THE IMPLIED FREEDOM OF POLITICAL DISCUSSION — ITS IMPACT ON STATE CONSTITUTIONS

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INTRODUCTION

In October 1994, the High Court decided two[1] cases, *Theophanous v Herald & Weekly Times Ltd*[2] and *Stephens v West Australian Newspapers Ltd*[3] both of which are of considerable constitutional importance to the States in terms of the reach of Commonwealth implied rights and the recognition of State implied rights. *Theophanous* establishes a constitutional defence to a defamation action based upon the implied freedom of political discussion[4] previously derived from the Commonwealth Constitution in *Nationwide News Pty Ltd v Wills*[5] and *Australian Capital Television Pty Ltd v Commonwealth*.[6] In *Stephens*, this defence was applied in the context of an entirely State matter.

The impact of the *Theophanous* and *Stephens* decisions on the States may be reduced to the following four propositions :

(1) The Commonwealth implied freedom of political discussion includes within the scope of the freedom the political affairs of the States;

(2) The Commonwealth implied freedom is an implied restriction on the legislative and executive power of the States as well as of the Commonwealth;

(3) The Commonwealth implied freedom overrides incompatible principles of the common law of the States as well as their statute law; and

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1 A third case was also decided, *Cunliffe v Commonwealth* (1994) 124 ALR 120, which involved the implied freedom of political discussion but did not involve any State issue.

2 (1994) 124 ALR 1.

3 (1994) 124 ALR 80.

4 Although different descriptions have been given to this freedom in the judgments of the High Court, this description is adopted as the one referred to in the joint judgment of Mason CJ, Gaudron and Toohey JJ in *Theophanous* (1994) 124 ALR 1 at 11-13. The distinction between "political discussion" and other forms of expression not covered by the implied freedom is discussed in that joint judgment at 13-14.

5 (1992) 177 CLR 1.

6 (1992) 177 CLR 106.

(4) A similar implied freedom is derived from the Western Australian Constitution Act 1889 (WA).

While some of these propositions were referred to in the seminal decisions of *Nationwide News* and *Australian Capital Television*, only the first proposition was actually established in *Australian Capital Television*. The second and third propositions were first established in both *Theophanous* and *Stephens*. The fourth proposition, decided in *Stephens*, is the first occasion in which the High Court has implied from a State Constitution a restriction on State power.

This article is critical of the reasoning adopted by the majority of the High Court in applying the implied freedom of political discussion as a restriction on the power of the States in relation to the discussion of matters solely the concern of the States. What began in *Nationwide News* as a restriction on the legislative power of the Commonwealth, has now been used to refashion the common law and has developed into a restriction on the legislative and executive power of the States. These latest cases use the argument that it is impossible to isolate any State political issue as one solely the concern of the State since all political issues are capable of attracting the attention of the Commonwealth. This article questions that position. Further, the reasoning put forward by the majority for extending the freedom to the States is meagre. On the basis of the constitutional derivation of the freedom, I will argue that the freedom, even as a restriction on Commonwealth power, should only protect discussion of Commonwealth or federal matters. Before discussing these criticisms in the context of the four propositions outlined above, a brief outline is given of the facts in *Theophanous* and *Stephens* to provide the background for the discussion which follows.

THEOPHANOUS V HERALD AND WEEKLY TIMES LTD — THE FACTS

An action for defamation was brought in Victoria by Dr Theophanous, a member of the House of Representatives and chairperson of the Joint Parliamentary Standing Committee on Migration Regulations, against both the Herald and Weekly Times Ltd as the publisher of the *Sunday Herald Sun*, and Mr Bruce Ruxton, whose published letter to the editor of that newspaper essentially questioned the fitness of Dr Theophanous to remain as chairperson of that parliamentary committee. The first defendant pleaded in defence a freedom implied from the Commonwealth Constitution to publish political material and the defence of qualified privilege.

This matter, along with *Stephens*, went to the High Court by way of case stated. A majority[7] of the Court accepted that the implied freedom of political discussion protected the publication of material critical of the performance of members of the Commonwealth Parliament from an action in defamation, provided the defendant establishes that:

(i) it was unaware of the falsity of the material published;

(ii) it did not publish the material recklessly, that is, not caring whether the material was true or false; and

7 Mason CJ, Deane, Toohey and Gaudron JJ; *contra* Brennan, Dawson and McHugh JJ.

(iii) the publication was reasonable in the circumstances.[8]

STEPHENS V WEST AUSTRALIAN NEWSPAPERS LTD — THE FACTS

An action for defamation was commenced by six members of the Legislative Council of Western Australia against the publisher of the *West Australian* newspaper in respect of three articles which were critical of their overseas trip as members of a parliamentary committee, the Standing Committee on Government Agencies. The publisher's defence relied upon two grounds: the implied freedom of political discussion in the Commonwealth Constitution and the defence of qualified privilege. The Court held unanimously (but for different reasons) that the plea of the implied freedom was bad in law. The reasoning of the majority[9] was that the plea had not complied with the terms of the constitutionally derived defence espoused in *Theophanous*. The same majority held that the plea of qualified privilege was not bad in law.

The Commonwealth implied freedom of political discussion includes within the scope of the freedom the political affairs of the States

As a restriction on Commonwealth power, this first proposition was established in *Australian Capital Television*, although it was discussed in *Nationwide News* by Deane and Toohey JJ.[10] Their Honours referred to the issue of whether the implied freedom of political discussion, derived from the Commonwealth Constitution, was confined to Commonwealth political affairs or whether it extended to include State affairs. While expressly leaving the issue open, since it was unnecessary for the decision in that case, they favoured a wide view of the freedom to include State affairs, given the interdependent nature of Commonwealth and State political affairs. They based this view upon several grounds outlined below. The only other Justices to recognise the implied freedom in *Nationwide News* were Brennan and Gaudron JJ. Brennan J[11] only indicated that the implied freedom as a restriction on State power is confined to federal matters, a view which he later held in *Stephens*. Gaudron J did not address this issue.

In *Australian Capital Television*,[12] there was a clear majority[13] view that the implied freedom extends to all political discussion. Mason CJ expressed the width of the scope of the freedom :

> [T]he implied freedom of communication extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connexion with the affairs of a State, a local authority or a Territory and little or no connexion with Commonwealth affairs.[14]

In that case, Part IIID of the Broadcasting Act 1942 (Cth) was held invalid for infringing the implied freedom of political discussion. Included in Part IIID, s 95D prohibited

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8 (1994) 124 ALR 1 at 23 per Mason CJ, Toohey and Gaudron JJ; Deane J at 63 submitted to this view to form a majority but was of the view that these conditions were not warranted by the implied freedom (see, in particular, at 60-62).

9 Mason CJ, Toohey, and Gaudron JJ with Deane J agreeing; *contra* Brennan, Dawson, and McHugh JJ.

10 (1992) 177 CLR 1 at 75-76.

11 Ibid at 52.

12 (1992) 177 CLR 106.

13 Ibid at 142 per Mason CJ; at 168-169 per Deane and Toohey JJ; at 216-217 per Gaudron J .

14 Ibid at 142.

political advertising during State and local authority elections by the Commonwealth and Territories (subs (1) and (2)) and by the States (subs (3) and (4)). These provisions which dealt with State political affairs were held to infringe the implied freedom on the same basis as those provisions concerned with Commonwealth elections.[15]

The justification given for this extension to State affairs was the inseparable relationship between Commonwealth and State political affairs as the result of the federal compact. Mason CJ in *Australian Capital Television* referred to the "indivisibility" of the freedom in this respect.[16] This relationship was explained by Deane and Toohey JJ in *Nationwide News* and by the majority judgments in *Australian Capital Television* by reference to a range of factors:

- that there is Commonwealth funding of all levels of government;[17]
- that there is no limit to the range of matters able to be debated in the Commonwealth Parliament;[18]
- that political parties and ideas operate at all levels of government;[19]
- that co-operation is required between the Commonwealth and the States in relation to the electoral process (ss 12, 15 and 29);[20]
- that the Commonwealth's doctrine of representative government is structured upon an assumption of representative government within the States (ss 10, 30 and 31);[21]
- that the distribution of powers between the Commonwealth and the States is not "immutable", see s 51(xxxvii) and s 128, as a result of the power of the States to refer matters to the Commonwealth and the power of the people to change the distribution of powers;[22] and
- that the Commonwealth Constitution expressly recognises State Constitutions (s 106), State Parliaments (ss 107 and 108), and their electoral processes (ss 9, 10, 15, 25, 29, 30, 31, 41, 123 and 128) and hence "recognises their democratic nature".[23]

