THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION, TWENTY YEARS ON

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I INTRODUCTION

Controversy over the initiatives of the Mason court relating to implied constitutional 'freedoms'[1] has died down as subsequent more conservative courts, for good or ill, have not utilised the potential of this innovative approach to Australian constitutional law. This is seen in the High Court's minimal changes with respect to legislation and common law relating to freedom of political communication and the focus of that court on finding a form of constitutional reasoning that places the implied rights development firmly within traditional modes of constitutional interpretation. This has helped to maintain something like a status quo with respect to both the powers of the Court and the Parliament, and the content of the law relating to political communication.

Nevertheless, the subsequent case law has given rise to some extended academic scrutiny of the perceived lack of coherence and clarity in High Court decisions on the topic. This lack of clarity was manifest in the radically different opinions as to the appropriate legal methodology to adopt in *ACTV*, *Nationwide News* and early defamation cases such as *Theophanous*. The failure to devise a clear and principled outcome in these cases has resulted in a wholesale re-evaluation from *Lange* onwards. In consequence, these pioneering cases now have very limited significance as precedents because the purported source, scope and application of the implied right to freedom of political communication have changed radically, without achieving much in the way of clarification.

The most significant development arising from the dozen or so freedom of political communication cases is the '*Lange* formula', according to which new legislation must not burden existing freedom of political communication unless it is 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[2] This formulation has been used to evaluate and modify the defence to defamation of qualified privilege. These changes may be considered mildly progressive in the context of pre-existing common law.

On the one hand, the case law has moved against drawing on theoretical ideas about what representative government and popular sovereignty might involve, thus excluding the possibility of establishing an individual right to freedom of political expression and, at the same time, refraining from participating in a broad based debate on the evaluation of communication law and policy. On the other hand, the emphasis on determining what

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1 We use here the generally preferred term 'freedom', which has been adopted to avoid the idea of an individual right to political communication that could provide a cause of action for restriction of political communication, or to seek positive assistance from government with respect to the people's political communication. However, the implied 'freedom' is, in terms of the classic Hofeldian scheme, a negative claim right to which the correlative duty is the court's duty to invalidate laws restricting the right holders' political communication (subject to certain exceptions). In terms of current constitutional case law, it is not, on this analysis, mistaken to say that Australians have an implied constitutional right to political communication.

2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 ('*Lange*').

is necessarily implied by the text and structure of the Constitution, nominally without taking into account material external to the Constitution, has led to a form of legal reasoning that is ill-suited to the sort of debate focused on the morally and politically most appropriate law of free expression in a democratic polity.

Although this is rarely explicit, judges wrestling with the new implied rights have had to make decisions based on their normative preferences that transcend the limits of purely textual interpretation. Cloaking those preferences in Owen Dixon's 'strict and complete legalism'[3] makes it hard to see what political views or hunches underlie their judgments, which contributes to the uncertainty involved in anticipating future judgments, and may explain in part why implied freedom cases commonly produce four to six judgments. This divergence of legal opinion has made it difficult to hide the political nature of judgments made on the basis of a formula that is incapable of producing a principled finding that can credibly be presented to the wider world as a logical deduction from the words of the Constitution. Further, the Court's unwillingness to discuss their normative preferences openly is an indication of why courts are an inappropriate forum to balance communication rights against other objectives and interests, as the *Lange* formula requires them to do.

More specifically, twenty years on, there is little progress in identifying what counts as 'political communication' when determining what norms are the authoritative standards by which to assess an alleged infringement of freedom of political communication, or when seeking to adopt a workable meaning to test what limitations on freedom of communication may be justified. This is important because in defining 'political communication', the High Court is the ultimate gatekeeper of what are and are not legitimate rights that should be protected under the freedom. The Court has consistently dodged this question, perhaps because there is no way to answer it from the Constitution alone, so that addressing it directly would bring their political function squarely into the open. Despite many comments by individual judges, we also still do not know whether a sliding scale of scrutiny/deference might be applicable to laws that target political communication to a greater or lesser extent.

The uncertainty and opacity of this portion of recent Australian legal history has the consequence that Australia now has the worst of both worlds with respect to the governance of freedom of political communication. Political initiatives with respect to free speech legislation to counter the corrosive impact of disparate wealth on public debate and electoral outcomes has been stalled by the intervention of the High Court in this domain.[4] Meanwhile, this intervention has not resulted in a coherent body of case law that provides a reasonable and appropriate basis for discussing and deciding the contemporary issues which arise in the sphere of freedom of communication generally, particularly with respect to any communication that can be construed as having political relevance.

The consequences of this history include:

> (1) Taking existing Australian law relating to freedom of communication as the benchmark for assessing whether new legislation burdens freedom of communication. This in practice assumes that existing law is good law;

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3 Sir Owen Dixon, 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952' in Severin Woinarski, *Jesting Pilate and Other Papers and Addresses* (1965) 154.

4 See Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (2010) 168, 172, 177. The various constitutional hurdles to legislated changes are set out in Anne Twomey, 'The Reform of Political Donations, Expenditure and Funding' (Paper prepared for the Department of Premier and Cabinet, November 2008).

> (2) Suppressing consideration of whether or not new laws which do conflict with existing free communication law actually promote the sort of freedom of communication that is justified in and important for the workings of a representative democracy, which, in practice, means that there is no scope for restricting the communicative capacities of some (e.g. wealthy individuals and associations) in order to promote the communicative capacities of others (e.g. the bulk citizens);[5]
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> (3) Discouraging citizens and their elected governments from working for the adoption of freedom of communication laws which promote the sort of democratic practice that can control the distortion of the political process resulting from the disproportionate expenditure on political advertising and party funding by corporate interests and unions. In this way, the freedom stifles laws that seek a better quality of political debate and greater availability of politically relevant information to citizens.

As a result, no branch of government is serving the Australian people well in this sphere. Indeed since there is now said to be no actual constitutional right to freedom of communication arising from so-called 'implied freedoms' avenue and little robust debate as to the nature of the free communication needed in a contemporary democracy, the constitutional protection of political communication provides a false assurance that courts are protecting and nourishing the public interest in open and free communication.

II THE CASE LAW

The Australian 'implied rights revolution'[6] began in 1992 with two cases, *Nationwide News Pty Ltd v Wills*[7] and *Australian Capital Television v Commonwealth* ('*ACTV*').[8] Both resulted in the invalidation of Commonwealth legislation on the grounds that it restricted political communication.

Nationwide News was a challenge to the prosecution of the publishers of *The Australian* for publishing an article supposedly calculated to bring the Australian Industrial Relations Commission into disrepute.[9] Three judges held that the law creating the offence was not supported by any head of Commonwealth power. Four, however, found that it infringed a novel implied freedom of political communication. Meanwhile, *ACTV,* concerning Hawke government legislation that simultaneously banned paid political advertising and provided free time to parties based on their showing in the previous election, was also found to be, in part, unconstitutional, on similar grounds.

In each case, majorities of the High Court held that Australian representative and responsible government requires that electors have the opportunity to freely discuss political issues. The exact reasons given varied. Deane and Toohey JJ held that this freedom arose from a doctrine of representative government that underlies the

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5 Although McHugh J purports to do that in *Coleman* with his test of whether communication overall is more or less 'free' (see *Coleman v Power* (2004) 220 CLR 1, 51 [97]), the matter is otherwise neglected, perhaps because it would involve openly second-guessing the legislature's weighing-up of policy considerations.

