FREEDOM OF EXPRESSION AND PUBLIC AFFAIRS IN AUSTRALIA AND THE UNITED STATES: DOES A WRITTEN BILL OF RIGHTS REALLY MATTER?

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Among various possible options, a theme for the 1993 Menzies Lecture quite naturally emerged for an American whose special field is freedoms of expression protected by the Constitution. A clear and easy choice was that of an American perspective on issues of free speech and press in light of the High Court judgments in *Australian Capital Television Pty Ltd v Commonwealth of Australia* (hereinafter *ACTV*)[1] and *Nationwide News Pty Ltd v Wills* (hereinafter *Nationwide News*).[2] The challenge of this assignment was daunting, since I realised that most who would hear and would later read these remarks would be far more conversant than I with these cases and their portent. Yet I took on the task with much enthusiasm, recognising an exceptional opportunity for international comparison and understanding.

At the outset, it should not seem presumptuous to offer a brief encomium on these quite remarkable judgments — judgments which, I regret, have received less attention in our press and legal media than they clearly deserve. Though we overuse terms like "singular" and "unique", those words seem warranted here. In what appears to be the earliest law review comment on the cases, Professor K D Ewing calls them "monumentally important."[3] That description seems, if anything, understated. Doyle, in a more recent commentary, called these judgments "decisions of the greatest importance"[4] — an assessment that seems fully justified.

What the High Court did in *ACTV* was to strike down major portions of the Political Broadcasts and Political Disclosures Act 1991 (Cth)— chiefly its curbs on the broadcast of political advertising — by finding those sections incompatible with a freedom of communication implicit in the Australian Constitution. In *Nationwide News*, the High Court invalidated on similar grounds a law that punished criticism of the Industrial Relations Commission which might "bring the Commission into disrepute". My focus will be primarily on *ACTV* for reasons that should emerge shortly. I do not mean, however, to slight *Nationwide News* in the process. Indeed, a close reading of both cases

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1 (1992) 177 CLR 106.

2 (1992) 177 CLR 11.

3 K D Ewing, "The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study" (1992) 22 *UWAL Rev* 239 at 240.

4 J J Doyle, "Constitutional Law: 'At the Eye of the Storm'" (1993) 23 *UWAL Rev* 15.

suggests the right implied in *Nationwide News* — "freedom of expression"[5] — may be broader in potential scope than *ACTV*'s "freedom of communication".[6] Both decisions and the several judgments in each merit the most careful study, not only by Australians but also by anyone with an interest in free speech.[7]

The importance of *ACTV* extends far beyond the immediate issue of control of politics or of broadcasting or of the intersection between the two. Indeed, as I shall suggest with reference to the American experience, the precise focus of this newly-protected Australian freedom falls well down our scale of constitutional values — though its lower level of protection in no way signals trivial importance. In our system and others, the televising of paid political messages has been the object of intense controversy. Regulating such broadcasts has been a persistent source of ambivalence for champions of free expression — not because the messages are irrelevant to the national interest or to civic participation — hardly so — but rather for the very reasons that led the Australian Federal Parliament to impose drastic limits upon those messages.

To measure the import of the *ACTV* judgment in terms only of broadcast political advertising would, I think, badly miss the mark. What I find profoundly important is that the High Court implied a novel basis for protecting freedom of communication where the framers of Australia's Constitution presumably chose not to create such a guarantee.[8]

The scope and meaning of this newly defined freedom deserve far more discussion than a single essay allows. Nonetheless, a foreign observer might be allowed to raise and explore a few questions, without fear of being seen as less than deferential or sympathetic. Let me present two such questions, and share an American constitutional lawyer's thoughts. First, I have wondered how our courts would address similar issues, guided by our explicit First Amendment guarantees of free speech and press.[9] Second, I would ask what lies ahead for Australia, to the extent American experience offers guidance — and I would not have chosen this topic had I not felt our experience could be helpful.

It is fair to ask what our courts would have done with a constitutional challenge to similar measures. Something must first be said about the nature of our express safeguards of free speech. A written Bill of Rights, like the one we adopted in 1791, was far from inevitable during the framing of our Constitution. Some even today view it as an afterthought, the product of a political compromise essential to ensure ratification of

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5 *Nationwide News* (1992) 177 CLR 1 at 34 per Mason CJ.

