'INSULT AND EMOTION, CALUMNY AND INVECTIVE': TWENTY YEARS OF FREEDOM OF POLITICAL COMMUNICATION

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Freedom of communication … is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.[1]

I INTRODUCTION

This sentence, extracted from a judgment of Chief Justice Mason, neatly summarises the reasoning of a majority of judges in the High Court's landmark judgments *Australian Capital Television v Commonwealth*[2] and *Nationwide News v Wills*[3] extending constitutional protection to communications about political matters. As is well known, the judgments were greeted with acclaim as well as a storm of controversy.

The 'freedom of political communication' decisions were regarded as something akin to a revolution. In the almost twenty-years since, two things are widely acknowledged. First, it is widely perceived that no revolution in Australian constitutional law has occurred. We have seen neither much more by way of development of constitutional rights by implication from representative government and progress towards a rights-oriented constitutional law has been slow and halting.

Second, the fate of the freedom of political communication exemplifies this trend. Though in *Lange v Australian Capital Television*[4] and *Levy v Victoria*[5] the High Court declined an invitation to overrule major decisions in the area,[6] at least since 1997, it has been rather cautious with the application of the doctrine. Since the foundational cases in 1992, both of which rendered Commonwealth laws invalid, only one federal law, one state law and one aspect of the common law, have been subjected to the requirements of the doctrine.[7] To put the point more precisely, the freedom of political communication is

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1 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

2 Ibid.

3 (1992) 177 CLR 1.

4 (1997) 189 CLR 520 ('*Lange*').

5 (1997) 189 CLR 579.

6 See Adrienne Stone, 'The Freedom of Political Communication since *Lange*' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads* (2000) 1.

7 The weakness of the freedom of political communication is often put down to its status as an implied right, or to its limited nature as a guarantee of 'political' expression rather than expression generally. As I have argued elsewhere these features do not fully account for the weakness of the freedom of political communication which is primarily due to the weakness of the interpretive arguments supporting its recognition: see Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29.

weak across two axes: it covers only a narrow category of expression[8] and it provides relatively weak protection for that expression.

While I do not as a general matter dispute this claim,[9] this article will strike a different note. Rather than dwelling on the weaknesses of the doctrine I will draw attention to a strand of reasoning in the High Court's decisions on freedom of political communication that stands in marked contrast to the general trend.

A consistent observation in the High Court's decisions in this area is that Australian political debate is properly considered to be unruly and raucous and may involve unpleasantness and insult. Moreover, it is apparent at least since *Coleman v Power*[10] that the law has no legitimate role in 'civilising' public debate. This conception of public discourse will naturally lend some protection to protest as well as conscientious public discussion, to activists, provocateurs and radicals as well as respected commentators and mainstream ideas.

In the first Part of this article, I will elaborate on this strand of reasoning and consider its significance for the freedom of political communication. The conception of public debate that the High Court appears to adopt in *Coleman* — a conception that accepts robust and unpleasant forms of political expression and is rather dismissive of the value of civility — provides the clearest understanding yet of the substantive values that underscore the freedom of political communication. As I have noted previously, moreover, this 'anti-civility' stance has some surprising affinities with aspects of the law of the First Amendment.[11]

Despite the contribution of *Coleman* to our understanding of the freedom of political communication, much remains unclear about the values that underscore the freedom and in particular, its apparently 'anti-civility' stance. In the second Part of this article I will consider, what those values might be. My starting point, argued elsewhere and revisited briefly here,[12] is that the Constitution (and specifically the method of interpretation ostensibly employed by the Court) provides few answers. Given that the Court must draw on values not derived from the 'text and structure' of the Constitution, I will consider other kinds of arguments that might guide the Court.

Once source of guidance lies in the political theory of freedom of expression, which in its most relevant form, has informed constitutional law in other countries. Turning to these ideas as a source of guidance, I will identify two forms of argument that might be made in support of the 'anti-civility' stance taken in *Coleman*. The 'negative form' of the argument focuses on the potential problems posed by the regulation of speech. Its central idea is that the state is not to be trusted. Regulation of speech is therefore likely to be either corruptly self-interested or at least incompetent. By contrast 'positive' arguments for freedom of expression turn not on the dangers posed by the state but on the virtues that leaving it unregulated creates. In both cases, however, even a brief comparative survey demonstrates the depth of the choices that face the Australian courts. These ideas drawn from the constitutional law of other countries might illuminate possibilities, they do not, I argue, remove the need for the Court to develop its own set of ideas as to the nature of the freedom of political communication. Indeed, the reasoning of some members of the High Court in *Coleman* strongly suggests that *Australian* values inform the freedom of political communication. In this spirit, I close the article by suggesting

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8 Narrower, I would argue, than its interpretive foundations require: see Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374.

9 Indeed, I have offered a diagnosis of the source of this weakness: see Stone, 'Australia's Constitutional Rights', above n 7.

10 (2004) 220 CLR 1 ('*Coleman*').

11 Adrienne Stone and Simon Evans, 'Free Speech and Insult in the Australian High Court' (2006) 4 *International Journal of Constitutional Law* 677.

12 See below nn 76–7 and accompanying text.

that *Coleman* might be read as showing a nascent but peculiarly Australian disregard for civility in political discussion.

II THE PROTECTION OF INSULT UNDER THE FREEDOM OF POLITICAL COMMUNICATION

A *The 'Rise and Fall' of the Freedom of Political Communication*

One of the aims of this paper is to highlight a strand of reasoning in the decisions of the High Court that accords surprisingly strong protection to certain forms of political expression. In doing so, I seek to offer a counterweight to the idea that the freedom of political communication necessarily embodies a weak conception of freedom of expression. Before doing so, I want to spend a moment addressing the commonly held view that, after an initial period of enthusiasm, the High Court 'backed off' with respect to the freedom of political communication.

This view is sometimes put as part of a wider view that the court under Chief Justice Brennan and then later under Chief Justice Gleeson was more inclined towards interpretive conservatism or 'legalism' in some form[13] than its apparently more adventurous and 'policy oriented' predecessor in the 'Mason Court'. Whether or not that view is accurate,[14] the change of emphasis with respect to the freedom of political communication that occurred around the time of the decision *Lange v Australian Broadcasting Commission*[15] decision is unmistakable.