6 Nicholas Aroney, 'The Implied Rights Revolution – Balancing Means and Ends?' in H P Lee and Peter Gerangelos, *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (2009) 173.

7 (1992) 177 CLR 1 ('*Nationwide News*').

8 (1992) 177 CLR 106 ('*ACTV*').

9 Maxwell Newton, 'Advance Australia Fascist', *The Australian* (Sydney) 14 November 1989, 15, 18.

Constitution.[10] Mason CJ drew a similar implication that '[a]bsent such freedom of communication, representative government would fail to achieve its purpose of government of the people through their elected representatives; government would cease to be responsive to the need and wishes of the people, and, in that sense, to be truly representative'.[11] In his view 'the *raison d'etre* of freedom of communication in relation to public affairs and political discussion is to enhance the political process…thus making representative government efficacious'.[12]

McHugh and Dawson JJ, on the other hand, based their narrower conceptions of the freedom directly on the sections of the *Constitution* that require that the two houses of the Commonwealth Parliament be elected 'directly by the people', sections 7 and 24. McHugh J occupied something of a middle position, adding that while representative government is not a freestanding constitutional concept, the sections from which the freedom emanates have to be read 'against the background of the institutions of representative and responsible government to which the Constitution gives effect but does not specifically mention'.[13] Dawson J dissented in *ACTV*, but conceded that 'the Constitution provides for a choice and that must mean a true choice'.[14] Brennan J also dissented.

The irony of *ACTV* is that it stuck down elements of an Act which can readily be seen as an attempt to improve freedom of political communication. The legislation imposed controls on advertising expenditure which existed in many democratic countries for the purpose of curtailing the impact of financial inequality in the electoral process. Moreover, the basis for the majority judgments was the very rationale given in support of the legislation, namely, enhancing the capacity of the electorate as a whole to contribute to debates and make informed and effective choices.[15]

In 1994, a bare majority in *Theophanous v Herald & Weekly Times Ltd*[16] extended the ruling in *ACTV* to cover the common law. It created a constitutional defence to defamation where the allegedly defamatory statements related to political issues, were not published recklessly or without caring whether they were true or false, and were made reasonably in the circumstances of the case.[17] The leading judgment reasoned that the purpose of the freedom was to protect responsible and representative government, and that it could not achieve that purpose if it applied to some areas of law but not to others. Common law rules of defamation must, therefore, conform to the Constitution.[18] *Theophanous* was affirmed in principle by the leading judgment in its companion case,

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10 *Nationwide News* (1992) 177 CLR 1, 69-70.

11 *ACTV* (1992) 177 CLR 106, 139.

12 Ibid 145.

13 Ibid 230.

14 Ibid187.

15 As described by the Minister during the Second Reading. For example, '[t]he airwaves of Australia belong to all Australians. Currently, access to those airwaves by means of paid advertising through commercially licensed operators is restricted to those few in the community who can afford to pay the prohibitively high cost … [figures from the 1990 election] illustrate the inherent inequity in the presentation of political debate through electronic advertising. The reality is that only the rich can get their message across by such means': Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3480 (Kim Beazley, Minister for Transport and Communications).

16 (1994) 182 CLR 104 ('*Theophanous*').

17 Ibid 137 (Mason CJ, Toohey and Gaudron JJ).

18 Ibid 128. Deane J agreed in an 'Addendum' at 187 only for the sake of a majority, as he had a different conception of the freedom, which, as he explained at 188, did not require that publication be reasonable in the circumstances. This disagreement made *Theophanous* vulnerable, as it contained no majority-endorsed ratio decidendi. On this point see *Lange* (1997) 189 CLR 520, 554-5.

Stephens v West Australian Newspapers Ltd,[19] where several judges also drew a similar implied freedom from the West Australian Constitution.[20]

Cunliffe v Commonwealth,[21] decided at the same time, brought to the fore disagreement about the scope of the implied freedom. The Court divided 4:3 on whether a scheme that allowed only registered immigration agents to give 'immigration assistance' burdened protected communication. Three judges held that there was no connection to political discussion or federal elections per se. Four disagreed, raising questions about the extent to which discussion of executive actions are covered by the freedom.

The reliance on representative and responsible government as a freestanding constitutional concept in these cases created tension within the Court, encouraging forceful dissents by the judges who typically found themselves in the minority in these cases – Dawson, Brennan and McHugh JJ. Dawson J thought that the majorities were relying on the novel idea that the assent and acquiescence of the Australian people is the ultimate source of the Constitution's legal force.[22] His Honour objected that the Constitution 'does not purport to obtain its force from any power residing in the people'.[23] McHugh J believed that his colleagues had judicially created a section 129 of the Constitution, bypassing the legitimate section 128 amendment mechanism.[24]

In 1995, Mason CJ retired and Deane J was appointed Governor-General. The promotion of Brennan CJ and appointment of Gummow and Kirby JJ led to a collapse of the majority upholding the *ACTV* status quo. At this stage, the implied freedom had a kind of second birth, emerging in its current form for the first time in *Lange v Australian Broadcasting Corporation*.[25] There the High Court held, in a rare single judgment, that the freedom arises not from 'representative and responsible government' as a concept, but from specific terms of the Constitution which require that legislators be elected by 'the people' of Australia,[26] and Ministers be drawn from the legislature.[27] The Court went on to provide a test of validity under the implied freedom, in a formulation which is by now familiar:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ...[28]

Lange, in which the eponymous former Prime Minister of New Zealand sued the ABC for defamation, also drastically departed from *Theophanous*. At the most general level, it upheld the ruling that the unimpeded operation of classic, English-style defamation law was incompatible with the implied freedom. The Court held, however, that there is no 'constitutional defence' to defamation because the decision of a defamation case by a court is not an exercise of state power (unlike the United States, where each state has its own common law which is ultimately subject to the due process

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19 (1994) 182 CLR 211.
20 Ibid 232-3.
21 (1994) 182 CLR 272.
22 See, eg, *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ).
23 *ACTV* (1992) 177 CLR 106, 180.
24 *McGinty v Western Australia* (1996) 186 CLR 140, 234.
25 (1997) 189 CLR 520.
26 Sections 7 and 24, and to a lesser extent the requirement of a referendum to amend the *Constitution* under s 128.
27 Primarily section 64.
28 *Lange* (1997) 189 CLR 520, 567.

clause of the Fourteenth Amendment).[29] Because the sections from which it derives do not confer rights, the implied freedom is only a limitation on legislative power, and not a source of individual rights or obligations between parties.[30]

The Court did, however, uphold an obiter dictum in *Theophanous* that the common law must be developed consistently with the Constitution.[31] Taking up its responsibility for development of the Australian common law, it enlarged the defence of qualified privilege to achieve much the same result as in *Theophanous*. Qualified privilege on political matters can now extend beyond its usual bounds to cover communications to large numbers of people, so long as publication is reasonable in the circumstances.

The articulation of a test of when a law infringes the implied freedom has not, however, made life much easier for judges who have to apply it. In *Levy v Victoria*,[32] handed down less than a month after *Lange*, the judges unanimously upheld the validity of Victorian regulations that, in practice, restricted the movements of protestors the during duck season. Nonetheless, seven judges produced six judgments,[33] sparking a trend which continued in major cases for fourteen years, until *Hogan v Hinch*[34] produced a six-judge plurality in 2011.

