THE LAST IN LINE: IMPLIED ASSOCIATION AND LITERARY-ARTISTIC EXPRESSION IN THE AUSTRALIAN CONSTITUTION

A Thesis submitted by

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ABSTRACT

This thesis is concerned with the protection of association and expressive speech under the Australian Constitution. The limitation of association to a corollary, failure to protect artistic-literary expression, confinement of protected speech to the 'political' and subsequent restriction of the average person's ability to communicate will be explored. By application of a Marxist inspired theory of speech, Australian constitutional free speech law will be shown to be currently neither practical nor protective of the popular sovereignty it was set up to protect. This thesis concludes that existing law protects the ruling class, providing minimal concessions to the people who are nominally the sovereign according to case law. Key shortcomings – limited association and institutionalized censorship – can be remedied by a return to deeper consideration of United States jurisprudence. Finally, a standalone freedom of association, protection of artwork, and an abolition of the 'political' criterion are proposed, accompanied by new US inspired tests following decisions by Justice Gageler. This new conceptualization of Australian constitutional free speech addresses some of the criticisms the existing body of law has drawn from scholars, and remedies the theoretical shortfalls and problems identified in this thesis.

CERTIFICATION

This thesis is entirely the work of Yari Wildheart, except where otherwise acknowledged. The work is original and has not previously been submitted for any other award, except where acknowledged.

Principal Supervisor: Professor Anthony Gray

Associate Supervisor: Dr. Jeremy Patrick

Student and supervisors' signatures of endorsement are held at the University.

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Dedication

To Hana Kimura and Ray Fitzpatrick, both of whom died during the writing of my thesis and both of whom contributed to my happiness enough at different times to be able to complete a doctoral thesis.

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LIST OF ABBREVIATIONS

ACB	Australian Classification Board
ACTV	*Australian Capital Television Pty Ltd v Commonwealth*
AMRA	Australian Music Retailers Association
APLA	*APLA Limited v Legal Services Commissioner* (2005) 215 ALR 403
ARIA	Australian Recording Industry Association
Banerji	*Comcare v Banerji* (2019) 93 ALJR 900
Bethesda	Bethesda Game Studios
SUNY	*Board of Trustees of State University of New York v Fox*, 492 US 469 (1989)
Boy Scouts	*Boy Scouts of America v Dale*, 530 US 640 (2000).
Brandenburg v Ohio	*Brandenburg v Ohio*, 395 US 444, 447 (1969)
Broadrick	*Broadrick v Oklahoma*, 413 US 601 (1973)
Brown v CRB	*Brown, Michael & Ors v Members of the Classification Review Board of The Office of Film & Literature Classification* [1998] 82 FCR 225
Brown v EMA	*Brown v EMA*, 564 US 786 (2011)
Brown v Tas	*Brown v Tasmania* (2017) 261 CLR 328
BSA	Boy Scouts of America
Burson	*Burson v Freeman*, 504 US 191 (1992)
Burstyn	*Joseph Burstyn, Inc. v Wilson*, 343 US 495 (1952)
Chaplinsky	*Chaplinsky v New Hampshire*, 315 US 568 (1942)
Classification Act	*Classification (Publications, Films and Computer Games) Act 1995* (Cth)
Clubb	*Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448
Coleman	*Coleman v Power* (2004) 220 CLR 1
Communist Party	*Australian Communist Party v Commonwealth* (1950) 83 CLR
CPC	Communist Party of China
Davis	*Davis v Commonwealth* (1988) 166 CLR 79
Doe v UM	*Doe v University of Michigan,* 721 F. Supp 852, 864 (ED Mich, 1989)
DRM	Digital Rights Management
ECHR	*European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953)
FCC	United States Federal Communications Commission
FEC	United Stated Federal Election Commission

Filmguide	*Guidelines for the Classification of Films 2012* (Cth)
Gameguide	*Guidelines for the Classification of Computer Games 2012* (Cth)
Gaynor	*Chief of the Defence Force v Gaynor* [2017] FCAFC 41
Grosjean	*Grosjean v American Press Co., Inc.*, 297 US 233 (1936)
Handyside	*Handyside v United Kingdom* (5493/72) [1976] ECHR 5 (7 December 1976)
Hanson	*Australian Broadcasting Corporation v Hanson* [1998] QCA 306
Hinch	*Hogan v Hinch* (2011) 243 CLR 506
Holder	*Holder v Humanitarian Law Project*, 561 US 1 (2010)
ICCPR	*International Covenant on Civil and Political Rights*
Implied freedom	Implied freedom of political communication
IARC	International Age Rating Coalition
Jaycees	*Roberts v United States Jaycees*, 468 US 609 (1984)
Kable	*Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51
Kruger	*Kruger v Commonwealth* (1997) 190 CLR 1
Lange	*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
Levy	*Levy v Victoria* (1997) 189 CLR 579
LGBT	Lesbian, Gay, Bisexual and Transgender
McKinlay	*Attorney-General (Cth) (ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1
Mutual Film Corporation	*Mutual Film Corporation v Industrial Commission of Ohio*, 236 US 230 (1915)
Miller	*Miller v California*, 413 US 15 (1973)
Miramax	*Miramax Films Corp v Motion Picture Association of America*, 560 NYS 2d 730 (NY Sup. Ct. 1990)
Mulholland	*Mulholland v Australian Electoral Commission* (2004) 220 CLR 181
Monis	*Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92
McCloy	*McCloy v New South Wales* (2015) 257 CLR 178
McGinty	*McGinty v Western Australia* (1996) 186 CLR 140
NAACP	*National Association for the Advancement of Colored People v Alabama*, 357 US 449 (1957)
Nationwide News	*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
NCC2005	*National Classification Code 2005* (Cth)
NSW	Australian State of New South Wales
NY Times	*The New York Times Co v Sullivan* 366 US 254 (1964)

OFLC	Office of Film and Literature Classification
Pacifica	*Federal Communications Commission v Pacific Foundation*, 438 US 726 (1978)
Pruneyard	*Pruneyard Shopping Center v Robbins* 447 US 74 (1980)
Pubguide	*Guidelines for the Classification of Publications 2005* (Cth)
QLD	Australian State of Queensland
RC	Refused Classification
Roach	*Roach v Electoral Commissioner* (2007) 233 CLR 162
Roth	*Roth v United States*, 354 US 476
Rowe	*Rowe v Electoral Commissioner* (2011) 243 CLR 1
SA	Australian State of South Australia
SA v Adelaide	*Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1
SCOTUS	Supreme Court of the United States
Sharkey	R v Sharkey (1949) 79 CLR 121
Stephens	*Stephens and Others v West Australian Newspapers Limited* (1994) 182 CLR 211
Tajjour	*Tajjour v New South Wales* (2014) 254 CLR 508
Theophanous	*Theophanous v Herald Weekly Times Ltd* (1994) 182 CLR 104
Totani	*South Australia v Totani* (2010) 242 CLR 1
UDHR	*Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948)
Unions NSW 1	*Unions NSW v New South Wales* (2013) 252 CLR 530
Unions NSW 2	*Unions NSW v New South Wales* [2019] HCA 1
Valeo	*Buckley v Valeo*, 424 US 1 (1976)
VIC	Australian State of Victoria
Wainohu	*Wainohu v The State of NSW* (2011) 243 CLR 181
Ward	*Ward v Rock Against Racism*, 491 US 781
Winters	*Winters v New York* 333 US 507 (1948)
Wotton	*Wotton v Queensland* (2012) 246 CLR 1
WPPA Act	*Workplaces (Protection from Protesters) Act* 2014 (Tas)
Yulee	*Williams-Yulee v Florida Bar*, 575 US ___ (2015)

CHAPTER I INTRODUCTION

As of the year 2020, Australian constitutional free speech has existed in some form for almost 30 years, yet we still know little of its scope. Driven by decisions of the Mason Court, it was set up as an 'implied freedom of political communication' (the 'implied freedom'). This was drawn from the text and structure of the *Australian Constitution*, but it was also drawn from the principles that the text and structure of the *Australian Constitution* sought to protect. The High Court considered the idea of democracy and how ss 7 and 24 (and s 128 to a more limited extent) set up a democracy by virtue of their requirement for direct choice of members of the House and Senate by the people. Direct constitution of the legislature, and therefore the executive branch, meant the people were sovereign. This means the people (holding ultimate power in a democratic system) must be able to communicate to each other about politics openly and freely. Recognition of limited civil rights were in order, and this took the form of the implied freedom.

While these rulings may draw some criticism – they have never been overturned. One finds many references to case law of the Supreme Court of the United States ('SCOTUS'). Canadian, European, and English law citations occur, however the presence and role of United States law in this field is notable, particularly as the Court does not often refer to US cases in its constitutional jurisprudence. One can hardly discuss free speech without reference to US jurisprudence on the matter. It is the oldest jurisdiction covering that issue and has decided on virtually every aspect of free speech before. Contrary to popular belief, SCOTUS decisions have developed free speech from a highly restricted civil right that protected nothing more than political communication (generally only at a federal level) to the deep, comprehensive protection that it is today.

One also finds references to SCOTUS methodology in the early Australian free speech cases, complete with varying levels of scrutiny depending on the degree and nature of the infringement. It appeared as if free speech in Australia would herald a new era of openness and speech protection. With the arrival of the Brennan Court a new, but unexpected, era arrived: one of relative silence on theoretical matters and scope. The scope not only remained limited, but the basic rationale for the implied freedom would be narrowed, albeit without contradicting the original decisions the High Court made. In a matter of only a few years the scope of the implied freedom had already narrowed enough that the very concept of democracy had largely been abandoned by the Court who now generally spoke in terms of representative 'government' and not 'democracy'.[1]

[1] Anthony Gray, 'The Protection of Voting Equality in Australia' (2016) 44 *Federal Law Review* 557, 568.

Nearly thirty years down the line, the impact of the Brennan Court remains. The implied freedom has undergone *some* development as it will be detailed in Chapter 2 – insult, for example, has been able to find some protection in the case of *Coleman*.[2]

The few examples of artwork and literature going before the Court has ended with them *not* receiving protection. The bar for what constitutes 'political' communication was raised without discussion of whether artistic, literary, or other forms of expression are protected. When considering expression in this thesis the focus will be kept tightly on artistic and literary expression. They are considered together as they cannot be easily separated and rely on each other – literary forms of expression often require artistic devices and philosophies in order to be expressed, and art too requires literary ideas, devices and philosophies in order to be communicated.

This will sometimes be referred to in this thesis as 'artistic-literary expression'. Artistic-literary expression serves as the primary means for communicating scientific, educational, artistic, philosophical, and other social, political, and economic messages and concepts. It will be argued throughout this thesis – primarily in the third, fourth, and sixth chapters – that communication about politics and entertainment are just as inseparable as artistic-literary expression is from the aforementioned (and not exhaustive) list of conceptual categories (social, political, scientific, etc). When one communicates about politics it is often through the lens of, or with reference to something gained from a form of entertainment – whether fictional or non-fictional.

And whether fictional or non-fictional, the source invariably relies on concepts from artistic-literary expression – be it the inclusion of dialogue, the use of writing, or simply listening to an edited recording, the editing process itself requiring use of artistic-literary concepts. All of this has been discussed, recognised, and uniformly adopted in United States *First Amendment* jurisprudence, and it will be argued in this thesis that the High Court must also recognise this issue because despite the critical role of artistic-literary expression in free speech, it is almost entirely unprotected in Australian constitutional jurisprudence.

As a result of this problem it will be argued that the restriction of free speech protection to a solely 'political' category should be abandoned. Throughout this work, criticism of the Australian High Court's insistence on this sole category of speech will be provided. It will be argued that more general free speech protections should be adopted, with a broader categorical approach akin to that in the United States. This approach is preferred not only because a basic version of it has already been adopted into Australian

[2] *Coleman v Power* (2004) 220 CLR 1 ('Coleman').

precedent in the judgments of Justice Stephen Gageler, but also for its efficacy in protecting a variety of forms of speech, including artistic-literary expression. Furthermore, this system provides the flexibility to allow reasonable restrictions on speech in a variety of ways. A variety of elements of *First Amendment* jurisprudence and its potential benefits to the *Australian Constitution* will be discussed in Chapter Four.

The High Court overall has continued to rely on US jurisprudence, although as it will be demonstrated in this thesis, its use is sporadic and divisive. One justice – Justice Gageler – has consistently relied on *First Amendment* theory as part of the majority, having even created his own separate test for the implied freedom. His Honour's test is largely drawn from SCOTUS decisions, as well as through Australian precedents stretching back to the origins of the implied freedom itself which in their own ways relied on some of the same *First Amendment* theory Gageler J did. That means his Honour's test is now firmly a part of Australian case law and should not be ignored, especially for the implications of a US-style test complete with multiple levels of scrutiny depending on the category of speech – this is an existing part of Australian jurisprudence. To adopt that test alone does not, in fact, mean 'importing' *First Amendment* jurisprudence. Even if reliance on foreign jurisprudence was not already an accepted practice, one does not have to do so to begin developing a US-style test as Gageler J has already provided one for us to use in precedential judgments.

The other primary aspect of this thesis, freedom of association in the *Australian Constitution*, remains an open issue, although the plurality has viewed it as merely a 'corollary' to political communication. Unfortunately, after three decades we are still in the sark as to what it truly means for association to be a 'corollary', or why it is even restricted to being one. It will be shown throughout this thesis that, much like the protection of 'political communication', protection of association as a 'corollary' has led to both more questions and less protection in practice. Just like with the implied freedom of political communication, it will be argued in this thesis that the status quo should be abandoned due to its inability to protect that which it nominally protects, and must be replaced with a standalone protection. It will be argued that it is fully capable of being protected, drawn directly from the *Australian Constitution* by similar means to that which I argue free speech should be protected.

In the decades since its origin, we still know little about the extent to which the implied freedom of political freedom exists, who it protects, and what its constitutional theoretical underpinning is. Despite some debate, and many citations which will be shown throughout this thesis, somehow the Court's stance towards usage of *First Amendment jurisprudence* remains unclear. Further frustrating this question is the fact that the proportionality analysis currently popular in the Australian High Court was directly sourced from international jurisprudence, especially that of the European Union. This means the Court is not

attempting to stray from the long-standing tradition in Australian common law of directly citing and incorporating non-precedential international opinions. These are not the only questions that remain – it is still unclear what forms of speech the *Australian Constitution* protects, and we still have no real sense of boundaries despite the efforts of Australian scholars to give guidance regarding them. These questions and more will be addressed in this work.

Chapter One will summarise contributions to freedom of expression and freedom of association jurisprudence in Australian case law. Critique of High Court jurisprudence will not occur in this chapter – that will be reserved for later chapters, especially in chapters five and six.

Chapter Two will be a literature review where the work of both critics and supporters of the implied freedom will be discussed, including comparative law and international contributors to these two fields. This will be an overview – it will serve to provide the reader an understanding of the current state of free speech research in Australia as well as how it has been influenced by international scholarship. Critique of existing scholarly paradigms will not occur until chapter three.

Chapter Three will explore the Australian constitutional rationale for free speech. This chapter will include criticism of proportionality, and the establishment of a Marxist basis for criticism of High Court jurisprudence. This will be compared with other theories of speech to establish that under most any approach to free speech theory, the Australian High Court's approach is inadequate. There will be a brief discussion of the role of United States law in Australian constitutional theory which will serve to link to chapter four. This chapter will advance the concept of democracy as a category, rather than a reference to liberal representative democracy specifically to establish that democracy is a values-driven system, and not a specific bureaucratic structure.

A diverse group of systems could be considered democratic in some form based on values. This being the case, the argument that the Australian Constitution does not protect a democracy will be criticised using the concept of democracy as a values-driven category. The Australian Constitution does set up a democracy, and this is clear in the values that it sets up – particularly popular sovereignty, which will serve as a constitutional legal basis for the protections of free speech advocated for in this work. It is not enough that there be some protection of free speech, however – protections must be reliable, consistent, and have the depth required to preserve the people's ability to determine their own opinions, criticise the government, and shape society itself as is the constitutional right of those charged with the duty of directly deciding who is to represent them.

The commonalities between different theories of speech can be seen in the overlap between Karl Marx and John Stuart Mill. While both come from two drastically different schools of thought, when it comes to free speech Marx did advocate in its favour and for its role in what he wanted from a democracy. Especially so in his earlier years before moving on to political economy as seen in works such as *Capital*. Marx saw the need for free speech to be protected in an authentic manner, and not simply as a minimum concession to an ideal that would, in effect, give the people very little protection despite giving them the illusion of free speech. This can even be seen in the Brennan Court's general shift towards framing ss 7 and 24 of the *Australian Constitution* in terms of simple, non-democratic 'government' and omission of democracy (a trend to be detailed in Chapter Two).

Protection of mere 'representative government' is a construction so minimal, Gray notes, that McHugh J even argued it could allow single-party rule and the restriction of voter enfranchisement to specific classes of society to be ruled constitutional.[3] It must be conceded however that there are still occasional references to representative democracy as an aspect of the *Australian Constitution*. For instance, in the case of *McCloy*, joint reasons delivered by French CJ, Kiefel, Bell and Keane JJ overturned a law prohibiting a cap on political donations by property developers based on political communication. This was because they argued that equal opportunity to participate in exercising political sovereignty is part of 'the representative democracy guaranteed by our *Constitution*'.[4] Yet these references remain rare, and in the case of *McCloy*, served to protect privileged members of society possessing the wealth necessary to exceed a cap on donations.

This is relevant because, as will be argued in this paper, the ability of the people to freely create artwork, publish literature, or associate remains restricted. Aside from voting, exposure to literature and artwork of various kinds – movies, series, computer gamers, books, newspapers - these are primary methods by which the average person engages with society. They are critical for the development necessary to utilise one's sovereign power. Lack of protection of these aspects of speech can lead to significant restrictions on the people's ability to exercise their sovereignty and communicate politically. Even on a basic theoretical level, privileged members of society's ruling class remain protected by democracy when it is necessary to do so while the rest of Australian society remains largely unprotected. The very basis for the implied freedom itself has become a minimum concession offering little in the way of protections - Karl Marx called this effect 'the democratic swindle'.

[3] Gray, 'The Protection of Voting Equality in Australia' (n 1) 567.
[4] *McCloy v New South Wales* (2015) 257 CLR 178, 207 ('McCloy').

It will be argued in this thesis that such a democratic swindle is occurring in Australia. The political class, while enjoying a comprehensive freedom of speech due to the privileges of their offices, also benefit in another manner. The implied freedom with its lack of scope and theory has enabled institutional censorship of literary-artistic expression in almost every form. The people's ability to be exposed to new ideas and concepts through literary-artistic expression has been stifled. Not only that, but their very ability to associate with one another has been stifled, freely restricted by the Australian government whenever it is politically expedient for them to do so. This has led to the reality of life in Australia where even if one is allowed to listen to a particular song, for instance, they may not be able to gather in public to discuss or develop the ideas they have gained from it.