While that decision did not of itself roll back the protection afforded to political communication,[16] the judgment deliberately emphasized the textual basis of the freedom of political communication in an effort to secure its legitimacy.[17] The Court, unanimously adopted an approach to the freedom of political communication according to which constitutional 'text and structure' alone determine the constitutional concept of representative government (the '*Lange* method'):[18]

> [T]he Constitution gives effect to the institution of 'representative government' only to the extent that the text and structure of the Constitution establish it … 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?'

At the same time, and not coincidentally I would suggest, the courts had become notably cautious in their application. On the question of the 'coverage' of the freedom of political communication (ie, the kinds of 'communication' thought to be within the scope of the freedom), the courts appeared to adopt a narrow conception of 'political communication'.[19] Moreover, the courts appeared ready to find that limitations on political communication were 'reasonable limits'.[20]

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13 Jason L Pierce, *Inside the Mason Court Revolution* (2006) ch 7.

14 Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads* (2000).

15 (1997) 189 CLR 520 ('*Lange*').

16 On the question central to that case (the nature of qualified privilege as a defence to defamation law) *Lange* adopted a position similar to earlier cases.

17 It is worth recalling that Justice Dawson raised serious doubts about the correctness of the High Court's earlier freedom of political communication decision during argument in *Levy v Victoria*, a case argued at the same time as *Lange*: see Transcript of Proceedings, *Levy v Victoria* [1997] HCATrans 88 (4 March 1997).

18 (1997) 189 CLR 520, 566–7.

19 Consider for instance *Brown v Classification Review Board* (1998) 154 ALR 67 discussed in Stone, 'The Freedom of Political Communication since *Lange*', above n 6, 6.

20 See ibid.

No case better represents this trend than the High Court's decision in *Langer v Commonwealth*, decided the year before *Lange*.[21] As is well known, in that case the High Court upheld as valid a section of the *Commonwealth Electoral Act 1918* (Cth) that prohibited actions 'encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with' s 240 of the Act which in turn required voters to number all candidates sequentially.

A majority of the Court accepted that the proscription was 'an incident to the protection of the s 240 method of voting'[22] was therefore a permissible limit on freedom of political communication.[23]

B *Counterpoint: Levy to Coleman*

Lange therefore seemed to herald an approach to the protection of political communication that is both narrow in scope and weak in the level of protection it afforded. However, at the same time as it decided *Lange*, the High Court handed down its decision in *Levy v Victoria*.[24] Some aspects of this case are consistent with the caution seen in *Lange*. The High Court upheld a Victorian law that required protestors to keep a certain distance from hunters during a duck hunting weekend as a law reasonably directed to protecting the personal safety of protestors. Moreover some judges appeared to narrow the 'coverage' of the freedom, casting doubt as to whether discussion of state political matters, which had previously been thought to be within the freedom, were now covered.[25]

Simultaneously, however, members of the Court were advancing a conception of freedom of political communication that was in one respect quite robust. Specifically, a number of the judges appeared to take considerable care to express an appreciation of the significance of protest activity within the freedom of political communication.

The most articulate defender of the view in this set of judgments was Justice McHugh who, in the course of his judgment, wrote:

> [T]he 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. To many people, appeals to emotions in political and government matters are deplorable or worse. That people should take this view is understandable, for history, ancient and modern, is full of examples of the use of appeals to the emotions to achieve evil ends. However, the use of such appeals to achieve political and government goals has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication.[26]

Justices Toohey and Gummow expressed a similar sentiment: 'The appeal to reason cannot be said to be, or ever to have been, an essential ingredient of political communication or discussion'.[27]

Something of the same approach is evident again in those cases in which the High Court has considered the relationship between freedom of political communication and defamation: *Theophanous v Herald and Weekly Times*;[28] *Lange v Australian*

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21 (1996) 186 CLR 302.
22 (1996) 186 CLR 302, 318 (Brennan CJ).
23 Ibid (Brennan CJ),334-35 (Toohey and Gaudron JJ), 340 (McHugh J), 351 (Gummow J).
24 (1997) 189 CLR 579.
25 (1997) 189 CLR 579, 595–6 (Brennan J).
26 (1997) 189 CLR 579.
27 Ibid 613.
28 (1994) 182 CLR 104.

Broadcasting Corporation[29] and *Roberts v Bass*.[30] In the first two of these cases the High Court adopted, in slightly different forms, a modified version of the rule in *New York Times v Sullivan*, which limits the capacity of public officials to bring actions for defamation — by providing a defence where a defendant has acted reasonably — and the third case elaborates on the nature of that rule.[31]

The reference to *New York Times v Sullivan*, itself, is significant for this line of thought. The famous opinion contains frequently quoted statements about public debate in the United States. It advances a vision of the 'unfettered interchange of ideas'[32] of 'vigorous advocacy' no less than 'abstract discussion'[33] and

> a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.[34]

While neither *Theophanous* nor *Lange* provide an unqualified endorsement of these cases[35] there are some echoes of *New York Times*' appreciation of robust, critical, unpleasant political debate. Especially significant is *Roberts v Bass*, from which it emerged that the rule adopted in *Theophanous* and *Lange* cannot be defeated merely by showing that the defendant intended to cause political damage or by the 'vigour or pungency' of the attack.[36] Even a lack of honest belief in the truth of the defamatory statement may not establish unreasonableness sufficient to defeat the defence.[37] Justice Kirby makes the more general point about the tenor of the Australian debate:

> Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest. In this country, a philosophical ideal that political discourse should be based only upon objective facts, noble ideas and temperate beliefs gives way to the reality of passionate and sometimes irrational and highly charged interchange.[38]

This line of authority culminates in *Coleman*,[39] in which the High Court upheld an appeal by an activist against his conviction for the use of insulting words during an altercation with a police officer. The case concerned a public order offence. Patrick Coleman was convicted for using 'threatening, abusive, or insulting words to any person'

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29 (1997) 189 CLR 520.

30 (2002) 212 CLR 1.

31 See below n 35.

32 *New York Times v Sullivan*, 376 US 254, 269 (1964) quoting *Roth v United States*, 354 US 476, 484 (1957).

33 Ibid 368 quoting *NAACP v Button*, 371 US 415, 429 (1963).

34 Ibid 270.

35 Like the Supreme Court of the United States in *New York Times v Sullivan* 376 US 254 (1963), the High Court recognised a new 'defence' to actions in defamation. However, there are differences between the defence recognised in *Lange* and the *New York Times v Sullivan* defence. The *Lange* version of the rule allows for greater protection of reputation. Specifically, rather than requiring a plaintiff to show (with convincing clarity) that the defendant was motivated by 'actual malice', the Australian form of the rule shifts the onus to the defendant and requires that the defendant prove its conduct was 'reasonable': see *Lange* (1997) 189 CLR 520, 573-574

36 *Lange* (1997) 189 CLR 520, 574; *Roberts v Bass* (2002) 212 CLR 1, 22 (Gaudron, McHugh and Gummow JJ).