Some judges in *Levy* had trouble connecting the choice of candidates in a federal election with protests against Victorian hunting regulations,[35] but most considered the question irrelevant because the law was, in any case, appropriate and adapted to a safety rationale. Some distinguished between the two impugned regulations on the basis that one was more clearly directed to preventing protest, and stated or implied that a higher standard of review would apply to laws that *targeted* communication rather than impose an incidental burden.[36] Many years later these issues have not been definitely settled, as we shall see.

After *Lange* and *Levy*, the implied freedom of political communication lay largely dormant in the High Court for seven years, with the freedom discussed only briefly in obiter dicta. In 2001, the Court decided *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[37] in which they overturned an interlocutory injunction preventing the ABC from showing video of the slaughter of possums at Lenah's facilities. The footage was taken secretly by an animal rights group and passed along to the ABC, so there was no action for trespass.

Most of the Court did not consider the constitutional argument that the implied freedom prevented the exercise by Lenah of a common law right to privacy, because they found that no such right existed and that, if it were developed, it would not apply to corporations.[38] The case is most interesting for the implied freedom because changes to the court since *Lange* broke the then existing consensus on the implied freedom. Hayne J, who had replaced Dawson J, joined Gummow J in support of the *Lange* consensus. On the other hand, Callinan J, having replaced Toohey J, explained at length why he believed that there was no freedom of political communication to be implied from the Constitution.[39] Throughout the rest of his career he would consistently cite this part of his

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29 Ibid 563; cf *New York Times Co v Sullivan*, 376 US 254, 265 (1964).
30 *Lange* (1997) 189 CLR 520, 560.
31 *Theophanous* (1994) 182 CLR 104,140; *Lange* (1997) 189 CLR 520, 566.
32 (1997) 189 CLR 579 ('*Levy*').
33 Gummow and Toohey JJ wrote together. Joint judgments, even in divisive areas, are typical of Gummow J. In every case discussed in this overview, he was part of a joint judgment.
34 (2011) 275 ALR 408 ('*Hinch*').
35 *Levy* (1997) 189 CLR 579, 596 (Brennan CJ), 626 (McHugh J).
36 Ibid 620 (Gaudron J), 647 (Kirby J).
37 (2001) 208 CLR 199.
38 Ibid 220 (Gleeson CJ).
39 Ibid 331-8.

judgment before applying *Lange* because, despite his objections, he recognised that *Lange* was the settled law of Australia.[40]

Roberts v Bass[41] was decided the next year. The case concerned publications that made false and defamatory statements about a then-incumbent Liberal Member of the South Australian House of Assembly. By the time the case reached the High Court the appellants were pleading only 'traditional' qualified privilege rather than the expanded form set out in *Lange*.[42] Several judges nonetheless made obiter comments about the applicable standard of review, how defamation law was developing, and the role of vitriol in Australian political debate.[43]

Two major political communication cases came down in 2004: *Coleman v Power*,[44] and *Mulholland v Australian Electoral Commission*.[45] Both cases produced six separate judgments. *Coleman* divided the Court 4:3. It was a successful appeal by a protestor against a conviction for using threatening, abusive or insulting words in a public place. The words in issue were uttered at what was, depending on whose evidence one accepts, either a protest against police corruption or an episode in an ongoing vendetta against certain police officers.

Three judges upheld the appeal because the law, properly construed, did not apply to the case. Only McHugh J decided for the appellant on the basis that the law was unconstitutional. All three minority judges considered that the law was constitutional. The main legacy of *Coleman* is a re-formulation of the second limb of the test in *Lange*. Three other judges agreed with McHugh J that the *means adopted* as well as the ends to which a law burdening political communication is directed must be 'compatible with the constitutionally prescribed system of representative and responsible government'.[46]

Mulholland was a challenge to the requirement that parties listed 'above the line' on the Senate ballot have at least 500 members. The challenge was mounted when the Electoral Commission moved to review the Democratic Labor Party's registration and threatened to de-register the party when they did not cooperate with the review by providing a list of its 500 members. As well as the implied freedom, Mulholland's arguments relied on an implied freedom of association, a general requirement not to discriminate between candidates, and a requirement that elections provide a 'true choice'.

The Court unanimously rejected the challenge, but the judges used different reasoning. Only three addressed the issue of whether having a party's name on a ballot paper was 'political communication'.[47] Two considered that the law burdened the

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40 *Roberts v Bass* (2002) 212 CLR 1, 101-2 [285]; *Coleman* (2004) 220 CLR 1, 109 [289]; *Mulholland* (2004) 220 CLR 181, 293 [322].

41 (2002) 212 CLR 1.

42 The SA Court of Appeal held that despite large-scale distribution of the defamatory materials, the facts were covered by traditional qualified privilege: see *Roberts v Bass* (2000) 78 SASR 302. Having lost the appeal anyway, the appellants went to the High Court on this defence because it is not subject to the *Lange* requirement that publication be 'reasonable'. The respondents would have to prove a higher threshold of actual malice.

43 At 62 [171], Kirby J defended protection of defamatory statements on the ground that '[b]ecause this is the real world in which elections are fought in Australia, any applicable legal rule concerning qualified privilege (and the related notion of malice) must be fashioned for cases such as the present to reflect such electoral realities'. Callinan J disagreed at 108 [305]: 'There is no reason why this Court should do anything to encourage recklessness and misrepresentation as to factual matters simply because they occur in electoral contests'. These contrasting positions laid the groundwork for the judges' disagreement in *Coleman*.

44 (2004) 220 CLR 1.

45 (2004) 220 CLR 181.

46 This was originally proposed by Kirby J: *Levy* (1997) 189 CLR 579, 646. McHugh J adopted it in *Coleman*, with the support of three colleagues: *Coleman* (2004) 220 CLR 1, 51, 78, 82. It is now unanimously accepted: *Hinch* (2011) 275 ALR 408, 425 [47], 436 [97].

47 *Mulholland* (2004) 220 CLR 181, 195-6 (Gleeson CJ), 219-20 (McHugh J), 275-7 (Kirby J).

freedom of political communication but was justified on the second limb of the modified *Lange* test, essentially to prevent abuse of the electoral system by registering 'sham' parties.[48] Five judges decided that no pre-existing right had been burdened, which meant that the case failed because the freedom is not a source of rights, only a restriction on power.[49]

After the 2004 cases the implied freedom lay largely dormant for a further seven years. It surfaced again in *Hinch*, in which radio broadcaster Derryn Hinch challenged the constitutionality of Victorian legislation allowing judges to suppress the identity of sex offenders whom they subjected to monitoring orders on their release from prison. Hinch's arguments were rejected unanimously, with judges rejecting his construction of the impugned laws as creating strict liability offenses, not requiring judges to give reasons, authorising orders contrary to the public interest, requiring hearings to be held in camera, and preventing the media from appealing orders.[50]

Overall, it is clear that, since 1992, the implied freedom of political communication has changed almost beyond recognition.[51] The original 1992 cases are now essentially redundant as precedent. *Lange*, and to a lesser extent *Coleman*, have changed the source, scope, form and application of the freedom to the point that only the idea of an implied freedom remains. The early defamation cases, too, are largely redundant, with the stress now placed on a requirement of a pre-existing right to be burdened probably extinguishing any suggestion of constitutional defences or actions.