They may have been targeted as a particular class disallowed from associating in public, or perhaps the ability to simply gather in numbers may have been banned entirely. Both situations can happen, and have happened, in Australia to the detriment of the Australian people. But there is a particular class in society who hold privilege excluding them from many of these restrictions. As the members of the legislative branch (who in Australia, also constitute the executive branch) enjoy an unadulterated freedom of association, they can and sometimes do deny that same freedom to the people who see no reliable protection whatsoever.

While association remains essentially unprotected in Australia, there are negative consequences for society and the very basis of the *Australian Constitution* itself. The sovereignty of the people is restricted when people cannot associate freely, because this means that one of their primary and most important means of disseminating ideas and opinions is not available to them.[5] Freedom of association is further important because without it, individuals cannot be sure of their ability to band together to demonstrate their opposition to the goals of the vast government bureaucracies, institutionalised forces and trans-national organisations that are now omnipresent.[6] It is widely understood that group association is one of the primary means in which advocacy occurs, and for many, is the only way to make one's views heard.[7]

It will be argued in this work that authentic protection of association is critical if the people are sovereign, and that similar reasons to these are why the SCOTUS protected association in an implied way from its own federal constitution. There is a clear link between the people’s ability to be exposed to new ideas and freedom of association. This warrants comprehensive protection, even if it must be found as an implied protection. The SCOTUS accepted this, and so too must the Australian High Court. The solution

[5] Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 272.
[6] Thomas I Emerson, ‘Freedom of Association and Freedom of Expression’ (1964) Yale Law Journal 1, 1.
[7] *Gibson v Florida Legislative Investigation Commission*, 372 US 539, 562-63 (1963) (‘Gibson v Florida’).

lies in an expansion of implied Australian constitutional freedoms: establishment of freedom of association as a standalone freedom, protection of artwork, and the implementation of new tests for both expression and association.

Chapter Four will detail how, contrary to popular belief, the US *First Amendment* only arrived at its current breadth through interpretation, beginning as an incredibly limited freedom protecting only highly political speech and publications (not too dissimilar from the current implied freedom in Australia). Likewise, freedom of association in the *US Constitution* exists only due to interpretation - it does not exist explicitly. Examples of *First Amendment* jurisprudence may be of use in the project to turn Australian free speech and association jurisprudence from a democratic swindle into authentic protections of civil rights. This will serve the rationale of maintaining the integrity of the Australian constitutional system of representative democracy. It will be argued that United States jurisprudence on free speech – whether association or expression – has much to offer Australian free speech jurisprudence and should serve as a much more significant basis for modelling the Australian approach to constitutional protection of those freedoms.

In Chapter Five the role of association in the *Australian Constitution* will be developed, accompanied by a critique of existing jurisprudence relating to freedom of association in Australia. It will be argued that it must be protected as a standalone freedom under a similar rationale to that which enabled the implied freedom of political communication.

Chapter Six aims to critique the High Court's approach to freedom of expression, focusing primarily on artistic expression and protection of literature in various forms. The focus of this chapter will remain concentrated mostly on this form of expression, due to the ties of performance art to the proposed freedom of association, but also because of its centrality in the everyday lives of the people. It will be argued in chapter three that artistic expression (including literature in various forms), whether engaged in as a viewer or creator, is the primary means through which ordinary people engage in politics. The everyday existence of the people is accompanied by artistic and literary expression. If that expression is the primary means through which people engage in politics, that means the everyday existence of the people is political and so it will be argued that expression, and in particular artistic expression and all that goes with it, must be protected. As a result, chapter six will include an in-depth analysis of current Australian domestic laws affecting artistic and literary expression, how those laws are impractical and why they should be overturned. A new model will be developed in order to show an alternative approach can be adopted – one that protects the people's sovereignty and the *Australian Constitution* without limiting the people's everyday expression and engagement with politics via artwork.

In summary, this thesis will make arguments towards the following conclusions. Firstly, it will be argued in chapter three that the *Australian Constitution* does protect a representative democracy via its explicit protection of direct election by the people. Arguments against its validity due to use of implications are futile as implications are settled constitutional doctrine, having been in use, and supported, across a century of High Court jurisprudence. The more common argument – that the *Australian Constitution* does not set up a democracy for lack of explicitly mandating a model, is also incorrect. I argue in chapter three that democracy is the political result of a society whose governance, in whatever form, is sanctioned by the people. The *Australian Constitution* fulfills this requirement explicitly as it enshrines in the people ultimate power to determine organs of governance and explicit constitutional development.

Consequently, I argue in this work that law is one of many avenues for socio-economic and political progress that can be developed for the benefit of the people – not necessarily the only avenue that should be relied upon, but an important one to make use of nonetheless. Protections must be 'authentic', or they may strengthen and centralise government power rather than limit it as intended. Throughout this thesis is the conclusion that the most common approaches to constitutional free speech in Australia are inadequate. To that end I argue in chapter four that approaches found in the United States are not only more flexible and practical, but better able to achieve the rationale of the Australian implied freedom of political communication (protection of popular sovereignty and democracy) than the common approach in the Australian High Court.

I argue in chapters three, five and six that the use of proportionality in Australian free speech and association testing should be abandoned due to its vagueness and value judgments, but also because it more easily contributes to censorship and majoritarianism. In chapters five and six I argue that current approaches to communication and association are inadequate, unjustified, and impractical. The political criterion is unconstitutional and impractical, the 'corollary' interpretation of association unsupported and impractical, and both lacking authenticity in application. To resolve these problems, I propose new models of protection for speech and association in Australia, dropping the political criterion and adopting US influenced categorical tests and Gageler J's levels of scrutiny. Both chapters five and six will also explore what could limit these freedoms without them becoming a democratic swindle.

CHAPTER II CASE LAW

A Pre-ACTV

Little to no protection of speech existed prior to *ACTV*. With the Mason Court came a shift in jurisprudence, which can be illustrated with reference to the history prior to that. A history best described as one of 'occasional suggestion' that protections should exist, at the same time as active interference with speech and even active legal strategies adopted to suppress it.[8] Infamously the Federal Government attempted to ban a political party,[9] but there was little discussion of freedom in this case, with the Court choosing instead to focus their attention elsewhere. Let us consider two other cases that were actually discussed there: *Burns v Ransley*, and *R v Sharkey*.[10] In 1949, two members of the Communist Party were imprisoned simply for expressing their political views – Mr. Burns in *Ransley* was convicted under sedition laws for stating that if there were a war between the Soviet Union and Australia, he would fight 'on the side of Soviet Russia' and Mr. Sharkey was convicted for conveying a similar sentiment.[11]

The Court in both cases found that Sharkey and Burns both could be found to have made seditious statements, disregarding the hypothetical nature of the statements in both cases and the intent (both men denied having an intent to cause trouble at all).[12] Convictions were upheld – Sharkey was left with 18 months of imprisonment for a hypothetical scenario given to establish his political opinion. These were members of a political minority in Australian society and yet again responsible government theory failed them. These cases were examples of Australia's history of suppressing minority players and dissent by punishing speech.[13] It was far easier to punish and abridge speech as under the pre-*ACTV* regime freedom of speech existed only as a common law right, where it could only be protected if no legislation existed to abridge it. No constitutional element existed, and meaningful protections did not arise. It was not until *ACTV* and *Nationwide News* that a constitutional system was established.

With few exceptions the Court has been quite conservative, and since the Brennan Court, that conservatism deepened, with the scope of the implied freedom unknown almost 30 years later. Freedom of association has been rendered simply a 'corollary' with no explanation or theory. The status of art has almost never been addressed and when it has, it was resolved in a way that favoured censorship and what is referred to in the United States as viewpoint discrimination. Hostility to viewpoint discrimination is a

[8]Melinda Jones, 'Free Speech Revisited: The Implications of Lange & Levy' (1997) 4(1) *Australian Journal of Human Rights* 188.
[9]*Australian Communist Party v Commonwealth* (1950) 83 CLR 1 ('Communist Party').
[10]*Burns v Ransley* (1949) 79 CLR 101 ('Ransley'); *R v Sharkey* (1949) 79 CLR 121 ('Sharkey').
[11]*Sharkey* (n 10) 160; Jones (n 8) 188.
[12]Jones (n 8) 188.
[13]Ibid.

fundamental principle of *First Amendment* jurisprudence. This means that laws will generally be invalidated in the United States if they discriminate against or censor speech because of a point of view expressed, or even simply because of the specific content of the expression.[14]

This is a relatively new principle in *First Amendment* jurisprudence, having its origins reaching back to *West Virginia Board of Education v Barnette* ('Barnette') where it was noted by the Court that it was a fixed position in *First* Amendment law that the government cannot 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'.[15] This occurred in 1943, but Lackland H. Bloom Jr argued that the Court's concern with discrimination based on viewpoints or content really began to come into focus in the early 1970s. Specifically, Bloom referred to cases like *Chicago v. Mosley* and *Grayned v. City of Rockford*,[16] whose precedents prompted a series of decisions leading to more recent cases like *Matal v. Tam*,[17] where it has become clear that the anti-viewpoint discrimination principle is a focal point of US free speech jurisprudence.[18] A law that discriminates based on content generally requires strict scrutiny, the highest level of scrutiny a *First Amendment*-violating law can be subjected to, and Bloom notes that viewpoint-discrimination often leads to immediate invalidation.[19] Contrary to the United States, Australian free speech jurisprudence generally is not concerned with content or viewpoint discrimination.

As it will be seen in this chapter, laws that discriminate based on content or viewpoint, when going before Australian Courts, have been validated even with the implied freedom of political communication in operation. Despite this, Justices like Kirby J have provided still-valuable dissents and Gageler J's *First Amendment*-inspired path incorporating aspects of content & viewpoint discrimination and other principles has given us an alternative to the opaque abyss of Australian constitutional free speech. Before critiquing the situation regarding association and artwork, a comprehensive overview of the Australian case law now proceeds.

B ACTV

In 1992 the Australian Federal government passed the *Political Broadcasts and Political Disclosures Act* 1992 (Cth). This amended Part IIID of the *Broadcasting Act* 1942 (Cth) and restricted broadcasts of

[14] Anthony Gray, 'The *First Amendment* to the United States *Constitution* and the implied freedom of political communication in the *Australian Constitution*' (2019) 48(3) *Common Law World Review* 142, 146 ('The 1st Amendment').
[15] *West Virginia Board of Education v Barnette*, 319 US 624, 642 (1943) ('Barnette').
[16] *Chicago v Mosley*, 408 US 92 (1972); *Grayned v City of Rockford*, 408 US 104 (1972) ('Grayned').
[17] *Matal v Tam*, 137 S. Ct. 1744 (2017).
[18] Lackland H. Bloom Jr, 'The Rise of the Viewpoint-Piscrimination Principle' (2019) 72 *SMU Law Review Forum* 20, 22-23.
[19] Ibid 21.

political advertising during elections and campaigning. The idea was to limit campaign finance requirements, and therefore create a more open, honest, and accessible political system while also reducing corruption. The freedom of political communication was derived by the High Court from ss 7 and 24 of the *Australian Constitution* in response. It was argued that the *Australian Constitution* provides for a representative democracy – and that required *some* freedom of speech to function effectively.[20]

This has been used to limit the freedom – for example, Mason CJ called it 'difficult if not impossible to establish a foundation for the implication of general guarantees of fundamental rights and freedoms'.[21] His Honour said the implied freedom 'extends to all matters of public affairs and political discussion' because those matters often turn on media discussion.[22] This was linked specifically to elections in the initial construction, which is why Deane & Toohey JJ said that a law regarding communications about government would be much harder to justify than a law regarding communications about 'some other subject'.[23] The implied freedom was limited by its political dimension, perhaps due to concerns about the Court going too far or to prevent controversy such as that which followed the decision in *Wik Peoples v The State of Queensland*.[24]

So, the Court was largely silent on what exactly was protected - almost entirely silent on the matters of artwork and association. However, while Mason CJ did not comment on association, one of his sources was McIntyre J of the Supreme Court of Canada discussing freedom of expression.[25] It is clear that McIntyre J viewed a wide variety of topics as protected expression – from sedition (to some extent), to heresy, to ideas and beliefs 'on every conceivable subject'.[26] Mason CJ said that McIntyre J's concept might be more expansive than what can be derived from ss 7 and 24, but concluded that it was not relevant to determine at the time – what was relevant was that 'implied freedom of speech *and expression*' existed in Australia.[27]

Restrictions on expression will 'amount to an unacceptable form of political censorship'.[28] If a law is content-neutral, it would be more acceptable.[29] A disproportionate burden on public interests would be

[20]Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18(2) University of Queensland Law Journal 249, 250.
[21]*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 ('*ACTV*').
[22]Ibid 108.
[23]*ACTV* (n 21) 169.
[24](1996) 187 CLR 1.
[25]*ACTV* (n 21) 115.
[26]*Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573, 584.
[27]*ACTV* (n 21) 141. Emphasis added.
[28]Ibid 143.
[29]Ibid.

unacceptable.[30] Mason CJ relied heavily on *First Amendment* jurisprudence in describing these standards for differing types of restrictions.[31] A distinction 'must be drawn', Mason CJ said, between laws whose restrictions prohibit or regulate the content of speech, and laws that only incidentally limit speech by regulating time, place, and manner of communication.[32] "Laws which seek to prohibit or regulate the content of electoral communications are in a different category" – it cannot be made clearer.[33] McHugh J supported this distinction. A compelling justification would be needed for laws discriminating against content/viewpoint, and the restriction could be no more than reasonably necessary to protect a competing public interest.[34] This was a clear example of US-style strict scrutiny being given as the required standard.

Deane & Toohey JJ did not comment on association at all but did support levels of scrutiny for different types of speech, arguing laws restricting political speech would be more difficult to justify.[35] This was also supported partially by their Honours' citation of a *First Amendment* case.

Gaudron J supported 'freedom of speech generally', but also freedom of association and of movement.[36] Restricting laws were said to be compatible with the implied freedom – those relating to defamation, sedition, blasphemy, obscenity, and offensive language. For association, her Honour cited Murphy J who discussed the rule of law but also prohibitions on slavery, serfdom, and cruel & and unusual punishment. Murphy J argued that all of these, including freedom of movement and association, flowed from the existence and necessities of a democratic society – perhaps, Gaudron J suggested, free speech should also be included.[37] Where it is established that freedom of association flows from the existence of a democratic society with a representative parliament, one should *also* accept freedom of speech.

McHugh J said the *Australian Constitution* 'embodies a system of representative government which involves the conceptions of freedom of participation, association, and communication in respect of the election of the representatives of the people'.[38] These were rights drawn from ss 7 and 24 of the *Constitution*. They are not absolute but are described as:

[30]Ibid.
[31]See for example ibid 140-144.
[32]Ibid 234.
[33]Ibid.
[34]Ibid 110.
[35]Ibid 169.
[36]Ibid 211.
[37]Ibid.
[38]Ibid 233.

> so fundamental to the achievement of a true choice by the electorate that a law enacted pursuant to the powers conferred by s.51 which seeks to prohibit or regulate the content of electoral communications can only be upheld on grounds of compelling justification.[39]

Their importance was such that McHugh J stated that not giving effect to the rights of participation, association and communication under ss 7 and 24 'would be to sap and undermine the foundations of the *Constitution*'.[40] McHugh J also said people 'must have access to the information, ideas and arguments which are necessary to make an informed judgment'.[41] In context, this quote is clearly setting up the basis for directly, overtly political material such as political advertising which was at issue in *ACTV.*

But this can apply to other material – for instance, the classic Stanley Kubrick film *Dr. Strangelove, or: How I Learned to Stop Worrying and Love the Bomb* is well known for its moral protest against the anti-Communist paranoia of the Cold War years and the hawkish, militaristic attitude of politicians at the time.[42] This obviously imparts 'opinions, arguments and information concerning matter intended or likely to affect voting' as his Honour argued is protected.[43] Yet film remains unprotected.[44] While the *Constitution* gives a general right of freedom of communication to members of Parliament, it was deemed unnecessary to determine whether the people also have such a general right. His Honour proceeded on that basis establishing only that freedom of communication existed (without establishing any boundaries) and that while it could exist as a general freedom of expression, that issue was simply not relevant for *ACTV*.

Dawson J did not comment on artwork at all and did not comment on association directly. His Honour did object to freedom of movement (and partially political communication), stating that the source for Murphy J's implications was not the *Australian Constitution* but simply 'the nature of our society'.[45]

In total, two justices (Gaudron J, McHugh J) in *ACTV* accepted that freedom of association existed as an implied freedom in the *Australian Constitution*, with a third making reference to freedom of movement, something often considered as part of or related to association. Four justices (Mason CJ, Brennan, Deane and Toohey JJ) did not comment on association at all.

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[39]Ibid 235.
[40]Ibid 232.
[41]Ibid 231.
[42]Charles Maland, 'Dr Strangelove (1964): Nightmare Comedy and the Ideology of Liberal Consensus' (1979) 31(5) *American Quarterly* 697, 705.
[43]*ACTV* (n 21) 231.
[44]Ibid.
[45]Ibid, 186.

C Nationwide News v Wills

In *Nationwide News v Wills* a unanimous court overturned a law criminalising criticism of the Australian Industrial Relations Commission. At least four justices (Mason CJ, Deane & Toohey JJ, Gaudron J) found that it was invalid because it infringed the implied freedom of political communication.

Expression did come up in this decision. Mason CJ made reference to *Davis v Commonwealth*,[46] where the majority applied proportionality to invalidate part of the *Australian Bicentennial Authority Act 1980* (Cth) that made it an offence to use certain symbols and expressions without the consent of the Authority.[47] The majority argued the legislation disproportionately affected freedom of expression and was unconstitutional.[48] Mason CJ, Deane and Gaudron JJ in *Davis* said that the relevant legislation 'impinges on freedom of expression'.[49] Although legislation of this type could be constitutionally legitimate, here it was an 'extraordinary intrusion into freedom of expression' that was overturned because it was not 'reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power'.[50]

Their Honours did not give the constitutional source of freedom of expression – they simply decided it existed and overturned the relevant legislation. Mason CJ in *Nationwide News* relied on these statements. His Honour also relied on Brennan J's *Davis* opinion, which similarly cited freedom of expression as the key reason for the law being overturned.[51] Brennan J also argued that minorities are 'entitled to freedom in the peaceful expression of dissident views'.[52] Note that his Honour was also particular about the role of government bodies – freedom of speech is ‘not restored by creating a discretionary authority to allow it'.[53]

Brennan J gave no constitutional source for freedom of expression, stating only that it existed and could not be infringed disproportionately. His Honour argued that freedom of public discussion of political and economic matters was not only essential, but that denying 'the freedom of public discussion' would lead to society being 'a parody of democracy'.[54] That is, a democratic society is not genuine when protection of freedom meets only the bare minimum standard – a democratic swindle robs a society of its democratic legitimacy. His Honour referenced the fragility of common law protection of 'free expression of opinion',

[46](1988) 166 CLR 79. (‘Davis’).
[47]*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29 ('Nationwide News').
[48]Ibid.
[49]*Davis* (n 33), 100.
[50]Ibid.
[51]*Nationwide News* (n 47) 30; Davis (n 33), 117.
[52]*Davis* (n 33), 117.
[53]Ibid 117.
[54]*Nationwide News* (n 47) 47.

and noted the UK had no formal constitution and thus no such rights without legislation (which the *Human Rights Act 1998* (c42) (UK) now provides).[55]

But in Australia, a formal *Constitution* establishing a representative democracy means that 'the freedom of discussion to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains'.[56] His Honour made extensive use of Canadian jurisprudence, including quotes that state that freedom of discussion necessarily protects the ability of independent sources to convey 'matters of public interest' to the people, but that this should be moderated by considerations of decency and public order.[57] This concept of free speech bears some similarity to that which is utilised in the United States. Despite all this there was little reference to anything that could give one an idea of scope.

