Freedom of Speech in the Constitution

Nicholas Aroney

Policy Monograph 40

THE CENTRE FOR INDEPENDENT STUDIES

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Key Points

- In 1992, the High Court of Australia held that the Constitution contains an *implied* guarantee of freedom of political communication.
- Later decisions extended the scope of the guarantee to the State parliaments.
- In 1996 and 1997, the court confirmed the existence of the implied guarantee but qualified and limited it.
- These decisions go to the root of the Constitution and raise issues concerning the fundamental nature of the Australian polity.

- Constitutionalism is essentially government under law, the opposite of arbitrary rule and despotic government. It involves the proposition that political power is legitimate only if it is justified by pre-existing law.
- Constitutionalism has always been basic to the Western conception of law and government; the problem has been *enforcement* of the constitution.
- The essential justification for placing the judiciary in an independent role is to uphold the law, particularly the constitution, against illegal acts of the executive and parliament.
- Where the constitution to be enforced is a written one, the appropriate judicial method is one of *interpretation*, not expansion, of the Constitution.
- The task is to formulate a theory of adjudication which does justice to the 'textualisation' of the constitutional order.

- Many of the central conceptions of contemporary constitutionalism and judicial review find their roots deep in Western and specifically English history.
- In principle, the mediieval king was under the law. There were

a number of categories of law, all of which in different ways were conceived as binding the king's authority.

- The conclusive outcome of the English Civil War made possible the increasing subjection of the king to the law and to the people through parliament.

- Colonial charters in America and Australia functioned as written constitutions, upon the basis of which the Privy Council exercised judicial review over colonial statutes.
- When the Americans organised and united themselves politically, they adopted *written* constitutions to define and limit the powers of government.
- The earliest drafts of the Australian Constitution were modelled on that of the United States.
- The relatively limited number of rights expressly entrenched in the Australian Constitution does not indicate that the framers neglected to deal with the question.
- Australia was settled at a time when parliamentary sovereignty was well established in England and relied more on a representative parliament to act in defence of rights.

- It is well established that necessary implications may assist the court in its interpretation of the Constitution.
- It is also well established that the doctrines of representative government, federalism and the separation of powers are necessarily implied by the Constitution.
- Other important implications which members of the court have suggested include the rule of law, constitutionalism and judicial review, and the common law.
- Constitutionalism is the most fundamental of these doctrines. Without it, there is very little if any scope for democracy, judicial review, federalism or the separation of powers.
- If the doctrine of constitutionalism means the limitation of

government, it means the limitation of all branches of government, including the judiciary.

- An implication can refer to a kind of logical necessity, or it can involve the consideration of what is 'necessary' for a provision to have a practical effect.
- A third sense of 'necessary implication,' relying on the idea of a 'good application,' draws on matters of substance or morality.
- 'Third-order' implications introduce extraneous values into constitutional interpretation.
- The *Freedom of Speech* cases involved a *multiple stage* implication: from the text, to representative government, to freedom of communication, to a guarantee thereof, to limitations on that guarantee.
- Multiple-stage implications compound the extraneous element in each step of the series, so that the result is far removed from the Constitution itself.

- It would be naive to reject the use of implications and fundamental principles and doctrines in the interpretation of constitutions.
- However, finding an implied guarantee in fact substituted the court's opinion for the value judgment taken by the framers of the Constitution.
- While members of the court saw a constitutional guarantee of freedom of political communication as a classical liberal right, the manner of its derivation was not necessarily liberal.
- The desirability of an effective system of representative government should not disguise the fact that the court has vastly extended the scope for judicial review of the substantive effects of legislation.
- In today's conditions, remodelling the Constitution can await a popular referendum and amendment of the Constitution according to law, no matter how difficult the process.

Foreword

The High Court of Australia has been no stranger to controversy throughout its near-century of existence. Probably at no time, however, has it been so consistently at the forefront of political debate as in the last five or six years. A rising tide of judicial activism – an apparent willingness to break with long-established precedents, and to utilise increasingly creative strategies of interpretation – has run against a strident reaction from some conservative politicians and interest groups.

As far as constitutional interpretation goes, the recent landmark was the decision striking down the ban on political broadcasting *(Australian Capital Television v Commonwealth)*, handed down in September 1992. In this and later cases, known collectively as the *Freedom of Speech* cases, the court held that the Constitution necessarily implies a guarantee of certain rights required by the existence of representative government, including a right to freedom of communication on political matters.

Supporters of liberty have, for obvious reasons, generally welcomed the *Freedom of Speech* cases. Nicholas Aroney, however, sounds a note of caution. He argues that, although the court may be acting to protect rights, its means of doing so places important values at risk, including even constitutionalism itself.

To reach this conclusion, Aroney investigates the history of constitutionalism as it has come down to us from its medieval roots. He traces the development of judicial review through British, American and colonial sources to its modern form of enforcement of a written constitution against the legislature. He then tests the theoretical understanding of the court's role with a close analysis of the *Freedom of Speech* cases and a critique of their reasoning.

Aroney endorses the role of the courts in enforcing the Constitution, including necessary implications from the constitutional text. However, he believes that if constitutionalism and the rule of law are to be maintained, judges need to be very cautious about drawing such implications. He argues that a series of inferences, each apparently innocuous in itself, may lead cumulatively to a result far removed from the intentions of the founders.

This book displays Aroney's analytical acumen and the breadth of

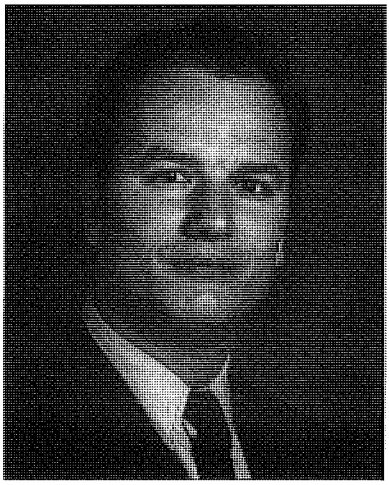
his historical learning. It is also noteworthy for the tone of his criticism. He shows by example that one can be respectful towards the High Court without being sycophantic; he disagrees with the judges' reasoning, but he does not question the integrity of their motives.

The shallowness of much of our current debate suggests that a wider understanding and appreciation of constitutionalism is highly desirable. Constitutional protection of rights is an issue that is unlikely to go away, and even those who disagree with Aroney's views will find that they cannot be ignored. The issues that this book raises will need to be considered in the search for an outcome that combines observance of the rule of law with the protection of individual rights.

The Centre for Independent Studies is very pleased to present *Freedom of Speech in the Constitution* as a major contribution to the continuing debate on constitutional interpretation.

Greg Lindsay
Executive Director

About the Author



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PREFACE

My interest in the general problem of limiting the power of parliament through the courts – without making the judiciary a government unto itself – was first sparked during my undergraduate law studies in the late 1980s. I was at the time intrigued by the Lord Chief Justice Sir Edward Coke's decision in *Dr Bonham's* case,[1] a decision in which he appeared to strike down, as 'against common right and reason,' a statute which purported to make the Royal College of Physicians judges in their own cause. This fascination with the conundrum between Parliamentary sovereignty and individual rights was further fuelled by Professor Walker's discussion of religious liberty in 'Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion.'[2]

In my undergraduate studies I endeavoured to explore, as far as I could, the legal and theological ideas of sovereignty and how they relate to the functions of the judiciary and the legislature. The triangle represented by the Common Law judges, a Puritan Parliament and the 'divine right' claims of the Stuart Kings is, I think, crucial to our understanding of the fundamental forces that have forged the modern political systems of the United Kingdom, the United States, New Zealand and Australia.

Of course, the matter remains a fascination to me. When, in 1992, the High Court of Australia decided what have become known as the *Freedom of Speech* cases,[3] I promptly recalled the judicial fortitude of Coke's courageous stand against parliamentary and executive excesses. My immediate reaction was one of approval. Here was a check on a statute having decidedly ominous implications: a control on the pretensions of a government which sought to 'regulate' our right to free discussion of political matters by prohibiting paid political broadcast advertising. Moreover, my instant response upon reading the reasons of the Court was one of admiration for an ingenious, carefully crafted and persuasive argument which showed how an implied guarantee of

[1] [1610] 8 Co. 113b.

[2] Walker 1985.

[3] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, *Nationwide News v Wills* (1992) 177 CLR 1.

freedom of political speech necessarily undergirds our system of representative government.

However, closer reading of the judgments lead me to conclude that, although I might strenuously object to the legislation, the process of reasoning adopted by the majority left too many matters at large, too many gaps in logic and too much freedom for future judges to build doctrines of implied 'rights' far removed from the terms of the Constitution or the constitutionally expressed desires of the people of the Commonwealth. The following thesis is the result.

My analysis and criticism of the argument adopted in the *Freedom of Speech* cases is not therefore without sympathy for the concern that an untrammelled majority operating under the veil of democracy is quite capable of inflicting serious burdens, even atrocities, on minorities or individuals under its power. A compelling case can certainly be made that there should be checks and balances on the exercise of executive and legislative power, even in the form of a system of judicial review which goes to the substance of legislation under consideration.

I have endeavoured in this book to formulate and apply a theory of judicial review which is sensitive to the tension that lies between judicial and legislative power, and to the concern that tyranny can develop on either side of the divide. Sovereignty is a dangerous idea, especially when ascribed to some political institution: judicial, parliamentary or otherwise. Perhaps it is at the same time an inescapable idea, but then, I rather think that it ought to be confined to its proper sphere (and origin), namely theology, whence it can perpetually challenge the pretensions of earthly governments.[4]

This study, then, commences with a chapter which seeks to introduce the *Freedom of Speech* cases and the issues raised by them. Since 1992, the High Court has had to work out the implications of its new approach in a series of important decisions. The justices have had to consider the implications of our system of representative government for the law of defamation, the position of the State Parliaments under the Commonwealth Constitution, our system of compulsory preferential voting and the distribution and size of electorates. Each of the cases significantly demonstrates the kinds of questions, and conundrums, raised by the Court's foray into implied constitutional rights.

As I point out in the first chapter, the possibility of including a range of Bill-of-Rights-type guarantees in the Australian Constitution

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[4] See, eg, Walker, 1990; Powell, 1993.

was openly debated and explicitly rejected in the Australian Federal Constitutional Conventions of the 1890s. For this reason, the Constitution in its present form contains only a few, scattered guarantees of rights, and in no place addresses the issue of freedom of speech; let alone provides for a guarantee thereof. Notwithstanding this, in the *Freedom of Speech* cases the Court held that the Constitution provides for a system of representative government, and that an effective system of representative government in turn requires the existence of freedom of communication with respect to political matters. It followed for the Court that because the legislative powers of the Parliament in section 51 are conferred 'subject to' the Constitution, the exercise of those powers is subject to a guarantee of freedom of communication with respect to political matters.

The cases thus raise the most fundamental issues about the nature of the Australian polity. Before turning to the question of necessary implications, the court stressed that the Constitution is a compact of a free and sovereign people, under which they set up a system of representative government which would respect their fundamental rights and liberties. This reflected a profound shift in emphasis. Previously, the court had stressed the fact that the framers of the Constitution maintained a steadfast trust in Parliamentary processes as a secure bulwark of personal freedom and individual rights. It was supposed that the system of representative government would protect the rights of the Australian citizen, so no additional guarantees of rights were necessary. Indeed, such limitations on Parliamentary power would be inconsistent with the principles of democracy: they would, it was thought, inhibit the rightful powers of a democratically elected legislature. It was therefore an extraordinary irony that the principle of representative government could be used by an *unelected* judiciary as the basis of a guarantee of freedom of communication which operates as a limitation of the powers of a *democratically elected* Parliament.

The formulation of a theory of judicial review and its application to the *Freedom of Speech* cases cannot, I submit, be undertaken without an appreciation of the broad sweep of Western, and specifically English, constitutional history. The second and third chapters of this book endeavour to develop a theory of judicial review which draws on what I argue are the lessons of that constitutional tradition of which Australia is a part. Here, the particular focus lies on the evolution of legal limits on governmental power, the use of a written constitution for that purpose and the emergence of the courts as final arbiters of the constitutionality of governmental acts. In that context, the central

proposition of Chapter Two is that the problem of judicial review is essentially about the *enforcement* of the constitution, and that the proper ground, purpose, scope and methodology of judicial review must be a constitutional one. It is argued that where a political order makes an independent judiciary the guardian of the constitution, and where the constitution to be enforced is a written one, the appropriate judicial method is one of *interpretation* of the Constitution; a methodology which calls for self-restraint on the part of the courts.

Chapter Three applies this method to the Australian case law, and seeks to show that, while the Court when interpreting the Constitution unavoidably draws on sources extraneous to the text (ranging from the definitions of terms to assumptions about how the constitution is expected, or properly supposed, to function), it must be careful when discovering (or devising) constitutional implications. When such implications rely on multiple steps, one implication leading to another as in the *Freedom of Speech* cases, the cumulative effect must be closely scrutinised.

Chapters Four and Five seek to apply this theory of judicial review to the cases in question by carefully analysing and then evaluating the reasoning adopted. It is concluded, in the words of Chief Justice Burger of the United States Supreme Court, that while 'each step, when taken, appeared a reasonable step in relation to that which preceded it, ... the aggregate or end result is one that [should] never have been seriously considered in the first instance.'[5]

But enough of my motivations and how they are expressed herein. It is of course fitting that I thank those who have been of assistance and given advice in the preparation of this book, although I must readily acknowledge that the views expressed are wholly my responsibility. I should firstly thank two colleagues: the supervisor of my Master of Laws thesis, Professor Gabriël Moens, for his legendary availability, guidance and well-targeted advice, and Reader Suri Ratnapala, for his integrity, support and friendly criticism. Professor F. N. Lee and Dr R. D. Mitchell willingly gave me timely and well-considered advice along the way which greatly helped to inspire and guide my thoughts. My editors, Mr Andrew Norton, with his 'eagle eye,' and Dr Charles Richardson, with his constructive criticisms, helped to make the book better and more readable than it would have been. Having said that, of course, I must accept responsibility for the errors and infelicities that remain.

[5] *United States v 12 200-Ft Reels* (1973:127).

Finally, and most importantly, I wish to thank my wife for her unfailing support, encouragement and willingness to make the substantial personal and financial sacrifices required by my scholarly obsessions, and to thank our two young children, who, though too young to fully understand what their distracted father has been up to (except that 'Daddy is (again) playing with his computer'), remain a constant source of inspiration and delight to us both.

Nicholas Aroney
Brisbane, March 1998

CHAPTER 1

THE FREEDOM OF SPEECH CASES

Free speech is now part of Australian constitutional law, although the framers deliberately chose not to include a right to free speech in the Constitution, and no referendum brought about this change. In two landmark cases decided in August 1992, the High Court of Australia held that the Constitution contains an *implied* guarantee of freedom of political communication. Then, in October 1994, the court further decided that the guarantee means that the State parliaments, as well as the Commonwealth Parliament, are not able to enact legislation which excessively inhibits the free discussion of political issues. The court also found that the constitutional freedom required changes to the law of defamation, so that the public is free to criticise those who hold high public offices, so long as those criticisms are reasonable.

At the time, the 'discovery' of this right to free speech drew forth a mixed reaction, and many asked where it would all end. Would the High Court gradually discover and define the outlines of what would amount to an implied 'Bill of Rights,' as Justice Toohey himself suggested (Toohey, 1992)? However when, in 1996 and 1997, a differently constituted court was asked to apply and extend the rights which were said to be implied by the Constitution, the court actually chose to significantly qualify and limit their scope, to the surprise of some. While the court confirmed the existence of the implied guarantee of freedom of political communication, the scope of any further rights remains unclear, even doubtful.

In order to understand these decisions, and what they mean for Australian constitutionalism, it is necessary to look first at the background to the cases.

Who Pays the Piper?
Australian Capital Television v Commonwealth

Following the 1987 federal election and 1988 constitutional referenda, the Joint Standing Committee on Electoral Matters of the Common-

wealth Parliament undertook an inquiry into the funding of election campaigns. Its 1989 report, *Who Pays the Piper Calls the Tune – Minimising the Risks of Funding Political Campaigns*, stated:

> The rising cost of television advertising time has coincided with the growing use of that medium for political advertising. This has greatly increased the reliance of parties on corporate sponsorship. The Committee is concerned that heavy reliance by parties on such sponsorship risks the distortion of our open democratic system.
>
> The electoral system should ensure that large financial sponsors, having paid the piper, do not also call the tune. The wider membership of political parties should not lose its influence within the respective parties.

The Labor Government response to the Report was to express concern that 'the reality is that only the rich can get their message across by ... means [of electronic advertising]' (*Hansard*, 9/5/91:3480). Accordingly, the Commonwealth Parliament enacted the *Political Broadcasts and Political Disclosures Act* 1991, which inserted a new Part IIID into the *Broadcasting Act* 1942. The provisions of Part IIID became part of the conditions upon which broadcasting licences were granted under the Act. These conditions completely prohibited the broadcasting of paid 'political advertisements' during 'election periods' and provided for the allocation of 'free time' political broadcasting in lieu of the prohibition.

One view of the legislation was expressed in the 2 December 1991 editorial of *The Australian* newspaper:

> The Political Broadcasts and Political Disclosures Bill [while] less ominous than its two earlier incarnations ... contains unacceptable restrictions and too many contradictions. ... There is little doubt that the vast increase in election spending in Australia is a problem that must be confronted. But Labor's credibility on this issue is weak. It enjoyed the benefits of an 'open' political advertising market when the party was being well funded and sought to 'close' this market only when the party fell into serious debt. ... The trouble for Labor is that the history and timing of this issue leave the indelible impression that its motive is self-interest, not public interest.

Australian Capital Television Pty Ltd, a number of other broadcasters and the State of New South Wales commenced proceedings in the High Court seeking a declaration that the legislation was unconstitutional. The litigation in *Australian Capital Television v Commonwealth*

of Australia (hereafter cited as *'ACTV'*) had commenced.

Advance Australia Fascist?
Nationwide News v Wills

Meanwhile, on 14 November 1989, the *Australian* newspaper had published an article by Maxwell Newton entitled 'Advance Australia Fascist.' The article contained a 'virulent attack on the integrity and independence' of the Australian Industrial Relations Commission, formed under the *Industrial Relations Act* 1988 (Cth) to replace the Commonwealth Conciliation and Arbitration Commission. The article claimed that Australian workers are:

> regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.

However, section 299(1)(d)(ii) of the *Industrial Relations Act* had provided:

> A person shall not ... by writing or speech use words calculated ... to bring a member of the Commission or the Commission into disrepute.

An officer of the Australian Federal Police alleged before the Federal Court of Australia that the publication of the article constituted an offence under section 299(1)(d)(ii). In the course of argument, Nationwide News Pty Ltd, the defendant proprietor and publisher of *The Australian*, argued that section 299(1)(d)(ii) was invalid because it was beyond the legislative competence of the Commonwealth Parliament under the Australian Constitution. The issues raised by this argument were removed into the High Court of Australia in *Nationwide News v Wills* (cited as *'Nationwide News'*).

It is reported that during submissions in *Nationwide News*, Justice Deane invited counsel to argue that section 92 of the Constitution protects freedom of speech. Unprepared for this invitation, counsel were sent away and returned with an argument based on the proposition that the Australian Constitution necessarily contains an implied guarantee of freedom of communication with respect to political matters (Flahvin, 1992:34).

Because both *ACTV* and *Nationwide News* raised the issue of the implication of a right of free speech, the High Court considered the cases together and for both cases gave its formal orders on 28 August 1992 (in time for the impending Victorian State election) and its reasons on 30 September 1992.

Both sets of applicants were successful. By a clear majority in *ACTV*[1] and a more tenuous one in *Nationwide News*,[2] the court held that the legislation in question contravened a guarantee of freedom of speech which, although not anywhere expressed in the Constitution, was said to be 'necessarily implied' by the democratic system of government enshrined in it. In doing so, the court inferred the existence of an implied constitutional guarantee of freedom of communication with respect to political matters – a landmark decision (Kirby, 1992).

Importantly, the court came to this conclusion by the purported application of strictly orthodox methods of legal interpretation and argument, as historically established by the court, on the basis of the text and structure of the Commonwealth Constitution.

A Junket of Mammoth Proportions?
Stephens v West Australian Newspapers

While the High Court was considering its decision in *ACTV* and *Nationwide News*, the *West Australian* newspaper published three articles which were sharply critical of an overseas and interstate trip undertaken by a number of members of the Western Australian Parliament, describing it as a 'junket of mammoth proportions.' The six members of parliament commenced an action for defamation against the publisher, West Australian Newspapers Limited, in *Stephens v West Australian Newspapers* (1994) (cited as *'Stephens'*).

Calwell Spinning in his Grave?
Theophanous v The Herald and Weekly Times

Then, shortly after the decision in *ACTV* and *Nationwide News* had been handed down, Mr Bruce Ruxton, president of the Victorian branch of the RSL, wrote a letter published in the *Sunday Herald Sun*

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[1] Chief Justice Mason, and Justices Deane, Toohey and Gaudron took a particularly robust view of the guarantee. Justices Brennan and McHugh concurred in the existence of the guarantee, but dissented as to its scope and weight. Justice Dawson dissented completely.

[2] Justices Brennan, Deane and Toohey decided *Nationwide News* on the basis of the implied guarantee. Chief Justice Mason and Justice McHugh, following earlier decisions, decided the case by enforcing a limitation on the extent of the Commonwealth's legislative power incidental to the heads of power in section 51, as there was an absence of 'reasonable proportionality' between the legislation and the legitimate incidental legislative powers of the Commonwealth Parliament. Justice Gaudron appeared likewise to decide the case on the basis of this limitation. However, she seemed also to imply that her reasoning was in effect equivalent to the approach of Justices Brennan, Deane and Toohey (see *Nationwide News*, 94-5). Justice Dawson, again, dissented.

which was sharply critical of Dr Andrew Theophanous, then chair of the Federal Joint Parliamentary Standing Committee on Migration Regulations. The letter stated:

> I have real regrets that [Dr Andrew Theophanous] ... stands for most things Australians are against. He appears to want a bias shown towards Greeks as migrants. ... It has been reported that Dr Theophanous wants the British base of Australian society diluted so that English would cease to be the major language. What is this man on about? ... Poor old Arthur Calwell must be spinning in his grave at the idiotic antics of the man in the seat named after him.

Theophanous commenced defamation proceedings against the Herald & Weekly Times Limited, proprietor of the *Sunday Herald Sun*. He pleaded that the letter contained a number of derogatory imputations, including the suggestion that 'the Plaintiff stood for things most Australians were against' and 'the Plaintiff was an idiot and his actions were the antics of an idiotic man.'[3]

In *Stephens* and *Theophanous*, the defendants argued that the articles and letter were published pursuant to a constitutional freedom to publish material discussing political matters, and the performance and suitability for office of members of parliament. It was maintained that this freedom required that the common law principles governing the law of defamation be reformulated to grant people greater freedom to undertake reasonable discussion and criticism of persons in high public office without fear of defamation proceedings.

These cases went beyond *ACTV* and *Nationwide News* in a number of respects. Firstly, it was argued that freedom of political communication necessarily impacts on the law of defamation, an ordinary aspect of the common law. Secondly, since the common law rules relating to defamation had been altered by Western Australian legislation, the court was necessarily asked to hold that the legislative powers of the Western Australian Parliament were limited by the implied guarantee.

Now the implied guarantee could extend to a State parliament in one of two ways: either as an implication of the State constitution itself, or as implication of the Commonwealth Constitution which extends to the legislative powers of the State parliament. In *Stephens* the court was asked to derive the guarantee from the WA Constitution; in *Theophanous* it was asked to derive it from the Commonwealth Constitution.

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[3] *Theophanous v The Herald and Weekly Times Limited (1994)*, cited as '*Theophanous*.'

On 12 October 1994, the High Court published its reasons for decision in *Stephens* and *Theophanous*. It held by a narrow majority that as a result of both the Commonwealth and Western Australian constitutions respectively the interpretation of the law of defamation must be altered.[4] Where a defendant publishes false and defamatory material relating to political matters or the performance of holders of high office, the court held that there is a defence available where the defendant establishes that it was unaware of the falsity of the publication, did not publish the material recklessly (not caring whether the material was true or false), and acted reasonably in not ascertaining whether the material was actually true or false.[5]

The guarantee inherent in the Commonwealth Constitution was said to extend to the State parliament due to the 'indivisibility' of communications and issues having a political significance in the state and federal arenas. The guarantee inherent in the WA Constitution was derived from the requirement in section 73 of the WA *Constitution Act* 1889 (as amended in 1978) that members of parliament be 'chosen directly by the people.' This provision is 'entrenched' in the *Constitution Act* because the Constitution requires any amendment to be approved at a popular referendum. Thus the WA Parliament is not able to amend section 73 by ordinary legislation. The court held that in entrenching a form of popular or representative government, the *Constitution Act* necessarily implied a guarantee of freedom of political communication similar to the guarantee operating at the Commonwealth level.

Voting for 'Tweedledum and Tweedledee'

Langer v Commonwealth

In the aftermath and euphoria of these momentous decisions, commentators began to speculate what further rights and implications the courts would be prepared to derive from the Australian system of representative democracy. Since they were based on a 'generalised' system of representative democracy, the *Freedom of Speech* cases[6] led

[4] Chief Justice Mason and Justices Deane, Toohey and Gaudron; Justices Brennan, McHugh and Dawson dissenting.

[5] In another decision brought down on the same day the High Court considered the new Part 2A of the *Migration Act 1958*, which prescribed a system for the registration of migration agents and placed restrictions, subject to certain exceptions, on the giving of 'immigration assistance' and on making 'immigration representations' by an unregistered person acting on behalf of an 'entrance applicant.' Despite its alleged infringement of the implied guarantee, the legislation was upheld: *Cunliffe v Commonwealth* (1994), cited as '*Cunliffe*.'

[6] *ACTV*, *Nationwide News*, *Theophanous* and *Stephens* are referred to collectively as the '*Freedom of Speech* cases.'

a number of commentators to speculate as to what further rights could be derived from this concept and be used to strike down inconsistent legislation (e.g. Doyle, 1993). In particular, some observers suggested that representative democracy implies an equality of voting power, so that the size of electoral districts must in fact be as nearly as practicable equal in size (Creighton, 1994; Kirk, 1995). Others took issue with the system of compulsory preferential voting established under the Commonwealth and State constitutions. The argument was that preferential voting is inconsistent with representative democracy, since it requires voters to express preferences for candidates for whom they might not wish to vote at all.

Consequently, in the atmosphere of the 1996 federal election, and with much media attention, Mr Albert Langer encouraged the electorate to 'Vote for Neither!' by filling in their ballots '1,2,3,3' or '1,2,3,4,4.' This was to be an expression of protest against the two major parties, 'Tweedledum and Tweedledee,' and implicitly a protest against compulsory full preference voting. The Australian Electoral Commission successfully sought a Victorian Supreme Court order to prevent Langer from distributing his material (*Australian Electoral Commission v Langer* (1996)). But Langer defied the injunction by distributing his leaflets outside the court, and was promptly sentenced to 10 weeks imprisonment (*Langer v Australian Electoral Commission* (1996)).

Apart from these proceedings, Langer brought a High Court action seeking a declaration that sections 240 and 329A of the *Commonwealth Electoral Act* 1918 were invalid (*Langer v Commonwealth* (1996), cited as '*Langer*'). Section 240 required voters to express a full preference vote by indicating sequential preferences for *all* candidates. However, the 'saving provisions' of sections 268 and 270 alleviated this by maintaining the formality of a vote which expressed only a partial or selective preference. The original purpose of the saving provisions was to 'provide a safety net for people who made a genuine mistake in filling out their ballot papers,' but according to a parliamentary report the unintended consequence was to enable people intentionally to vote in a selective manner (Joint Standing Committee on Electoral Matters, 1990:30). Following this Report, section 329A was inserted to minimise this unintended consequence by imposing a penalty of imprisonment for up to six months for encouraging voters to engage in selective preferential voting.

This was certainly a heavy-handed response. The Commonwealth Parliament decided to penalise – with criminal sanctions – expressions of opinion intended to persuade people to vote in a way which

expresses no preference for particular political candidates and for the parties which sponsor them.

Voting for 'Neither'

Muldowney v South Australia

The provisions of the *Commonwealth Electoral Act* challenged by Langer have counterparts in State electoral legislation. Section 76 of the *Electoral Act* 1985 (South Australia) imposes a system of full preferential voting in language effectively equivalent to the corresponding section 240 of the Commonwealth Act. Paragraphs 126(1)(b) and (c) of the South Australian Act likewise make it an offence to advocate publicly 'that a voter should mark a ballot paper otherwise than in the manner prescribed in section 76(1) or (2)' or 'that a voter should refrain from marking a ballot paper issued to the voter for the purpose of voting.' This paralleled the effect of section 329A of the Commonwealth Act.

Mr Muldowney, likewise a campaigner against compulsory full preference voting, sought a High Court declaration that sections 76 and 126(1)(b) and (c) were invalid as contrary to the freedom of political discussion implied by the Commonwealth Constitution and contrary to a similar freedom implied by the South Australian Constitution (*Muldowney v South Australia* (1996), cited as '*Muldowney*').

Equality of Voting Power

McGinty v Western Australia

Meanwhile, members of the Western Australian Legislative Assembly and Council assailed the unequal manner in which the *Constitution Acts Amendment Act* 1899 and the *Electoral Districts Act* 1947 (WA) distributed Western Australian electorates (*McGinty v Western Australia* (1996), cited as '*McGinty*'). They argued that the unequal distribution was contrary to representative democracy as implied by the Commonwealth and WA constitutions. Taking issue with the gross 'malapportionment' of electorate sizes – against metropolitan and in favour of non-metropolitan voters – the basis for the challenge was that there is a constitutional requirement that, as far as is practical and reasonable, electoral divisions should contain approximately the same number of eligible voters, thereby ensuring a reasonable level of equality of 'voting power' for all electors across the State.

This constitutional requirement was said to be derived in a number of ways. Firstly, it was seen as an implication of the basic concept of representative democracy. Secondly, it was justified by

reference to the principle of political equality. Thirdly, it was presented as an implication of the specific language of the Commonwealth and Western Australian constitutions. In sloganistic but succinct terms, the plaintiffs were urging the court to find that the principle of 'one vote, one value' applied to the State Constitution.

However, the High Court by substantial majorities unexpectedly rejected the plaintiffs' arguments in *Langer*, *Muldowney* and *McGinty*, even though they were based on the apparently nascent emphasis that the High Court had given to representative democracy and freedom of speech. Freedom of political communication did not save Mr Langer from spending some ten weeks in prison for continuing to encourage people not to express full preferences in their voting after a Supreme Court order proscribing such conduct. Representative democracy did not imply the need for equality of voting power so as to strike down Western Australian electoral legislation which allowed discrepancies in the sizes of electorates of up to 376%, and, on current enrolments, apparently as high as 414% (*McGinty*, 214).[7]

Shooting Ducks

Levy v Victoria

Meanwhile, another important case commenced in July 1995, when Mr Lawrence Levy brought High Court proceedings seeking a declaration that regulation 5 of the *Wildlife (Game) (Hunting Season) Regulations* 1994 (Victoria) was invalid. In June 1994, Levy had been charged under the regulations and associated provisions for entering a permitted hunting area during prohibited times without a valid game licence. For him, entry into the hunting area was a means, indeed the only effective means, of protesting against the practice of duck-shooting. It would enable him to bring the practice to the attention of the television viewing public and to collect wounded ducks as evidence of the inhumanity of the practice. He therefore argued that the regulations were contrary to an implied constitutional freedom (amongst other things):

1. to protest against the law, policy and practice by physical presence or activity in the hunting area and by attracting media attention to actual events in the hunting area;

2. to engage in informed, rational and persuasive debate of the issues, making use of actual samples; and

[7] In *McGinty*, Chief Justice Brennan and Justices Dawson, McHugh and Gummow rejected the plaintiff's case; Justices Gaudron and Toohey dissented; in *Langer*, somewhat ironically, only Justice Dawson upheld the plaintiffs'case. See Aroney, 1996.

3. to be publicly seen aiding injured ducks.

In the particular circumstances, Levy asked the court to go further than it had in *Stephens* and *Theophanous*. Firstly, Levy was essentially asking the court to protect protest activities which, while a form of communication, were not specifically speech or writing. Secondly, while Levy relied on the *Stephens* and *Theophanous* application of the implied guarantee to State legislative powers, those cases had concerned public criticism of politicians, something central to the political process in a free society. *Levy* did not concern politicians or defamation. Thirdly, while the Victorian Constitution, like its counterpart in Western Australia, provides for a system of representative government, the relevant provisions are not 'entrenched' by requiring a popular referendum for their alteration. It therefore lies within the power of parliament to alter the system of representative government in Victoria. In *Stephens*, it was the entrenchment of 'democracy' which placed freedom of political communication beyond the power of the WA Parliament.

Without this firm basis for the derivation of a guarantee of free communication, the plaintiff was forced to rely on the guarantee operating under the Commonwealth Constitution, as applied in *Theophanous*. Moreover, the relevant provisions in the Victorian Constitution do not use the classic words 'chosen by the people' which appear in the Commonwealth and WA constitutions. Finally, the regulations were introduced after reports contained in an official Regulatory Impact Statement of dangerous confrontations between armed shooters and rescuers. Their professed purpose was to protect against potentially lethal encounters, and the magnitude of the risk called for strong measures, and this, it turned out, was the major problem facing Mr Levy.

In *Levy v Victoria* (1997) (cited as '*Levy*'), counsel for the defendants initially sought only to distinguish the Levy circumstances from those in *Stephens* and *Theophanous* and to rely on some of the more restrictive comments in *Theophanous* and *McGinty*. However, under prompting from Justice Dawson, the defendants sought leave to reopen and re-argue the principles contained in those cases. Leave was granted and the matter adjourned to enable other interested parties to make submissions in the matter in due course.

Unanimity and Consensus?

Lange v ABC

Meanwhile, Mr David Lange, former Prime Minister of New Zealand,

commenced proceedings in the New South Wales Supreme Court for damages for allegedly defamatory statements published by the Australian Broadcasting Corporation (*Lange v Australian Broadcasting Corporation* (1997), cited as '*Lange*'). The statements concerned Lange's conduct as a member of the New Zealand Parliament. Lange argued that *Theophanous* and *Stephens* ought to be re-opened, having been wrongly decided, and, in the alternative, argued that they did not support the defences pleaded, particularly in that the case involved the conduct of a member of the New Zealand Parliament. The court had again to determine whether, and if so in what way, the implied freedom of political communication impacted on the law of defamation.

Because *Levy* and *Lange* concerned similar issues, they were heard together. However, perhaps because the court was able to deliver a unanimous judgment in *Lange*, its decision in that case was brought down first. Bearing in mind the controversy which had accompanied the previous decisions, the unanimous decision in *Lange* came as something of a relief. The 9 July 1997 editorial of *The Australian Financial Review* was pleased to note that:

> Faced with a difficult balancing act between freedom of speech concerns and mounting criticism of judicial activism, the High Court's seven justices ... have constructed a unanimous decision.

Likewise, the editorial of *The Australian* opined that:

> entrenching the basic achievement of the court under former Chief Justice Anthony Mason ... such coherence and consolidation is good for the court itself as an institution, considering the vehemence of the recent spate of attacks.

The High Court, in its own words 'armed' with the 'illumination and insights' derived from the earlier cases, sought 'to settle both constitutional doctrine and the contemporary common law of Australia governing the defence of qualified privilege in actions of libel and slander' (*Lange*, 103). With clarity and simplicity, the court, now consisting of Chief Justice Brennan and Justices Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby, delivered a concise, synthesising and conciliating judgment, which brought together the strands of the previous decisions. It confirmed a central consensus affirming the existence of the implied freedom of political communication, but seemingly limited its scope and the potential for further implications, and also reworked and clarified the way in which the constitutional guarantee impacts on the law of defamation.

In *Levy*, much of this consensus prevailed, the court unanimously

holding that the freedom extended to expressive conduct, including the conduct of the plaintiff. All members of the court, however, thought that the prohibition in regulation 5 was reasonable, given its objective of ensuring 'a greater degree of safety of persons in hunting areas during the open season.'

The Breakdown in Unanimity

Kruger v Commonwealth

This consensus, however, was not to prevail. In May 1997 the nation was shocked by the report of the Human Rights and Equal Opportunity Commission into the forcible removal of Aboriginal and Torres Strait Islander children, known as the *Stolen Generation Report*.[8] In *Kruger v Commonwealth* (1997) (cited as '*Kruger*'), a number of indigenous Australians brought an action alleging that, as children, they had been unconstitutionally removed from their parents and detained under the *Aboriginals Ordinance* 1918 (Northern Territory), and, in one case, that her child was taken from her. They sought a declaration that the Ordinance was invalid, and sounded in damages either in trespass or as a 'constitutional tort.' In support of these contentions, the plaintiffs raised a number of grounds of invalidity, including several implied constitutional limitations on legislative power, such as freedom of movement, freedom of association, fundamental legal equality, due process and a prohibition on genocidal legislation. The first of these two implied freedoms is of course closely related to the implied freedom of speech.

The justices expressed varying measures of concern or regret at the policy which motivated these removals (*Kruger*, 135, 147-8, 165-6, 189, 231). However, they also took the view that the actions of the past needed to be evaluated in light of the views of the past, and not contemporary standards (*Kruger*, 135, 147, 178, 231). In the result, a majority of the court held that the implied limitations on legislative power had no relevant operation. For Chief Justice Brennan and Justice Dawson (with whom Justice McHugh agreed), this was because the plaintiffs had failed to establish the very existence of the implied limitations on power. By contrast, Justices Gummow, Gaudron and Toohey thought that the guarantee of freedom of movement and freedom of association had been established, and the latter two were prepared to strike down the Ordinance; Justice Gaudron on the case before her, Justice Toohey if at a full trial of the matter the evidence

[8] *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997.

supplied was sufficient.

The significance of the cases

The implication of the guarantee of freedom of communication was indeed a radical step for the court to take. This is seen especially when the historical and legal background of the Constitution is taken into consideration. The records of the constitutional conventions of the 1890s indicate that the possibility of including Bill-of-Rights-type guarantees in the Australian Constitution was openly debated and explicitly rejected (La Nauze, 1972:227-32). The Constitution in its present form contains only a few scattered guarantees of rights, such as free trade between the states (section 92) and the free exercise of religion (section 116). The Constitution in no place addresses the issue of freedom of speech, let alone provides for a guarantee thereof.

However, the court held that, despite the lack of express provision, the Constitution necessarily implies such a guarantee, by virtue of the provision for a system of representative government in sections 7, 24, 25 and 64 of the Constitution. These provisions envisage elections at which electors directly choose qualified individuals to sit as members of parliament, from amongst whom Ministers of State will be selected to advise the Governor-General in the exercise of the executive power of the Commonwealth. Further, section 128 provides for the amendment of the Constitution upon the approval of a majority of electors in a majority of the states and a majority of all electors throughout the Commonwealth.

The court held that these sections necessarily imply the doctrine of representative government, and that representative government in turn necessarily implies the existence of freedom of communication with respect to political matters. It followed that because the legislative powers of the parliament in section 51 are conferred 'subject to' the Constitution, they are subject to a guarantee of freedom of communication with respect to political matters. Finally, the court held that the guarantee is not absolute, but is subject to limitations in cases where legislation can be justified as a reasonable and appropriate measure for the attainment of a legitimate public objective when balanced against the public interest in freedom of communication.

Now it is well established that necessary implications may assist the court in its interpretation of the Constitution. It is also well established that the doctrines of representative government, federalism and the separation of powers are necessarily implied by the Constitution. Indeed, the court has occasionally been prepared to reject

Commonwealth legislation which unduly affects the system of federalism by discriminating against a State or States. However, the process of implication involved in those cases was tightly confined to the text of the Constitution. Limits were placed on the extent to which such implications could in turn engender further implications or generate limitations on legislative power. As Justice Toohey acknowledged in an address, shortly after delivery of the reasons for decision in ACTV:

> In Australia, the existence of implied limits derived from the federal nature of the polity is well established, but historically the High Court has not implied limits derived from the liberal-democratic nature of the polity (Toohey, 1992:9).