Any fears that an activist High Court would wield the implied freedom as a sword with which to cut swathes through laws and regulations deemed undesirable have not materialised. The courts have not used the freedom to invalidate a law statutory provision or regulation since the 1992 cases. There are probably several reasons for this, including the appointment of legally conservative judges by the Howard government and a return to the Court's traditional 'devotion to legalism'.[52] There has been some weakening of defamation laws that were deemed to inhibit freedom of political communication, and some liberalisation with respect to apparently defamatory political insults. The issue of political advertising has not been addressed, arguably because the implied right to freedom of political communication and the unpredictability of High Court decisions in this area has discouraged the introduction of legislation aiming either at enlarging or restricting freedom of communication. Meanwhile, the implied freedom has not prompted significant legal or political debate about the substantive issue of *ACTV*, namely the proper content and scope of the law relating to political advertising and campaign finance.

The current state of the law leaves a variety of questions unanswered. Most judges have consistently avoided answering questions such as whether there is a higher standard of review for laws that directly or intentionally (rather than incidentally) burden communication, what communication is 'political', and what nexus to a federal election is required for a communication to be sufficiently connected to sections 7 and 24 to merit protection.

On the issue of what communication is protected, *Lange* suggests that communication regarding any level of government, international organisations and even foreign domestic politics might be covered in some situations.[53] We are none the wiser as

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48 Ibid 201 [41] (Gleeson CJ), 279 [292] (Kirby J).

49 Ibid 223 (McHugh J), 247 (Gummow and Hayne JJ), 298 (Callinan J), 304 (Heydon J).

50 *Hinch* (2011) 275 ALR 408, 411, 419, 421-3 (French CJ), 429-30, 432, 436.

51 We can also add a second 'implied freedom', namely, a restriction on the ability of the Commonwealth Parliament to arbitrarily restrict the franchise: see *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 273 ALR 1.

52 Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: a Comparative Study* (2006) 106.

53 *Lange* (1997) 189 CLR 520, 571.

to whether an objective appraisal of the communication, the subjective intention of the communicator, the subjective or objective response of an audience or likely audience, or some other criterion might be used to decide whether communication must be protected.

Answering these questions is only possible by making assumptions about the purpose of the implied freedom. Meagher, for example, arrives at his answer (a 'likely audience' test) only by first conceptualising the implied freedom as an incident of a 'minimalist model of judicially-protected popular sovereignty'.[54] This is his own view of how the freedom should be seen, which may or may not have great merit, but has certainly not been adopted by the High Court.

In practice, the High Court has consistently declined to answer the question of what 'political communication' is protected By deciding cases on other grounds, it has set few limits on what constitutes 'political communication'. Despite the freedom's origins in the safeguarding of free and fair federal elections, judges have applied it to Victorian hunting regulations, the defamation of a former Prime Minister of New Zealand, a protestor calling one particular police officer corrupt, and protests against the suppression of sex offenders' identities under Victorian legislation.[55]

It is therefore unsurprising that in *Hinch*, the Chief Justice commented that while a restriction on what constitutes 'political communication' 'may be a logical consequence of the source of the implied freedom ... [t]he limit propounded, despite its logical attraction, is not of great practical assistance'.[56] The trend in the case law to stress the existence of national parties and the propensity of some voters to punish the missteps of a party at one level across the board recognises that voters do not always act in a totally cold, rational way, and that attempts to strictly bind the operation of the implied freedom to ss 7, 24 are futile.[57]

The problem here is that this acceptance, realistic though it is, might well lead to the conclusion that virtually anything can inform a vote in a federal election. This would undermine the High Court's insistence that the implied freedom is not a protection of speech generally.[58] The Court cannot change its position on this point without undermining its traditional legalism, but the limits that it places on the content of 'political communication' are yet to be seen. For various reasons, cases that might have shed some light on this question did not reach the High Court.[59]

The applicable standard of review is also a vexed issue. In *ACTV*, both Mason CJ and McHugh J would have required that a law that directly burdened political communication be supported by a 'compelling justification',[60] which they found that an attempt to 'level the playing field' could not supply except in extreme circumstances.[61]

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54 Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438, 451.

55 *Levy*, *Lange*, *Coleman* and *Hinch* respectively.

56 *Hinch* (2011) 275 ALR 408, 425 [48].

57 See, eg, *Lange* (1997) 189 CLR 520, 571; *Levy* (1997) 189 CLR 579, 645 (Kirby J); *Hinch* (2011) 275 ALR 408, 425-6 (French CJ).

58 See, eg, *Lange* (1997) 189 CLR 520, 561.

59 *Evans v New South Wales* (2008) 168 FLR 576 was decided in the appellants' favour on another basis. Had it gone to the High Court on the implied freedom, the appellants would have been required to show that NSW regulations regulating protests at World Youth Day burdened protected political communication, with some kind of nexus to a federal election. Parts of racial discrimination legislation such as that recently at issue in *Eatock v Bolt* [2011] FCA 1103 might provide another context in which these questions could be considered, though the implied freedom was not argued in *Creek v Cairns Post Ltd* (2001) 112 FCR 352 or *Toben v Jones* (2003) 129 FCR 515.

60 *ACTV* (1992) 177 CLR 106, 110, 143 (Mason CJ), 233-5 (McHugh J)

61 Ibid 239-40 (McHugh J).

Though the source and form of the freedom has changed substantially, the idea of a higher standard of review in some circumstances remains. Gaudron J and Gleeson CJ both thought that a higher standard of review should apply where laws directly burdened free communication.[62] In *Hinch*, six judges drew a distinction between laws that target communication and those that burden it incidentally.[63]

What standards would be applicable, however, is not clear. Since *Nationwide News* and *ACTV*, no High Court majority has characterised an impugned statute or regulation before it as imposing a direct burden, or as targeting political communication.[64] Whether there would be an element of 'strict scrutiny' in such a case, or how the second limb of the *Lange* test would be applied, is unclear. Again, cases that might have illuminated this question have not reached the High Court.

Perhaps the judicial method itself simply promotes a degree of uncertainty and obfuscation. Judges need only decide as much as is necessary to dispose of a case. That is why we draw a line between the ratio decidendi, the basis for deciding a case, and obiter dicta, observations that do not bear directly on the result.[65] In the context of freedom of political communication, this methodology presents the problem that questions can be dodged – and repeatedly have been.

As we have seen, the legal method has allowed to Court to deploy several 'get out of jail free' cards. In *Levy*, most judges did not address the question of whether the protest in question was relevantly political communication because even if it was, the impugned regulations would in any case be appropriate and adapted to a means and in a manner compatible with constitutional government.[66] In *Mulholland*, five judges did not consider whether a ballot paper was 'political communication' because there was no pre-existing right to communicate one's party affiliation on it.[67] The result of these 'dodges' is that we have no reasonably precise idea what 'political communication' is, and what the test of whether communication is 'political' might be.

Essentially, the fundamentals of the adversarial legal system discourage courts from handing down clear tests that itemise every element required for an argument to be made out. In the context of the implied freedom, important questions about the breadth of communication protected, or the standard of review, can be answered only by a decision of a case on that basis. This would require an appellant to go to the expense of mounting a High Court challenge based, at least in part, on an uncertain part of law..

This is not the only problem with Court-developed freedoms. As has already been noted several times, cases which might have shed light on aspects of the freedom might not reach the High Court for a variety of reasons. Parties may not be able to afford to appeal all the way to the High Court, and may be especially discouraged from doing so when the under-development of the freedom makes outcomes extremely uncertain.