In *Theophanous*, where this first proposition was not in issue since the case concerned an entirely Commonwealth matter, Mason CJ, Toohey and Gaudron JJ consolidated the most significant of these factors in this rationale for the wide view of the freedom:

> The interrelationship of Commonwealth and State powers and the interaction between the various tiers of government in Australia, and the constant flow of political information, ideas and debate across the tiers of government and the absence of any limit capable of definition to the range of matters that may be relevant to debate in the

15 Ibid at 142 per Mason CJ; at 168-169 per Deane and Toohey JJ; at 216 per Gaudron J.
16 Ibid at 142.
17 *Nationwide News* (1992) 177 CLR 1 at 75 per Deane and Toohey JJ; *Australian Capital Television* (1992) 177 CLR 106 at 142 per Mason CJ; at 216-217 per Gaudron J.
18 *Australian Capital Television* (1992) 177 CLR 106 at 142 per Mason CJ.
19 *Nationwide News* (1992) 177 CLR 1 at 75 per Deane and Toohey JJ.
20 Ibid.
21 Ibid.
22 *Australian Capital Television* (1992) 177 CLR 106 at 216-7 per Gaudron J.
23 Ibid.

> Commonwealth Parliament and to its workings make unrealistic any attempt to confine the freedom to matters relating to the Commonwealth government.[24]

This proposition was, however, at issue in *Stephens* in relation to criticism of members of the Western Australian Parliament. A majority of four Justices[25] accepted that the implied freedom derived from the Commonwealth Constitution "extends to public discussion of the performance, conduct and fitness for office of members of a State legislature".[26] Indeed, it extends "to all political discussion, including discussion of political matters relating to government at State level".[27] Reliance was placed upon the fact that if the implied freedom were restricted to Commonwealth affairs, it would be impossible to give effect to, since public affairs in Australia cannot be characterised into separate categories of Commonwealth and State affairs.[28] The joint judgment of Mason CJ, Toohey and Gaudron JJ in *Stephens* [29] stated that a majority[30] of the Justices in *Nationwide News* and *Australian Capital Television* were of the view that the implied freedom extended to all political discussion. They merely approved the reasons given in those cases and in *Theophanous*. While a majority in *Stephens* regarded the implied freedom as protecting the discussion of State political affairs, they extended it beyond being a restriction on Commonwealth power to apply as a restriction on the power of the States. The second proposition below discusses this extension of the freedom as a restriction on State power.

A different approach was taken by Brennan J in *Stephens*. While his Honour accepted that the implied freedom is a restriction on the power of the States, he gave it a narrower scope. As a restriction on State power, the implied freedom was, in his view, limited to discussion of political affairs of a federal nature. Accordingly, the freedom did not protect the discussion of the performance of members of a State Parliament — an entirely State affair. He confined the freedom to one which protects the discussion of matters which pertain to the government of the Commonwealth, since the implied freedom is derived from ss 7 and 24 of the Commonwealth Constitution:

> [T]hat implication is to be found in provisions that prescribe the structure of the government of the Commonwealth, not the structure of the government of the States. That implication effects a qualified (not absolute) freedom to discuss government, governmental institutions and political matters in order to protect the structure of the government of the Commonwealth. But the publication of the material complained of in these proceedings touching the performance by members of the Western Australian

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24 (1994) 124 ALR 1 at 12; Deane J at 44 relied on his reasons in *Nationwide News* (1992) 177 CLR 1 at 75 to hold that the freedom extends to all political matters.

25 (1994) 124 ALR 80 at 88 per Mason CJ, Toohey and Gaudron JJ; at 108 per Deane J.

26 Ibid at 88.

27 Ibid.

28 *Nationwide News* (1992) 177 CLR 1 at 75-76 per Deane and Toohey JJ; *Australian Capital Television* (1992) 177 CLR 106 at 142 per Mason CJ; at 168-69 per Deane and Toohey JJ; at 216-17 per Gaudron J.

29 (1994) 124 ALR 80 at 88.

30 The reference, however, to a majority of Justices in *Nationwide News* (1992) 177 CLR 1 seems inaccurate and puzzling when the only judgments footnoted (see n 4 at 88) from that case are those of Deane and Toohey JJ at 75-76. As outlined earlier, the other Justices in *Nationwide News* expressed no opinion on this issue. Hardly a majority view! There is, on the other hand, a clear majority view (see n 11) in *Australian Capital Television* (1992) 177 CLR 106 that the implied freedom extends to all political discussion.

> Parliament of their official functions is irrelevant to the government of the Commonwealth and is unaffected by the implication.[31]

According to Brennan J, some connection with the government of the Commonwealth needs to be established in order to invoke the freedom against State law.

How is this view reconcilable with his Honour's approach in *Australian Capital Television* to s 95D (3) and (4) of the Broadcasting Act 1942 (Cth)? As indicated earlier, those provisions prohibited political advertising by any person including State governments and their authorities during State and local authority election campaigns. His Honour held these provisions to be invalid as "laws which burden the functioning of the political branches of the government of the State with statutory constraints and restrictions"[32] in violation of the principle established in *Melbourne Corporation v Commonwealth*.[33] (This principle prevents the Commonwealth and the States from inhibiting or impairing each other's continued existence or capacity to function.) But before reaching this conclusion, his Honour applied the Commonwealth implied freedom of political discussion to s 95D(3) and (4) and concluded that it was not infringed as those provisions were reasonably appropriate and adapted to reducing the danger of electoral corruption. In arriving at this conclusion, his Honour accepted that the implied freedom protected the representative governments of the States from Commonwealth interference:

> The limitation on that power which guarantees a freedom of political communication in relation to the government of the Commonwealth and its territories certainly precludes an exercise of the broadcasting power that would substantially impair the freedom of political discussion essential to maintain the representative governments of the several States. The Constitution is constructed on the footing that each State has a Parliament and an Executive Council to advise the Governor. The Constitutions of the respective States are continued as they were "as at the establishment of the Commonwealth".[34]

This view is reconcilable with his Honour's approach in *Stephens* only on the basis that he distinguished between the scope of the implied freedom as a restriction on the power of the Commonwealth and its scope as a restriction on the power of the States. His Honour seems to espouse in the above passage from *Australian Capital Television* the view that the implied freedom prevents a Commonwealth power unreasonably impairing discussion of State political affairs (as well as of Commonwealth affairs). In *Stephens*, his Honour applied the reverse principle in part to the States, namely, that the implied freedom prevents the States from impairing discussion of Commonwealth (that is, federal) political affairs. In his view, this is as far as the implied freedom operates as a restriction on the power of the States because its constitutional origins[35] confine it to protecting representative democracy only at the Commonwealth level. Hence, the scope of political affairs appears to differ, according to Brennan J, depending upon whether one applies the implied freedom as a restriction on the power of the Commonwealth or on that of the States.

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31 (1994) 124 ALR 80 at 91.

32 *Australian Capital Television* (1992) 177 CLR 106 at 164 per Brennan J. See also McHugh J at 241-2 who held these provisions invalid as "their immediate object is to control the States and their people in the exercise of their constitutional functions".

33 (1947) 74 CLR 31.

34 *Australian Capital Television* (1992) 177 CLR 106 at 162-163.

35 Especially ss 7 and 24 of the Commonwealth Constitution.

Given his Honour's view in *Australian Capital Television* that there was, in that case, an infringement of the *Melbourne Corporation* principle,[36] it was unnecessary for him to consider the implied freedom. But it is interesting to note that in his view, the *Melbourne Corporation* principle proved a more onerous restriction on the Commonwealth in that case than did the implied freedom.