A sophisticated argument

In light of this background, the court's argument was couched in careful terms. Chief Justice Mason emphatically stated that 'any implication must be securely based' (*ACTV*, 134). Justice Brennan considered that:

> The only foundation for judicial review of legislation is the subjection of both the parliament and the courts to the supreme law of the Constitution ... The courts are concerned with the extent of legislative power but not with the wisdom or expedience of its exercise. If the courts asserted a jurisdiction to review the manner of a legislative power, there would be no logical limit to the grounds on which legislation might be brought down (*Nationwide News*, 44).

In *Theophanous*, his Honour became even more emphatic:

> In the interpretation of the Constitution, judicial policy has no role to play. The court, owing its existence and its jurisdiction ultimately to the Constitution, can do no more than interpret and apply its text, uncovering implications where they exist. The task is to expound the text of the Constitution ... (*Theophanous*, 143).

This reserve was heavily underscored by the majority in *McGinty* and by the entire court in *Lange*. In the latter case, the court stated:

> Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of 'representative government' only to the extent that the text and structure of the Constitution establish it (*Lange*, 112).

Thus the court unanimously pointed out:

> Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly

> understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution (*Lange*, 112).

The sophistication of the court's reasoning lay in two areas. Firstly, while general guarantees of individual rights might be inconsistent with the Constitution's faith in representative government, the court plausibly maintained that guarantees of rights essential to the proper functioning of representative institutions are actually consistent with a reliance on those institutions. In this sense, the argument derived strength from the kind of thesis propounded by Professor Ely in his well-known *Democracy and Distrust* (1980), and more recently refined by Professor Sunstein in *The Partial Constitution* (1994). On this view, freedom of speech and similar rights lie at the heart of representative government, and must be understood as 'democracy reinforcing' or 'preconditions for democracy' (Sunstein, 1994:142-4). When applied to the Australian constitutional order, this readily translates into the view that freedom of speech is necessarily implied by the provision for representative government.

This thesis also fitted in well with a second objective, to show how the guarantee of freedom of communication merely involves an application of traditional methods of legal reasoning. The court sought to demonstrate that the implication of the guarantee was consistent with previous case law and represented no significant departure from the principles of interpretation followed by the court since the landmark decision in the *Engineers' case* in 1920.[9] It would therefore be distinguished from the unsuccessful attempts of Justice Murphy through the 1970s and 1980s to establish a catalogue of constitutional rights on the relatively ephemeral basis of 'the nature of our society.' The court's decision would be 'restrained' by precedent and by the application of strictly legal reasoning. It would not be an instance of 'judicial activism.'

Far-reaching consequences?

Although in the more recent cases the court has become more reticent, the decisions remain significant. There is no judicial indication that *ACTV* or *Nationwide News* is likely to be overruled, so, in addition to introducing a guarantee of freedom of communication, they continue to open the way for further implied rights, especially at a Commonwealth level (Doyle, 1993:27). Commentators have suggested that

[9] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920), cited as '*Engineers*.' See the discussion in chapter three.

these might include freedom of association, a right to participate in political affairs and a general right to freedom of speech. Indeed, Justices Gaudron, Toohey and McHugh in varying degrees have expressly supported these kinds of rights (*ACTV*, 227; *Kruger*, 176-7, 196-7), although Justice McHugh has subsequently reconsidered the matter to some degree (*Theophanous*, 206; *Kruger*, 218). Justices Gaudron and Toohey have cited with approval Justice Murphy's dissentient support for a guarantee of freedom of movement and prohibitions of serfdom and slavery, and of cruel and unusual punishment (*ACTV*, 212; *Kruger*, 175).

Further, *ACTV*, *Nationwide News* and *Theophanous* are particularly radical decisions, in that they go to the root of the Constitution and raise the most elementary issues concerning the fundamental nature of the Australian polity. As we shall see, before turning to the question of necessary implications the court inquired into the legal or constitutive authority upon which the Constitution is based, and the appropriate method of interpretation which should follow. A majority then emphasised the view that the Constitution is essentially a contract entered into by a *free and sovereign people*, under which they have set up a system of representative government which respects their fundamental rights and liberties. By stressing this doctrine of 'popular sovereignty' and a 'social contract' interpretation of the Constitution, it was easier to conclude that a guarantee of freedom of communication is necessarily implied.

Democracy and rights

But this position reflected a profound shift in emphasis. Previously, the court had stressed the nature of the Constitution as an Act of the Imperial Parliament (albeit a constitutive Act and a fundamental law), and as a federal agreement or pact between the states. The court had hitherto relied on the idea that the founding fathers and the Imperial Parliament, on the basis of Dicey's theory of the sovereignty of parliament, intended to set up something of a 'Westminster' style government, adapted for Australian conditions and a federal polity, which itself involved a steadfast trust in parliamentary processes as a secure bulwark of personal freedom and individual rights (*Engineers*, 151). It was supposed that the system of representative government would protect the rights of the Australian citizen, so no additional guarantees of rights were necessary. Indeed, such limitations on parliamentary power would be inconsistent with the principles of democracy: they would, it was thought, inhibit the rightful powers of

a democratically elected legislature.

It was thus ironic that the principle of representative government should be used by an *unelected* judiciary as the basis of the implication of a guarantee of freedom of communication which operates as a limitation of the powers of a democratically elected parliament (Winterton, 1986:234). According to A.V. Dicey's theory, the sovereignty of the people, used by the court as undergirding representative government, is the ultimate foundation of the *supremacy* of parliament, and the supremacy of parliament as understood by Dicey is antithetical to the idea of judicially defined constitutional rights (Dicey, 1920:68; Lumb, 1983:68). Therefore, at a fundamental level, it is not easy to see how majority rule (implicit in representative democracy) and constitutional guarantees of individual rights defined and enforced by the courts can *fully* coexist.

For many commentators, the apparently antithetical values of the democratic process and majority rule on one hand and constitutional guarantees of individual rights on the other constitute the central dilemma, and impasse, of contemporary constitutional thought (see Waltman and Holland, 1988:5, 227; Brewer-Carias, 1989:113, 116; Walker, 1990; Foley, 1989:94-7, 120-2; McIlwain, 1947:139-40). For example, Justice Kirby, when President of the Court of Appeal in New South Wales, observed that the 'one central problem' of constitutional theory in common law countries is the conundrum of how to resolve the conflict between individual rights and democratic theory. He thought that the primary task of constitutional adjudication was to devise a 'means for the protection and enhancement of individual human rights in a manner consistent with the democratic basis of our institutions' (*Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986:387); cf. Allan, 1985).

For this reason, the argument in favour of an implied guarantee of free political communication as a necessary implication of representative democracy was breathtaking. And in the later cases, Justices Deane and Toohey went even further, arguing that the Constitution must be interpreted as a 'living force' adapted to changing times and the needs of society:

> To construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and its

> adaptability to serve succeeding generations (*Theophanous*, 171; cf. *McGinty*, 199).

But it is an unelected judiciary which is adapting the Constitution to new uses, without the sanction of an amendment to the Constitution. The consent of the governed, expressed in the will of the majority, is generally considered to be the basis of the legitimacy of the state and of the exercise of its monopolistic, coercive powers.[10] The exercise of those powers by an *elected* legislature is thought to justify at least some state-enforced restrictions on individual liberty (see Tierney, 1982; Walker, 1990; Gifford, 1989). However, the majority in a society may choose to support legislation or executive action against individuals which, to a greater or lesser degree, impinges on what are deemed to be their 'inalienable rights' as individuals (Dworkin, 1981). In the light of this possibility, safeguards against such legislation have been devised in the form of Bills or Charters of rights, which implicitly or explicitly give judicial bodies the power to refuse to enforce such legislation and to declare it void.

While the Bills or Charters indicate the areas of rights to be upheld by the courts, a certain area of discretion is left open by virtue of the kind of language used: value-laden and sometimes ambiguous (Moens, 1994). Judges may take expansive or narrow views of the amount of discretion they are entitled to exercise (Waltman and Holland, 1988:9; Brewer-Carias, 1989:106-11), and in taking an expansive view, they will be substituting their own view of a matter for the views expressed by the democratically elected legislature reflected in the legislation under review. The difficulty, particularly when judges take an expansive view of their role, is that judges are not democratically accountable. They are protected from legislative and executive interference because of the independence of the judiciary: they can only be removed upon proved misbehaviour and addresses by both houses of parliament, and their salaries cannot be reduced. Obviously, they are not subject to regular popular elections (Montesquieu, 1748:151; Locke, 1764:75-5, 83; Madison, 1788a:300-324).

Certainly, the independence of the judiciary is very important to the preservation of constitutional limits on government and the protection of individual rights. If the executive government can easily remove judges from office or financially induce them to concur with unconstitutional government policy, the courts are unlikely to present any effective constitutional barrier to a determined executive. How-

[10] Either as an outworking of, in conjunction with or in substitution for appeals to a divine, natural, customary or reason-based sanction of human government.

ever, the essential justification for placing the judiciary in such a role is to uphold the law, and particularly the law of the constitution, against illegal acts of the executive and parliament. If, however, the law of the constitution turns out to be extensively malleable in the hands of the High Court, why should it, as an unelected body, have what is effectively the power to veto legislation with which it disagrees?

What makes the issue particularly pointed in the context of the *Freedom of Speech* cases is that the implication of the guarantee of freedom of communication was not based on the typically abstract, value-laden and open-ended language of most express guarantees of rights contained in international covenants or national Bills or Charters of rights.[11] Where the language is intentionally open-ended, it is much less objectionable for courts to exercise their discretion to fill in the meaning of the terms used in the instrument: the ambiguity *invites* judges to use their discretion and it is difficult to see how they can avoid doing so at least to some degree (Dworkin, 1981:134-6; Brewer-Carias, 1989:109-10; Zines, 1986:87; Crawford, 1986:123). The debate then relates to how they exercise that discretion. Judges might have regard to the original understanding of the framers (Berger, 1977:99-116), to what they discern to be contemporary community values, or to what they believe to be fundamental moral principles.

However, the guarantee implied in the *Freedom of Speech* cases is based on a collection of texts which are very concrete, relatively value-free and determinate in meaning.[12] The court inferred a fully fledged guarantee of free communication with respect to political matters, including exceptions which concede the enactment of appropriate legislation for legitimate public purposes – all purportedly on the basis of five relatively terse sections of the Constitution and all purportedly in terms of well established methods of interpretation used by the High Court through its ninety-two years of constitutional adjudication. Admittedly, Sir Anthony Mason has elsewhere suggested a more 'progressive' method (Mason 1987). However, as we shall see, he and Sir Gerard Brennan carefully relied on the methodology of 'necessary implication,' as developed in *Melbourne Corporation v Commonwealth* (1947) (cited as '*Melbourne Corporation*'), suggesting the importance

[11] The kind of provisions to which Ely, 1980 and Dworkin, 1980, 1986 and 1997 consistently appeal.

[12] Putting aside, for the moment, arguments of those who hold that all texts are inherently and profoundly 'open' to interpretation. The court's very method of argumentation (and rhetoric) presupposes that the Constitutional text, and indeed the law itself, has a capacity to control the judges in their 'interpretations.'

of those established methods of interpretation.

Such methods aim to maintain the predicability of court decisions and, more importantly, the accountability of judges to something more than their personal views on the issues set before them (Dixon, 1965:165; Goldsworthy, 1997). An important question, then, is whether the court, in inferring the guarantee of freedom of communication, has succeeded in formulating an argument which genuinely follows these concrete methods or guidelines. I ask this question nevertheless with strongly felt sympathy for concerns at the potential for a 'tyranny of the majority' and the need for some limits on the supposed 'omnicompetence' of parliament (Walker, 1985). The matter is a vexed one.

PART I

A THEORY OF JUDICIAL REVIEW

It has been very properly said ... that this act declaring the right of the citizens and forming their government ... must be considered as a rule obligatory upon every department, not to be departed from on any occasion. But *how far* the court, in whom the judiciary power may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its form by the legislative power, without exercising the power of that branch contrary to the plain terms of the constitution, is indeed a deep, important, and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas. (Judge Pendleton, *Commonwealth v Caton* (1782))

CHAPTER 2

JUDICIAL REVIEW AND THE ENFORCEMENT OF THE CONSTITUTIONAL ORDER

> Conundrums concerning the constitutional source and justification of judicial power to declare legislation invalid are not only intrinsically important. They ought to be of considerable significance in the determination of when and on the basis of what criteria the judiciary should make such declarations. ... If ... no authorisation for judicial review is provided by the Australian Constitution, those courts which embark upon such a journey must do so with caution (Thomson, 1988:177).

The *Freedom of Speech* cases raise, in a fundamental, complex and interweaving manner, very searching questions concerning the *locus* of sovereignty under the Australian constitutional order. They force us to consider what is the essential nature of the Australian polity, and what implications this has for the role of the High Court and the powers of the Commonwealth Parliament. The decisions embody a profound irony: an elite judiciary acting as the bulwark of the democratic process, against an elected parliament and a responsible executive which might seek to sabotage the very democratic process which is said to give them legitimacy.

In seeking to resolve that fundamental irony, the court's logic relies implicitly on a distinction between a *constitutive sovereignty* resting in the 'people' and a *constituted authority* vested in the departments of government under the Constitution. Each has its constitutional role to fulfil as allocated by the people, and for the court that role includes judicial review of legislation (Brewer-Carias, 1989; Ackerman, 1991). However, since the *Freedom of Speech* cases, especially as formulated in the earlier decisions, turn on a series of implications rather than explicit provisions of the Constitution, the difficulty is not resolved quite that easily. It is still an unelected judiciary which imputes to the 'people' a set of implications which they have not made explicit in the Constitution. In this sense the argument is not unlike the dubious 'logic' of Rousseau's 'lawgiver' who would 'force

the people to be free':

> by themselves the people always will what is good, but by themselves they do not always discern it. The general will is always rightful, but the judgment which guides it is not always enlightened ... Individuals must be obliged to subordinate their will to their reason; the public must be taught to recognise what it desires ... Hence the necessity of a lawgiver. (Rousseau, 1762:83)

While a constitutional guarantee of freedom of political communication is a classical liberal right, and members of the court saw it in this way (*Nationwide News*, 76), the manner of its derivation was not necessarily liberal. As Michael Greve recently pointed out, despite ostensible 'libertarian commitments':

> Once the Supreme Court strays from the text, it must find legitimacy elsewhere. It must build and maintain political support, and so constitutional law becomes another interest group racket (Greve, 1997:46).

A Perennial Questiion

The cases therefore acutely raise a question about the nature of judicial review under the Australian constitutional order, and it is necessary first to consider the grounds and scope of judicial review before examining the particular exercise of the power in the *Freedom of Speech* cases. The issues which appear when we consider the legitimacy of judicial review in general, reappear when we consider the implication of a guarantee of freedom of political communication. Judicial review has always appealed to law as a constitutional control or limit on the exercise of political power, rather than law as an instrument of power, though the partisans have varied at different times and in different places. At one stage, the constitutional battle lines lay between the forces of overarching empire, church and kingdom; at other times, between local baronial and centralising royal power; again at other times, between the executive prerogatives of a strong crown, and parliamentary and judicial appeals to an 'ancient constitution' and 'immemorial rights.' In all of these instances, whether sincerely or out of self-interest or both, the debate was waged in constitutional and legal terms.

With the mature evolution of judicial review under the Australian constitutional order, one finds a similar conflict of views rooted in fundamental conceptions of constitutionalism and the rule of law. Here, the battle lines lie between the judicial and the parliamentary departments of government. These two departments, once united and

victorious over the royal prerogative, are now fighting over the spoils of battle, so to speak. But again, the governing principles to which the partisans consistently appeal are constitutional ones.

The formulation of a theory of judicial review and its application to the *Freedom of Speech* cases cannot, therefore, be undertaken without an appreciation of the broad sweep of Western, and specifically English, constitutional history. Here, the particular focus lies on the evolution of legal limits on governmental power, the use of a written constitution for that purpose, and the emergence of the courts as final arbiters of the constitutionality of governmental acts. In that context, the central proposition of the present chapter is that the problem of judicial review is essentially a problem of the *enforcement* of the constitution, and that the proper ground, purpose, scope and methodology of judicial review must be constitutional. Our conception of the constitutional order will determine our particular conception of the purpose, scope and methodology of judicial review.

It should be understood at the outset that the idea of judicial review, in all its forms, presupposes the existence of a constitutional order consisting of *pre-existing* law which functions as the standard of review. The constitution is enforced by the courts when they refuse to give force to legislation or executive acts which are unconstitutional or illegal. They are deemed to be *ultra vires* (beyond power) and void, and the courts refuse to execute judgment on persons against whom the void legislation or executive act purported to apply.

Thus within the constitutional sphere there are two basic forms of judicial review, depending on whether it is applied to legislation or administration, and there are a number of sources of law which can function as the standard of review in each case. In the case of the review of legislation, the pre-eminent standard of review is of course the Constitution. In the case of the review of administration, the standard of review can be either the Constitution or specific legislation directed at controlling the executive. As we shall see, the early development of judicial review was centrally concerned with the legal control of the executive powers of the king and his officials. Because the English Parliament eventually secured ultimate supremacy over the king during the seventeenth century, parliamentary legislation is clearly a ground upon which executive action can be subject to judicial review. This has evolved into what is today known as administrative law.

About the same time that parliament secured supremacy over the king, a further important fact came to be recognised. This was that parliament had for some time asserted a *legislative* role: that it actively

made, rather than passively discovered and declared, the law. It was realised that parliament, as a *legislature*, enjoyed a supremacy over the other institutions of government. The concern then became one of placing constitutional limits on parliament as the new 'sovereign,' a concern which led to the development of judicial review of legislation.

The development of judicial review of legislation also took strength from another form of judicial review, this time over the historical antecedents of the colonial legislatures. In the field of local government, where a municipal or corporate body may be granted specific administrative or legislative powers, the courts held that that body must not exceed its powers, and if it did, its actions were *ultra vires* and void. With the growth of the British Empire and the creation of colonial bodies having various administrative and legislative responsibilities, the same principles of judicial review were applied to *ultra vires* acts of these corporations, a form of judicial review. This *imperial* model of judicial review formed an institutional basis and precedent for *constitutional* judicial review in the American and Australian colonies. As the colonial charters and statutes granting colonial administrative and legislative powers evolved into our modern constitutions, the imperial model of judicial review – coupled with a concern to control the otherwise sovereign powers of colonial legislatures – merged imperceptibly into modern constitutional judicial review of colonial legislation.

Thus judicial review under the Australian Constitution has varying institutional and theoretical foundations. In the *Freedom of Speech* cases, two methodologies of judicial review were perceived as being in conflict. The first was a methodology founded on a conception of the Australian Constitution as fundamentally an Act of the United Kingdom Parliament, with the implication that it is to be interpreted as an instrument of the Imperial Parliament creating a subordinate legislature whose powers are limited to the terms of the grant of power and subject to judicial review on that basis. The second was a methodology based in a view of the Constitution as a foundational document which derives its force from the consent of the Australian people.

In the *Freedom of Speech* cases it was urged that the former model of judicial review precluded the implication of a guarantee of freedom of communication, whereas the latter model was used to support the implication. Thus the court gave particular weight to the idea that the Constitution derives its force from the consent of the Australian people. The abdication of British legislative powers over Australia, consummated in the *Australia Acts* 1986, was seen as an important reason for

adopting the latter model and concluding that the Constitution is essentially concerned with providing the framework for a *democratic* society – which necessarily requires a guarantee of freedom of political communication.

However, in the chapters which follow it will be argued that the latter model does not inherently lead to the implication of a guarantee of freedom of political communication. With this purpose in mind, the present chapter will endeavour to show that the constitutional model of judicial review, in the light of its historical development, is principally concerned with the enforcement of a particular constitutional order which is purposely controlled by a *written document*. Two aspects will therefore be dealt with: the problem of *who* is to be the guardian of the constitution, and the problem of *what* is the constitution to be enforced. It will be argued that where a political order places the role of guardian on the shoulders of an independent judiciary, and where the constitution to be enforced is a written one, the appropriate judicial method is one of *interpretation*, not expansion, of the Constitution; a methodology which calls for *self-restraint*, not unconstrained activism, on the part of the courts.

Enforcing the Unwritten Constitution

Constitutionalism: Legal Limits on Governmental Power

What is notable, laudable and perhaps unique – while far from ideal and not always disinterested – about the history of Western legal and political institutions is the stubborn manner in which interested parties sought principled means to limit and control the exercise of power (Tierney, 1982:108). As the national or political state evolved and increased in strength, particularly after the eleventh century, a shadow of limitation and control imperfectly dogged its trail, sometimes falling behind, but making up the lost ground again and again (Strayer, 1970:13ff; Friedrich, 1964). In general terms, this shadow of limitation and control we know as constitutionalism or the rule of law.

One means by which to recount this history and development is to see it as centrally concerned with the problem of the enforcement of the constitution against those exercising civil and ecclesiastical power. On this approach, constitutionalism has always been basic to the Western conception of law and government; the perennial problem has been to enforce the constitution so that the theory was reflected in the reality. A survey of the historical development of judicial review shows that it developed essentially as one of the central means by

which constitutional limits were made *effective* against those who exercised civil power. To understand this development, we will need to outline the evolution of constitutionalism and the problem of its enforcement, as that process has been worked out under the particular conditions of the various Western legal systems.

In this sense, both medieval and modern constitutionalism is essentially government under law, or limited government. Certain principles of law are fundamental because they are basic and 'unalterable by ordinary legal means,' and the government must abide by them and cannot change them at will. In his influential study, *Constitutionalism: Ancient and Modern*, Charles McIlwain stated:

> In all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law (1947:21-2).

Constitutionalism therefore involves the proposition that political power – wielded by what today we call 'the state' and backed by naked force – is legitimate only if it is justified by pre-existing law.

Accordingly, the meaning of constitutionalism is not exhausted by the proposition that political power uses laws as the *means* of enunciating general rules governing behaviour. The idea that the legislature should enunciate generalised laws, rather than allow the executive to exercise discretionary powers granted by open-ended legislation, is certainly an important aspect of constitutionalism (Ratnapala, 1990:8-13). John Locke, for example, insisted that the legislature 'cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by *promulgated standing laws*, and known authorised judges' (Locke, 1764:71). Likewise, Dicey thought that the first principle of the 'rule of law' was the 'absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government' (Dicey, 1920:198). But these propositions, while important, concern the narrower concern for the legislative control of executive power and the need for prospective, rather than retrospective, laws. A fuller conception of constitutionalism is concerned with the general proposition that *all* public power – whether executive/administrative, legislative, or judicial – should be exercised only when justified by pre-existing law, chiefly the law of the constitution.

We need not fall into the 'anachronistic' error of reading contemporary ideas back into distant history to recognise that many of the central conceptions of contemporary constitutionalism and judicial review find their roots deep in medieval history (Tierney, 1982:1-8, 103-8). What this implies is that forms of constitutionalism and judicial review existed in the middle ages, and to understand their development – and their justification, purpose and scope – we need to canvass that history.

There is clear evidence of a spirited medieval constitutionalism. As Gierke pointed out:

> Medieval Doctrine, while it was truly medieval, never surrendered the thought that Law is by its origin of equal rank with the State and does not depend upon the State for its existence. To base the State upon some ground of Law, to make it the outcome of a legal act, the medieval Publicist felt himself absolutely bound. Also his doctrine was permeated by the conviction that the State stood charged with a mission to realise the idea of Law: an idea which was given to man before the establishment of any earthly Power, and which no such Power could destroy. It was never doubted that the highest Might, were it spiritual or were it temporal, was confined by truly legal limitations (Gierke, 1968:74).

At the same time, there is also evidence of what McIlwain thought was a fundamental 'weakness' in the medieval system:

> The fundamental weakness of all medieval constitutionalism lay in its failure to enforce any penalty, except the threat or the exercise of revolutionary force, against a prince who actually trampled under foot those rights of his subjects which undoubtedly lay beyond the scope of his legitimate authority (McIlwain, 1947:93).

This 'weakness' has led some to deny the existence of a genuine medieval constitutionalism (Schochet, 1979:2-3). The key issue seems to be the transition from merely abstract theory and pious rhetoric to genuine practice: the problem of the *enforcement* of the constitution.

Medieval Constitutionalism

That there were conceived to be rights of subjects which lay beyond the scope of the king's legitimate authority certainly appears again and again in the classic patristic and medieval texts. A quite defensible starting point is to turn to Saint Augustine's influential *De Civitate Dei*, where he famously stated (only to be quoted incessantly by later

writers): 'When justice is taken away, what are realms except great bands of robbers?' (426/7:4:4). Implicit in this statement is the clear view that unless the state has justice or moral authority it is fundamentally illegitimate and held together by sheer, naked force. 'Justice,' on this view, is clearly something that exists prior to a 'realm.'

Importantly, the emphasis given to the Christian doctrine of original sin led to a negative and temporal view of the state. The basic presupposition of medieval constitutionalism was that the state was a temporary order necessitated by defects in human nature. It could not make us good; it could only prevent us from being altogether bad (Walker 1990:167-8; Cochrane 1957). As Walker argues, these assumptions are fundamental to modern constitutionalism, and are illustrated by Madison's well-known statement in *The Federalist, No. 51*:

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, nether external nor internal controls on government would be necessary (1788b:321).

The implications of these assumptions were worked out progressively in medieval and modern constitutionalism. St Isidore of Seville, Hincmar of Rheims, John of Salisbury, Thomas Aquinas and John Wyclif in distinctive ways advocated ideas which were essentially in line with this ideal of constitutionalism.[13] Carl Friedrich has noted:

> In most medieval writers such notions were connected with a doctrine of tyranny; tyranny was believed to be 'unjust' government and that meant a government directed not to the common good, but to the private good of the ruler (1964:22).

That the king was responsible to God to maintain, obey and uphold the law of God and the law of the land was a commonplace of medieval thinking, both in England and on the continent (Mitteis, 1975:9). As Strayer has pointed out, the growth of the modern state, headed by the king as sovereign, had its medieval origin in an energetic emphasis on *law* as the basis and purpose of royal authority. The developing ability of the king to provide justice, according to law, in a timely and efficient manner through the expansion of the royal courts, was one of the practical foundations of his growing authority (Strayer,

[13] See Costanzo, 1982:70, 73; Carlyle and Carlyle, 1903, I:211, 230, 242-4, 248; Gierke, 1950:22ff.; Ullmann, 1967:12-48.

1970).

It is reported that in England in 1185 Ranulf Glanvill, Henry II's chief justiciar (a status analogous to the contemporary position of Prime Minister), considered that

> our customary rights had been established reasonably and wisely, that nothing excessive could be found in them, and that the lord king neither wishes nor dares to go against customs in some measure so ancient and so just or to change anything respecting them (McIlwain, 1947:65).

The medieval polity was a 'law state' in which all political action properly functioned under and according to pre-existing law. This principle of subjection to customary law was the foundation of the king's authority. The king's accession to the throne was conditioned on his oath to uphold the traditional laws, customs and liberties of the realm. Justice was a central concern of the coronation oath, and seen as the basis of the king's authority. For example, Ethelred swore:

> In the name of the Holy Trinity three things do I promise to this Christian people my subjects: first that God's church and all the Christian people of my realm hold true peace; secondly that I forbid all rapine and injustice to men of all conditions; thirdly that I promise and enjoin justice and mercy in all judgments, that the just and merciful God of his everlasting mercy may forgive us all (Maitland, 1908:98; cf. Tierney, 1992:300; Ullmann, 1967:78-80).

In principle then, the king was under law. But what was the form and content of this law? There were a number of categories of law, all of which in different ways were conceived as binding the king's authority: the *jus divinum* (the law of God as revealed in the Bible), the *jus naturale* (the law of Nature as apprehended by reason), the *jus commune gentium* (the law commonly recognised by all nations), and the *legibus et consuetudinibus* (the ancient, immutable laws and customs of each nation). In this, as Dickinson notes,

> The identification of the 'higher law' with the 'law of God' as embodied in the scriptures, and the belief that its provisions were directly reproduced in existing texts of the Roman law, eliminated for thinkers of the twelfth century one of the cardinal difficulties which beset the doctrine of 'higher law' when it appears in the form of the supremacy of the 'law of nature,' – the difficulty, namely, of identifying any specific rules or precepts as belonging to this law (1963:xxxiv-xxxv).

For this reason the more pressing problem to be solved was how to enforce the law against the king, rather than to identify or interpret what that law was or to raise questions about who should have power to make that determination.

The Divine Avenger

Writing in the middle of the thirteenth century, Henry of Bracton stated in the *Introductio* to his *De Legibus et Consuetudinibus Angliæ*:

> The English laws ... since they have been approved by the consent of those who use them and confirmed by the oath of kings, they can not be changed without the common consent of all those by whose counsel and consent they were promulgated (c1260:Folio 1, 21).

This remarkable evaluation of the ground and authority of English law identifies two important grounds of constitutional limitation of power: consent and confirmation by oath. Nevertheless,

> The King has no equal within his realm ... . The King must not be under a man, but under God and under the law, because law makes the King, for there is no King where will rules rather than law, since he is the vicar of God (c1260: Folio 5, 33).

Therefore, should the king break his oath, it appears that the penalty can be exacted by none but 'God the avenger':

> Since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend his act; if he does not, it is punishment enough for him that he await God's vengeance (*De Personis*, Folio 5, 33).

Notably, the idea that all lawful political power comes from God was regarded as quite consistent with the theory that the consent of the *res publica* is the efficient cause of all legitimate government (Tierney, 1982:39-42). But on the other hand, it appears that the unlawful exercise of political power can only be penalised by God the Avenger, a prominent figure in Bracton's *Introductio*.

For McIlwain, this was a chief problem of medieval constitutionalism. On one hand, it placed the king under the laws of God and the laws of nature. But medieval constitutionalism did not establish a regular temporal means of enforcement of the law, short of revolution. The king could do no wrong; no lawful coercive process could proceed against the king, for the king's own writs did not run against him. For similar reasons, 'there was no legal machinery' by which the king could be dethroned, even though Edward II and Richard II were deposed by parliament as a matter of fact: respectively in 1327 for 'incompetence

and incorrigibility' and in 1399 for 'acting on the theory of absolute monarchy.' The lack of legal machinery derived in no small measure from the fact that parliament could not legally be summoned except by the king's writ (Maitland, 1908:190-5; Freeman, 1898).

Lawful Resistance

An ultimate right of resistance is implicit in constitutionalism, founded as it is in the notion that the consent of 'the people' is the efficient cause of the king's authority (McIlwain, 1947:9). John of Salisbury went so far as to defend tyrannicide, the execution of a tyrannical king, in his influential *Policraticus* (III:15, VIII:20; see Dickinson, 1963:lxxii, 367-74). Building on what went before, it easily followed for theorists of the seventeenth century that 'inferior magistrates' were authorised to resist royal tyranny – as representatives of the people and under a Divine duty – and by force if necessary (Gierke, 1950:231).

Implicit in many of these later theories of lawful revolution, culminating in Althusius, was a conception of the *federal* enforcement of the constitutional order (Tierney, 1982:60-79; Gierke, 1950:70-72). Where, at a national, provincial or municipal level, a tyrannical government exceeded its constitutional limits, Althusius argued that the constituent bodies, which he called 'symbiotes,' could legitimately withdraw from the federal union and resist the attempt to impose unlawful centralised power, power contrary to the *jus symbioticum* or constitution of the federation (Althusius, 1603:191-200). It is likewise notable that clause 61 of Magna Carta (as issued in 1215 but omitted from later versions) provided, in the words of the king, that if

> we or our justiciar or our bailiffs or any of our servants offend against anyone in any way, or transgress any of the articles of peace or security ... [and] do not redress the offence within forty days ... [the] barons with the commune of all the land shall *distrain and distress us in every way they can, namely by seizing castles, lands and possessions, and in such other ways as they can* ... (Evans and Jack, 1984:59, emphasis added).

In other words, 'lawful resistance' was the ultimate means of enforcement of Magna Carta. This conception of the enforcement of the medieval constitution persisted into the sixteenth and seventeenth century, so that by that time the forefront of constitutional development lay with those who were developing *and acting upon* theories of lawful resistance to tyranny. In the seventeenth century, the Stuart kings on one hand, and parliament on the other, clashed in the English Civil War over the king's claim to rule by 'divine right,' which

parliament saw as an attempt to rule in a manner unlimited by law and the 'ancient constitution' (Pocock, 1957:30-55). The consistent avowed purpose of such resistance was constitutional. The Puritan leaders saw their victory as one of a *restoration* of the ancient constitution of England – *not* as a revolutionary introduction of a new order.[14]

Likewise, in the eighteenth century, the American colonists fought the War of Independence over what they thought was unconstitutional tyranny by the English king and parliament (McIlwain, 1966:193). The Americans took full advantage of the resulting conditions of independence to formulate their own written constitutions, the idea of which has now encircled the globe. Even in the American Civil War, the secessionist confederate states conceived their actions as being justified as legal resistance to unconstitutional impositions by the United States government. Similar sentiments fuel some of the secessionist movements of our day.

Controlling the King

However, ecclesiastical influence and lawful resistance were not the sole means of enforcing the constitutional order in the Middle Ages. Bracton had said that while the king was under no man, he was under God and the law. McIlwain explains that Bracton envisaged that on one hand the English King was supreme in the sphere of government or administration (*gubernaculum*) and that 'no one, not even a judge, can question a specifically royal act so as to bring its legitimacy into doubt.' But on the other hand, the king *was* bound in the sphere of law (*jurisdictio*) and could not make laws contrary to the ancient customs and laws to which the people had consented (McIlwain, 1947:77). McIlwain explains:

> For in *jurisdictio*, as contrasted with *gubernaculum*, there are bounds to the king's discretion established by a law that is positive and coercive, and a royal act beyond these bounds is *ultra vires*. [Here] we find the most striking proof that in medieval England the Roman maxim of absolutism was never in force theoretically or actually. For in jurisdiction the king was bound by his oath to proceed by law and not otherwise (1947:85).

The precedents which supported this supremacy in the field of

[14] Albeit that the final outcome of that conflagration was the unprecedented establishment of parliamentary supremacy in England, which continues today to be considered the highest legal principle of the English constitution, tempered by the ultimate political sovereignty of the people (Dicey, 1920:425; Gough, 1955:221-3).

gubernaculum were used in the seventeenth century by the supporters of the wide view of the king's prerogative; and the courts upheld this prerogative. There was 'a lack of sanction for the protection of the sphere of law from invasion by the power of government.' For example, the use of torture was not allowed by Common Law, but was regularly used during the Tudor dynasty as a prerogative of the crown supported by a constant course of practice and the acquiescence of those opposed to it in principle (McIlwain, 1947:117-9; Dicey, 1887:114).

However, where the prerogative was seen as extending into the field of *jurisdictio*, the courts were prepared to step in, as in *Willion v Berkley* (1559). In that case the Court of Common Pleas held that the king was bound by a statute which did not refer to him explicitly:

> for every Man is an Inheritor to this ... Common Law, which the King cannot defeat without Parliament, for of this Law every Man shall take advantage ... Every Subject may claim from him Justice and the King is forced by Justice to do that which he ought (1 Plowden 235-7; McIlwain, 1947:114).

An important implication of this was that what amounted to an 'unconstitutional' law was beyond power (*ultra vires*) and void *ab initio*:

> For in jurisdiction the king was bound by his oath to proceed by law and not otherwise. Although the judges were his, appointed by him and acting in his name alone, they were nevertheless bound by their own oaths to determine the rights of the subject not according to the king's will but according to the law; and any careful study of the masses of plea rolls which survive from this period must convince one that this was no mere pious theory, but on the whole the actual and the general practice (McIlwain, 1947:86).

In 1628, in the debate on the *Petition of Right*, Charles I wrote to the House of Lords a letter in which he gave assurances of his intention to maintain the rights that the Commons were seeking, but reserving his 'sovereign powers.' The House of Lords passed the letter to the Commons, with an amendment to the petition which made a similar reservation. Members of the Commons gave their famous responses, among them, Sir Edward Coke:

> In my opinion, [the reservation] weakens Magna Carta, and all our statutes; for they are absolute, without any saving of sovereign power. And shall we now add it, we shall

> weaken the foundation of law, and then the building must needs fall; let us take heed what we yield unto. I know that prerogative is part of the law, but 'sovereign power' is no parliamentary word ... Magna Carta is such a fellow, that he will have no sovereign. ... If we grant this, by implication we give a sovereign power above all these laws ... (Cobbett, 1809:III:193-4).

The outcome of the English Civil War was the military success of those supporting the narrow view of the prerogative of the crown. The king was decisively defeated and the way made possible for his increasing subjection – both in *jurisdictio* and *gubernaculum* – to the law and to the people through parliament, which at this stage was far from fully representative (Kenyon, 1969:1-4).

Controlling Parliament through Judicial Review

From our contemporary perspective, we can distinguish in these early beginnings two means of regular, temporal enforcement of the constitution: judicial and parliamentary. In the Middle Ages, the courts certainly upheld the king's prerogative as uncontrolled by law, but at the same time refused to enforce attempts to expand prerogative into the sphere of jurisdiction. Parliament eventually came to control the king in his government through parliament's legal power over taxation and the conventions of responsible government.

The constitution was (imperfectly) enforced through the courts and through parliament. But the control considered so far concerned only the king, not parliament itself. Constitutional judicial review in the modern sense pertains to the judicial control of parliament. And we find in the Middle Ages some of the first and seminal approaches to the modern conception of judicial review of legislation. Speaking from the perspective of the European continent, Gierke has observed:

> The properly medieval ... theory declared that every act of the Sovereign which broke the bounds drawn by Natural Law was formally null and void. As null and void therefore every judge and every other magistrate who had to apply the law was to treat, *not only every unlawful executive act, but every unlawful statute* ... (Gierke, 1968:84, emphasis added).

In England, the most famous instance of the judicial review of legislation was the striking decision of Chief Justice Sir Edward Coke in *Dr Bonham's* case (1610). Coke had stated:

> And it appears in our books, that in many cases, the

> common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void ... (8 Coke Rep 114a at 118a).

On its face, a more strident statement of the power of judicial review of legislation is hardly imaginable. However, what Coke meant by this has been the subject of controversy (Plucknett, 1926-7; Holdsworth, 1912; Gough, 1955:30-47; Thorne, 1938).

McIlwain and Wood have pointed out that at the relevant time English lawyers did not distinguish between 'legislation' and 'judicial decision' with quite the same rigour as we do today: both the courts and the parliament exercised what we would call judicial and legislative powers, without always distinguishing between the two functions. The distinctively *legislative* role of parliament emerged out of a very gradual process, beginning in the Middle Ages, consolidated during the Tudor period, and at last widely recognised during the Long Parliament and the Interregnum. Formerly, the 'High Court of Parliament' exercised its supreme authority to *declare* the common law (albeit by statute), a function which was not in principle different from the province of the lower courts (Wood, 1997:60). The idea of creation of law by legislative fiat was not openly ventured (McIlwain, 1979; compare Holdsworth, 1912).

In an age when 'law' obtained its validity and authority only when in accord with the 'law of nature' (rather than merely as the expression of the will of the state), both the High Court of Parliament and the lower courts saw their ultimate function and highest duty as one of discerning and applying that law of nature as expressed in the common law. In this light, if a general statement of the law to be found in a statute happened to work specific injustice, one can understand the common law frame of mind treating the general statement as it would an overreaching dictum delivered by a superior court of record. The lower court might be bound by the specific decision of the higher court, but its generalised *obiter dictum* is not binding: for the intention of a higher court, even the High Court of Parliament, could never have been to create an injustice in the particular instance (Wood, 1997:60).

Dr Bonham's case therefore enjoyed popularity in England during the seventeenth century. However, it was subsequently attacked from a number of directions (Plucknett, 1926-7, Knafla, 1977:297). The three-way contest for ultimate supremacy between crown, parliament

and common law courts was resolved by the Glorious Revolution of 1688 in favour of parliament (Winterton, 1981). By the end of the eighteenth century, only fragments of Coke's doctrine remained, the common law judges in England always glad of the opportunity to avoid the delicate issue of deciding whether a statute was contrary to common right and reason. Indeed, through that century, some judges were prepared to question the doctrine, albeit in a veiled manner, only to be later eclipsed by those who would emphatically reject it. Thus A.V. Dicey's famous description of what he thought was the 'dominant characteristic of English political institutions' was that

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. ... There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament (Dicey, 1920:37-8, 60; cf. Blackstone, 1765:I:III:91).