6 *ACTV* (1992) 177 CLR 106 at 138-140 per Mason CJ and at 149-151 per Brennan J.

7 For example, M Coper, "The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?" (1994) 16 *Syd LR* 186 for an early and thoughtfully different perspective on the issues and implications deserving of close study.

8 Let me explain the basis for that assumption. My reason for treating the omission of a free speech and press guarantee as conscious is nearly unique to Australia, even without evidence of later consideration and rejection by Australians of such a provision. I have often been struck by the close parallel between section 116 of the Australian Constitution and the injunction of our First Amendment that "Congress shall make no law respecting an Establishment of Religion or abridging the Free Exercise thereof ..."

9 "Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Amendment I, United States Constitution.

the main charter, rather than a reflection of inherent national values. Occasionally we ask what would have happened had the amendments never been drafted, or had they been rejected in 1791. The eminent philosopher Alexander Meikeljohn once argued:

> The principle of freedom of speech springs from the necessities of the program of self-government ... It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.[10]

Meikeljohn's clear implication — and he is not alone — is that we would have free speech today without a First Amendment. With all deference, I have never been quite so sanguine. Even *with* a Bill of Rights which could hardly be more explicit about free expression — "Congress shall make no law ..." — we had no free speech decisions for the first century and a third after its adoption. Even when our Supreme Court began to apply the free expression guarantees, the process was tortuous and at times grudging. There have been many times when only a constitutional shield could stay the censor's or repressor's hand. I find frightening the prospect of what would have happened had basic liberties in our system been at the mercy of judicial belief. Natural law or not, I am one who finds the First Amendment indispensable to the freedoms of expression we enjoy today. Anything less may well not have sufficed.

The text of our First Amendment is, however, quite general. It leaves a great deal to the courts. On issues like those which were before the High Court, one might expect we would have neat and concise answers. That assumption is valid in part. In fact, the issue raised in *Nationwide News* would have been a relatively easy one for our courts. American courts have consistently refused to allow the use of contempt or similar sanctions against the media to protect the image or reputation of a government agency like the Industrial Relations Commission.[11]

ACTV is, however, a quite different matter. We would draw a virtual blank on the precise issue which the High Court addressed. We have had myriad cases dealing with different facets of political speech.[12] Our reform efforts, however, have dealt mainly with political contributions and expenditures: the amounts, where they come from, through whom they are channeled, and for what purposes. Our legislative remedies have involved more reporting and disclosure, and less prohibition, than one might expect of a nation reeling from the scandals and misadventures of the Watergate era. When the initial reforms were challenged on free speech grounds, the Supreme Court essentially split the difference in the celebrated 1976 case of *Buckley v Valeo*.[13] The Justices upheld extensive curbs on political contributions, while striking down on First Amendment grounds the not easily distinguishable limits on campaign expenditures.

Despite many later cases, this basic framework remains intact. There is, however, growing sentiment in our country that some way must be found — through constitutional amendment, if necessary — to limit massive expenditures by people like Ross Perot who may distort the political process by using personal fortunes. I must confess that, to a degree, I share that sentiment. Major winds of change are reshaping our regulation of campaign finance. We may before long see stricter control of the political process. Our courts will almost certainly need to revisit the uneasy constitutional compromise of the mid 1970s.

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10 A Meikeljohn, *Free Speech and Its Relation to Self-Government* (1960) at 26-27.
11 For example, *Wood v Georgia*, 370 US 375 (1962); *Bridges v California*, 314 US 252 (1941).
12 For example, *First National Bank v Bellotti*, 435 US 765 (1978).
13 424 US 1 (1976).

At the same time, our preoccupation with the amounts and sources of campaign funds diverted our attention from the use of these funds. We have focused hardly at all on the content of what is said by or on behalf of (or in opposition to) candidates for high elective office. While our courts require that regulation of political speech be content-neutral, our inattention to what politicians say is the more surprising in light of what we know of the distortion and manipulation of the electorate, through televised advertising, in virtually every major recent election, most notably the 1988 presidential campaign.

