of s92. But, as *Lange* fully acknowledges, the law on defamation must conform with the Constitution and the effect of any failure to do so spells invalidity for that law. Hence there was a need for the expansion of the defence of qualified privilege in order to avoid that result.

Thirdly, these decisions seem to me to be less than satisfactory regarding the effect of the freedom in limiting the reach of *State legislative power*, especially as regards laws which limit or interfere with the freedom to discuss political matters which are only relevant to *State political affairs*. In *Theophanous* and *Stephens* a majority of the Court had affirmed the operation of the implied freedom to limit State legislative power to enact laws which limited or interfered with the freedom to discuss State political matters. One of those judges relied on s106 and certain other sections in the Commonwealth Constitution. Such a ground seemed vulnerable in the light of the views expressed in *McGinty*. However the remaining three majority judges relied on a different and pragmatic ground which was founded on the unreality of separating communications about State and Commonwealth political matters.

By contrast, although the Chief Justice recognised that the freedom was capable of limiting the exercise of the legislative powers of the State Parliaments, the relevant freedom was confined to the freedom to discuss political matters that concern the federal level and institutions of government. Thus he did not regard the freedom as applying to the publication of allegedly defamatory material regarding the performance of a State member of parliament.[78]

I have previously argued that the latter view has a deceptive simplicity which disguises the difficulty of its application. This was illustrated by the events which surrounded the Royal Commission established to inquire into the conduct of the former Premier of Western Australia in circumstances which had an undoubted political significance to her role as a senior and popular federal Minister by the time the Commission was established. I believe

77 (1997) 189 CLR 520 at 563.

78 See Lindell, "*Theophanous* and *Stephens* Revisited" (1997) 20 *UNSW LJ* 195 at 198.

this example supports the pragmatic rationale used in *Theophanous* which relies on the indivisibility of political speech in a federal system of government.

It is significant that a majority of the High Court failed to confirm the application of the freedom of political communication to State laws which limit or interfere with the freedom to discuss political matters which only concern State political affairs in both *Lange* and *Levy*. As was seen before, this was an issue which was directly raised by the facts in *Levy*, but the Court failed to avail itself of the opportunity to resolve the issue in that case. In fact, as indicated earlier, the unanimous judgment seems to suggest that the discussion of the same matters will not come within the constitutional freedom of political communication unless those matters also bear upon matters at the federal (national) level of government.

The further complication added in *Lange* is that the same limitation may not apply to Territorial laws which limit or interfere with the discussion of political affairs of the Territories of the Commonwealth.[79] This seems odd given that such matters always potentially fall within the legislative power of the Commonwealth Parliament, a potential which was strikingly realised and illustrated by the federal legislation passed to override the Territorial laws on euthanasia in 1997. In other words the indivisibility of political speech is equally present in relation to the affairs of a Territory.

Furthermore I do not think the non-application of the freedom of political communication to matters which only bear on the State level of government will be easy to reconcile with the explicit reliance placed by the Court on s128 of the Constitution as one of the express provisions of the Constitution which supports the existence of the same freedom.

The essential test seems to involve judgments being made about whether issues are likely to confront electors in a federal election or referendum. In my view this is unlikely to prove to be a promising exercise. It also could encourage arid exercises in line drawing in order to determine whether the Commonwealth Parliament could become involved in the resolution of political problems. At least when the Court is called upon to perform that role it usually requires legislation to have been enacted in order to avoid giving advisory opinions.

Fortunately, the difficulty of applying the test will largely be avoided in the context of defamation laws, at least in the absence of any legislative attempt to restrict or narrow the *common law* defence of qualified privilege. The very kind of pragmatic considerations which led three judges in *Theophanous* to extend the *constitutional* freedom of communication to State laws were used by the unanimous Court in *Lange* to widen the common law defence of qualified privilege in order to cover the discussion of government

79 The fact that the Court in *Lange* had in mind the discussion of Territorial politics is clear from the discussion at (1997) 189 CLR 520 at 571-572.

or politics at the State, Territory and local government level, whether or not the discussion bears on matters at the federal level. Thus it was said:

> The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia [made] this conclusion inevitable.[80]

However this was only used to widen the *common law defence* and not the *constitutional freedom*. To that extent there may be a significant reduction in the scope of the freedom instead of its mere consolidation. But, for the moment, it would be unwise to treat the issue as settled.