The Ascendancy of Parliament

It is notable that following the victory of parliament and upon settlement of the monarchy in 1689, important steps were taken to protect the relative supremacy of parliament. The *Coronation Oath Act* 1689 prescribed an express acknowledgment of parliament's role as legislator. In due course, via parliamentary control of taxation, parliament's *political* control over executive policy developed into the modern system of responsible government. Representative and popular government evolved concurrently as the franchise was extended. Legal accountability of executive action was supplemented by regular political control through the responsibility of the ministry to parliament. Using Bracton's language, parliament gained control over the *gubernaculum.*

In this way, the 'defect' of medieval constitutionalism as McIlwain saw it was in part remedied. The conflict between parliament and crown was waged in constitutional terms. The parliamentarians argued that the ancient constitution of England supported the parliamentary claims; they saw their function as one of upholding and enforcing the constitution and their ancient liberties. They did not originally intend to go so far as to execute the king and govern directly, but to enforce

the constitution against the king's perceived attempts to expand his prerogative powers beyond the 'ancient bounds.' They continued to refer to the 'High Court of Parliament,' which unconscious choice of language serves to emphasise the *curial* function of declaring the law– in this case, the law of the constitution – rather than the *legislative* function of making law.

Essentially, parliamentary supremacy was tied to the attempt to control the king and enforce the spirit of the ancient constitution (McIlwain, 1947:128). If the scope of the king's prerogative was defined by the common law courts, and if the common law could be changed (only) by and through the consent of the people 'represented' in parliament, it followed that parliamentary statutes could define *and redefine* the scope of the king's prerogative. Thus a central step in the achievement of parliamentary control over the king's prerogative lay in the assertion of the ability of parliament to change the law of the land. But if parliament could change the law of the land itself, and by doing so, change the scope of the royal prerogative – the courts being required to apply the law as defined and redefined by parliament – this was tantamount to supreme legal power. Assisted by the precedents of Tudor times, the parliaments of later generations became regarded as *sovereign* and *capable of changing the constitution*, even though the expressed motives of those who initiated the events which led to this sovereignty were more concerned with enforcing the 'ancient constitution,' rather than asserting the power to change it.

Judicial Review and the Written Constitution

The unwritten constitution of England and attempts to form a written constitution

In what we have outlined so far, one of the most commonplace observations about the form of the English constitution is that it remains *unwritten*. This image of an unwritten constitution comports with the view that it is the consequence of a gradual and not altogether conscious development of basic principles, rather than the instantaneous and calculated design of a specially selected constituent assembly (Dicey, 1920:22, 191-2; Finer, 1979:34; Maitland, 1908:537-9).

We noted earlier that under the medieval system, the constitution was a mix of the law of nature, the law of God, Roman Law, the common laws of Christendom and the ancient laws and customs of the realm. However, as times changed, influences combined to question the certainty of the content of the constitution. These were driven by

cleavages between Roman and Christian ideas of law, between the *ancient* laws and customs of the realm as they really were and their *modern* equivalents, and between natural law and divine law. Political systems were judged more in terms of abstract principle than concrete law (Hayek, 1982:8-9). There was a movement from law and political order as a *given* to law and the political order as an *artefact*.

Against this background, medieval ideas of representation and government by consent underwent a metamorphosis. Originally, the medieval idea of representation and consent operated within the confines of a given order. It was later transformed into the view that the people as a constitutive body might consciously create and then continue to modify the outlines of the political order under which they wished to live. In this, the first step was the recognition of an increasing scope given to legislation as a means by which the old common law and political order might be reformed. The next step lay in the direction of the written constitution.

The first English attempts to formulate a written constitution in the modern sense came in the late 1640s. Members of Cromwell's New Model Army propounded a series of proposals for a constitutional settlement of the dispute with Charles I. While the parliamentarians believed that they were restoring the ancient constitution of England, there was a felt need to confirm any such settlement in writing (McIlwain, 1979:54; Kenyon, 1969:60).

The documents produced by the New Model Army progressively took the matter further than that which had gone before, largely because the army leaders began to distrust parliament to maintain the cause of the ancient constitution and of Protestantism as they saw it. These documents included the *Heads of the Proposals* of 1647, the *Agreement of the People* of 1647, a later *Agreement of the People* of 1649 and finally the *Instrument of Government* of 1653. The two earlier documents were produced before the execution of the king in 1649. As a consequence, their primary concern was the limitation of royal power. But after the king's death, as Gardiner notes:

> the despotism of Parliament was the chief danger to be feared, and there was no possibility of averting this by Acts of the Parliament itself. Naturally, therefore, arose the idea of a written Constitution, which the Parliament itself would be incompetent to violate (Gardiner, 1906:xlix-l).

Vile confirms this view when he points out that parliamentary abuse of power

> had shown to men who had previously seen only the royal

> power as a danger, that parliament could be as tyrannical as a king [hence] legislatures must also be subjected to restriction if individual freedom was not to be invaded (Vile, 1967:43).

The *Agreements* purported to be derived from the people directly, as a constitutive body, and to be directed to establishing 'a firm and present peace upon grounds of common right and freedom.' Kenyon notes that, at the time, 'the Army's claim to represent the nation was plausible enough' (1969:289). Concerned about the possibility of 'corruption' of members of parliament, in language which James Madison would use 140 years later, the army expressed its wish that parliamentarians

> not have the temptation or advantage of an unlimited power fixed in them during their own pleasure, whereby to perpetuate injustice or oppression upon any, without end or remedy, or to advance or uphold any one particular party, faction or interest whatsoever ... (Kenyon, 1969:299).

The first *Agreement* declared parliament's powers to be 'inferior only to theirs who choose them' and to extend only 'to whatsoever is not expressly or implicitly reserved by the represented' (Kenyon, 1969:302, 308; Wootton, 1988:283-5; Gardiner, 1906:334). The later *Agreement* sought to render all laws or statutes contrary to the Agreement void. It distinguished these provisions as 'fundamental to our common right, liberty, and safety,' and expressly denied the power to take away such rights (Gardiner, 1906:359-71). Article XXXVIII of the *Instrument of Government* of 1653 provided:

> That all laws, statutes and ordinances, and clauses in any law, statute or ordinance to the contrary of the aforesaid liberty, shall be esteemed as null and void (Gardiner, 1906:426; Kenyon, 1969:347).

While the *Instrument* was implemented by Cromwell, the first Parliament of the Protectorate refused to be bound by the *Instrument*, and later parliaments completely abandoned it. Nevertheless, in 1655 'an increasing number of judges served notice, in effect, that although for the sake of good government they had accepted an illegal constitution they would not allow the executive to infringe that constitution' (Kenyon, 1969:337; Gardiner, 1903:III:149ff). This may well have been the first indication of intention by the courts to exercise constitutional judicial review on the grounds of a *written* constitution, although the focus remained on the executive, not the legislature.

These attempts at forming a written constitution fell into dormancy

following the restoration of Charles II in 1660 and the complete realisation of parliamentary sovereignty in 1688. From then on, consistent with parliamentary sovereignty and the view that parliament is the essential guardian of the English constitution, the great constitutional documents of England returned to the form of parliamentary statutes, such as the *Bill of Rights* 1689 and the *Act of Settlement* 1701. Nevertheless, the events of 1688 and 1689 were genuinely *revolutionary*, since in the absence of a king who could lawfully summon parliament, the Commons and Lords were forced to act independently in order to re-establish the constitutional order on the basis of the *Bill of Rights* (Maitland, 1908:281-5; Freeman, 1898). The entire constitutional structure of England was thenceforth founded on what we might call a constitutive convention or assembly. Thus, despite the ultimate failure of the earlier attempts to create a written constitution for England, such attempts were successful in a more limited sense when a constitutive assembly determined the constitutional settlement of 1689.

The intention behind all of these measures was to resolve the deadlock, remove uncertainty and to entrench fundamental rules for the nature and powers of the institutions of government.

Written constitutions in America

During the same era, similar considerations concerned those involved in the formation of the American state and federal constitutions: the interest in regular parliaments, fair elections, defined and separated powers, entrenched rights and the denial of *ex post facto* laws; also architectonic concern with constituent assemblies, the rule of law, constitutionalism and the use of a written constitution to put the content of those rights beyond doubt and resolve the legal quandaries created by revolutions.

The legal relations between Britain and the American colonies had their foundation in the various royal charters which established the colonies (Goebel, 1971:52, 56, 58; Dicey, 1920:146). The colonial powers of legislation and adjudication were required to be exercised in a manner consistent with English law. Colonial legislation contrary to English law would be void (Lutz, 1987:5; Hazeltine, 1917:6; Dicey, 1887:90-1; Latham, 1937:519). On this basis, colonial acts were declared null and void on several celebrated occasions (Goebel, 1971:70-9). The impact of these practices on American political thinking was profound:

Indeed, after nearly a century of subjection to these con-

> trols, the Americans when they came to frame their own instruments of government were prepared to accept supervision of legislation as a constitutional principle and in some states to provide machinery to execute it (Goebel, 1971:60).

The colonial charters functioned as written constitutions which defined, amongst other things, the legislative powers of the colonial assemblies, and were the basis upon which the Privy Council exercised judicial review over colonial statutes. They eventually came to be regarded as expressly framing the constitution under which each American colony possessed powers of self-government, and under which a framework for judicial review was available. However, the charters gained their legal force by virtue of the authority of the English Crown. This is where one further element dating from medieval times now percolated to the surface, the idea of a federal covenant or pact.

This idea of a federal pact may have had its origin in the eleventh century with the birth of the modern European city (Berman, 1983:359ff). Ideas of 'covenant' and 'oath' were central to the institutions of medieval governance, whether in feudal pacts, coronation ceremonies, city-state charters or early confederations, having, as they did, examples in the covenants of the Bible (Elazar, 1996). These ideas were distilled through centuries of practice and theory, and were particularly taken up following the Protestant reformulation of medieval concepts of conciliar government and federal organisation of church and civil government. They had a profound and immediate influence on the theory and practice of resistance to tyranny, culminating in the English Civil War and the War of American Independence. It was natural for the American settlers, especially the dominant Congregationalists and Presbyterians, to organise themselves on a covenantal or federal basis (Lutz, 1987:3).

Plymouth 'rested, throughout its history as a separate colony, upon the Mayflower Compact' (Hazeltine, 1917:7; Lutz, 1987:8-9). The Massachusetts Body of Liberties (1641) incorporated precepts of both biblical law and fundamental English law (such as chapter 39 of Magna Carta) as part of a 'struggle for written laws, as opposed to the exercise of wide discretionary powers on the part of the executive and judicature ...' (Hazeltine, 1917:7). In his *History of New England*, John Winthrop explained that the reason for the enactment of the Body of Liberties was that 'The deputies ... conceived great danger to our State in regard that our magistrates for want of positive law in many cases might proceed according to their discretion ...' (Hazeltine, 1917:8).

Thus when the Americans sought to organise and unite themselves politically, they adopted *written* constitutions which, as fundamental statutes, defined and limited the powers of the constituted governmental bodies (Wood, 1997:61-2). These became near universal models, so that, in discussing the United States Constitution and Madison's part in it, Schochet observed: 'This reliance upon a written constitution as the surest means of guaranteeing limited government and the rule of law is the most conspicuous attribute of modern constitutionalism ...' (1979:13). And Jefferson remarked, in a letter to William Cary Nicholas on 7 September 1803, that 'Our peculiar security is in the possession of a *written* Constitution. Let us not make it a blank paper by construction' (Thomson, 1982a:321; Berger, 1977:291). Chief Justice Marshall of the United States Supreme Court in *Marbury v Madison* 1803 referred to written constitutions as 'what we have deemed the greatest improvement on political institutions.'

Following independence and formation of the Federal Constitution, the United States was distinguished from the English system in a number of important respects, especially the existence of a written constitution enforced through judicial review (Hazeltine, 1917:24). The achievement of a supreme written constitution was twofold: all departments of government were bound by the fundamental law, and the terms of the constitution were explicit, which went far in resolving the debate over the content of the fundamental law. The state constitutions consistently contained express guarantees of individual rights (Lutz, 1987:30). These explicit rights and freedoms were the result of conscious choices about what the framers of each constitution thought to be essential to the 'constitutional order' and necessary to be put beyond doubt by express provision. They *selectively* enshrined particular constitutional principles which had been the subject of conflict over the preceding centuries.

Notably, the United States Constitution originally did not include the Bill of Rights for which it is now famous. It was a concession by the Federalists in face of Antifederalist opposition to the concentration of political power involved in federation (Storing, 1981:57, 65). Originally, Alexander Hamilton had argued that there was no need for a Bill of Rights because the Constitution itself embodied a system of government 'professedly founded upon the power of the people and executed by their immediate representatives and servants,' whereas bills of rights are in their essential nature documents which profess to control the prerogatives of a king, whose powers are of a different nature (Hamilton, 1788b:513-5).

It was under the energetic arguments of Antifederalists such as 'Brutus' that the Constitution was ratified on the understanding that an express Bill of Rights would be the first task for the new federal Congress (Storing, 1985:118-122). Brutus had noted that the 'only answer that can be given' to the complaint that there was no bill of rights under the original plan of the Constitution was that such rights would be 'implied.' But his forceful response was that with 'equal truth it may be said, that all the powers, which the bills of right, guard against the abuse of, are contained or implied in the general ones granted by this Constitution' (1985:121). Because implications 'cut both ways,' the Antifederalists won the day on this point. Under this impetus, the American Bill of Rights, as progressively aggregated by additional amendments, today incorporates a selection of 'fundamental rights.'[15]

Judicial Review in America

As one would expect, *Dr Bonham's* case had a relatively successful career in the United States, with a different impact on the constitutional status of the American legislatures.[16] Coke's *Institutes* were leading textbooks in the early colonies, and it did not take the courts long to begin applying the *Bonham* principle.[17] Moreover, there is a further reason why it is not surprising that the American courts initially drank heavily of the *Bonham* attitude. *Bonham*, as has been noted, was a product of the pre-Stuart judicial technique. The American colonies were started at the very end of the Tudor period largely in response to the religious persecution of the age, and well before the clash between the Stuarts and parliament which was to result in parliamentary sovereignty. The Americans inherited and persevered in the older attitude. They did not make their Governors or President responsible to Congress. The Massachusetts legislature has maintained to this day the honorific title of General Court of Massachusetts, following the style of the High Court of Parliament (Scalia, 1997:9; Wood, 1997:60). By contrast, the English accepted the supremacy of parliament as the only effective counter-weight to the Stuart claims of divine right. They thus accepted the principle of parliamentary sovereignty, and developed

[15] For a contrary view, see Grey, 1975:715-6. It must be conceded that the selection included the 'contentless' reservation of the Ninth Amendment and now includes the ambiguities of the Fourteenth Amendment, which unavoidably require a degree of judicial creativity. But the Australian Constitution has no such provisions. See *Griswold v Connecticut* (1965:491-2).

[16] Useful accounts of this appear in Plucknett, 1926-7; Corwin, 1910-1; Corwin, 1928 and Goebel, 1971.

[17] E.g. *Robin v Hardaway* (1772), *Trevett v Weeden* (1786), *Bowman v Middleton* (1792).

the doctrine of responsible government as a means of popular control over the executive government.

However, once the American colonies consolidated their status as independent, self-governing states, having their own written constitutions, recourse to Coke's doctrine became unnecessary. 'Common right is vague at the best, and cannot compare with a well-drawn constitution as a check upon legislative action' (Plucknett, 1926-7:68); and when the constitutions contained express guarantees of individual rights (Lutz, 1987:30), there was little point in appealing to *Bonham*.

Indeed, the legislative steps taken by the English parliament at the Glorious Revolution and the constitutional steps taken by the American colonies have this important quality in common: they attempted to enshrine in written form those principles of the unwritten constitution which they believed had been transgressed. The legislation of the Glorious Revolution era enshrined the principles of freedom of speech in parliament, parliamentary control over taxation, and the prohibition of royal suspensions of the law. The American constitutions enshrined freedom of religion and conscience, the right to vote, trial by jury, *habeas corpus*, protection against taxation without consent and prohibitions against bills of attainder and *ex post facto* laws. The most important difference between the two constitutional settlements is that while the English principles are contained in statutes under the control of parliament, the American principles are contained in written constitutions to which the legislatures are subject. Even without the US Bill of Rights, the American federal government was to be a government of limited powers. What is common to both systems is that decisions were taken as to those rights which were to be the subject of explicit provision, with a decided reliance on the new constitutional machinery to prevent abuses from occurring.

Thus began in the United States a highly successful international career for judicial review under a written constitution. Judicial review drew deeply on the *Bonham* approach, but the written constitution was intended to remedy the problems inherent in reliance on unwritten, and therefore relatively amorphous, fundamental rights, which the shift to abstract natural law thinking had engendered. Returning to the terminology which Bracton had used so many centuries earlier, the central concern driving judicial review was not the control of policy within the *gubernaculum*, the government, but the constitutional issue of *jurisdictio* – the role of the courts to define the *scope* of political power according to the law of the constitution. Judicial review developed as a means of policing the *jurisdictio*, of limiting the

legislature and the executive to their respective legal spheres of authority. Control of the policy of government (whether within the executive or legislature), the *gubernaculum*, was achieved in England through the conventions of responsible and representative government, and in the United States through the election of the President, Senate review of executive appointments and Congress's control of appropriations.

The two classic defences of judicial review following independence were those of Alexander Hamilton in *The Federalist No. 78* and of Chief Justice Marshall in *Marbury v Madison* (1803), the first case in which the Supreme Court struck down federal legislation as unconstitutional under the Constitution of the United States.

Hamilton's argument for judicial review was based on the principle that the Constitution, emanating from the people, contains certain '*specified* exceptions to the legislative authority,' so that any statute 'contrary to the manifest tenor of the Constitution is void.' Constitutional limitations could be 'preserved in practice no other way than through the medium of courts of justice,' for otherwise, 'the legislative body are themselves the constitutional judges of their own powers.' Since the Constitution is the fundamental law, it lies within the province of the courts to resolve any 'irreconcilable variance' between the Constitution and a purported statute. But this does not imply a superiority of the judiciary over the legislature. Rather, it flows from the principle that the courts themselves ought to be governed by the Constitution. Having therefore neither 'force' nor 'will' but only 'judgment,' the courts are in fact the 'least dangerous branch' of government (Hamilton, 1788a:466-7).

But what if the judiciary should 'substitute their own pleasure to the constitutional intentions of the legislature'? What if the courts should be disposed to exercise *will* instead of *judgment*? 'To avoid an arbitrary discretion in the courts,' Hamilton said, 'it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them' (1788a:471).

Justice James Iredell expressed a similar view in an important case decided in 1798. While supporting the institution of judicial review of legislation, he rejected the proposition mooted by his fellow judge, Samuel Chase, that judicial review could be activated solely on the grounds of legislation being 'against all reason and justice [and] the general principles of law and reason.' Iredell, on the contrary, thought that 'the ideas of natural justice are regulated by no fixed standard: the

ablest and purest men have differed upon the subject' (*Calder v Bull*, 1798:399).

It was not until 1803 that the Supreme Court of the United States actually exercised the power of judicial review to strike down an Act of Congress (see Thomson, 1988:207-8). Chief Justice Marshall's celebrated defence of judicial review in that case, *Marbury v Madison*, relied on the proposition that it is the function of the court to declare what the law is, and when faced with legislation on one hand and an inconsistent Constitution on the other, it is 'emphatically the province and duty of the judicial department to say what the law is.' Because the courts are bound by the Constitution and are to regard it as 'superior to any ordinary act of the legislature,' they must give effect to the Constitution, 'disregarding' unconstitutional legislation.

Stepping back from the propositions argued by Hamilton and Marshall, one distinct feature is that judicial review is grounded in the authority of a *limiting* Constitution, a written constitution which sets out very clearly, *specific* grants of legislative power and *specific* protections of various rights. The authority of the courts to exercise judicial review is based on, and extends only to, the enforcement of the Constitution. The courts are only to exercise judgment, not will (cf. Grey, 1975:707).

Antifederalists saw the issue of judicial review in terms similar to Federalists such as Hamilton and Marshall, but a number of them came to a quite different conclusion. Brutus saw clearly that under the proposed Constitution the judges would exercise judicial review, and he concluded, contrary to Hamilton, that the power of the Supreme Court in particular would as a result be 'in many cases superior to that of the legislature' (Storing, 1985:185). Inveighing against such a power, Brutus argued:

> Had the construction of the constitution been left with the legislature, they would have explained it at their peril: if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right: and indeed I can see no other remedy that the people can have against their rulers for encroachments of this nature. ... [W]hen this power [of judicial review] is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but with a high hand and an outstretched arm (1985:118-22,187).

Indeed, prior to the ratification of the United States Constitution, the institution of judicial review hung in the balance. It was not inevitable that the Federalists would win the day, and to do so, they had to compromise their position on the Bill of Rights. In this light, Hamilton's argument that the courts would only exercise *judgment* and not *will* was the foundation of the Federalist defence of judicial review under the Constitution. Without this distinction between judgment and will, it is a matter of conjecture whether the Constitution would have been ratified at all. It is therefore strongly arguable that the ratification of the US Constitution largely rested on the restriction of the courts to the exercise of *judgment.*

Written constitutions in Australia

When Australia federated, the framers of the Commonwealth Constitution could have followed the colonial example, by merely sketching the broad outlines of the constitutional powers of the Commonwealth. However, since Australia was to be a federation, incorporating a division of powers between the Commonwealth and the states, the very earliest drafts of the Constitution were modelled on the United States Constitution, and so contained a great deal of entrenched detail.

In respect of the details, one of the most remarkable features of the American state and federal constitutions was the degree to which those documents enshrined certain rights and freedoms as beyond the power of the executive and legislature. In each instance, the drafters made conscious decisions about those fundamental rights deemed important enough to entrench in the Constitution and, under judicial review, to be enforced by the courts. The same is characteristic of the Australian Commonwealth Constitution, although it is a commonplace observation that, in contrast to the American Bill of Rights, the Australian Constitution contains only a limited number of explicit rights or limitations on power.

However, it is facile to suggest that the relatively limited number of rights expressly entrenched in the Australian Constitution indicates that the framers neglected to deal with the question, so that the courts need to step in. In fact, the Australian Constitution explicitly entrenches a surprisingly large number of rights, but according to criteria quite different from the American example. Because today we tend to understand 'constitutional rights' as immunities from legislative interference, we tend to overlook the fact that at the Glorious Revolution the idea of constitutional rights was not so narrowly conceived. The leading concern, rather, was to settle the constitutional position of

parliament as supreme for the purpose of ensuring that it would have sufficient power to defend the rights of the people.

The principle of selection operating in Australia draws from the events of and surrounding the Glorious Revolution or from developments that were consequent on its fundamental achievements, such as the fuller evolution of representative and responsible government. The Australian Constitution entrenches many of the key provisions of the *Bill of Rights* of 1689 and the *Act of Settlement* of 1701.[18] The decision to entrench these provisions is of the utmost significance in understanding the nature of the Australian Constitution. The detailed consideration given to these issues renders it very difficult to suggest that other rights, such as those contained in the American Bill of Rights, had been overlooked and should be read as implied in the Australian Constitution. The strongest example, perhaps, of this is that in section 116 the Australians deliberately adopted the religion clauses of the American First Amendment almost word-for-word, but intentionally decided not to incorporate the freedom of speech and freedom of the press clauses.

Judicial Review in Australia

As regards the development of judicial review in Australia, it is important to understand that Australia was settled at a time when parliamentary sovereignty was well established in England. The early Australian colonial courts looked almost exclusively to the practices of their English cousins, rather than to the example of the Americans. The ground of judicial review in colonial Australia, therefore, drew primarily on the imperial model of repugnancy to English law, constitutive Imperial legislation, Royal Charters, Letters Patent and Orders in Council. Unlike the American experience, Australian judicial review generally did not draw on ideas of fundamental right and reason in the *Bonham* tradition. Statutes of 1696, 1833 and the better known *Colonial Laws Validity Act* of 1865 progressively clarified and modified the common law rule of repugnancy, which was applied in various Canadian decisions in the later nineteenth century, and assumed to apply to Australia (Quick and Garran, 1901:347-52). Statutes of 1823 and 1828 regulated the power of the courts to determine matters of repugnancy and the possibility of judicial review of legislation bore contested fruit (Thomson, 1988:25ff; Melbourne, 1963:93, 96, 115-8;

[18] Compare Maitland, 1908:281ff, 293, 306ff, 320ff and Holdsworth, 1912:16 with sections 1, 5, 6, 13, 16, 23, 28, 32, 40, 44-6, 49, 50, 51(ii), 53, 64, 72, 81 and 83 of the Australian Constitution.

Castles, 1992:131, 183, 186, 278, 408, 411, 450; Currey, 1968:214).

But although there was judicial review underwent a storm of controversy over judicial review in Australia prior to federation, the High Court from its very beginning regarded judicial review as an axiomatic principle, and even today has never systematically and deeply examined the basis of its judicial review function per se. In only a very small number of cases has the High Court given the source of its power of judicial review more than passing attention, and these instances (as we might expect) have tended to occur on those occasions when the court was faced with a legal issue which forced at least some reflection on the source *and scope* of the power of judicial review.[19] In these instances, the court appears to have relied on a number of categories of justification of judicial review:

1. The constitutional text.
2. The intentions of the framers of the Constitution, particularly with the Supreme Court of the United States as a model.
3. The necessities of a rigid, federal constitution.
4. The established principles of English jurisprudence, which expand into an argument from constitutional history and precedent.
5. The acceptance or acquiescence of the legal and wider community.

In respect of each of these grounds of judicial review, the justification of the power of judicial review reduces to the point of inadequacy when pressed too far in the direction of unrestrained judicial power. Limitations on the scope and role of judicial review are incorporated into each of the cases for it.

It is most notable that the power of judicial review is nowhere expressly granted to the High Court under the Constitution. Despite the fundamentally important nature of judicial review and the immense power it involves, as Thomson has observed:

> Unlike the vast reservoir of enquiry concerning the origins and establishment of judicial review – that is, power to authoritatively declare legislative and executive acts unconstitutional – in American constitutional law, examination of the analogous Australian enterprise has been sparse and sporadic (1988:1).

[19] See e.g. *D'Emden v Pedder* (1904); *Baxter v Commissioners of Taxation (NSW)* (1907); *Engineers*; *Australian Communist Party v Commonwealth* (1951); *R v Kirby, Ex parte Boilermakers' Society Of Australia* (1956) (cited as '*Boilermakers* (1956)'); *Victoria v Commonwealth* (1971); *Victoria v Commonwealth and Hayden* (1975).

Rather, judicial review in Australia seems to be a *fait accompli*, a fundamental and *unquestioned* axiom, a 'prodigious power' which seems to rest on a 'slender reed' indeed (Thomson, 1988:176; Lane, 1966; Lindell, 1977:161-86; Galligan, 1979 and 1987:42-74). While judicial review is defended on the ground that the legislature should not be able to determine for itself the extent of its own powers, the judiciary's affirmation of its own power of judicial review is not itself effectively reviewed by another body. This confirms that judicial review, however justified, should be exercised with restraint.

The Return of the Circle

In this sense, judicial review under the written constitutions of the United States and Australia represents something of a synthesis of natural law and legal positivism. Natural law concepts undergird the idea of constitutional, 'higher law' limits on the power of governmental institutions; positivist concepts undergird the use of written constitution to alleviate the uncertainty inherent in generalised concepts of natural law. Professor Berger says that the American Founders were, in fact, 'deeply committed to positivism, as is attested by their resort to written constitutions – positive law' (Berger, 1977:252; contrast Hart, 1977). They were therefore committed to *explicit* allocations of and corresponding limits on political power.

The achievement of judicial review under a written constitution is essentially one of the enforcement of the constitution. At one time, 'the king was under no man, but under God and the law,' which meant that there was a fundamental problem of the temporal enforcement of the law of the constitution. The king was bound by this oath towards God, but it was for 'God the Avenger' to enforce the terms of his oath. But because 'men were not angels' and no angels condescended to rule men, further means of enforcement developed: ecclesiastical influence, lawful resistance, parliamentary control, written constitutions and judicial review. But in the final analysis, the exercise of those powers of enforcement was – at an ultimate level – legally unreviewable. While each step in the evolution of constitutionalism added an additional means of enforcement, the perennial question re-emerged each time. As classically posed by Juvenal: 'Quis custodiet ipsos custodes?' or, 'who shall guard the (new) guardians?'

Concerns with the elitist power accorded to unelected judges exercising judicial review is one of the many reasons which have led some constitutionalists to propose a further constitutional safeguard in the form of a citizen's initiated recall (Walker, 1987:158-62). However,

such additional precautions are not inconsistent with the principle that the practical realisation of constitutionalism turns on a personal commitment to legality and the rule of law on the part of those who exercise political power (Walker, 1988:41). In many circumstances the moral resistance offered by the voluntary institutions of civil society is vital to the imposition of effective limits on the coercive state. While checks and balances can frustrate attempts to exercise arbitrary power, the oath of office given by monarchs, ministers of the crown, members of parliament and judges is the ground of their ultimate duty and responsibility to the rule of law. When and in so far as the power that they are exercising is externally unreviewable and uncontrollable (short of impeachment), the oath becomes the sole ground of their constitutional responsibilities; a matter of conscience before God, and something which urgently calls for self-restraint.

The judicial oath creates an obligation to execute justice *according to law* (Berger, 1977:289). Examples of this reliance on the oath of office as the ground of duty are manifold: ancient and contemporary (eg, Brennan, 1995; Kirby, 1996). When deciding *Marbury v Madison*, Chief Justice Marshall declared:

> It is apparent that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.
>
> Why otherwise does it direct the judges to take an *oath* to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support? (1803:179-80)

As Professor George Winterton notes:

> The present judicial oath, whereby judges swear to 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will' is an important, indeed vital, means of protecting civil liberty, and has been so in the past (1981:274).

The cases to which Winterton refers illustrate situations where judges have felt compelled, under their oaths of office, to apply the law in the face of extreme pressure from the executive or legislature. In the case of constitutional issues, this judicial duty under oath translates into an obligation to enforce the law of the constitution. Adopting a dictum of Justice Isaacs, Justice McHugh has thus stressed – that 'our sworn loyalty is to the law itself, and to the organic law of the Constitution first

of all' (*McGinty*, 235). Since judicial review is ultimately a legally unreviewable power, this implies that self-restraint is necessary. The key function is to identify the constitution, to interpret it and to enforce it.

In this, there is the ever-present temptation to incorporate the power to amend or adjust the constitution into the power of enforcement. This is well illustrated by the progress of the English constitutional settlement. At first, the houses of parliament, especially the lower house, asserted their powers with the professed and apparently sincere purpose of enforcing the 'ancient constitution' against the king, a constitution which emphatically included the king and his prerogatives as its central feature. But the assertion of the power to enforce the constitution culminated in parliament eventually claiming the power to *change* the English constitution in the most fundamental manner. A similar temptation arises under the American and Australian systems. At first, the courts *asserted* their powers of judicial review with the professed purpose of enforcing the constitution against the legislature. But the temptation to exercise a greater and more fundamental power has not always been resisted.

This calls for a differentiation between the increasingly representative character of the legislative bodies of Britain, the United States and Australia and the unrepresentative character of the courts. Not all constitutions have included a 'safety valve,' the express power of amendment. The existence of an explicit and representative method of amendment in section 128 of the Constitution suggests that the locus of the power to adjust the Constitution to contemporary needs should not fall to the courts (Goldsworthy, 1997:27).

Indeed, the Australian framers explicitly considered the question of how the Australian polity would evolve in the future. With that in mind, they consciously distinguished between those institutional details which they would entrench, those which they would specify while leaving power to parliament to change as it saw necessary, and those which they left completely open to the political process (Convention Debates, Adelaide, 1897:455). The High Court did not come into the equation. Likewise, the framers of the American Constitution openly considered and expressly rejected the suggestion that the national judiciary (with the President) should constitute a 'council of revision' 'to examine every act of Congress and by its dissent to constitute a veto.' In rejecting the proposal to give the judges a veto power, George Mason and James Wilson *distinguished* the recognised authority of the courts to strike down unconstitutional statutes from the

proposed power of discretionary veto (Berger, 1977:300-1).

The dilemmas remaining in such systems are twofold. Firstly, while the judiciary is in law subject to the constitution, there is no regular mechanism for making the judiciary accountable in its interpretation and application of the constitution. It is this problem which many commentators say constitutes the central problem of constitutional theory today. Secondly, while making the fundamental law explicit overcomes much of the confusion, in some ways it merely postpones the debate and transforms it into an argument over *interpretation* rather than one resting on general arguments of legal and political principle. The task is to formulate an interpretive methodology consistent with this account of the judicial function. At the very least, however, what has been canvassed in this chapter, it is submitted, excludes a deliberately non-interpretive approach to constitutional adjudication.[20]

Since the question becomes one of interpretation, the next chapter in this book will consider some guidelines for the interpretation of the constitutional order and the use of constitutional implications. Contemporary attacks on 'interpretivism' from the point of view of postmodernism and the critical legal studies movement must, however, be noted, albeit briefly. Critical legal studies (CLS) and, in a more pointed fashion, deconstructionism attack the objectivity or determinacy of law and assert that 'no uninterpreted source of meaning stands outside of or prior to an interpretive act' (Feldman, 1994:1060; cf. Derrida, 1981:20). Thus Professor Unger's criticism of liberal constitutionalism lies in its 'formalism' and 'objectivism,' particularly its formalism as a

> belief in the possibility of a method of legal justification that can be contrasted to open ended disputes about the basic terms of social life, disputes that people call ideological, philosophical or visionary (Unger, 1982:564-5).

On Unger's view, one cannot assume that authoritative legal materials such as the Constitution embody a defensible scheme of human association. The more radical critique of law asserts that law is inherently an expression of power, not reason or justice. For Foucault:

> The system of right, the domain of the law, are permanent agents of these relations of domination .... Right should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that

[20] I accordingly maintain the view that there is a coherent sense in which the constitution 'stands over' the judge, contrary to the deconstructionism of Derrida (1986:10) and Kennedy (1990:807).

it instigates (1980:96).

In this context, Unger's 'super-liberalism' seeks to ensure that normative convictions, when informing the law, are put more publicly and visibly 'for the sake of effective contest' (Unger, 1982:564-5).

The argument in this book endeavours to state a normative case for submitting judicial power to the strictures of a modified legal formalism (compare Unger, 1976:66ff). Unavoidably, as Professor Kennedy points out, this kind of argument posits 'God, Reason and the Constitution' as standing over the judges, rather than the notion that the Constitution is merely what the judges say it is (Kennedy, 1990:807). One powerful response to this is Professor MacCormick's argument that

> the perennial problem of the human situation is the interpersonal disputability of the values and principles that should guide us. As is commonly held, a strong justifying reason for the maintenance of legal and other common social institutions among humans is to diminish the scope for disputes about governing values and principles in the social arena. And this is what in turn justifies giving considerable weight to linguistic and systemic argumentation in law, and imposing rather heavy threshold constraints against too ready recourse to teleological/deontological argumentation to raise, and sometimes to resolve, interpretative difficulties in law (MacCormack,1993:28).

Unger acknowledged that the dilemma of purposive or policy-oriented legal reasoning (the contrary of legal formalism) is that it undermines the generality and autonomy of the law in favour of subjectivism. Thus, to use Unger's own words in a slightly different context, CLS has 'the sense of being surrounded by injustice without knowing where justice lies' and accordingly 'to "unmask" an idea becomes a surrogate for the proof that it is false or evil' (Unger, 1976:173, 175, 194-9, 209-10; cf. Tay and Kamenka, 1995:236-8).

Professor Berman's response was:

> the revolt against legal formalism seems both inevitable and benign. Yet what is to prevent discretionary justice from being an instrument of repression and even a pretext for barbarism and brutality, as it became in Nazi Germany? (Berman,1983:40-41).

Justice Scalia expressed a similar view when he stated:

> Of all the criticisms leveled against textualism, the most

> mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic!* The rule of law is *about* form. ... Long live formalism. It is what makes a government a government of laws and not of men (Scalia, 1997:25).

CHAPTER 3

CANONS OF JUDICIAL REVIEW

> Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at a deeper level, the values that underlie the principle. At the appellate level, analogy and experience, as well as logic, have a part to play. Judgments must be principled, reasoned and objective ... . And, most significantly, each step in the reasoning must be exposed for public examination and criticism. (Brennan, 1995:xi)

Australian constitutionalism resolves the problem of *who* is to enforce the Constitution by placing ultimate *judgment* in the High Court as a means of limiting the *force* of the executive and the *will* of the legislature. In turn, Australian constitutionalism resolves the problem of *what* is the constitution by reducing it to writing. All in all, this turns the constitutional question into a problem of interpretation.

It has regularly been the sensible approach of the courts to ask themselves about the fundamental nature of the Constitution when considering their role as interpreters and when considering the meaning of the Constitution. At this point, the courts have often taken into consideration various implications which are said to flow from the fundamental nature of the Constitution, and which go beyond the explicit text. In this, there is at least the appearance of conformity to the principle that the power of judicial review is grounded solely on the court's role as enforcer of the Constitution: the courts appear merely to be enforcing the fundamental principles of the Constitution, even though those principles might not have been the subject of express provision. Echoing these themes, Justice McHugh has thoughtfully observed that the Constitution 'contains no injunction as to how it is to be interpreted.' Therefore, 'any theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself' (*McGinty*, 230).

However, according to the account developed in the previous chapter, Australian constitutionalism, at a Commonwealth level, is concerned with the reduction of the constitution to a written text. Thus while recourse to the fundamental nature of the constitution seems to

be unavoidable, the present task is to formulate a theory of adjudication which does justice to the 'textualisation' of the federal constitutional order.

The Fundamental Nature of the Constitution

The question of the fundamental nature of the Constitution has traditionally been answered in a number of ways. Most commonly it has been described as either an Imperial Statute, a fundamental law under which ordinary laws are made, a social contract to which the Australian people are a party or a federal compact between the constituent states (Thomson, 1985).

The answer that the Constitution is essentially a statute of the Imperial Parliament derives from the fact that it is contained in section 9 of the *Commonwealth of Australia Constitution Act*, 63 & 64 Victoria, chapter 12. (See *Engineers*, 151-3; Latham, 1961:5; Dixon, 1965:44). Following the traditional form, the statute begins by reciting:

> Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows... .

On this view, the ultimate *legal* authority behind the Constitution is the Imperial Parliament, not 'the people' as is said to be the case under the United States Constitution (*ACTV*, 181). Rather, the powers of self-government enjoyed by the Commonwealth were 'carved out of the British empire,' so that, according to Quick and Garran, the powers of self-government were substantially subject to British sovereignty (1901:300). Unlike the United States, there was no revolution against Imperial Parliamentary sovereignty; the Commonwealth was created according to law, under the authority of the Imperial Parliament.

The third and fourth kinds of answer to this question are often collapsed. It is often stressed that the Constitution is a compact between the people of the constituent states. Thus, although contained in an Act of the Imperial Parliament, recites the Preamble:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established ...[21]

[21] Western Australia was not mentioned since it did not support federation until after the Constitution Bill had been passed by the UK Parliament: Quick and Garran, 1901:250.

The Constitution reflects the agreement of the people of the colonies of Australia to join in a federal Commonwealth. The terms of the federal constitution were 'in convention after convention ... hammered out by members of the several states' (*Boilermakers* (1956:536)). It was upon the initiative and request of Australian delegates and upon the agreement by referendum of the Australian people that the Imperial Parliament enacted the *Commonwealth of Australia Constitution Act*. Therefore, the Constitution is said to reflect the political sovereignty of the Australian people and should be interpreted in this light (*ACTV*, 138).

However, two separate conceptions are at work here, and vie for dominance. One stresses the popular nature of the Constitution: the *people* as a whole, voting as individuals, adopted the Constitution; therefore, the Constitution should be understood as a *social contract*, based on popular sovereignty. The other conception is that the moving forces were the people and legislatures of the separate and formerly independent colonies, now states, which points to the fundamental nature of the Constitution as a *federal pact*.

In certain respects the Australian Constitution, like the American, is properly understood as partly federal and partly national: a compound or mixed government under which both the people as a whole and the people grouped as states are the constituent elements (see Madison, the *Federalist No. 39*). Even when it comes to the representative provisions in the Constitution, the federal principle significantly qualifies the national and democratic provisions. This includes the composition of the House of Representatives (section 24) and the amendment procedure (section 128), in addition to the Senate's composition as the 'states' house' (section 7) (*McGinty*, 269; Aroney, 1996).