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62 *Levy* (1997) 189 CLR 579, 619-20 (Gaudron J), Kirby J makes similar comments at 645. Gleeson CJ affirmed Gaudron J's approach in *Coleman* (2004) 220 CLR 1, 31-32 [31]-[33].

63 *Hinch* (2011) 275 ALR 408, 435-6 [95]-[96].

64 But see, eg, *Levy* (1997) 189 CLR 579, 620 (Gaudron J).

65 The distinction can be significant, as we saw when the Court in *Lange* did not technically have to overrule *Theophanous* because there was no majority-supported ratio.

66 Most judges skip straight to the *Lange* analysis: see *Levy* (1997) 189 CLR 579, 608-9 (Dawson J), 613-5 (Toohey and Gummow JJ), 619-20 (Gaudron J). Two judges made obiter statements that they had trouble connecting the communications with the choice of electors at federal elections, but held that the laws were in any case permissible under the *Lange* test – see *Levy* (1997) 189 CLR 279, 596 (Brennan CJ), 626 (McHugh J). Only Kirby J was prepared to say outright, at 645, that the communication was protected.

67 *Mulholland* (2004) 220 CLR 181, 223 (McHugh J), 247 (Gummow and Hayne JJ), 298 (Callinan J), 304 (Heydon J).

III POLITICAL ANALYSIS

It is disappointing from the point of view of legal values, such as clarity and certainty, that the implied right to political communication has not been developed into legal principles and rules capable of providing clear and coherent guidance to citizens, journalists and politicians as they are engaged in the rough and tumble of political debate. However, there are further questions to be raised about the social value of the outcomes of legalistic judicial methods in the absence of formally good law, and the desirability of courts cloaking political judgments in the garb of 'strict legalism' instead of openly, rather than covertly, engaging in political policy formation.

This Part comments on the developing implied right of freedom of political communication from this wider and more political perspective, taking up some issues raised by one of the authors of this paper in an article published shortly after *Nationwide News* and *ACTV* that raised questions of institutional competence and legitimacy with respect to these decisions.[68]

In that article, it was suggested that such developments in constitutional law were likely to require the judiciary to rely on unjustified factual assumptions about the role of political advertising in democratic systems and elicit from them indeterminate and controversial moral judgments in the guise of alleged empirical and conceptual 'necessary implications'. It was argued that abstract statements of human rights, such as 'freedom of political communication' are, in themselves, too indeterminate a basis on which to conduct the sort of moral and empirical reasoning adequate to the task of formulating desirable laws relating to freedom of communication. Abstract rights generate disagreement as soon as they are applied to concrete situations, and few if any such rights are absolute, thus making it necessary, in relation to actual circumstances, to weigh a right against other rights and in the light of other moral consequences.[69]

The relevance of these general points in the epistemology of human rights to the nature of legal constitutional rights and freedoms was illustrated by the formulations presented in *ACTV*, which came down to determining what is causally necessary for the existence of representative government. Thus, Mason CJ contended that 'representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act' and that 'indispensable to that accountability and responsibility is freedom of communication, at least in relation to public affairs and political discussion'.[70] However, while no one could deny that a measure of freedom of communication is necessary if a government is to be successfully representative in that sense, the question of what sort of freedom of communication and how much is necessary for full (or more realistically an acceptable degree of) responsiveness to the need and wishes of the people is a complex empirical and normative question that courts are in no position to answer satisfactorily. This, it was

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68 Tom Campbell, 'Democracy, Human Rights, and Positive Law' (1994) 16 *Sydney Law Review* 195.

69 Ibid 200: 'Once we move on from prohibitions on the grosser barbarities to the articulation of policies within a basically humane system we soon discover that the content and form of even the least controversial rights is a matter of some difficulty and no agreed methodology. Does the right to life exclude capital punishment? Does it require the best available emergence medical care at no cost to the indigent? Does it give a right of action against a department of state that fails to prevent deadly child abuse? Indeed, as soon as we try to lift our standards from crude extremes, even the definition of "torture" becomes problematic in relation to aggressive methods of interrogation and disgusting prison conditions'.

70 *ACTV* (1992) 177 CLR 106, 138 (Mason CJ).

argued, at the time, could open the way to a form of strong judicial review characteristic of bill of rights jurisprudence.[71]

Legal commentators can respond to this sort of analysis by pointing out that subsequent case law, as outlined above, has circumnavigated such prospects. The question of whether a piece of legislation or portion of the common law is a 'burden' on political communication has been settled by adopting the test of whether or not such law involves restrictions on existing 'rights'. There is no need, therefore, to ask whether freedom of political communication, as a normative ideal, involves correlative duties on governments to do such things as furthering equality in access to communicative opportunities and reducing the impact of money in the provision of political opinion. Further there is no requirement to make moral (or indeed legal) decisions about what constitutes the right to political communication because there is no such constitutional right involved in the implied 'right', since the constitutional freedom acts only as a restriction on legislative power and an influence on the common law, with no relevance for individual rights since the constitutional provision only deals with the power of courts to override legislation and alter the common law in relation to such matters as defamation.

These are certainly helpful moves with respect to improving the formal quality of the legal provisions so that they do not require courts to deal with so many controversial and speculative factual and moral policy issues in order to apply the *Lange* formula, and further reading down of implied freedom could be achieved, through such legal stipulations. However, we do not consider that the properly legalistic moves adopted by the High Court over the succeeding years are successful in excluding the difficult empirical and controversial moral questions from implied rights jurisprudence.

Consider the *Lange* test as modified in *Coleman* and summarised by six judges in *Hinch*. First, does the law burden protected political communication? If so, is it nonetheless 'reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'?[72] To apply such a test a court has to determine (1) what is and what is not 'protected political communication'; (2) whether a law is appropriate and adapted to a stated end; (3) whether that end is compatible with maintaining Australian constitutional government; and (4) whether the means by which the law pursues that end is compatible with maintaining that system.

Problems with and solutions to point (1) have already been discussed above and a legalistic solution to avoid the abstraction of the idea of 'freedom of communication' accepted pro tem. Point (2) has been addressed many times in the case law, and has typically been framed as a legal question about the utility of the phrase 'reasonably appropriate and adapted' as a criterion of validity,[73] a debate which, given the widespread use of that phrase in other constitutional jurisprudence, extends beyond the scope of this paper despite its significance for the implied freedom. Points (3) and (4) we now take up.

The idea that a court can decide whether means and/or ends of a law are consistent with constitutional representative and responsible government implies that it would at least be theoretically possible to compile a list of necessary preconditions to this form of government. The existence of the implied freedom requires that the High Court have knowledge of what is necessary for Australian constitutional government. Making these judgments is difficult in practice. Five judges in *Mulholland* recognised this, commenting that the Constitution leaves many aspects of Australia's electoral system to the

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71 Campbell, above n 68, 204-7; Philip Alston, 'An Australian Bill of Rights: By Design or Default' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) 7-8.

72 *Hinch* (2011) 275 ALR 408, 436 [97].

73 See, eg, *Coleman* (2004) 220 CLR 1, 32 [33] (Gleeson CJ), 90 [235] (Kirby J), 110 [292] (Callinan J).

Parliament, and noting the potential for innovations in the form of representative democracy.[74] The problem here, then, is deciding what are, to borrow terms from other High Court judgments, the 'connotations',[75] 'defining characteristics'[76] or 'essential features'[77] of constitutional government, and which aspects of our current electoral and political system(s) are merely 'denotations', i.e. typical examples – perhaps longstanding, but inessential.