The American regulatory slate is not completely blank, however. Federal communications law has long contained the "equal time" provision.[14] It obligates licensed radio and television stations to make air time available — though not without charge — to every qualified candidate seeking an office for which any contender has broadcast. Since stations must carry the material as candidates present it, with no right to edit, broadcasters may not be held liable for any defamatory content.[15]

Our communications law also gives to anyone who is the object of a "personal attack" on the airwaves a statutory right of reply,[16] which the Federal Communications Commission and the courts will enforce if the station refuses to do so. The personal attack rule was challenged on free speech grounds and sustained by the Supreme Court in the late 1960s.[17] The Justices later upheld a narrower provision that gives a candidate for federal office a "reasonable" right of access to the airwaves.[18] On the other hand, our courts have refused to create a right of access for non-candidates who wish to get their political views on the air.[19] Even though Congress requires broadcasters in our country to cover the news with balance and "fairness", that duty does not translate into a private right of access — or, for that matter, a viewer's right to shape the content of what goes over the air.[20]

None of these cases, of course, directly addresses political content. Because we tend to equate content control with censorship, our laws have continued to seek content-neutral means of addressing what are really content concerns. Several laws proposed in Congress, but not likely to pass, would require candidates to appear on the air in a sort of cameo and in that way warrant the accuracy of messages broadcast in their names. A few states have adopted laws that limit false, deceptive or misleading political advertisements. Those laws have not, however, fared well in the courts. New York and Ohio statutes curbing such advertisements have been held unconstitutional,[21]

14 47 USC § 315 (1990).
15 *Farmers Educ & Coop Union v WDAY, Inc*, 360 US (1959).
16 47 Code of Federal Regulations § 73.123.
17 *Red Lion Broadcasting Co v FCC*, 395 US 367 (1969).
18 *CBS, Inc v FCC*, 453 US 367 (1981).
19 *CBS, Inc v Democratic Nat'l Comm*, 412 US 94 (1973).
20 *Muir v Alabama Educ Television Comm*, 688 F2d 1033 (5th Cir 1982), *cert denied*, 460 US 1023 (1983).
21 *Vanasco v Schwartz*, 401 F Supp 87 (EDNY 1975), *aff'd mem*, 423 US 1041 (1976); *Pestrak v Ohio Elections Comm'n*, 926 F2d 573 (6th Cir 1991).

on grounds (such as the breadth or vagueness of the key language) that might some room for government to try again.

The only exception seems to be a federal appeals case upholding a California law officials who publish briefing booklets for voters delete candidate-submitted they deem false or deceptive.[22] This is admittedly an easier case for tion. The publication in issue is governmental rather than private. The didate is left completely free to disseminate the deleted material through other nels.

As must by now be apparent, we in the United States have not yet faced the precise that was before the High Court in *ACTV*. Given our deep concern for content-distinctions, I rather doubt this specific question will arise. We do, however, culate a good bit about what government could do to regulate campaign vertising, especially broadcast advertising, should it choose to act. The difficulty we in offering clear answers comes from the conflict between two basic constitutional ciples.

On one hand, the *message* is clearly political, and it is aimed at voters. That fact entitles the expression to a high level of protection. On the other hand, the nature of the *medium* seems to lead to the opposite conclusion. Among forms of expression, advertising has always ranked near the bottom. Until rather recently, our courts gave protection whatever to commercial speech.[23] The scope of protection remains modest, even for advertising in the print media.[24] When it comes to broadcast advertising, the constitutional status is lower still.[25] This, then, is the dilemma our courts would face if the *ACTV* issue arose. The political content would argue for a high level of protection, while the broadcast advertising format would qualify that claim. Clearly laws about political advertising are different from, let us say, regulation of routine broadcast commercials for soap or automobiles. After all, "selling" a candidate for elective office is fundamentally different from advertising a product or even medical and legal services. What is unclear in the absence of an actual case is just *how* different.

One other approach deserves brief mention. Our courts might sustain certain limits on political advertising under the rubric of time, place and manner. There is recent precedent for such an approach. Last year the Supreme Court upheld against First Amendment challenge state laws that bar the handing out of leaflets and campaign material near the polling places on election day.[26] United States law-makers have talked a good deal about limiting the broadcast of the results of exit surveys of voters, and of early projections while the polls are still open in our most Western states — an issue that has been largely rendered moot by self restraint among the networks. Courts have taken a rather dim view of such bans, despite the obvious interest in letting western voters cast their ballots before they learn how eastern states voted.