Now while it is generally conceded in the cases that the legal authority undergirding the Constitution as at the turn of the century was that of the Imperial Parliament, commentators and some judges have argued that this has changed due to developments since federation. These developments are the transition of the British Empire into a Commonwealth, the advent of Australian nationhood and independence in world affairs, and the cumulative impact of the Balfour Declaration of 1926, the *Statute of Westminster* 1931 and the *Australia Acts* 1986. It is argued that the Constitution now has the force of law because it is accepted as such by the legal and wider community, and ultimate sovereignty rests with the Australian people (Lindell, 1986; Zines, 1991:26-7; Cooray, 1979:98; *Bistricic v Rokov* (1977:169);

Kirmani v Captain Cook Cruises Pty. Ltd. (No. 1) (1985:410); *ACTV*, 138).

There are a number of difficulties with the use to which Chief Justice Mason put this point of view in *ACTV*, and these will be addressed in a later chapter. It will suffice to say at this stage that to regard the 'Australian people' as a whole as the constitutive authority behind the Constitution ignores the federal nature of the Constitution, which is strikingly entrenched even in its 'democratic' sections (sections 7, 24 and 128). If the developments culminating in the *Australia Acts* necessarily shift the locus of sovereignty in the Australian federal polity, the locus of that sovereignty must be the entity described in the preamble and in section 128: the people aggregated as states and the people as a whole (Lindell, 1986:37).

Indeed, the Australian Constitution is sometimes *criticised* as being little more than a political compromise or, in the words of one delegate to the Convention in 1891, 'a mere commercial treaty [since we] are not here to raise a national standard, but to enter into a bargain, colony with colony, on terms which we think advantageous to each' (Convention Debates, Sydney, 1891:451).

Methods of Interpretation

These views of the nature of the Constitution can lead to divergent methods of interpretation, but not necessarily. It is tolerably clear that the Imperial Statute conception leads to an interpretation of the Constitution according to the established canons of statutory interpretation established by the common law courts, with a concomitant reliance on the literal text (to the exclusion of extraneous information), and the use of distinctly legal argument (*Engineers*, 142; *ACTV*, 180-1; Latham, 1961:8; Quick and Garran, 1901:792). On this view, the court should only have regard to the will of the Imperial Parliament (the legal sovereign) as expressed in the text. It is not appropriate for the court to have direct regard to the will of 'the people' (supposing this is ascertainable), even though the people may be sovereign in the political sense (Quick and Garran, 1901:326-8; Dicey, 1920:72). This is the view Justice Dawson adopted in *ACTV* and has maintained consistently through the subsequent cases.

By the same token, Justice McHugh, while accepting that political and legal sovereignty now rests with the Australian people, noted that 'the only authority that the people have given to the parliaments of the nation is to enact laws in accordance with the terms of the Constitution.' Accordingly, 'since the people have agreed to be governed by a

constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and by no other means.' It follows 'that the text be the starting point of any interpretation of the Constitution' (*McGinty*, 231; cf. Zines, 1995).

This method amounts to Chief Justice Dixon's 'strict and complete legalism' (Dixon, 1965). It is sometimes associated with, while at other times distinguished from, a more wooden 'literalism.' Legalism is oriented to literalism when the importance of the text is stressed, but it diverges from literalism when distinctly legal methods of reasoning are emphasised (Cooray and Ratnapala, 1986). The distinction is borne out in Cooray's description of Dixonian legalism as 'the interpretation of a statute according to legal principles and techniques excluding over-emphasis on political, social, economic and philosophical and other non-legal considerations.' Cooray contrasted this with 'literalism,' 'a method of interpretation of the words of a statute in which the bare words of a particular section ... are interpreted without reference to outside sources or implications' (Cooray, 1979:2).

At the same time, the close association of the two terms is noticeable when they are used in contrast to two further methods of interpretation known as 'progressive interpretation' and 'intentionalism' (Craven, 1992b, 1992c).

Progressive interpretation stresses that policy decisions are unavoidable in constitutional interpretation, and calls for a disclosure of the relevant policy considerations and an attempt to construe the Constitution in the way that best meets the perceived 'needs' of contemporary Australian society (Stone, 1964; Mason, 1986 and 1987; Coper, 1984). In the 1970s and 1980s, Justice Murphy used this method in close association with his stress on the popular basis of the Constitution: as if the nature of the Constitution as a social contract calls for a progressive method of interpretation (cf. *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979)). Of the views of the fundamental nature of the Constitution, this view is most closely associated with popular sovereignty. It is borne out clearly in the plaintiffs' arguments in *McGinty* and *Levy*, for example (Johnston, 1996). It has been adopted by Justice Deane (eg, *Theophanous*, 171) and often resonates in the judgments of Justices Toohey and Gaudron.

'Originalism', by contrast, seeks to enshrine the 'original understanding' of the text of the Constitution (Goldsworthy, 1997; Scalia, 1997). It is said to flow from a consideration of the democratic basis of the Constitution: democracy requires that the court confine itself to the

textual expression given to doctrines which the people popularly approved in the original ratification processes and ongoing referenda (Goldsworthy, 1997:27; Scalia, 1997:9). In that sense, originalism is not unrelated to popular sovereignty, but is perhaps more closely related to the view of the Constitution as a federal pact, especially as the Convention debates of the 1890s point to a very vigorous federalism at work there. Nevertheless, originalism is distinguished from traditional legalism in its (guarded) recourse to the Convention debates and similar materials beyond the Constitutional text itself and the various drafts of the Constitution (Scalia, 1997:38).[22] The inquiry into the extraneous materials is generally limited to the resolution of ambiguity, however, so the distinction from legalism is of limited import (see Craven, 1992a; Goldsworthy, 1989 and 1994). The pre-1920 High Court interpretation of the Constitution was strongly oriented to federalism. Even though it was the early justices who set down the rule prohibiting recourse to extraneous materials and thereby established legalism (Holman, 1928), they represented the prevailing view in the Convention debates and generally applied this in their interpretation of the Constitution.[23]

Thus the various ideas of the fundamental nature of the Constitution do not necessarily lead to widely divergent *methods* of interpretation. The convergence occurs because recognising that the Constitution is a statute and interpreting it according to the ordinary rules of construction leads the interpreter to ask what kind of statute the Constitution is; and it is, of course, a special statute, a fundamental law under which laws are to be made, and a constitution ratified by the people of the constituent states (eg *Attorney-General for NSW v Brewery Employees Union of NSW* (1908:611-2); *Victoria v Commonwealth* (1971:394-5)). Moreover, the court historically has not taken a radical view of the social compact theory of the Constitution and has, on the contrary, transferred to the constitutional field the same methods of legal analysis it applies in its decisions at general law.

In the first year of its existence, the court also established that in

[22] However, the original reason for *restricting* judicial attention to the drafts of the Constitution seems to have been Chief Justice Griffith's observation that only the drafts had received the sanction of the state legislatures: a remarkably 'federalist' rationale. See *Tasmania v Commonwealth* (1904:333, 360).

[23] Of the early justices, while Justices Isaacs and Higgins were important figures in the Conventions, Chief Justice Griffith and Justices Barton and O'Connor more closely represented the mainstream point of view. It was the latter judges who maintained the federal orientation from 1903 to 1920, against Isaacs and Higgins's national-democratic perspective, which did not prevail until *Engineers* in 1920: cf. Aroney, 1998.

the interpretation of the Constitution it should focus on the literal text and the natural meaning of the words used (*Tasmania v Commonwealth* (1904)). The most significant decision, however, came in *Engineers*, where Justice Isaacs affirmed that both as a statute and as fundamental law, the Constitution should be interpreted according to the natural meaning of the actual text:

> It is the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed (*Engineers*, 142).

A number of judges have also repeated Justice O'Connor's call for a generous and liberal interpretation of the 'broad and general' terms of the Constitution. The Privy Council once observed that a broad and generous interpretation can coexist with a fidelity to the actual text:

> It is true that a Constitution must not be construed in any narrow and pedantic sense. ... It has been said that 'in interpreting a constituent or organic statute such as the Act that construction most beneficial to the widest possible amplitude of its powers must be adopted.' ... But ... [t]he true test must, as always, be the actual language used (*James v Commonwealth* (1936:43)).

Members of the court purported to depend on this historic view of interpretive methodology in the *Freedom of Speech* cases. The familiar incantation of *Engineers* was summoned; and with it came the language of traditional legalistic and textual interpretation of the Constitution (*ACTV*, 133-5, 215; *Nationwide News*, 41-50, 69). Therefore, the implication of a guarantee of freedom of political communication was presented as an application of the same methods which had led to the well established implications derived from federalism and the separation of powers in *Melbourne Corporation* and *Boilermakers* respectively (see *ACTV*, 134-5, 209-10; *Nationwide News* 41-4, 69-70).

At the same time however, the majority judges emphasised the Constitution's nature as a social pact and a democratically produced document (*ACTV*, 138, 210-11, 228; *Nationwide News*, 70). In the court's substantive reasoning, the notion of popular sovereignty took on a decidedly 'progressive' function. This progressive function facili-

tated the inference of the guarantee of freedom of communication; something which Sir Anthony Mason has said is required by the conditions of contemporary Australian society (Mason, 1987:158-9, 162-3; 1986:5, 12-3, 22-3).

The question is whether in fact the derivation of the guarantee was consistent with established methods of interpretation and the judicial restraint promoted in the previous chapter.

Necessary Implications and the Doctrine of Federalism

There are basically two ways in which implications can be used in the interpretation of the Constitution (Winterton, 1986; but cf Winterton 1997). Firstly, they can assist the construction of specific provisions, such as the heads of power in section 51. The 'heretical' doctrine of state reserve powers was an implication from the idea of federalism used in this way (Douglas, 1985).[24] Secondly, they can be used to discover or create a prohibition on legislative power, as if that prohibition were a provision in the Constitution. The 'heretical' immunity of instrumentalities was such a doctrine.[25] The moderated reciprocal immunity developed in *Melbourne Corporation*[26] and the separation of judicial power established in *Boilermakers*,[27] together with the guarantee of freedom of political communication, are likewise less extreme examples of the second use to which implied doctrines can be put.

Does an appropriate approach to constitutional interpretation preclude the use of ideas, doctrines or rules which are said to be 'necessarily implied' by the terms of the constitution? The framers were aware of a number of American authorities that supported the resort to necessary implications (Coper, 1986:21). This principle was accepted

[24] The state reserve powers doctrine, which prevailed prior to *Engineers*, maintained that before construing the extent of Commonwealth legislative powers under sections 51 and 52 of the Constitution, the court should first take into consideration those powers which were *intended* to have been 'reserved' to the states, particularly the power to regulate intra-state trade and commerce.

[25] According to this doctrine, which also prevailed prior to *Engineers*, the Commonwealth executive enjoyed a virtually absolute immunity from state legislation, and the state executives enjoyed a reciprocal immunity from Commonwealth legislation. As a result, for example, the states were unable to tax the salaries of Commonwealth government employees.

[26] The reciprocal immunity developed in this case operates only where legislation, say of the Commonwealth, threatens to strike at the very existence of the states or discriminates against them.

[27] Under the rule in *Boilermakers* the judicial power of the Commonwealth cannot be exercised by a body which is not a 'court' established under sections 71 and 72 of the Constitution.

by Quick and Garran as early as 1901 on the basis of those authorities (1901:511, 794). However, *Engineers* discarded the doctrines of the immunity of instrumentalities and state reserve powers in a return to an interpretation of the text in accordance with the ordinary principles of interpretation. The court referred disparagingly to the doctrine of implied immunities as based 'on implication drawn from what is called the principle of "necessity".' Such necessity was 'referable to no more definite standard than the personal opinion of the Judge who declares it.' As such, the court rejected 'the possible abuse of powers' as a basis of 'limiting the natural force of the language creating' the powers under consideration. Only 'expressed qualifications of the powers granted' are a sound basis for limiting such powers (*Engineers*, 142).

It might therefore be said (and seems in some quarters to have been thought) that the two doctrines were overturned because the resort to the idea of 'necessary implication' is not sustained by an application of the ordinary principles of interpretation (*West v Commissioner of Taxation (NSW)* (1937:681), cited as '*West*'). However, a careful reading of *Engineers* does not corroborate this understanding. Justice Isaacs, speaking for the majority, stated:

> The doctrine of 'implied prohibition' finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed *or necessarily implied meaning* (*Engineers*, 155; emphasis added).

Taking up this dictum in *Pirrie v McFarlane* (1925:214-5), Justice Higgins, although an outspoken opponent of the doctrine of implied immunities and a member of the court in *Engineers*, suggested that *Engineers* only struck down the doctrine 'in its extreme form,' leaving intact an as yet undefined but less extreme version. Similarly, Justice Isaacs, although he took the leading role in *Engineers*, considered that there is a 'natural and fundamental principle that, where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the capacity or functions expressly conferred on the other' (1925:191).

Apart from a parenthetical remark in *Australian Railways Union v Victorian Railways Commissioners* (1930:390), this idea was not authoritatively taken up again until 1937, when Justice Dixon opined:

> Since the *Engineers'* case a notion seems to have gained currency that in interpreting the constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments

> a written constitution seems the last to which it could be applied. I do not think that the judgement of the majority of the Court in the *Engineers'* case meant to propound such a doctrine (*West*, 681).

Accordingly, the legislative powers of the states and the Commonwealth are subject to an implied limitation intended to protect the integrity of the Commonwealth and the states, respectively. The Commonwealth cannot impose special burdens or discriminatory measures on the states, and the states cannot do the same to the Commonwealth.

Another ten years later, this formulation was given its first practical application in *Melbourne Corporation*. In that case, Justice Dixon held that the 'efficacy of the system' of State and Commonwealth governments exercising independent powers 'logically demands' that the states enjoy an immunity from Commonwealth legislation which would hinder the states from 'performing their essential governmental functions' or would prevent them from continuing to exist as such (80-83).[28] His Honour thought that the constitution 'predicates ... [the] continued existence [of the states] as independent entities' (82). For that reason, the Constitution was held impliedly to prohibit discriminatory interference between parties to the Federation. Therefore, a Commonwealth Act which purported to prohibit banks from conducting banking business with a State, an authority of a State or a local government authority without ministerial consent was held invalid.

Following this approach, in *Victoria v Commonwealth*, Justice Gibbs considered that:

> The ordinary principles of statutory construction do not preclude the making of implications when these are necessary to give effect to the intention of the legislature as revealed in the statute as a whole (1971:417).

On this basis, the *Melbourne Corporation* decision was upheld in principle, although found not to be of application on the facts in the case. Nevertheless, according to Justice Gibbs, the Constitution is essentially a federal document, and this federal nature leads to specific implications which restrict the legislative powers of the Commonwealth. For Justice Gibbs, this meant that *Engineers* overturned the wide doctrine of the immunity of instrumentalities on the restricted ground that it was not a 'proper' implication of the federal nature of the Constitution; leaving proper implications of the federal system permis-

[28] But see Chief Justice Latham at 61, Justice Starke at 70, 74, Justice Williams at 99 and Justice Rich at 66.

sible and, indeed, necessary. It was stressed that the *Constitution Act* was a response by the Imperial legislature to the wish of the Australian people to join in a *federal* union which would incorporate a distribution of powers between the Commonwealth and the State governments. While the Commonwealth was in some respects placed in a position of supremacy,

> it would be inconsistent with the very basis of the federation that the Commonwealth's powers should extend to reduce the States to such a position of subordination that their very existence, or at least their capacity to function effectually as independent units, would be dependent upon the manner in which the Commonwealth exercised its powers, rather than on the legal limits of the powers themselves (*Victoria v Commonwealth* (1971:417-8)).

Therefore, the States enjoy an immunity from Commonwealth legislation that attacks their very existence or capacity to function as such. This limited immunity was applied and further explained in *Queensland Electricity Commission v Commonwealth* (1985), where the combined effect of the cases was thus summarised:

> A general law, made within an enumerated power of the Commonwealth, will be invalid if it would prevent a State from continuing to exist and function as such [and a] Commonwealth law will also be invalid if it discriminates against the States in the sense that it imposes some special burden or disability on them (Chief Justice Gibbs, 1985:206).

The Scope of the Melbourne Corporation Principle

The High Court has explained that the notion of 'necessarily implied meaning' encompasses those doctrines which are necessary for the 'efficacy of the system' or 'necessary to give effect' to the Constitution. It is arguable that this is something of an extension of Justice Isaacs' formulation. The expression, 'necessarily implied meaning,' as used by Justice Isaacs, seems to centre on the meaning or definition of the terms used in the Constitution. On this view, the meaning of certain words in the Constitution, albeit when read in the context of the Constitution as a whole, may imply certain fundamental doctrines necessary to the very definition of the terms used. However, Chief Justices Dixon and Gibbs seem to have relied on the slightly wider notions of 'giving effect to the Constitution' and 'the efficacy of the system.' On this latter basis, it would seem, implications are appropriately drawn when they are

necessary to give a practical effect to the system created or contemplated by the entire Constitution. If the implications are not put into practice, the system will not work as intended – as that intention is discerned in the Constitution itself. Thus, by way of application, the court thought that since the Constitution provides for the parallel functioning of independent Commonwealth and State governments, that independent functioning would simply not occur if the Commonwealth passed legislation which disabled the states from functioning as independent governments, or worse, from existing as such.

Later in this chapter we will return to this distinction between implications based on definition of terms and those based on the efficacy of the system created by the Constitution. The notion is crucial to the consideration of the *Freedom of Speech* cases, where the court has adopted a view of necessary implications which seem to be significantly wider than even Chief Justices Dixon and Gibbs' already generous formulation, and where it has applied the wider view to a doctrine (representative democracy) which, while indubitably implied by the Constitution, has far less textual support than federalism. At this point, however, it is necessary to look first at the other types of implications approved by the court.

The Separation of Powers

A second recognised implication is the doctrine of the separation of powers. The implication has been said to result from a close study of the terms of the Constitution itself, unaided by external considerations. Thus Justice Dixon prefaced certain of his remarks in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) (cited as '*Dignan*') as follows:

> But an independent consideration of the provisions of the Commonwealth Constitution unaided by any such knowledge [i.e. knowledge of the Constitution of the United States] cannot but suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested by the Constitution, the doing of that which can be done in virtue only of the possession of such a power (1931:96).

In other words, the structure and terms of the Constitution necessarily imply a separation of powers between the Legislature, the Executive and the Judiciary because sections 1, 61 and 71 allocate *discrete* powers to the parliament, the Queen and the federal courts respectively. The fact that under common law there is no Common-

wealth governmental power apart from what is conferred under the *Constitution Act*[29] means that, for example, the judiciary cannot exercise legislative power for the simple reason that legislative power is not conferred on the judiciary. This appears to be the point of the closing phrase in Justice Dixon's statement. On this view, his Honour was correct in claiming that 'an independent consideration' of the Constitution leads to this conclusion.

While the Privy Council subsequently agreed with this approach (*A-G (Cth) v R, Ex parte Boilermakers' Society of Australia* (1957:540), cited as '*Boilermakers* (1957)'), the supposed reliance on the text alone did not in fact mean that the court took no other matters into consideration. For a start, the whole problem with the delegation of legislative powers to the executive (which was the issue in *Dignan*) is that while legislative power may not be vested in the executive by virtue of the Constitution, could it not be vested by virtue of ordinary legislation? The separation of legislative and executive power, to be an effective guarantee, must amount to a limitation of legislative power.

Moreover, 'external' considerations were the basis of the general exception to the doctrine of separation which was developed in *Dignan*. It was there held that parliament is able (subject to certain ineffective conditions – see Ratnapala, 1990) to grant to the executive the power to create subordinate legislation in light of 'the history and usages of British legislation and the theories of English law.' These usages and theories indicate that 'subordinate legislation which remains under parliamentary control ... lack[s] the independent and unqualified authority which is an attribute of true legislative power ...' (*Dignan*, 101-2).

On this, Sir Owen Dixon noted that the failure of the separation of powers doctrine to achieve full operation 'may be ascribed perhaps to judicial incredulity ... Legal symmetry gave way to common sense' (1965:52). Thus while the court has firmly struck down mixtures of judicial power and legislative or executive power, it has allowed the executive to make regulations under statute and subject to legislative supervision. The separation of judicial power has been tightly circumscribed because the argument from historical usage is not available in that instance and because the independence of the judiciary has been regarded as an essential or necessary bulwark for the protection of the

[29] The executive powers vested in the crown are an apparent exception. Thus section 61 *recites* that 'the executive power of the Commonwealth is vested in the Queen' – rather than 'shall be vested.' However, apart from the Constitution, the crown in right of the Commonwealth would not exist and nor would the executive powers of the Commonwealth.

Constitution, particularly the federal division of powers between the Commonwealth and the states (*Boilermakers*, 1956:269, 276; 1957:540).

However, in *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) Chief Justice Barwick and Justice Mason criticised the reasoning in *Boilermakers* on the basis that the doctrine of the separation of powers is

> unnecessary ... for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power (1947:90, 102).

Reflecting on these issues, Professor Zines has argued that 'the text clearly permits, on ordinary rules of interpretation, a number of approaches.' He stated:

> the basis of the decision in the *Boilermakers'* case is not the text of the Constitution but matters of policy related to the exercise of judicial power – the effective working of the Australian Constitution, the separation of the judicial power of the Commonwealth and the protection of the Constitution (1992:150).

Does this indicate that something other than a test of 'necessary implication' was involved? Chief Justice Barwick and Justice Mason classified 'the effective working of the Constitution' as a legitimate criterion, but denied that the separation doctrine was required on that basis. They also thought that the independence of the courts was a legitimate criterion, and likewise, the independence of the judiciary can be justified in terms of the efficacy of the Constitution: it facilitates the court's enforcement of the Constitution without fear or favour, as was argued in *Boilermakers* (1956:276). On the other hand, Zines distinguished between these criteria and the requirements of the text of the Constitution. This reinforces the fundamental distinction between implications of the text of the Constitution and implications thought to be necessary for the efficacy of the Constitution.

There remains a problem with the qualification of the separation doctrine in the delegation of legislative power to the executive. As the court pointed out in *Boilermakers*:

> The fact that responsible government is the central feature of the Australian constitutional system makes it correct enough to say that we have not adopted the American theory of the separation of powers. For the American theory

> involves the Presidential and Congressional system in which the executive is independent of Congress and office in the former is inconsistent with membership of the latter. But that is a matter of the relation between the two organs of government and the political operation of the institution. *It does not affect legal powers.* It was open no doubt to the framers of the Commonwealth Constitution to decide that a distribution of powers between the executive and legislature could safely be dispensed with, once they rejected the system of the independence of the executive. *But it is only too evident from the text of the Constitution that that was not their decision* (*Boilermakers*, 1956:276, emphasis added).

Although in *Boilermakers* (1956:278) the High Court approved the decision in *Dignan*, this dictum casts some doubt on it (see Ratnapala, 1990).

Representative Government

We now turn to the third doctrine which historically has been said to be necessarily implied by the Constitution, the doctrine of representative government. This implication is well established in the case law and, of course, is essential to the court's argument in the *Freedom of Speech* cases.

At the outset, the distinction between 'responsible government' (executive responsibility to parliament as a matter of constitutional convention) and 'representative government' (responsibility of the legislature and executive to the people through the electoral system) should be noted (Barker, 1951:70; Lumb, 1983:ch 6). Responsible government means that although executive authority is formally vested in the crown and in the Queen's vice-regal representative, real executive power is held by the Prime Minister and cabinet, who are collectively responsible to the parliament. A 'government' which loses the confidence of parliament ought therefore to resign. Failing resignation, the government will be dismissed by the Governor-General, since it was the support of at least the lower house of parliament which led to its appointment. The practices of responsible government are part of the English and Australian systems of government by virtue of constitutional conventions, not law (Dicey, 1920:19-29; Cooray, 1979:59-62). Consistent with their character as conventions, the practices of responsible government (and representative government) were not explicitly set out in the Constitution (Crommelin, 1986:127). Nevertheless, the court's inference of responsible government, on the basis of section 64

of the Constitution in particular, is well established in the Convention debates and in the cases (*Engineers*, 147; *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922:446); *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926:411-3)).

Representative government means that the legislative and executive powers of government are exercised or controlled by an assembly composed of individuals who each represent an electorate or the people of an electoral region; that the electors have regular power to appoint their representative(s), usually by ballot; and that the representative assembly meets regularly. Again, the implication of representative government is well attested in the case law (*Federal Commissioner of Taxation v Munro* (1926:178); *A-G (Cth), Ex rel McKinlay v Commonwealth* (1975:56, 62, 71) (cited as '*McKinlay*'); *A-G (NSW), Ex rel McKellar v Commonwealth* (1975:540)).

However, the court has made limited the use of these implications. In *Engineers*, Justice Isaacs referred to the doctrine of responsible government as a distinguishing feature of the Australian Constitution, which meant that American authorities could not be relied on in support of the implied immunities doctrine (*Engineers*, 145-8). Moreover, his Honour stated:

> The extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the courts. ... If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this court in such a case is necessary or proper (*Engineers*, 151-2).

Similarly, in *McKinlay*, the question, addressed again in *McGinty*, was whether the embodiment of representative government in section 24 requires equal numbers of persons or electors in electoral regions. In answering this question, members of the High Court found that the House of Representatives was to be elected on the basis of 'democratic principles' and that section 24 embodied the principle of 'representative democracy.' However, the majority declined to draw specific conclusions from the principle of representative government other than those which could be based directly on the terms of the Constitution.

Chief Justice Barwick conceded that section 24 required 'popular

election,' but he denied that this meant 'any particular theory of government' and further, that '*express words* are regarded as necessary to warrant a limitation of otherwise plenary powers' vested in a near-sovereign Parliament (*McKinlay*, 21, 24, emphasis added).

Justice Gibbs warned against adding to the Constitution 'new doctrines which may happen to conform with our own pre-possessions.' These prepossessions may include a democratic system of government in which the electorate is 'fairly apportioned into electoral districts whose boundaries are not gerrymandered,' where the ballot is 'correctly and honestly conducted,' and where the vote is 'fairly counted' and 'corrupt electoral practices' are 'suppressed.' But, said Justice Gibbs, it is a matter of opinion as to how each of these values can or should be realised (*McKinlay*, 43-5). More importantly:

> the Constitution does not lay down particular guidance on these matters; the framers of the constitution trusted the Parliament to legislate with respect to them if necessary, no doubt remembering that in England, from which our system of Representative Government is derived, democracy did not need the support of a written constitution (1975:46).

His Honour adverted to the American experience and indicated that he considered that the American decisions 'reflect a view that every major social ill ... can find its cure in some constitutional "principle".'

Justice Stephen likewise thought that 'the particular quality and character of ... representative democracy ... is not fixed and precise,' for 'representative democracy is descriptive of a whole spectrum of political institutions, each different in countless respects yet answering to that generic description.' By the same token, he thought that '[t]he spectrum has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy.' But within the generic description of representative democracy, there is no one *essential* characteristic. Thus to require equality of numbers within electoral divisions is, amongst other things, 'to deny proper meaning to language' (*McKinlay*, 56-7). It is, therefore, a question of definitions of terms.

Justices McTiernan and Jacobs also denied that there was any requirement of 'absolute or as nearly as practicable absolute equality of numbers of the people' in each federal electorate. Nevertheless, in discussing the width of the franchise, they thought that there would be a point at which 'a choice by electors' would cease to be a 'choice by the people of the Commonwealth,' though this could not be determined in the abstract. This comment seems also to have applied to the

'notion of equality' since that question too remained a matter of degree (*McKinlay*, 36-7).

Justice Mason likewise thought that it was

> perhaps conceivable that variations in the numbers of electors or people in single member electorates could become so grossly disproportionate as to raise a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people of the Commonwealth (*McKinlay*, 61).

Nevertheless, his Honour distinguished between those matters that were explicitly dealt with in section 24 and the implications that were urged on behalf of McKinlay. He cited with approval an earlier dictum that the only limitations which could be placed on grants of power were those found in the *express* words of the Constitution (*McKinlay*, 62).

Justice Murphy, dissenting, held that the 'command' in section 24 that members of the House of Representatives be 'chosen by the people' requires an equal number of people or electors in each division (*McKinlay*, 70).

In the *First* and *Second Territory Representation* cases (*Western Australia v Commonwealth* (1975) and *Queensland v Commonwealth* (1977)), the court upheld the validity of a Commonwealth Act which provided for two representatives from each of the two territories to be full voting members of the Senate. The issue centred on the relationship between section 7 of the Constitution ('The Senate shall be composed of senators for each State') and section 122 ('The Parliament ... may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit'). In the earlier case, Justice Murphy maintained that the 'democratic theme of the Constitution' requires that Parliament should be able to 'allow representation by membership in either house to territories at the time and on the terms' which it considers appropriate. Implicitly therefore, his Honour held that section 122 qualifies section 7.

By way of contrast, Chief Justice Barwick (in the minority) held that the 'essentially federal nature of the polity' created by the Constitution requires that the Senate is essentially a 'states' house' and that therefore only representatives of states may be voting members of the Upper House. Accordingly, section 7 should override section 122. Behind these positions each judge applied the doctrines of democracy and federalism, each to different effects. In the result, the legislation

providing for territory representation was held to be valid. Of course, the case did not involve an argument for a prohibition on legislative power, as in the *Freedom of Speech* cases.

Further, in a number of judgments between 1975 and 1986 Justice Murphy adverted to the 'democratic theme of the Constitution' and 'the nature of our society' in support of implied guarantees concerning slavery and serfdom, cruel and unusual punishment, arbitrary discrimination between the sexes, freedom of movement and freedom of communication.[30] For example, in *McGraw-Hinds v Smith*:

> Because of the brevity of constitutions, implications are a prominent feature in the history of their judicial interpretation. The Australian Constitution does not express all that is intended by it: much of the greatest importance is implied. Some implications arise from consideration of the text; others arise from the nature of the society which operates the Constitution. Constitutions are designed to enable a society to endure through successive generations and changing circumstances.
>
> [Australian] society professes to be a democratic society – a union of free people ... From the nature of our society, an implication arises prohibiting slavery or serfdom. Also from the nature of our society, reinforced by the text ... an implication arises that the rule of law is to operate, at least in the administration of justice.
>
> [F]rom the nature of our society, reinforced by parts of the written text, an implication arises that there is to be freedom of movement and freedom of communication. Freedom of movement and freedom of communication are indispensable to any free society (1979:667-70).

Likewise, in *Miller v TCN Channel Nine* his Honour maintained that the Constitution contains an implied guarantee of freedom of communication as necessary for the proper operation of representative government (1986:581-2). However, a majority including Justices Mason and Brennan disagreed on the basis that section 92 covered the field and that a possible abuse of power and 'political necessity' are not a sufficient basis for such an implication (1986:569, 579, 615, 636).

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[30] *R v Director-General of Social Welfare for Victoria, Ex parte Henry* (1975:386-389); *Buck v Bavone* (1976:138); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977:88); *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979:670); *Seamen's Union of Australia v Utah Development Company* (1979); *Uebergang v Australian Wheat Board* (1980:312); *Sillery v R* (1980:231-5); *Gallagher v Durack* (1983:246); *Miller v TCN Channel Nine Pty Ltd* (1986:581-2).

Notably, however, Justice Deane was careful to stress that his rejection of Justice Murphy's position was based on the 'wide operation which current authority gives to section 92,' an operation which was subsequently overturned in *Cole v Whitfield* (1988). In fact, Justices Deane and Toohey were to discuss the relevance of section 92 to the question of freedom of communication in *Nationwide News*, 81-4.

Other Implications

There are a number of other important doctrines which members of the court have said or suggested are implications of the federal Constitution.

The Rule of Law

In *Australian Communist Party v Commonwealth* (1951) Justice Dixon noted that the rule of law is a 'traditional conception' in accordance with which the Constitution had been framed (1951:193). Enlarging on this theme in an address entitled 'The Law and the Constitution,' Sir Owen argued that three conceptions undergird the Australian federal and state constitutions. They are the supremacy of the law, the supremacy of the crown and the supremacy of parliament (1965:38). He noted that the Australian Constitution, like the American, is founded on the notion of the supremacy of the law, for it is self evident in the division and restriction of powers seen in the Constitution and the English *Bill of Rights*. In another address he concluded that '[t]he rule of law ... is a conception without which the theory of a rigid Constitution could never have grown ...' (1965:101).

Judicial Review and Constitutionalism

Another two judiciially recognised implications of the Constitution are the doctrines of constitutionalism and judicial review, as noted in the account of Australian constitutionalism developed in the previous chapter. It was confirmed in *Victoria v Commonwealth* (1975:379) that the doctrine of judicial review developed in the seminal decision of Chief Justice Marshall in Marbury v Madison is a fundamental assumption of all Australian constitutional decisions. This judicial duty to interpret the Constitution and to determine whether legislation passed by the parliament falls within legislative power as provided for in the Constitution is said to flow necessarily from the federal and constitutional form of government established by the Constitution (*Boilermakers*, 1956:267-8). As Chief Justice Marshall argued, judicial review is necessarily required by the pre-eminence of the Constitution. For

either the Constitution is 'asuperior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legeslation, alterable when the legislature shall please to alter it.' If it be superior, and if this superiority is applied in practice, then legislation repugnant to the Constitution must be void. Further, it is the duty of the courts to apply the law even if two relevant laws are contradictory. Therefore, if two laws (one constitutional and the other ordinary) are contradictory, the courts must apply the constitutional law as of paramount application. It follows, as Chief Justice Latham stated:

> Common expressions, such as 'the courts have declared a statute invalid' sometimes lead to misunderstandings. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour – but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it and thereafter invalid. If it is beyond power it is invalid *ab initio* (*South Australia v Commonwealth* (1942:408)).

On this view, the High Court has consistently regarded the Constitution as a document which not only binds the legislature but protects and acts as a 'bulwark' and a 'safeguard' for the preservation of the Australian polity. In *Australian Communist Party v Commonwealth* (1951:259), Justice Fullagar even considered that legislative power exists to make laws for the protection of the Constitution. It is a fundamental assumption here that the written Constitution defines and limits the powers possessed by the organs of the Commonwealth. Once we say this, we are conceding that constitutionalism is a fundamental assumption of the operation of judicial review and the use of the written Constitution as the standard of review.

But if constitutionalism is a doctrine implied by the Constitution, then there is the remarkable possibility of a conflict between a particular view of representative government and the doctrine of constitutionalism. This possibility is in fact well illustrated by the *Freedom of Speech* cases. The doctrine of representative government is there said by the court necessarily to imply a guarantee of freedom of communication with respect to political matters. However, this process of 'implication,' as I shall argue, involves a number of extraneous ideas (and results) which have no necessary relationship to, and are far removed from, the text of the Constitution. The doctrine of constitutionalism, in requiring the limitation of all branches of government,

postulates the existence of limitations on the power of the judiciary as well as the legislature and executive. How then are the powers of the judiciary limited? As previously argued, the answer must be that they are limited by the terms of the Constitution. Therefore, the judiciary should not have recourse to notions which are extraneous to the terms of the Constitution if this produces results which are not effectively constrained by those terms.

Common Law

The final implication (or presupposition) of the Constitution to which we will refer is the common law. Common law provides the background to the Constitution, fills in the gaps left by the Constitution and other statutes and provides doctrines which assist in the interpretation of the Constitution. In *Pirrie v McFarlane* (1925:200) Justice Isaacs noted that 'the fabric of the Common Law stands behind the words of the Constitution and of every constitution so far as the written words do not alter it.' Likewise, Sir Owen Dixon observed that common law is 'the source of the legal conceptions which govern us in determining the effect of the written instrument,' because 'common law is the source of the [supreme legislative] authority of the Parliament at Westminster.' Therefore, 'constitutional questions must be considered and resolved in the context of the whole law, of which the common law ... forms not the least essential part' (1965:9).

Indeed, common law legislative powers of the Imperial Parliament; if there were no such notion of imperial legislative power, there would have been no *Commonwealth of Australia Constitution Act.* Further, it has been said that the English constitution is part of the common law of England and is composed of a series of rights possessed by the subject (Dicey, 1920:191-2, 197; Maitland, 1908:527). On this view, the Australian Constitution, as a document, is but part of the entire body of constitutional law of Australia, and that body of constitutional law is part of the entire common law of Australia. In this light, there is strength in the argument that common law embodies rights and principles which run so deep that even parliament is not competent to trench upon them (see Walker, 1985; Smallbone, 1993). Smallbone suggests that Sir Edward Coke's use of common law and natural law to strike down legislation in limited circumstances should be revived and replace the *ACTV* doctrine. This suggestion is not incompatible with the argument made in this book insofar as limitations rooted in common law possess a specific content which effectively controls judicial power. However, it still faces the problem that

parliamentary supremacy is rooted in the ancient idea of parliament as the 'High Court of Parliament,' ultimately charged with guarding and overseeing the common law – which now seems to mean that Parliament is legislatively supreme (see *Kruger,* 162-3; *Kable v DPP (NSW)* (1996:590)'.

Entrenching Individual Rights and Restricting Legislative Power

The Scope of Implications

While it is well established that the drawing of necessary inferences from the Constitution is appropriate, the contentious matter lies in the application of implied doctrines and in the relationships between them. We have already seen that *Engineers* and the *First Territory Representation* case reflected a perceived conflict between 'federal postulates' and the doctrines of representative and responsible government. Thus, as has been said, if constitutionalism is a presupposition of the Constitution, then it is arguable that the *Freedom of Speech* cases involve a conflict between the doctrine of constitutionalism and the doctrine of representative government. If the doctrine of constitutionalism means the limitation of government, it means the limitation of all branches of government, including the judiciary. There is then a question whether the court has in fact subjected itself to the Constitution, as required by the theory of constitutionalism advaanced in the previous chapter.

Where two implied doctrines are perceived to be in conflict, a decision has to be made as to the scope of the implied doctrines in question (Winterton, 1986:224). Thus *Engineers*, the *First Territory Representation* case, *Boilermakers*, *Dignan* and *Melbourne Corporation* each involved an argument over the extent to which implied doctrines should be given effect. The difficulty is that the entire content of each implied doctrine is not set out in the text of the Constitution, although it is on the basis of the full doctrine that the practical implications are discovered and applied. For example, for the pre-*Engineers* cases, while the actual text of the Constitution specified only *aspects* of the full idea of federalism, the Constitution as a whole implied the *full* doctrine. The full idea was used to infer the immunity of instrumentalities and reserve powers doctrines.

Accordingly, the contentious aspect in the implication of doctrines is in the derivation of consequences that go beyond the textual basis of the implication, or which conflict with other parts of the text or other

implications. Once necessary implications are allowed, the difficulty lies in shaping a balance between the text and the full consequences of the idea adduced by the process of implication. This difficulty calls for the application of a consistent standard.

This is crucial for the evaluation of the *Freedom of Speech* cases, as they involved a *multiple stage* implication: from the text, to representative government, to freedom of communication, to a guarantee thereof, to limitations on that guarantee. The present argument is that constitutionalism requires a limit on the extent to which constitutional implications are given effect, a limit which need not rely on the 'literalism' of *Engineers*. It is supported by a combination of considerations: (1) the express text; (2) the doctrine of constitutionalism; (3) the framers' intent; and (4) the needs of contemporary and, indeed, all societies for limited government under law (see Craven, 1992d).

The argument is in turn premised on the view that constitutionalism is the most fundamental of these doctrines. If one abandons constitutionalism, there is very little if any scope for democracy, judicial review, federalism or the separation of powers. Without the conception of the Constitution as a higher law defining and limiting the powers of the Commonwealth and the states, and of the Executive, Legislature and Judiciary, there is little meaning left to the ideas of federalism or the separation of powers. Both presuppose constitutionalism and the rule of law. Likewise, with no constitutionalism, there can be no meaningful judicial review. For Chief Justice Marshall, judicial review was premised on the notion of the US Constitution as fundamental law. Without fundamental law as the standard of review, there is no relevant difference between judicial review and a discretionary power of veto over legislation. Even representative democracy is virtually meaningless without constitutionalism, for unless the *rules* of the democratic order are consistently followed, one can have no functioning democracy.

If, then, constitutionalism is something more fundamental than representative democracy, it is self-defeating to subordinate constitutionalism to the formulation of a guarantee of freedom of communication in the name of democracy. What point is democracy, indeed, what point is freedom of communication, if their very foundation in constitutionalism is jeopardised?