Deane & Toohey JJ cited Canadian law to support a freedom of expression, noting it was not unlimited in scope and would not overturn, for instance, a law prohibiting conspiracy or incitement to commit a serious crime.[58] Gaudron J said nothing in s 51 of the *Australian Constitution* authorised laws that 'impair or curtail freedom of political discourse', giving some strength to the implied freedom but limiting it by the political criterion.

In terms of other limitations, urgent national security and defence matters were also specified as being able to limit the implied freedom.[59] Deane & Toohey JJ in their judgment described the implied freedom as applying simply to “all political matters, including matters relating to other levels of government”.[60] As in *ACTV*, the implied freedom in *Nationwide News* was framed around politics primarily to provide significant limitations without ever actually detailing specifics about them. With lengthy discussion in two concurrent cases justifying implications from the *Australian Constitution* it could be simply that the linking of free speech exclusively to the ‘political’ is a limiting factor designed to prevent controversy around the introduction of civil rights into Australian constitutional law.

D Theophanous & Stephens

The implied freedom was developed considerably by the cases of *Theophanous v Herald Weekly Times Ltd* and *Stephens v West Australian Newspapers Limited*.[61] Both cases involved members of parliament

[55]Ibid 48.
[56]Ibid 49.
[57]Ibid.
[58]Ibid 77.
[59]Ibid 51.
[60]Ibid 75.
[61]*Theophanous v Herald Weekly Times Ltd* (1994) 182 CLR 104 ('Theophanous'); *Stephens and Others v West Australian Newspapers Limited* (1994) 182 CLR 211 ('Stephens').

suing newspapers for defamation. In both cases the majority held that the implied freedom could support a defence to defamation and set out three criteria to be satisfied for the speech to pass.

From *Stephens* the implied freedom was extended to the States (as it applies to all political communications).[62] In principle, the Court found it necessary to 'protect the efficacious working of representative democracy' against common law principles and individual reputation.[63]

In *Theophanous* Mason CJ, Toohey and Gaudron JJ explicitly rejected claims that the implied freedom was limited exclusively to participation and communication directly related to voting, but still limited it to political matters.[64] That meant a vast array of communications that could not be realistically confined,[65] ranging from discussion of indigenous affairs to purely economic matters.[66] Their Honours supported Eric Barendt's concept of political speech as including virtually anything that an intelligent citizen should think about - 'the whole range of issues'.[67] Their Honours *ACTV,* arguing the difference between entertainment and politics may not always be possible to discern,[68] and that drawing such a distinction is not only difficult but impractical.[69] So art was considered here.

Notably their Honours stated the implied freedom was not an effort to protect fundamental human rights, giving little reason why.[70] Representative 'democracy' is referred to throughout this case, apparently evident from the *Australian Constitution* but not necessarily taken directly from its text. Notably, Dawson J explained why his Honour refrained from referring to 'democracy' instead of 'government' - arguing that democracy was 'in the eye of the beholder' and so was too vague a term to be useful.[71]

But most importantly, the Court seemed to argue that the implied freedom could support a wide variety of speech forms, rather than being a tightly restricted, text based right. This was somewhat muted by the strict adherence to the 'political only' criterion, despite its admitted impracticality. That the implied freedom *itself* could give rise to a defence to defamation is an important ruling from this case, because it showed the Court was willing to accept that the implied freedom could stand on its own and in doing so, have further consequences beyond simple limitations on legislation. The Court understood that this was a negative right and to allow a constitutional defence for defamation, or other law derived from the

[62]*Stephens* (n 61) 233, 236.
[63]*Theophanous* (n 61) 133 (Macon CJ, Toohey & Gaudron JJ, Brennan J agreeing at 236).
[64]Ibid 121.
[65]Ibid 122.
[66]Ibid 124.
[67]Ibid.
[68]Ibid 122.
[69]Ibid 123.
[70]Ibid 125.
[71]Ibid 189.

implied freedom, does not transform it into a positive right. The *First Amendment* grants some protection in defamation cases and likewise, as noted in a previous chapter, is not characterized in the US as a positive right.

In dissenting judgments the 'politicalness' criterion was emphasised, as were proportionality and restrictions (sedition, defamation, ads for drugs, obscenity).[72] Brennan J advocated a case-by-case approach rather than a categorical one.[73] Notably Deane J favoured living tree interpretation and declared the *Australian Constitution* a 'living force' that should represent contemporary Australians, openly rejecting constitutional originalism.[74]

These were the last major cases before the Brennan Court arrived, which saw a noted drop in references to 'democracy' as the court became increasingly literal in its interpretation. Largely abandoning doctrinal commitments to protection of the people's democratic rights, 'representative government' became the dominant term rather than 'representative democracy' by the time of *Lange*.[75] This enabled a significantly more restricted freedom of speech, allowing politicians to more effectively censor works that were critical of them, or works that they personally found distasteful.[76]

E Brennan CJ, or: Legalism Strikes Back

By the time *Lange* was decided Sir Anthony Mason was no longer Chief Justice, succeeded by Sir Gerard Brennan. McHugh J once wrote that the Mason Court was not as radical as it is often perceived to be – his Honour only regarded eight of the approximately 70 constitutional cases decided by the Mason Court as radical.[77] The cases establishing free speech – such as *ACTV, Theophanous*, and *Stephens* – were regarded as a substantial part of the radical constitutional jurisprudence of the Mason Court.[78] His Honour argued that the non-constitutional jurisprudence of the Mason Court is the true source of that Court's reputation for radicalism, but ultimately summed up the basis of this reputation for radicalism as in the Mason Court's recognition of new common law, equitable, and constitutional rights, and strengthening of existing ones in all three areas.[79] Of all the decisions finding rights and freedoms under the Mason Court (constitutional or not), only freedom of political communication survived in the long-

[72] Ibid 152, 180.
[73] Ibid 152.
[74] Ibid 171.
[75] Gray, 'The Protection of Voting Equality in Australia' (n 1) 568.
[76] *Australian Broadcasting Corporation v Hanson* [1998] QCA 306 ('Hanson').
[77] Michael McHugh, *The Constitutional Jurisprudence of the High Court* (2008) AustLII <http://classic.austlii.edu.au/au/journals/SydLawRw/2008/1.html>.
[78] Ibid.
[79] Ibid.

term. There was a clear difference in favoured interpretation methods between that Court and its successor.

Leading up to *Lange*, the Mason Court had moved 'towards a more policy oriented constitutional interpretation', giving less weight to originalist and legalist concerns and precedent.[80] Mason CJ argued that these sorts of factors might be necessary in order to reach a reasoned conclusion.[81] This approach is how the Mason Court arrived at free speech jurisprudence and civil rights, although McHugh CJ argued that even after establishing free speech and constitutionalising defamation, the Mason Court still did not develop civil rights extensively, nor did they see the rights they did establish as comprehensive.[82] However, living tree interpretation and its establishment of civil rights was curtailed by the arrival of the Brennan Court, which returned to the age-old Australian constitutional legalist mantra of 'text and structure'.

Where in *Theophanous* the Court largely accepted democracy as a somewhat free-standing concept not necessarily drawn from the text and structure of the *Australian Constitution*, now the Court strictly referred to 'representative government' only. They rejected the idea of democracy as an aspect of the Australian system, and confined constitutional implications strictly to concerns within the text and structure of the *Australian Constitution*.[83] Where previously Mason CJ and Deane J supported popular sovereignty as the source of authority for the *Australian Constitution*, this view was generally denied by the Brennan Court. It survived via Kirby J, who included it in some influential decisions that remain precedential.[84] So the Brennan Court (with some exceptions) abandoned the living tree interpretation of the Mason Court, preferring the traditional strict literalism that remains the dominant view and is evident in *Lange*.

F Lange & Levy

In *Lange*, a unanimous decision reconsidered *Theophanous* and *Stephens*. The implied freedom was strictly limited to 'political or government matters' - no mention of art or association.[85] It did provide two important rulings. Firstly, the influential *Lange* test for infringement of the implied freedom:

[80]Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5.
[81]Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21, 23.
[82]McHugh (n 77).
[83] Ibid.
[84]*Eastman v The Queen* (2000) 203 CLR 1, 79-80; McHugh (n 77).
[85]*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. ('Lange').

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

2. If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people?[86]

For a law to be held invalid, the answer to the first question must be yes, and the answer to the second question must be no. The first question is a simple determination of whether political communication has been limited ('burdened') in any form. The second question has two parts. Firstly, determine the purpose (the 'end') of the law and its constitutional compatibility. Secondly, determine if the law is 'reasonably appropriate and adapted' to that purpose.[87] The manner for determining if a law was ‘reasonably appropriate and adapted' was not given, although in *McCloy* it was determined by the majority that it allowed European-style proportionality, although post-*McCloy* justices diverged on this point, applying a variety of tests as will be discussed later on in this chapter and in subsequent chapters.

The other important rulings from *Lange* related to common law. *Theophanous* and *Stephens* were reinterpreted as extending the qualified privilege defense to political communication as common law must conform to the implied freedom in at least some circumstances.[88] The implied freedom was found to be capable of shaping the common law itself, rather than simply limiting or striking down statutes – this meant that potentially all laws could be subject to the implied freedom, as one would expect of a constitutional source. *Lange* also established that the English common law doctrine of parliamentary supremacy was ‘rendered inapplicable’ by the *Australian Constitution*.[89]

The principles from this case were applied in *Levy* to overturn a regulation prohibiting anyone without a duck hunting license from entering the hunting area within two days.[90] The Court accepted that the implied freedom protected symbolic action.[91] However, *Levy* also demonstrated the effects of a post-Lange world. Under the somewhat *First Amendment*-like test discussed by Mason CJ in ACTV and elsewhere, one had to determine if the restriction discriminated against a viewpoint or content, or if it was content-neutral. A content-neutral law would require a lower standard of testing, but the law in *Levy* was directed specifically at political protesting against duck hunting. The kind of law that Mason CJ said would be ‘extremely difficult to justify’, and ‘ordinarily unacceptable’, requiring a compelling

[86]Ibid.
[87]Ibid.
[88]Ibid.
[89]Ibid.
[90]*Levy v Victoria* (1997) 189 CLR 579. (‘Levy’).
[91]Ibid.

justification – a sentiment shared in similar terms by McHugh J.[92] Furthermore, they required the legislation to adopt the least restrictive means test.

But under *Levy*, a burden on free speech only required a legitimate end coupled with ‘reasonably appropriate and adapted’ provisions. This is quite a low standard - it is unlikely that anyone would disagree that protecting protesters from being shot as was cited in this case would be illegitimate. Would such a goal be a ‘compelling enough purpose to ban all political protesting on-site for two days? Melinda Jones contends less restrictive means existed, such as limiting the actions of shooters over those two days.[93] So while *Levy* did protect symbolic speech, it revealed the consequences of *Lange*. Requiring only service of a legitimate end in an appropriate and reasonable manner made it much easier for the implied freedom to be restricted.

G Kruger

Kruger was important as it identified association as 'association for political, cultural and familial purposes'.[94] Brennan CJ argued that association was not implied in the *Australian Constitution* and no textual or structural foundation existed for it.[95] His Honour argued association and movement could only exist as corollaries to political communication, and the impugned provisions did not impede communication, so neither association nor movement were to be considered.[96] In any case, it was argued that association or movement would not invalidate the relevant provisions even if they did exist.[97] Dawson J agreed that association & movement were corollaries.[98] His Honour argued it was not a 'right' and was simply 'of the negative kind', referring to the negative-positive freedoms-rights debate. His Honour rejected Gaudron J's argument regarding democracy from *ACTV* and said that was based on the extra-constitutional “nature of our society”.[99] Dawson J stated "there is nothing to be found in the Constitution which would support an implied constitutional right to, or guarantee of, freedom of movement and association for political or other purposes".[100]

Toohey J's view was that association was an element of political communication and cited McIntyre J to make it clear that freedom of association was already recognised by Canadian law prior to the enactment

[92]*ACTV* (n 21) 143 (Mason CJ, McHugh J agreeing at 235).
[93]Jones (n 8) 188.
[94]*Kruger v Commonwealth* (1997) 190 CLR 1, 10 (‘Kruger’).
[95]Ibid 45.
[96]Ibid.
[97]Ibid.
[98]Ibid 68.
[99]Ibid 69.
[100]Ibid 70.

of their bill of rights.[101] Toohey J's view echoed the corollary view – association protected only as "an essential ingredient of political communication".[102] Accordingly, Toohey J found that s 122 of the *Australian Constitution* was indeed confined by the freedom of political communication – "the authority conferred by the Ordinance to take Aboriginals into custody must yield to the freedom of association implied by the constitution".[103] His Honour did not overturn provisions on the basis of freedom of association, arguing it was impossible to find 'at this stage of the proceedings'.[104]

Gaudron J seemed to generally agree with Toohey J and reiterated support for freedom of association, albeit in the more limited form described elsewhere in this case. Her Honour did maintain democracy as a component of the *Australian Constitution* however:

> It is also settled constitutional doctrine that the system of democratic government for which the Constitution provides depends for its maintenance on freedom of communication and discussion of political matters.[105]

Here Gaudron J supported the corollary view, stating political communication depended on human contact and therefore could not possibly occur without individuals being free to associate.[106] Her Honour argued that any time the ability of a person to meet other people or move about in society is abridged, so their ability to gain, offer, and spread political ideas is also abridged.[107] Citizens cannot be held in enclaves no matter how large or congenial the enclave, her Honour said, pointing out the practical dimensions of political communication that necessitate protecting the ability of people to associate with others, and the resulting necessity to protect freedom of movement. "Freedom to move within society" was, Gaudron J argued, one of the absolute minimum requirements of political communication.[108]

Gaudron J continued with association as a corollary by referring to s 122 of the *Australian Constitution* as confined by 'the freedom of political communication identified in *Nationwide News* and in *Australian Capital Television* and by the subsidiary freedoms of association and movement'[109]. Her Honour said the freedoms of association and movement 'must yield to valid laws of the Commonwealth on topics which clearly comprehend restrictions on movement and association'.[110] This referred to such examples as s 51(vi), s 51(ix), and s51(xix) of the *Australian Constitution* which authorise respectively, laws in relation

[101]Ibid 91.
[102]Ibid 96.
[103]Ibid 93.
[104]Ibid 93.
[105]Ibid 114.
[106]Ibid 115.
[107]Ibid 125.
[108]Ibid 116.
[109]Ibid 118.
[110]Ibid 121.

to defence, laws in relation to quarantine, and laws concerned with naturalisation and non-citizens.[111] It was noted that freedoms of association and movement were contradicted by court orders for detention after conviction. Her Honour stated that these were not to be taken as boundaries being marked out, as the Court had yet to do that.[112]

McHugh J argued the *Australian Constitution* also protected freedom of association. His Honour argued because the *Australian Constitution* set up a representative democracy, there must be protection of association or people will not be able to travel, vote, or participate in politics in any meaningful form:

> the people must be free from laws that prevent them from associating with other persons, and from travelling, inside and outside Australia for the purposes of the constitutionally prescribed system of government and referendum procedure.[113]

So an implied freedom of association protected by the *Australian Constitution* protected at minimum the ability to vote, support or oppose the election of candidates, monitor performance of ministers and members of parliament, and vote in referenda.[114] Remember that McHugh J specified the "very least" that association protected and saw the need for future development. By contrast, Gummow J (in dissent) argued Gaudron J's view from *ACTV* was no longer authority for the assertion that freedom of movement and association were necessary for the efficacy of a representative parliamentary democracy.[115] A 'responsible and representative government' did not protect any such freedoms.[116] Notably however his Honour took 'association' as including familial association.[117]

Four justices (Brennan CJ, Dawson, Toohey and Gaudron JJ) in *Kruger* considered association as protected, but only as a corollary to political communication. One judge (McHugh J) accepted association as standalone, and one judge (Gummow J) rejected its existence outright. This divide continued to develop over time.

H Hanson

In *Hanson* the Queensland Court of Appeal upheld an injunction which was granted to controversial politician Pauline Hanson to prevent a song satirising her from being broadcast.[118] Here the court argued that the song was not political enough to be protected by the implied freedom of political

[111]Ibid.
[112]Ibid.
[113]Ibid 142.
[114]Ibid.
[115]Ibid 157.
[116]Ibid 156-157.
[117]Ibid 156.
[118]*Hanson* (n 76).

communication.[119] The song, 'Back Door Man' by the artist Pauline Pantsdown, was created by setting samples of Pauline Hanson's speech to a beat and by the time it was released, Hanson herself was a nationally known and controversial political figure.[120] It was said that forbidding broadcasting 'could not possibly be said to infringe against the need for "free and general discussion of public matters" fundamental to our society'.[121] This was because, according to the Court, the song contained 'grossly offensive imputations relating to the sexual orientation and preference of a Member of Parliament and her performance ... as part of an apparently fairly mindless effort at cheap denigration'.[122] The Court was so serious about this fact that they noted that:

> There is no real room for debate but an ordinary sensible listener not avid for scandal would conclude that at least one or more of these imputations arose. If a jury were to find the opposite I am satisfied that this Court would on appeal set aside its verdict as unreasonable.[123]

This judgment amounted to censorship, something that continued in the years beyond it.

I Brown v Classification Review Board

Another important expression case related to the censorship of an article titled 'The Art of Shoplifting' published in a La Trobe University student publication called *Rabelais*.[124] This article began by describing those marginalised by capitalism and suggested shoplifting as a solution to the alienation felt by those who were marginalised.[125] The language in this article has been described in scholarship as colloquial and confrontational.[126] In 1995 the Chief Censor decided to 'refuse classification' (and thus ban) the article, under a co-operative scheme between the states that allowed censorship on the basis of it apparently 'inciting or instructing in matters of crime or violence'.[127] This decision was confirmed in 1996 by the Classification Review Board under the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.[128]

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[119]Adrienne Stone, 'The Nature of the Freedom of Political Communication' (2001) 25 *University of Melbourne Law Review* 374, 380.
[120]*Hanson* (n 76) 2.
[121]Ibid 6.
[122]Ibid.
[123]Ibid 5.
[124]*Brown, Michael & Ors v Members of the Classification Review Board of The Office of Film & Literature Classification* [1998] 82 FCR 225, 228 (‘Brown v CRB’).
[125]Ibid 228.
[126]Bashi Kumar, 'Brown v. The Classification Review Board: Robin Hood or Rebel without a Cause' (1999) 21 *Sydney Law Review* 294, 295-296.
[127]*Brown v CRB* (n 124) 227.
[128]Ibid 238.