How does the High Court go about this? In a sense, its approach is conservative. The essentials of representative democracy protected by the freedom are assessed by reference to past practice. We see this in the insistence that fiery and even insulting or potentially defamatory debate must be protected, because that is and has always been the reality of Australian political debate. Looking similarly to the past, the Court has rejected the notion of positive implied rights to free political communication, where governments have obligations to achieve certain outcomes. Its approach will only invalidate burdens on pre-existing 'rights', which in the common law tradition generally means the absence of restraint rather than entitlement to positive action. This approach finds some support in classical liberal philosophy, largely concerned as early authors were with 'negative' liberty, or freedom from regulation. It is problematic, however, in the twenty-first century. By concentrating on impositions on pre-existing 'rights', the High Court ignores a variety of other factors that can compromise electors' 'true choice', which governments may have good reason to regulate.

The obvious elephant in this particular room is money. A society in which there is no legal regulation of citizens' rights to express political opinions may, in theory, be free, but this is a kind of illusory freedom if some actors are totally locked out of the public sphere because they have neither influential connections nor money to buy campaign advertising. In theory, a homeless person may, in a negative sense, be as 'free' as any other Australian to express their political views. In practice, however, they are at a great disadvantage compared to others who have editorial influence over Australia's highly concentrated media, or who have the money to advertise their views.

This tends to exclude marginalised groups such as the homeless, minorities including non-English speakers, migrants, indigenous Australians, drug addicts, welfare recipients and other groups from Australian political discourse.[78] All views, then, may be equal; in practice, however, some are more equal than others. This creates problems when one considers the possibility that a legislature might restrict the pre-existing 'rights' of the privileged few in order to 'level the playing field' for others. In response, the High Court adopted McHugh J's modification to the *Lange* test in *Coleman*, to examine not only the ends to which regulation is directed, but also of the means employed.

This second dimension of the *Lange* test's second limb is vitally important when we re-consider *ACTV* in the light of the *Lange* analysis. Plainly, the impugned law in *ACTV* burdened pre-existing 'rights' to communicate political messages by buying advertising. It claimed to do so, however, in an attempt to neutralise advantages and disadvantages

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74 *Mulholland* (2004) 220 CLR 181, 189-90 [9]-[11] (Gleeson CJ), 206-7 [63]-[64] (McHugh J), 237 [154]-[155] (Gummow and Hayne JJ), 255 [213] (Kirby J).

75 Used in characterisation of Commonwealth powers. See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461, 537.

76 Used to assess the institutional integrity of state courts and the continued existence of state Supreme Courts: *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 75; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 566.

77 Used to assess whether trial on indictment for an offence in Commonwealth law is 'by jury' as required by the *Constitution* s 80: *Cheatle v The Queen* (1993) 177 CLR 541, 549.

78 Peter Putnis, 'Popular Discourses and Images of Poverty and Welfare in the News Media' in Ruth Fincher and Peter Saunders (eds), *Creating Unequal Futures? Rethinking Poverty, Inequality and Disadvantage* (2001) 70-101; Australian Electoral Commission, *Electorally Engaging the Homeless* (Research Paper No. 6, February 2005) 10.

enjoyed or suffered by parties not because of the quality of their policies, but because of the amount of money available to them for funding of political advertising. This would seem to be a legitimate end, compatible with constitutional representative government. It is questionable whether a court would wish to find that the measure adopted was not 'reasonably appropriate and adapted' to that aim, since this would be tantamount to calling the legislature unreasonable.

The *Coleman* modification to *Lange* provides a second, ex post facto justification for invalidity that squares reasonably well with the pre-*Lange* reasoning employed in *ACTV*: despite laudable aims, the measure adopted, in practice, unacceptably discriminated against minor parties, and so was inconsistent with the 'true choice' that ss 7 and 24 require. Likewise, to use McHugh J's analysis (to which we will turn shortly), its overall effect was to make elections less 'free'.

Deciding whether the means adopted and ends to which regulation is directed are sufficiently compatible with constitutional government to save their validity raises another epistemological problem. By doing so, the High Court directly has to decide whether a representative and responsible legislature has a sufficient interest in regulating a subject notwithstanding burdens on political communication. According to Adrienne Stone, the Court must balance 'the interest pursued by the law against that pursued by the freedom'.[79]

Uniquely among his colleagues, McHugh J attempted to address this problem in *Coleman*. According to his judgment, the *Coleman* reformulation makes clear what was always implicit in the application of *Lange*: that the High Court does not have to (and should not be seen to) balance the interests of actors at all. His Honour was eager to refute Stone's criticism, since from it she drew the conclusion that this balancing required the consideration of extra-constitutional values.[80]

McHugh J responded with two observations. First, he noted that because the implied freedom arises only by necessary implication, it is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution'.[81] Second, he observed that state and federal legislative powers exist subject to the *Constitution*, which must necessarily make them subordinate to the requirements of the freedom.[82] Because of this, he says, there is no question of balancing the freedom against legislative interests in regulating – the latter must yield to the former.[83]

These observations are presented as a refutation of Stone's critique, but they do not appear to succeed. The second point would have great force if the protection of political communication were absolute. In that case, any law that burdened political communication (however defined) would have to yield to the constitutional guarantee. That is not, however, what the *Lange* test involves. The parliaments of Australian *may* burden political communication so long as the measures adopted, and the ends to which they are directed, are compatible with constitutional responsible and representative government. The problem Stone identifies is not that judges must balance competing interests to see whether the freedom is applicable, but that they must do so to decide whether the qualification presented by the second limb of the test permits a burden in a given case

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79 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 681.

80 Ibid 702-4.

81 *Lange* (1997) 189 CLR 520, 561; cited in *Coleman* (2004) 220 CLR 1, 48-9 [89] (McHugh J).

82 Ibid 49[90].

83 Ibid 49-50 [91].

One need not adhere to an extreme legal realist philosophy to conclude that in doing so, the Court must still balance competing interests.[84] As Leslie Zines notes, '[i]t is difficult to see how this method can operate without some balancing of conflicting interests and without having some regard to the importance of the interest that the law seeks to enhance or protect'.[85] Zines gives the example that one cannot decide the validity of noise restrictions that would prohibit a protest outside a hospital 'by simply asking whether the application of the prohibition in the case is consistent with representative government',[86] or perhaps more precisely, whether the negative effects on representative government are outweighed by the positive. McHugh J's insistence that no balancing is involved in the test would dictate that only the effects of the law on political communication should be considered. However, it should not be particularly controversial to say that only a test completely divorced from reality could focus on that consideration to the exclusion of the patients' health and comfort.