Since, in *Stephens*, Dawson J[37] rejected the existence of the implied freedom under the Commonwealth Constitution, it was unnecessary for him to discuss this first proposition. McHugh J[38] also made no express comment on this issue as he limited the implied freedom to a "freedom of participation, association and communication in relation to federal elections",[39] following his view in *Australian Capital Television.*[40]

In relation to this first proposition, three views of the scope of the Commonwealth implied freedom of political discussion emerge from these decisions. First, the majority view of Mason CJ, Deane, Toohey and Gaudron JJ is that the freedom extends to all political affairs at all levels of government in Australia whether as a restriction on Commonwealth or State power. Secondly, Brennan J seems to agree with this majority view only in so far as the implied freedom operates as a restriction on the power of the Commonwealth. His Honour differs from the majority view in limiting the implied freedom as a restriction on the power of the States to matters pertaining to the government of the Commonwealth, which may include State political affairs sufficiently connected to the Commonwealth. Thirdly, McHugh J limits the freedom to federal elections.

The majority view appears attractive for it seems to be a realistic[41] and practical approach which recognises the obvious inter-relationship between Commonwealth and State affairs, as well as avoiding any argument that the matter has no connection with the Commonwealth. There is clearly an inter-relationship between the political affairs of the Commonwealth and those of the States but, with respect, this is not the case in respect of *all* their political affairs. What possible connection existed between the affairs of the Commonwealth and criticism of members of the Legislative Council of Western Australia over an overseas study trip which they undertook as members of a standing committee on State Government agencies? Further, is it constitutionally justifiable to extend the scope of the implied freedom to include all political affairs on the ground that it would be difficult or "impossible" to characterise a matter as a Commonwealth affair? The Court faces similar difficulties when characterising laws under certain[42] heads of power in s 51 or the incidental power, or within restrictions on power, such as ss 90 and 92. Moreover, the cases will be obvious when it is an entirely State affair, such as in *Stephens*. Surely, it is not so difficult for the Court to determine, by adopting Brennan J's approach, whether there is a connection with the Commonwealth. The

36 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
37 (1994) 124 ALR 80 at 109.
38 Ibid at 110.
39 Ibid.
40 (1992) 177 CLR 106 at 227.
41 L Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Syd LR* 166 at 178.
42 For example on the (xxxi) acquisitions power see: *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 119 ALR 577; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 119 ALR 629; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 119 ALR 655.

textual origins of the implied freedom require this connection. This was recognised by Brennan J and seemingly ignored by the majority in *Stephens*.

The approach adopted by Brennan J to the implied freedom as a restriction on the power of the States should be applied also to the implied freedom as a restriction on the power of the Commonwealth. As Brennan J noted in *Stephens*, the implied freedom is derived from constitutional provisions which require representative government of the Commonwealth, not of the States. The implied freedom should be confined to the discussion of *federal* affairs which would include, in addition to Commonwealth matters, those State matters which are connected to Commonwealth affairs. If this view is accepted, there remains the issue: on what basis is the Commonwealth prevented from impairing discussion of exclusive State political affairs? Such a restriction ought to be based upon the *Melbourne Corporation* principle.[43] Indeed, it has already been noted that Brennan J in *Australian Capital Television* found that the Commonwealth restrictions on State electoral broadcasting infringed the *Melbourne Corporation* principle.

Since a majority of the High Court has held, however, that the implied freedom as a restriction on the Commonwealth and the States is all-encompassing in relation to political affairs, it may seem logically to follow that the freedom operates as a restriction on the power of the States in relation to *their own affairs*. But logic, it is submitted, cannot provide the constitutional justification for that proposition. Why should an implication from the Commonwealth Constitution which is designed to protect the representative nature of the *federal* government, operate also as a restriction on the power of the States in relation to their own affairs? There is much to commend the approach taken by Brennan J in *Stephens* whenever the implied freedom is invoked as a restriction on the Commonwealth and the States.

In summary, the implied freedom as a restriction on the power of the Commonwealth should extend to a wide range of Commonwealth and State political affairs, provided that the latter are sufficiently connected with the government of the Commonwealth. This connection, which will be obvious in most cases, is required because the freedom serves to protect representative democracy at the federal level. Correspondingly, this should also be the scope of the freedom if it applies as a restriction on the power of the States. Whether it so applies, is the subject of the next proposition.

The Commonwealth implied freedom is an implied restriction on the legislative and executive power of the States as well as of the Commonwealth

The second proposition is that the Commonwealth implied freedom of political discussion restricts the legislative and executive power of the States. The majorities in *Theophanous* and *Stephens* established a new principle only hinted at by the earlier cases. Although this issue was left open by those Justices who raised the point in *Nationwide News*, they did indicate the likelihood that some restriction on State power might arise.[44] In *Australian Capital Television* the issue hardly[45] rated a mention. But then neither case involved a challenge to any action on the part of a State.

43 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
44 (1992) 177 CLR 1 at 52 per Brennan J; at 76 per Deane and Toohey JJ: "strongly arguable".
45 See (1992) 177 CLR 106 at 217, where Gaudron J left the issue open.

In *Theophanous*, only Brennan and Deane JJ in separate judgments expressly discussed this issue, each concluding that the implied freedom is a restriction on the power of the States. The joint judgment of Mason CJ, Toohey and Gaudron JJ did not expressly advert to this issue. Yet it is implicit in their reasoning that the implied freedom is a restriction on the State's capacity to impair discussion of all political affairs. It therefore overrode the common law and statute law of Victoria by recognising a new constitutional defence to defamation. The extension of the implied freedom as a restriction on the power of the States needs, with respect, some explanation in terms of constitutional principle. In the past, when the High Court has implied from the Commonwealth Constitution restrictions on the legislative and executive power of the States, it has attempted to justify and explain their derivation. This occurred with both the *Melbourne Corporation* principle[46] and the principle of Commonwealth immunity from State regulation.[47] So it is surprising that the joint judgment fails to directly advert to this second proposition and its constitutional basis.

At least Deane J cited[48] three considerations to support the implied freedom as a restriction on State power: first, the text of the Commonwealth Constitution, ss 106, 107, and 108; secondly, common sense, in that it would otherwise enable the States to undermine the Commonwealth implied freedom; and thirdly, "persuasive authority" in *R v Smithers; Ex parte Benson*[49] where Griffith CJ and Barton J recognised as binding on the Australian States an implied freedom equivalent to that implied under the United States Constitution,[50] a freedom of access to the organs and instrumentalities of government. Brennan J in *Theophanous*[51] simply acknowledged that the implied freedom restricts the legislative power of the States, citing ss 106 and 107.

In dissent, McHugh J limited the implied freedom to one in relation to federal elections. While not indicating whether this implied freedom restricts the power of the States to interfere in federal elections, his Honour recognised no restriction derived from ss 7 and 24 of the Commonwealth Constitution on the power of the States in relation to their own political system:

> [T]he Constitution has nothing whatever to say about the form of government in the States and Territories of Australia ... There is not a word in the Constitution that remotely suggests that a State must have a representative or democratic form of government or that any part of the population of a State has the right to vote in State elections.[52]

In *Stephens*, a majority of five Justices[53] accepted that the implied freedom derived from the Commonwealth Constitution operates as a restriction on the power of the

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46 *Melbourne Corporation* (1947) 74 CLR 31.

47 See *Commonwealth v Bogle* (1953) 89 CLR 229 at 259-60 per Fullagar J; *Commonwealth v Cigamatic Pty Ltd* (1962) 108 CLR 372 at 378 per Dixon CJ.

48 (1994) 124 ALR 1 at 45-46.

49 (1912) 16 CLR 99 at 108-109 per Griffith CJ and at 109-110 per Barton J; Deane J also cited *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 550 per Dixon CJ and *Nationwide News* (1992) 177 CLR 1 at 73-74.

50 See *Crandall v State of Nevada* 73 US 35 (1867) at 44-45.

51 (1994) 124 ALR 1 at 38.

52 Ibid at 73. Would his Honour allow State interference in federal elections?

53 (1994) 124 ALR 80 at 88 per Mason CJ, Toohey and Gaudron JJ; at 91 per Brennan J; at 108 per Deane J.

States, as well as on the power of the Commonwealth.[54] Here, again, no reasons were given in the joint judgment of Mason CJ, Toohey and Gaudron JJ. Brennan J[55] and Deane J[56] relied upon their respective reasons in *Theophanous*.[57] Significantly, as noted in the first proposition above, Brennan J limited the scope of the implied freedom to *Commonwealth* affairs in so far as the freedom operates as a restriction on the power of the States. The other four Justices clearly did not accept that restriction by holding that the States are precluded from impairing discussion of all political affairs.