To return to my first question, we do not know how American courts would address the issue posed in *ACTV*. Even on so narrow and specific a question, we have contrasting lines of precedent. There are strong differences among constitutional

22 *Geary v Renne*, 914 F2d 1249 (9th Cir 1990).
23 See *Valentine v Chrestensen*, 316 US 52 (1942).
24 *Central Hudson Gas & Elec Co v Pub Serv Comm'n*, 447 US 557 (1980).
25 *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748 (1976).
26 *Burson v Freeman*, 119 L Ed 2d 5 (1992).

scholars and First Amendment experts. In such a confused setting, our system does not offer much direct guidance on the *ACTV* issue. The High Court wisely proceeded on its own, aware of foreign parallels, but without feeling rigidly bound by precedent or analogy from abroad. Our system, at least, would not have had much to offer.

Let me shift now to a quite different set of issues. Here I begin to contemplate the fascinating future the High Court has opened. Looking ahead, I recognise the possibility that Australia might codify free expression through constitutional amendment, even though yours is not a system of liberties to which a Bill of Rights is essential.[27] Should that occur, we in the United States could offer some guidance. We would caution, for example, that flatly declaring Congress shall pass "no law" abridging free speech does not really quite mean "no law", nor does it foreclose the need to define what is "freedom of speech". Even the staunchest absolutists among our jurists — people like the late Justice Hugo Black — have always conceded the need for some limits, if only to protect government itself against imminent and violent overthrow. Americans would also caution that if a charter of free expression like our First Amendment is to remain intact for two centuries, courts must have much leeway and must show creativity in applying its precepts.

Along the way, even with an explicit guarantee, judges may engage in a process of implication comparable with that employed by the High Court in *ACTV*. Let me offer just one example. "Freedom of association" finds no mention in our Bill of Rights. Yet it became increasingly clear that political and other forms of association needed constitutional protection, no less than did the spoken and printed word. Thus a 1958 Supreme Court decision simply conferred First Amendment protection upon that form of expression.[28] Most Americans now simply assume the Bill of Rights includes associational freedom. They would be startled to learn that such a safeguard needed to be implied by judges. Much the same is true for our now firmly established doctrine of "unconstitutional conditions". Since the late 1950s our courts have held that government may not force citizens to surrender their free speech or religious liberty as the price of obtaining a public benefit like a job or a scholarship or a license.[29] Here, too, our courts have implied key elements of free expression that the framers, wise and far-seeing though they were, did not provide in the original First Amendment.

Americans would also warn that explicit guarantees of freedom in principle do not always ensure liberty in practice — as one would note from even a cursory comparison of the fine phrases in the old Soviet constitution and in other nations where free speech has been worth no more than the paper on which a repressive government had it printed to delude citizens and foreign observers. With or without a Bill of Rights, freedom is only as healthy or as strong as the commitment of judges and of public officials to ensure and protect the underlying values. Having a First Amendment helps, if the other elements are present, and in our system may well have been essential. It is not, however, invariably sufficient.

Let me assume for the moment that Australia will continue the process of judicial implication it has just begun. Indeed, I rather hope that will be the case. To adopt a constitutional amendment now might well be superfluous. To codify by amendment principles that have been recognised by the High Court might also imply a lack of

27 P H Lane, *An Introduction to the Australian Constitution* (5th ed 1990) at 211.
28 *NAACP v Alabama*, 357 US 449 (1958).
29 For example, *Sherbert v Verner*, 374 US 398 (1963).

confidence in the judicial approach to defining liberties. Moreover, the High Court's action seems to me in many ways more satisfying. By finding free expression implicit in the very nature of responsible and representative government, this judgment avoids much of the uncertainty that has plagued our jurisprudence these past seventy-five years. While the quest for antecedents and for framers' intentions may be as important in Australia as it is for us in the United States, the issues on which Australians are likely to seek guidance — for example, the original basis for representative government — will be quite different from those pursued in our often fruitless quest for the framers' view of terms like "speech" and "abridge".