French J stated the case law left open 'the possibility of further development of the law as to what will constitute "*political discussion*"'.[129] His Honour acknowledged the article in this case is understood as political discussion:

> There is much to be said for the conclusion that "The Art of Shoplifting" falls outside the scope of political discussion. But, inelegant, awkward and unconvincing as is its attempt to justify its practical message about shoplifting by reference to the evils of capitalism, it is arguable that in some aspects it would fall within a broad understanding of political discussion.[130]

But His Honour did not feel that this gave it protection, noting that a law could still legally censor speech.[131] It was argued that as far as possible legislation such as the *Classification (Publications, Films and Computer Games) Act* 1995 (Cth) should be interpreted so as to conform with the requirements of treaties, common law in relation to freedom of expression, and the implied freedom.[132] His Honour emphasised that 'adults should be able to read, hear and see what they want' and that *in principle* 'writers, publishers, film makers and producers of computer games' should be able to create whatever they want.[133] These (excluding the implied freedom) were however mere expressions of principle, easily ignored when legislation overrides them.

His Honour argued that censorship should not extend to literature that is satirical or ironic in nature, as it could not be instructional due to its character indicating that it should not be taken seriously and thus negated the criterion of 'instruction'.[134] The Board viewed the article as instructive with no consideration of its purpose – whether it was intended to outrage, offend, shock, or some other purpose – and his Honour stated the Board did not have to consider that.[135] They simply considered whether it could be seen as instructive at all – a methodology accepted by French J.[136] In summary, French J seemed to advocate principles of free information and creative freedom, but decided that legislation with a legitimate purpose such as prevention of crime could override these principles to allow censorship.

Heerey J argued that free speech 'while not an absolute, should be restricted only to the minimum extent necessary to protect other important values in a civilized society'.[137] This appeared to indicate that Parliament could not legislate just any reason to censor – only 'legitimate' reasons would be upheld as per *Lange*. Heerey J noted accordingly that reports of crime, crime fiction and criminology material, or

[129]Ibid.
[130]Ibid.
[131]Ibid 238-239.
[132]Ibid 239.
[133]Ibid.
[134]Ibid 240.
[135]Ibid.
[136]Ibid 241.
[137]Ibid 242.

even publications dealing with committing crime that are satiricial or ironic, could not be restricted by the Board and could be protected by the implied freedom of political communication.[138] However, his Honour said that *The Art of Shoplifting* article was not protected by the implied freedom.

The implied freedom was considered by Heerey J to be a 'broad and generous' freedom that 'cannot be confined to the election period', that 'extends to conduct as well as speech' and is not confined to 'existing parameters of political discourse at any given time'.[139] This is where both Heerey & Sundberg JJ deviated from French J. Heerey J found that *The Art of Shoplifting* was not political communication at all because it did not concern 'political or government matters', advocacy for the repeal of a law, or commentary on the conduct of politicians or their views.[140] His Honour distinguished United States and Canadian case law because 'protection of speech is not conditioned on its subject matter or purpose, or the occasion of its exercise' in those jurisdictions, and consequently none of the leading cases from those jurisdictions (such as *Brandenburg v Ohio)* were seen as applicable. His Honour concluded by noting that 'mere advocacy' or 'abstract teaching of the necessity of propriety of criminal or violent conduct' was not protected because that conduct is not part of the system of representative democracy.[141]

J Coleman v Power

The case of *Coleman* involved a student from Townsville protesting police corruption by handing out pamphlets in public.[142] The student was charged under the *Vagrants, Gaming and Other Offences Act 1931* (Qld) (the ‘Vagrants Act') which made it an offence to use 'any threatening, abusive, or insulting words to any person'.[143] A 4:3 majority (McHugh, Gummow & Hayne JJ, and Kirby J) overturned a conviction for insulting words, arguing that political communication could include insults.

This case led to the *Lange* test being slightly altered. Where it was formerly two-stage, it became a three-stage test. Primarily the second question from *Lange* underwent changes, having been split into a second and third question. The second question focused on whether the purpose of a law and the means of achieving it were legitimate (regarding the constitutional system of 'representative government'). Assuming this could be answered 'no', then the third question asked whether the law was 'reasonably appropriate and adapted' to its legitimate purpose. The primary changes in the new second question were that the test referred only to 'representative' and not 'responsible' government, and now omitted *Australian*

[138]Ibid.
[139]Ibid 243.
[140]Ibid 246 (Heerey J, Sundberg J agreeing at 258).
[141]Ibid.
[142]*Coleman* (n 2) 21.
[143]Ibid.

Constitution s 128. One might expect arguments as to why responsible government and s 128 were no longer important, but the Court provided us with no such reasoning. *Coleman* did provide much of use to implied freedom jurisprudence, nonetheless.

For instance, where the *International Covenant on Civil and Political Rights* ('ICCPR') had been used to interpret legislation, Gleeson CJ (in dissent) argued it had no value, not having been ratified and there being no obligation to follow it (arguing it wouldn't help anyway).[144] His Honour also argued that the law was not political enough to be protected by the implied freedom because 'it was not party political, and it had nothing to do with any laws, or government policy'.[145] This is where Gleeson CJ followed the opinions of Heerey & Sundberg JJ from *Brown v Classification Review Board*, where speech being political *per se* is not enough. Speech will only be protected if it meets a high enough standard – the Court will assess whether the speech is political enough. This entails examining the directness of speech in relation to legislation or government - and even then, it may not be protected.[146] It was on this basis that the legislation was validated by Gleeson CJ.

The majority argued the statements were clearly political. McHugh J said the appellant's words were correctly described as political, and 'it is beside the point that those words were insulting to Constable Power'.[147] His Honour said that insults were just as much a part of political communication as irony, humour and acerbic criticism, and that 'many of the most biting and offensive political insults as witty as they are insulting'.[148] It was also said that 'insults are a legitimate part of the political discussion protected by the Constitution' and an unqualified restriction of insults would be unconstitutional.[149] Gummow & Hayne JJ cited US jurisprudence and stated that while there are restrictable categories of speech – 'the lewd and obscene, the profane, the libelous, and the insulting or "fighting' words"' – if legislation did create restrictions on public speech it should be read as 'narrowly limited'.[150]

While their Honours did not overturn s 7(1)(d), it could not operate to restrict speech merely because someone was insulted, or because the words were calculated to hurt the self-esteem of the hearer.[151] More would be needed than words alone, such as the words being specifically designed and reasonably likely

[144]Ibid 27-29; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14-15.
[145]*Coleman* (n 2) 30.
[146]Ibid.
[147]Ibid 45.
[148]Ibid.
[149]Ibid 54.
[150]Ibid 76.
[151]Ibid 79.

to provoke actual physical retaliation.[152] The only way the *Coleman* provisions could be validated was to read them down to conform to that standard. So, a law that restricts insults or other speech in public would be held to the highest and narrowest standard.

Kirby J said Australia was not only a party to the ICPCR, but also to the first optional protocol that allowed complaints to the UN regarding Australian laws that don't conform to the ICPCR – this meant it had a clear influence in Australian law.[153] His Honour took the same approach as Gummow & Hayne JJ, arguing that in order for the relevant legislation to operate it must be narrowly confined to 'fighting words' (words that are likely to provoke a physical response).[154] His Honour argued 'robust public expression of opinions' was part of the freedom inherent in the Australian system of representative democracy and that attempts to suppress accusations of corruption, even when wrong-headed and insulting, were oppressive and 'ultimately unjustified'.[155] Finally, the content of what was said & published by the appellant would barely be noticed – 'all would pass on' upon hearing or reading it.[156] His Honour so strongly condemned the use of the legislation to suppress speech that he said the only element of insult in this case was the use of police powers to suppress free expression.[157]

In dissent, Callinan J argued the idea the Vagrants Act could burden political communication in any way was farfetched.[158] While insulting or abusive words would 'no doubt generate heat' it would be highly unlikely in his Honour's opinion that they would 'throw light on anything, let alone government or political matters'.[159] Heydon J agreed with this assessment, and said the relevant provisions were legitimate measures that, by restricting insulting words, did not detract from representative democracy.[160]

K Mulholland

In *Mulholland*, a unanimous court rejected an appellant's attempt to have party de-registration provisions ruled invalid.[161] Callinan, Heydon, Gummow & Hayne JJ (a majority) argued that to invoke political communication and apply the *Lange* test, a 'threshold' must be met where some pre-existing common law or statutory right already existed.[162] McHugh J, Gleeson CJ, and Kirby J did not use this standard.

[152]Ibid.
[153]Ibid 92.
[154]Ibid 100.
[155]Ibid 99.
[156]Ibid.
[157]Ibid.
[158]Ibid 113.
[159]Ibid 114.
[160]Ibid 127.
[161]*Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (‘Mulholland’).
[162]Ibid 244 (Gummow & Hayne JJ, Callinan J agreeing at 297-298, Heydon J agreeing at 303).

Kirby J openly rejected it, arguing the threshold test could neuter political communication.[163] Little was said about artwork & expression, although this case was significant for association.

Gleeson CJ agreed with Deane & Toohey JJ from *ACTV* and Gaudron J from *Levy*, noting that a law with the purpose of prohibiting or restricting political communications would be significantly harder to justify than a law that relates to some other subject, particularly when the impact on communication has nothing to do with the communications' political nature.[164] His Honour refused to consider association as it was a mere corollary.[165]

In terms of association, McHugh J followed his view from *Kruger* and *ACTV* that the *Australian Constitution* outright protected it, deriving from the text in ss 7 and 24 in the same way that speech was derived.[166] Ballot papers were characterised by McHugh J as communications on political and government matters.[167] McHugh J distinguished his view from Toohey J and Gaudron J by noting that they both recognised it as an aspect of the implied freedom of political communication.[168] The claim under association failed despite McHugh J having supported an implied freedom of association under ss 7 and 24 of the *Australian Constitution*.[169] However it failed because of the privacy-related claim – not because of association.[170]

Gummow and Hayne JJ supported the corollary view advanced in *Lange*[171]. Again, no reasoning or justification was given to support this argument, and corollaries were noted as giving "no additional life" to the appellant's case.[172]

Kirby J supported a standalone freedom of association for the same reasons behind the establishment of the implied freedom of political communication. That purpose was "that the constitutional system of representative democracy will be attained as envisaged by Ch I".[173] His Honour regarded High Court justices as generally being 'unduly cautious' about association.[174] If the rationale for the implied freedom was settled doctrine a similar rationale also obliged protection of 'political association' under ss 7 and 24

[163]Ibid 276.
[164]Ibid 200.
[165]Ibid 201.
[166]Ibid 225.
[167]Ibid 219.
[168]Ibid 225.
[169]Ibid.
[170]Ibid 225-226.
[171]Ibid 234.
[172]Ibid.
[173]Ibid 278.
[174]Ibid.

of the *Australian Constitution*.[175] His Honour then concluded freedoms of association and participation covered:

> a freedom to participate in federal elections extending to the formation of political parties, community debate about their policies and programmes, the selection of party candidates and the substantially uncontrolled right of association enjoyed by electors to associate with political parties and to communicate about such matters with other electors.[176]

Freedom of association was 'at the very least' supported by s 15 of the *Australian Constitution* which explicitly recognised 'particular political parties', and as a result it was 'impossible to deny an implication of free association to some degree'.[177] Association must be protected in order to ensure that 'political parties' in s 15 could be a practical reality.[178] Callinan J rejected the appellant's submissions relating to a standalone freedom of association, calling it unnecessary and stating that his view was in line with Gummow & Hayne JJ.[179]

Four justices (Gummow, Hayne, Heydon JJ, Callinan J) viewed association as a corollary to political communication with no justification or reasoning given for this conclusion. Two (McHugh, Kirby JJ) viewed it as a standalone freedom implied by the *Australian Constitution*. One declined to comment on association (Gleeson CJ), arguing that if there was a burden on political communication, any other freedoms would also be burdened. This seems to imply that Gleeson CJ viewed association as a corollary, although his Honour did not state as such in this case. The corollary view continued to be asserted in later cases such as *Totani v South Australia*.[180]

L Totani

French CJ referred to restrictions on freedom of association in connection with 'serious criminal activity' as nothing novel or unique.[181] Provisions could lead to imprisonment for five years and were said to be preventative, directed at participation in criminal activities.[182] Previous laws extended to innocent association with proscribed classes of people such as 'reputed thieves, known prostitutes or persons who had been convicted of having no visible lawful means of support'.[183] His Honour found association was

[175]Ibid.
[176]Ibid 277-278.
[177]Ibid 278.
[178]Ibid 277.
[179]Ibid 306.
[180]*South Australia v Totani* (2010) 242 CLR 1. ('Totani').
[181]Ibid 35.
[182]Ibid.
[183]Ibid 31.

only an 'incident' of political communication due to British precedent in the 'historical connection between freedom of association and the right to petition Parliament under s 5 of the *Bill of Rights*'.[184]

Gummow J agreed with French J that association was tied to political communication, but the legislature decided restriction of freedom of association was in the public interest.[185] Certain forms of association between 'close family members' would be allowed unless the prosecution could prove that the association was not reasonable.[186] Heydon J said the *Totani* legislation effect is to 'curtail significantly the freedom of association enjoyed by individuals' and association between individuals is criminalised where it otherwise wouldn't be a crime.[187] His Honour (in dissent) agreed that association was only a corollary.[188]

Three justices (French CJ, Gummow J, Heydon J) saw association as a corollary only. Three did not make any comment on association (Crennan, Kiefel, Bell JJ), and one (Hayne J) referred to "freedom of association" without elaboration. Surprisingly, there is little of value for association in this case. Corollary or not, six justices supported freedom of association in some form although the case was not decided on that basis. For French CJ for instance, association was simply not a relevant issue.[189] His Honour questioned whether association was even burdened, stating ‘the successful attack on validity was put on another and quite distinct basis which has a surer footing in the decisions of this Court’.[190]

Clearly his Honour was hesitant to decide based on freedom of association while its status is still unclear. Judging by the consistent lack of discussion, his Honour’s view regarding relevance seems to have been the common view despite the subject matter. For example, Heydon J excluded freedom of association on the basis that criminal or tortious acts were not protectable.[191] Even if they were, Court orders would still need to restrict communication about politics as well – a high bar, because many of the *Totani* provisions do not relate to communication about politics *per se*. Overall, the Court showed little interest in association. Their Honours largely committed to the corollary view, with little to no justification for it. This continued in *Wainohu*.

M Wainohu

In *Wainohu* French CJ and Kiefel J in a joint judgment referred to the 'implied freedom of political communication and freedom of association’ but did not elaborate, arguing the Act did not concern

[184]Ibid 29.
[185]Ibid 54.
[186]Ibid 57.
[187]Ibid 137.
[188]Ibid 99.
[189]Ibid 29-30.
[190]Ibid 54.
[191]Ibid 99-100.

communication or association.[192] In this 2011 case a challenge to the anti-association section of the *Crimes (Criminal Organisations Control) Act 2012* (NSW) was dismissed.[193] It was argued by Gummow, Hayne, Crennan and Bell JJ that the Act was not directed at political communication or association.[194] This was because the Act allowed exemptions to be made - if the circumstances required, the Court could exempt someone from prohibition on association.[195] The provisions in s 19(7) allow the restriction of control orders so as to avoid unreasonably burdening the freedom of political communication.

The Supreme Court's power to make control orders must be interpreted in conformity with implied freedoms.[196] No provisions for exemptions existed for interim control orders. If an interim control order did burden political communication, Gummow, Hayne, Crennan, and Bell JJ accepted the Commonwealth's argument that limiting activities of criminal organisations and their members was a wlegitimate end. Their Honours argued that an implied freedom of association could not exist on its own to overturn such a law. It could ‘exist only as a corollary', and the standard political communication test applies.[197] No reasoning was given as to why this was the case.

Heydon J dismissed association as even an element of political communication. His Honour argued many authorities had been cited by other Justices, but "none of them supported it".[198] His Honour went on to argue the *Australian Constitution* contained no "general freedom of political communication" at all except for that which is necessary "for the effective operation of the system of representative and responsible government provided for in ss 7, 24, 64 and 128".[199]

Two justices (French CJ, Kiefel J) referred to "freedom of political communication *and freedom of association"* (emphasis added) but did not elaborate. Four justices (Gummow, Hayne, Crennan, Bell JJ) referred to it as a corollary with no justification. Heydon J denied the *Australian Constitution* even really protected political communication, let alone association. The corollary view remained dominant (albeit largely unsupported), but the Court would later admit a divided history on the construction of association.[200]

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[192] *Wainohu v The State of New South Wales* (2011) 243 CLR 181, 220. (‘Wainohu)
[193] Ibid.
[194] Ibid 231.
[195] Ibid.
[196] Ibid.
[197] Ibid 230.
[198] Ibid 251.
[199] Ibid.
[200] *Tajjour v New South Wales* (2014) 254 CLR 508 (‘Tajjour’).

N Monis

Mr. Monis and an alleged accomplice (Amirah Droudis) was said to have written letters between 2007 and 2009 to parents of soldiers that were killed during the occupation of Afghanistan.[201] They were charged under s 417.12 of the *Criminal Code* (Cth) which prohibits 'a postal or similar service' from being used in a way that could be deemed 'offensive'.[202] In this case, the Court delivered an 3:3 opinion, resulting in the previous court's opinion being affirmed, making these judgments unreliable authorities. The Court unanimously agreed that the law burdened political communication and read the 'offensiveness' criterion of the relevant provisions down as having to be 'offensive to public morality ... in the higher ranges of offensiveness'.[203] Division on the matter related to whether the provisions satisfied the second part of the *Lange* test.