37 *Roberts v Bass* (2002) 212 CLR 1, 29, 36: though actual knowledge of falsity is 'almost conclusive evidence' of an improper motive: at 32.

38 Ibid 63 (Kirby J).

39 (2004) 220 CLR 1.

in or near a public place[40] contrary to s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld). The High Court allowed Coleman's appeal against his sentence, and laid down a more general principle that an insulting language offence may only limit insulting political communication if it is an element of the offence that a violent response is either the intended or reasonably likely result.[41]

C *The Significance of Coleman*[42]

The decision, it should be immediately acknowledged, seems so far to have been limited in its effect. For Mr Coleman personally the victory was hollow. His conviction for resisting arrest was upheld, notwithstanding the fact that the law under which he was arrested was found to have no application to him. He remained imprisoned despite his legal victory.[43]

More generally, some have raised doubts as to whether political insult (as opposed to insult in the course of other kinds of communication) had been much regulated before *Coleman*.[44] For the most part, the evidence suggests, insulting language statutes have been used as part of a general public order regime, to arrest those engaged in altercations with police.[45] The insulting language against which such laws are typically directed is not usually 'political communication' as that term is understood within the Australian constitutional context. There is therefore a question as to whether the case will have much effect on the way in which insulting language offences are prosecuted.[46] In addition, it seems that the case is prone to misunderstanding. The case produced a clear majority on a point of principle, a law prohibiting insulting language could only validly prohibit 'political communication' in circumstances in which a violent response is either the intended or reasonably likely result.[47] However, an underlying disagreement about statutory interpretation[48] obscured the point and has led at least one lower court to the mistaken conclusion that a majority rejected the proposition that an insulting words law must be limited to such circumstances.[49]

From the point of view of identifying the High Court's understanding of freedom of expression, however, the judgments in *Coleman* were highly significant. The case provides glimmerings of a substantive understanding of freedom of political communication. It picks up on, and confirms, that conception of a robust and fearless Australian political debate hinted at in earlier judgments. In doing so, the case provides a

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40 *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7(1)(d).

41 (2004) 220 CLR 1, 77–8, 98–9, 99–100.

42 Cf Roger Douglas, 'The Constitutional Freedom to Insult: The Insignificance of *Coleman v Power*' (2005) 16 *Public Law Review* 23. This portion of the article expands upon the analysis set out in Stone and Evans, above n 11.

43 I am grateful to Jeremy Gans for his insights on these aspects of the case.

44 See Douglas, above n 42.

45 Ibid.

46 See also, Tamara Walsh, 'The Impact of *Coleman v Power* on the Policing, Defence and Sentence of Public Nuisance Cases in Queensland' (2006) 30 *Melbourne University Law Review* 191.

47 (2004) 220 CLR 1, 53–4 (McHugh J), 77 (Gummow and Hayne JJ), 97-98 (Kirby J).

48 The case was complicated by a disagreement among the four Justices who found in favour of Mr Coleman. Three of those Justices found the law valid but only because, as they interpreted it, as a matter of statutory construction the law applied only where unlawful physical retaliation was either intended or reasonably likely. *Coleman* (2004) 220 CLR 1, 77 (Gummow and Hayne JJ), 87 (Kirby J). The fourth Justice, Justice McHugh, found the law invalid because, as he interpreted the statute, it did not contain the required limitation: at 53–4.

49 *Ferguson v Walkley* [2008] VSC 7 (21 January 2008) [24]–[25]. Jeremy Gans drew my attention to this aspect of the case.

refreshing change from the barren, formalist account, focussed on the unhelpful concept of 'constitutional text and structure'.[50]

The three majority judgments (of Justice McHugh, Justices Gummow and Hayne in a joint judgment and Justice Kirby) are structured as refutations of arguments in favour of allowing the unqualified[51] regulation of insult. Those arguments are each represented in the following passage from the judgment of Justice Heydon (in dissent) who would have upheld the challenged law and by extension Mr Coleman's conviction for the reason that:

> Insulting statements give rise to a risk of acrimony leading to breaches of the peace, disorder and violence, and the first legitimate end of s 7(1)(d) is to diminish that risk. A second legitimate end is to forestall the wounding effect on the person publicly insulted. A third legitimate end is to prevent other persons who hear the insults from feeling intimidated or otherwise upset: they have an interest in public peace and an interest in feeling secure, and one specific consequence of those interests being invaded is that they may withdraw from public debate or desist from contributing to it.
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> Insulting words are a form of uncivilised violence and intimidation. It is true that the violence is verbal, not physical, but it is violence which, in its outrage to self-respect, desire for security and like human feelings, may be as damaging and unpredictable in its consequences as other forms of violence. And while the harm that insulting words cause may not be intended, what matters in all instances is the possible effect — the victim of the insult driven to a breach of the peace, the victim of the insult wounded in feelings, other hearers of the insult upset.[52]

Later in his judgment, Justice Heydon makes a further, important point. Recalling that political communication is protected so that 'the people be enabled to exercise a "free and informed choice as electors" … with "an opportunity to gain an appreciation of the available alternatives"':

> Insulting words are inconsistent with that society and those claims because they are inconsistent with civilized standards. A legislative attempt to increase the standards of civilization to which citizens must conform in public is legitimate. In promoting civilised standards, s 7(1)(d) not only improves the quality of communication on government and political matters by those who might otherwise descend to insults, but it also increases the chance that those who might otherwise have been insulted, and those who might otherwise have heard the insults, will respond to the communications they have heard in a like manner and thereby enhance the quantity and quality of debate.[53]

He concludes, later in the judgment, that '[i]nsulting words damage, rather than enhance, any process which might lead to voter appreciation of the available alternatives'.[54]

The argument here is multilayered. In the first passage, Justice Heydon makes three arguments: an insult law reduces the risk of disorder or violence (the 'disorder argument'); prevents the intimidation of the victims of insult (the 'intimidation argument'); and prevents the 'wounding effect' 'upset' and 'outrage to self-respect' that insult causes (the 'civility argument'). Avoiding these harms — disorder, intimidation and 'outrage' — justifies limiting freedom of political communication.