That proposition finds support in the case law. Whatever McHugh J thought, it is by no means clear from *Lange* that only ends and means that further representative and responsible government are 'legitimate'. In *Levy*, for example, only three judges' analyses made the point that Levy could make his message heard in ways not prohibited by the impugned regulations, or that the regulations were not particularly burdensome as they were confined in the time and place of their operation.[87] This could be read in light of *Coleman* as stating that expression of political messages was not significantly hampered, and that (paradoxically) the regulations thus did not leave political communication less relevantly 'free', even though it did burden that communication. Four judges, however, decided the case based on whether the regulations were reasonably appropriate and adapted to their stated legitimate end, that of maintaining safety.[88] Toohey and Gummow JJ used a slightly different approach, adding a further step that the regulations were no more invasive than necessary to meet that legitimate objective, which Kirby J also considered in his test of proportionality.[89]

McHugh J's attempt to exclude the balancing of interests is thus not convincing. It is also not clear that any other judge has adopted his arguments on this point. It seems from the two judgments in *Hinch* that the degree to which political communication is burdened in a given case is simply one factor going to whether the law is '*reasonably appropriate and adapted'* to its end. Though the judges rejected several contentions about the extent of the burden in *Hinch*, it was always related back to the community protection rationale of the impugned legislation. The Chief Justice in particular spent some time discussing the various ways in which the legislation acted to protect the community – not how it protected representative democracy.[90]

If we accept that the Court balances competing interests in applying the implied freedom, other epistemological problems become apparent. The *Constitution* provides no test of how to value the legitimate ends to which the Court has decided that political communication may be burdened. The concern, then, is that extra-constitutional considerations are involved, though judges do not acknowledge them.

This, in essence, was the second part of Stone's critique. McHugh J answered that '[w]hether the burden leaves the communication free is, of course, a matter of judgment.

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84 Legal realists hold that one must look beyond black-letter law and examine any and all factors (including extra-legal factors that theoretically should not matter) that help predict outcomes in cases. See Brian Leiter, 'American Legal Realism' (2003) *The Blackwell Guide to Philosophy of Law and Legal Theory*, edited by W. Edmundson and M. Golding.

85 Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 551.

86 Ibid 552.

87 *Levy* (1997) 189 CLR 579, 614-5 (Toohey and Gummow JJ), 648 (Kirby J).

88 Ibid 597-8, 608-9, 619-20, 627-8, 648.

89 Ibid 614-5, 648.

90 *Hinch* (2011) 275 ALR 408, 420 [32].

But there is nothing novel about courts making judgments when they are asked *to apply* a principle or rule of law',[91] but this does not really address the point. Judges may legitimately disagree on the proper application of a legal standard; the problem with the implied freedom is the distinct impression that there is no legal standard from which to proceed. Rather, each judge seems to be working from quite different conceptions as to what representative democracy in Australia requires. Thus, we see several judges in *Coleman* defending Australians' right to use insulting language in political contexts, because Australian politics is and has always been robust and vitriolic.[92] Others, conversely, would have upheld the laws in question on the grounds that promoting civility in fact improves political debate and thus democracy as a whole.[93]

In other situations, such a divide in opinion based on individual judgments about what protects or degrades constitutional democracy could be quite problematic. We have already mentioned problems with the Court's conservative approach where disparities of funds and influence are involved. Consider *ACTV*, where the Court 'knew' that restricting pre-existing rights in the way that the Parliament did was inconsistent with representative government (and asserted this quite explicitly, since the Court had not moved to its wholly textual foundation for the implied freedom). One might argue, however, that the law made elections more 'free' by regulating pre-existing 'rights' to free communication.

What we are coming to is that this kind of analysis is not the traditional institutional domain of Australian courts, although it may be commonplace in jurisdictions involving strong-form judicial review on the basis of constitutional rights. In Australia, courts rarely hear submissions on the merits and disadvantages of relative positions as criteria of validity. In fact, the High Court has strenuously asserted on many occasions that as long as a law is within power, it does not 'second-guess' decisions of legislatures.[94] The High Court as an institution does not possess the 'knowledge' necessary to decide cases according to the test of validity that it has articulated. Yet, by 'discovering' the implied freedom, the High Court has withdrawn from the legislature the ultimate responsibility for deciding whether certain measures are compatible with Australian constitutional government. The test of validity involves the weighing up not only of interests, but in the varied effects of certain measures, and the making of an ultimate judgment as to whether measures leave political discourse unacceptably less 'free'. This is an implicit claim of 'knowledge', but it is by no means clear that the High Court is the most competent and legitimate body to make these determinations. Indeed, in this regard, it is the *least* capable branch of government.

If one accepts that the implied freedom involves a balancing of interests, a weighing up of policies' complex effects, and ultimately a measure of the adjudicators' personal preferences, then the High Court is not the appropriate body to decide these cases. Institutionally, the bodies most able to determine these questions are the Commonwealth Parliament and its state and territory equivalents. Open debate about the relative merits of protecting existing interests versus resolving other problems, and ideological factors that might incline a vote one way or the other, are the domain of legislatures. Moreover, entrusting these decisions to a parliament legitimates them, as legislators are elected by constituents who have the ability to replace them at periodic elections.

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91 *Coleman* (2004) 220 CLR 1, 53 [100] (emphasis in original).

92 Ibid 45-6 [81] (McHugh J), 91 [238]-[239] (Kirby J); see also 78-9 [199] (Gummow and Hayne JJ).

93 Ibid 112 [297] (Callinan J), 121-2 [323] (Heydon J).

94 See, eg, *Burton v Honan* (1952) 86 CLR 169, 179 (Dixon CJ).

IV THE DEMOCRATIC DIMENSION

Introducing democratic considerations to this review of the history and developing nature of the implied freedom of political communication produces the paradox of what we have presented as the 'worst of both worlds' with respect to articulating and achieving the optimum form and extent of that freedom. On the one hand we have a jurisprudence that can be characterised in large part as a gradual reduction of the implied 'right' towards a legally conservative formula which offers little to those who aspire to the realisation of a human right to communicative freedom. On the other hand we have something like a de facto freeze on the development of legislation that might have some impact on the remarkably lax governance of political communication in Australia, which fails to address the problems relating to equal and effective access to political communication with respect to both providers and recipients of such communications. Australia thus remains one of the most libertarian regimes with respect to use and abuse of political campaign funding.[95]

In part members of the public should welcome the attempt to reduce the implied rights jurisprudence to a set of rules and principles that can be applied without recourse to speculative empirical opinions and controversial moral judgments. While this may not have been successfully carried through to its logical conclusion, steps have been taken towards providing some clarity and hence some predictability in the relevant law and hence increasing that freedom which arises from having knowledge of the law prior to acting in ways which might infringe the law. Indeed, in the case of ordinary rather than constitutional law, this would also have the advantage that politicians and the populace can know what the law is and how it might therefore be improved in accordance with democratic political process.

However, in the case of constitutional law, however specific it may be, this opportunity is not available except through the cumbersome and usually unsuccessful mechanism of constitutional amendment. In such circumstances, it might be thought better that there be overt and widespread value-driven political debate about the importance of protecting certain types of communication in order to involve the wider community in a debate which might influence the decisions of courts on constitutional matters.[96] This would mean that some of the issues that are not addressed in the legalistic approach to constitutional rights could get an airing, including political communication that is more directed to bringing pressure on governments than to influencing voting, the reduction of the impact of disparate wealth in the communicative process, and more developed consideration of the classic arguments for freedom of speech. This would, however, involve widening the debate to include the protection of interests through political communications, the model of political communication as a marketplace of

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95 The situation is lucidly set out by Graeme Orr: 'Party politics in Australia is a sizeable business involving a variety of revenue streams, most notably corporate donations, union contributions, investment income, loans and public funding. Declared receipts in 2007, a federal election year, were just over $200 million for the Coalition and Labour parties combined. This figure represented a rise of over 50 per cent on the figure just six years, or two federal electoral cycles, earlier. We blanch at reports that United States presidential elections are now billion-dollar events. But the United States electorate is close to 15 times larger and much more diverse than Australia's. Its system is also much more complex, as it encompasses primaries and voluntary voting. In relative terms, money politics in Australia is not too far behind ...'. Orr, above n 4, 238. Since then some changes have occurred in Queensland and New South Wales. See also Anne Twomey, 'The Reform of Political Donations, Expenditure and Funding', above n 4.