High Court Decisions

There were, at the time the first of the *Freedom of Speech* cases were decided, a number of cases in which it had been argued before the

High Court that the Constitution necessarily implies a number of judicial process rights, such as equality before the law, freedom from retrospective criminal laws, a prohibition of bills of attainder and a right to judicial trial in criminal matters. It was argued in these cases that the nature of judicial power in chapter III of the Constitution, and its separation from executive and legislative power in chapters I and II, necessarily implies the judicial process rights in question.[31]

In *Polyukhovich v Commonwealth* (1991), Chief Justice Mason and Justices Dawson, Toohey and McHugh held that it was implicit in the separation of judicial power that a special penal law directed at particular persons and enforced by the executive without judicial trial would be invalid. However, they considered that the Act in question did not fall under this implied restriction because, although retrospective, it left to judicial determination the factual question of whether a particular person charged had committed the offence. On the other hand, Justices Deane and Gaudron, while agreeing with the primary rule of the majority, added that there is an implied constitutional guarantee against trial for infringement of a statute which operates retrospectively. Justice Deane even suggested that there might be a constitutional guarantee of equal protection before the law. Justice Toohey agreed that a guarantee against such retrospective legislation exists, but held that the guarantee had no present operation because the conduct in question, murder, was a crime at the time and in the place where it was committed.

In *Leeth v Commonwealth* (1992), a minority consisting of Justices Deane, Toohey and Gaudron accepted the argument that the Constitution necessarily implies a doctrine of fundamental legal equality, meaning the subjection of all persons to the law and the 'inherent theoretical equality of all persons under the law and before the courts' (1992:693).[32] This doctrine, in the minority's view, served to strike down legislation which provided that the non-parole period for particular federal offences would depend on the non-parole period applicable for a similar offence in the particular state in which the offence was tried. A majority – Chief Justice Mason and Justices Brennan, Dawson and McHugh – however, disagreed. Chief Justice Mason and Justices Dawson and McHugh denied the existence of the

[31] I limit my examination to the cases decided up to 1992, for these were the context in which *ACTV* and *Nationwide News* were decided.

[32] Similarly, in *Queensland Electricity Commission v Commonwealth* (1985:247), Justice Deane referred to an 'implication of the underlying equality of the people of the Commonwealth under the law of the Constitution.'

implication. Justice Brennan suggested (but did not apply) a more limited implication which would render legislation void if it exposed offenders under the same law to different maximum penalties. The basis of this implication was said to be the fundamental unity of the Australian people reflected in the preamble to the Constitution (1992:685).

The minority's argument for the implication is instructive. Their premise was that the framers of the Constitution consciously incorporated underlying doctrines into the Constitution, reflected in the general nature of the federation and in specific provisions. Although the particular provisions were limited in scope, their existence did not preclude, but rather required, the implication of the wider doctrines underlying them. The doctrine of legal equality was thus inferred for three reasons. (1) The conceptual basis of the Constitution is an agreement of the people, which presupposes the inherent equality of each citizen. (2) The separation of judicial from executive and legislative power presupposes that the courts exercise judicial power, which itself involves the administration of equal justice to all people. (3) A number of specific provisions reflect the doctrine of legal equality.

What is relevant about this process of reasoning is the *multiple stage inference* which is involved for each of the three arguments. In particular, the second argument moves: from the text, to a separation of judicial power, to a requirement that the essential attributes of a court be exhibited, to an obligation to act judicially, to the obligation to administer equal justice, to the obligation to treat defendants fairly, impartially and without irrational or irrelevant discrimination, to a doctrine of irrational versus relevant discrimination *in the law.* This multiple stage inference, a minority view, is similar to the kind of reasoning adopted in the *Freedom of Speech* cases and is arguably subject to the same kind of criticisms that will be raised in the next chapters, except in so far as it rests in the common law background of the Constitution. Suffice to say that the majority did not accept it. They argued that the notion of judicial power is concerned with 'the function of a court rather than the law which a court is to apply in the exercise of its function' (1992:680).

This propensity to read the Constitution as being concerned with individual rights was reflected in Justice Deane's list of implied rights set out in *Street v Queensland Bar Association* (1989). On the basis of sections 24, 25, 51(ii), 51(iii), 71, 86, 88, 90, 109 and 118, he included a 'right' only to be liable to Commonwealth jurisdiction through a section 71 court; a 'right' to freedom from discrimination in taxation

and other matters; a 'right' to direct suffrage and equality of voting rights; and a 'right' not to be affected by inconsistent Commonwealth and State laws (see Hanks, 1992:93).

Moreover, in *Davis v Commonwealth* (1988) the decision in the *Freedom of Speech* cases was prefigured when a majority of the court held that the scope of the Commonwealth's 'incidental' legislative power under section 51(xxxix) of the Constitution is limited to legislation which is reasonably proportionate and adapted to a legitimate objective under some other head of legislative or executive power. It was held that the legislation under consideration (in this case, concerning the commemoration of the Australian Bicentenary) was not reasonably proportionate to this legitimate objective because it unduly encroached upon *free speech* and was, for that reason, invalid (1988:100, 116). This method of restricting incidental legislative power by reference to a test of proportionality was applied by the majority in *Nationwide News v Wills*, as is discussed more fully in the next chapter.

Relevant Decisions in Other Jurisdictions

There was also by 1992 increasing evidence of a tendency in common law jurisdictions to infer constitutional limits on legislative and executive powers and to question the idea of parliamentary sovereignty. These cases are evidence of a change in judicial attitude, that judicial review may apply to Westminster-style, hitherto 'sovereign' parliaments, and that the courts can invoke notions of fundamental rights as the basis of that review.

At the time of federation it was generally understood, in the words of A.V. Dicey's influential *Introduction to the Study of the Constitution*, that 'the dominant characteristic of our political institutions' was the 'sovereignty of Parliament,' meaning

> neither more nor less than this, namely, that Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament (Dicey, 1920:37-8).

As Dicey noted (1920:95-116), the legislatures of the British colonies, i.e. India, Canada, Australia and New Zealand, were at the turn of the century subordinate to the Imperial Parliament and subject to the doctrine of repugnancy, under which laws passed by the colonial legislatures which were repugnant to any Imperial Act extending to the particular colony would be invalid (*Colonial Laws Validity Act* 1865).

However, within those confines, the colonial legislatures possessed plenary and effectively sovereign legislative powers to legislate within their respective territories (*Hodge v R* (1883)).

Therefore, the state legislatures in Australia have traditionally been regarded as possessing plenary legislative powers. Indeed, over the course of time these plenary powers have expanded, since the repugnancy doctrine and possibly the extra-territorial limitation have now been repealed under the *Australia Acts* 1986 (*Union Steamship Co of Australia v King* (1988)). Thus, speaking of the Commonwealth Parliament in 1901, Quick and Garran concluded that 'its authority within the limits prescribed by the Constitution are as plenary and ample as the Imperial Parliament in its plenitude possessed and could bestow,' hence 'plenary, absolute, and *quasi*-sovereign' (1901:509-10).

It has been argued that parliamentary sovereignty was actually the creation of legal academics such as Dicey (Walker, 1980). If so, it is noticeable that of recent years, again under the influence of legal academics, the 'dogma' of parliamentary sovereignty has come under concerted attack. Sir Ivor Jennings pointed to some of the anomalies in Dicey's use of the term 'sovereignty' and his need to distinguish between legal and political sovereignty (Jennings, 1948:135-48). The matter has been taken much further by Professor Allan, who most recently has pointed out that the justification of parliamentary sovereignty lies in the commitment to parliamentary democracy, so that a statute which destroyed 'any recognizable form of democracy' would be subversive of the very foundation of parliamentary sovereignty. Indeed,

> Judicial obedience to the statute in such (unlikely) circumstances could not coherently be justified in terms of the doctrine of parliamentary sovereignty, since the statute would violate the political principle which the doctrine itself enshrines (Allan, 1993:282; see Allan, 1985).

The Supreme Court of New South Wales

In this spirit, in *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) (cited as *'BLF'*) the Supreme Court of New South Wales was asked to invalidate legislation of the NSW Parliament on the grounds of: (1) an improper interference with the judicial process; (2) inconsistency with the form of words granting legislative power to colonial legislatures, viz., 'the legislature shall ... have power to make laws for the peace, welfare, and good government of New South Wales'; and (3) an

improper legislative interference with fundamental common law rights. While the court dismissed the challenge to the legislation, Chief Justice Street in principle accepted that the words 'peace, welfare and good government' constitute a substantial limitation on legislative power – contrary to the traditional view.

Chief Justice Street maintained that the expression 'New South Wales' referred to a particular body politic which by definition was to be 'a parliamentary democracy,' 'an entity ruled by a democratically elected parliament whose citizens enjoy the great inherited privileges of freedom and justice under the protection of an independent judiciary' (at 382). Therefore, courts are required to determine whether a statute is in fact for the 'peace,' 'welfare' and 'good government' of that democratic polity. Thus laws interfering with universal suffrage or the independence of the judiciary could well be struck down on this basis. Reflecting on Sir Edward Coke's famous dictum concerning statutes 'against common right and reason,' the Chief Justice opined:

> This brave assertion has not stood the test of time ... but the ringing words of Lord Coke ... may yet provide encouragement for courts in putting down tyrannous legislation (at 386).

Justice Priestley also considered this approach to be arguable (at 421). Justice Glass reserved his position (at 407). However, in a thoughtful judgment, President Kirby (as he then was), pointed out that the primary problem of constitutional adjudication in cases such as this is to devise a 'means for the protection and enhancement of individual human rights in a manner consistent with the democratic basis of our institutions' (at 387). But the NSW Constitution, according to President Kirby, lacked any explicit limitation on the powers of the parliament analogous to the 'express limitation on the enactment of a "legislative judgment"' that appears in Article I, paragraphs 9(3) and (4) of the US Constitution (at 398). On the 'peace, order and good government' argument, his Honour noted that 'our protection against such predicaments remains, fundamentally, a political and democratic one' (at 406).

Justice Mahoney likewise noted that there was 'nothing in the terms of the former or present *Constitution Act* or in any other law' which warranted an implication of a separation of judicial power under the NSW Constitution. There would have to be 'significant indications in the constitutional arrangements' to suggest such a segregation of powers. While pointing to the restrictive construction that the courts traditionally place on legislation which interferes with human rights, his Honour concluded that 'in the end the power, and so the

responsibility, lies with parliament' (at 407, 409 and 413).

Accordingly, in *Union Steamship Co. of Australia Pty Ltd v King* (1988), the High Court rejected the limitation of legislative powers on the second ground argued in the *BLF* case, although the justices (knowing their own minds on the matter) did not exclude the possibility of 'rights deeply rooted in our democratic system of government and the common law,' a possibility which of course bore fruit in the *Freedom of Speech* cases.

The New Zealand Court of Appeal

Sir Robin Cooke, President of the New Zealand Court of Appeal, has declared that there are some common law rights that go so deep that even parliament cannot destroy them. In *New Zealand Drivers' Association v New Zealand Road Carriers* (1982), his Honour expressed doubt whether an Act of parliament can take away the right of citizens to resort to the ordinary courts for determination of their rights. In *Fraser v State Services Commission* (1984), he extended this possibility to other (unspecified) common law rights which 'go so deep even parliament cannot be accepted by the courts to have destroyed them.' And in *Taylor v New Zealand Poultry Board* (1984) his Honour adduced an example, namely a right against governmental duress or compulsion to answer questions under torture.

The Supreme Court of Canada

Until the introduction of the Canadian Charter of Rights and Freedoms, the Canadian legislature, like its New Zealand counterpart, possessed plenary and effectively sovereign legislative powers (*Hodge v R* (1883)). Nevertheless, the Supreme Court of Canada had extended judicial review to the defence of rights which are said to be necessarily implied by the doctrine of representative government. Indeed, it has long held that the *British North America Act*, in providing for representative government, implies a guarantee of free speech and equal rights for citizens in the different provinces.[33] Again, these implications, particularly the implication of free speech, were said to be necessarily implied in order to give efficacy to or to afford scope to the working of the institution of representative government. It should not be surprising, therefore, that the High Court specifically relied on these decisions in the *Freedom of Speech* cases (*ACTV*, 140, 212; *Nationwide News*, 48-49). More recently, the Canadian decision of *Reference re: Electoral*

[33] *Re Alberta Legislation* (1938:107-9, 119-20); *Saumur v City of Quebec & Attorney-General (Que)* (1953:694); *Switzman v Elbling* (1957:358, 369, 371).

Boundaries Commission Act (1991), though based on the Charter, was deeply influential in *McGinty* (294, 309, 322-3, 331–2, 337, 357, 373-4), after having itself been influenced by the Australian decision in *McKinlay* (see *Electoral Boundaries Commission* case, 1991:38).

Critical Reflections

Professor Zines observed on some of the earlier manifestations of these developments:

> The extraordinary upsurge in judicial boldness in challenging legislatures in the cause of individual and democratic liberties and the rule of law, in Canada, Australia and New Zealand, corresponds with the vastly increased checks that British judges, and those of other countries, have imposed on executive and administrative authority over the last 20 years or so, but it is, of course, more radical.

But he expressed some concern over them, when he added:

> If this trend should develop further, it seems to me that it would be highly dangerous and certainly undesirable. This is not because I am of the view that there should be no limitations on parliamentary power. It is simply that these efforts to create legislative restrictions, which are not based on any specific provisions, provide no guidance or check to judicial aggrandisement or personal predilections. I agree with Kirby P, President of the New South Wales Court of Appeal, that these notions should be rejected 'because, once allowed, there is no logical limit to their ambit.'
>
> I am not totally distrustful of judges when it comes to the protection of the individual or of minorities. But I suggest that they should not be given, nor should they grab, a blank cheque (1991:51-2).

Professor Zines argued that the drafting of Acts, constitutional provisions, or treaties relating to rights needs very careful consideration. Those in existence differ in significant respects, even when confined to the 'negative' freedoms of the liberal society. They should provide guidelines for the judges who have to interpret them. Accepting that entrenched rights confer on the judiciary broad policy making powers, it is necessary to give deliberate attention to the extent and limits of this judicial power. To accept 'peace, welfare and good government' or 'a free and democratic society' as the starting point in reasoning is to invite a judge to discover in the Constitution his or her own broad political philosophy (1991:52). Justice Brennan reflected on

these comments in his circumspect decision in *Nationwide News* (44), and the concerns expressed were to solidify in *Theophanous* (28) and *McGinty* (295-6), as we will see.

The Supreme Court of the United States

The very terms and history of the United States Constitution and Bill of Rights have greatly facilitated the extension of judicial review into areas of substance, both within the express terms of the Bill of Rights and beyond those terms. For example, by way of 'necessary' implication, the Supreme Court has found a constitutional right to privacy in the 'penumbra' of the Constitution (*Griswold v. Connecticut* (1965); *Roe v Wade* (1973)). Indeed, it has been argued that many of the important American constitutional decisions have been 'openly noninterpretive,' meaning that they 'articulate and apply contemporary norms not demonstrably expressed or implied by the framers' (Grey, 1975:706-7).

The use of implications and a liberal interpretation of the Constitution is so advanced in the United States that it would be impossible to canvass the decisions in any more than a selective and limited manner. Moreover, much of its jurisprudence is strictly inapplicable, though instructive. Thus on numerous occasions the Australian courts have considered that the Canadian Constitution and Supreme Court decisions bear a much closer analogy to the Australian than do the American (eg *McGinty*, 247, 270). Nevertheless, the parallels to the Australian Constitution should not be underestimated. Measure for measure, the Australian Constitution is more like the American than the Canadian Constitution. The Australian framers were insistent that they would follow the American over the Canadian model, especially when it came to matters relevant to federalism.

Thus while the American cases on freedom of speech, expressly guaranteed by the First Amendment, are not directly helpful on the derivation of constitutional implications, the American cases on equality of voting power, as argued in *McGinty*, are instructive, though influenced by a different history (*McKinlay*, 23). This is especially the case with regard to congressional districting, since the American implication of equality of voting power in congressional elections is derived from Article I, paragraph 2, upon which section 24 of the Australian Constitution was modelled. Article I, paragraph 2 provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch

of the State Legislature.

In the seminal[34] *Wesberry v Sanders* (1964) the US Supreme Court held that 'construed in its historical context, the command of Art. I, paragraph 2 ... means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's' (1963:7-8). The opinion of the court delivered by Justice Black and the dissenting judgment of Justice Harlan focussed on the history of Article I as debated in the Philadelphia Convention of 1787 (see 1963:7-17, 30-41). After recounting those events at length, Justice Black said that Article I must be construed 'in the light of such history,' and Justice Harlan countered that Justice Black's 'historical context ... bears little resemblance to the evidence found in the pages of history' (1963:17, 24).

Nevertheless, the textual and theoretical dimension was also briefly canvassed by the judges. A number of themes emerged. Justice Black said that the right to vote is the most 'precious' in a free country, for 'other rights, even the most basic, are illusory if the right to vote is undermined' (1963:17). By contrast, Justice Harlan emphasised the specific terms of Art. I, showing that they did not require 'one vote, one value,' at the level of 'sentence meaning' at least (see Goldsworthy, 1994). The specific words used, on their respective definitions, only required 'a choice by the People' not 'a choice by every individual among the People casting a vote of equal value' (1963:24). Thus the majority opinion actually turned on an implication derived from what Justice Harlan called a 'dubious' historical account and 'a particular political theory,' rather than the meaning of 'constitutional provisions which speak so consistently and plainly' (1963:30). Likewise, Justice Harlan contrasted the provisions in question with the 'vague contours' of the due process clause contained in the Fourteenth Amendment which 'leave much room for constitutional developments necessitated by changing conditions in a dynamic society' (1963:48).

Three Senses of 'Necessary Implication'

In the light of the widespread and differing use of 'implications' in the Australian and overseas case-law, what 'kinds' or 'orders' of implication can be discerned among the disparate authorities?

An 'implication' is a difficult entity to pin down (Wilson, 1986;

[34] The earlier and equally important decision on equality of voting power, *Baker v Carr* (1961), was based on the 'equal protection clause' of the Fourteenth Amendment – which has no Australian parallel, although the implications argued in *Polyukhovich v Commonwealth* (1991) and *Leeth v Commonwealth* (1992) are directly analogous.

Wilks, 1986). Even in the context of the interpretation of a text written by one author, it has a variety of meanings. And, of course, the Constitution was actually drafted by a diverse group of individuals at the Constitutional Conventions of the 1890s, was ratified by a majority of the people of the various colonies of Australia and was passed by the United Kingdom Parliament. However, putting this to one side and considering the simple case of a document having a single author, the expression 'implication,' on one meaning, can signify something which an author of a written work *intended* as the meaning of his or her text, including implications or unexpressed assumptions (see Goldsworthy, 1997). On another view, it can mean something which is *deductively* or *logically* contained in an express statement. On still a third view, it can refer to a more indefinite, non-deductive, connotation.

Similarly, what is 'implied' by an author may or may not be 'inferred' by the reader; or a reader may *infer* something from a text even though the writer did not intend such an inference be drawn or in circumstances where, objectively speaking, the inference is illogical. This whole matter is further complicated by the different readings which different individuals will make of a text. One might say that the expression 'implication' should be reserved for cases where most people would draw the same or substantially the same inferences in reading the text in question (Williams, 1946:392, 400).[35] But the difficulty remains in determining what inferences 'most' people would make: which 'people' and what percentage is sufficient for these purposes? Finally, the matter is complicated still further when the source of the text is a body of diverse individuals, each of whom may have quite different ideas about the implied meaning or intended consequences of the text which they have produced. And, indeed, this all assumes that the individuals involved actually had a clear intent on the specific matter in question in the first place.[36]

Logical Necessity

That having been said, it is submitted that there are at least three senses in which the idea of 'necessity' in the expression 'necessary implication' has been used in the Australian case-law. *Firstly*, 'necessity' can refer to a kind of logical necessity, where the concept designated by a

[35] Williams argues that the courts will enforce only three kinds of non-logical implications: the actual, conscious intention of framers, the constructive intention of framers (what they would have intended had they been asked at the time), and implications based on policy.

[36] For these and other reasons, theories of 'original intent' must be modified: see Goldsworthy, 1997.

certain term *by definition* presupposes another concept or collection of concepts. The use of a certain term or set of terms (standing for a concept or a set of concepts) logically or by definition entails a particular concept or set of concepts (Rico, 1990:45-6). For example, we might draw on Aristotle's famous definition of 'man' as a 'political animal' (Aristotle, *Politics*:1253a, 1-4). Aristotle's definition of man *logically* entails the concept of an 'animal' which is 'political.' In this sense, the use of the word 'man,' for Aristotle, *necessarily implies* the ideas of 'political' and 'animal.' Therefore, when Aristotle speaks of man, he expects that we should understand him to be referring to a political animal, even though he might not say so in so many words.

Importantly, when applied to a provision in legislation, this first kind of necessary implication is indifferent to the question of whether the provision will be given a practical effect. All it is concerned with is the definition of the terms involved. Thus, on Aristotle's definition, if a particular man were stranded on a desert island, we would still be able to recognise him as a man, and therefore (theoretically) as a political animal, even though he did not enjoy the company of any other person with whom he could function *politically*. As Aristotle observed, if by *accident* an individual is without a state, he is still, in *essence*, a man.[37] We will not, therefore, be concerned with placing the man within a society if our concern is merely with his definition; the accident, or external situation, of desertion is something which does not concern us when we consider only the definition of the term 'man' without being concerned that definition be given a practical effect.

Practical Necessity

But on the other hand, *secondly*, particularly in the context of legislation, the notion of 'necessary implication' can involve the consideration of those *factual conditions* which are 'necessary' for a provision to have a *practical effect* (Holman, 1928:13, 23, 49). For a start, legislation adopts the language of command, not description, thus legislation is intended to achieve some purpose. Further, if the

[37] Thus Aristotle: 'And he who by nature and not by mere accident is without a State, is either above humanity or below it' (ibid.). Aristotle was drawing on the classical distinction between *essences* and *accidents*. Essences relate to the definition of things (those attributes which are essential to being a certain kind of thing); accidents relate to unessential attributes of a particular thing. Thus a man is, *essentially*, a political animal; but a particular man may, *accidentally*, be short or fat, another particular man might be tall and thin: but they are both still men so long as they are animals which are political. Similarly, a man may be – by *accident* – on a deserted island and without a 'state' or a 'society'; but that accident does not affect his nature or essence as a political animal.

necessary factual conditions do not exist or are not taken as implied by the provision, then the provision can have no practical effect. Thus, returning to Aristotle's definition: if an individual is stranded alone on a desert island, we might say that it is not practically possible for him to *function* as a *political* animal. We might conclude, therefore, that a necessary condition or a necessary implication for the practical expression of the idea that man is a political animal is the existence of a 'political society' or 'state' in which a particular man can function. In this case, the 'accident' that a man is stranded on an island is very relevant to his being a political animal in a practical sense.

Third-order-implication

Further, this second kind of 'necessary implication' can be distinguished from a third type, based on the difference between the possibility of a bare factual application and a 'good' or 'desirable' application. The second kind of necessary implication calls on ideas about what enables a provision to be given any effect at all; it relies on notions of physical or logical possibility. It is not physically possible for a solitary man on a desert island to experience the society of other people or be involved in Aristotle's *polis*. On the other hand, the third sense of 'necessary implication,' in referring to the idea of a 'good application,' draws on matters of substance or morality. Thus the difference between the second and third senses of necessary implication relates to the meaning that is given to the idea of 'practical expression' or 'practical application.'

Such practical expression or application may, on the second sense of necessary implication, be satisfied where a bare application is factually possible. On the analogy of Aristotle's man stranded on the island, this 'bare application' might be satisfied on the level of social intercourse merely if another person was on the island, no matter how limited the communication between them might be (which would be a matter for them). On the other hand, the third sense of necessary implication requires that the application of the idea or provision *work well*. It is not sufficient that the provision have a bare application; the provision must be given a *good* application. And 'good' in this context means that a standard extraneous to the provision is used to test whether a good application has been achieved. Accordingly, for the maxim that a 'man' is a political being to be given a good effect, it would be 'necessary' that the two deserted persons meaningfully discuss their feelings about being shipwrecked and work together to better the quality of their otherwise isolated and solitary lives. The

'goodness' of this application is derived from an extraneous moral standard which stipulates that we should communicate and work together in a meaningful way.

In this regard, these two senses of necessary implication bear an analogy to the distinction between the natural law and legal positivist definitions of 'law.' Likewise, against Cicero's definition of a 'republic' as a people joined together by one consent of law and common good, Augustine substituted a more pragmatic one: an assemblage of reasonable beings bound together by a common agreement as to the objects of their love (Augustine, 426/7:2:21, 19:21, 19:24). For Augustine it implied merely the practical element: reasonable beings who were *in fact bound together*, and it did not matter what the objects of their love were; whereas for Cicero, a republic implied a substantive and moral content in the *common good*.

Extraneous 'Implication'

Each of these senses of necessary implication can, in turn, be distinguished from a *fourth* notion, not properly called an implication, which involves the direct application of an idea or doctrine of what is good or appropriate completely extraneous to the text of the document in question. It is an idea or value which cannot be inferred, and is not posed as having been inferred, from the Constitutional text. In the constitutional context, such extraneous ideas may be derived from external sources such as the constitutional convention debates of the 1890s, from ideas prevalent at the date of the Constitution, from contemporary theories or from popular mores.[38] As Grey has candidly noted, in many of its decisions the US Supreme Court is 'quite openly *not* relying on constitutional text for the content of the substantive principles it is invoking to invalidate legislation' (1975:709).

However, this fourth category is in important respects similar to the third category of 'necessary implication' because the third category involves the application of some extraneous criteria according to which the meaning of a 'good application' is determined. Because the third category calls for a judgment as to whether a provision is enabled to 'work well,' it implicitly involves the application of some extraneous criteria according to which the meaning of 'work well' is determined.

[38] Compare and contrast the following observation by McConnell (1989:1528; quoted in Goldsworthy, 1997:38): 'Functionally, to apply an unintended meaning is no different from introducing a principle that has no textual basis whatsoever. The only difference between the unintended meaning and the extratextual principle is verbal happenstance.'

This itself involves the application of standards which are not contained within the provision in question. Thus to be 'effective' as political beings, one might consider that people should actively be involved in the political process. But this notion is not *necessarily* contained in the idea that we are political animals.

For this reason, the border between third and fourth order implications may in some cases be difficult to determine precisely. Grey identifies three sub-categories of 'noninterpretive' judicial review, the last of which could be designated as a 'third-order implication' when viewed in isolation. The first sub-category, 'where courts have created (or found) independent constitutional rights with almost no textual guidance,' such as 'the contemporary right to privacy and the older liberty of contract,' is clearly noninterpretive.[39] Grey's second sub-category is 'where the courts have given general application to norms that the constitutional text explicitly applies in a more limited way.' A case which would probably fall into this category is *Wesberry v Sanders* (1964), since in the US and Australian Constitutions, representation on a population basis is explicitly required as between each of the states as a whole, but not between intra-state electorates. By the same token however, *Wesberry v Sanders* also evidences Grey's third sub-category, since it maintained that the expression 'chosen by the People' implies equality of voting power, which is akin to Grey's third sub-category: the 'extension or broadening of principles stated in the Constitution beyond the normative content intended for them by the framers' (Grey, 1975:713). As it also involves the importation of a 'good application' of the requirement, it is an example of my third-order implication.[40]

Similarly, the border between second and third-order implications can be difficult to ascertain in some circumstances. Both second and third-order implications involve the idea of 'practical application.' However, the former looks only for a *bare possibility of application*, the latter looks for a *good application*. A third-order implication involves the use of extraneous standards as to what makes an application 'good.' But it should be seen that second-order implications also

[39] E.g. in *Roe v Wade* (1973) and *Lochner v New York* (1905).

[40] If so, one might conclude that the case for equality of voting power argued in *McGinty* is stronger than the case for freedom of speech. I think that is the case for another reason as well: freedom of speech requires more steps in the inference from text to constitutional right. In other words, voting is more intrinsic to representative government than free speech. The difficulty which remains, however, is that equality of voting power imports a particular conception of representative government, which is not required by the Constitution, and it ignores the impact which federalism has on representation.

involve extraneous standards, this time as to what is physically or logically possible. Nevertheless, a difference between second and third-order implications remains: it lies in the nature of the extraneous standards used in each case. Second-order implication calls on ideas about what enables a provision to be given any effect at all. It is different from third-order implication because the idea of bare practical effect calls on notions of physical or logical possibility, whereas the idea of a good application draws on notions of substantial morality. The difficulty in distinguishing the two kinds of necessary implication occurs when postulates of substantive morality are smuggled into an equation in the guise of statements about what is physically or logically possible.[41]

Clearly, each of these categories is progressively more and more free from the text of the Constitution. A notion of 'necessity as logical entailment' in the most narrow sense merely calls for a bare definition of terms according to readily ascertained common or legal usage. Certainly, this does involve some considerations which extend beyond the bare text. But they do not extend to the question whether the provision can or will have a practical effect or not. This second notion calls for a consideration of the conditions necessary for a bare practical application of the idea in question. Again, however, this notion is less extended than the third idea of necessity as 'necessary for a "good" or "useful" practical effect.'

According to this last notion, a practical effect must not only be given to a provision, but the effect will be evaluated as 'good' or 'useful' according to some standard which introduces considerations far removed from the text of the provision. What distinguishes this third notion from the fourth idea of having free recourse to totally extraneous ideas is that the third notion is nevertheless constrained by the need to show at least some connection with the text. In application, this means that it would only have to be shown that the conclusion being drawn, in addition to meeting the extraneous standard being applied, complies with the minimal requirements prescribed by the plain meaning of the provision in question.

Nevertheless, the last two categories are in a sense similar in that they both involve the application of extraneous values in addition to

[41] Again, the difference between first and second-order implications may be difficult to plot in some circumstances. Professor Winterton, by contrast, first distinguishes the implication of the doctrine from the application of the doctrine. He then asks whether the implication and whether the application of the doctrine are 'constitutional' or 'extra-constitutional' (Winterton, 1986).

the minimal requirements of the bare text. In the last sense, third-order implication verges on noninterpretivism. The difficulty is that in many instances it is not simply a case of a single step, but a chain of inferences which build on the extraneous values in a series of thrid-order implications, so that the result is tantamount to a fully-fledged noninterpretivism.

Constitutional Guidelines for Necessary Implications

Where is the line to be drawn between the various 'orders' of implication which have been identified? There are two ways into this question. The first is to recall the fundamental importance of constitutionalism in our scheme of government. The second is to examine the approach that has been taken by the High Court generally throughout its history. On the whole, the two approaches lead to the same result. A constitutionalism focused on the written Constitution instructs us to renounce non-interpretivism or fourth-order 'implications,' and it suggests that we must be wary of third-order implications. Likewise, in traditional High Court jurisprudence, non-interpretivism has been rejected and third-order implications treated with grave caution.

The case law clearly supports the use of first and second-order implications. The cases where the bare implication of the doctrine of federalism was relied upon represent examples, on one view, of second-order implications. The doctrine and secondary implications of that doctrine were arguably necessary to give the sections of the Constitution providing for the existence of the Commonwealth and the continued existence of the states a bare effect, but not necessary to make the Constitution work well.

However, the distinction between second and third-order implications can break down where there is reasonable disagreement as to what is a 'bare application' of the Constitution and what is a 'good application.' This is demonstrated by the cases which rely on the implication of federalism. Bare federalism might exist so long as general and regional internally sovereign governments possess divided powers (as provided for by sections 51, 52 and 107). However, the implication of the doctrine of federalism arguably also involves wider ideas associated with a fully working federal system. Thus it cannot be said *in the abstract* that the court has not approved the use of third-order implications. We must conclude that the court has approved the use of first and second-order implications and that (depending on the actual situation, the specific provisions in question and the view one takes of the extent of the implication under consideration) the court

may have countenanced the use of third-order implications.[42]

However, what the court has not approved is the use of completely extraneous considerations in the fourth sense described above. Examples of the court drawing the line are seen in the rejection of Justice Murphy's attempts to apply doctrines which are supposedly required by 'the nature of our society.' Similarly, the rejection of the doctrines of state reserve powers and implied immunities in *Engineers* was, at least purportedly, a rejection of extraneous notions. Necessarily and expressly involved in these decisions not to approve this fourth kind of judgment is the disapproval of building multiple implications of the third type upon one another.[43] In doing so, a court would, in effect, be having recourse to extraneous considerations wholly unconnected to the text in a direct sense.

This can be illustrated by reference to the cases on federalism and the cases on representative government. Thus in *Melbourne Corporation* the court carefully restricted the implied immunities of the states and their agencies to laws which discriminate by way of a special burden or disability against the states, or laws of otherwise general application which unduly burden the states in carrying out their constitutional functions or their essential governmental activities (or, at least, which would prevent them from continuing to exist or function as such). Arguably, these rules are restricted to second-order implications; they are only necessary to retain the bare existence of a federation. And the *definition* of the notion of federalism from which the immunities are derived is limited to the text:

1. a federal Commonwealth constituted by general and regional governments (see the Preamble, covering clauses 3-5 and 6, sections 1, 61, 71 and chapters IV, V and VI);
2. which have discrete powers (sections 51, 52 and 107-109);
3. of independent government (sections 1, 51, 61, 71, 106-110, 118, 120, 123-124).

Thus the federalism required by these provisions *means* that the states and the Commonwealth possess *independent* powers of government. This definition leads *in one step* to the *fact* of the exercise of governmental functions free from interference. The only other step in

[42] As Goldsworthy (1994) has argued, unexpressed assumptions are unavoidable in constitutional interpretation.

[43] It appears that multiple first-order implications are not objectionable, assuming an example can be imagined. By contrast, multiple third-order implications are objectionable because the successive implication is based on the extraneous material contained in the prior implication.

the reasoning is to conclude that there is a constitutional prohibition of legislation which would create such interference. Thus the resultant immunities are limited to bare necessary implications of this definition of federalism: special burdens on or discrimination against states, undue burdens on states in carrying out constitutional or governmental functions, or the prevention of states from existing or functioning as such.

On the other hand, it might be argued that the implied restriction on *burdening* (as opposed to *preventing*) involves a third-order kind of implication: it requires that the states *freely* exercise their governmental functions, which is to say that the states' exercise of those functions should *work well*. Two points can be made. Firstly, even if this involves a third-order implication, it is not a process of multiple stage implication and it is not a fourth order implication for that reason. Secondly, it is arguable that the relevant sections of the Constitution relating to the governmental activities of the states (sections 106-110, 118, 120, 123-124) specifically require a complete freedom from *burdens* (and not just *preventions*). For example, section 107 says that *'every power'* of the state parliaments 'shall ... continue as at the establishment of the Commonwealth' and section 118 requires 'full faith and credit' for 'the laws, the public Acts and records, and the judicial proceedings of every State.' These provisions entail the exercise of very specific state governmental functions *as independent governments*; it is difficult to see how they can be exercised in a *governmental* way unless free from restrictions on the free exercise of this sovereignty.

A similar point can be made in relation to *McKinlay*, where the court acknowledged the implication of representative government, but refused to draw specific guarantees of rights (such as 'one vote, one value') from that doctrine unless supported by a specific text of the Constitution. This otherwise would have amounted to a multiple stage inference, by first finding a doctrine of representative government, and then introducing an extraneous notion of 'one vote, one value' as 'good' representative government.

Thus the court has consistently resisted the extension of implications into guarantees or limitations on legislative power. Since *Engineers*, on only two occasions has the court actually struck down legislation on the ground of an implied restriction based in federalism: *Melbourne Corporation* and *QEC v Commonwealth* (1985). Professor Winterton suggests that this is because there is a great deal of difference between making use of implied doctrines in the interpretation of

sections (such as in reading down the scope of the incidental legislative powers of the Commonwealth) and the use of implications directly to strike down legislation which is otherwise constitutionally valid (1986:224-6). Thus the court has consistently set boundaries on the use of implications to produce limitations on legislative power.

In conclusion, then, the last two chapters have sought to set forth a theory of judicial review under the Australian Constitution which is attuned to the problem of the definition and the means of enforcement of 'the constitution,' bearing in mind the developing roles of the crown, parliament and the judiciary. The following key conclusions arise:

1. Constitutionalism is concerned with the limitation of power.
2. Judicial review and reducing constitutional principles to a written document are key means of enforcing modern constitutionalism.
3. Inherent in this, however, is that judicial power, like all political power, must be limited.
4. The problem becomes one of interpretation.
5. In constitutional interpretation, implications and assumptions are unavoidable.
6. The High Court has historically placed limits on implications.
7. The call for such limits on implications arises by virtue of the nature of the Australian constitution, whose terms are far less open than the American.
8. 'Third-order' implications introduce extraneous values into constitutional interpretation.
9. Multiple-stage implications compound the extraneous element in each step in the series of implications, so that the result is far removed from the Constitution itself.

PART II

THE FREEDOM OF SPEECH CASES

If the connection between the text and the propounded implication is tenuous or obscure, it would be wrong for a court by declaration to withdraw from public debate the matters to which the submitted restraint [on legislative power] applies. If the constitutional text does not clearly support an implication of restraint, the court declaring the restraint is plunged into political controversy in which it is ill-fitted to engage and from which it is hard put to withdraw. (Chief Justice Brennan, *Kable v DPP (NSW)* (1996:582-3))

CHAPTER 4

THE FREEDOM OF SPEECH CASES AND THEIR REASONING

> It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. Chief Justice Mason, *ACTV*, 135

The object of the present chapter is to examine closely the arguments put forward in favour of the implied guarantee of freedom of communication with respect to political matters. The intention is to set out the reasoning in its most comprehensive and persuasive form. The steps taken in the reasoning relate to the nature of the Constitution; constitutional implications; the implication of representative government; the meaning of representative government; freedom of communication as a matter of fact; a guarantee of freedom of communication; the scope of the guarantee; limitations on the guarantee; and application to the legislation in question.

The nature of the constitution

For all justices, either explicitly or implicitly, notions about the nature of the Constitution (particularly its legal basis, its political basis and the legal context into which it was born) were central to the development of their arguments. This was particularly the case in *ACTV* and *Nationwide News*; in *McGinty* and *Lange* the focus was more on the text and structure of the Constitution, rather than its underlying fundamental nature.

For Chief Justice Mason in *ACTV*, and Justices Brennan, Deane and Toohey in *Nationwide News*, a consideration of the permissibility of constitutional implications necessarily required a consideration of *Engineers*. As we have seen, *Engineers* addressed the doctrine of the immunity of instrumentalities and indirectly addressed the reserve powers doctrine. In that case, the court considered that because the

Constitution is fundamentally an Act of the Imperial Parliament, the ordinary rules of construction of statutes should be applied in the interpretation of the Constitution. Those rules precluded the implication of the doctrines then under consideration.

Previously, an emphasis on the nature of the Constitution as a federal pact assisted the conclusion that the reserve powers and implied immunities doctrines should be inferred. Therefore, *Engineers* illustrates the fact that the scope for the implication of any doctrine is significantly reduced when we stress the nature of the Constitution as an Act of parliament and downplay its nature as a fundamental compact formed by the people. This is particularly illustrated by cases involving the doctrine of representative government, because contemporary ideas about representation follow more naturally from the idea of a fundamental people's compact. The compact presupposes that the people have the right to determine their form of government. If they have this authority, then one would expect that they would have the right, and positively want, to continue to exercise this authority over the ongoing activities of the government. This continued exercise of authority is achieved, at least theoretically, through representative government.

Why then did these justices begin their discussion with a consideration of *Engineers*? It seems that they wished to show that the implication of representative government and of a guarantee of freedom of communication was a necessary result of the application of the ordinary principles of statutory interpretation and of the traditional methods of legal reasoning approved by the High Court through most of its history. The result, therefore, would be consistent with *Engineers* and all of the other cases that have followed it and its method; a method of interpretation using strictly legal arguments.

It was, however, natural for the majority judges to stress the nature of the Constitution as a fundamental compact, rather than as an Act of parliament. Justice Gaudron expressly adverted to 'the opening words of the Constitution, reciting the agreement of the people to unite in an "indissoluble Federal Commonwealth ... under the Constitution"' (*ACTV*, 210-1). Justices Deane and Toohey considered that the rational basis of the doctrine of representative government is the thesis that all powers of government ultimately belong to, and are derived from, the governed (*Nationwide News*, 70; *Kruger*, 175). Again, Justice McHugh referred to the resolution at the Adelaide Convention in 1897 to the effect that the purpose of the Constitution was to enlarge the powers of self-government of the people of Australia (*ACTV*, 228). Chief Justice

Mason quoted Professor Harrison Moore to the effect that 'the great underlying principle' of the Constitution is that 'rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power' (*ACTV*, 136), a reference which Justice Murphy had emphasised in *McKinlay* (71).