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50 See Adrienne Stone 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668.

51 That is, not limited to circumstances in which unlawful physical retaliation was either intended or likely.

52 (2004) 220 CLR 53, 330.

53 (2004) 220 CLR 1, 125 (footnotes omitted).

54 Ibid.

Some of these arguments are found in the other dissenting judgments as well. Justice Callinan was most concerned about the propensity of insulting language to cause violence;[55] the Chief Justice advanced this argument and also the propensity of insulting language to intimidate, reasoning that in many cases the victims of insulting language will not, or will not be able to, retaliate violently.[56]

This first set of arguments casts the law as serving a competing interest that is justifiable in the circumstances. The second passage introduces a different claim. Simply put, the argument is that section 7(1)(d) actually improves the capacity of voters to make electoral choices — the very thing the freedom of political communication is designed to ensure (the 'enhancement' argument).

1 *The Disorder and Intimidation Arguments*

The first set of arguments found in the first passage quoted above — the arguments from 'disorder', 'intimidation' and 'civility' — are very clearly rejected by the majority.[57] The treatment of the argument from disorder takes the most familiar form. It is reasonably clear that the majority judges find that while the prevention of disorder and violence may be a 'legitimate end' as required in *Lange* the means used by this particular law pose too great a cost to freedom of expression. Thus, for the majority, a law may limit insult, even where that insult falls within the category of 'political communication' provided that it is an element of the offence that there be an intention to cause an unlawful violent response or that such a response is reasonably likely. The rejection of this argument thus reveals the majority's positive position with respect to freedom of political insult – the disorder argument justifies limitations only when a violent response is intended or reasonably likely.

Much the same emerges from the treatment of the argument from intimidation, though the treatment of this argument, which is addressed explicitly only by Justice McHugh, is very brief. Justice McHugh held that the intimidation argument cannot justify an 'unqualified' prohibition on insulting words found in the challenged law. He therefore leaves open the possibility that a law aimed at preventing intimidation with appropriate qualifications might withstand constitutional challenge. It is unclear, however, just what those circumstances would be. Justice McHugh held:

> The use of insulting words is a common enough technique in political discussion and debates. No doubt speakers and writers sometimes use them as weapons of intimidation. And whether insulting words are or are not used for the purpose of intimidation, fear of insult may have a chilling effect on political debate. However, as I have indicated, insults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. Such a prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted to maintaining the system of representative government.[58]

The implication of that analysis appears to be that intimidation only justifies a prohibition on political insult where those words are intended to or reasonably likely to produce an unlawful violent response.[59] If that is so, his rejection of the intimidation

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55 Ibid, 111–2. See also 24 (Gleeson CJ), cf 126 (Heydon J).

56 Ibid, 24.

57 Stone and Evans, above n 11.

58 (2004) 220 CLR 1, 24.

59 Or on Justice McHugh's formulation 'the law would have to make proof of a breach of the peace and the intention to commit the breach elements of the offence': (2004) 220 CLR 1, 53 (McHugh J).

argument simply serves to reiterate the point made in rejecting the argument from disorder.

2 *The Civility Argument*

The majority's rejection of the argument from civility — the argument that justifies the insult law as protection against the 'wounding effect', 'upset' and 'outrage to self-respect' caused by insult — is especially unambiguous.

The lack of equivocation is especially evident in the judgment of Justices Gummow and Hayne. Their Honours interpreted the challenged law narrowly as applying to political communication only in circumstances where insulting words are 'intended to, or they are reasonably likely to provoke unlawful physical retaliation'.[60] Their Honours continued:

> If s 7(1)(d) is not construed in the way we have indicated, but is construed as prohibiting the use of any words to a person that are calculated to hurt the personal feelings of that person, it is evident that discourse in a public place on any subject (private or political) is more narrowly constrained by the requirements of the Vagrants Act. And the end served by the Vagrants Act (on that wider construction of its application) would necessarily be described in terms of ensuring the civility of discourse. *The very basis of the decision in* Lange *would require the conclusion that an end identified in that way could not satisfy the second of the tests articulated in* Lange.[61]

To flesh this argument out, the point seems to be that the limitations on capacity of public officials to sue for damage to their reputation imposed by *Lange* presuppose that incivility is a legitimate or at least unavoidable feature of public debate. It cannot, therefore, be legitimate for a law to seek to protect others from the offence or hurt that incivility inevitably causes.

The precise structure of this reasoning is important. To recall, the High Court's established position is that a law burdening freedom of political communication will only be valid if it is 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the constitutionally prescribed system of representative and responsible government'.[62] The test focuses on both the means employed by a challenged law and the end it pursued.

In most freedom of political communication cases, laws found invalid have been found invalid on the basis that the means employed are beyond what is 'reasonably appropriate and adapted' to the end they pursue.[63] In *Coleman* however the focus of Justice Gummow and Hayne is on the *end* pursued.

Justices McHugh and Kirby may be making a similar point. Justice McHugh's conclusion (quoted above) that 'insults are a legitimate part of the political discussion protected by the Constitution' echoes his earlier conclusion in *Levy* that the use of 'appeals to emotion … has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication'.[64] Justice Kirby replies to Justice Heydon's reliance on 'civility' in a similar way with an invocation of the nature of the Australian political tradition:

> [Justice Heydon's] chronicle appears more like a description of an intellectual salon where civility always (or usually) prevails … Australian politics has regularly included

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60 (2004) 220 CLR 1, 77.
61 Ibid, 78–9 (emphasis added).
62 (1997) 189 CLR 520, 567–8.
63 See Stone, above n 6.
64 (1997) 189 CLR 579, 623 (McHugh J).

> insult and emotion, calumny and invective, in its armoury of persuasion … the Constitution addresses the nation's representative government as it is practised.[65]

The implication of these findings seems to be that the inevitable consequence of this practice — hurt feelings, outrage to self-respect — can never be a justification for limiting political expression. If this reading is correct these judges, like Justices Gummow and Hayne, regard the pursuit of civility not merely as a weak justification for a law limiting political communication, but no justification at all.

All judges in the majority thus reject the civility argument. For at least two (and perhaps four) of these judges, the rejection of the argument takes an especially categorical form, finding that no burden on political communication in the name of 'civility' is justified.