(v) *Kruger*

The same rationale which supports the need for freedom of expression in order to ensure free elections also supports the need for freedom of assembly and of association. A similar view can be taken of freedom of some forms of movement.

Before *Kruger v Commonwealth* [81] there was considerable judicial authority, even if it was not decisive, to support the existence of a freedom of movement and a freedom of access to the seat of government and the institutions of government. The freedoms, if they exist, are derived by implication from the Australian Constitution and exist independently of s92.[82] Ultimately these judicial statements can be traced to the famous American case of *Crandall v Nevada*.[83] That case stressed the importance of citizens having the right to be allowed to visit the seat of government, to petition federal authorities and to examine the public records of the federal courts and other governmental institutions. On reflection, it is surprising that this element did not receive greater emphasis in *Cunliffe* as regards the content of the freedom to communicate with the government and its officers.

Arguments based on both the freedoms of movement and association were advanced in *Kruger*, which involved a challenge to the constitutional validity of Territory laws dealing with the removal of Aboriginal children from their families into the care and custody of an authority appointed, ostensibly, for their protection and welfare. The brief discussion of that case below is confined to the outcome of those arguments.

That outcome provided only inconclusive light on the existence and nature of the freedoms in question. The challenge based on those freedoms was dismissed by a majority of the

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80 At 571-572.
81 (1997) 190 CLR 1.
82 At 116 n459, where Gaudron J cited those authorities.
83 (1867) 6 Wall 35.

Court.[84] There was, however, no general agreement on the reasons for the dismissal of this aspect of the challenge amongst those judges who were in the majority. Dawson J denied the existence of the freedoms either at all or as a limitation on the exercise of the power to legislate under s122 of the Constitution.[85] Brennan CJ asserted that the freedoms had not hitherto been held to be implied in the Constitution. He also observed that the textual and structural foundations for the implications supporting those freedoms had not been demonstrated in this case.[86]

McHugh J acknowledged the existence of both freedoms but linked their existence to the exercise of the right to vote which flows from the system of representative government established by ss7 and 24 of the Constitution. Thus he stated:

> The reasons that led to the drawing of the implication of freedom of communication lead me to the conclusion that the Constitution also necessarily implies that "the people" [of the Commonwealth and the States] must be free from laws that prevent them from associating with other persons, and from travelling, inside and outside Australia for the purposes of the constitutionally prescribed system of government and referendum procedure.[87]

There were two factors which militated against the existence of the requisite link in this case. First, Territory electors did not derive their right to vote in federal elections from that system but instead legislation enacted in the exercise of the power of the Parliament to make laws for the Territory. Secondly, Aboriginal persons did not have the right to vote in federal elections during the relevant period which was the subject of the challenge (1918 - 1957).[88]

The remaining justice in the majority, Gummow J, held that, even if such freedoms could be implied, the freedom of association in question was not in effect a freedom of *familial* association. His Honour did not seem to accept the existence of a general freedom of movement but, on the assumption that there was an implied right of access to government and the repository of statutory power, he thought the challenged provisions could be given a construction which accorded a full operation to the restraint on that freedom of movement.[89]

84 Brennan CJ, Dawson, McHugh and Gummow JJ; Toohey and Gaudron JJ dissenting.
85 (1997) 190 CLR 1 at 68-70.
86 At 45.
87 At 142.
88 At 142-144.
89 At 157.

In contrast, the two dissenting judges acknowledged the existence of both freedoms and the possibility that the provisions challenged in this case had breached those freedoms.[90] They thought the freedoms were effective to restrain the exercise of the Territories power in s122 and were not dependent on the right of the persons affected by the challenged provisions to vote at federal elections. The difference between those two judges however was that, whereas Gaudron J held that the challenged provision did breach the freedoms, Toohey J was prepared to send the case back to trial to determine whether those provisions could nevertheless be upheld as regulatory of those freedoms. In other words, to determine whether they could be seen as reasonably necessary for the protection and preservation of the Aboriginal people of the Northern Territory. His Honour emphasised that the latter question had to be determined by the standards and perceptions prevailing at the time of the operation of the challenged provisions in order to determine their validity at that time.[91] His remarks regarding the similar issue which arose in relation to the breach of the right of equality suggests that those standards and perceptions might not perhaps have saved the operation of the challenged provisions today, if they were still in force and if those same standards and perceptions were no longer current.[92]

I think that McHugh J is correct in acknowledging the existence of both the freedoms and in a way that treats them as adjuncts of the political process. This seems to constitute a more faithful adherence to the rationale accepted by the whole Court for justifying and confirming the existence of the implied freedom of political communication. For what it is worth, I also suspect that this view will ultimately come to be accepted by a majority of the Court sometime in the future. *Kruger* was not a good test of its acceptance, essentially because of the attempt to extend the freedoms beyond the part they play in the political process.