Now that freedom of communication has been recognised in Australia, fascinating new issues arise. There is a basic question of scope. Even if the newly defined freedom applies only to the Federal Government and not to the States — a matter on which there is now lively debate — its extent and meaning must be measured. One may ask whether the High Court has declared a general and pervasive freedom, or has more narrowly recognised the need to protect a particular form of communication deemed essential to representative government. I am keenly aware of the Chief Justice's caution that other applications "were not debated and do not call for decision."[30] Certain passages in the *ACTV* judgments do, however, suggest a broader right of free speech.

Our approach in the United States has been to assume that all speech is protected unless there is good reason for an exception. The First Amendment creates a strong presumption of protection, subject to narrowly defined limits. The main task of our courts has been to identify and apply those limits. They remain impressively few. There is of course the long recognised exception for speech that creates a clear and present danger to government itself or to life and limb. There is an exception for obscenity, though there is little clarity on what that term means.[31] Libel or slander that injures reputation is actionable, though false statements about a public official or public figure justify damages only when there has been actual malice or reckless disregard for the truth.[32]

Recently our courts created a new exception for child pornography, similar to the treatment of obscenity, but drawn from different sources and with different dimensions.[33] Direct verbal assaults in the form of "fighting words" may be curbed.[34] As I noted earlier, advertising enjoys partial but not full protection. These are the exceptions. Speech or press activity that does not fall within them is protected from governmental restraint, and occasionally from private restraint as well. Our debates all occur within this framework, though the details may be complex and consensus often elusive.

There is another basic question. "Speech" and "press", like most key words in our Constitution, are undefined. (In fact, "treason" may be the only term the framers of our Constitution did define). The traditional and familiar forms of expression — written and spoken words — are undoubtedly covered. But expression takes many other forms

30 *ACTV* (1992) 177 CLR 106 at 141. See, for a broad reading of the potential import and implications of the High Court judgments, P Creighton, "The Implied Guarantee of Political Communication" (1993) 23 *UWAL Rev* 163 at 169-72.
31 *Roth v United States*, 354 US 476 (1957).
32 *New York Times v Sullivan*, 376 US 255 (1964).
33 *New York v Ferber*, 458 US 747 (1982).
34 *Chaplinsky v New Hampshire*, 315 US 568 (1942).

that fit less neatly within these terms. As early as 1931 our courts brought some non-verbal or symbolic expression within the First Amendment.[35] The Supreme Court later recognised draft-card burning during the Vietnam War,[36] and quite recently both flag-burning[37] and cross-burning[38] as protected speech. Yet in a 1993 judgment sustaining state hate-crime laws,[39] the line between expression and conduct remains elusive. Here the meaning of the First Amendment is far less obvious.

Some traditional legal scholars argue that "speech" and "press" should be literally construed; if our framers meant to go beyond the written and spoken word, they contend, such an intent would appear more clearly.[40] But the contrary view has always seemed to me to be compelling. I find it hard to believe that a generation for whom the Boston Tea Party was a seminal act of protest would not have meant their new charter of liberty to cover such non-verbal expression. The courts have tended to take this broader view, finding in symbolic protest a mix of speech and conduct, and then looking closely at where the legal sanctions fall. As the Supreme Court reaffirmed in the flag-burning and cross-burning cases, expressive conduct may not be punished, any more than pure words, by laws that single out an unpopular message or viewpoint. Yet the defining of "speech" and "press" not only creates for us lively academic debates, it is a practical necessity as courts address the range of novel settings where First Amendment claims arise.

Once free speech has been recognised as a constitutional value, the messages that merit protection must also be defined. For us, the debate about the scope of constitutional "speech" is endless. Political speech has long been viewed as the irreducible core of our First Amendment, both because it is so closely linked to the history that bred our Bill of Rights, and because any rationale for free expression gives primacy to the nexus between communication and citizenship. Beyond political speech, the consensus in our system is more tenuous. Some of our ablest scholars insist that little more than political speech falls within the First Amendment.[41] Those views are occasionally tested in dramatic ways. Judge Robert Bork's published view to that effect became a focus of Congressional scrutiny several years ago, and may in large part have deprived him of the Supreme Court seat for which he had been nominated.