3 *The Enhancement Argument*

The remaining argument, the enhancement argument, builds on the civility argument. In addition to avoiding 'hurt' and 'outrage to self-respect', Justice Heydon argues that incivility damages the political process by degrading the quality of public debate and discouraging participation. These assertions form the basis of the argument that the regulation of political insults serves to enhance, rather than frustrate the goals of the freedom of political communication.

In the context of *Coleman*, the argument is clearly rejected. That much is implicit in the majority's finding that 'civility' does not justify an unqualified prohibition on insult. In other words, the majority judges accept that insult is protected in political debate notwithstanding the harm it might cause.

But before continuing it is worth noting that the very form of this argument — the justification of restrictions on freedom of expression as enhancements of public debate — raises problems in some legal systems. Indeed, in the United States such arguments are categorically impermissible. The Supreme Court of the United States famously declared in *Buckley v Valeo,* that:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.[66]

In Australia, however, it seems that such an argument might succeed in some circumstances. At the very least, in *Australian Capital Television v Commonwealth*, the Court seems to have accepted that a law might validly restrict freedom of political communication in order to protect the political system from 'corruption and undue influence'.[67] Thus in that case, the majority found the law invalid because of the distorting potential of the provisions of the Act that distributed 'free time'.[68] Specifically, it was inequalities in this distribution of that time that ultimately led to the invalidation of the Act.[69]

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65 (2004) 220 CLR 1, 91.

66 424 US 1, 48–9 (1976).

67 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 129 (Mason CJ).

68 Section 95H(1) of the *Political Broadcasts and Political Disclosures Act* 1991 (Cth) provided for the grant of free time to certain political parties according to the representation in the previous Parliament and the number of candidates fielded in the current election. In addition, there was provision in s 95L for the discretion grant of free time to independent candidates and political parties not catered for by s 95H. *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 126-7 (Mason CJ).

69 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 131–2 (Mason CJ).

The reasoning in *Australian Capital Television v Commonwealth* seems therefore to leave open the possibility that an appropriately drafted law limiting political communication might be justified as an 'enhancement' of political communication. In addition, in *Coleman*, Justice McHugh is quite explicit that these forms of argument are permissible in principle, stating:

> Communications on political and governmental matters are part of the system of representative and responsible government, and they may be regulated in ways that enhance or protect the communication of those matters. Regulations that have that effect do not detract from the freedom. On the contrary, they enhance it.[70]

Despite the rejection of this argument in *Coleman*, it does seem that an argument relying on the capacity of a challenged law to enhance political discussion is not excluded in principle.

III THE AUSTRALIAN CONCEPTION OF FREEDOM OF EXPRESSION

A *Why Protect Insult? The Ideas*

As a doctrinal matter, the following propositions defining the freedom of political communication emerge from *Coleman*.

First, that it is permissible to limit political communication in order to prevent a violent response to insulting words, though such a law must be 'reasonably appropriate and adapted' to that end. In particular, a limitation on political communication in the form of insulting words must provide, as an element of any offence, that there be an intention to cause an unlawful violent response or that such a response is reasonably likely.

Second, it seems it is now well established that 'insult and emotion, calumny and invective' are within the scope or 'coverage'[71] of the freedom of political communication. Moreover, for at least three judges, the pursuit of 'civility' is not a 'legitimate end' within the meaning of the second stage of the *Lange* test.

These doctrinal propositions hint at a deeper set of values that the Court is developing. *Coleman* gives us a picture of the kind of political debate that the Constitution protects: that political debate may be potentially unruly, irrational and unpleasant.

But the question remains: 'why?' The remainder of the article seeks to make a modest contribution to responding to this question. My task will be to seek a fuller account of the values that might underscore the position taken by the majority in *Coleman*.

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70 (2004) 220 CLR 1, 90.

71 It is helpful here to rely upon the distinction between the concepts of 'coverage' and 'protection'. By the 'coverage' of the freedom of political communication, I mean the category of communications that are accorded some level of protection under the freedom. 'Protection', on the other hand, refers to the degree or extent to which such communications are immune from regulation. See generally, Frederick Schauer, *Freedom of Speech: A Philosophical Enquiry* (1981) 89–91.

B *A Preliminary Note: Constitutional Text and Structure*

Before proceeding, however, I need to revisit a question of method. For those who hold the view that the *Lange* method[72] determines the meaning of the freedom of political communication, the answer to the question just posed is provided by the 'text and structure' of the Constitution. In other words, the answer is determined by considering what form of public debate is required to ensure the proper functioning of representative and responsible government (in so far as that form of government is provided for by the text of the Constitution).

However, I have long held the view — and have defended it at length elsewhere[73] — that this interpretive method does not provide answers to many cases concerning freedom of political communication. It does, of course, structure the inquiry. It:

> [C]onfines our attention to the specific institutions of representative and responsible government identifiable in the text rather than a more general or 'free standing' principle of representation government … [and] invokes the concept of 'necessity'. Judges are not required to consider what would be desirable for the operation of representative and responsible government. The freedom of political communication is a minimum requirement protecting only communications without which representative and responsible government at the federal level would falter.[74]

But even accepting these limits, the proper scope of the freedom of political communication is highly uncertain. In almost every case, there will be competing, and often vastly different, conceptions of political communication any of which could satisfy the text and structure method.

Since this argument has been extensively canvassed elsewhere, I do not intend to repeat it here, save to say that the cases reviewed here themselves illustrate the problems of that method, at least where it is thought that it provides clear answers to difficult cases. As the judgments show, there are at least two views as to what 'the constitutionally prescribed systems of representative and responsible government' requires in these circumstances: Justice Heydon's vision of a civilised political discourse where the freedom of political communication serves to protect the quality of public discussion and encourage political participation, and Justices McHugh and Kirby's vision of a robust and perhaps aggressive political debate in which hurt feelings and intimidation or discouragement from participation are costs to be borne rather than avoided.

Importantly, both visions of public debate are justified in terms of how they improve the political process and neither is obviously required or excluded by the requirement that voters exercise a 'true choice' in federal elections or any other aspect of the 'constitutionally protected systems of representative and responsible government'. It is plausible that the constitutionally required system of representative and responsible government requires, or is best realised by, a vision of robust and caustic political debate, which the judges in the majority take to be the Australian tradition.[75] It is also plausible to think that, as judges in the minority did, that a civil public debate free from

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72 See above n 18 and accompanying text.

73 I first made the argument in Stone, 'The Limits of Constitutional Text and Structure', above n 50; it was the subject of critical commentary by Justice McHugh in *Coleman v Power* (2004) 220 CLR 1, 46-49; and a further defence by me in Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842.