It would appear that the main constitutional basis relied upon in *Theophanous* and *Stephens* for the Commonwealth implied freedom operating as a restriction on the power of the States in relation to all political affairs, is simply its inherent nature as an implied freedom under the Commonwealth Constitution. For this reason, in their joint judgment, Mason CJ, Toohey and Gaudron JJ may have considered any discussion of this second proposition unnecessary. Their reasoning most probably was that since the implied freedom encompasses all political affairs, it must operate as a restriction on all levels of government in Australia. Further, once it is accepted that the freedom extends to discussion of all political affairs including those pertaining to the States, the very nature of the freedom requires not only the Commonwealth but also the States to respect that freedom. As a freedom of discussion of all political affairs, it would be argued that it must protect against interference from any exercise of legislative or executive authority under the Constitution, whether this be Commonwealth or State. It is submitted, with respect, that if this was the reasoning of the joint judgment, it ought to have been stated. Yet even that explanation fails to refer sufficiently to constitutional principle.

It is important to note in that process of reasoning, that the extension of this implied freedom as a restriction on State power in relation to both Commonwealth and State affairs (in the majority view) stems from the peculiar nature of this particular freedom, namely, the apparent impossibility of distinguishing between the political affairs of the Commonwealth and of the States. Were the freedom to be, for example, the right to vote at Commonwealth parliamentary elections, no degree of ingenuity could legitimately transform such a right into one relating to State elections as well.

In *Theophanous*, Deane J provides the main reasoning in terms of constitutional principle for the extension of the implied freedom to the States. His Honour did not advert to the inherent nature of the freedom as suggested above. Indeed, he seemed to say that it does not necessarily follow from the wide scope of the freedom, as one extending to all political affairs, that the States are restricted by it.[58] Instead, his Honour cited the three grounds outlined earlier. How persuasive are these grounds?

The first ground, ss 106, 107 and 108 of the Commonwealth Constitution, is of limited assistance, since those sections only provide the obvious path by which substantive restrictions, expressly or impliedly prescribed by the Commonwealth Constitution as restrictions on the States, are effectively imposed upon the States. Those sections cannot be used on their own to derive any implied substantive restrictions on State power. Section 106 merely retains the State Constitutions for the

54 Previously hinted at in *Nationwide News* (1992) 177 CLR 1 at 76 per Deane and Toohey JJ.
55 (1994) 124 ALR 80 at 91.
56 Ibid at 108.
57 (1994) 124 ALR 1 at 38 per Brennan; at 45-46 per Deane J.
58 Ibid at 44.

purposes of creating the federation and subjects them to the Commonwealth Constitution.[59] Only those restrictions imposed upon the States expressly or impliedly by the Commonwealth Constitution extend to the States by virtue of s 106. Hence, the *Melbourne Corporation* principle, implied from the federal nature of the Constitution, is inherently a restriction on the power of the States as well as of the Commonwealth. Similarly, the implied freedom of political discussion may be viewed as inherently a restriction on both the Commonwealth and the States. Another argument to support the proposition that s 106 operates as a restriction on the power of the States, is that any implied freedoms derived from the Commonwealth Constitution "flow on" as restrictions on State power, since their Constitutions form part of the Commonwealth Constitution by virtue of s 106.[60] This view is considered further below in relation to the fourth proposition. It is submitted there that such a view is untenable.

The second ground cited by Deane J was one of "common sense", that the States cannot be free to impair political discussion when the Commonwealth is restrained from doing so. This ground seems to refer to the obvious inconsistency between the implied freedom and any State law which impinges upon that freedom. Such a State law will be invalid by virtue of its incompatibility with the Commonwealth Constitution.[61] The third ground of *R v Smithers; ex parte Benson*,[62] is, as Deane J described it, only of "persuasive authority". Of the four Justices, (Griffith CJ, Barton, Isaacs and Higgins JJ) only Griffith CJ and Barton J recognised that the restriction on the power of the States to exclude undesirables from crossing their borders was implied from federation. In their judgments, the two Justices adopted the reasoning of Miller J in *Crandall v State of Nevada* [63] who implied from the United States Constitution a right of access to government. Isaacs and Higgins JJ instead relied upon the freedom of intercourse in s 92 of the Constitution as expressly conferring this right.

The first of these reasons (combined with the underlying basis for the second reason) partly explains the application of the implied freedom as a restriction on the power of the States. If one accepts that all political affairs are within the potential protection of the implied freedom, it is submitted that the constitutional basis for the freedom as a restriction on the power of the States may be found in any one or more of the following principles:

(i) A State law which impinges upon the implied freedom is inconsistent with the protection accorded by the Commonwealth Constitution to Commonwealth representative democracy. By virtue of this inconsistency, the State law is invalid, since Clause 5 of the Commonwealth of Australia Constitution Act 1900 (Imp) declares that the Commonwealth Constitution "shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". It is by virtue of this ground that one might say that the inherent nature of the implied freedom, as one protecting the discussion of all political affairs

59 Covering Clause 5 is also relied upon in so far as it proclaims that the Constitution is "binding on the courts, judges, and people of every State".

60 A R Blackshield, " The Implied Freedom of Communication" in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232 at 266.

61 See Clause 5 of the Commonwealth of Australia Constitution Act 1900 (Imp).

62 (1912) 16 CLR 99.

63 73 US 35 (1867).

including those pertaining exclusively to the States, requires it to operate as a restriction on State power. This is not to say that any freedom implied from the Commonwealth Constitution applies as a restriction on the power of the States.

(ii) In its broadest sense, the *Melbourne Corporation* principle might restrict the States from impairing discussion of Commonwealth affairs. This principle prevents the Commonwealth and the States from inhibiting or impairing each other's continued existence or capacity to function.[64] Unreasonable restrictions imposed by a State Parliament on the discussion of Commonwealth political affairs should satisfy this test by impairing the capacity of the Commonwealth to function as a polity. Admittedly, this may be stretching the current scope of the principle.[65]

(iii) The third basis might be Commonwealth immunity from State law in respect of its governmental functions.[66] This immunity has so far been regarded as enjoyed only by a Commonwealth entity when a State law purports to directly regulate a Commonwealth activity. Further, the scope of this immunity is not entirely clear with reference to protecting the "fiscal rights" of the Commonwealth or its prerogative powers.[67] But as a restriction on State power, the implied freedom overrides State laws which may impact directly on private individuals and organisations rather than on the Commonwealth. Although the situation may not quite fit the generally accepted view of this immunity, there appears to be no obvious reason for not extending the immunity to provide the constitutional basis for the implied freedom to operate as a restriction on the power of the States. Of the two principles, however, the *Melbourne Corporation* principle seems the more appropriate. Section 106, however, performs no substantive role here other than to provide the formal constitutional link with the State Constitutions.

If, on the other hand, the scope of the freedom were limited to political affairs sufficiently connected with the Commonwealth, as suggested in the discussion of the first proposition above, on what basis would the implied freedom restrict the power of the States in relation to Commonwealth political affairs and exclusive State political affairs? With regard to Commonwealth political affairs, the States would be prevented from impairing their discussion on the same grounds outlined above which prevent the States from impairing discussion of all political affairs: (i) inconsistency with the Commonwealth Constitution; (ii) the *Melbourne Corporation* principle; and (iii) Commonwealth immunity. Further, it might be argued that the States lack the capacity to impair representative democracy at the federal level as this would not be for the peace, welfare or good government of the State.[68] In relation to exclusive State political

64 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 217 per Mason J.

65 See L Zines, above n 41 at 178-179: "Admittedly that doctrine [the *Melbourne Corporation* principle], as at presently worded, may not exactly fit the current situation; but it would seem to come within the same policy on which it is based and which flows from the concept of federalism."

66 *Bogle* (1953) 89 CLR 229; *Cigamatic* (1962) 108 CLR 372; L Zines, *The High Court and the Constitution* (3rd ed 1992) ch 14, especially at 305-316 ; A R Blackshield above n 60 at 26.

67 *Cigamatic* (1962) 108 CLR 372 at 378 per Dixon CJ.