French CJ (Heydon J concurring) and Hayne J argued the purpose was to prevent delivery of offensive communications. For French CJ this was illegitimate due to its breadth, and for Hayne J because it served to penalise offending people.[204] On the other hand, Crennan, Kiefel and Bell JJ argued prevention of intrusive, serious offensive communications into private spaces was a legitimate cause.[205]

Hayne J argued being implied did not make political communication any weaker than an explicit protection would be.[206] While the implied freedom was not absolute, that did not mean it allowed restriction of the conduct of minorities, even if the majority found it repugnant.[207] The 'very purpose of the freedom is to permit the expression of unpopular or minority points of view' – that without protection may be censored, an orthodoxy formed, and an oppressive, inflexible mainstream developed.[208] Yet his Honour also stated than non-political communications could justifiably be censored.[209]

O Tajjour

Only Hayne J and Keane J discussed association in *Tajjour*. Hayne J only argued no free standing right of association could be implied from the *Australian Constitution*, that this topic should not be revisited, and that this challenge failed.[210] Keane J cited the statements from Gummow and Hayne JJ in *Mulholland* and comments from *Wainohu* that effectively amounted to a brief dismissal of a frequently discussed

[201] *Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92, 105 ('Monis').
[202] Ibid 105.
[203] Ibid 119-120.
[204] Ibid 133-134, 162.
[205] Ibid 215-216.
[206] Ibid 141.
[207] Ibid.
[208] Ibid 146.
[209] Ibid 145-146.
[210] *Tajjour* (n 200) 567.

concept with no real reasoning at all.[211] The minority varied from viewing association as a corollary, to denying its existence. French CJ found the relevant provisions invalid only based on political communication. His Honour posed the following two questions because of arguments put forward:

> Q2: is there implied into the Commonwealth Constitution a freedom of association independent of the implied freedom of communication on governmental and political matters?"
>
> "Q3: Does s 93X of the *Crimes Act* 1900 (NSW) contravene any implied freedom of association referred to in question 2?[212]

Unfortunately both were ruled "not necessary to answer".[213] His Honour had run through the *Lange-Coleman* test for political communication, found the provisions failed, and argued there was no need to go further.[214] As a result an implied freedom of association was set aside. His Honour argued that any burden on association would also burden political communication, so protecting association outright was unnecessary.[215] His Honour argued the Court had rejected the concept anyway, citing statements from *Wainohu.*[216] Note that his Honour also stated there was a history of divergent views on this matter, indicating it was not settled.[217] Gageler J made a brief mention of association, saying it 'founders at the threshold; there is no foothold in the Constitution for such an implication'.[218]

Three justices (French CJ, Hayne and Keane JJ) viewed association as a corollary, three (Crennan, Kiefel & Bell JJ) did not discuss it, and one (Gageler J) viewed it as non-existent.

P McCloy

In *McCloy*, the majority dismissed a challenge to campaign finance legislation.[219] The Court adopted a European-style proportionality test and modified the test for the implied freedom. The first stage required determining whether freedom was burdened or not. The second stage required ‘compatibility testing’, where the purpose of the law and its provisions were analysed as to their compatibility with the Australian constitutional system. The third stage consisted of assessment of whether the law was reasonably appropriate and adapted, requiring usage of European-style proportionality testing. The plurality argued

[211]Ibid 605-606.
[212]Ibid 556.
[213]Ibid.
[214]Ibid 553-554.
[215]Ibid 554.
[216]Ibid.
[217]Ibid 525.
[218]Ibid 576.
[219]*McCloy* (n 4).

that this would lead to them being ‘more objective’, making their value judgments ‘more explicit’, and avoiding ‘impressionistic judgment’.[220]

While Gageler and Gordon JJ agreed with the end result of the plurality’s judgment, they rejected their usage of proportionality analysis.[221] Gageler had been developing an alternative US-style test since *Tajjour*, based on both elements from *Lange* as well as pre-*Lange* concepts from Mason CJ, McHugh J, and others. His Honour strenuously rejected proportionality, arguing for a test that sets different levels of scrutiny depending on the type of speech, with each level setting different standards.[222]

Q Brown v Tasmania

Brown v Tas was about legislation that prohibited association. An offence was committed where a person entered a business access area within 3 months after being told to leave by a police officer at their discretion – whether any hindrance occurred or not.[223] Each of these offences could attract criminal liability and fines of up to $10,000 or up to four years imprisonment.[224] Returning constituted an offence under s 6(4), and s 11(6) set a three month period in which their presence in any part of the area, regardless of intent or possibility of damage or disruption, could immediately constitute an offence.[225] The *Protesters Act* applied to all protesters and deterred them from associating within vast undefined areas, including access points to those areas, under threat of committing an offense for associating.[226] So if there was a protest ongoing on or near a business premises, a police officer could arrive on the scene and tell people to leave, with no regard for context or location. Refusal to leave could mean serious criminal charges. Despite all this association was not mentioned once.

The purpose of this law was generally said to be controversial but legitimate, but the law was overturned for being too severe, rendering political communication meaningless.[227] Kiefel CJ, Bell and Keane JJ found some provisions were not relatable to the purpose of the Act, and the rest were far too broad to be called reasonably necessary.[228] Consider if a police officer directed protesters to leave the Lapoinya Forest. They may not return within 4 days, to an 89-hectare area around the township of Lapoinya. Lawful protests could have been rendered illegal and could have had an effect that extended far beyond the

[220]Ibid 200-201, 216-217.
[221]Ibid 222, 234-238, 276, 281-282.
[222]Ibid 238.
[223]*Workplaces (Protection from Protesters) Act* 2014 (Tas) ss 8, 11 (‘WPPA Act’).
[224]*Brown v Tasmania* (2017) 261 CLR 328, 352 (‘Brown v Tas’).
[225]Ibid 371.
[226]Ibid 372.
[227]Ibid 363, 414, 415.
[228]Specifically, ss 8(1)(b), 11(7) and 11(8) of the *WPPA Act* (n 223).

intended purpose of the Act itself. The general public could have been deterred from any association at all – and charged for any participation.

Their Honours argued availability of alternative methods of communication did not make the implied freedom intact.[229] What was important was not that that people could still protest somehow – they must be able to do so effectively. In this case, broadcasting and communication of images that show damage to the natural environment were necessary to send an effective message. Without these images, the majority argued the protests would have been difficult to communicate.[230] None of this was a problem for the minority (Gordon J, Edelman J) who argued the provisions were valid, because they constituted already-illegal trespass.[231]

There was a divide in this case over proportionality. Both Tasmania and Queensland (intervening) argued the use of proportionality should be reconsidered since *McCloy* provided for other ways to test legislation.[232] Queensland suggested a determination of if legislation "went too far".[233] Kiefel CJ, Bell & Keane JJ, and Nettle J favoured proportionality.[234] In dissent, Edelman J did not find there was a burden on political communication at all and so his view on proportionality was not expressed. Gageler J and Gordon J were critical of proportionality to varying extents and did not favour its use. Gageler J said that the first stage was acceptable if kept narrow, but the second stage too prescriptive and mechanical, and the third stage too open-ended and requiring of value judgments.[235] Gordon J argued that the necessity criterion was simply not useful and was opposed to the balancing criterion because it was said to be too easy for the court to go beyond its role and undermine the legislature.[236] Gordon J was concerned about the use of balancing because it has been suggested that in German law it has become 'the most decisive' stage and if this were to occur in Australia it would be a fundamental shift in political freedom jurisprudence (which her Honour was opposed to).[237]

Gageler J argued proportionality inappropriate for an implied freedom, and instead developed a US-style test he referred to as 'calibration', citing an earlier decision in *Tajjour*.[238] This involved justification, determined by considering the intensity and nature of the burden on speech, and applying the appropriate

[229]*Brown v Tas* (n 224) 367.
[230]Ibid 367, 387, 413.
[231]Ibid 463, 505.
[232]Ibid 368-370.
[233]Ibid.
[234]Ibid 368-370, 417.
[235]Ibid 367-377.
[236]Ibid 464, 466-467.
[237]Ibid 467.
[238]Ibid 376-377.

level of scrutiny.[239] The levels range from a test similar to rational basis review, to ‘close scrutiny’ which was almost identical to US strict scrutiny. The *Brown v Tas* provisions were subject to close scrutiny, requiring an extraordinary justification, and could not restrict the implied freedom more than absolutely necessary.[240] This was because provisions were targeted at protesting, and also because they were engaged in viewpoint-discrimination against environmentalists.[241] His Honour overturned the provisions on this basis.

While *Brown v Tas* did provide some assistance doctrinally (particularly regarding testing), this case somewhat mystifyingly shed no light on the constitutional status of association at all. This is unusual given the centrality of association to the case and seems to reflect the Court simply being unwilling to change the status quo.

R Chief of the Defence Force v Gaynor

References to ‘representative democracy’ returned in the Federal Court.[242] The Federal Court accepted Gageler J's rejection of proportionality, and use of a different test - although did not choose to use it themselves.[243] Worryingly, their Honours considered valid the restriction of speech based on its ‘tone and attributes’.[244] What were they referring to, exactly? Their Honours said 'is not so much the subject matter of the communication' in question, but that Major Gaynor was not exercising the right etiquette.[245] If his 'tone and attributes' were effusive and polite, his speech would apparently be protected. [246] Free speech was balanced here against the public relations of the military, who did not want to be seen as "extreme" as the Court described the respondent.[247] Arguably this judgment flies in the face of *Coleman*, where the majority decisively protected insulting and offensive speech. Furthermore, the Federal Court engaged in the type of majoritarian, mainstream-only views that were advanced in *Brown v CRB* by calling the respondent 'extreme' and allowing restriction of free speech.

There was another problem with the Court's treatment of the respondent's speech. The Court made note of the respondent's comments about 'homosexual people', arguments that military members should not march in the Sydney Mardi Gras in uniform, and criticism of Islam as part of a 'culture of violence'.[248]

[239]Ibid 390.
[240]Ibid.
[241]Ibid 390-391.
[242]*Chief of the Defence Force v Gaynor* [2017] FCAFC 41, 322. ('Gaynor').
[243]Ibid 319.
[244]Ibid 324.
[245]Ibid.
[246]Ibid.
[247]Ibid.
[248]Ibid 302.

No mention was made of the 'tone and attributes' of these comments. One particular social media exchange was earlier described as 'intemperate, vitriolic, and personally offensive'.[249] The above noted comments were not really examined, but simply summarised. No real time was dedicated as to how the 'tone and attributes' were relevant, or what even was the problem. What exactly are we to examine when 'tone' is the consideration? Perhaps we shall need to measure exactly how offended people are and include that in our metric for whether censorship of political speech is acceptable.

S Clubb v Edwards

In *Clubb*, the High Court unanimously dismissed two challenges against State legislation that prohibited anti-abortion communication and protests within a certain range of abortion clinics.[250] Clubb was arrested for speaking to a couple at a Melbourne abortion clinic and giving them a leaflet, while Preston protested on a street corner near a clinic in Hobart. There was yet again no mention of association in this case. It appears by this point that the High Court, since predicted after *Tajjour*, simply will not discuss association despite its divided history. Nevertheless, there is jurisprudence of value in *Clubb*.

While the decision was unanimous, reasoning (and tests) varied significantly. Kiefel CJ, Bell and Keane JJ in a joint judgment affirmed the three-step test including proportionality analysis,[251] as did Nettle J.[252] Edelman J was critical but consistent with the plurality, Gordon J expressed reservations about proportionality, and Gageler J yet again rejected it outright.[253] Gordon J argued that structured proportionality was a valid tool for analysis but not a constitutional doctrine, inappropriate for methodology for common law jurisdictions or Australian free speech jurisprudence given its implicit nature.[254] Gageler J's judgment however was the most informative to the methodology proposed in this thesis.

Justice Gageler followed his approach in *Brown v Tas*, openly rejecting proportionality testing. His Honour considered the nature and intensity of the burden on political communication as requiring close scrutiny due to several factors. Firstly, the provisions restricted protests: the 'oldest and most orthodox form of public expression of political dissent in a *representative democracy*' (emphasis added).[255]

[249]Ibid.
[250]*Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448. ('Clubb').
[251]Ibid 462.
[252]Ibid 493.
[253]Ibid 484, 529-530, 533.
[254]Ibid 530-531.
[255]Ibid 484. Worth noting here is that Gageler J was not the only justice in *Clubb* to refer to a "representative democracy" in the context of discussing the test for the implied freedom of political communication. Edelman J at 497 also referred to representative democracy in this same context.

Secondly, the provisions constituted viewpoint discrimination (a feature in common with *Brown v Tas*) because they targeted those opposed to abortion.[256] Thirdly, they were content-specific because they were limited to protests on the subject of abortion.[257] While one could argue that it was viewpoint-neutral in operation, his Honour argued that practically it was discriminatory due to the disproportionate effect the prohibition had on anti-abortionists.[258] All of these factors meant that the law required close scrutiny, meaning the legislation must be justified by a compelling government interest and be no more restrictive than reasonably necessary.[259]

The government interest was said to be in protecting the privacy and dignity of women engaging lawfully provided abortion services and their ability to access the premises – his Honour accepted this as unquestionably important enough to be characterised as compelling.[260] A significant part of this reasoning relied on Canadian and SCOTUS jurisprudence. Two Canadian courts accepted the same purpose as 'pressing and substantial',[261] and the SCOTUS similarly recognised protection of a woman's freedom to seek pregnancy-related services.[262] His Honour stated the 150m zone in the Australian provisions was unjustified and excessive, going far beyond the size of the zones in Canada and the United States.[263] However, a finding of fact showed that the protests could still be held in places where protesters could significantly impact those entering access zones to abortion clinics, and could still have their message and ideas communicated in a meaningful, authentic way.[264] It was on this basis that the legislation survived close scrutiny and was upheld.

T Other Cases

In the case of *Hogan v Hinch* ('Hinch'), French CJ stated the 'broad' range of matters able to be characterised as 'governmental and political' include 'social and economic features' because they were matters that potentially affect governance.[265] The plurality in this case argued laws generally should have a 'direct' rather than 'incidental' burden' on communication.[266] French CJ's view is broad enough that in *Attorney-General for South-Australia v Corporation of the City of Adelaide*, religious preaching could constitute 'political communication' in an indirect way because the 'class of communication protected by

[256]Ibid 486.
[257]Ibid 484-485.
[258]Ibid 485.
[259]Ibid 490.
[260]Ibid.
[261]Ibid; *R v Lewis* (1996) 139 DLR (4th) 480; *R v Spratt* (2008) 298 DLR (4th) 317.
[262]*Clubb* (n 250) 490.
[263]Ibid 493.
[264]Ibid.
[265]*Hogan v Hinch* (2011) 243 CLR 506, 543-544.
[266]Ibid 555-556.

the implied freedom in practical terms is wide'.[267] It was said that 'preaching, canvassing, haranguing and the distribution of literature' were 'political' but the provisions restricting them by requiring permits were ultimately upheld.[268] The court effectively recognised 'prior restraint' provisions that required pre-approval of expression by the government, despite the implied freedom.[269]

That distinction between direct and incidental burdens on free speech was maintained following *Hinch*. A law that imposed an incidental burden on speech is a lower standard that would more easily pass the *Lange* test, the Court said in *Wotton v Queensland*.[270] In *Wotton* the Court discussed provisions relating to restrictions on journalists obtaining statements from prisoners. These provisions were acceptable because they did not restrict a prisoner from making unsolicited statements and sending them to journalists.[271] Political communication was not burdened because "s 132(1)(a) does not create practical impediments to a prisoner making an *oral or written communication*".

In another case, Keane J noted that ss 7, 24, 64, and 28 of the *Australian Constitution* protected political communication 'in order to ensure the political sovereignty of the people of the Commonwealth' as they were charged with making decisions about who should govern and if the *Australian Constitution* itself should be altered.[272] In *Unions NSW 1*, a unanimous High Court overturned provisions restricting political campaign contributions on the basis of these provisions violating the freedom of political communication. In a joint judgment, the Court said political communication could not be confined to party politics because the judgment of electors turns on 'free public discussion, often in the media, *of the views of all those interested*' (emphasis added).[273] To that point their Honours cited *Buckley v Valeo*,[274] where the SCOTUS argued there was a need to protection the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people'.[275]

As a result, campaign funding could also be protected by political communication as it was said that restricting funding restricts a person's ability to effectively communicate.[276] In *Unions NSW 1* Keane J also noted:

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[267] *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43. ('SA v Adelaide').
[268] Ibid.
[269] Ibid; Anthony Gray, 'The 1st Amendment' (n 14) 146.
[270] *Wotton v Queensland* (2012) 246 CLR 1, 16 ('Wotton').
[271] Ibid 27.
[272] *Unions NSW v New South Wales* (2013) 252 CLR 530, 570-571 ('Unions NSW 1').
[273] Ibid 551 (French CJ, Hayne, Crennan, Kiefel & Bell JJ).
[274] *Buckley v Valeo*, 424 US 1 (1976) ('Valeo').
[275] *Unions NSW 1* (n 272) 551; *Valeo* (n 274) 14.
[276] *Unions NSW 1* (n 272) 554.

> the freedom of political communication ... is not an adjunct of an individual's right to vote, but an assurance that the people of the Commonwealth are to be denied no information which might bear on the political choices required of them'.[277]

This referred to the 'indispensable entitlement of the people of the Commonwealth to free access to information' which might be relevant to their political sovereignty. His Honour clearly argued here that free speech was *not* restricted to voting, but limits censorship of anything relevant to their social, political and economic interests as argued by French CJ in *Hinch*.

U Conclusion

The state of free speech jurisprudence in Australia is divisive and somewhat dysfunctional. After several decades worth of case law, we know little more now than we did immediately post-*ACTV*. The High Court has refused to develop or explore the boundaries of free speech and refuse to consider the issue of association in any depth at all with an unsubstantiated, theory-less corollary view prevailing. The efficacy of this view and alternatives to it will be discussed in Chapter Five. When considering developments since ACTV, we have what at face value appears to be a body of case law, but the cohesiveness of that case law is debatable with the rise of European-style proportionality in Australian free speech jurisprudence, using a strictly case-by-case system of decision-making.

This has enabled the Court to avoid deciding on the scope of the implied freedom entirely, never having to address anything beyond the facts of the case immediately before them while simultaneously distinguishing prior cases in their proportionality analysis. As a result, lower Courts deciding on matters of literary and artistic expression have found little guidance, making decisions that will be revealed in Chapter Six as contributing to an ineffective, impractical, and unconstitutional system. None of this has gone unnoticed, of course, and both Australian and United States scholars have criticized the state of Australian free speech law.

[277]Ibid 580.

CHAPTER II LITERATURE REVIEW

Australian free speech scholarship has been driven by two questions. Firstly, should implications be drawn from the *Australian Constitution*, and should the implied freedom be overturned? Secondly, what is the scope of the implied freedom's protections? This is a small, but productive, field. Criticism of implications comprises a significant part of its scholarship, with Nicholas Aroney and Dan Meagher being two of the leading critics.

On the other hand, Adrienne Stone has written extensively advocating expansion of the scope of the implied freedom. Anthony Gray, adding to Stone's work, is one of the only scholars that has devoted any real time to constitutional freedom of association. Outside these 'big names' in this area, there is only brief analysis of the implied freedom in papers devoted to other subjects.

There is a significant body of international scholarship, particularly from the United States, that shaped Australian scholarship. A comprehensive review of United States free speech scholarship is beyond the scope of this work, but a limited review thereof will be included.[278] There is a limited body of scholarship relating directly or indirectly to freedom of association, and there is little to no discussion of artwork constitutionally. As much as is possible, this review will attempt to focus on literature relating to those areas, and beyond that, scholarship relating directly to the implied freedom of communication. Note that this is also deliberately a descriptive chapter, serving to provide a review of the state of Australian free speech scholarship. Theoretical critique will occur primarily in subsequent chapters, with application occurring in chapters 5 and 6.

A Critics: Abolitionists

The primary critics of the implied freedom are Nicholas Aroney and Dan Meagher. Theoretically speaking, they are both primarily adherents of constitutional legalism, following the age-old Australian constitutional focus on 'text and structure' advocating limitation (or even abolition) of speech protections. Although others have criticised the implied freedom to varying extents, Aroney and Meagher's work is both consistent and well known.[279] They differ on whether to abolish or to simply limit free speech. We will proceed by examining Aroney's abolitionism.