The Chief Justice also, however, noted that the Constitution is contained in an Act of the Imperial Parliament. He therefore had to discount the inference that the Constitution is essentially an exercise of Imperial sovereignty, and the associated inference that this would preclude an implication of representative government and free speech; something which Justice Dawson, and later Justice McHugh, were to emphasise (*ACTV*, 180-1; *McGinty*, 230).

These statements set the stage for uncovering an implication of representative government. As we saw above, it seems to follow that *if* the people have power to set up the parliament under the Constitution, they should have power to control the activities of that parliament through the institution of representative government. *If* the people had power to set it all up, they surely could not have intended to abdicate their powers over its ongoing operations.

Constitutional implications

Chief Justice Mason and Justices Brennan, Deane and Toohey pointed out that *Engineers* did not preclude the drawing of constitutional implications, it merely required that those implications be necessarily implied by the text of the Constitution. *Engineers* allowed this on the basis that implications are consistent with the ordinary rules of construction of statutes – so long as they are conttrolled by the *text* and are confined to *necessary* implications.

Nevertheless, Chief Justice Mason argued that *Engineers* set out too restrictive a rule when it said that 'the ordinary principles of construction are applied so as to discover *in the actual terms* of the instrument their expressed or necessarily implied meaning' (*ACTV*, 134).[44] According to the Chief Justice, if taken literally this would preclude the implied restrictions on Commonwealth and State legislative powers derived from the federal nature of the Constitution. In *Melbourne Corporation* (83) Justice Dixon had thought that 'the efficacy of the system logically demands' the implication, since it reflects 'an intention ... plainly to be seen in the very frame of the Constitution.' Such an appeal, according to Chief Justice Mason, goes

[44] Emphasis added by Chief Justice Mason. See *West*, 681 and *Australian National Airways Pty Ltd v Commonwealth* (1945:85).

beyond a mere 'necessary' implication derived from the actual terms of the Constitution. Yet his Honour also said:

> It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. (*ACTV*, 135)

The use of the word 'may' in this extract indicates that he did not wish to pronounce a final opinion because it was not necessary to decide the question. The decision of the framers not to include a Bill of Rights in the Constitution could preclude the implication of 'general guarantees of fundamental rights and freedoms' (*ACTV*, 136). But a *necessary* implication will overcome the conscious exclusion of a Bill of Rights. Chief Justice Mason distinguished between *implications* and the *unexpressed assumptions* upon which the framers proceeded in drafting the Constitution. Whereas an implication 'inheres in the instrument and as such operates as part of the instrument,' an assumption 'stands outside the instrument' and should have no impact upon Constitutional interpretation (*ACTV*, 135).

Since an implication 'inheres' in the instrument and 'operates as part' of it, a *necessary* implication provides an answer to the conscious intention not to include a Bill of Rights. Although the framers rejected a Bill of Rights, they also included other provisions which, according to the court, embody a necessary implication of representative government. Implicitly, a necessary implication is tantamount to and of as much force as an express provision. *Ergo*, what the framers necessarily implied should be given full and complete effect. It is irrelevant that the framers decided not to include a Bill of Rights; they *did* provide (by necessary implication) for representative government. The Chief Justice then distinguished between textual and structural implications, maintaining that structural implications, such as representative government, 'must be logically or practically necessary for the preservation of the integrity of the structure' (*ACTV*, 135).

Justice Brennan's approach in *Nationwide News* contained the seeds of a more restrictive view, which bore fruit in the later cases. He saw *Engineers* and the present cases as turning on the application of 'the ordinary rules of construction ... so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning.' Therefore, it was a matter of 'uncovering,' rather than 'making,' implications (*Nationwide News*, 41-2). Justice Dixon's judgment in

Melbourne Corporation was significant, not for the 'efficacy of the system,' but for properly construing *Engineers* as allowing text-based implications and for giving effect to 'a consequence of the conception upon which the Constitution is framed' (*Melbourne Corporation*, 82; *Nationwide News*, 42). Accordingly, it was not permissible to draw implications from sources extraneous to the text, such as to enshrine the States' 'reserve powers,' to prevent abuse of powers on grounds of political necessity, or to protect abstract human rights or fundamental freedoms:

> The only foundation for judicial review of legislation is the subjection of both the Parliament and the courts to the supreme law of the Constitution (*Nationwide News*, 44).

Otherwise, there is no logical limit to the grounds on which legislation could be rendered invalid.[45] Such action is justified only where the Constitution includes a Bill of Rights (*Nationwide News*, 42-4).

Nevertheless, Justice Brennan clearly thought that limitations on the legislative powers of parliament may be found on the basis of implications arising in and from the text or structure of the Constitution as read in the light of general law (*Nationwide News*, 44-5). In this way his Honour stressed the distinction between implications drawn from the text and implications drawn from extraneous sources. But he has also accepted Chief Justice Mason's view that implications may be derived from the 'structure of representative government prescribed by the Constitution' so long as it is 'logically or practically necessary for the preservation of the integrity of that structure' (*Theophanous*, 149-50).

Justices Deane and Toohey observed that the decision in *Engineers* does not preclude the use of implications in the interpretation of the Constitution when those implications are derived from the fundamental doctrines upon which the Constitution as a whole is founded, from the specific provisions of the instrument, or from the fundamental rights and principles recognised by the common law at the date of the Constitution (*Nationwide News*, 69). For them, the significance of Justice Dixon's approach was that a denial of implications would 'defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied' (*West*, 681). Undoubtedly, this was a broader formulation than that adopted by either Chief Justice Mason or Justice Brennan.

Similarly, Justice Gaudron, again drawing on the authority of Sir Owen Dixon (1965:205), maintained that since the Constitution came

[45] Justice Brennan relied upon comments of President Kirby in *BLF* (405) and Professor Zines (1991:46-52).

into existence within the pre-existing system of common law, it should be construed in that context. That context, she contended, includes 'fundamental constitutional doctrines' which have guided the development of democracy and responsible government. While they may not have been expressly set out in the text, they were 'taken to be so obvious that detailed specification [was] unnecessary' (*ACTV*, 209; cf. *Levy*, 270-71). For, 'the detailed provisions with respect to elections reveal that the Constitution is for a Commonwealth which is a free society' (*ACTV*, 215; *Kruger*, 196). Her Honour made these comments in the context of the classic references to constitutional implications in *Melbourne Corporation* (*ACTV*, 209-10, 214-5).

This wider view certainly distinguished Justices Deane, Toohey and Gaudron in *Theophanous, Stephens* and *Cunliffe*, and the latter two justices in *McGinty, Levy* and *Kruger*.

By way of contrast, in the 1992 cases Justice McHugh did not explicitly turn to the general theoretical and methodological question of constitutional implications. Rather, he turned directly to the *actual text* and looked for those institutions and systems to which the Constitution 'gives effect but does not specifically mention' (*ACTV*, 230). Rather than reading the constitution as being concerned with an '*equal* share in political power,' Professor Harrison Moore was now significant for saying that:

> Fervid declarations of individual right, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the constitution ensures him. (1910:327; *ACTV*, 229)

Justice McHugh maintained that the text must be read in the light of the conceptions of these institutions held by informed people at the time of federation. These institutions are 'part of the fabric on which the written words of the Constitution are superimposed' (*ACTV*, 230).[46] However, his more circumspect approach was reflected in the limited nature of the guarantee he formulated in *ACTV* and his strong response to further constitutional implications in *Theophanous, Stephens, McGinty, Levy* and *Kruger*.

Justice McHugh took care to cite the opinions of important figures among the framers of the Constitution (eg Barton, Garran, Griffith and Isaacs), and referred to the *intention* of the Constitution, as if the intention determined the existence of the implication. He focused on

[46] Citing Justice Isaacs in *Commonwealth v Kreglinger* (1926:413).

the terms of sections 7 and 24 'and supporting sections,' and limited the implied constitutional guarantee to election periods (*ACTV*, 228-3, *Levy*, 273). In *Theophanous* he limited the use of constitutional doctrines to cases where 'there are grounds for concluding that the meaning of the constitutional provision was intended to be understood by reference to such a theory or principle' (*Theophanous*, 198). As such, they operate not as 'free standing' principles, but to assist in the interpretation of specific provisions (*McGinty*, 234). Moreover, while 'the actual intentions of the makers [do not] control the meaning of the Constitution,' the proper use of constitutional doctrines can be discerned from either the text itself, the framer's intent, the history of the nation and its institutions or the common law (*Theophanous*, 198-9).

Representative government: implication

How, then, did the majority specifically find that representative and responsible government are implied by the Constitution? The implication was in fact well established in the cases. But the kind of use to which these ideas were put in the *Freedom of Speech* cases had been directly rejected. Nevertheless, the justices generally purported to rely on those precedents and also argued independently on the basis of sections 7, 24, 25, 64, 128 'and related sections' of the Constitution (*Lange*, 104-6; *Levy*, 273). Indeed, the reliance on specific sections appears increasingly pronounced as one analyses the cases from 1992 through to 1997. The relevant portions of those provisions are as follows:

> The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until Parliament otherwise provides, as one electorate (section 7).[47]
>
> [E]ach elector shall vote only once (section 8).
>
> The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth ... The number of members chosen in the several States shall be in proportion to the respective numbers of their people ... (section 24).[48]
>
> ... voting at elections ... (section 25).

[47] An earlier draft of the equivalent provision provided that the Senate should be composed of persons chosen by the Parliaments of the several states (Craven, 1986:VI:356).

[48] An earlier draft omitted the word 'directly' and substituted 'of the several states' for 'of the Commonwealth' (Craven, 1986:VI:379).

> ... no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives (section 64).[49]
> And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent (section 128).[50]

The justices used different language to describe the implication of representative government. Adopting a well-known dictum of Justice Stephen in *McKinlay*, Chief Justice Mason maintained that these provisions of the Constitution 'provided' for representative government; they incontestably 'contained' the principles of representative democracy and direct popular vote. Likewise, Justice Brennan thought that the Constitution 'prescribes' responsible government, and that 'representative democracy' can be 'discerned' in section 24. Justice McHugh thought that the Constitution 'gives effect' to representative and responsible government. For Justices Deane and Toohey, representative government is 'implemented' by the Constitution. Justice Gaudron, noting that the constitution provides for regular elections, a direct choice of representatives by the people, and popular referenda, held that these provisions are 'fundamental' to the Constitution, and that they 'predicate and, in turn, are predicated upon a free society governed in accordance with the principles of parliamentary democracy.' Even in dissent, Justice Dawson held that the Constitution 'contains and implies' representative democracy, direct popular election and responsible government. (See *ACTV*, 137-8, 185, 210, 230, *Nationwide News*, 46-7.)

Representative government: meaning

In order that the implication of representative government should support the argument which the court accepted, it was necessary to provide a definition. A specific meaning would be necessary for the application of the concept to other areas and to infer from it the notion of freedom of communication.

The Chief Justice considered that the doctrine of 'representative government' signifies a system where the sovereign power of government, residing in the people, is exercised through representatives

[49] An earlier draft did not contain this requirement (Craven, 1986:VI:484).

[50] An earlier draft provided for ratification through conventions chosen by the electors of the several states (Craven, 1986:VI:585).

chosen by the people (*ACTV*, 137-8).[51] Accordingly, representatives exercise their powers as representatives of the people, and in the exercise of those powers they are *of necessity* accountable to the people for what they do and have a responsibility to take account of the views of the people (*ACTV*, 139).

Now remembering how Chief Justice Mason limited the task of implications, we shall have to ask whether the principle that representatives exercise the sovereign power of the people and have a responsibility to take account of their views 'inheres in' and 'operates as part of' the Constitution. As Chief Justice Mason conceded, the Constitution 'owes its legal force to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people's inherent authority to constitute a government' (*ACTV*, 138). However, his Honour defended his conclusion on the ground that this Act of Parliament brought into existence a system of representative government; and further, that the *Australia Act* 1986 (UK) ended the legal sovereignty of the Imperial Parliament and recognised the ultimate sovereignty of the Australian people – as had been argued by Dr Geoffrey Lindell (*ACTV*, 138; Lindell, 1986:49). We shall have to ask, however, whether the materials acutely analysed by Lindell leads to the conclusions which the Chief Justice drew from them (see Lindell, 1986:44).

Echoing, again, a more circumspect approach, Justice Brennan thought that the principles of responsible government and representative democracy are 'intended ... to make both the legislature and executive ultimately answerable to the Australian people' and that these principles lie beyond the power of parliament to control, since it is 'incompetent to alter the principles prescribed by the Constitution to which it owes its existence' (*Nationwide News*, 47). In *Theophanous*, his Honour would apply this rule *mutatis mutandis* to the High Court: its own power of judicial review is limited by the Constitution, the instrument to which it owes its existence (1994:141).

Somewhat more elliptically, Justice McHugh relied on the famous resolution at the Adelaide Convention in 1897 referred to above, that the purpose of the Constitution was to further representative govern-

[51] This form of argument was in the United States adopted by Chief Justice Marshall in the celebrated case of *Marbury v Madison* when he maintained, on firm ground with respect to the American Constitution, that: (1) it is the fundamental basis of the 'whole American fabric' that the people have exercised a sovereign right to establish their future government; (2) in doing so, the people have assigned to different departments their respective powers and have placed express limitations on those powers.

ment, by a 'transfer,' but not 'surrender,' of the rights and powers of individuals 'to a plane on which they could be more effectively exercised' (*ACTV*, 228). We shall have to ask, however, whether this resolution in fact carried the sense which his Honour sought to place on it.

Justice Gaudron consistently referred to 'representative parliamentary democracy,' rather than 'representative government,' but beyond this, did not define the nature of this fundamental constitutional doctrine. Rather, her Honour proceeded directly to the proposition that 'freedom of discussion of matters of public importance is essential to the maintenance of a free and democratic society' (*ACTV*, 211). Similarly, Justices Deane and Toohey consistently referred to 'the people' and 'all citizens,' rather than 'the electors' – having emphasised the adoption of full adult suffrage (*Nationwide News*, 70-73). They pointed out that representative government is 'government by representatives directly or indirectly elected or appointed by, and ultimately responsible to, the people of the Commonwealth,' for the 'rational basis' of the doctrine of representative government is 'the thesis that all powers of government ultimately belong to, and are derived from, the governed' (*Nationwide News*, 70). Therefore, *all citizens* 'are entitled to share equally in the exercise of ... ultimate powers of governmental control' (*Nationwide News*, 72).

However, as was noted earlier, a quite different perspective was emphatically asserted in *Lange*, where the court unanimously pointed out:

> Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of 'representative government' only to the extent that the text and structure of the Constitution establish it (*Lange*, 112).

Hence 'representative government' is but a 'shorthand way' of referring to whatever the relevant sections specifically require. Justices Dawson and McHugh had pointed out that democracy is wider than representative government since it is often associated with 'equality of rights and privileges' (*Theophanous*, 189, 199). But furthermore, as the court explained in *Lange*, the question is not even 'what is required by representative and responsible government?,' but rather 'what do the terms and structure of the Constitution prohibit, authorize or require?' (*Lange*, 112).

Thus while clearly affirming the implication of representative and responsible government, *Lange* seems to have brought the focus back to the text and structure of the Constitution, instead of its 'underlying

doctrines'. In *Levy* and *Kruger*, Justices Toohey and Gaudron reaffirmed their wider perspective (*Kruger*, 175-6, 195), but the unanimous judgment in *Lange* maintained:

> Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution (*Lange*, 112).

Freedom of communication with respect to political matters

The court took the further step, of course, of saying that freedom of communication is implied by representative government. This amounted to the proposition that for representative government to really exist, there must be a genuine freedom of communication with respect to political matters. Despite the more guarded approach which has prevailed since *McGinty*, central to this argument is the contention that the Constitution requires 'real,' 'substantial,' 'effective' or 'good,' not merely 'formal' or 'illusory,' representative government. It appears that a supposed system of representative government which is not 'informed,' 'workable,' 'efficacious,' 'adequate,' 'intelligent' or 'responsible' is not a true representative government as required by the Constitution. Thus the definition of representative government referred to in the preceding section also involved for the court the notion of a 'real' or 'informed' representative government. We shall have to ask, therefore, whether the Constitution necessarily implies these notions of 'real' or 'informed' representative government.

Further, the court held, representative government is not 'informed,' 'workable' etc. unless there is a 'real' freedom or liberty of discussion or communication of facts, ideas, policies, opinions among electors and between representatives and electors. Therefore, according to Chief Justice Mason, freedom of communication is 'necessarily implied' and 'prescribed' by, an 'essential concomitant' of, and 'fundamental and essential' to the doctrine of representative government. His Honour thought that representative government requires a number of intermediate processes, such as accountability and responsibility to the 'will of the people,' influence by citizens on government, 'government by the people' and the exercise of individual judgment. He considered that freedom of communication is necessary for these intermediate processes to occur (*ACTV*, 138-9).

Along similar lines, Justice Brennan maintained that freedom of public discussion of political and economic matters is implied by

representative government. Freedom of communication is 'essential' in order to 'sustain' the existence of representative democracy, for the converse would be a 'parody' of democracy. The people cannot 'adequately' influence political decisions otherwise; this freedom is 'inherent' in, the 'foundation' of and 'essential' to the 'effective maintenance' of representative democracy; representative democracy 'depends' on and derives its 'efficacy' from this freedom; and this freedom is the 'breath of life' for parliamentary institutions. Therefore, the Constitution 'contemplates a parliament working under the influence of public opinion and public discussion' (*Nationwide News*, 47-50).

Again, Justices Deane and Toohey indicated that the people or electors should exercise their powers of governmental control in a 'responsible,' 'intelligent,' 'fully-informed,' and 'effective' way, so that parliamentary democracy is enabled to 'work.' It is not possible to exercise these powers *responsibly* without free communication because the physical act of voting involves communication. It is not possible to vote *intelligently* unless the identity of candidates is communicated. It is not possible to vote in a *fully-informed* way unless the following information is transmitted: the background, qualifications and policies of candidates, the factual and theoretical circumstances and considerations relevant to a consideration of what is in the best interests of the nation, a locality, a community or an individual. Further, representative government implies a relationship of 'representation and responsibility.' That relationship requires communication between representative and represented of information, needs, views, explanations and advice; and communication between the electors of information and opinion about the exercise of governmental powers. It follows from the necessity of *effective* and *workable* parliamentary democracy that the doctrine of representative government implies freedom of communication of information and opinions about matters relating to the government of the Commonwealth (*Nationwide News*, 72-5).

Justice Gaudron, by contrast, concentrated on general principles of common law, which acknowledge that freedom of discussion of important public matters is essential to a free and democratic society. This includes the acquisition of information, argumentation and discussion through the press. Other consequences may include freedom of movement, freedom of association and freedom of speech generally. Relying on both ancient and recent authority, her Honour cited both Sir William Blackstone [52] and Justice Lionel Murphy, among others (*ACTV*,

[52] Blackstone (1765:IV:XI:151).

211-2).

Justice McHugh, however, focused on the electoral process itself. He pointed out that the right to choose representatives is more than merely the right to go through the mechanical exercise of voting (meaning the marking of a ballot paper), irrespective of the dissemination of information about the candidates and the issues between them. Representative government, to operate 'effectively,' must include scrutiny, debate and accountability – for information, ideas, capabilities, performances, arguments and policies – and the formulation of these by a free press. For these to exist, there must be communication between electors and candidates. In this context, 'directly chosen by the people' refers to a process which begins when an election is called and ends at the declaration of a poll. It includes nominating, campaigning, advertising, debating, criticising and voting. We see, therefore, that while his Honour focused on the actual text and limited the implication to election periods, in his definition of representative government Justice McHugh included the idea of 'efficient' or 'responsible' representative government.

We shall need to ask whether this notion of '*effective* representative government' is necessarily implied or 'given effect' to by the text of the Constitution.

A guarantee of freedom of communication

However, a crucial step remained for the court. While it might be conceded that the Constitution implies a system of representative government and that representative government implies freedom of communication as a matter of fact, it does not necessarily follow that Commonwealth legislation which prohibits certain communications essential to the effectiveness of the system of representative government is unconstitutional and void for lack of legislative power or for transgression of a *guarantee* of freedom of communication.

The proposed basis for the step to a *guarantee* of freedom of communication is not contained in the reasoning of Chief Justice Mason. Having discussed the implication of representative government and the indispensability of freedom of communication to representative government, his Honour turned to the implication of the guarantee. His Honour argued:

1. Freedom of communication is so indispensable to the efficacy of representative government for which the Constitution makes provision that it is '*necessarily implied* in the making of that provision';

2. The Supreme Court of Canada has concluded that the *British North America Act* (the Canadian Constitution) by necessary implication means that neither federal nor provincial legislatures can by legislation abrogate the right of free public discussion (*ACTV*, 140-1).[53]

Notably however, Chief Justice Mason offered no further reason why a *guarantee* or *immunity* should by inferred from the Constitution. The first argument is merely a restatement of the position arrived at thus far (i.e., concerning the factual necessity of freedom of communication). The argument from the Canadian authorities is inconclusive and secondary at best. By his own standards (that an implication 'inheres in the instrument and as such operates as part of the instrument,' while an assumption 'stands outside the instrument' and should have no impact upon Constitutional interpretation), his Honour must indicate a basis for the guarantee as inhering within the instrument. This is a crucial difficulty. It is quite conceivable (for the sake of argument) that a document such as the Constitution could provide for representative government and the framers anticipate (assume) that freedom of communication would be enjoyed, but neither explicitly nor implicitly provide a guarantee of freedom of communication. His Honour gives no clear reason for the implication of the *guarantee*.

The basis for the guarantee or immunity is in fact contained elsewhere in the court's reasoning as a whole. This is that the legislative powers granted in section 51 of the Constitution are granted 'subject to this Constitution' and that therefore legislative power cannot validly be exercised contrary to the Constitution.[54] In fact, this is the basis of all implied limitations or prohibitions on Commonwealth legislative power. In this case, since the Constitution provides for a system of representative government which is 'effective' and conducted in an environment of free communication of political matters, legislative power cannot be exercised so as to prohibit this free flow of communication. Thus there is a guarantee of freedom of communication with respect to political matters: individuals possess an 'immunity'

[53] This implication may be broader than the one Chief Justice Mason identifies (*Re Alberta Legislation* (1938:107-9); *Switzman v Elbling* (1957:371)). Further, the Canadian authorities seem to have allowed the federal Parliament to 'curtail, if deemed expedient and in the public interest, the freedom of the Press' (*Re Alberta Legislation* (1938: 119-20)).

[54] Chief Justice Barwick rejected the use of the words 'subject to this Constitution' as the basis of an implied limitation of legislative powers in *Victoria v Commonwealth* (1971:380-1).

from such purported legislation and the parliament has 'no power' to enact such legislation.

For instance, Justice Brennan held that legislative powers, such as the power to legislate with respect to industrial arbitration contained in section 51(xxxv), should not be read in isolation, but are 'subject to' the Constitution, including its express and implied limitations (*Nationwide News*, 69). Therefore, the legislative powers of parliament are limited by an implication which precludes the enactment of law trenching upon that freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution.

Similarly, Justice McHugh reasoned that parliament cannot exercise legislative power under section 51 in derogation of the right of free communication because it is conferred subject to the Constitution. Thus in relation to the choice prescribed by sections 7 and 24 of the Constitution, the people have a constitutional right to participate, associate and communicate using all lawful means of communication (*ACTV*, 227). Again, Justice Gaudron held that the grant of powers in section 51, because 'subject to' the Constitution, are subject to the principle that no legislative power is granted which is contrary to the free and democratic nature of the Commonwealth, such as the enactment of laws which impede the free flow of political information (*ACTV*, 215).

Justices Deane and Toohey likewise maintained that section 51(xxxv) should not be read in isolation, but 'read and construed' subject to the Constitution as a whole (*Nationwide News*, 69-70). However, here they went much further than the rest of the court, concluding that the implications included:

1. 'fundamental implications of the doctrines of government upon which the Constitution as a whole is structured and which form part of its fabric';
2. implications discerned in particular provisions of the Constitution; and
3. implications flowing from fundamental rights and principles recognised by the common law at the time of federation.

We shall have to ask, therefore, how far the implication of a *guarantee of freedom of communication* is supported by the expression 'subject to this Constitution' in section 51. Chief Justice Mason argued that the conscious decision not to include a Bill of Rights does not preclude the effect of doctrines which are necessary implications of

the Constitution. But it is also necessary to show that the expression 'subject to this Constitution' necessarily implies the existence of the guarantee.

It is noticeable that in the later cases the court has shifted its approach to this question. In *Lange*, the court saw the limitation on legislative power as flowing from the fact that the State and Commonwealth parliaments are not supreme or sovereign due to their adaptation 'to a federal system of government embodied in a written and rigid Constitution' (*Lange*, 108). We shall have to ask, however, whether judicial review as a federal precaution of itself necessarily implies judicial review as a safeguard of implied individual freedoms.

The scope of the guarantee: *Theophanous*, *Stephens*, *Lange* and *Levy*

The matter does not rest with the conclusion that there is an implied guarantee of freedom of communication. An important aspect of the decisions under consideration relates to the scope of the guarantee.

This question of scope has five important dimensions. The first dimension relates to the *kind* of communications that are protected. The second concerns the nature of the 'rights' guaranteed. The third dimension pertains to whether the communication concerns the performance of the local, State/Territory or Commonwealth tiers of government (Douglas, 1993:336). The fourth dimension has to do with which of those various tiers of government is in fact limited by the guarantee. The fifth concerns the branches of government that are affected: legislative, executive and judicial.

The kind of communications which are protected

In the 1992 cases, the general tenor of the court was that it was not necessary to answer whether there is a general right to communicate (*ACTV*, 136, 212). Although Justice McHugh initially left the matter open, he subsequently held that he could find no basis for such a right (*ACTV*, 232; *Theophanous*, 206). The touchstone in this reasoning was that the guarantee would be extended to material which could be shown to be relevant to the efficacy of representative government. It was not surprising, then, that in *Levy* most of the justices strongly affirmed that 'expressive conduct' such as Levy's duck shooting protests fell within the idea of 'freedom of *communication*' (*Levy*, 251, 267, 274, 286).

The nature of the 'rights' protected: liberal, negative rights

Right from the beginning, Justices Deane and Toohey stressed that the

guarantee is limited to a '*freedom from* legislative prohibition': it is not a right of 'free communication' or of 'free access *to* all the means of communication.' In *Lange*, this principle was crucial to determining the impact of the freedom on the common law (*Nationwide News*, 76; *Lange*, 110-11). It means that the court enshrined a 'liberal' (as opposed to a 'welfare right') conception of the right to free speech. As a 'freedom from' governmental interference with personal liberty, the guarantee sees protection from government to be the main concern of constitutional rights and freedoms.

This has led many classical liberals and libertarians to applaud the court's decisions. By contrast, egalitarian conceptions of rights are concerned with equality rather than liberty, and see constitutional rights as means by which governments are compelled to enable people to participate equally in social affairs. Thus the electoral advertising laws in *ACTV* were in fact justified by reference to egalitarian values, namely to limit the scope for corruption through political donations by wealthy individuals or corporations, and to equalise access to electronic political advertising.[55]

Impact on Local, State, Territory and Commonwealth tiers of government

Justice Gaudron held that the guarantee extends to Commonwealth, Territory and State legislation. For instance, she drew attention to the fact that the distribution of powers between the tiers of government is not immutable (through a reference of powers or referendum), the exercise of power by the Commonwealth or a State affects the other through their federal and economic relationship and through section 109 of the Constitution, and the Constitution recognises State constitutions, parliaments and electoral processes, and hence their democratic nature (*ACTV*, 216). The same perspective was further developed in her Honour's judgments in *Muldowney* (376) and *Kable v DPP (NSW)* (1996).

Likewise, Justices Deane and Toohey cautiously concluded that the guarantee extended to all tiers of government and to political matters relating to all tiers of government. Their reasons were that:

1. The Constitution envisages the operation of three levels of government and, in particular, the State constitutions are in fact preserved 'subject to' the Commonwealth Constitution under section 106.

[55] For a criticism of the liberal orientation of the decision, see Campbell, 1994; Berns, 1993:113.

2. The Constitution assumes representative government within the states.
3. The Constitution assumes cooperation between the tiers of government.
4. Tax receipts of the Commonwealth are distributed to and through the other levels of government.
5. Political parties and political ideas extend through all levels of government.
6. The authorities for freedom of access to the seat of government were decided in the context of assaults upon State legislation[56] (*Nationwide News*, 75-6; *ACTV*, 168-9).

Chief Justice Mason agreed with Justices Deane, Toohey and Gaudron in so far as freedom of political communication cannot be subdivided into its application to the various tiers of government. The freedom relates to all public affairs, whether (for the moment, or on one view) characterised as a state or federal or local issue, because ultimately the issue has some relation to all tiers of government (*ACTV*, 142). On the other hand, Justices Brennan and McHugh were more guarded. In *Nationwide News*, Justice Brennan cautiously suggested that the guarantee of freedom of communication may cover state legislation, at least if state laws impair rights and freedoms in federal matters (*Nationwide News*, 52).[57]

Two distinct issues: the limitation of state legislative powers and the discussion of state political issues

It should be noted, however, that there are two distinct issues here, as Justice Deane later pointed out (*Theophanous*, 164). One issue concerns whether communications having to do with State, Territory or local politics will be protected; the other concerns whether State, local or Territory legislatures will be bound by the guarantee. The court's stance on these two issues was clarified and solidified in *Theophanous* and *Stephens*, only to be further adjusted in *Lange* and *Levy*.

In *Stephens*, a majority consisting of Chief Justice Mason and

[56] In these cases it was argued that state legislation unconstitutionally inhibited citizens from gaining access to the Australian Capital Territory. The court affirmed the existence of such an implied limitation on state power in *R v Smithers* (1912:109) and *Pioneer Express v Hotchkiss* (1958:550).

[57] Further, Justice McHugh limited the guarantee to communications with respect to elections (not political matters generally, which he left undecided). On the other hand, he would have extended the guarantee to a freedom of association and participation with respect to elections (*ACTV*, 227-233).

Justices Toohey, Gaudron and Brennan (perhaps with Justice Deane) held that the Western Australian Constitution necessarily implies a guarantee of freedom of political communication (*Stephens*, 232-4, 236, 257). The argument began with section 73(2)(c) of the *Constitution Act* 1889 (WA), which controls the capacity of the WA Parliament to alter the WA Constitution by requiring that no bill which provides that the Houses of Parliament are to 'be composed of members other than members chosen directly by the people' will receive the royal assent unless it is carried by an absolute majority of both Houses and by a majority of electors. The majority considered that this entrenched a system of representative democracy (Chief Justice Mason, Justices Toohey and Gaudron) or was 'in terms similar to those found in sections 7 and 24 of the Commonwealth Constitution' (Justice Brennan). It was on these grounds that the guarantee was derived at a Commonwealth level, and was therefore to be derived under the WA Constitution. In this case, it is noticeable that both the entrenchment of representative government and the source of limitation on legislative power (i.e., the existence of the guarantee) flow from the same provision: namely that any such bill shall not be presented to the Queen unless passed according to the manner and form prescribed.

In *Theophanous*, a majority consisting of Chief Justice Mason and Justices Toohey, Gaudron and Deane held that the right extends from the Commonwealth Constitution to the Western Australian Parliament and to the law of defamation within that state (*Theophanous*, 128-9, 140, 164-5; see *Stephens*, 232-4, 257). While in the minority, Justice Brennan did not resile from the view that the guarantee of freedom of communication may extend to state legislation.[58] Indeed, like Justice Deane, he seemed to go so far as to affirm that the limitation applied to state legislative power by virtue of sections 106 and 107 of the Commonwealth Constitution (*Theophanous*, 156, 165-7). By contrast, as Justice Toohey subsequently pointed out in *McGinty*, Chief Justice Mason and Justices Toohey and Gaudron decided that the guarantee restricts the legislative powers of the states 'on the basis of the indivisible nature of political discussion, not because of the operation of section 106' (see *McGinty*, 210, note 226).

Lange and *Levy* have led to an adjustment and clarification of these principles. In *Lange*, the court unanimously reinforced the principle that the implied freedom was a limitation on legislative power, rather than a personal right. This meant that the common law and statutory

[58] His dissent was based on other grounds: see the discussion of limitations on the guarantee, below.

rules relating to defamation are controlled by the Constitution in only a 'negative' sense. Accordingly, freedom of speech under the Constitution prevents the expansion of the common law or statutory rights of persons defamed, but does not limit the extent of the defences that the common law or statute may say are available to those who publish defamatory material. The extent of defences available is a matter for the court to determine as part of its general responsibility to develop the law in accordance with 'the common convenience and welfare of society,' and to 'strike a balance ... between absolute freedom of discussion of government and politics and the reasonable protection of the persons who may be involved, directly or incidentally, in the activities of government or politics' (*Lange*, 111).

Moreover, in these cases New South Wales and Victorian legislation was impugned. In terms of the decision in *Stephens*, there was a remote possibility that an applicable guarantee of free speech could have been derived from the representative provisions to be found in the New South Wales and Victorian constitutions. However, representative government is not entrenched in those constitutions to the degree found in Western Australia, so the case turned, rather, on the implication to be derived from the Commonwealth Constitution, as was decided in *Theophanous*.

The court thus maintained in both *Lange* and *Levy* that the Commonwealth guarantee extended to the powers of the State parliaments. However, there was no mention of a basis for this extension to the State legislatures, such as section 106 or the 'organic unity' of the Australian political system. Rather, the reasoning focused on the nature of the communications involved, suggesting (as Justice McHugh made clear) that the guarantee derived from the Commonwealth Constitution extended to all communications which have some relationship to federal politics, and therefore limited the capacity of the State parliaments to place unconstitutional fetters on such communications (see *Lange*, 111, 114-7; compare *Levy*, 252-3, 263, 271, 274, 290). Notably, Justice Kirby grounded his decision in *Levy* on the defendants' concession of this issue (*Levy*, 291).

The branches of government affected by the guarantee

As a further issue, Justice Deane (and perhaps Justice Brennan) also considered that the guarantee extended to the executive (and for Justice Deane to the judicial) power of the Commonwealth, although sections 61 and 71 do not expressly vest those powers 'subject to' the Constitution (*Theophanous*, 149, 164; *Nationwide News*, 47, 50-1). As to

this latter point, Justice Deane made two observations: firstly, that executive and judicial power conferred on particular bodies by legislation under section 51 is 'subject to' the Constitution; secondly, that 'arguably, the implication also applies to ... other legislative, executive or judicial powers' conferred directly by and not expressly 'subject to' the Constitution. It could be that Justice Brennan had the first proposition in mind when his Honour said that 'like section 92, the implication limits legislative and executive power.' Alternatively, his Honour may have had in mind the fact that the doctrine of responsible government is intended to make the executive 'ultimately answerable to the Australian people,' hence the guarantee extends to the executive by implication of the doctrine of responsible government.

Limitations on the guarantee

The court has emphasised and applied the principle that freedom of communication is not absolute, but is subject to certain limitations or regulations that can be justified according to specific criteria. The criteria that have been adopted by the judges recall decisions of the European Court of Human Rights and the United States Supreme Court, as well as the terms of the various national and international bills, charters and covenants on human and political or civil rights (See Antieau, 1985:275ff). The justices approached the question in significantly different ways, as the varying findings in *ACTV* demonstrated. While subsequently the court unanimously agreed on a standard formula in *Lange*, the differences of approach resurfaced in *Levy* and *Kruger*.

Chief Justice Mason said that the guarantee is not absolute, but is qualified in accordance with limitations consistent with 'an ordered society,' or 'a society organised under and controlled by law.' Thus competing interests of the public may qualify the freedom in terms of the following considerations:

1. the media are subject to laws of general application;
2. with respect to restrictions that target ideas or information, only a 'compelling' justification will warrant the imposition on the guarantee, and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest (such justification is generally a difficult exercise – paramount weight will be given to the freedom);
3. with respect to restrictions that restrict an activity or mode of communication, a more flexible 'balancing' of the public interest

in the freedom and the public interest in the restriction will be applied (being more susceptible of justification);

4. while weight is given to the legislative will, the question is ultimately one for the courts (*ACTV*, 142-4).[59]

In a similar manner, Justices Deane and Toohey observed in *Nationwide News* that the freedom is not an absolute and uncontrolled licence: 'it is a freedom under the law of an ordered society.' Limitations may be justified as being in the public interest or because they do not go beyond what is reasonably necessary for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society. Valid limits to and regulation of the freedom depend on the characterisation of the law in question: whether it is with respect to an extraneous matter which may have an incidental effect on the freedom – and hence probably valid; or whether it is with respect to communication about government – and probably invalid. Further, the freedom may be modified, confined or excluded by the express powers to be found in section 51, some of which may manifest an intention to do so (*Nationwide News*, 76-7).

In *ACTV*, Justices Deane and Toohey discussed the matter further, since it was an issue more relevant to the facts in that case. Again, legislation must be closely examined where it relates directly to political communication: such laws are only justified if they are in the public interest because they are conducive to the overall availability of the effective means of communication or do not go beyond what is reasonably necessary for the preservation of an ordered and democratic society, or the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society (*ACTV*, 169).

Justice Brennan also carefully set out the criteria according to which incursions on freedom of communication may be justified (*ACTV*, 150-1). He said that the issue of justification involves a balancing of the guarantee of freedom of communication against other 'legitimate interests' (e.g. justice, personal reputation or decency). The limitations should not, however, impair the capacity of the people to form the political judgments required for the exercise of their constitutional functions. It will depend on the following factors: the practicability of protection by a less severe curtailment of the freedom, the

[59] This recalls the test used by the United States Supreme Court in *United States v O'Brien* (1968:376-7).

extent to which the protection of the other interest enhances the exercise of democratic rights and freedoms, the nature of the legislative power in question (such as defence and national security) and the risk to other legitimate interests.

Justice Brennan continued that because the effect of Part IIID of the *Broadcasting Act* 1942 (Cth) was only a partial and temporary restriction on political advertising, a closer analysis of the implied limitation was required. The *extent* of the limitation is parallel to the *scope* of the freedom, but the freedom is ascertained after the legislative power is considered and the immunity from that power is measured. That measure is the scope of the freedom (unlike the United States Bill of Rights where the scope of the freedom is measured first, independent of the legislative power). Hence the boundary of the freedom differs from one subject matter of legislative power to another. For example, the defence power may during armed conflict allow almost complete encroachment upon the freedom (see *Nationwide News*, 50-1; *ACTV*, 150-162). Thus 'It follows that the court must allow the Parliament what the European Court of Human Rights calls a "margin of appreciation"' (*ACTV*, 159; see *Theophanous*, 162-3).

Justices Gaudron and McHugh formulated the criteria differently. Justice Gaudron considered that because the freedom of political discourse derives from general law, the principles of general law regulating free speech are indicative of appropriate limitations on the constitutional guarantee. Limitations on political discourse are valid if 'reasonably and appropriately adapted' to some end which lies within section 51 powers. Her Honour adopted a test which, although similar in result to the judges mentioned above, drew its principles more directly and explicitly from the principles applicable to determining the scope of the power to legislate in a manner incidental to the heads of power provided for in section 51 of the Constitution (*ACTV*, 217-8). Indeed, this was the very manner in which the majority determined *Nationwide News*. It is consistent with Justice Gaudron's observation that the approach she adopted in *Nationwide News* involves the same process as the approach adopted by Justices Brennan, Deane and Toohey in *Nationwide News* and the larger majority in *ACTV* (*Nationwide News*, 95).[60]

Justice McHugh considered that the right of free communication is limited to the extent necessary to enable *electors* to make a true choice of representatives in a free and democratic society, and therefore may

[60] But contrast the impact on the law of defamation derived from the guarantee reflected in her Honour's joint decision in *Theophanous* and *Stephens*.

be regulated by laws which seek to achieve an honest and fair election process, such as to prevent fraud, intimidation, corruption and misleading information. Therefore, laws which incidentally limit freedom of communication but which aim to achieve 'some competing aspect of the public interest,' and are not disproportionate to that aim, are valid. Laws which seek to restrict the content, ideas or speakers of communications require compelling justification (*ACTV*, 235).