74 Stone, 'The Limits of Constitutional Text and Structure Revisited', ibid, 843.

75 (2004) 220 CLR 1, 99 (Kirby J).

intimidation is compatible with the constitutionally prescribed system of representative and responsible government.[76] As I have written elsewhere:[77]

> What is important to note here is that all these judges disagree *despite their adherence to the text and structure method, including the concept of necessity*. These disagreements, moreover, run deep. The division seen in the High Court in *Coleman v Power* mirrors the deepest and most fundamental schism in modern free speech theory. Chief Justice Gleeson and Justice Heydon appear to be aligned with those who place emphasis on the quality of public debate and are sympathetic to government intervention in order to promote a rich and balanced debate.[78] Justices McHugh and Kirby, on the other hand, appear to be aligned with more traditional free speech theorists who believe that such intervention poses an unacceptable risk of authoritarian censorship.

The *Lange* method thus poses a question: 'What is necessary for the maintenance of the constitutionally prescribed system of representative and responsible government?' But in answering the question we enter into deeply disputed territory.

C *Freedom of Expression in Comparative Constitutional Law and Theory*

The deficiencies in the *Lange* method mean that freedom of political communication cases necessarily rest on judgments that are not revealed in the reasoning. Incompleteness of reasoning may not itself be a cause for concern. It is an understandable response to the pressures on courts (especially multi-member courts) and reflects the very difficult and contested nature of the enterprise in which they are engaged.[79] Over the longer term, however, the 'thin' and formal nature of the reasoning encouraged by the *Lange* methods poses a number of problems.

It has at least two consequences: first it necessarily means that the substantive choices on which the courts' decisions depend are somewhat suppressed. This lack of candour is itself a problem for rule of law related reasons. As part of their reason-giving function, courts should reveal the bases of their decision. But in addition, it makes the development of the law somewhat less predictable. It means that the dominant interpretive method provides no meaningful touchstone against which to consider developments in the law that are urged upon it. That makes the direction of the freedom of political communication open to missteps and unintended consequences.

D *The Negative Argument: Mistrust of Government*

Once the task of developing a substantive account of the freedom of political communication is faced squarely, there is no choice but to look beyond the text and structure of the Constitution. Freedom of expression in other constitutional systems is an obvious and, subject to obvious qualifications, entirely appropriate place to look.[80]

Taking that path, one does not have to look very far to find some ideas to explain why the High Court has so clearly rejected the idea that 'civility' is valued in political communication. The problem of the protection of 'extreme speech' (of which insult is

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76 Ibid 31, 32 (Gleeson CJ), 121 (Heydon J).

77 Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited', above n 73, 850.

78 The most powerful exponents of this idea are Owen Fiss, *The Irony of Free Speech* (1996) and Cass Sunstein, *Democracy and the Problem of Free Speech* (1993).

79 I explored these reasons in Adrienne Stone, 'Incomplete Theorizing in the High Court' (1998) 26 *Federal Law Review* 195.

80 See Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] *New Zealand Law Review* 45.

one form) has received considerable scholarly attention[81] and if one turns to other systems of freedom of expression and to the scholarly literature one finds a fairly well-theorised account of reasons for its protection.

One especially promising form of the argument turns on the idea of mistrust of government. Among the most frequently advanced of the arguments for freedom of expression is that it guards against governmental self-interest and incompetence in the regulation of speech. This argument is founded on the belief that officials will inevitably abuse their power to regulate speech, by acting illegally, dishonestly or self-servingly. In addition, even when acting in good faith they are likely to make incompetent decisions about the value of freedom of expression. This latter element of the argument is partly founded upon an idea of human fallibility, which has been at the core of arguments of freedom of speech at least since John Stuart Mill.[82] But the problem of human fallibility is taken to be exacerbated in the cases of government action, especially where laws are enforced by a bureaucracy that might apply those laws in a manner not contemplated by the lawmakers.[83]

As I have put it so far, the argument from mistrust of government is an argument for freedom of expression generally, and thus it might seem to have no particular bite with respect to extreme speech. But note that, in First Amendment law at least, the idea of mistrust of government underscores the doctrinal features that lend protection to extreme forms of speech. It underscores the First Amendment's strong presumption against 'content-based laws'. In First Amendment law, laws that target expression because of its content (as opposed to content-neutral reasons)[84] are presumptively invalid.[85] In addition, mistrust of government also underscores the limited and rigid nature of the categories of freedom of expression that attract less than full protection.[86]

There is in theory of freedom of expression, then, a rich tradition of ideas that can assist the courts in developing an account of the values that underlie the freedom of political communication and that explains the High Court's particular approach in *Coleman*. Moreover, this set of ideas seems relevant to the freedom of political communication notwithstanding that it is a guarantee only of freedom relevant to protecting representative and responsible government (at the federal level) rather than a guarantee of freedom of expression more generally. The idea that 'the people' require a freedom of political communication to ensure their choice in federal elections seems premised on some level of mistrust that the state will otherwise allow the dissemination of all relevant information. The High Court's appreciation of 'insult and emotion, calumny and invective'[87] and disregard for civility might therefore seem to link it to this body of thought about freedom of expression.

Moreover, evidence of the influence of ideas of mistrust of government is identifiable in the case law on the freedom of political communication. An especially

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81 See, eg, Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (2009).

82 Mill argued for freedom of expression partly on the grounds that it subjected received wisdom to challenge. J.S. Mill, *On Liberty* (Elizabeth Rapaport revised ed, 1978) 15-52.

83 Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2 *American Bar Foundation Research Journal* 521.

84 'Content neutral laws' are those that regulate expression for reasons unrelated to the content of the expression such as laws that are directed to the 'time, place and manner' in which the communication takes place. Erwin Chemerinsky, *Constitutional Law: Principles and Policy* (2nd ed, 2002) 902-10.

85 *R.A.V. v St Paul*, 505 US 377 (1992).

86 For the role of this in First Amendment Law see, Adrienne Stone 'How to Think about the Problem of Hate Speech' in Katharine Gelber and Adrienne Stone (eds), *Freedom of Speech and Hate Speech in Australia* (2007).