68 A submission of the Solicitor-General for South Australia, Mr John Doyle QC, in *Stephens* and *Theophanous* in his Outline of Submissions, at 3, para 7.

affairs, the States would not be confined by the Commonwealth implied freedom nor by any other principle unless a similar freedom is prescribed expressly or impliedly by their particular State Constitution. Such a freedom was, of course, implied from the Western Australian Constitution in *Stephens* (the fourth proposition below examines this development).

Challenging this last conclusion is the argument that the Commonwealth Constitution guarantees the principle of representative democracy or government at the State level as well as at the Commonwealth level. Therefore, the States are precluded from enacting laws which are inconsistent with this principle in the same way that the Commonwealth is precluded from so doing. This view means that whatever implied restrictions on the power of the Commonwealth are derived from the principle of representative democracy, the same restrictions will also apply to the States in relation to their own systems of government. Statements made by Deane, Toohey and Gaudron JJ in connection with the impossibility of categorising political affairs in Australia might be used to support this argument. In *Nationwide News*, Deane and Toohey JJ stated: "Indeed, the Constitution's doctrine of representative government is structured upon an *assumption* of representative government within the States [ss 10, 30 and 31]".[69] Gaudron J in *Australian Capital Television* stated that the Commonwealth Constitution recognises the democratic nature and processes of the States' Constitutions.[70]

But is an assumption or mere recognition in the Commonwealth Constitution of representative State government sufficient to constitute a constitutional guarantee? To so hold seems, with respect, to rewrite the Commonwealth Constitution. In *Australian Capital Television*,[71] Mason CJ distinguished between a constitutional implication which inheres in the Constitution, such as responsible government, and an "unexpressed assumption upon which the framers proceeded in drafting the Constitution" which stands outside it. It can be strongly argued that representative government at the State level is such an unexpressed assumption, not a constitutional guarantee or implication.

To sum up on this second proposition, if the proper basis for the freedom operating as a restriction on the power of the States, is its inherent nature as a constitutional freedom and/or the *Melbourne Corporation* principle, then it is submitted that the scope of the freedom should be confined to protecting discussion of those matters which concern the government of the Commonwealth. This concern cannot be assumed to exist in respect of all political affairs. State legislative competence in exclusive State affairs should remain unaffected by the Commonwealth implied freedom. While at the same time, as noted earlier in the discussion of the first proposition, Commonwealth impairment of discussion of such exclusive State matters should be precluded by the *Melbourne Corporation* principle.

The Commonwealth implied freedom overrides incompatible principles of the common law of the States as well as their statute law

The first of the questions posed in the case stated in *Theophanous* was whether the Commonwealth implied freedom of political discussion provided a defence in a defamation action brought in Victoria. As noted earlier, the joint judgment of Mason

69 (1992) 177 CLR 1 at 75 (emphasis added).
70 (1992) 177 CLR 106 at 216-217.
71 Ibid at 135.

CJ, Toohey and Gaudron JJ gives little indication of the basis upon which the Commonwealth's implied freedom operates as a restriction on the power of the States. Moreover, they held that the implied freedom "shapes and controls the common law".[72] In their view, the law of defamation at the State level (both statutory and common law) has to acknowledge and accommodate the constitutional freedom of political discussion.[73] They left open whether the implied freedom constitutes a source of positive rights, preferring to describe it not as a guarantee but as an *implication*. Similarly, Deane J merely recognised State common law as subject to the freedom without giving any specific justification.[74] Brennan J, on the other hand, rejected this view, asserting that the implied freedom is only a restriction on the legislative and executive power of the States (as well as of the Commonwealth) and so does not affect the common law.[75]

In deciding whether the law of defamation in Australia impinged upon the implied freedom, the joint majority concluded that the need to prove truth clearly impinged upon that freedom.[76] While not adverting expressly to the balancing process prescribed in *Australian Capital Television*,[77] namely, whether the impairment of discussion is reasonably necessary to achieve the competing public interest, that test is implicitly applied in their judgment. Nor did the joint majority allow for any legislative discretion.[78] Indeed, they referred to the different legal regimes in the States as an indication that "neither the courts nor the legislatures have achieved a balance that is universally acceptable."[79]

Deane J carefully examined the statutory position in the States before agreeing with the joint majority that the state of the law was inconsistent with the implied freedom.[80] In contrast, Brennan J reached the opposite conclusion, finding no infringement of the implied freedom after giving due weight to the "margin of appreciation"[81] allowed to legislatures in reconciling these competing public interests. As regards the *common law* of defamation, the joint majority and Deane J similarly concluded that it was inconsistent with the implied freedom. In dissent, Brennan J emphatically stated that he regarded as erroneous any examination of the common law in the same manner as statute law. Nevertheless, his Honour asserted that the common law by its nature satisfactorily reconciles the competing public interests, making it inappropriate for the Court in this case to review that balance.[82]

At the heart of this difference in views between the majority and Brennan J is the very nature of the implied freedom. As noted earlier, the joint majority called it an "implication" which "shapes and controls the common law", in that, "[a]t the very least,

72 (1994) 124 ALR 1 at 15.
73 Ibid, especially at 14-17.
74 Ibid at 45-46.
75 Ibid at 31-38.
76 Ibid at 17-20.
77 (1992) 177 CLR 106 at 143 per Mason CJ, at 174-175 per Deane and Toohey JJ, and at 218 per Gaudron J; cf at 157-162 per Brennan J.
78 See *Cunliffe* (1994) 124 ALR 120 at 133 per Mason CJ.
79 (1994) 124 ALR 1 at 17.
80 Ibid at 55-61.
81 Ibid at 39.
82 Ibid at 36-38.

development in the common law must accord with its content."[83] Leaving undecided whether the implied freedom is a source of positive rights, they went on to say : "If the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former."[84]

Brennan J,[85] in rejecting this approach, confined the implied freedom as a restriction on the legislative and executive power of the Commonwealth and of the States :

> The freedom which flows from the implied limitation on power considered in *Nationwide News* and *ACTV* is not a personal freedom. It is not a sanctuary with defined borders from which the operation of the general law is excluded. Like s 92, the implication limits legislative and executive power. In *Nationwide News* and *ACTV*, the question in each case was whether the legislative power which prima facie supported the impugned law was limited by an implication that left the law without support.[86]

Why is it not a personal right according to Brennan J? This is not answered clearly but his Honour appeared to rely upon several factors in reaching this conclusion: first, the fact that the implied freedom is derived from "the structure of representative government prescribed by the Constitution" and not from any particular text therein; secondly, that the freedom is designed to preserve that structure to allow the people to form political judgments; and thirdly, while many other factors (for example, education) impact upon the people's capacity to make political judgments, these factors do not generate rights enforceable against the government. His Honour acknowledged that as a personal freedom, it would be much broader in scope, requiring one to define the area of immunity from what would otherwise be valid regulation. In his view, however, the implied freedom operated only as a restriction on the government's ability to impair freedom of political discussion.[87] Moreover, his Honour regarded the Constitution as not affecting the rights and liabilities of individuals *inter se* but as prescribing "the structure and powers of organs of government, including powers to make laws which deal with those rights and liabilities."[88]

In *Theophanous*, Dawson J recognised no implied freedom as such, but accepted that a Commonwealth or State law would be invalid if it interfered with the requirements of ss 7 and 24 of the Commonwealth Constitution.[89] In the same case, McHugh J maintained his view in *Australian Capital Television* that the principle of representative government reflected in ss 7 and 24 of the Commonwealth Constitution was not independently a source of limitation on Commonwealth power. Rather, that principle assisted in determining the scope and effect of those specific provisions (ss 7 and 24) from which the people acquired "the right to participate, the right to associate and the right to communicate" during federal elections.[90] Therefore, his Honour refused to recognise that any private right or immunity was conferred by the Commonwealth Constitution in relation to defamation of public officials. Hence, the law of defamation in the States was not affected by the Commonwealth Constitution.[91]

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83 Ibid at 15.
84 Ibid.
85 Ibid, especially at 31-32.
86 Ibid at 33.
87 Ibid.
88 Ibid at 36.
89 Ibid at 65.
90 *Australian Capital Television* (1992) 177 CLR 106 at 231-232.
91 (1994) 124 ALR 1 at 74.