While most of us would argue today for a broader concept of protected speech, the case becomes more tenuous when we leave the safe harbour of politics. Take the arts, for example — an area that has been of much concern lately because of Congressional efforts to limit the grounds on which federal grants may be made to controversial artists. If art is not "speech", then constitutional challenge to such restraints will be daunting indeed. Our Supreme Court has said surprisingly little about artistic expression — a few passing references that imply a tolerant view, but never the square holding that would reassure the painter or performer. Indeed, one faces in this area an intriguing analytical problem. We insist on tolerating speech we find unsettling

35 *Stromberg v California*, 283 US 359 (1931).
36 *United States v O'Brien*, 391 US 367 (1968).
37 *Texas v Johnson*, 491 US 397 (1989).
38 *RAV v St Paul, Minn*, 120 L Ed 2d 305 (1992).
39 *Wisconsin v Mitchell*, 124 L Ed 2d 436 (1993).
40 For example, R Bork, "Neutral Principles and Some First Amendment Problems" (1971) 47 *Ind L J* 1.
41 Ibid.

because we assume that in a marketplace of ideas, truth will eventually prevail. Thus, as Mr Justice Brandeis of our Supreme Court wrote a half century ago:

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.[42]

This rationale applies fully to political speech. But the case of artistic expression is more difficult, since the role of counter-speech is uncertain. Concepts such as "truth" and "exposure" do not apply to painting, music and sculpture. Yet the case for extending full protection to the arts is a compelling one, and one that our courts have begun to accept. Several recent cases have extended the reach of First Amendment freedoms to include the creative and performing arts.[43] But this extension has not been easy one, given the historic rationale for free speech.

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courts, starting later, would be more perceptive about the nature of these two media, and would stress the obvious similarities much more than the diminishing differences.

Broadcasting had barely found its niche in our law when cable came on the scene, creating a whole new set of problems. Courts at first assimilated this new medium to licensed broadcasting, and upheld extensive regulation. Then cable came to look much more like the print medium, and earned substantial immunity. Most recently a middle ground has evolved. Our courts have come to recognise cable as the unique medium it is, regulable for some purposes rather like licensed broadcasting, while for other purposes it enjoys the status of the print medium and thus substantial freedom.[46]

After dealing with cable, our free speech guarantees were next required to assimilate even newer and stranger media like computer bulletin boards and networks, fax transmissions and compact discs. The few cases testing these technologies have not yet gone above the trial court level, and no clear patterns have emerged. Within the next decade, fascinating new ways of communicating will pose the most challenging First Amendment issues for courts and legal scholars in the United States.

For Australian courts, the challenge seems different, and perhaps more manageable. The High Court's initial recognition of freedom of communication involved one of the newer media. The *ACTV* decision strongly implies that broadcasting enjoys many, if not all, of the freedoms that newspapers would enjoy in disseminating similar messages. Thus you may well be spared the tortuous course that has plagued our free speech development. Australian judges will be far less likely than ours have been to dismiss or relegate broadcasters' free speech claims because of alleged scarcity of outlets at a time when major cities have dozens of radio and television channels — with hundreds more in prospect — but may have no more than one or two daily newspapers. Yet your courts, like ours, will soon need to address vastly complex issues raised by communication technologies just emerging and others yet to be developed. Here it seems to me we would do well to collaborate, as two legal systems which share a fundamental belief that free expression is vital to a free society.

Let me turn finally to a very different issue. Our courts have been much troubled of late, and yours may soon be troubled as well, by what we term "hate speech" — laws designed to protect racial and ethnic minorities, women and other disadvantaged or victimised groups. These laws often reach expression as well as behaviour. For the best of motives, many of our states and cities, and a number of our finest colleges and universities, have enacted so-called speech codes.