87 (2004) 220 CLR 1, 91 (Kirby J).

clear statement of the sentiment is found in the judgment of Chief Justice Mason in *Australian Capital Television v Commonwealth:*

> [T]he Court should scrutinise very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process. Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. *All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process*.[88]

In addition to this general sentiment, some of the specific doctrinal manifestations of First Amendment style 'mistrust' have appeared in freedom of political communications decisions. After a period of uncertainty,[89] the Court has adopted a distinction between 'direct' and 'incidental' burdens on political communication,[90] a distinction analogous to the distinction between content-based and content-neutral laws that is central to First Amendment law.[91]

Unmodified, however, this line of reasoning might lead to troubling consequences, given the rather exceptional nature of First Amendment law on matters like the permissibility of the regulation of racist and other hateful forms of expression and the regulation of electoral law, particularly campaign funding.[92]

The tenor of First Amendment law is usefully contrasted with jurisprudence of the Supreme Court of Canada. In its interpretation of the *Canadian Charter of Rights and Freedoms*,[93] the Court has struck a very different note. The Canadian Court clearly does not share the mistrust of government evident in First Amendment law. Indeed, that Court has specifically recognised that in cases where the state is 'mediating between the claims of competing groups', the Court has recognised a need to be deferential to the legislature and mindful of its representative function.[94] The vulnerability of these groups is treated as a reason for deference to the legislature (and its attempts to remedy disadvantage) rather than, as conventionally analysed in American constitutional theory, a reason for strong enforcement of rights against the state.[95] It is particularly significant, moreover, that this moderation of the attitude of mistrust towards the state is reflected in the law of freedom of expression. Relevantly for our purposes, though Canadian law is protective of insult,[96] it is much less protective than its United States counterpart of other forms of extreme speech such as racist and obscene 'hate speech'.[97]

Even on this brief comparative survey it is evident that with respect to freedom of expression, it is apparent that there are widely divergent approaches from which to

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88 (1992) 177 CLR 106, 145 (emphasis added).

89 Discussed in Stone, 'The Limits of Constitutional Text', above n 49.

90 *Hogan v Hinch* [2011] HCA 4, [95].

91 See generally, Stone, 'The Limits of Constitutional Text', above n 50.

92 See, eg, *R.A.V. v St Paul*, 505 US 377 (1992); *Citizens United v Federal Electoral Commission* 558 US _ (2010).

93 *Canada Act 1982* (UK) c 11, sch B pt I.

94 *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927, 993.

95 *United States v Carolene Products*, 304 US 144, 152 (1938).

96 *R v Lohnes* [1992] 1 SCR 167 interpreting the insulting language provision of the *Criminal Code* to apply only in cases were an 'externally manifested disturbance of the public peace' was a reasonably foreseeable consequence.

97 On the differing levels of 'mistrust of government' evident in the free speech law of the United States and Canada, see Stone, 'How to Think about the Problem of Hate Speech', above n 86, 75-8.

choose. The concept of 'mistrust of government' taken alone is simply too vague (and consequently subject to multiple interpretations) to give much guidance to the development of the freedom of political communication.

E *The Positive Argument: The 'Virtues' of Freedom of Expression*

The other form of argument that the justification for insult might take has a 'positive' form, by which I mean that freedom of expression is justified by a claim of what it creates (rather than the fear of what might happen in its absence).

The argument at its most general is that freedom of expression creates virtues in the citizenry. Alexander Meiklejohn argued for freedom of expression on the basis that, among other things, it assists citizens in developing the kind of critical capacity necessary for effective discharge of their democratic duty.[98]

But of special interest for our purposes are arguments that seek to justify extreme speech in particular and consequently may help explain the High Court's anti-civility stance in *Coleman*. In different forms the argument is that freedom of expression for extreme forms of speech creates tolerance or, in another form, that it encourages citizens to develop an attitude of 'courage' in their civic relations; to contradict and combat evil ideas and to discourage fear of ideas which is thought to be an especially dangerous sentiment in a democracy.

Could an argument of this kind explain the preference for a robust form of political debate in Australia? Of course, it is possible that a future High Court might adopt ideas of these kinds but I find it rather unlikely for the following reasons.

First, the ideas that I have just referred to find no real foothold in Australian constitutional law and may be inconsistent with some aspects of our broader constitutional culture. The idea of 'civic courage' finds its best exposition in opinions of Justice Brandeis and those opinions are clearly based in a particular, rather heroic understanding of the founding generation in the United States. In expounding his ideal Justice Brandeis wrote in *Whitney v California*:

> [T]hose who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[99]

Whatever its salience as an explanation for the law of the First Amendment, the brave revolutionary spirit of the American founding generation has nothing to say to the Australian conception of political debate.

The argument that freedom of expression, and in particular freedom of extreme expression, creates tolerance has quite a different character. It does not so obviously depend on an heroic idea of a fearless citizenry but likewise its foundation either in the Australian Constitution or the broader constitutional or political culture is also tenuous. Unlike the Canadian *Charter* for instance, the Australian Constitution contains no explicit acknowledgment of an idea like multiculturalism. It may be that an argument could be mounted that derives from the injunction in ss 7 and 24 that the Houses of Parliament be 'directly chosen by the people' and that this requires the promotion of tolerance through the protection of insult and other forms of extreme expression, but it is difficult to identify a firm foundation for that argument. In addition, an argument for tolerance could equally well support *restrictions* on freedom of expression. Indeed,

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98 See, eg, Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).

99 *Whitney v California*, 274 US 357, 377 (Brandeis J) (1927).

arguments of this kind — derived from a commitment to multiculturalism — are the foundation of the Canadian Supreme Court's acceptance of laws regulating hate speech.[100] Even if 'tolerance' were accepted as playing some role in the law of freedom of political communication, it is not clear whether it would count in favour of or against the regulation of expression in any given instance.

F *The High Court as Interpreter and Definer of Australian Political Culture*

This analysis is but a brief survey of some of the main lines of thought found in a rich body of foreign case law, accompanied by a rich and varied scholarly literature. But though these sources can inform an analysis of the freedom of political communication by suggesting possible lines of argument, they are no more definitive of the answers than the 'text and structure' of the Constitution approach.[101]

A central conclusion of this article, then, is that the courts have a vast degree of discretion in relation to the meaning of the freedom of political communication, both when determining particular cases and when articulating the deeper values that define the doctrine.