[278]For one such review, see Anthony Gray, *Freedom of Speech in the Western World: Comparison and Critique* (Lexington Books, 2019).

[279]For instance, see Tom Campbell, 'Democracy, Human Rights, and Positive Law' (1994) 16 *Sydney Law Review* 195; Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166; Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133; Jeffrey Goldsworthy, 'The High Court, Implied Rights, and Constitutional Change' (1995) 39 *Quadrant* 46; Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23 *Monash University Law Review* 362;

Aroney's contributions have been primarily concerned with the validity of constitutional implications. That is why even Aroney's early 1994 paper was described as part of a 'wider, growing tendency in common law jurisdictions to question the idea of Parliamentary sovereignty and to 'discover' or 'devise' constitutional limits on legislative and executive powers'.[280] One of Aroney's primary contributions lies in his strict constitutional textualism. Aroney is disinterested in a 'constitutionally entrenched' guarantee or 'extra-constitutional values' being a part of Australian constitutional discourse.[281] This view means that the implied freedom itself is *verboten.*

This is because application of constitutional guarantees to contested cases requires something 'properly grounded in the text and structure of the Constitution'.[282] Aroney's view is that the implied freedom does not have 'sufficient conceptual resources' to be supported, as he argued that representative democracy and popular sovereignty are not constitutional themselves.[283] Dan Meagher also argued that free speech could not be supported by the *Australian Constitution*. Meagher said the Meiklejohnian concept of 'political communication' - which protects literature, artwork, and academia – could not be supported by the *Australian Constitution,* or by the reasoning in *Lange*.[284]

Aroney rejected the Brennan Court's more restrictive *Lange* decision that protected only communications that could influence federal voting choices. [285] Aroney objected to judicial activism and ethical evaluations, and what he called an undemocratic imposition of rights 'without the direct sanction of the people'.[286] Aroney continued to argue post-*Coleman* that there was no constitutional basis for the implied freedom, calling it a 'third-order implication', and maintaining representative democracy and popular sovereignty themselves were unconstitutional.[287]

Aroney's view persisted even while admitting that the Court continued to refer to representative democracy post-*Lange*. [288] Aroney has created a body of constitutional textualist literature that remains a counterpoint to civil rights protections. In his own words, he is focused entirely on 'the question of

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Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24.

[280]Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 250.

[281]Ibid; Nicholas Aroney, 'Reasonable Disagreement, Democracy, And the Judicial Safeguards of Federalism' (2008) 27(1) *The University of Queensland Law Journal* 129 ('Reasonable Disagreement').

[282]Nicholas Aroney, 'Towards the Best Explanation of the Constitution: Text, Structure, History and Principle in Roach v Electoral Commissioner' (2011) 30 *The University of Queensland Law Journal* 145, 157 (Towards the Best').

[283]Ibid.

[284]Dan Meagher, 'What is 'Political Communication'? The Rational and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438, 465 ('What is 'Political Communication'?').

[285]Aroney, 'Towards the Best' (n 282) 157.

[286]Nicholas Aroney, 'Representative Democracy Eclipsed?' (1996) 19 *The University of Queensland Law Journal* 75, 77-78.

[287]Aroney (n 281) 134.

[288]Ibid 135.

constitutional design' and 'objections to judicially-enforced bills of rights'.[289] He is not concerned with developments of the implied freedom as he would rather see it abolished entirely. Aroney's view continues to be developed by him and others.[290]

B Minimalism

Dan Meagher's view is that of minimalism - a limited interpretation of *Lange* and the implied freedom cases – with some caveats.[291] While the 'logical conclusion' of political communication is that "every communicative act could be 'political'", Meagher denied this should be accepted by the Court as that would lead to a comprehensive freedom of communication.[292] He opposes that Meiklejohnian concept, focusing on 'text and structure'. Meagher argued the implied freedom had a quite limited purpose, supported by textual origins that require it to be quite limited, and stating that *Lange* essentially supports this view.[293] Meagher recognised if 'political communication' is too narrow, it could undermine the purpose of the implied freedom. This led to his 'likely audience' test, keeping the 'political' component but defining what is 'political':

> if the subject matter of the communication is such that it may reasonably be relevant to the federal voting choices of its likely audience[294]

Meagher designed this test to reflect "the *reality* of political communication, not what it ought to be in the eyes of the politically enlightened or 'high-minded parliamentarian'".[295] Meagher's proposed reform attempted to fix the problem of free speech disproportionately benefiting those with political and economic power, while avoiding developing a more general freedom of speech. Meagher agreed that broadcasters, members of parliament, and newspaper publishers should not be the only ones benefiting.

For instance, Meagher's test does not more easily deem communication to be political because it was delivered in a mainstream format. It does not discriminate between communication in a street leaflet or the biggest newspaper in Australia. That is an objective standard that is achievable, and for an Australian

[289]Ibid 143.
[290]Notably James Allan continues to carry the torch of strict literalism and abolition of implied rights. See James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245; James Allan, 'Implied Rights and Federalism: Inventing Intentions while Ignoring Them' (2009) 34 *University of Western Australia Law Review* 228; James Allan, 'Paying for the Comfort of Dogma' (2003) 25 *Sydney Law Review* 63. For Allan's broader criticisms of human rights protections, see James Allan, 'You Don't Always Get What You Pay For: No Bill of Rights for Australia' (2010) 24 *New Zealand Universities Law Review* 179; James Allan 'Not In for a Pound – In for a Penny? Must a Majoritarian Democrat Treat All Constitutional Judicial Review as Equally Egregious?' (2015) 21 *King's Law Journal* 233.
[291]Meagher, 'What is 'Political Communication'?' (n 284) 462.
[292]Ibid 465.
[293]Ibid.
[294]Ibid 467.
[295]Ibid 468.

conservative approach to free speech reform, quite reasonable. While cases like *Coleman v Power* helped remedy these issues, they are not solved without protection of the primary means of political communication of the ordinary person – artwork and literature. Meagher did not avoid discussing this issue, either.

Meagher considered expressive works in the scope of his likely audience test, considering the article from *Brown v CRB* ('The Art of Shoplifting'), and the song from *Hanson* ('Back Door Man'). Meagher seemed noncommittal as to whether 'The Art of Shoplifting' would be protected, saying a 'decent argument could be made' for its relevance to voting choices of its likely audience.[296] Particularly when discussions about the nature and benefits of capitalism are quite common on university campuses. Meagher's stance on *Hanson* was clear, arguing that his test easily dealt with *Hanson* and would overturn that decision. Because the radio stations 'Back Door Man' were played on (like Triple J) were a primary source of political information and discussion by listeners, this constituted political communication in the 'classic' sense.[297] To deny Pauline Pantsdown's song constitutional protection 'would betray the essence of the implied freedom and the *reality* of political discourse'.[298]

In other cases, Meagher argued an employer's racist insults to an employee would not constitute political communication because no connection can be made between subject matter and federal voting choices of its likely audience.[299] An employer insulting an employee in the work place made this a private commercial environment. This was not another *Coleman*, Meagher argued; this was simply the boss berating an employee in a private environment. Meagher did not find Nazi polemics relevant to federal election choices of Nazis. While Meagher did not find Nazi polemics directed at other Nazis protectable, hate speech could be if it were in relation to a specifically Australian political context.[300] Hate speech alone does not survive the likely audience test, but can when it is relevant to the electoral choices of its likely audience.

Meagher's test was a significant development in critical scholarship, attempting to reconcile inconsistencies in the implied freedom's application with a textualist approach to the *Australian Constitution*. Meagher argued the High Court should not interpret *Lange*'s 'federal voting choices' nexus as requiring a narrow interpretation of what constitutes freedom of speech.[301] Meagher argued the scope

[296]Ibid 469.
[297]Ibid.
[298]Ibid.
[299]Ibid 470.
[300]Ibid.
[301]Dan Meagher, 'Is There a Common Law 'Right' To Freedom of Speech?' (2019) 43(1) *Melbourne University Law Review* 269, 281 ('Common Law Right').

of the implied freedom is essentially unknown, and the High Court has yet to give us any critical explanation of it.[302]

Meagher has also criticised proportionality due to separation of powers concerns, and argued judges cannot effectively evaluate validity of legislative policy and purpose even if that didn't require violating separation of powers.[303] Assuming they actually had the time, expertise, or resources to do so, which Meagher doubted.[304] Furthermore, Meagher argued parliaments and their counsel could not remedy rights issues in legislation if the scope were determined by proportionality, because it is so case-by-case that no body of precedents could develop. Legislation can be difficult with civil rights in mind when there is no underlying theory or scope.

Aroney and Meagher are the leading conservative, textualist voices in Australian free speech jurisprudence. Even as a textualist, Meagher's view is that the implied freedom *should* be developed, in a limited direction. At the most minimal extent that is reasonable, he argued that artwork must be protected. As a critic, Meagher is critical of both proportionality as well as the anti-theoretical approach that dominates implied freedom jurisprudence.

For either Aroney or Meagher, the status quo for the implied freedom is not satisfactory. For Aroney, the implied freedom itself lacks justification. For Meagher, the implied freedom is justified, but lacks a theoretical basis and a recognisable scope – it requires significant reform and development to become workable and useful. In either of the leading textualists' views, the status quo cannot stand. Even for those who embrace the implied freedom a similar consensus exists – significant change must occur.

C Defence & Development

Adrienne Stone has developed alternative models for reform, while Anthony Gray has created a body of scholarship on freedom of association. Stone's work also provides some rare commentary on the place of artwork in the *Australian Constitution*. Stone argued while implied freedom cases in *ACTV* and *Nationwide News* were regarded as 'akin to a revolution', that did not work out over time.[305] Since *Lange* the boundaries of the implied freedom and its scope remain vague, a conservative approach that had only narrowed it over time.[306] It is no surprise then, that when *Coleman* was decided, despite it contributing to our knowledge of the scope of the implied freedom, it contributed absolutely nothing to our

[302]Ibid 287.
[303]Ibid 297.
[304]Ibid.
[305]Adrienne Stone, ''Insult and Emotion, Calumny and Invective': Twenty Years of Freedom of Political Communication' (2011) 30(1) *University of Queensland Law Journal* 79 ('Insult and Emotion').
[306]Stone, 'The Nature of the Freedom of Political Communication' (n 105) 378.

understanding of the theory of speech or values that surely must be the basis of the freedom in the first place.[307]

Those who advocate for development of the implied freedom appear to be supportive of 'living tree' interpretation, a method advocated particularly by Anthony Gray. The High Court has also been criticised by Gray and Stone for lack of justification for their decisions, particularly those textualist justices who appear to expect their statements to be taken at face value.[308] Gray has also argued that abandonment of democracy in favour of 'representative government' has led to consequences for the electoral system. Following the Court's logic in *ACTV*, he argued that ss 7 and 24 of the *Australian Constitution* create a representative democracy, so fairness and equality must be enshrined in electoral mechanics.[309] If malapportionment of votes could damage the freedom or fairness of an election, that means the democratic values enshrined in the *Australian Constitution* by way of ss 7 and 24 are also damaged. The freedom and fairness of elections however see less protections if the *Australian Constitution* protects only 'government'.

Under Gray's living tree approach, the common modern conception of democracy generally requires universal suffrage and does not lend itself well to malapportionment.[310] If the *Australian Constitution* sets up a democracy, freedom of association in some form should be protected. Dawson J argued that the *Australian Constitution* didn't mandate any particular model, only required the government to be 'representative', and that any number of systems could be 'representative'.[311] Thus His Honour argued voter equality, measures against malapportionment, or even universal suffrage were not requirements of the *Australian Constitution*. Universal suffrage did not exist at federation, and neither did women have the right to vote. The logical conclusion of Dawson J's view then must be that a 'representative government' could constitutionally deny women the right to vote in the present day. Obviously, the approach of scholars like Gray who advocate for progressive, living-tree interpretation does not support such a view. They generally reject this sort of literalism, and argue for more comprehensive, standalone freedoms, and so it is these positions we now turn to.

[307] Ibid 80.
[308] Anthony Gray, 'Freedom of Association in the *Australian Constitution* and the Crime of Consorting' (2013) 32(2) *The University of Tasmania Law Review* 149, 160 ('Freedom of Association and the Crime of Consorting'); Stone, 'Insult and Emotion' (n 305) 80.
[309] Gray,
[310] Ibid 564.
[311] Ibid.

D Advocacy of Association

Gray has advocated a departure from the 'corollary' freedom of association towards a standalone freedom. Other scholars have touched on association to lesser extents. Mirko Bagaric assessed freedom of association in *Tajjour* as an ambitious argument that ultimately led nowhere.[312] Mitchell Landrigan wrote about anti-protest laws surrounding abortion clinics, albeit focusing primarily on issues of political communication generally.[313] Adrian Ricketts has criticised the laws that have been passed that marginalise freedom of association, arguing that a focus on communication alone makes the implied freedom deficient.[314]

Geoffrey Milani and Elizabeth Handsley also advocated for a standalone freedom of association.[315] However, it is a 'freedom of political association' since they argue existing jurisprudence such as *Lange* can support a standalone model for association with very minimal adjustments.[316] Association would only be protected in their model 'provided the activity serves a constitutional purpose'.[317] This is a minimalistic and limited model by design, tailored only to finding a foothold for a standalone protection of association.

Gray moved away from 'politicalness' after increasingly considering US jurisprudence, pushing for adoption of a more general 'freedom of association'.[318] Arguing the 'political' limitation was a misguided decision, if the High Court had considered the difficulties of discerning the 'political', they may not have adopted that standard (which even Meiklejohn abandoned).[319] What is 'political' is often just a matter of what politicians of the day say it is via their platforms, policies or judicial appointments, meaning that formulation privileges those with political power and not the sovereign people the implied freedom was designed to protect.[320] Likewise, Dr. Murray Wesson argued that there was no reason why freedom of association should be simply a corollary and not derived directly from the *Australian Constitution*.[321]

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[312]Mirko Bagaric, 'The High Court on crime in 2014: Outcomes and jurisprudence' (2015) 39 *Criminal Law Journal* 7, 11-12.
[313]Mitchell Landrigan, 'Protests Outside Abortion Clinics, Constitutionally protected speech?' (2016) 41(1) *Alternative Law Journal* 8.
[314]Adrian Ricketts, 'Freedom From Political Communication, The rhetoric behind anti-protest laws' (2015) 40(4) *Alternative Law Journal* 234.
[315]Geoffrey Milani and Elizabeth Handsley, 'Finding the Foothold: Freedom of Political Association in the *Australian Constitution*' (2019) 47(2) *Federal Law Review* 306.
[316]Ibid.
[317]Ibid 323.
[318]Gray, 'The 1st Amendment' (n 14).
[319]Ibid 160.
[320]Ibid 161.
[321]Murray Wesson, '*Tajjour v New South Wales*, Freedom of Association, And the High Court's Uneven Embrace of Proportionality Review' (2015) 40 *The University of Western Australia Law Review* 102, 104 ('Tajjour v New South Wales').

State-level laws abrogating freedom of association have been passed in a variety of ways.[322] The corollary view is so narrow that it cannot protect against these laws as they rarely target communication itself, making it an inadequate protection.[323] Gray argued in response that either the High Court should interpret 'political communication' broadly enough to directly protect association, or association should be recognised as a standalone protection.[324] Wesson argued it is required because the people cannot 'directly choose' their representatives if they are denied the ability to form political associations and seek political power collectively.[325] Gray has also ensured that comparative free speech law remains in focus, having published entire books focusing on different aspects of comparative free speech law.[326]

The status of proportionality among proponents of the implied freedom is divided. Wesson advocated for proportionality but also for the adoption of judicial deference to other branches of government if the Court continues to use structured proportionality. He has noted the precarious and controversial position of proportionality in the High Court where the test used differs between Justices. Examples include a US-style categorical test (Gageler J), the traditional *Lange* test (Gordon J), or a modified proportionality similar to what Wesson advocates.[327] Wesson argued that instead of a non-doctrinal deference to the legislature that occurs with application of proportionality, an explicit system of deference should be adopted in its place.[328] This should be necessary if balancing occurs, because without according weight to the legislature's moral determinations, the High Court 'would collapse into an exercise in primary decision-making' and 'judicial imperialism'.[329]

E Reformers & new models

Adrienne Stone is the other key proponent of the implied freedom, advocating for its development and expansion for protection of democracy. She has argued that a freedom of speech that primarily protects institutions would not be 'compatible with the freedom's basic justification'.[330] Stone has noted a worrying trend in the Court consistently narrowing the implied freedom's scope. Stone has consistently

[322]For Gray's analysis of this, see papers such as Gray, 'Freedom of Association and the Crime of Consorting' (n 308), or Anthony Gray, 'Australian 'Bikie' Laws in the Absence of an Express Bill of Rights' (2009) 4(4) *Journal of International Commercial Law and Technology* 274, 283 ('Bikie Laws').
[323]Gray, 'The 1st Amendment' (n 14) 165.
[324]Ibid.
[325]Wesson, 'Tajjour v New South Wales' (n 321), 104.
[326]Anthony Gray, *Freedom of Speech in Practice: Controversial Applications of Law and Theory* (Lexington Books, 2019); Gray, 'Freedom of Speech in the Western World: Comparison and Critique' (n 264).
[327]Murray Wesson, 'Case Note, *Unions NSW v New South Wales [No 2]*: Unresolved issues for the implied freedom of political communication' (2019) 23(1) *Media and Arts Law Review* 1, 7 ('Case Note Unions NSW').
[328]Murray Wesson, 'Crafting a Concept of Deference for the Implied Freedom of Political Communication' (2016) 27(2) *Public Law Review* 101 ('Concept of Deference').
[329]Ibid, 112-13.
[330]Stone, 'The Nature of the Freedom of Political Communication' (n 119) 378.

dismantled the Court's narrowing decisions, pointing out the influence anti-capitalist critique in *Brown v CRB* can have on voters, the power of environmentalist activism in *Levy*, or the quite obvious relevance of criticising standing members of parliament in *Hanson*.[331]

Stone proposed a categorical approach with four tiers of political communication. The first is 'explicitly political' - communication that is 'substantively *about* government'.[332] This drew from Robert Bork. This category would need to extend to discussion of the conduct of courts, but also to discussion and criticism of members of Parliament, in contrast to decisions failing to protect these areas.[333]

Because the implied freedom would not cover issues of speculated or near-future importance (such as changing the Australian flag, or introduction of a national military draft), the second category involves 'potential subjects of government action'.[334] The views of voters do not simply points of light that come into existence once the legislature introduces a bill.[335] Anything that could become a matter of law, policy, or government action should be protectable speech in Australia. The third category involves 'communication that influences attitudes towards public issues.[336] This includes speech involving religion, philosophy, history, science, sociology, economics, and other areas. Anything that can affect a person's attitude towards public policy such as the censored material in *Brown v CRB* should be protectable. The final category is expressive materials such as artwork, literature, education, science and philosophy. These are all 'communication that develops qualities desirable in a voter' because these are all forms of speech that enable voters to exercise political power.[337]

A variety of scholars from different viewpoints have now accepted that the 'political' criterion may need to be abolished due to its impracticality. Consider *Brown v CRB*, where the Court was able to admit that the communication was in fact political by any common sense of the word, but still couldn't be deemed political in the legal sense.[338] The historical focus on 'text and structure' serves to limit it to the bare minimum necessary to protect electoral institutions.[339] This is why she has characterised it as an 'institutional' protection. A protection of speech not concerned with protecting speech, but the political

[331]Ibid 383.
[332]Ibid 384.
[333]Ibid.
[334]Ibid.
[335]Ibid 385.
[336]Ibid 386.
[337]Ibid 387.
[338]*Brown v CRB* (n 124) 238.
[339]Stone, 'Insult and Emotion' (n 305) 90.

institutions of Australian society. This methodology, combined with the lack of transparency in arguments, and the failure to develop a consistent doctrine has led to significant problems.