A similar implied freedom is derived from the Western Australian Constitution Act 1889 (WA)

A majority of four Justices[92] in *Stephens* accepted that a freedom of political discussion equivalent to that implied from the Commonwealth Constitution was implied in the Constitution of Western Australia (WA Constitution).[93] The joint judgment of Mason CJ, Toohey and Gaudron JJ was prepared to derive this implication from the WA Constitution despite this being "perhaps not of great importance",[94] given their view that the Commonwealth implied freedom applied in that case. This was so because of the wide scope they accorded the Commonwealth implied freedom, viewing it as encompassing all political affairs and as restricting the power and laws of the States as well as of the Commonwealth. For Brennan J, however, who also implied a freedom of political discussion from the WA Constitution, it was a critical issue since he did not accept that the Commonwealth implied freedom operated as a restriction on State power in relation to the discussion of the conduct of State Members of Parliament — exclusively a State political affair. Such a freedom was, in his view, to be found only in the State Constitution.

In view of this difference in reasoning in *Stephens*, it is worthwhile to consider on what basis an implied freedom of political discussion was derived from the WA Constitution. The joint judgment of Mason CJ, Toohey, and Gaudron JJ noted that the Commonwealth implied freedom was based upon the concept of representative democracy and government which derived from the structure and provisions of the Constitution, principally from ss 7 and 24. Their Honours saw in the WA Constitution a counterpart to this, referring to provisions of the Constitution Acts Amendment Act 1899 (WA) which provide for a popularly elected Parliament[95] and to s 73(2)(c) of the Constitution Act 1889 (WA). This last-mentioned provision prevents any constitutional amendment which would result in either House being "composed of members other than members chosen directly by the people" unless such amendment is passed by an absolute majority at the second and third readings in both Houses and by the electors at a referendum. Given the effective entrenchment of this provision (it parallels ss 7 and 24 of the Commonwealth Constitution) no relevant distinction ought to be drawn because the Western Australian provision does not in positive terms require a direct election. Brennan J agreed with the joint judgment that an implied freedom could be derived from the WA Constitution on the basis of the entrenched s 73(2)(c) and the constitutional requirement that members of both Houses "be elected by those possessing the franchise qualifications".[96]

It is, however, not entirely clear whether this prescription that the members of the Parliament are to be directly chosen by the people, was essential to deriving the implied freedom, or whether the Justices would have arrived at the same conclusion on the basis of the other provisions to which they refer. More significant in their reasoning seems to be the overall effect of these provisions in providing for representative democracy in Western Australia. But in the following passage from the joint judgment

92 (1994) 124 ALR 80 at 89-90 per Mason CJ, Toohey and Gaudron JJ; at 91 per Brennan J.
93 Constitution Act 1889 (WA) and Constitution Acts Amendment Act 1899 (WA).
94 (1994) 124 ALR 80 at 88 per Mason CJ, Toohey and Gaudron JJ.
95 Constitution Acts Amendment Act 1899 (WA), ss 5, 6, 8(2)and (3), and 15.
96 (1994) 124 ALR 80 at 91.

of Mason CJ, Toohey and Gaudron JJ, emphasis is placed upon the prescription that the members of the Parliament are directly chosen by the people:

> [S]o long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are "directly chosen by the people", a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the Commonwealth Constitution, in order to protect the efficacious working of representative democracy and government.[97]

How important it was that s 73(2)(c) is effectively entrenched in the WA Constitution is also not entirely clear from their joint judgment. But it is clear that unless the provisions from which the principle of representative democracy is implied, are entrenched by a provision such as s 73(2)(c), any implied freedom is of no effect against subsequent inconsistent State legislation. Nevertheless, an unentrenched freedom might be effective against executive action and the common law until the enactment of inconsistent legislation. This would be subject, however, to the possible argument that a freedom implied from unentrenched provisions of a State Constitution might already have been abrogated wholly or in part by inconsistent State legislation enacted at any time since the enactment of those provisions of the State Constitution from which the freedom was implied. This is based upon the principle that the freedom is deemed to have existed from the date when those provisions from which it is implied were enacted. A final query: if only some of the provisions from which the implied State freedom is derived are entrenched, can one argue that the principle of representative democracy and hence, the implied freedom, are not entrenched? *Stephens* suggests this is not a feasible argument for not all the provisions in that case were entrenched.

SCOPE OF THE IMPLIED STATE FREEDOM

There remains the issue as to whether the implied freedom derived from the WA Constitution extends only to the discussion of the affairs of that State or whether it extends, in line with the majority view of the Commonwealth freedom, to all political affairs? None of the judgments in *Stephens*, except that of Brennan J, tackled this issue since the facts of the case concerned State political affairs. Brennan J clearly limited the State implied freedom to State political affairs in the same manner as he restricted the Commonwealth implied freedom to matters which pertain to the government of the Commonwealth.[98] The only reference to the scope of the State implied freedom from the joint judgment of Mason CJ, Toohey, and Gaudron JJ is this equivocal statement:

> [L]ike its counterpart in the Commonwealth Constitution, [it] extends to criticism of the conduct, performance and fitness for office of a member of Parliament.[99]

It is submitted for the reasons canvassed above in relation to the Commonwealth implied freedom, that any State implied freedom should similarly be restricted to political affairs connected with that State.

THE POSITION UNDER THE OTHER STATE CONSTITUTIONS

Whether or not there can be derived from the other State Constitutions a similar implied freedom of political discussion, may be of limited legal significance. Since

97 Ibid at 89-90.
98 Ibid.
99 Ibid at 90.

Theophanous and *Stephens* establish that the States are incapable of impairing discussion of their own political affairs by virtue of the Commonwealth implied freedom, there is little need to look for a similar freedom in State Constitutions. But if the Commonwealth freedom were to be narrowed in scope so that it only encompassed political affairs clearly connected to the Commonwealth, or was viewed as not restricting State power in relation to exclusive local affairs, it would become an issue of some importance whether an implied freedom can be derived from a State Constitution. This was, as noted earlier, the position reached by Brennan J in *Stephens*. It may also be of local political significance to determine whether the other State Constitutions generate this same implied freedom. Moreover, the precedent of *Stephens* may encourage the implication of other rights or principles from State Constitutions, especially if a challenge to State law is brought before a comparable challenge to Commonwealth law.

Significantly, none of the other State Constitutions contains any reference to *direct* election by the people. All five State Constitutions, however, refer to members of Parliament being elected[100] and three[101] also refer to them representing electorates. Tasmania[102] and Victoria[103] prescribe the qualifications of their electors who are "entitled to vote". New South Wales[104] and South Australia[105] prescribe that the size of the electorates may vary only by 10 per cent. These are the types of provisions relied upon in *Stephens* to derive a principle of representative democracy from the WA Constitution. Hence, it is arguable, subject to the issue of entrenchment, that a similar implied freedom may be derived from the other State Constitutions.

In contrast with the entrenched provisions of the Commonwealth and WA Constitutions, most of the provisions just referred to in the other State Constitutions are not entrenched. Only certain provisions in the Constitutions of New South Wales[106] and South Australia[107] which may generate the implied freedom, are effectively entrenched by a referendum requirement.[108] Hence, the case is stronger in those two States for an implied constitutional freedom of political discussion.

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100 Constitution Act 1867 (Qld), s 28; Constitution Act 1934 (SA), ss 11 and 27.

101 Constitution Act 1902 (NSW), s 26; Constitution Act 1934 (Tas), ss 18 and 22; Constitution Act 1975 (Vic), ss 26 and 34.

102 Constitution Act 1934 (Tas), ss 28 and 29.

103 Constitution Act 1975 (Vic), s 48.

104 Constitution Act 1902 (NSW), ss 28 and 28A; s 11A refers to a "general election".

105 Constitution Act 1934 (SA), s 77 entrenched by s 88; and s 83(1) refers to a "popular vote".

106 Constitution Act 1902 (NSW), s 26 entrenched by s 7B(1).

107 Constitution Act 1934 (SA), s 77 entrenched by s 88; possibly ss 11 and 27 entrenched by s 8.

108 Effective entrenchment depends upon the manner and form (i) being entrenched itself (which is the case with the New South Wales and South Australian provisions) and (ii) deriving binding force from s 6 of the Australia Acts 1986, or possibly, by virtue of the principle of *The Bribery Commissioner v Ranasinghe* [1965] AC 172 or s 106 of the Commonwealth Constitution. Section 6 of the Australia Acts 1986 enforces manner and form provisions only if they are with respect to the "constitution, powers or procedure of the Parliament". Any law which purports to over-ride those provisions of State Constitutions from which representative government is derived is likely to be with respect to the "constitution" of Parliament. Otherwise, the other two grounds (if accepted) are likely to apply. On manner and form generally, see G Carney, "An Overview of Manner and Form in Australia" (1989) 5 *QUTLJ* 69.