I will conclude this article by speculating that the answers are likely to be found in the deeper commitments of *our* constitutional culture. I make that claim for two reasons. The first is pragmatic. Experience has shown that, for the most part, constitutional courts do not depart radically from widely held views in the society they govern. If courts are significantly out of step with dominant political forces their decisions are likely to be overturned, or if those decisions survive they become ineffective or produce political backlash.[102] The second turns on the High Court's own conception of its role in this sphere. It is striking that both Justices McHugh and Kirby frame their arguments as claims about the *existing* practices in political debate. In *Levy*, Justice McHugh appealed to the idea of a 'Western' tradition of political debate:

> [T]he use of such appeals to achieve political and government goals has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication.[103]

In *Coleman*, Justice Kirby rejects the idea of civility as a guiding principle for the freedom of political communication because 'the Constitution addresses the nation's representative government as it is practised'.[104]

The idea that existing practices determine the meaning of constitutional doctrine is at first sight unusual. It surely cannot be the case that Justices McHugh and Kirby are of the view that *all* long standing practices are immune from change by reference to

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100 See Stone, above n 97.

101 Unlike the Canadian Charter of Rights and Freedoms which in its very structure seems to contemplate more government intervention with respect to rights. In this regard s 1 which provides that all rights are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' is especially significant.

102 The classic study is Robert McCloskey's analysis of the Supreme Court of the United States. Robert G McCloskey, *The American Supreme Court* (5th ed, 2010).

103 (1997) 189 CLR 579, 623 (McHugh J).

104 (2004) 220 CLR 1, 91 [239] (Kirby J).

constitutional requirements. Apart from any more fundamental objection,[105] it is evident that long standing practices with respect to the law of defamation are subject to change by reference to the freedom of political communication.[106]

It seems more likely that Justice Kirby means that *certain* fundamental practices are not subject to challenge on constitutional grounds. Our constitutional law takes these practices as given and is crafted on the assumption that those practices remain unchanged. But in identifying these fundamental features, judges are undertaking a complex and highly evaluative task. Our political practices are difficult to define and rife with conflicting instances. Which practices have this status and which do not? What is to be done when different aspects of our laws and our practices may point in different directions and thus require a choice between competing conceptions of those political practices? As Justice Heydon pointed out, the regulation of insult is also a long standing practice.[107]

The problems with this method are profound, yet it is a significant starting point to note that these members of the High Court seem to be positioning the Court as the interpreter, and consequently the definer, of our broader political culture.[108]

G *A Concluding Speculation*

This analysis brings me to my final point. If I am right that the High Court's approach to freedom of political communication is best determined by reference to our broader political culture (and that this understanding of its role is at least nascent in High Court judgments), what is it that explains *Coleman*? Why is it that the majority of the High Court so unreservedly rejects the argument that Australian political debate is defined by notions like 'civility'?

One possibility is that the distaste for 'civility' in public discourse can be explained by a kind of egalitarianism. While it is difficult to identify a consistent Australian commitment to 'equality', it might be that certain types of distinctions are particularly foreign to the Australian political culture. The concept of 'civility' has been linked by

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[105] Simon Evans and I have canvassed these elsewhere: To justify their reliance on the nature of Australian public debate, Justices McHugh and Kirby need to explain why the implied freedom draws part of its content from existing political and legal practices. Such an argument might be made, on institutional and prudential grounds, along the lines that an approach to the scope of the implied freedom that upheld existing laws and practices was necessary in order to preserve the legitimacy of the implication, given its recent origins and absence of an express textual foundation. Alternatively, such an argument could be made on grounds that interpretive principle requires that constitutional concepts be given meaning by reference to established practices. Or, existing practices might be given normative weight, perhaps on the basis that the principles that determine the content of the implied freedom derive from *Australian* political traditions and practices rather than from overseas practices or from abstract principle or reason. These do not seem to be likely explanations. These arguments assume the need to limit judicial discretion and thus run directly counter to the assertion in *Lange*, to which both Justices were a party, that the Constitution's text and structure determine the content of the freedom of political communication. Further, the Burkean flavour of the third argument would be especially problematic for Justice Kirby, who would interpret the Constitution so as to conform to international human rights principles that derive from inherent human dignity. Stone and Evans, above n 11.

[106] *Lange* (1997) 189 CLR 520.

[107] (2004) 220 CLR 1, 123: 'Insulting words are within a field of verbal communication which has traditionally, since well before federation, been curtailed in the public interest as part of the general law'.

[108] In my view, a similar stance is taken in the joint reasons of Gummow, Kirby and Crennan JJ in *Roach v Australian Electoral Commission* (2007) 233 CLR 162. See Stone, 'Comparativism in Constitutional Interpretation', above n 80.

some sociologists of law to older notions of 'honour' that have their roots in social conventions of respect due to the well-born. These notions have been modernised, but James Whitman has drawn a distinction between societies (like France and Germany) which have adapted old aristocratic notions like 'honour' to modern circumstances by 'levelling up'. That is, these societies now extend to all, the 'honour' once due to only the noble. By contrast, Whitman argues the United States is a society that has 'levelled down'. Equality is realised by denying to all the protection of notions of honour and respect once due to the well born alone.[109] It is perhaps significant that, like the United States, Australia is a society of the New World and one to which the notions of honour that might found a strong respect for 'civility' are largely foreign. The rejection of the idea that 'civility' in public debate is a legitimate reason to curtail political communication might have its roots in a discomfort with the aristocratic origins of the notion of civility in public debate.

Relatedly, the particular nature of the facts in *Coleman* is striking. They are peculiarly old fashioned. Many modern freedom of expression cases involve complex aspects of modern life: problems raised by the internet and by campaign funding in modern economies among them. Yet *Coleman* is an almost iconic kind of case: the lone dissenter on a street corner, handing out pamphlets.

Is there something in the facts of this case that explain the High Court's direction? The tradition of the irreverent, Australian larrikin immediately spring to mind. Is *Coleman* motivated by an acceptance of the right to express *disrespect* for those in power? That sentiment might be quite distinct from a strongly held mistrust of government. It might be more concerned with tone than with substance. It might come into play when the powerful are subject to insult or other forms of extreme speech but not be relevant when citizens speak about each other from a position of equality. Its precise meaning awaits further articulation but in the meantime, *Coleman* presents the intriguing possibility that 'irreverence' in the face of authority is an aspect of our political tradition that has received constitutional recognition.

These conclusions are inevitably speculative. But as we head into a third decade of a constitutional law of freedom of political communication, the time has come to consider the values that the freedom of political communication depends upon and the vision of political debate that it pursues.

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[109] James Q Whitman, 'Enforcing Civility and Respect: Three Societies' (2000) 109 *Yale Law Journal* 1279.