The *Lange* method means that the Court relies on concepts that are not stated or revealed in the reasoning of the cases.[340] This leads to an 'under-theorised' body of law that is frail and poorly understood. The legislature cannot make effective choices based on Court decisions, and the executive may have trouble enforcing them. If the police do not know what exactly is protected, how are they to avoid another *Coleman*? Stone has also argued the Court's *Lange* methodology led to a situation where courts were not revealing the basis of their decisions. This makes developing the law unpredictable as the scope and theoretical basis of many decisions is unclear. As a result, there is no resource or precedent against which to consider further developments of the law.[341] The implied freedom is subject to mistakes, unintended consequences, and apparently 'out-of-nowhere' decisions. In virtually all corners, Australian free speech scholars argue that the Court has failed in terms of theory.

Even the Justices with more developed views have this issue at times. Consider the theoretical basis of Justice Gageler's work. His Honour's thinking can be traced back to the earliest free speech cases where a US-style test was outlined. From there, one realises that Gageler J has adopted a SCOTUS-style methodology. As Gray notes, while US justices have attempted to articulate the theoretical basis for their decisions when deciding on *First Amendment* cases, even they have been inconsistent.[342] For instance, some judgments favour the marketplace of ideas, a popular theory in American free speech jurisprudence. Others favour self-actualisation, and others still emphasise autonomy and self-government. These are just three examples Gray gives from existing case law.[343] So which does Justice Gageler favour – the marketplace of ideas, or self-actualisation? Perhaps self-government? We do not know because even Justice Gageler has never really explained the theoretical basis of his decisions.

The High Court has never discussed free speech theory.[344] There is an abundance of theories, many of which can lead to different results in case law, and the High Court has addressed none of them. The Court has deliberately adopted this approach, particularly since *Lange.* [345] There does not appear to be a single scholar happy with the Court's 'anti-theoretical' approach, and it is widely considered to have led to an

[340]Ibid 91.
[341]Ibid.
[342]Gray, 'The 1st Amendment' (n 14) 159.
[343]Ibid.
[344]Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 699 ('Limits of Text'); Gray, 'The 1st Amendment' (n 14) 159.
[345]Stone, 'Insult and Emotion' (n 305) 90; Stone, 'Limits of Text' (n 344) 696.

untenable situation. In Gray's words, 'it is beyond time' that the Court adopted a theory of speech.[346] Both Stone and Gray have argued if the Court were to adopt a theory of speech, it would be a Meiklejohn-style theory of self-government, a view Meagher would approve of, but Gray might not.[347] These issues around theory will be discussed in a later chapter of this work - for now, we turn to the areas of hate speech and the influence of international scholarship on Australia.

F Hate Speech & Harm

Australian scholarship surrounding hate speech generally focuses on provisions contained in the *Racial Discrimination Act 1975* (Cth) – some in relation to free speech protections.[348] Katharine Gelber has consistently argued that hate speech laws are compatible with the implied freedom and its rationale.[349] Larissa Welmans has argued that hate speech laws actually *enhance* the implied freedom by 'levelling the playing field' and ensuring that words do not damage political discourse and 'crush individual autonomy rather than vindicating it'.[350] In this view hate speech laws are capable of protecting the expression of vulnerable members of society.[351]

On the other hand, it has been argued by Joshua Forrester, Lorraine Finlay, and Augusto Zimmermann that the implied freedom is clearly burdened by the Racial Discrimination Act, and thus unconstitutional.[352] They argue racial discrimination cannot be defeated publicly if those in favour of it are prevented from speaking about it.[353] They also make arguments from democracy, arguing it is

[346]Gray, 'The 1st Amendment' (n 14) 159.

[347]Ibid; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842; Stone, 'Limits of Text' (n 344) 668.

[348]For more general discussions of the *Racial Discrimination Act 1975* (Cth) and racial vilification laws in Australia, see scholarly works such as: George Williams, 'Protecting Freedom of Speech in Australia' (2014) 39(4) *Alternative Law Journal* 217; Dr. Judith Bannister, 'It's Not What You Say But the Way That You Say It: Australian Hate Speech Laws and the Exemption of "Reasonable" Expression' (2008) 36(1) *Florida State University Law Review* 23; Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia' (2015) 49(3) *Law & Society Review* 631; Gail Mason, 'Hate crime laws in Australia: Are they achieving their goals?' (2009) 33(6) *Criminal Law Journal* 326; Katharine Gelber, 'Speaking Back: The Free Speech versus Hate Speech Debate' (John Benjamins, 2002); Anne Flahvin, 'Can Legislation Prohibiting Hate Speech Be Justified in Light of Free Speech Principles' 18 *University of New South Wales Law Journal* 327; Beth Gaze, 'Has the Racial Discrimination Act contributed to eliminating racial discrimination? Analysing the litigation track record 2000-04.' (2005) 11(1) *Australian Journal of Human Rights* 171; Luke McNamara, 'Regulating racism: Racial vilification laws in Australia' (Institute of Criminology, 2002); Luke McNamara and Tamsin Solomon, 'The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment' (1996) 18 *Adelaide Law Review* 259;

[349]Katharine Gelber, 'Freedom of political speech, hate speech, and the argument from democracy: The transformative contribution of capabilities theory' (2010) 9(3) *Contemporary Political Theory* 304 ('Gelber 1').

[350]Larissa Welmans, 'Section 18C and the Implied Freedom of Political Communication' (2019) 44(1) *University of Western Australia Law Review* 21, 57.

[351]Ibid.

[352]See Chapter 2 of Joshua Forrester, Lorraine Finlay, Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court Publishing, 2016).

[353]Ibid.

incompatible. A sort of originalist position accompanies this argument, where references are made to what drafters intended for the *Australian Constitution* and the society it would set up. This argument has been made by Zimmermann and Finlay before, arguing a democratic imperative that 'citizens should be allowed to speak openly and publicly about their personal convictions'.[354] This relies heavily on John Stuart Mill's argument about truth, opportunity, and posterity.

G Mill

Mill's *On Liberty* remains one of his most important works, with Chapter 2 in particular dealing with free speech.[355] His argument is summed up quite well in the first paragraph of Chapter 2, where he stated:

> the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[356]

Mill believed not just the truth was valuable, but the actual perception of truth too. It is not necessarily enough that the truth be known, but it should be able to be known publicly, rather than restricted to a select few in private. For Mill, free speech policy should be guided by the principle that the people must have all the tools necessary to arrive at true beliefs about the world. The people must be able to recognise what they know as the truth, having been allowed to arrive at those beliefs through public exchanges of information in a marketplace of ideas.

Without genuine and comprehensive free speech protection censorship occurs, preventing people from arriving at an accurate understanding of the world. For Mill, censorship did not just prevent people from arriving at the truth, but also from fully understanding what they know as *actually* the truth. Under a censoring authority one might find another avenue of learning information. Having been denied or silenced, they may not have a clear picture of the world, or may not recognise the truth when they know it. Falsehoods and errors become harder to distinguish from truth.

Mill thought truth promoted utility, and therefore free speech worth promoting, but any speech that could lead to unacceptable harm, reasonably speaking, might be worth limiting. Consider the 'very simple' harm principle.[357] Under this principle 'the only purpose for which power can be rightfully exercised

[354]Augusto Zimmermann and Lorraine Finlay, 'A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness' (2014) 14 *Macquarie Law Journal* 187, 194.
[355]John Stuart Mill, On Liberty (Project Gutenberg, 2011).
[356]Ibid 31.
[357]Ibid 18.

over any member of a civilized community, against his will, is to prevent harm to others'.[358] This faces the problem of harmful speech that leads to the truth. So, what did Mill mean when he referred to harm? This is a hotly debated matter. Mill opposed speech that could result in violence against others, but not immoral speech alone, because 'there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.'[359]

Mill referred to 'rights' consistently in *On Liberty*, so one might conclude 'harm' meant speech or actions invading personal rights. It is difficult to prove that one's speech harmed another person, so limitations on speech based on harm would necessarily be narrow - Mill did not support limitations on speech *solely* because a person was harmed. He made a distinction between 'legitimate' and 'illegitimate' harm, with Jacobson arguing that 'legitimate' harm in Mill's view was a direct, demonstrable violation of rights.[360] In short, Mill believed that free speech via the marketplace of ideas, promoted truth and therefore utility, leading to a greater and more democratic society. It should almost never be limited unless harm occurred. Censorship should be limited because silencing expression robs present and future humans of the opportunity to dissent or refute erroneous beliefs and 'exchange' them for truth.

Zimmermann, Finlay, and Forrester made similar arguments,[361] as did Anthony Gray:

> the price we pay for democracy is that some people will exercise this right in an irresponsible way, but the solution for this is not (should not be) to ban someone saying it.[362]

Gray argued the price to pay for having a democracy was that people would hear and experience speech they dislike - the potential cost of censorship was argued to be too high.[363] Augusto Zimmermann argued 'nobody living in a democratic society should really expect to be exempt from the possibility of facing strong criticism'.[364]

Both sides of the hate speech debate are heavily influenced by Mill. Anthony Gray for instance has referred to Mill extensively throughout his career.[365] Gelber's discussion of hate speech relies heavily on

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[358]Ibid.
[359]Ibid 29.
[360]David Jacobson, 'Mill on Liberty, Speech, and the Free Society' (2000) 29(3) *Philosophy and Public Affairs* 276.
[361]Zimmerman & Finlay (n 340) 195; Forrester, Finlay, & Zimmerman (n 352).
[362]Anthony Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (2012) 41 *Common Law World Review* 167, 189 ('Racial Vilification and Freedom of Speech').
[363]Ibid.
[364]Augusto Zimmerman, 'The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws are Contrary to the Implied Freedom of Political Communication Affirmed in the *Australian Constitution*' (2013) 3 *Brigham Young University Law Review* 457, 490-491.
[365]Referring to the idea of 'truth' in Gray, 'The 1st Amendment' (n 14) 158; Referring to self-development and association in Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 161; Referring to popular sovereignty and control over the legislature in Gray, 'The Protection of Voting Equality in Australia' (n 1) 580; Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (n 362).

Mill's concept of harm, something that Mill himself never truly elaborated on that Gelber has skilfully taken up, focusing on prejudice and how it relates to marginalised vs non-marginalised members of society.[366] That is, unrestricted free speech is argued as leading to significant harm and stigmatization of targeted groups – discrimination legitimizing violence and thus threatening democracy itself.[367] Overall it would be difficult to find any Australian free speech scholarship without some influence from Mill.

H Meiklejohn

Alexander Meiklejohn is another important name in Australian free speech scholarship. Adrienne Stone relied heavily on Meiklejohn's arguments about the scope of free speech in developing her own model, for instance.[368]

Meiklejohn argued a broader freedom of expression was necessary under democracy to help citizens develop critical thinking skills necessary to perform their democratic duties. William G. Buss called this the basis of the *US Constitution* as the founding fathers agreed to a democratic system where the people were simultaneously the governors and the governed.[369] If the people are the governors, they must be free to speak their opinions, hear the opinions of others, and make sure that politicians hear those views as they are obligated to justify their political existence to the people.[370] For Meiklejohn, democracy meant self-government by the people. That required free speech by necessity as a function of popular sovereignty.

Without protection of speech, bureaucrats and politicians might become divorced from the people who they nominally rule on behalf of. If that were to happen the society would not be an authentic democracy, as the ability of the people to choose *effectively* would be limited. In Australian jurisprudence, the influence of Meiklejohn is obvious in their reliance on popular sovereignty and self-governance as the rationale for the implied freedom of political communication. The High Court explicitly mentioned Meiklejohn in *Theophanous*.[371] The Australian government exists by virtue of direct election by a sovereign people in a democratic system, so they must be able to communicate about politics for the system to function effectively.

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[366]Katharine Gelber, *Speech Matters: Getting Free Speech Right* (University of Queensland Press, 2011).
[367]Katharine Gelber and Luke J. McNamara, 'Evidencing the harms of hate speech' (2016) 22(3) *Social Identities* 324, 326.
[368]Stone, 'The Nature of the Freedom of Political Communication' (n 119) 387.
[369]William G. Buss, 'Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication' (2006) 34 *Federal Law Review* 421 ('Buss 1').
[370]Alexander Meiklejohn, *The First Amendment is an Absolute* (1961) *Supreme Court Review* 245; Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper Brothers, 1948).
[371]*Theophanous* (n 61) 124 (Mason CJ).

The High Court's limitation of matters to the political also appears to be drawn from Meiklejohn. There is a notable difference between Meiklejohn's concept of free speech and its implementation in the Australian High Court. While Meiklejohn's view was originally restrictive, he eventually changed his mind.[372] There were hints under *ACTV* and *Theophanous* that a scope more along the lines of Meiklejohn's preferences would eventually arrive, but this never came to be. Meiklejohn argued free expression helped individuals more effectively perform their democratic duty, a view noted as possible an aspect of *Coleman* judgments.[373] For Meiklejohn anything that helped people 'acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare' would constitute protected communication.[374] He argued education, science, philosophy, art, and literature were all political communications because 'the people do need novels and dramas and paintings and poems, because they will be called upon to vote'.[375]

Meiklejohn's key works, including 'The First Amendment Is an Absolute' and 'Free Speech and its Relation to Self-Government' both remain influential in Australian jurisprudence.[376] Meiklejohn's influence in Australian scholarship is such that Buss wrote an entire paper on it, concluding 'in a convoluted way, one might say that Meiklejohn won the debate in Australia' despite the Australian path having deviated significantly from Meiklejohn's ideas, being far narrower than he required.[377]

I International scholars

According to Buss, Meiklejohn's 'basic idea has long been in the public domain'.[378] Other scholars advanced similar ideas, such as Frederick Schauer, Immanual Kant, Benedict de Spinoza, David Hume, and Charles Black. These, and others, have been influential on Australian scholarship. Anthony Gray's work on hate speech shows extensive citation of Robert Post, Cass Sunstein, and Schauer.[379] Katharine Gelber has extensively relied on Jurgen Habermas and Martha Nussbaum.[380] The works of these scholars cannot all be summarised in this review, so an overview of select individuals will follow.

[372]See Meiklejohn, 'Free Speech and its Relation to Self-Government' (n 370) 22-27, where he distinguishes speech of 'public concern' from other kinds of speech.
[373]Stone, 'Insult and Emotion' (n 305) 94.
[374]Meiklejohn, 'The First Amendment is an Absolute' (n 370), 257.
[375]Ibid 245, 255, 257.
[376]Ibid; Meiklejohn, 'Free Speech and its Relation to Self-Government' (n 370).
[377]Buss, 'Buss 1' (n 369), 423, 457.
[378]Ibid 422.
[379]Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (n 362).
[380]Gelber, 'Gelber 1' (n 349); Katharine Gelber, ''Speaking Back': The Likely Fate of Hate Speech Policy in the United States and Australia' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (OUP Oxford, 2012).

Eric Barendt has been influential, particularly in High Court decisions like *Theophanous*. Barendt's definition of 'political speech' served as the basis for a *Theophanous* judgment.[381] Barendt's purpose in *Freedom of Speech* was to compare three primary jurisdictions in the context of philosophy and principles. Barendt rejected literalism and originalism, arguing that philosophical principles should guide interpretation of free speech – with limits imposed by the text and the concepts embodied by a constitution overall.[382] For example, Barendt used the argument from self-fulfilment and the argument from democracy to justify freedom of association. Overall, Barendt's work has proven influential in the Australian High Court and thus also Australian legal scholarship.

J Post

Robert Post citations can be found everywhere in Australian scholarship. Stone, for instance, relied on Post to strengthen her argument relating to harm, free speech, and the nature of open public discussion.[383] Post summarised his view of democracy as 'the rule of public opinion'.[384] The purpose of protecting free speech was, in Post's view, to make sure that legislation, and acts of government, could be moderated by public opinion or shaped by it. This point is where Post's influence on Stone, as well as on the research that follows in later chapters of this work, can be found.

Using the example of the film *Brokeback Mountain*, Post says that public opinion was formed within the public sphere, and political views in the public sphere evolve from 'the world of letters'.[385] So *Brokeback Mountain* is protected in the United States because 'it is paradigmatically constitutive of the public sphere'.[386] *Brokeback Mountain* didn't need to be specifically about government policy to be protected – it only needed to contribute to the way people thought when they communicated their public opinions. It did influence people's public opinions, making it a fundamental part of the process by which society itself, determines what it believes and thinks. This is true individually and collectively, Post argued, citing Habermas to strengthen his argument that public opinion plays a significant role in democratic sovereignty, a 'subjectless form of communication'.[387]

Post said that boundaries do exist but are normative and generally reflected in constitutional doctrine already. Stone discussed Post extensively when arguing for protection of expressive works. She

[381]Eric Barendt, 'Freedom of Speech' (n 5) 162.
[382]Ibid 4-5.
[383]Adrienne Stone and Simon Evans, 'Australia: Freedom of speech and insult in the High Court of Australia' (2006) 4(4) *I CON* 677, 683.
[384]Robert Post, 'Participatory Democracy as a Theory of Free Speech: A Reply' (2011) 97(3) *Virginia Law Review* 617, 620.
[385]Ibid.
[386]Ibid 621.
[387]Ibid 621.

ultimately concluded that the High Court strayed significantly from Post's views, which have some force in terms of principle and cannot simply be dismissed, posing a challenge to the High Court that they have yet to address.[388]

K Redish

Martin Redish has written extensively on free speech, with perhaps the most important works being *The Value of Free Speech*, and an article relating to speech advocating illegal activity.[389] The latter illustrates that he is not an absolutist. In terms of illegal conduct, Redish's view was intermediate, and while he had criticisms of *Brandenburg v Ohio* ('Brandenburg'), ultimately the SCOTUS ended up taking an approach similar to his own.[390] Redish's issue with the *Brandenburg* clear and present danger test was in its 'directed to' element, which he argued implied a requirement to demonstrate a mens rea of intent.[391] He objected to this because free speech is about communicating ideas, and analysis of intent and mens rea did not possess any real link to free speech values and could have a chilling effect besides. Redish preferred focusing on if speech would be 'likely to incite' the illegal conduct – the same sort of standard found in *Coleman*.[392] Although their Honours did not cite Redish, it is likely his work was influential given his status as one of the leading scholars.