How critical is entrenchment of these provisions for deriving the implied freedom? One can argue that for the purpose of deriving the implied freedom, entrenchment is unnecessary. All that is required is that the principle of representative democracy be retained as part of the State Constitution. But, of course, the practical effect of such an unentrenched freedom is limited. It will be abrogated by any law which is inconsistent with it, although until this occurs an unentrenched freedom may, as indicated earlier, protect against executive power and fashion the common law.

The position would be quite different if the principle of representative democracy is entrenched in State Constitutions by force of some implication from the Commonwealth Constitution. The States would then be precluded from enacting legislation which is not only inconsistent with the implied freedom of political discussion but also with other rights which may be derived from the principle of representative democracy, such as the rights to vote and voting of equal value, or the rights to association and assembly. As noted earlier in the discussion of the second proposition above, certain Justices[109] of the High Court may support a Commonwealth constitutional guarantee of representative democracy or government at the State level. The difficulty already identified with this view is that it appears to rely upon an *assumption*, especially in ss 10, 30 and 31 of the Commonwealth Constitution, that there is representative government at the State level. How can an assumption become a restriction on State power?[110] Even if the States are prevented from abrogating the representative nature of their government, it might be argued that the Commonwealth Constitution entrenches only those features of representative government in the States that were in existence as at 1901. Also, it must not be forgotten that s 106 expressly contemplates the amendment of State Constitutions "in accordance" with their manner and form provisions.[111]

Another approach, briefly mentioned earlier, is that suggested by Professor Blackshield[112] who has described s 106 as having a "flow on effect", that is, whatever guarantees are implied in the Commonwealth Constitution flow on to the States as restrictions on their power. This "flow on effect" argument is distinct from and, it is submitted, is an unjustified development of the view that by s 106 the State Constitutions are incorporated within the Commonwealth Constitution and derive their authority since 1901 from the Commonwealth Constitution. Support at least for the view that State Constitutions derive their authority from the Commonwealth Constitution can be found in Quick and Garran,[113] and in certain judgments of Barwick

109 See Deane and Toohey JJ in *Nationwide News* (1992) 177 CLR 1 at 75: "Indeed, the Constitution's doctrine of representative government is structured upon an assumption of representative government within the States" (They cite in n 35: ss 10, 30 and 31).

110 L Zines, above n 41 at 179.

111 *Wilsmore v Western Australia* [1981] WAR 159.

112 A R Blackshield, above n 60 at 26.

113 *The Annotated Constitution of the Australian Commonwealth* at 930: "[It] may be argued that the Constitutions of the States are incorporated into the new Constitution, and should be read as if they formed parts or chapters of the new Constitution ..." But earlier in their text, Quick and Garran (at 372) seem to contradict the view that the State Constitutions derive their authority from the Commonwealth Constitution: "The States existed as colonies prior to the passing of the Federal Constitution, and possessed their own charters of government, in the shape of the Constitutions granted to them by the Imperial Parliament. Those charters have been confirmed and continued by the Federal Constitution, not created thereby." See also *Victoria v Commonwealth* (1971) 122 CLR 353 at 371.

CJ and Murphy J.[114] For instance, in *New South Wales v Commonwealth*,[115] Barwick CJ stated:

> On the passage of the Imperial Act [Commonwealth Constitution Act], those colonies ceased to be such and became States, forming part of the new Commonwealth. As States, they owe their existence to the Constitution which, by ss 106 and 107, provides their constitutions and powers referentially to the constitutions and powers which the former colonies enjoyed, including the power of alteration of those constitutions. Those constitutions and powers were to continue by virtue of the Constitution of the Commonwealth.[116]

Further, the Final Report of the 1988 Constitutional Commission accepted that the Commonwealth Constitution could be amended pursuant to s 128 to effect changes to the Constitutions and the constitutional systems of the States.[117] The Australia Acts 1986 may be another source of authority for State Constitutions.[118] On the other hand, in *Western Australia v Wilsmore*,[119] Burt CJ with whom Lavan SPJ and Jones J agreed, rejected the view that the State Constitutions derived their authority from the Commonwealth Constitution. His Honour discussed the views outlined above but relied upon the High Court decisions in *Clayton v Heffron*[120]and *Southern Centre of Theosophy Inc v State of South Australia*[121] for maintaining that the source of authority is imperial legislation.[122]

This issue as to the ultimate source of the authority of the States was not discussed in the latest High Court decisions on the implied freedom of political discussion. The only relevant comment is from Deane and Toohey JJ in *Nationwide News*:

> The provisions of the State Constitutions were, however, preserved under the Federation "subject to" the Constitution of the Commonwealth and it is strongly arguable that the Constitution's implication of freedom of communication about matters relating to the government of the Commonwealth operates also to confine the scope of State legislative powers.[123]

It is interesting to speculate how the notion of the ultimate sovereignty of the people (at least under the Commonwealth Constitution)[124] applies at the State level. State Constitutions differ from the Commonwealth Constitution in two important respects which may be pertinent in this context. The first is that they are local enactments and the second is that they are, on the whole, flexible.

Whether the State Constitutions form part of the text of the Commonwealth Constitution and derive their authority from the Commonwealth Constitution, should

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114 *Commonwealth v Queensland* (1975) 134 CLR 298 at 337 per Murphy J.
115 (1975) 135 CLR 337.
116 Ibid at 372. See also *Victoria v Commonwealth* (1971) 122 CLR 353 at 371.
117 *Final Report of the Constitutional Commission* (1988) Vol 1 at paras 2.104-2.105.
118 Neil Douglas, "The Western Australian Constitution: Its Source of Authority and Relationship with Section 106 of the Australian Constitution" (1990) 20 *WALR* 340 at 349-352.
119 (1981) 33 ALR 13.
120 (1960) 105 CLR 214.
121 (1979) 27 ALR 59.
122 (1981) 33 ALR 13 at 16-17. Burt CJ's analysis of these cases is questioned by Neil Douglas, above n 118 at 349.
123 (1992) 177 CLR 1 at 76.
124 *Australian Capital Television* (1992) 177 CLR 106 at 137-138 per Mason CJ.

have no bearing upon the extent to which a Commonwealth implied freedom extends to the States. The only relevant consequence of this view is that s 128 may be used to alter the constitutional systems of the States.[125] Even if the State Constitutions are chapters in and derive their authority from the Commonwealth Constitution, it does not follow that any guarantees implied in the Commonwealth Constitution are thereby restrictions on the power of the States. Naturally, s 106 ensures that the States become subject to the express and implied provisions of the Commonwealth Constitution, but only in so far as those provisions expressly or impliedly restrict the powers of the States.[126] Hence, the Commonwealth implied freedom of political discussion is justifiably a restriction on the power of the States in relation to the broad notion of Commonwealth affairs. But to use s 106 to apply that Commonwealth freedom as a restriction on the power of the States in relation to either all political affairs or just their own political affairs, usurps the scope of that section in a manner which may ultimately lead to the total subjugation of State Constitutions.

TERRITORIES AND THE IMPLIED FREEDOM

The wide prescription given in *Australian Capital Television* to the Commonwealth implied freedom of political discussion has already been referred to in the first proposition discussed above. The freedom extends, according to a majority of the High Court, to discussion of all political affairs, whether Commonwealth, State or Territorial. Hence, at least in the exercise of s 51 legislative powers, the Commonwealth is clearly restrained by the implied freedom. Whether s 122 of the Constitution, the Territories power, is similarly limited has not been determined by the High Court.