Such measures are not unknown in this country. The Federal Parliament has considered measures designed to curb racial vilification.[47] At the state level, there are such provisions as the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) which bans public vilification. The Anti-Discrimination Board has authority to determine whether a report is "fair," and whether discussion of a racially sensitive subject is "reasonable", "in good faith", and "in the public interest." Apparently substantial sanctions could be imposed on reporters and publishers found to have

46 For example, *Cruz v Ferre*, 755 F 2d 1415 (11th Cir 1985).

47 A Bill for an Act to Amend the Crimes Act 1914 to create an offence of racial incitement and to amend the Racial Discrimination Act 1975 to make racial vilification unlawful — (presented and read a first time 16 December 1992).

disseminated such views.[48] Similar laws have recently been the subject of the most intense debate in the United States, and are unlikely to escape similar challenge and scrutiny in Australia now that free speech has attained constitutional status.

To the extent that our experience offers guidance, the path will be a tortuous one. Our legal system has struggled uneasily with two contending principles. On one hand, it is argued that persons who have long been victims of bias and even brutality (and in some cases still are) deserve a caring legal system willing if necessary to enforce civility.[49] On the other hand, it is claimed with equal force that the test of speech cannot be what we like or dislike, or even what offends or wounds — in part because the message that finds favour today may be in disfavour tomorrow.[50] Opponents also doubt the efficacy of such laws, and fear they may even be counter-productive, for example by creating backlash among racist and sexist groups.

Quite recently our Supreme Court has addressed two facets of this issue in ways that are not easily reconciled. A year ago the Justices were unanimous in holding that states may not proscribe even unprotected expression — cross-burning accompanied by fighting words — if the effect of so doing were to single out particular messages or viewpoints.[51] The difference was between banning all cross-burning by laws unrelated to content, and banning (as the ordinance in question had done) only cross-burning that evinced racial or other bias. The former approach had to do with fire, and the latter with racial *animus*.

For a time the law seemed fairly clear. Many colleges and other institutions simply repealed their speech codes. Then the Court revisited the issue in 1993 and — again without dissent — reached a conclusion which many Americans see as quite consistent, while others find the contrast perplexing. The latest case upheld the use by states of so-called hate crime laws, which typically impose a heavier penalty for acts like assaults that reflect a racial or other bias.[52] The state court found that such a law inevitably punished speech or thought, if only because the defendant's words offered the sole evidence of the required motive. But the Supreme Court disagreed, finding that such laws punished only conduct, not expression — and conduct which was, after all, especially reprehensible and thus deserving of governmental restraint. The facts of this case were so extreme — a group of young black men beating a white youth without provocation and solely out of racial *animus* — that the outcome may well have been affected. Yet we now have a clear precedent for the validity of hate-crime laws — a precedent not easily reconciled with what our courts have said of cross-burning and other expressive protest.

Should there be an Australian test of measures such as the New South Wales vilification law, the courts would face a similar dilemma. The scope and meaning of

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48 T Katsigiannis, "How the NSW Anti-Discrimination Laws Threaten Free Speech" *Policy*, Summer 1989, at 29. See generally W Sadurski, "Racial Vilification, Psychic Harm, and Affirmative Action" Freedom of Communication in Australia — Workshop, 6-8 August 1993, Australian National University, Canberra.

49 C R Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" (1990) *Duke L J* 431.

50 N Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" (1990) *Duke L J* 484.

51 *R A V v St Paul, Minn*, 120 L Ed 2d 305 (1992).

52 *Wisconsin v Mitchell*, 124 L Ed 2d 436 (1993).

ACTV and *Nationwide News* would then need to be clarified and defined in regard to quite different kinds of expression. The distinction our courts have shaped between hateful thought and mindless hate might be helpful. On the other hand, the novelty and creativity of the High Court in *ACTV* suggest the potential for a quite different approach — premised, perhaps, like Canadian and European law on a higher deference to measures that ensure civility, even at some cost to free expression. It is also possible that the expressive values which were central to *ACTV* and *Nationwide News* would be found wanting in the hate speech context. Suffice it to say that balancing these sharply contending forces has deeply divided and confounded our legal system.

Further conjecture would exceed the licence graciously given a foreign visitor. We in the United States — indeed, I suspect at least the rest of the English-speaking world — will be watching closely and awaiting further developments with keen interest. We have already learned from you much that is of value to our legal system and our understanding of free expression. Our next Menzies visitor to the United States will have much more to share with us. It is our hope that exchanges of the kind that the Menzies Foundation has so generously made possible may continue to benefit both our nations and their uniquely congenial systems of law and liberty.