In *Langer* and *Muldowney*, Commonwealth and South Australian provisions which imposed a prison sentence for encouraging voters to engage in selective preferential voting were seen by the majority as a reasonable and appropriate means of supporting the central policy of full preferential voting (*Langer*, 317, 334, 339; *Muldowney*, 365-6, 374-5, 375). As Chief Justice Brennan later characterised his decision in *Langer*:

> Section 240 was construed as the *primary* method of choosing members of the House of Representatives, section 329A was upheld as a valid protection of the *primary* method prescribed (*Muldowney*, 366).

In *Lange*, the court confirmed that the freedom is not absolute, but is limited to 'what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution' (*Lange*, 107-8). However, given the divergences in the previous decisions, one of the remarkable features of the unanimous judgment was the agreement on a verbal formulation which summarises the principle:

> the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end (*Lange*, 108).

However, the judgment also noted the 'differences of opinion' which remained. The court said:

> different formulae have been used by members of this court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a

> legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts. For ease of expression, throughout these reasons we have used the formulation of reasonably appropriate and adapted (*Lange*, 108).

These differences of emphasis became apparent in *Levy* and *Kruger*. In *Levy*, the Chief Justice denied that the courts should 'assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice,' once again rejecting the stricter test favoured by most of the other justices (*Levy*, 254). Justice Dawson, who felt constrained to follow the consolidation of the freedom in *Lange*, took the matter further, reasoning that since the freedom is not a positive right, there is never a question of 'balancing' it against other interests: it is simply a question of whether the impugned law precludes the holding of the free elections required by sections 7 and 24. Nevertheless, his Honour assessed the law on the basis of whether it had a legitimate objective and an incidental impact on freedom of communication, and whether it was appropriate and adapted to a legitimate objective and 'reasonable in the interests of an ordered society' (*Levy*, 262).

Justice Kirby noted the various tests and formulations that had been advanced, and saw benefit in them all, while pointing out that 'a universally accepted criterion is elusive.' Despite disagreeing with some of Justice Dawson's criticisms of 'the concept of proportionality,' his Honour likewise thought that the question was whether the law was inconsistent with the system of representative government for which the Constitution provides, a less stringent test (*Levy*, 293). At the same time, he treated the *Lange* formulation as determinative and, when considering the regulations, noted that they were appropriate and adapted, proportionate and within the margin of appreciation to be accorded to the law-maker. His Honour appeared to disagree with the focus adopted by Justice Gaudron, however, in that he held that the legislation did not specifically target the content of the message, and thus did not require a compelling justification (*Levy*, 293-4).

Justice McHugh, and Justices Toohey and Gummow in their joint judgment, likewise decided that the regulations were 'reasonably capable of being seen as appropriate and adapted to the aim pursued.' It is noticeable that Justices Toohey and Gummow contrasted the *incidental* impact on communication posed in *Lange*, the *direct* prohibition of certain forms of communication in *ACTV* and the *facilitation* of the democratic process in *Langer* and *Muldowney* (*Levy*,

267).

Justice Gaudron noted the emphasis she had placed on the purpose of the legislation and the standards of common law in her judgment in *Nationwide News*. However, she distinguished the 'less stringent' test advanced by Chief Justice Brennan in *Langer*, and the two-tier test expounded by Chief Justice Mason and by Justices Deane and Toohey in *ACTV*. Her Honour affirmed that if the direct purpose of the law was to restrict political communication, it would require some 'overriding public purpose'; whereas if the interference was only incidental, the regulation need only be reasonably appropriate and adapted to its legitimate end (*Levy*, 270-71).

We shall have to ask whether limitations on the extent of the guarantee are necessarily implied by the Constitution and, if so, whether the specific terms of these varying formulations are also necessarily implied.

A constitutional right to choose representatives

In *ACTV*, Justice Dawson disagreed extensively with the reasoning of the majority. Having taken a different view of the fundamental nature of the Constitution and having disagreed with the approach that had been taken by Justice Murphy, Justice Dawson, following well-established authority, conceded that constitutional implications can be found to limit constitutional legislative powers, so long as those implications follow strictly from the text of the Constitution.

Therefore, when the Constitution provides for a choice by the electors of their representatives in both houses of parliament, that choice must mean a 'true' choice. A choice is not a true choice when it is made without an appreciation of the available alternatives or, at least, without an opportunity to gain an appreciation of the available alternatives. It would follow, for Justice Dawson, that 'an election in which the electors are denied access to the information necessary for the exercise of true choice is not the kind of election envisaged by the Constitution.' The question, therefore, is whether the legislation is incompatible with the Constitutional provision for a choice of members of parliament. The question is not whether the legislation ought to be considered desirable in the interests of free speech or of representative democracy (*ACTV*, 187).

Thus in 1992, although Justice Brennan demonstrated a willingness to grant parliament a wide 'margin of appreciation' and Justice McHugh limited the guarantee to election periods, only Justice Dawson resisted the implication of a freedom of political communication, and

even he conceded a more limited guarantee of a 'true choice.' However, as has been noted, in *Theophanous*, *Stephens*, and then *McGinty*, Chief Justice Brennan and Justice McHugh exhibited a greater measure of restraint, rejecting the idea of 'representative democracy' as a 'free-standing' constitutional principle abstracted from the specific text and structure of the Constitution (*McGinty*, 168-71, 188, 232-5). Hence 'representative government' is a 'shorthand way' of referring to whatever the relevant sections specifically require. The question is not 'what is required by representative and responsible government?,' but rather 'what do the terms and structure of the Constitution prohibit, authorize or require?' (*Lange*, 112; see *Levy*, 293). Indeed, the unanimous explanation of the nature of the guarantee given in *Lange* began with Justice Dawson's 'true choice' made with 'an opportunity to gain an appreciation of the available alternatives' (*Lange*, 106).

Thus while Justice Dawson was compelled to accept the existence of a 'freedom of political communication' in so many terms, the way in which the freedom is now understood discloses a very significant concession to the concerns which he had first raised.

Application

It is in the application of these principles to the facts of each case that we see their practical effect and meaning. The rationale of the cases cannot be understood apart from the application of the stated principles to the specific facts.

Nationwide News

The issues raised by the facts in *Nationwide News* were less complex than the issues raised by *ACTV*. Only Justices Brennan, Deane and Toohey decided *Nationwide News* completely on the basis of the implied guarantee. The other justices decided the case on the basis that the legislation relied on the power of the parliament to legislate on matters incidental to its general legislative power in section 51(xxxv), and that such legislation must be appropriate and adapted to achieving objectives which fall within the Commonwealth's power to legislate with respect to the arbitration and conciliation of inter-state industrial disputes (see *Davis v Commonwealth* (1988)).

Of the justices who relied on the implied guarantee, Justice Brennan simply observed that section 299(1)(d)(ii) was invalid because it purported to control criticism of the Commission regardless of whether the attack was reasonable or unfair (*Nationwide* News, 53). Similarly, Justices Deane and Toohey considered that section

299(1)(d)(ii) was invalid because well-founded and relevant criticism would be in the public interest (apart from a national emergency) and legislative control of attacks on the Commission *regardless of whether the attack was well-founded or relevant* could not be justified. However, section 299(1)(d)(ii) purported to do this. Since neither section 51(xxxv) nor (xxxix) evinces an intention to modify or exclude the general implication of freedom of communication in the exercise of the powers contained therein, section 299(1)(d)(ii) was invalid (*Nationwide News*, 79).

Australian Capital Television

ACTV required a more careful consideration of the relevant principles regarding the extent of permissible restrictions on the guarantee of freedom of communication and also required a more detailed explanation of the application of those principles to the facts.

The Political Broadcasts and Political Disclosures Act 1991 had amended the *Broadcasting Act 1942*, inserting a new Part IIID, divided into four divisions containing sections 95 to 95U. The provisions of Part IIID became part of the conditions upon which broadcasting licences were granted under the Act. Division 2 of Part IIID prohibited the broadcasting of 'political advertisements' during 'election periods.' Division 3 provided for 'free time' political advertising in lieu of the prohibition in Division 2. Division 4 allowed the broadcast of the policy launches of political parties. The legislation was purportedly supported by the 'broadcasting' power in section 51(v), the various powers to legislate with respect to federal elections referred to in sections 29-31 and elsewhere, and the power to legislate with respect to territories in section 122 (see, *ACTV*, 156-7).

In Division 2, section 95B prohibited the broadcasting of 'political advertisements' during Commonwealth elections or referenda, and sections 95C and 95D extended the prohibition to Territory and State elections respectively. Parallel subsections contained in sections 95B, 95C and 95D extended these prohibitions to broadcasts on behalf of the Commonwealth and 'political advertisements' by Territories, States or other persons on their own behalf.

Division 3 provided for the allocation of 'free time' advertising in relation to Commonwealth, Territory and State general elections. Ninety percent of the free time allocated was to be granted to the parliamentary parties in proportion to their respective voting shares at the previous election. The remaining ten percent of free time was available to be granted in equal shares to existing Senators who were

candidates for the Senate in the present election. If all or some of the remaining time was not allocated on this basis, it could be distributed to political parties and individual candidates.

Importantly, the free time advertisement was required to consist of words spoken by a single speaker in the form of a 'talking head' lasting two minutes for television and one minute for radio broadcasts. The presentation could not involve dramatic enactment or impersonation (see *ACTV*, 128).

The Decision

Chief Justice Mason and Justices Deane, Toohey and Gaudron (for slightly differing reasons) held that the entirety of Part IIID was invalid because it impinged on the implied guarantee. The judges' estimation (and characterisation) of the effect of the legislation in *ACTV* was important to the decision brought down in each instance.

The Chief Justice characterised the effect of the provisions negatively. According to him, the effect of Part IIID was to prohibit a vital medium of political campaigning and dissemination of political information, comment and argument. His Honour stressed that talkback radio would become the principal vehicle for political discussion and that Part IIID could make it more difficult for a political party, person or group to make an effective response to information or comment contained in such a program. Therefore, the ability of broadcasters, persons, parties and groups to express views by broadcasting was restricted.

Further, Part IIID did not create a level playing field: as to 'free' advertising, preference was given to existing parties and members of parliament, and others had to rely on the discretion of the Tribunal when distributing the free advertising. There was no scope for persons who were not candidates or for groups who were not putting forward candidates. Accordingly, his Honour concluded, Part IIID *severely* impaired the freedoms previously enjoyed by all people and organisations to discuss public and political affairs and to criticise federal institutions (*ACTV*, 129, 132). Because Part IIID targets ideas and communication, the court must 'scrutinise the validity of Part IIID with scrupulous care.' While there is a public interest in safeguarding political processes from corruption, undue influence, unfair advantage to the wealthy and trivialisation, nevertheless, 'experience has demonstrated' that the benefits of freedom of communication outweigh its detriments. Therefore, Part IIID was invalid (*ACTV*, 144-7).

Justices Deane and Toohey traversed the same ground when they

characterised the legislation and its link with the Constitution. They considered that the legislation could not be justified because the prohibition extended very widely over broadcasting during election periods; free time was granted selectively, was weighted to existing parties and completely excluded outsiders (*ACTV*, 170-3). The interference with freedom of communication was substantial because television advertising is the most effective means of communication and the interference applied during the most important period. Hence the interference distorted communication and denied participation by the represented. It was not necessary to go to such lengths in order to control excessive spending and political corruption (*ACTV*, 175).

On the other hand, following her approach outlined above, Justice Gaudron dealt with the application of the legislation by observing that the entirety of Part IIID was not reasonably and appropriately adapted to the regulation of broadcasting under the relevant head of power because it did not deal with broadcasting generally, but dealt with election advertising and prohibited it at the most crucial time, election periods. Section 95B extended to all persons and all information (it was not restricted to candidates and parties – which if it did, might render it a reasonable and appropriate regulation of federal elections), and this curtailment was not reasonable or appropriate. It could not be severed to apply only to candidates and parties (*ACTV*, 218-9, 221).

Justice Brennan (partly in dissent) considered that sections 95B, 95C and 95D required separate consideration. He held that sections 95B, 95C and 95D were generally not caught by the implied guarantee because they were reasonably proportionate to the appropriate interests to be served by the restriction on election advertising. However, the exception to this was that sections 95D(3) and (4) – which restricted advertising in State elections – specially and unduly burdened the states' capacity to function as such and were invalid under the *Melbourne Corporation* principle (*ACTV*, 159-67).

As for section 95B, while the extent of the restriction was extensive, the interests to be served by the restriction were a reduction in cost, a reduction in corruption and a reduction of the advantage to the wealthy (*ACTV*, 151-7). Therefore, contemporary political conditions are relevant and the court cannot judge these factors as well as parliament can – a 'margin of appreciation' should be accorded the legislature for this reason. For Justice Brennan, that margin of appreciation allows parliament to decide whether section 95B tangibly minimises the risk of corruption and control by the wealthy, whereas the court should only ask whether that decision could reasonably be made.

The restrictions do not destroy or substantially impair the ability of electors to form political judgments because information still flows. Indeed, television is a poor medium (for reasons of brevity and trivialisation), and other, better media remain open (talkback, press). Therefore, the legislative decision could reasonably be made; and the provision is proportionate (*ACTV*, 159-63).

Further, section 95C, supported by sections 51(v) and 122 of the Constitution, was not caught by the implied guarantee, supposedly for the above reasons. It was a moot point whether the implied guarantee applied to section 122. Again, sub-sections 95D(1) and (2) related to advertising for State elections by the Commonwealth and Territories, and were valid as regulations of the Commonwealth executive by the Commonwealth legislature. Sub-sections 95D(3) and (4) restricted States' and other persons' advertising in State elections and were struck down because they specially burdened and inhibited the states' capacity to function (the implication of *Melbourne Corporation*). The allocation of free time in sections 95H to 95R did not breach the requirement of acquisition of property on just terms in section 51(xxxi) of the Constitution, and did not impinge on the guarantee of freedom of communication (*ACTV*, 162-7).

Justice McHugh held that section 95B was invalid because it infringed the (narrower) guarantee of freedom of communication *with respect to federal elections* which he favoured. While the effect of Part IIID and especially section 95B was to prevent the use of broadcast advertising,

> having regard to the conceptions of representative government, Parliament has no right to prefer one form of lawful electoral communication over another. ... [The choices of candidates and electors] are a matter of private, not public, interest. Their choices are outside the zone of governmental control (*ACTV*, 236).

His Honour also thought that the provisions which affected the states were invalid because their immediate objective was to control the states and the people of the states in the exercise of their constitutional functions and the ordering of their constitutional processes, and this was inconsistent with the continued existence of the states under sections 106 and 107 (*ACTV*, 241-44). However, section 95C with respect to Territories was valid because the Constitution does not imply a restriction of the exercise of power with respect to Territories, especially in the light of the terms of section 122; and it is possible to sever section 95C from the remainder of Part IIID (*ACTV*,

235-46).

Justice Dawson, who rejected the implied guarantee of freedom of communication, characterised the effect of the legislation in significantly more generous terms than did most members of the majority. His Honour thought that the fundamental purpose of the legislation was to enhance (not damage) the democratic process. Paid political electronic advertising constitutes a monumental financial burden on political parties. By reducing political parties' financial dependence on wealthy donors, the legislation sought to reduce the scope for corruption (*ACTV*, 189). While his Honour adopted a guarantee of a 'true choice' of parliamentary representatives, he concluded that the legislation did not impinge on this limited guarantee. Nor did his Honour strike down any part of the legislation on the ground of its effect on the states (*ACTV*, 188-91, 199-202).

Theophanous and Stephens

Theophanous and *Stephens* raised further issues. It has been noted that the court found that the implied constitutional guarantee applied to the law of defamation operating in the State of Western Australia. It held in *Theophanous* and *Stephens* that a defence in law would be available where a defendant publishes albeit false and defamatory material which relates to political matters, the performance of holders of high office or the suitability of individuals for such office (*Theophanous*, 140, 185).[61] In these circumstances, the defence would operate where the defendant publisher was unaware of the falsity of the publication, did not publish the material recklessly (not caring whether the material was true or false) and acted reasonably in the circumstances. It would then be a publication on an occasion of qualified privilege, operating at all times, whether or not a federal election was about to be called (*Theophanous*, 141). Moreover, publication with malice would not defeat the defence (*Theophanous*, 137). Justice Deane wished to go even further, by dispensing with the requirement that the defendant establish that it had acted reasonably or without recklessness, particularly when the publication concerned a holder of high public office (*Theophanous*, 188).

By contrast, Justice Brennan held that the implied guarantee operating by virtue of the Commonwealth and State constitutions did not limit the operation of the law of defamation in protecting the

[61] In *Cunliffe*, the court rejected the argument that the restrictions on the giving of 'immigration assistance' and on making 'immigration representations' by an unregistered person acting on behalf of an 'entrance applicant' interfered with the constitutional freedom.

personal reputations of public officials, including members of parliament (*Theophanous*, 163; *Stephens*, 236). His Honour considered that the common law was consistent with the system of representative government and appropriately balanced the protection of personal reputation against the importance of free speech (*Stephens*, 255). Justice McHugh put it this way: there is no *general*, private right to communicate at all times in relation to the performance of members of federal parliament such that it would override the common law and federal and state legislation relating to defamation (*Theophanous*, 206; *Stephens*, 259). Justice Dawson denied the very existence of an implied guarantee, for the 'argument must founder on its first premise' (*Theophanous*, 191; *Stephens*, 258).

Langer and Muldowney

In *Langer*, all members of the court, except, ironically enough, Justice Dawson, rejected the plaintiff's contention that legislation restricting the capacity of people to encourage voters to vote other than by expressing a full preference was inconsistent with representative democracy and freedom of speech as implied by the Constitution. This argument seems to have been 'raised but not pressed' and was given so little stress by the plaintiff that Justices McHugh, Toohey and Gaudron concluded that he did not, in the final analysis, argue the point (*Langer*, 315, 333, 340).

Justice McHugh held that parliament has power to direct voters to fill in ballot papers by expressing a full order of preference for each candidate; it accordingly has power to punish those who intentionally encourage voters to disregard lawful directions imposed by parliament. He thought that:

> There is a world of difference between prohibiting advocacy that is put forward with the intention of encouraging breaches of statutory directions and prohibiting advocacy that criticises or calls for the repeal of such directions. Nothing in s 329A prevents the plaintiff or anybody else from arguing that the system set up by Pt XVIII is unfair, undemocratic, an attack on conscience, or riddled with inconsistencies and absurdities (*Langer*, 340).

Parliament could not prevent people from expressing the latter kind of criticisms. But because parliament can compel people to vote, it can also dictate the form of that vote; and it can punish people for advocating that voters mark their ballot papers in a manner other than the way which parliament prescribes.

Justice Gummow added that Langer's actions were an attempt 'intentionally to undermine the effective franchise' by encouraging informal votes, thereby 'denying the effective exercise by those electors of their right to participate' in the process of representative government. Langer thereby *weakened the efficacy of the system of representative government* (*Langer*, 351). This amounts to the view that, so far from inhibiting the system of representative government, section 329A *promoted* it. It could not therefore be inconsistent with the implied guarantee of freedom of political speech.

Chief Justice Brennan and Justices Toohey and Gaudron noted that the implied freedom is not absolute, and that curtailments of freedom of speech are justified where they can 'reasonably be regarded as appropriate and adapted to furthering or enhancing the democratic process' (*Langer*, 317). Justices Toohey and Gaudron thought that the prohibition could be regarded as furthering 'full, equal and effective participation in the electoral process' (*Langer*, 334). Chief Justice Brennan thought that section 329A was 'a means of protecting the method which Parliament has selected for the choosing of members of the House of Representatives' (*Langer*, 318).

Justice Dawson, however, thought that since the entire scheme of the Act in fact permitted voters intentionally to record a selective preference, 'to prohibit communication of *this* fact ... is to restrict the access of voters to information essential to the formation of the choice required by s 24 of the Constitution' (*Langer*, 325-6). As such, he decided the case on the basis of the guarantee of a 'genuine choice' which he had outlined in *ACTV*. It seems that he thought that whatever the particular electoral system parliament prescribes, once it has prescribed a system it must abide by it: it cannot prohibit a genuine choice from being made within the framework of that system. Since the system, as regards preferential voting, should be read as a whole, and since sections 268 and 270 of the Act provided that selective preferential votes could be formal despite initial informality under section 240, parliament cannot in section 329A prohibit communications intended to encourage voters to take advantage of that fact (*Langer*, 325).

In *ACTV* Justice Dawson had taken the view that when the Constitution expressly provides that representatives in both houses of parliament shall be 'directly chosen by the people,' that choice must mean a 'true' choice. A choice is not a true choice when it is made without an appreciation of the available alternatives or, at least, without an opportunity to gain an appreciation of the available alternatives. It followed that 'an election in which the electors are denied access to the

information necessary for the exercise of a true choice is not the kind of election envisaged by the Constitution' (*ACTV*, 187). In *Langer*, Justice Dawson noted that 'the freedom of communication ... required by the Constitution [is] confined to what is necessary for the conduct of elections by direct popular vote as envisaged by ss 7 and 24 and related sections.' This contrasted with the majority in *ACTV* who found 'a constitutionally guaranteed freedom of communication' on the basis of 'a notion of representative government which does not appear from any requirement contained in the constitution itself' (*Langer*, 324).

The way was therefore open for Justice Dawson to decide *Langer* by holding that the legislative power in sections 31 and 51(xxxvi) used to enact section 329A is likewise 'subject to' the implied guarantee of a genuine choice. However, his Honour adopted the more restrained course and held that sections 31 and 51(xxxvi) confer a *purposive* power: 'a power to make laws for the purpose of implementing s 24' of the Constitution. Because the power is purposive, it must be exercised in a manner which is 'reasonably and appropriately adapted to the achievement of an end which lies within power' (*Langer*, 324-5).

Having adopted the reasonable proportionality test, the final matter to resolve was whether the legislation was proportionate. It was here that Justice Dawson differed from the majority in a way which made the crucial difference in the result. His Honour seems to have taken the view that the electoral system thus devised must not prevent the dissemination of information necessary for voters to exercise genuinely the choice of representatives made possible by the entire legislative scheme. The legislation purported to allow the communication of the relevant information provided it was not with the intention of encouraging voting other than in accordance with section 240. But Justice Dawson thought that 'if there is a line' between merely informing people of the law and encouraging people to take advantage of the law, it is a 'thin one,' and did not rescue the legislation from invalidity (*Langer*, 323).[62]

McGinty

In *McGinty*, a majority of the court rejected the argument that the Western Australian electoral distribution was invalid as contrary to the system of representative democracy established under the Constitu-

[62] In *Muldowney* the court unanimously rejected the freedom of communication argument, Justice Dawson distinguishing the South Australian legislation since it mandated full preferential voting and 'provided no alternative method in the form of an optional or selective preferential system' (27).

tion. Essentially, Chief Justice Brennan and Justice Dawson stressed the importance of the text of the Constitution and the care that must be taken in seeking to derive implications from the representative provisions contained in the Constitution. Justices McHugh and Gummow took the matter further by noting that, far from establishing a system of representative democracy premised on equality of voting power, many of the structural provisions of the Constitution demonstrated a striking adaptation to a federal system, which required a noticeable inequality in voting power (see Aroney, 1996). By contrast, Justices Toohey and Gaudron decided that the relevant provisions of the electoral system were 'at odds with the principle of representative democracy to be found in the Constitution of Western Australia,' such that members of parliament would not be 'chosen ... by the people' within the meaning of those words' in the Constitution Act (*McGinty*, 215-6, 223-4).

Lange

In *Lange*, the court had to reconsider its findings in *Theophanous* and *Stephens*, to determine whether, and if so in what way, the implied freedom of political communication impacted on the law of defamation. In contrast to the earlier cases, the court emphasised that the freedom was a 'negative' in form, a limitation on legislative power and not a personal right. Accordingly, while the court unanimously affirmed that the common law and state legislative regimes relating to defamation must be consistent with the constitutional freedom, the freedom *only* prevents the expansion of the common law or statutory rights of persons defamed; it does not limit the extent of the defences that the common law or statute may say are available to those who publish defamatory material. Developing the law in accordance with 'the common convenience and welfare of society,' the court held that the appropriate balance between personal reputation and the constitutional interest in free speech would be met by a general defence of qualified privilege which requires the publisher 'to prove reasonableness of conduct' and, contrary to the decision in *Theophanous*, affirmed that proof of publication with 'malice' would defeat the defence (*Lange*, 117).

Beyond the specific finding in *Lange*, the case was notable for its unanimity: the sense it gives of the entire court settling on an agreed understanding of the implied freedom of political communication. One important feature of this 'agreed understanding' was the court's close analysis of the text of the Constitution as the basis for the implication and, as a consequence, the way in which the court chose to define the

freedom as nothing more than a 'short-hand' way of referring to the particular requirements of the provisions of the Constitution.

Levy

In *Levy*, the court unanimously held that regulations which prevented entry into duck hunting areas were reasonably proportionate or appropriate to achieving the legitimate objective of public safety (*Levy*, 256, 263, 287-8, 278, 294). Justice Gaudron, however, thought that regulation 5 had the direct purpose of restricting the freedom of movement of those who wished to protest against duck shooting, and therefore had to be justified by some overriding public purpose. Nevertheless, human safety was such an overriding concern, given 'the use of firearms and the likely enthusiasm' (*Levy*, 272).

Kruger

Kruger raised a large number of disparate constitutional issues. As far as is relevant to the present study, a majority (Chief Justice Brennan and Justices Dawson, McHugh and Gummow, the latter reluctantly) held that the various implied limitations on legislative power – particularly freedom of movement and freedom of association, along with freedom of communication – had no relevant operation. For Chief Justice Brennan and Justice Dawson (with whom Justice McHugh agreed) the case turned on a failure to establish the existence of the implied limitations on power (*Kruger*, 141, 160, 218). Justice Gummow seemed to agree that a freedom of association 'in any general sense' is not 'logically or practically' necessary for the preservation of the constitutional system of representative government (*Kruger*, 230).

However, Justices Gaudron and Toohey held there were relevant implied limitations on legislative power, especially the guarantee of freedom of movement and freedom of association. According to Justice Gaudron, the constitution guarantees 'whatever is necessary for the maintenance of the democratic processes for which it provides' (*Kruger*, 197). For both justices, freedom of association is 'an essential ingredient of political communication, (*Kruger*, 177, 196-7). Justice Gaudron thought that 'freedom of association necessarily entails freedom of movement' (*Kruger*, 196). Justice Toohey cited Justice Murphy to the effect that freedom of movement is a 'fundamental right arising from the union of the people in an indissoluble Commonwealth' (*Kruger*, 175).

For Justice Gaudron, this meant that since the ordinance conferred powers directly to prevent freedom of movement and association, the

matter turned on whether an 'overriding public purpose' was in view, and, if so, whether less drastic measures were available. It would therefore have to be shown that detention of Aborigines was necessary for their protection or preservation as a people; but this could in no way be shown. The relevant provisions of the ordinance were accordingly at all times invalid (*Kruger*, 208). For Justice Toohey, the matter continued to turn on evidence which would need to be supplied at trial (*Kruger*, 179). Thus in *Kruger*, the unanimity of *Lange* and *Levy* broke down as the divergent views of individual justices were reasserted.

In each of the cases canvassed, the individual reasons for the decisions have been set out in detail so that on one hand the strength and ingeniousness of the reasoning is appreciated, and on the other hand to make evident the discrete steps in reasoning involved. In the chapter that follows, I will argue that each of these discrete steps needs to be examined so as to determine what kind of an inference has been employed. The cumulative effect of these multiple inferences can then be assessed.

CHAPTER 5

CRITIQUE: A SEDUCTIVE PLAUSIBILITY

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth or fifth logical extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process – 'thus far but not beyond.'
>
> Chief Justice Burger,
> *United States v 12 200-Ft Reels* (1973:127)

The court has adopted a legal form of argument by restricting itself to necessary implications of the Constitution. However, in this chapter it is argued that the court has diverged from this stated goal. The arguments adopted by the majority are often uncompelling because the conclusions do not follow from the reasons or premises put in their support. Moreover, the court departed from the precedents referred to in chapter three (particularly as they relate to the drawing of necessary implications), although the court sought to distinguish the previous decisions on various grounds, as we shall see.

Both of these points are seen in the fact that each step in the court's reasoning involves a third-order implication (as those kinds of implications were explained in chapter three). The *combination* of steps means that the process of reasoning as a whole demonstrates no *necessary* relationship between the text of the Constitution and the guarantee of freedom of communication. The guarantee, not to mention the limits placed on it, has no closer than a fourth order relationship to the text. But if each step is an argument by way of 'illusory reference,'[63] how much more the argument as a whole?

[63] An 'illusory reference,' according to Julius Stone, is a proposition used in a legal argument which does not logically support an inference drawn from it, although the court treats the proposition as if it did. The use of illusory references is a means by which the courts substantially alter or develop the law while appearing to conform to precedent and established propositions of law (see Stone, 1964; *McGinty*, 269-70).

These issues will be addressed in the order in which the steps in the court's argument were set out in the previous chapter. However, it is necessary to relate those steps to the argument as a whole, in order to demonstrate the nature and salient features of each step in the reasoning, and problems associated with them. This often involves a more or less extended discussion of features of other steps in the process.

The Nature of the Constitution: An Act of the Imperial Parliament, a Social Contract or a Federal Pact?

We have seen that the majority in *ACTV* stressed the nature of the Constitution as a social contract formed by the Australian people and ultimately derived from their authority. Contrary to this, Justice Dawson emphasised the nature of the Constitution as an Act of parliament. He observed that the Constitution was produced by an exercise of sovereign legislative power by the Imperial Parliament. Therefore, despite 'the abstract proposition of political theory that the Constitution ultimately depends for its continuing validity upon the acceptance of the people' – and 'the same may be said of any form of government which is not arbitrary' – the Constitution is to be interpreted as a law passed pursuant to Imperial legislative authority (*ACTV*, 180-1). Thus:

> the legal foundation of the Constitution is the Act itself. The Constitution does not purport to obtain its force from any power residing in the people to constitute a government, nor does it involve any notion of the delegation of power by the people such as forms part of American constitutional doctrine. (*ACTV*, 180-1)

This proposition is well established by the authorities. Although the case law often characterises the Constitution as a fundamental law and a federal compact, it is well established that the legal force of the Constitution at the time of its enactment was derived from its nature as a statute of the Imperial Parliament, and that the interpretation of the Constitution should proceed on such a basis. Even after the passage of the *Australia Acts*, as Justice McHugh has pointed out, 'since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and by no other means,' and 'that the text be the starting point of any interpretation of the Constitution' (*McGinty*, 230-31). Thus in the cases since *McGinty*, the court has tended to avoid the issue, focusing rather on the text and structure of the Constitution as the starting point in its

reasoning.

The court's approach in *ACTV* and *Nationwide News* led counsel in *McGinty* and *Levy* to argue that specific doctrines are implied into the Constitution upon the ultimate political authority or sovereignty of the people *as a principle in itself.* However, the more successful approach has been to read specific provisions or the overall structure of the Constitution in the light of popular sovereignty (see e.g. Chief Justice Mason in *ACTV*, 138).

But even that is not enough. In accepting the existence of the implied guarantee, the majority in *ACTV* seemed to maintain that the people, in establishing the Constitution, retained for themselves the immunities said to be inherent in a system of representative government. This is conceivable; but it is also conceivable that a sovereign people might be satisfied with placing these powers in a representative assembly without reserving any immunities for themselves. Thus the supposed immunities are not necessarily inherent in representative government. We might consider that the latter choice would be foolish or short-sighted, but both choices are possible; both systems can fairly be described as 'representative.' So how do we determine which in fact is or was the case without examining the text of the Constitution?

The majority of the court tended to read the Constitution, especially sections 7 and 24, in the light of the idea that the people in fact retained the powers, rights and immunities inherent in a system of representative government. Once the Constitution is seen in that light, it follows by definition (i.e. a first-order implication) that the Constitution embodies a system of representative government in which the people retain an immunity against legislation inconsistent with their ability to control the government, i.e. through freedom of speech.

However, the conclusion has been smuggled into the premises. Moreover, popular sovereignty, in the sense of a nation-wide people possessing ultimate sovereignty, is not the only or obvious conclusion to draw. The federal nature of the Constitution, seen for example in the special place accorded to the people organised as states in the Preamble and in sections 7, 24, 106-7 and 128, suggests that if the *Australia Acts* make a difference, the Constitution should be seen as resting on a federal pact, rather than a social contract (Aroney, 1998). In that light, popular government would be seen as best protected by an insistence on local or regional government, rather than government controlled by a Bill of Rights created by the judiciary. Dr John Cockburn reflected a predominant concern of the framers when he stated in 1897:

> local government, self government, and government by the

> people are analogous terms. ... centralization is opposed to all three, and there can be no government by the people if the Government is far distant from the people. (Convention Debates, Adelaide, 1897:338-9)

Professor Harrison Moore perceived a connection between the 'federal' outlook and the absence of guarantees of individual rights when comparing the Australian and American Constitutions:

> Large States, where the central power was far off, were more dangerous to liberty than small States, where popular control was more readily exerted ... .
>
> From the Australian Constitution such guarantees of individual rights are conspicuously absent. ... with hardly an exception all restraints imposed by the Constitution upon the Commonwealth Parliament or States may be referred to federal needs (Harrison Moore, 1910:612, 615).[64]

Thus while the Adelaide Convention of 1897 resolved that the Constitution was 'to enlarge the powers of self-government of the people of Australia,' Sir Robert Garran explained that the powers of self-government would be enlarged because they would be elevated 'to a plane on which they could be more effectively exercised' (*ACTV*, 228). Accordingly, the resolution was hardly concerned with the quality or nature of representative government (having to do with the existence of guaranteed democratic rights), but rather had to do with the scale on which it was to be exercised (on a national scale). The resolution reflects the belief that a national government would transcend petty rivalries between the colonies and reinforce the case for self-government by a nation independent of Imperial control. The purpose of the resolution was to allay fears that federation meant a 'surrender' of local control, fears which had forestalled federation during the years after the first Convention in 1891. As with so much of the Constitution, the concerns were federal in orientation. Thus the powers of self-government to be 'transferred' were of the same quality as those exercised in the colonies, where the local parliaments were modelled after the 'High Court of Parliament' in the United Kingdom.

Constitutional Implications

Many of the justices stressed the importance of remaining faithful to the text of the Constitution and of avoiding implications based on solely extraneous ideas. All members of the majority used expressions which

[64] There is therefore an important difference in the way American federalism is structured.

indicate a *necessary connection* between the text and the implied doctrine.

Justice Dawson agreed, but pushed the issue to its logical conclusion. Following *Engineers*, interpretation should not proceed on

> a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted ... but arrived at by the Court on the opinions of judges as to hopes and expectations respecting vague external conditions (*ACTV*, 181-2; Engineers, 145).

This was set against Justice Murphy's 'nature of our society,' a 'vague, individual conception of the spirit of the compact' and not a secure basis upon which to establish constitutional interpretation. His Honour expressly denied that the question was whether the legislation was desirable in the interests of free speech or representative democracy, though this was not to deny that freedom of communication is 'indispensable to any free society' (*ACTV*, 186). In casting the issue as a stark contrast between two distinct points of view, the suggestion is that the argument by 'necessary implication' is but a subterfuge to disguise the bold creativity involved in the guarantee of freedom of communication.

For Justice Dawson, the majority in *McKinlay* declined to draw specific conclusions from the principle of representative government other than those which could be based directly on the terms of the Constitution. *McKinlay* held that the Constitution leaves open these questions and it is not proper to infer and apply specific kinds of safeguards on the basis of broad principles which are said to undergird the Constitution as a whole. The true question was whether the legislation was 'incompatible with those sections of the Constitution which provide for the direct choice of members of the Parliament' (*ACTV*, 187). This way of expressing the matter resurfaced in the unanimous judgment in *Lange*, as has been noted.

Nevertheless, the majority in *ACTV* explicitly or implicitly relied on the notion of necessary implication to avoid the objections raised by Justice Dawson. And indeed, it would be naive simply to reject the use of implications and fundamental principles or doctrines in the interpretation of constitutions. The question here is, which of the possible senses of 'necessary implication' did the court in fact use?

Looking at the argument overall, it is difficult to sustain the thesis that a guarantee of freedom of communication is, in a direct sense, a 'necessary implication' of the actual text of the Constitution – on any one of the three senses of necessary implication. A bare reading of

sections 7, 24, 25 and 128 logically entails, by definition of the words used, a very narrow set of requirements. A broader reading, on the basis of a bare practical application, does not take one much further: it remains possible for the people to choose their representatives in terms of sections 7 and 24 even if political broadcast advertising were completely prohibited or if freedom of speech were severely restricted, perhaps so long as there are alternative candidates to choose between. Again, even on the basis of a third level implication, it is difficult to see how the choice of senators or members of the House of Representatives necessarily requires more than a choice in which there is a genuine apprehension of the alternatives (see *ACTV*, 187).

Common Law Rights

Justices Deane, Toohey and Gaudron also relied on the idea that the Constitution should be read in the light of fundamental common law rights extant at the time of federation. The difficulty is that according to the view dominant at the time of federation, common law rights were not in the nature of constitutionally entrenched guarantees or abstract statements of rights, but took the form of concrete legal rules and accompanying remedies, which the courts administer in the absence of legislation clearly revokes such rights (Burke, 1790:89-91, 97; Dicey, 1920:195-197, chs. V-VII; Lumb, 1983:100-104). Thus, although the courts will only recognise legislative interference with traditional rights if the parliament makes that intention plain and unavoidable, common law courts will not strike down legislation on the sole ground of being contrary to such rights (Maxwell, 1969:251-6; *Pickin v British Railways Board* (1974)). At common law, the High Court of Parliament was in fact the highest court of appeal in the nation, a supremacy gradually converted into a legislative sovereignty, consolidated in 1688. On this view, common law militates against the implication of guarantees of rights, as Justice Dawson was to point out (see *Kruger*, 162-3; *Kable v DPP (NSW)* (1996:590)).

It might be argued that the rule of interpretation requiring a presumption that parliament does not intend to impinge on fundamental common law rights, unless making that intention clear and unavoidable, impacts on our reading of the Constitution. However, the original understanding of the Constitution appears to have been that the Commonwealth Parliament would have the kind of powers possessed by a 'Westminster'-style parliament, to be exercised in a particular territory. It would, with respect to the enumerated topics, possess the same kind of powers as are possessed by the Imperial Parliament,

subject only to a very limited list of express limitations and limitations necessarily implied by the Constitution, strictly understood. While these limitations undoubtedly work a severe qualification in parliamentary sovereignty in the absolute sense, the limitations seem to have been originally understood as focusing on the requirements of federalism, rather than individual rights.

The essence of the problem is that parliamentary supremacy is itself an outworking of a well-founded view of representative government: parliament represents the people organised as states and localities. As the 'High Court of Parliament,' it is supreme over the executive and the courts. The argument from representative government is an equivocal way to build a case for common law rights. For a resolution of the question we must return to the general issue of the validity and proper extent of constitutional implications. The argument from common law rights does not progress the matter independently from this fundamental question.

Representative Government as an Implication

The next step for the majority was to draw the specific conclusion that the Constitution necessarily implies the doctrine of representative government. The court used expressions such as 'contain and imply,' 'give effect,' 'prescribe,' 'implement,' 'predicate' and 'fundamental' to describe the link between the guarantee and the text. There are subtle differences in nuance which these expressions connote, but it is well established and generally approved in the case law that representative government is in some sense 'implied' by the Constitution and may have a tangible effect upon its interpretation and application.

The issue, however, is not with the implication of this doctrine in and of itself; it is with the use of this doctrine as a stepping stone to further implications. The difficulty with the implication of representative government is that it necessarily involves the importation of an *idea of representative government* which is not contained in the terms of the instrument. The expressions 'representative government' or 'representative democracy,' of course, do not appear in the text. The provisions in the Constitution (providing for a choice of representatives for the House of Representatives, etc) when combined do not, in their express formulations, create a fully operating system of representative government, on any view of the various kinds of representative government available, even those of the most minimal character.