As a general principle, the extent to which the Territories power in s 122 is confined by restrictions on Commonwealth power contained elsewhere in the Commonwealth Constitution depends upon the nature of the restriction.[127] Restrictions contained within the s 51 heads of legislative power, such as s 51(xxxi), do not operate upon s 122 laws.[128] Outside s 51, s 80 (trial by jury) was held not to apply to the Territories in *R v Bernasconi*.[129] Yet, since that decision in 1915, the High Court has accepted that s 122 is "subject to other appropriate provisions of [the Constitution] as, for example, s 116."[130] Similarly, the joint judgment of Brennan, Deane and Toohey JJ in *Capital Duplicators Pty Limited v Australian Capital Territory*[131] declared: "It would therefore be erroneous to construe s 122 as though it stood isolated from other provisions of the Constitution which might qualify its scope."[132]

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125 See the *Final Report of the Constitutional Commission* (1988) Vol 1 at paras 2.104-2.105.

126 See L Zines, above n 41 at 179-180.

127 *Spratt v Hermes* (1965) 114 CLR 226 at 242 per Barwick CJ.

128 *Teori Tau v Commonwealth* (1969) 119 CLR 564.

129 (1915) 19 CLR 629.

130 *Teori Tau* (1969) 119 CLR 564 at 570; in *Lamshed v Lake* (1958) 99 CLR 132 at 142, Dixon CJ was of the view that s 116 (freedom of religion) applied to the Territories on the basis that the Territories are not to be viewed as outside the Commonwealth but rather as part of it.

131 (1992) 117 CLR 248.

132 Ibid at 272. They quoted with approval the judgment of Barwick CJ in *Spratt v Hermes* (1965) 114 CLR 226 at 242 that it is a question of construction whether the restriction applies to the Territories.

It is submitted that this approach should be applied to the implied freedom of political discussion so that it operates as a restriction on the exercise of the Territories power in s 122 in two respects. First, it prevents the Commonwealth Parliament from directly enacting laws for the government of the Territory which unreasonably impair the freedom. Secondly, it prevents the Commonwealth from empowering the Territory legislatures to enact laws which are inconsistent with the implied freedom. Hence, Commonwealth and Territory powers are restricted by the implied freedom. This view is based upon the nature of the freedom as one protecting discussion of political matters at all levels of government in Australia. The same conclusion would be reached if the implied freedom were confined, as argued above, to the discussion of Commonwealth matters (not including exclusive State matters). Clearly, matters connected to the Territories are Commonwealth matters. Accordingly, it cannot be argued that since the implied freedom is derived from ss 7 and 24 of the Constitution in order to protect the representative character of the Commonwealth system of government, it is not concerned with the affairs of the Territories.

There are indications from three Justices of the current High Court, Brennan, Deane and Toohey JJ,[133] that an exercise of s 122 power is subject to the implied freedom of political discussion. Brennan J in *Theophanous* acknowledged that Territory legislatures were indirectly restrained by the implied freedom since the Commonwealth was incapable of conferring upon them any power to impair that freedom. [134] Deane J, in the same case, expressed a tentative view that the implied freedom restricts Commonwealth power over its *internal* Territories — presumably because of their self-governing status — and thereby also restricts its capacity to empower Territory legislatures to impair that freedom. [135] Gaudron J left the issue open in *Australian Capital Television*.[136] On the other hand, McHugh J in *Theophanous*[137] could find nothing in the Commonwealth Constitution requiring representative government in the Territories. Earlier in *Australian Capital Television*, his Honour had stated that the Constitution did not prevent the Commonwealth from interfering with the functions of the Territory governments.[138]

If s 122 is qualified by the implied freedom, this does not mean that the Commonwealth Constitution guarantees representative government in the Territories. Section 122 allows the Commonwealth to decide in what manner it will govern the Territories.[139] Nevertheless, the operation of the implied freedom in respect of the discussion of Territorial affairs is not dependent upon the representative nature of the system of government in the Territories. It is derived from the requirement of a representative system at the Commonwealth level. Moreover, it is a freedom enjoyed by all Australian citizens[140] whether or not inhabitants of the Territories.

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133 Brennan J in *Theophanous* (1994) 124 ALR 1 at 38; Deane and Toohey JJ in *Australian Capital Television* (1992) 177 CLR 106 at 176-177; and Deane J in *Theophanous* (1994) 124 ALR 1 at 45.

134 (1994) 124 ALR 1 at 38.

135 Ibid at 45.

136 (1992) 177 CLR 106 at 215-216.

137 (1994) 124 ALR 1 at 73-74.

138 (1992) 177 CLR 106 at 246.

139 McHugh J seems to adopt this argument in *Theophanous* (1994) 124 ALR 1 at 73-74.

140 *Cunliffe* (1994) 124 ALR 120 at 154-155 per Brennan J, at 161 per Deane J; cf at 132 per Mason CJ, at 194 per Toohey J.

There remains the possibility that the Commonwealth legislation providing self-government and representative government for the Northern Territory[141] and the Australian Capital Territory[142] may generate in each case an implied guarantee of freedom of political discussion of each Territory's affairs, in the same way that *Stephens* derived such an implied freedom from the WA Constitution. Moreover, the entrenchment of the self-governing legislation within each Territory[143] completes the analogy with the entrenched provisions of the WA Constitution.[144] If, however, within the scope of its s 122 power, the Commonwealth Parliament were to resume direct control over those Territories or provide for other than a representative system of government,[145] the Commonwealth implied freedom would continue to protect discussion of Territorial affairs both within and outside those Territories.

IMPLICATIONS FOR THE FUTURE

The combined effect of the first three propositions discussed in this article is to leave vulnerable all State common law and statute law which in any way is inconsistent with or derogates from the implied freedom of political discussion. Consideration will need to be given to the following:

- Whether areas of the common law comply with this freedom, including: the law of sedition; other offences against the state; the law of contempt of court,[146] including the disclosure of confidential sources of information; the law of confidentiality in relation to official government information (which has implications for whistle-blowing).
- Whether statutes dealing with any of the above matters need to be reviewed in the light of the implied freedom; also statutory controls on election advertising for State and local authority elections must be consistent with the freedom.

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141 Northern Territory (Self-Government) Act 1978 (Cth).

142 Australian Capital Territory (Self-Government) Act 1988 (Cth).

143 The legislatures of the Northern Territory and the ACT are incapable of amending the Commonwealth Acts conferring self-government — Northern Territory (Self-Government) Act 1978 (Cth) and Australian Capital Territory (Self-Government) Act 1988 (Cth): see *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 422 per Brennan J; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464 per Mason J; and *Attorney-General (NT) v Hand, Minister for Aboriginal Affairs* (1989) 25 FCR 345 at 366 per Lockhart J and at 402 per von Doussa J.

144 Constitution Act 1889 (WA), s 73(2)(c) and Constitution Acts Amendment Act 1899 (WA), ss 5, 6, 8(2)and (3), and 15.

145 Gaudron J in *Australian Capital Television* (1992) 177 CLR 106 at 224 concluded that Part IIID of the Broadcasting Act 1942 (Cth) in so far as it regulated political advertising in Northern Territory and Australian Capital Territory elections, lacked a sufficient connection with the government of those Territories to be a law with respect to s 122 "[g]iven that the Commonwealth has enacted legislation with respect to [those Territories], in each case establishing a separate body politic, conferring a significant measure of self-government and establishing representative and democratically elected legislatures." Why this is so is not clear, but the conferral of self-government in this form cannot be interpreted as restricting Commonwealth power under s 122.

146 Deane J in *Theophanous* (1994) 124 ALR 1 at 62 affirmed that the contempt powers of the superior courts and of Parliament are justifiable in the public interest.

- Whether the freedom also affects the privileges of Parliament[147] including the rules permitting the publishing of the proceedings of Parliament, and the power of contempt.[148] The freedom of speech enjoyed by members during the debates and proceedings of Parliament is unlikely to be affected.

Finally, the decisions of the High Court in *Theophanous* and *Stephens* confer upon that Court the capacity to establish national uniform standards and laws in so far as they regulate the discussion of political affairs in this country. No doubt in time other implied rights may be derived from the Commonwealth Constitution and possibly even from State Constitutions. Closely allied to the freedom of political discussion are potential freedoms of assembly and of association. It is to be hoped, however, that in deciding whether such rights operate as restrictions on the power of the States, the Court will carefully justify their extension to the States on substantial grounds rather than merely reciting s 106.

147 Ibid. His Honour made the same comment about Parliament's power to punish for contempt.

148 *Theophanous* (1994) 124 ALR 1 at 62 per Deane J.