CONCLUDING REMARKS: BROADER IMPLICATIONS FOR THE FUTURE

I have previously observed that the increasing restlessness and boldness in areas of traditional liberty, which Professor Zines once attributed to some judges, can no longer be confined to certain individual members of the High Court.[93] The *Lange* case in particular confirms, if any confirmation was needed, that the "new constitutional law" is here to stay: only the pace and scope of its development can be varied. This is underlined by the fact that the lonely adherent to the more traditional approach in the *ACTV Case* joined in the

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90 At 88-93 per Toohey J and 114-121 per Gaudron J.

91 At 92-93.

92 At 97. Gaudron J did not think the challenged provisions were regulatory of the freedoms in question even at their inception: at 128-130.

93 Lindell, "Recent Developments in Constitutional Interpretation" in Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, Sydney 1994) p20.

single judgment in the former case. A strong case can be made to show that even Dawson J had in some areas departed from that approach.[94]

In 1995 Sir Maurice Byers QC, a former Commonwealth Solicitor-General, asserted that freedom of speech when combined with representative democracy and responsible government obviates the need for any written guarantees of individual rights.[95] He had in mind the judicial implications drawn from the system of representative and responsible government recognised in the Commonwealth Constitution.

What remains fascinating to me is how those implications were discovered and developed in the face of a tradition of parliamentary supremacy and the absence of a Bill of Rights; and also after such a long course of time had elapsed since the Constitution was established. And yet the formal or analytical reason is remarkably simple. The provisions relied on by the majority in the *ACTV Case*, and the whole Court in *Lange*, to establish the system of representative and responsible government, are located in a written and rigid Constitution, however machinery-like in nature those provisions happen to be. Their presence in the Commonwealth Constitution can only be altered by the method prescribed in s128. The presence of corresponding statutory provisions which establish the same system of government in the United Kingdom can of course be easily varied. Doubtless this is what the Court had in mind when it stated that:

> The Constitution displaced, or rendered inapplicable the English common law doctrine of the general competence and unqualified supremacy of the legislature.[96]

The same point is illustrated by Dawson J's recognition that words of s24 give rise to the need for a "genuine choice" despite his closer adherence to the tradition of parliamentary supremacy and the significance he usually attaches to the absence of an Australian Bill of Rights.

Yet by the time of the Brennan CJ's departure the Court, in its attempt to consolidate rather than reverse previous developments, will have attempted to contain the full potential unleashed by the new constitutional law, at least in the area of representative government. It is as if the Court has tried up to this point to steer a middle course. That course may be seen by some to be uniquely Australian in that it is similar in different respects to, but not the same as, the British and American approaches to constitutional interpretation.

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94 For example his treatment of the constitutional protection from arbitrary arrest in *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1 at 27.

95 Byers, "Constitutional change and implied freedoms" in Coper & Williams (eds), *Power, Parliament and the People* (Federation Press, Sydney 1997) p5.

96 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

A number of techniques have been used by the present Court to contain the development of the new law. The first is the repeated reliance on the formal character of the implied freedoms discussed in this paper as being only restrictions on legislative power. Thus the Court in *Lange* emphasised that the provisions used to support the existence of those implied freedoms *do not confer personal rights on individuals*.[97] I have questioned the practical significance of this factor, since the freedoms are fully effective in invalidating the laws which breach the freedoms. Nevertheless it is possible that the Court hoped to justify a narrower interpretation being given to such freedoms than might otherwise be the case with the interpretation of guarantees of individual rights. If so the fact that the freedoms are not guarantees of that kind may, after all, have some impact on the interpretation and scope of those freedoms.[98]