96 It is worth noting that judges clearly note community standards when they state that we must tolerate the possibility of defamation in political matters because robust debate is part of the reality of Australian politics – yet many lawyers would resist the notion that extra-judicial and potentially populist debate can guide the meaning of the Constitution.

ideas and the inherent importance to the individual of self-expression, all of which have to be viewed in the light of contemporary circumstances, including the increasing power of corporations, the expanding influence of the media and increasing public sensitivity to racial, religious and gender-based communicative abuse and other aspects of human rights, including privacy.

This is not the place to enter into a wide-ranging presentation of the case for this debate being conducted in the public domain, with the focus on legislative development through parliamentary decision-making under the umbrella of democratic accountability. However, it is possible to make a few points about the relevance of the implied rights saga for the ongoing debate about the desirability of strong human rights-based judicial review of legislation.

First, the implied rights debate raises in a very visible way the issue of institutional competence. It is unsurprising and understandable that courts should shy away from open-ended policy discussions that raise difficult empirical issues and involve controversial value judgments. Legal training, court-room practice and judicial experience are not focused on the full range of considerations that are central to the work of executive government. This case study is an illustration of why legislatures are better equipped to make decisions about what sort of free speech rights ought to be respected and implemented through specific legislation and adequate financial expenditure.

Second, the narrative outlined above gives no grounds for courts adopting a special constitutional role in the protection of democratic rights in contrast to social and economic rights or other desirable political goals. Superficially it may appear attractive to think of courts holding together the framework in which partisan political debate can continue and produce a fair and effective outcome. The argument here is that politicians cannot be trusted to oversee the rules of the game to which they owe their political powers. A prime rationale of democracy, however, is that politicians, like all power holders, are not to be trusted in any sphere. Hence, the electoral system and its associated rights are essential curbs and controls over the full range of political issues. It is the democratic political power of electors that is the only effective control on political power. This serves as the basis for arguing that the voting public is the legitimating factor in all important issues, including what constitutes representative government, the theory being that democratic accountability produces the best available approximation to an artificial overlap of interests between governments and people. This means that, while it is right for everyone, including judicial officers when off duty, to be suspicious of politicians, it is reasonable to suppose that elected governments often act in the interests of the public, even in matters of political constitutions. Arguably we have an example of this in the amendments introduced by the *Political Broadcasts and Political Disclosures Act 1991* that were impugned in *ACTV*.

The democratic defence of implied rights, and the best answer to the assertion of legitimacy in constitutional matters, is that 'democracy is neither self-justifying nor self-correcting', and that a truly democratic system cannot elect, for example, to either disenfranchise members of the electorate by discriminating against minorities or electing to abandon democracy itself.[97] This is how, Dan Meagher reconciles the implied freedom (and his preferred test of whether communication is relevantly 'political') with the notion of popular sovereignty on the basis that democracy itself must sometimes be defended from nominally democratic institutions.[98] There is considerable difficulty, however, in identifying what these occasions should be, unless they are confined to extreme cases such as legislating for a one party state.[99] In the case of *ACTV*, however, the question as to whether or not the model of free political advertising in proportion to past electoral

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97 Campbell, above n 68, 195.

98 Meagher, above n 54, 452.

99 A position that is, at the least, not excluded by *Mulholland*.

support is more or less 'democratic' has met with conflicting answers within evidently democratic states.

A third point in the democratic argument relates to the variability and unpredictability of court-based decisions regarding such matters as fundamental political rights. The decision in *ACTV* was amenable to being developed in a radically activist way, enabling the High Court to enforce its vision of representative government on a whole range of issues where they considered that governments were not taking adequate account of the views of the people they represent. That this has not taken place does not mean that it could not do so. At a time when human rights based judicial review is an increasingly adopted legal mechanism and judges urge their colleagues to take more account of international precedents, there remains the opportunity for subsequent High Court benches to take a more adventurous approach. In line with the High Court's adoption of something like the US position by reducing the protection against defamation allotted to public officials, we might find strong court opposition to any proposal to address the problem of unequal wealth by introducing quite modest restrictions on level of campaign donations and funding generally.[100]

In terms of unpredictability, the US Supreme Court provides us with a recent and extreme example of the turnarounds that can occur once the notion of judicial supervision of democratic process takes off. The contentious case of *Citizens United v Federal Election Commission*[101]recently overturned well-established US case law in striking down provisions of the McCain-Feingold Act that prohibited corporations from broadcasting electioneering communications.[102] It did so by giving First Amendment protection, and thus unlimited funding rights, to independent political broadcasts and to 'corporate speech'. The decision was opposed by the vast majority of the population,[103] and condemned by the dissenting justices as threatening 'to undermine the integrity of elected institutions across the Nation'.[104] The view might be that such dramatic change could not happen in Australia, and certainly it is unthinkable given the present members of the High Court bench. However, given the inevitable changes of personnel and circumstances and the Court's difficulties in arriving at a clear and coherent set of rules in this area, complacency may be a risky attitude towards potential judicial utilisations of the implied right to freedom of political communication in Australia.

V CONCLUSION

Without engaging in extended discussion on the intractable and ongoing disagreement about the value of human rights-based judicial review, we can say that the case law arising out of *ACTV* does not offer any of the parties to that debate any significant comfort. In themselves, *ACTV* and *Nationwide News* do look something like a failed experimental move towards a broader scope for human rights-style judicial review. Understandable in their time as a move to bring Australian constitutional law into greater harmony with the trends in other jurisdictions and as an attempt to meet growing demands from human rights pressure groups and some academic constitutional lawyers, the development of implied constitutional rights or freedoms presented subsequent courts

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[100] *New York Times Co v Sullivan*, 376 US 245 (1964); now substantially expanded to loosely defined 'public figures': *Curtis Publishing Co v Butts*, 388 US 130 (1967).

[101] 558 US 08-205.

[102] 2 USC §411b (2002).

[103] Inter-University Consortium for Political and Social Research, 'ABC News/Washington Post Monthly Poll, February 2010' (2010) 94.

[104] *Citizens United v Federal Electoral Commission*, 558 US 08-205, 4 (2010) (Stevens J, joined by Ginsburg, Breyer and Sotomayor JJ). See also Samuel Issacharoff, 'On Political Corruption' (2010) 124 *Harvard Law Review* 118.

with difficult and as yet unresolved problems rather than leading to a new and fruitful direction. Since that time, the cases drawing on the implied freedom of political communication could all have been decided in much the same way, substantively, without drawing on the implied rights jurisprudence, and without anything like the degree of internal dissent on the means by which such decisions were reached.

To date, the clear casualty of the matter has been the Australian democratic system. In particular, there is the ongoing failure to come to grips with the inequities and distortions of campaign finances, a realm in which there are vast political expenditures provided by individuals, corporations, unions and taxpayers, on a scale which, proportionate to the population's size, is amongst the highest in the world. This not only disregards the ideal of political equality central to democratic values, but also encourages methods of campaigning and propagandising which are rightly seen by their subjects as insultingly uninformative and non-argumentative, a type of political communication which is neither free nor inviting.