More elements must be added to the express constitutional provisions before a bare working system of representative and respon-

sible government exists. The 'transitional' provisions of the Constitution which adopt the electoral systems of the states depend on State systems that are controlled by the State parliaments as an exercise of their own plenary legislative powers. The constitutional conventions of responsible government are required to make the executive responsible to the legislature and to require the Governor-General to exercise his or her powers (apart from the reserve powers) strictly in accordance with the advice of the Prime Minister and cabinet – based on the support of a majority of parliamentary representatives. Further elements of a full system are supplied by the *Commonwealth Electoral Act* 1918 and the *Australian Citizenship Act* 1948, as enacted under sections 9, 10, 27, 29-31 of the Constitution. The system also derives from the provision for the publication of Hansard and legislation, and the parliamentary rules, procedures and practices as declared or made by the parliament pursuant to sections 49 and 50 of the Constitution.

As Justice Stephen stated in *McKinlay*:

> representative democracy (by which I mean that the legislators are chosen by the people) ... may ... be discerned in the opening words of s 24. ... The principle of representative democracy does indeed predicate the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected. However, the particular quality and character of the content of each one of these three ingredients of representative democracy, and there may well be others, is not fixed and precise. ... Representative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description (1975:56-7).

While in *ACTV* Justice McHugh appeared to disagree with Justice Stephen's observations, his Honour stressed in *Theophanous* that he did 'not see how there can be implied into the Constitution ... The whole apparatus of representative government.' He said:

> It does not follow ... that, because some provisions of the Constitution give effect to an aspect of a particular institution, that the institution itself is part of the Constitution (*Theophanous*, 203; see *ACTV*, 233).

The process of discovering an implication of representative government is one whereby missing elements are provided so as to place the express components within the context of a fully operating system.

What determines what these missing elements are? Answer: the doctrine of representative government *as defined.*

Now, the majority claimed that representative government is a necessary implication of the *terms* or *structure* of the Constitution and that, in turn, freedom of speech is a necessary implication of representative government. Therefore, the court was building on an idea which was something less than an express provision. The step from the bare text and structure of the Constitution to a (bare) system of representative government is itself a significant one. A collection of Westminster conventions and parliamentary statutes is necessary for the guarantee of freedom of communication with respect to political matters to have any practical importance. For if the conventions do not apply and the executive is not responsible to the legislature, it is fruitless to insist on freedom of speech as an essential part of a good system of responsible government. The people might be free to communicate and to elect members of parliament, but the executive would be able to exercise its powers and determine its policies apart from responsibility to the legislature, and, through it, the people.

But freedom of political communication is concerned most typically with the performance of the Prime Minister and cabinet in their exercise of governmental powers spanning both executive and legislative policy, as well as with the performance of ordinary members of parliament, whether in government or in opposition. Without responsible government, there would be no point in freely discussing and debating the performance of the ministry, since appointments to such offices would remain within vice-regal discretion. In turn, if members of parliament were not popularly elected, even if the executive government was responsible to parliament, the government would not thereby be responsible to the people. Thus both the conventions of responsible government and the machinery for a democratic electoral system are necessary prerequisites for a system of representative democracy in which freedom of political communication has any real significance.

The difficulty is that although the court was certain that the entity (representative government) is there in the text (it has found its essence to be expressly set forth), elements that are deemed essential to that entity (i.e. an electoral system and constitutional conventions that are necessary for a guarantee of freedom of speech to have practical meaning and effect) are not in the text – and must also be implied into it. The court must therefore turn to the second or third notion of necessary implication, and to extraneous sources.

The doctrine of representative government is itself an implication. Assuming that the implication of freedom of communication is also a second- or (as is argued) a third-order implication, we have a total process of a third-order implication building upon another third-order implication. The extraneous considerations called upon by the entire process are given a generous hand, so that the result has a very weak connection to the text or structure of the Constitution, to say the least. Indeed, the result is tantamount to arguing on the basis of extraneous considerations which are completely unrelated to the text; a wide, fourth-order implication in the sense referred to above.

Thus the implication of representative government, including the constitutional conventions of responsible government, is a third-order implication. A different way of putting it might be that the court inferred the idea of representative government on the basis that the Constitution is essentially a social compact by which the people exercised their sovereign powers to set up a system of representative government. On this basis, representative government follows as a first-order implication. However, this is at the expense of introducing the notion of popular sovereignty at the beginning of the argument, and the social compact premise is itself a third-order implication. The point at which the extraneous material is introduced is changed; the substance of the argument as a whole is the same.

Representative Government of a Certain Quality

As Justice Toohey conceded in *McGinty* (1994:319), 'It is one thing to say that the Australian Constitution contains an implication of representative democracy. It is another to give content to that implication.' Thus Birch pointed out:

> there is no single theory of political representation ... which commands general acceptance. Instead there is a continuing debate in which a variety of theories are invoked, some of them being variations on a theme and others being logically incompatible with one another (1964:227).

How then is the court to determine among this variety which theory of representation to enforce? In *ACTV*, the majority used the idea of popular sovereignty in their definition of representative government so that notions of 'effective' and 'workable' or 'good' representative government were introduced into the argument. This necessarily went beyond those implications required for a bare system of representative government. The court was concerned with 'efficacious' representative government. The stage was set for the implication of freedom of

communication: it provided the court with a basis upon which to *choose* a definition of representative government which *necessitated* freedom of communication.

In *ACTV*, the Commonwealth submitted that 'representative government' is descriptive of a spectrum of institutions and processes, and it is for parliament (not the court) to regulate the system of representative government within these constraints. Justice McHugh's 'short answer' to this argument was simply that the legislative powers of section 51 are 'subject to' a Constitution which 'embodies a system of representative government which involves conceptions of freedom of participation, association and communication' with respect to elections. Accordingly, these freedoms are 'elevated to the status of constitutional rights' (*ACTV*, 233).

This response densely compacts and tends to conceal the steps in the argument. Merely saying that Commonwealth power is subject to the Constitution's provision for representative government does not explain why the Constitution's provision for representative government must include a guarantee of freedom of political communication. For it to do so one must hypothesise a system of representative government of a particular quality, an efficacious system. This involves a further implication as an additional step in the reasoning.

Furthermore, 'representative government' and 'representative democracy' or 'popular sovereignty' are not equivalent terms. It is noticeable how those justices inclined to extend the guarantee furthest have referred to democracy rather than representative government (eg *ACTV*, 210; *Theophanous*, 123). As noted, Justice McHugh pointed out in *Theophanous* that democracy is wider than representative government, since it is often associated with 'equality of rights and privileges.' Indeed, as Justice McHugh pointed out, 'even wider definitions can be found, particularly in socialist societies where it is defined to include the economic and social spheres as well as the political sphere' (1994:72; see Birch, 1964:84ff). Ironically, it need not involve representatives; it can be satisfied by 'direct democracy' where each citizen directly plays a part in every decision of government. Nor need it involve elections and an evaluation of the character and skills of representatives, since some ancient democracies chose political leaders by lot. Hence the jury system has a representative character, even though jurors are selected randomly: *Cheatle v R* (1993).

By the same token, representative government need not involve notions of popular sovereignty. Representation of the people can coexist with fundamental ideas of divine or legal sovereignty. It is

possible to have a system of representative government if the powers of government are exercised by persons who represent an electorate: in liberal societies the tendency is to focus on the process of selection, but at other times the focus has been on the activities or personal characteristics of the representatives, and the extent of the franchise and the existence of free speech were not crucial. Thus 'in England the notion of representation was originally bound up with class.' The Lords Spiritual, the Lords Temporal and the Commons represented the various estates: the higher clergy, the aristocracy and the gentry and townspeople (Lumb, 1983:53; cf. Bogdanor and Butler, 1983:2-3; Maitland, 1908:363).

In turning to wider conceptions of democracy, the court happens to have chosen a liberal interpretation of representation; it could have chosen a 'socialist' one by a teleological focus on equality as basic to the Constitution. This is not to suggest that the teleological interpretation is warranted by the text. The expression 'directly chosen by the people' in sections 7 and 24 centres on the ability of the people to *choose* members of parliament, rather than on the quality of the relationship of representation. The designation 'House of Representatives' suggests a relationship of representation, but does not prescribe the quality or nature of this representation. Thus the legal power to choose leaves to the electorate the task of ensuring that members of parliament represent them adequately. This does imply that the choice must be genuine, as Justices Dawson and McHugh have pointed out. But it does not require that the people actively exercise that power or effectively make their representatives responsible to them. Nor does it require that the people discuss the performance of their representatives or that they must enjoy a constitutional guarantee of freedom of communication in order to exercise that power.

It is therefore suggested that a system of representative government may conceivably exist, even though one might be critical of the way it functions – as being ill-informed, ineffective, or otherwise of poor quality. There is no indication within the Constitution that representative government (insofar as it is implied by the Constitution) must be 'workable,' 'well informed' etc. to the standard that was required in *ACTV* in particular. The provisions in question (sections 7, 24, etc.) are relatively terse and limited to specific topics. The words 'chosen ... by the people' do not compare to the generality of the US Fourteenth Amendment's 'due process of law,' 'privileges and immunities' and 'equal protection of the laws,' or the Ninth Amendment's 'The enumeration in the Constitution, of certain rights, shall not

be construed to deny or disparage others retained by the people' (Ely, 1980:13-14; Grey, 1975). By arguing on the basis of 'good' or 'effective' representative government, however, sections 7 and 24 are treated as if they were equally value-laden.

Freedom of communication with respect to political matters

Free elections, freedom of speech and freedom of political organisation are generally regarded as essential to our system of representative government. But they are so regarded for various reasons which point to the fact that they are in fact 'third-order implications' of representative government, meaning they turn on judgments of value. If freedom of communication has a third-order relationship to representative government, its relationship to the text and structure of the Constitution is even more removed. There are intervening steps: the idea of representative government and of the constitutional conventions which facilitate the effective working of representative and responsible government. In the result, the idea of freedom of communication with respect to political matters has only a fourth order relationship to the text; which is to say, it has no direct relationship to the text at all. It completely relies on the notion of *good* representative government. The specific idea of 'goodness' in that notion is itself derived from extraneous standards or considerations; and it is solely on the basis of that specific kind of 'goodness' that the idea of freedom of communication arises at all.

A counter argument was suggested when Justice Brennan considered that a system of government which was formally representative but denied 'the freedom of public discussion from which the people derive their political judgments' would be a 'parody' of representative government (*ACTV*, 47). A facile response to this would be that the relatively limited restrictions on electronic advertising under consideration in *ACTV* are consistent with systems of representative government throughout the world. But the point of the 'parody' argument is that the complete destruction of freedom of communication is essentially inconsistent with representative government. However, this does not establish that minor restrictions of freedom of communication are inconsistent with representative government; and, in fact, Justice Brennan upheld much of the legislation in *ACTV*. The problem is that before doing so, his Honour erected a complete constitutional guarantee of freedom of political communication. It was the further matter of a 'wide margin of appreciation' accorded to parliament which led to Justice Brennan's conclusion.

In other words, this process of reasoning reveals that there are two discrete steps in the argument. The first is that freedom of speech is implied by representative government because the absolute destruction of freedom of speech would produce a parody of representative government. The second step is that, nevertheless, the freedom is *not* absolute, but can be limited by measures which are reasonably adapted to achieving various legitimate public objectives. Ironically, then, the argument makes clear that there is an additional step in the reasoning from the principle of freedom of speech to the formulation of limits on that freedom: thus the court is compelled to make use of the idea of 'legitimate public objectives,' and to suggest examples of them, such as public safety. The formulation of those limits, in turn, is not derived from the idea of political communication as essential to representative government, but rather from the notion of competing public objectives that can override the principle in certain circumstances.

But how is this all an implication of the Constitution? Because the idea of freedom of communication is so far removed from the text of the Constitution and relies on purely extraneous considerations, the contentions of the court are excessively wide and threaten to have very significant implications well beyond the scope of the particular legislation that was under consideration. Many other statutes or executive actions would conceivably fall under the censure of the court for being prejudicial to the 'effectiveness' and 'adequacy' of the Australian system of representative government. The court has in fact undertaken the task of determining whether the system of representative government adopted by the parliament is 'effective,' 'responsible,' 'adequate' and so on. It is a small step from this to asking whether other parliamentary activities are likewise effective, responsible or adequate. The desirability of such a state of affairs (i.e. of an effective system of representative government) should not disguise the fact that the court has vastly extended the scope for judicial review of the substantive effects of legislation.

Even if it is true that representative government is a necessary implication (in the wide sense) of the text of the Constitution, and that freedom of communication with respect to political matters is a necessary implication (in the wide sense) of representative government – it does not follow that freedom of communication with respect to political matters is a necessary implication of the text or structure of the Constitution. And this does not even take us as far as a *guarantee* of freedom of communication, let alone a set of limits on the freedom in the form of 'balancing' legitimate social interests.

A constitutional guarantee of freedom of communication

Our contemporary system of representation has in fact evolved since 1901 without explicit change to the Constitution. In the United Kingdom, representative government and free speech developed without a written Constitution (*McKinlay*, 46). The Australian framers, while wishing to set out some aspects of the framework for a system of representative and responsible government, recognised that the Constitution need not prescribe their precise form, expecting that they would operate in conformity with the traditions and inclinations of the populace. The Constitution was deliberately left open to enable these institutions to evolve freely (Convention Debates, Sydney 1891:35f).

This decision to leave the Constitution open and not to entrench a guarantee of freedom of speech, despite the example of the US Constitution, seems to have been influenced by the view that the effective or responsible operation of a system of representative government is not something that can be mandated by a written constitution. In the final analysis, it depends rather on the ability and character of those who operate within the system. This perspective was reflected in Sir Harry Gibbs's observation that 'if society is tolerant and rational, it does not need a Bill of Rights. If it is not, no Bill of Rights will preserve it' (Zines, 1991:34). Even though it can be argued that guarantees of rights may slow down the process of degeneration in a political system, the issues raised by these arguments revolve around questions of policy and normative theory that are extraneous to the Constitution.

This demonstrates two things. Firstly, the implication of a *guarantee of freedom of communication* is itself a third-order implication of the notion that a 'good' system of representative government will involve freedom of speech as a matter of fact. Freedom of speech can exist without a constitutional guarantee thereof. It is a separate inference based on particular value judgments to conclude that a *guarantee* is required. Secondly, to infer a *guarantee* is in fact to substitute the court's opinion for the value judgment taken by the framers of the Constitution. If free-ranging implications are to be inferred from the structure of the Constitution, surely one of the notable structural features of the Constitution is the absence of a Bill of Rights. Even though it may be cast as an inference from silence, it is difficult to resist the impression that the theory of representative government which really undergirds the Constitution is one which relies on a steadfast trust in parliamentary institutions as the most secure bulwark of freedom.

In this light, the Commonwealth pointed out that an omnicompetent parliament, such as the parliament at Westminster, cannot be restricted as to its legislative powers. Justice Brennan countered that the Commonwealth Parliament is a creature of the Constitution and is therefore subject to its terms, whether express or necessarily implied; it is not omnicompetent in this sense. However, during the Federal Convention of 1897, William Trenwith described what the framers were creating as 'a nation of sovereign States with a sovereign Central Government' (Convention Debates, Adelaide, 1987:328). Chief Justice Barwick likewise noted that apart from limitations on power consequent on federation, 'there was no antipathy amongst the colonists to the notion of the sovereignty of parliament in the scheme of government' (*McKinlay*, 24). Thus while the Commonwealth is indeed a creature of the Constitution and subject to its terms, that very Constitution intended to create or continue the existence of the Commonwealth and State parliaments along the lines of the 'High Court of Parliament.' As Justice Williams stated in *Nelungaloo v Commonwealth*:

> It is trite law that the powers conferred upon the Commonwealth Parliament by s 51 of the Constitution are plenary powers of legislation as large and of the same nature as those of the Imperial Parliament itself (1947:503-4).

On this view, one would say that the Constitution provides for a Westminster-style parliament which operates in a federation of other Westminster-style parliaments. The federation is characterised by a balance of powers between the State parliaments and the Commonwealth Parliament, whereby the Commonwealth is accorded certain specified legislative powers (subject to certain explicit Constitutional limitations), and the remainder are left to the states as residual powers. Thus the pre-existing parliaments, whose powers of legislation were plenary, agreed to relinquish certain powers on particular terms set out in the compact. The grant of powers (in section 51) was expressed to be subject to the Constitution lest it be construed that it was not subject to limitations referred to elsewhere in the Constitution, such as sections 92, 99, 100, 116 and 117.

In the result, it is arguable that the Commonwealth Parliament was intended to be as competent as possible (after the models of the Westminster and colonial governments), given the fact of federation and the express terms of the federal compact as reflected in the convention debates (Quick and Garran, 1901:510, 794; Thomson, 1986:177, 182, 185). Its legislative powers were expressed to be 'subject to' the Constitution with these explicit limitations clearly in view. It

would follow that, if implied limitations on power are still appropriate, they are only appropriate where shown to be necessarily implied in the narrow sense of being necessary for some practical outworking or effect of the provisions of the Constitution, like the implications derived from the federal system.[65] But it was not intended that by rendering Commonwealth legislative powers 'subject to' the Constitution they would be subject to a guarantee of freedom of political communication.

Along similar lines, Justice Dawson reasoned that while it is true that freedom of speech is generally recognised in a practical sense as necessary for an effective system of representative government, the real issue one has to determine concerns the means adopted by the Constitution for the preservation of freedom of speech. It was the 'deliberate choice' of the founding fathers that the Constitution would not attempt to establish personal liberty by constitutional restrictions, something which the Commonwealth made very clear in its submissions (see Convention Debates, Melbourne 1898:688-90). Thus, 'the extravagant use of the granted powers ... is a matter to be guarded against by the constituencies and not by the courts.'

Freedom of speech exists because there is nothing to prevent its exercise and because governments recognise that if they attempt to limit it, they must do so at their peril. Justice Dawson observed:

> Indeed, those responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model ... was ... The British Parliament, the supremacy of which was by then settled constitutional doctrine.
>
> To say as much is not for one moment to express disagreement with the view expressed by Murphy J, that freedom of movement and freedom of communication are indispensable to any free society. It is merely to differ as to the institutions in which the founding fathers placed their faith for the protection of those freedoms (*ACTV*, 186).

[65] It is thus another question whether implied limitations on power can properly be founded on the federal nature of the Constitution. The 'federalism' created by the Constitution is one where powers are *constitutionally* demarcated along federal lines and enforced by the judiciary, whereas the form of representative government created is one which relies on parliamentary supervision as its safeguard: e.g. sections 29-31 of the Constitution.

Chief Justice Mason and Justice Brennan conceded that this conscious decision made it 'difficult, if not impossible' to infer general guarantees of fundamental rights and freedoms, because this would be contrary to the 'prevailing sentiment of the framers.' However, they reasoned that this consideration is no answer to a *necessary* implication of freedom of communication (*ACTV*, 136; Nationwide *News*, 43-4). Accordingly, it remained for the court to demonstrate a clear and necessary implication of a guarantee of freedom of communication with respect to political matters. For the above reasons, it does not appear that the court has done so.

The majority argument drew force from the underlying premise that the guarantee of freedom of communication was centrally concerned with the protection of representative democracy (see *Mills v Alabama* (1966:218)). But this fact cuts both ways. The Australian framers deliberately chose not to protect representative government with a constitutional guarantee, although they had the model of the First Amendment before them and selectively adopted the religion clauses but passed over freedom of speech. If freedom of speech guarantees are centrally concerned with protecting representative government, the framers' decision not to include such a guarantee cannot be written off as a decision not to enshrine freedom of speech generally (leaving a guarantee of *political* communication still viable).

If implications are to be grounded in intent, then the majority would have to provide evidence of an intention to imply a guarantee. On the contrary, the possibility of the implication of guarantees was positively feared. There was concern to draft the Constitution Bill so as to minimise the possibility for such implications (La Nauze, 1972:227-9). If asked, it seems incontrovertible that the vast majority of the framers would have denied any intention to imply a guarantee, probably for reasons similar to those which led them to reject a Bill of Rights in the first place.

The fact is that no institution or document will infallibly protect liberties or ensure the effective functioning of representative government. There is no *deus ex machina* stalking the machinery of the Constitution. The spirit to defend liberty or administer good government is a personal quality grounded in the religious and moral character of individuals. Therefore, it is not necessary to effective representative government or real freedom of speech that a constitutional guarantee of such freedom is found in the Constitution and enforced by the courts. It can of course be added that the Australian people voting at referenda have rejected amendments to the Constitu-

tion which would entrench Bill-of-Rights-type guarantees (Galligan, 1990:344).

The scope of the guarantee – a restriction on state legislative power?

It has to be shown that the guarantee applies to state legislation by showing that state legislative powers are expressly made subject to the Commonwealth Constitution. In *Theophanous*, Justices Brennan and Deane found a partial answer to this question in section 106 of the Constitution (*Theophanous*, 156, 165-7). Section 106 provides that the constitutions of the states shall continue, 'subject to' the federal Constitution. However, section 107 expressly provides for the continuation of every power of the parliament of each state which is not exclusively vested in the parliament of the Commonwealth or withdrawn from the parliament of a state. Section 106 deals more generally with state constitutions as a whole, and it could be argued that the more specific qualifications to the continuation of state powers in section 107 contain the only limitations which are newly imposed on the state legislatures. Subject to those limitations, the language of section 107 is categorical: every power shall continue as at the establishment of the Commonwealth. The limitations contained in section 107 relate to powers which are exclusively vested in the Commonwealth by virtue of section 52 or are by their nature exclusive to the Commonwealth and those powers which are withdrawn from the states by prohibition directed at the states (i.e. sections 114 and 115).[66] Of course, a majority thought that section 106 was unaffected by section 107, and Justice Deane in particular sought to avoid this problem. However, section 106 is itself 'subject to' the Constitution. Section 107 is a part of the Constitution; and it is not so qualified. A textual interpretation would therefore suggest that section 106 is subject to section 107 (Gilbert, 1987:41).

As has been noted, the 'subject to this Constitution' argument disappeared in the later cases of *McGinty*, *Lange* and *Levy*, Justice Toohey explicitly distancing himself from the argument (*McGinty*, 210). His Honour distinguished *Theophanous*'s concern with the 'indivisibility' of political communication from the endeavour in *McGinty* to control the state parliaments' capacity to regulate their own state electoral systems through an implied constitutional guarantee of

[66] See *Theophanous*, 201 and 205; *R v Barger* (1908), 83; *Australian Boot Trade Employés' Federation v Whybrow* (1910:290) and *Pioneer Express Pty Ltd v Hotchkiss* (1958).

equal electorates operating at a federal level. Certainly, as his Honour pointed out, section 106 seems more concerned with protecting the constitutional status of the states than with subjecting them to the Commonwealth Constitution (*McGinty*, 210). The indivisibility argument focuses on the need to protect the representative system prescribed by the Commonwealth constitution, a system that could be compromised by state legislation. By contrast, it is relatively more difficult to see how 'inequality in voting power' in a state electoral system might prejudice the operation of the federal electoral system. But in both cases the powers of the state legislatures are limited, and there must be some reason in law for this. It is therefore difficult to see how the reliance on section 106 can be avoided[67] – despite Justice Toohey's firm distinction between the two lines of argument (*McGinty* 210, note 226).

Moreover, the 'subject to this Constitution' argument was not all there was to the decision in *Theophanous* (as revised in *Lange*), since the decision was that freedom of communication affects common law, which, of course, does not rest on section 51 and is therefore not 'subject to' the Constitution in that sense. It was profoundly ironic that the common law should have been revised in this manner. The impact on common law derives (in part) from the principle that statute overrides common law, the statute in this case being the Constitution as contained in an Act of the Imperial Parliament. This involves an application of the sovereignty of parliament! Even if we say that the Constitution is in essence a social contract, it still has precedence over common law by virtue of its deliberative, representative character. But of course, the implication of the constitutional guarantee of free speech is decidedly a limitation on the sovereignty of the Commonwealth Parliament and the substitution of judicial opinion for the deliberative judgment of elected representatives.

Likewise, in *Stephens*, a majority considered that the Western Australian Constitution, in entrenching representative government, itself implies a guarantee of freedom of political communication which limits the legislative powers of the State Parliament (*Stephens*, 232-4, 235). However, this did not rest on the words 'subject to' the Constitution. Rather, the guarantee arose through the entrenchment of 'representative democracy' in the requirement that any bill which would provide that members of the WA Parliament be chosen other than by the people would have to be passed in the manner and form

[67] Justice Deane supplemented the argument from section 106 with arguments from 'common sense and persuasive authority': *Theophanous*, 166.

prescribed, i.e. by an absolute majority of both Houses and a popular referendum.

On most accounts, the effectiveness of the manner and form prescription depends on section 6 of the *Australia Act* (UK), which lends the paramount force of Imperial Legislation to State provisions which in certain circumstances prescribe a special 'manner and form' for the passage of particular bills. Otherwise, the state legislature would be capable of amending its Constitution by ordinary legislation as an exercise of its plenary legislative powers. The same irony, then, arises: that the implementation of the guarantee (as a limit on the power of the State parliament) rests on an exercise of Imperial Sovereignty.

Limitations on the guarantee

We have seen that the court maintained that the guarantee of freedom of communication is not an absolute right, but is subject to limitations. The question is whether these limitations are necessarily implied by the text of the Constitution, by the doctrine of representative government or by the guarantee of freedom of communication.

A Necessary Implication of the Text?

Due to the very nature of its reasoning, the court does not seem to have considered that this was a relevant question to ask. No members of the court presented an argument on the matter. Do the references by Chief Justice Mason and Justices Deane, Toohey and, less directly, Brennan to 'an ordered society' or 'a society organised under and controlled by law' answer it?[68] Certainly the first step in this possible argument seems to be easily established: the very existence of the Constitution and the process of judicial review would appear to presuppose the notion of a society controlled by law. However, the difficulty lies in taking the argument the step further to determining what specific limitations are 'consistent' with such a society. This test requires the application of some concrete criteria by which this 'consistency' is measured. The notion of a 'society governed by law' is too vague to prescribe specific conclusions in law. It calls for additional sources of value or criteria in order to be given tangible operation.[69]

Again, Justices Deane and Toohey referred to limitations which

[68] Compare Justice McHugh's 'competing aspect[s] of the public interest' (*ACTV*, 235) and Justice Brennan's 'some other legitimate interest' (*ACTV*, 150), the latter being unanimously affirmed in *Lange*, 108.

[69] Notably, the limitations on the guarantees under European Law are actually derived from express qualifications; under American law they are implied, but that is in conjunction with an express Bill of Rights.

are reasonably necessary for the 'protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society.' These notions of 'legitimate claims,' 'peace' and 'dignity': what do they specifically mean and what concrete legislative measures do they justify? The answers to these questions must be derived from values and value-systems which are obviously extraneous to the text of the Constitution.

A Necessary Implication of Representative Government?

For the same reasons that the *guarantee* of freedom of communication bears a fourth order relationship to representative government, the *limitations* imposed on the guarantee can have no closer relationship to representative government.

It might be argued that some (although not all) limitations on the guarantee of free communication are third-order implications of representative government due to a countervailing public interest in *fair elections*. This may call for legislative restrictions on certain kinds of communications or communications at particular times. Thus a blackout of political broadcasting on the eve of election day might ensure that campaigning is undertaken in a *fair* manner, without, for example, last-minute alarmist broadcasts to which no timely response can be made. Similarly, a legislative restriction on defamatory communications might be supported by the public interest in truthful and relevant political debate. Members of the court seem to approve of restrictions of this kind (*ACTV*, 142, 159, 234; *Langer*, 317, 334, 349).

However, the difficulty with this line of reasoning is that it arguably leads to the kind of considerations which actually precipitated the electoral advertising legislation in *ACTV*: that the public interest in accountable government and corruption-free politics calls for legislative restrictions on political broadcast advertising. This opens up the possibility that *restrictions* on political discussion are necessarily required by the doctrine of representative government, an ironic result indeed, but one which was nearly affirmed in *Langer* and *Muldowney*. In either case, it is abundantly clear that this process of 'balancing' the various interests and considerations involves extraneous value judgments in the sense of third-order implications.

A Necessary Implication of the Guarantee of Freedom of Communication?

The limitations are implications of the *guarantee* of freedom of communication if we presuppose that all freedoms and rights must be

limited to some extent by other countervailing rights or freedoms. But the fact that we must presuppose this as a principle reveals that the limitations are third-order implications of the guarantee. They are necessary in order for the guarantee to have a 'good' effect. If there were no limits on the freedom, there could be no legal protection of personal reputation, national security, and so on. The limitations are third-order implications because they affirm both that other rights should exist and that a society which does not grant all of these rights in something of a *proper balance* will not enable its citizens to make *good* use of the rights that they do possess. The extraneous ideas of 'good' and 'balance' indicate that the implication of the limitations is in the nature of a third-order implication of the guarantee, rather like the derivation of similar limitations under the US Bill of Rights.

It might be argued that 'limits' on the freedom are merely the measure of how far the freedom extends; they are not additional steps in the reasoning. In respect of this kind of argument, it is noticeable that Justice Dawson has denied that the question is one of 'balancing' the freedom against other interests; it is simply a question of whether the impugned law precludes the holding of the free elections required by sections 7 and 24. However, having conceded the existence of the guarantee as a result of *ACTV* and *Lange*, his Honour was compelled to resolve the issue in terms of the *Lange* test and recur to 'the proper working of the electoral system' and to the notion of 'reasonable regulation in the interests of an ordered society' (*Levy*, 262).[70] This latter notion calls on wider ideas of 'reasonableness' and an 'ordered society'. These ideas are distinct from and wider than the idea of 'free elections'.

Accordingly, the affirmation of a constitutionally enforceable guarantee of free political communication, even in the hands of Justice Dawson, seems to call for limitations on the guarantee (and not just limitations deemed necessary to achieve 'fair elections'). Reliance on some conception of the interests of 'an ordered society' seems unavoidable. It might be said that the necessity involved here shows that limits on the guarantee are in fact first-order implications of the guarantee itself; thus even when Justice Dawson endeavours to avoid 'balancing' the guarantee against other 'legitimate interests,' he is forced to recur to 'an ordered society.' However, the important point is that while we may affirm the need to find some balance between various rights, interests and objectives, we do so because we believe

[70] Likewise Justice Gaudron's focus on the 'limits ... marked out by the general law' and the legitimacy of attaining 'some end within power' (*ACTV*, 217-8; *Nationwide News*, 95) is less open to attack.

that *no right can be absolute*, and when we do so we unavoidably apply extraneous values of one kind or another. The use of these values in the balancing process reveals that the limitations placed on the guarantee are in the nature of third-order implications.

Application

In reaching a decision, the court had to apply the guarantee of freedom of communication to the particular facts at hand and to ask whether the legislation under question fell within the limitations (operating as exceptions) to the guarantee. This necessarily involved the court members in political, moral, sociological and personal value judgments in the sense of fourth order considerations, disassociated from the text of the Constitution.

Applying the limitations to the guarantee, the court had to ascertain what was in the public interest (and to determine by what criteria an interest is recognised as relevant and compelling); to ascertain the weight to be accorded various public interests and to choose between them; to ascertain whether the means to an objective were reasonably necessary; and to ascertain whether a public interest was of a compelling nature. The members of the court therefore used language that lent itself more to a *prescription* of political and philosophical values than to a *description* of the extent of legislative power, especially in the earlier cases. The criteria adopted for the determination of the extent of legislative power were value-laden, prescriptive, and dependent on subjective and contentious predilections. Can it be said that the Australian people, through the Constitution, intended that the High Court would engage in such questions? Justice McHugh, for example, used language which called for the weighing of sociological and statistical evidence, when he observed:

> it would need to be demonstrated by acceptable evidence ... that, by reason of their practical control of the electronic media, some individuals and groups so dominate public discussion and debate that it threatens the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives (*ACTV*, 239).

In turning to political and value-laden criteria, the court in fact adopted prescriptions that follow from classical liberal assumptions about the existence and exercise of liberty. The counter-argument that freedom of communication by way of broadcasting is not, in fact, exercisable by persons or groups lacking sufficient wealth was not given much weight by the court. The counter-argument could be

further extended to the contention that political broadcasting is exercisable only by an elite comprised of existing political parties and that this unjustifiably secures the elite in office. Is 'true' democracy and 'true' choice exercised in such conditions?

We have seen that Justices Deane and Toohey emphasised that the guarantee of freedom of communication did not mean a right to the free use of the means of communication, as would be prescribed by a more egalitarian assessment of what a right to free speech should include. Nevertheless, the approach taken requires the court to descend to arguments of this nature, even if to reject them in favour of some other sociological theory or political value-system. It is therefore notable that in *Levy* Justice Dawson, while following the authority of *ACTV* and *Lange*, explicitly rejected the idea of proportionality and balancing (*Levy*, 262).

A constitutional right to choose representatives

We have seen that Justice Dawson originally maintained that parliament does not have power to legislate so as to deny the possibility of a 'true' choice of representatives (*ACTV*, 187). Justice McHugh has adopted similar language at times, and there seems to have been a convergence of views (*ACTV*, 234; *Theophanous*, 203-6; *McGinty*, 182, 233-6; *Lange*, 106-7). However, do the arguments against the implication of a guarantee of freedom of communication also overcome this argument for a 'true choice'? While the Constitution provides for a choice of representatives, it needs to be demonstrated how it provides protection for the 'trueness' of that choice. If it can be said that the Constitution relies on parliament to respect and protect freedom of speech, it could also be said the Constitution relies on parliament to protect the reality of the choice of representatives.

Justice Dawson seems to have argued that the matter of 'choice' is something expressly required by the Constitution and that, by applying normal rules of construction to the actual text, the meaning of the word 'choice' encompasses and requires a 'true choice,' because a 'false' choice is no choice at all. After all, the text does refer to a 'direct choice by the people.' Accordingly, since section 51 is 'subject to this Constitution,' an exercise of legislative power cannot destroy the 'trueness' or reality of that choice. This approach in fact bore fruit in *Langer*, as has been noted.

Justice Dawson admitted that a form of representative government can be discerned in the Constitution (*ACTV*, 184). On this basis, and using a similar argument, one might say that sections 7 and 24 of the

Constitution *mean* 'representative government' just as they mean a 'true choice of representatives.' Then, it might be argued, representative government is not 'true' representative government without 'freedom of speech' (this, too, Justice Dawson acknowledged: *ACTV*, 186). Why then did he baulk at a guarantee of freedom of speech, when he does not baulk at a 'guarantee of a true choice'? In this sense, there is little difference between Justices Dawson and McHugh, as has become apparent in the later cases.

Justice Dawson's characterisation of the issue and his final decision on the facts (which, of course, was vastly different to Chief Justice Mason and Justices Deane, Toohey and Gaudron) shows clearly that there is an important difference here. It is readily conceivable that a law might disproportionately restrict communication of political ideas (and fall foul of the guarantee of freedom of communication) but not eliminate the existence of a real (although somewhat limited) choice based on a real appreciation of the alternative candidates and issues. Therefore, the two tests readily issue in different results when applied to various fact situations.

More importantly, the two tests also differ in that the notion of a 'true choice' is much more closely associated with the text of the Constitution than is the notion of freedom of speech. This relationship is a third-order implication of the text, at worst, and it does not involve a series of implications. It is, rather, a single step implication. On a bare definition of 'choice,' supposedly, there must be two or more alternatives to choose between (i.e., not a one-candidate election or a one-party state). Thus the notion of choice in the context of sections 7 and 24 would also probably include a right to be a candidate or to nominate a candidate. As Justice Dawson stated: 'a choice is not a true choice when it is made without an appreciation of the available alternatives or, at least, without an opportunity to gain an appreciation of the available alternatives.' It followed that 'an election in which the electors are denied access to the information necessary for the exercise of true choice is not the kind of election envisaged by the Constitution' (*ACTV*, 187). Thus his Honour took the matter further than the bare existence of alternatives: he referred to an apprehension of alternatives, which meant access to relevant information.

Indeed, Justice Dawson's position is arguably no more than a second-order implication, i.e. an implication which is practically necessary to give the provision a bare practical application. Unless voters are given sufficient information by which to form an apprehension of the alternative candidates, they cannot exercise a choice. Be

that as it may, the argument unavoidably merges into a value judgment when the question is how much information must be available, so there seems little point in denying that a third-order implication is involved.

The point, however, is that it involves a single step. It is not a multiple-stage inference which, in the final analysis, takes one well beyond the terms of the Constitution. On the other hand, the majority position in *ACTV* involved a series of third-order implications that build upon one another so that the final result is not connected to the text at all. This problem, though not always discussed in these terms, is at least part of the reason why the court has become far more reticent in the very recent cases, such as *Lange*, *Levy* and *Kruger*.

EPILOGUE

'That wild or vast notion of what in every man's conception is just or unjust'

> We have been by Providence put upon strange things, such as the ancientest here doth scarce remember.

So spoke Edward Sexby on 28 October 1647. He was in the presence of Lieutenant-General Cromwell and Commissary-General Ireton at a general council of officers of Cromwell's New Model Army. In the extremities of the English Civil War, the army had found the Long Parliament to have failed them, and they were seeking to thrash out a new constitutional settlement which could be negotiated with a captive King Charles.

With their attachment to making declarations and subscribing to solemn undertakings, upon seizing Charles on 4 June 1647 'officers and men subscribed a Solemn Engagement not to disband until their immediate claims had been met and the constitution in Church and State had been settled' (Kenyon, 1969:290). But some five months later, the frustrations of finding a solution and calls for an expansion of the franchise forced the meeting of officers which met on 28 October in the church in Putney.

The soldiers had indeed seen things their parents dared not conceive. But the engagements of the past stood in the way of what the more radical elements saw as the path of progress. The question was whether those engagements should continue to bind their consciences, or whether new conditions called forth what the twentieth century would call a 'revolutionary consciousness,' a higher authority which could cut through the ties of the past in favour of the present demands of 'justice.'

Both sides in the matter were deeply troubled by the dilemma. John Wildman complained of:

> a principle much spreading, and much to my trouble ... that when persons once be engaged, though the engagement appear to be unjust, yet the person must sit down and suffer under it; and that therefore, in case a Parliament, as a true Parliament, doth anything unjustly, if we be engaged to submit to the laws that they shall make, though they make

> an unjust law, though they make an unrighteous law, yet we must swear obedience. I confess, to me this principle is very dangerous ... (Woodhouse, 1965:24).

But Ireton's concern was on the other side of it:

> There is no other foundation of right I know ... but this general justice, and this general ground of righteousness, that we should keep covenant one with another. ... in covenant ... to live in peace one with another .... This is the general thing: that we must keep covenant one with another .... And therefore when I hear men speak of laying aside all engagements to [consider only] *that wild or vast notion of what in every man's conception is just or unjust,* I am afraid and do tremble at the boundless and endless consequences of it (Woodhouse, 1965:26-7).

In remarkable ways, the dilemmas faced by these soldiers were not altogether unlike the position of today's judges, who have sworn to do justice according to law.

One can only sympathise with those who face these dilemmas in the extremities of the moment. But England in 1647 was of course a place quite different from Australia at the turn of the twenty-first century. The *extremities* of the situation are hardly comparable. Even then, for the army officers, their oaths were not to be disregarded lightly. In like manner today, to do justice *according to law* calls for restraint in constitutional adjudication. In extreme conditions, a Lord Justice Coke, a Lieutenant-General Cromwell, and a series of debates in Putney may be called for. But in today's conditions, remodelling the Constitution can await a popular referendum and amendment of the Constitution according to law, no matter how difficult the process.

In the cases which have been reviewed in this book, the High Court decided that the Australian Constitution necessarily implies that the Commonwealth and State parliaments do not have power to pass legislation which unduly infringes our right as citizens to freely discuss political matters. The justice of the moment, on many accounts, seems to call for this limitation on government. The Commonwealth's *Political Broadcasts and Political Disclosures Act* 1991 was indeed ominous and unacceptable, as the editorial of *The Australian* pointed out at the time. Moreover, the court's reasoning was ingenious and breathtaking. Here was a Court courageously standing up to an executive government which, through its control of parliament, had passed a disturbing piece of legislation.

But on reflection, the reasoning in the decision seems to have lost

sight of the importance of our 'solemn engagements,' so to speak. The exigencies of the moment had seemed to call for a forthright response. And the argument from 'necessary implication' gave the appearance of constitutional propriety. In the final analysis, however, it has been argued that the conclusion oversteps the mark by going beyond – and against – the ascertainable intentions of the framers of the Constitution, and beyond that which can fairly be said to be a necessary implication of our fundamental law.

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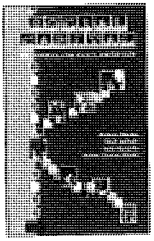

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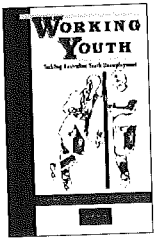

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