The second technique is not so much what the Court in its collective capacity has relied on, but, rather, something that it failed to rely on or endorse, namely, the notion of the sovereignty of the people. This contrasts with the use made of it by some judges in the *ACTV* and *Nationwide News* cases. I believe the failure of the Court in *Lange* to rely on it is wise given the inherent dangers involved in its use as a factor in constitutional interpretation. If used in that way it increases immeasurably the potential of judges to give effect to their own subjective beliefs regarding limitations that should be placed on the role of government in our society. This was why my espousal of the notion was confined to its use as a means of explaining the reason for the fundamental and organic character of the Commonwealth Constitution, especially after Australia became fully independent in the domestic as well as the international sense of that term. A close reading of my previously expressed view on the matter will reveal that I did not think the adoption of that explanation should or did involve major changes in the judicial interpretation of the Constitution.[99] Hence my attempt, however unsuccessful, to stress that the influence of history, and the nature of the Constitution as part of a British enactment, could not be ignored to the extent that the original agreement of the Australian people was to the adoption of the Constitution in the form in which it emerged, namely, as a British statute. It was therefore to be interpreted in the way in which such instruments were interpreted at that time, subject of course to the necessary modifications required by its organic character.[100] As I also stated, nothing that has happened since its enactment indicates that the continued agreement of the people to treat the Constitution as a higher law has changed its operation (except of course to cancel out the role played by our former colonial parent

97 Eg at 560-561. This explains the reference made in that case to the absence of a so called constitutional "private right of defence": at 575.

98 Compare Zines, "Form and Substance: 'Discrimination' in Modern Constitutional Law" (1992) 21 *Fed L Rev* 136 at 140.

99 Lindell, "Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Fed L Rev* 29 at 43-49 esp 44.

100 I believe the member of the Court who has come the closest to adopting the same view is McHugh J, especially in his judgment in *McGinty v Western Australia* (1996) 186 CLR 140 at 229-235.

and deal with the necessary consequences of that cancellation). It seemed to me unrealistic to treat either the fact of independence or my explanation for the binding character of the Constitution as a reason for changing basic principles of interpretation or constitutional doctrine without there being a more explicit indication that this was intended by the Australian people or their representatives.[101]

Finally, there is also the emphasis placed by the whole Court in *Lange* on the need to ground implications in the text and structure of the Constitution. As attractive as this may appear as an instrument of containment, the fact remains that, as Dawson J pointed out, "the line between construing the text and making implications is not always easy to draw."[102] The question is likely to be only one of degree and there will therefore be much room here for subjective differences of opinion. At the same time the emphasis on the text serves to highlight a reduced inclination to derive implications of this nature than was and is evident with such judges as Deane, Toohey and Gaudron JJ.

Although these techniques evidence a new and more cautious note of judicial restraint in the area of representative democracy, I doubt that they will prevent future growth of the freedoms discussed in this paper. But what they do indicate is that the developments are likely to be narrower in scope and spasmodic in nature, as the present Court battles to pay homage to the ghosts of the past.

A plausible case can be made to show that the developments in this area have sought to reinforce and legitimise the traditions of parliamentary supremacy along the lines suggested by the theory of judicial review discussed by John Ely.[103] Thus it can be claimed that by improving the processes of our political system we can have more confidence in the legislative and executive outcomes of that system. The implications are confined to improving and perfecting those processes.

But, as Professor Zines has rightly pointed out, there is an overlap between the object of those who wish to ensure representative government as a foundation of parliamentary supremacy and those who wish to abolish parliamentary supremacy in respect of rights and freedoms. I also agree with him when he says:

> Nevertheless, if parliamentary supremacy is seen as the major principle and the judicial implication of representative government is in aid of that principle (as seems to be the case), the High Court should keep in mind that object and avoid wide interpretations of implied freedoms which are more suited to the ideology of a state with a bill of rights, rather than one

101 Lindell, "Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Fed L Rev* 29 at 44.

102 *Levy v Victoria* (1997) 189 CLR 579 at 607.

103 Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, Mass 1980).

> which has, since the *Engineers*' case, relied on representative and responsible government as its central principle.[104]

I believe that a majority of the Court, as composed when this paper was delivered at the end of 1997, fall into the category of those who subscribe to the object of ensuring representative government as the foundation of parliamentary supremacy, while judges like Toohey and Gaudron JJ are more likely to fall into the category of those who wish to abolish parliamentary supremacy in respect of rights and freedoms.

My final comment is that those who desire to confer on the Australian people the full benefits of a judicially enforceable and entrenched Bill of Rights will still need to persuade the electorate that such a change should be achieved by the processes prescribed by s128 of the Constitution.

104 Zines, *The High Court and the Constitution* p393.