In terms of philosophy, Redish's view can be seen in *The Value of Free Speech* where he argued that 'self-realization' is the principle freedom of speech relies on, that the *First Amendment* is best justified by it, and that all the alternatives – such as democratic processes – derive from it in the end.[393] Redish argued that the value of a democracy lies in its ability to promote self-actualisation, enabling people to live relatively autonomously and develop themselves.[394]

L Chesterman & Schauer

Michael Chesterman provided an early basis for development of Australian free speech scholarship. His 'pessimistic' view explained how the High Court's refusal, post-*Lange*, to refer to "representative democracy' was consistent with a conception of democracy as purely institutional.[395] According to *Lange*,

[388]Stone, 'The Nature of the Freedom of Political Communication' (n 119) 386, 389-400.
[389]See Martin H. Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591. For the article on illegal activity, see Martin H. Redish, 'Advocacy of Unlawful Conduct and the First Amendment: In defence of Clear and Present Danger' (1982) 70 *California Law Review* 1159 ('Unlawful Conduct').
[390]*Brandenburg v Ohio*, 395 US 444 (1969).
[391]Redish, 'Unlawful Conduct' (n 389) 1178.
[392]Ibid 1180; *Brandenburg v Ohio*, 395 US 444, 447 (1969); *Coleman* (n 2).
[393]Redish, 'The Value of Free Speech' (n 389) 593.
[394]Ibid 602-604.
[395]See a collection of essays by Chesterman on judgments and comparative law in Michael Chesterman, 'Freedom of speech in Australia law: A delicate plant' (Dartmouth Publishing Company, 2000) 39.

the implied freedom was incidental to 'representative and responsible government' and although it was constitutionally protected its scope was significantly narrowed.[396] Being only an implied protection, and thus vulnerable, subsequent decisions have narrowed it further, hence Chesterman's description of Australian free speech as a 'delicate plant'.[397] Subsequent scholars have been significantly influenced by these arguments.[398]

Frederick Schauer has also played a foundational role, and was once described as 'the Mercator of modern *First Amendment* theorists, eschewing blind faith and hackneyed metaphors and embracing analytical and empirical methods'.[399] Schauer is notable for having linked political philosophy to free speech law to try to eliminate scholarly confusion around these subjects. His *Free Speech: A Philosophical Enquiry* has had a long-standing impact. Consider his argument from democracy - regardless of how it is framed, elected officials are not in fact servants. They are 'elected rulers' that operate within government superstructures that 'are more likely to become as concerned with perpetuation of their own power as with acting in what they perceive to be the public interest'.[400]

Schauer believed the motivations that actually lead people to want to become politicians in the first place lead them to want to maintain those positions – they do not enter into political campaigning with an intent to take office for a brief time before moving on to some other occupation. As a result government institutions tend to be 'self-perpetuating', power-centralising institutions that necessitate freedom of expression or else the resulting society risks becoming tyrannical.[401] Schauer criticised several arguments for democracy – arguments from truth, from self-expression, from autonomy, and more – in the search for a strong free speech principle, and much of this work is still relevant today.

M Marxists

Finally, in terms of scholars we turn to the work of Karl Marx & Friedrich Engels. As essentially the 'founding fathers' of Marxism, their work has been highly influential across a range of academic disciplines, with scholars throughout the world devising Marxist theories of law, or critiques thereof. A comprehensive overview of Marxist legal theory is not possible here, so a brief overview will be provided

[396]Michael Chesterman, *Freedom of speech in Australia law: A delicate plant* (Dartmouth Publishing Company, 2000) 8.
[397]Ibid 7-12.
[398]Katharine Gelber, 'Distracting the masses: Art, local government and freedom of political speech in Australia' (2006) 10 *Law Text Culture* 195, 206; John Chesterman, 'The 'Delicate Plant' of Free Speech Needs Water' (2007) 32(1) *Alternative Law Journal* 4.
[399]Mark G Yudof, 'In Search of a Free Speech Principle' (1984) 82(4) *Michigan Law Review* 680.
[400]Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 43.
[401]Ibid.

on the present debate and how it relates to the theory advanced in this work that will be further expounded in Chapter 3.

Marx's general worldview evolved over time. In fact, Akbar Rasulov noted there were three 'epistemological ruptures – that is, abrupt paradigm shifts' in Marx's lifetime, occurring in approximately 1945, 1848, and 1871.[402] Rasulov thought that no single model could be devised from the whole of Marx's work without creating a 'theoretical forgery' - a point highlighted by centuries worth of bitter political and theoretical conflicts between supporters of a dizzying array of models.[403] Many of these divides centre around the shifts in Marx's worldview, which becomes most evident when considering the debates between supporters building on 'young Marx' versus those in favour of Lenin's adaptation of Marx's later works.[404]

In terms of legal theory, it was uncommon for Marx & Engels to write specifically about jurisprudence. However, as noted in scholarship on the matter, they addressed legal matters throughout their body of work.[405] These changing views ultimately expressed themselves in how the various fields of law deal with Marxist theory today. In terms of modern Marxist legal theory there are two sides of an ongoing debate. The first of those involves the 'base/superstructure' theory, where the legal and political structures and relations of society are a sort of ideological 'superstructure', determined ultimately by a 'base of economic relations'.[406] This is often referred to as a 'structural' or 'economism' theory, whose proponents are somewhat hostile to the notion of engaging in legal theory, viewing reform therein as futile as the economic demands of the capitalist base will ultimately negate any perceived gains.

In the realm of international law for example, these structuralists tend to denounce the entire discipline of international law, its established frameworks, and ideals. As the highly influential China Mieville is known to have done with what is one of the central works of Marxist legal structuralism, they tend to 'exile themselves' (in Rasulov's words), hoping to eventually establish an alternative system.[407] Often they claim there will be no laws per se in the new society as a new 'base' will render the legal

[402] Akbar Rasulov, 'A Marxism for International Law: A New Agenda' (2018) 29(2) The European Journal of International Law 631, 633-634.
[403] Rasulov (n 402) 633.
[404] Ibid.
[405] Maureen Elizabeth Cain and Alan Hunt, 'Marx and Engels on Law' (Academic Press, 1979); Paul Phillips, *Marx and Engels on Law and Laws* (Oxford, 1980).
[406] Nate Holdren and Rob Hunter, 'No Bases, No Superstructures: Against Legal Economism – Nate Holdren and Rob Hunter', *Legal Form* (Blog Post, 15 January, 2020) <https://legalform.blog/2020/01/15/no-bases-no-superstructures-against-legal-economism-nate-holdren-and-rob-hunter/>.
[407] Rasulov (n 402) 640; China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Haymarket Books, 2006).

superstructure obsolete.[408] This school of thought results from the age-old divide among radical authors over whether to engage with existing structures or to resist and reject them. Mieville's approach was to reject the idea of engagement with existing structures or fields of law, with little development of his ideas following from either those who have no interest in contributing to the field, or those who Mieville accused of being little more than sophisticated apologists for imperialism.[409]

This school of thought is generally said to be rooted directly in the preface to an original Marx work, which Holdren and Hunter note was still being referenced by Marx & Engels later on as a materialistic basis for their work.[410] Aspects of economism would later be refined in the early 20th century by those such as Lenin to include the theory of class instrumentalism which argued that the legal system was an integral part of the state whose rules and devices were designed to further the ends of the ruling class.[411] Criminal law for instance was seen as being a vital aspect of ruling class power, supporting private ownership of the means of production. Rules prohibiting theft or trespass were explained not necessarily in a more simple economist framework, but rather as direct expressions of the will of the dominant class, who necessarily has antagonistic interests and seek to maintain their control and source of power by any means possible.[412]

Rejection of law and interaction with it as a field also found expression in Post-Marxist criticism of human rights. Scholars such Alain Badiou, Giorgio Agamben, and others criticised law and human right specifically. It is not possible here to provide a comprehensive overview of them all, nor would such an effort be within the scope of this paper, so for the purposes of illustration we shall focus on Badiou. Badiou criticised human rights discourse as a reactionary idea predicated upon a society organised through commodity exchange, where human rights and legality in liberalism served to naturalise the capitalist mode of production.[413] This argument focused primarily on a concept of freedom that builds a cult around individualism and economic freedoms such as the freedom to own property, freedom of enterprise, and the freedom to gather wealth.[414]

In this context, Badiou determined that human rights were built on underlying ethics of 'Good and Evil', where Good is reduced to a mere determinant of Evil that seeks to prevent it – a right 'not to be mistreated

[408] Hugh Collins, *Marxism and Law* (Oxford Scholarship Online, 2012) 94.
[409] Mieville (n 407) 293.
[410] Holdren and Hunter (n 406); Karl Marx, *A Contribution to the Critique of Political Economy* (Progress Publishers, 1859).
[411] Collins (n 408) 27.
[412] Ibid.
[413] Alain Badiou, *The communist hypothesis* (Verso, 2010).
[414] Ibid 2.

in regard to one's life' for instance is not truly a Good, but simply a non-Evil.[415] Under this system of ethics, the only role something good has is prevention of a priori evil things. This leads to Badiou's critique of economically developed European countries as self-satisfied paragons intervening in developing countries to remedy the misery of incompetent subhumanity, despite their role in creating that misery via centuries of imperialism and colonialism.[416]

This all feeds into Badiou's rejection of legal approaches to Marxist theory as Badiou argued that this leads to Marxism being cast as an inherently totalitarian ideology. Of course, in the modern concept of human rights – concepts such as due process, freedom of expression, freedom of movement, and more may be discussed, but economic freedom are always part of the discussion, and it is true that economic rights play a large role in tort law (trespass, copyright infringement, etc). So, critiques of capitalism and its accompanying class structure are characterised as evil by virtue of their rejection of a system prioritising and centralising property rights.[417] Those advocating rejection of a legal 'Good' are easily cast as those actively supporting violations of individual rights which are acts of 'Evil'.

Every attempt to depart from the norms of our current society we are told is a 'utopian' project doomed to totalitarianism – attempts to *do* Good create Evil in Badiou's terms.[418] Consequently, Badiou opposes radical adoption of law as a means by which to advance the goals of Marxism, a futile endeavour that can only lead to reinforcing the existing power structures and perceived injustices that occur. The origin of the current strength of the legal system should be noted, Hugh Collins argued, as the development of legal sovereignty lies in bourgeois fears of a return to the autocratic power of monarchs and nobility, putting an end to the freedom of the marketplace.[419] Similarly, Collins remained critical of law and in particular the rule of law principle, arguing that neither the state nor its devices are truly neutral, and since the ultimate arbiters of disputes under a liberal capitalist society are those seeking to serve the purposes of the ruling class, one cannot truly achieve emancipation with recourse to law.[420]

On the other hand, the competing school of thought, epitomised by the work of Bhupinder S. Chimni, asserts that from the work of Marx & Engels one can find a more nuanced view, rather than the economic determinism advocated by Mieville et al. This view argued that law can play an important role in shaping the struggle between classes in society, and like the structuralists, they also cite Marx. In his *International*

[415] Alain Badiou, *Ethics: an essay on the understand of evil* (Verso, 2001) 9.
[416] Ibid 13.
[417] Daniel McLoughlin, 'Post-Marxism and the Politics of Human Rights: Lefort, Badiou, Agamben, Rancière' (2016) 27 *Law and Critique* 303, 9.
[418] Badiou (n 413) 13.
[419] Collins (n 408) 134.
[420] Ibid 142.

Law and World Order, Chimni argued that Marx and Engels rejected Marxist legal structuralism. Specifically, Chimni highlighted letters from Engels where he wrote 'neither I nor Marx have ever asserted' an economic element played the sole determistic role attributed to the two, calling such an argument a 'meaningless, abstract, senseless phrase'.[421]

While supporters of this theory do not necessarily think that legal reforms alone could lead to a classless society or liberation from the domination of capital, they argue that law has a constitutive power in society. These Marxist scholars have argued that, for instance, the productive relations discussed so much by Marxists of all kinds are, in part, only meaningful in terms of their definitions at law.[422] Chimni argued that law had a constitutive power in society, and in terms of productive relations, only in a conceptual world could one find production preceeding legal relations – in reality, they are mutually constitutive of the other.[423] Marx and Engels were of course committed to the concept that revolution would be ultimately necessary to achieve liberty from capitalism.

However, Chimni also noted that the two recognised the value of legal professionals interpreting law, as well as the value of legal reforms for improving the conditions of the people.[424] Chimni's purpose here was to establish that Marx and Engels did not reject law outright, but instead were rejecting a strategy of socio-economic change built exclusively around legal rights. While Hugh Collins was not entirely in favour of Marxist legal strategies, he did show some support for Chimni's interpretation of Marx and Engels in his own arguments.

Collins did not entirely reject Marxist jurisprudence as a useful endeavour, noting that certain legal conditions increase the opportunities for ultimate emancipation of the people, such as freedom of association, or the freedom 'to disseminate literature'.[425] Collins argued that it was 'entirely consistent' for a Marxist to be suspicious and critical of existing legal systems while maintaining a strong desire to protect fundamental civil liberties. This is because, Collins argued, the 'elementary rights of political activity serve to ease the path of working-class organizations to establish revolutionary consciousness'.[426] So long as one does not see the protection of these liberties as the ultimate goal, Collins theorised that

[421] B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, 2017) 450.
[422] E.P. Thompson, *Whis and Hunters: The Origin of the Black Act* (Penguin Books, 1977) 267.
[423] Chimni (n 421) 451.
[424] Ibid 452-454.
[425] Collins (n 408) 142.
[426] Ibid.

civil rights protections help create the atmosphere needed to establish the sort of democracy that a radical might want.

This is echoed by the views of other modern Marxists who have adopted a favourable approach to jurisprudence and argue that Marxism has something to offer to the various fields of that discipline. Now, basic legal disciplines like the rule of law, all too often discarded wholesale by Marxists as Collins did, see alternate conceptions and analysis being discussed. Colin Sumner argued the traditional Marxist approach that discards civil liberties and legal theories is a major theoretical and political errors. Instead, Sumner proposed Marxist approaches to legal theory to help realise 'meaningful civil liberties and a meaningful rule of law' to accompany an emancipated working class and a democratic mode of production.[427]

In Sumner's view, too many Marxists abandon social context in favour of prescriptive abstractions which leads to them failing to consider the practical reality of law and politics. Criticisms of movements such as the women's movement for being too focused on attaining a 'bourgeois right emanating from some transcendental quality' are short-sighted because groups must achieve at least some basic social recognition in order for them to develop any meaningful power.[428] Marxist advocates of economism and class instrumentalism fail to take account of the basic legal conditions necessary in order for a class to become a 'class-for-itself'.[429] That is to say that women, for example, are not suddenly going to become a powerful, class conscious section of the working class for radical democracy and economic change if they do not have legal personality, or the ability to vote, to own property or even the ability to initiate a divorce.

Sumner's thesis is that the building of a movement requires practical engagement in politics, a goal that can rarely be achieved by anybody without some form of civil liberties. For example, if people are not free to associate, and a government decides to criminalise association for a particular class of people or all people broadly, then it is much less likely that people are going to be willing to engage in protest or strikes, especially under threat of criminal sanction. Yes, for many Marxists, the establishment of a post-capitalist society is the primary goal. But as Rasulov argued, while it may be exciting to 'find oneself thrust in the middle of some grand transcendent revolutionary activity', in many cases it is necessary to

[427] Colin Sumner, 'The Rule of Law and Civil Rights in Contemporary Marxist Theory' (2016) 2 *Studia Socologica VIII* 16, 38.
[428] Ibid 34.
[429][429] Ibid.

pursue struggles that are more modest in terms of scale and ambition – a fact that does not make a struggle any less important in terms of emancipation or practicality.[430]

Sumner argued that civil liberties are the socially rooted legal principles guiding democratic policymaking, and without them it is difficult to envision any sort of consistently libertarian culture. This means that a Marxist view need not reject legal analysis and development but should embrace it – so long as they remember that cultural factors, class, and other aspects of society should also be challenged. Marxism does have something to offer jurisprudence, as scholars like Collins, Sumner, Chimni and others have shown, and it should be accepted as they have argued that law can play an important role in shaping the struggle between classes and power structures in society. Their view is one of several that informs the theory of democracy and free speech advanced in this work. Of course, there are a variety of scholars and works that have influenced the ideas in this work. With that in mind, we now turn to international scholarship relating to the *First Amendment* and Australian jurisprudence.

N The First Amendment & Australian Jurisprudence

The High Court consistently cites international jurisdictions too. However, because the influence of the *First Amendment* has proven so controversial in Australian scholarship, we will focus primarily on the role of *First Amendment* jurisprudence in Australia. In the High Court there is an inconsistent history of citation of United States case law and scholarship, even though referral to US case law is neither radical nor controversial in Australia.[431] Although at first glance one might think Dan Meagher was hostile to the idea, as he took issue with the Court applying the 'fighting words' doctrine from *Chaplinsky v New Hampshire*.[432] Meagher is not against application of US decisions *per se*, so long as it is done with a high degree of caution and critical thinking. Gageler J – a Justice that relies on judgments built around SCOTUS decisions – said that international jurisprudence should not be cited uncritically.[433]

Meagher was concerned that Court did not do enough research to ensure that their statements regarding *Chaplinsky* were entirely correct. For example, Meagher argued Gummow & Hayne JJ were wrong in declaring *Chaplinsky* is a well-accepted decision. The *Chaplinsky* doctrine has *not* been consistently applied, and in fact is a broader standard than what the Court applied.[434] Several of the *Chaplinsky*

[430] Rasulov (n 402) 638.
[431] Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 160.
[432] Dan Meagher, 'The 'fighting words' doctrine: off the First Amendment canvas and into the implied freedom ring?' (2005) 28(3) *University of New South Wales Law Journal* 852, 853 ('Fighting Words'); *Chaplinsky v New Hampshire*, 315 US 568 (1942) ('Chaplinsky).
[433] *Clubb* (n 250) 179.
[434] Meagher, 'Fighting Words' (n 432) 854.

categories now constitute protected forms of speech.[435] Libellous and obscene speech as categories have also been narrowed substantially, as has the actual 'fighting words' doctrine itself as of *RAV v St Paul*.[436] Meagher also argued the *Chaplinsky* values were outdated, not just because the standard changed, but the 'fighting words' doctrine had an 'aggressive, male concept of discourse' at its core.[437] This was because 'fighting words' was based on a privileged white male point of view and reflected the 'macho' tone of discourse – it is assumed that men will respond with violence, whereas women, minorities or the powerless are more likely to remain silent and submissive. The real danger of 'fighting words' for Meagher was how they could 'engender fear, intimidation, and then silence'.[438]

But Meagher did not criticise the *use* of US jurisprudence alone and joined Anthony Gray in advocating for Australian Courts to consider US jurisprudence in in other ways. For instance, Meagher advocated adoption of SCOTUS jurisprudence from cases which highlight 'speech in public issues' as being that of the highest priority for *First Amendment* protection.[439] Meagher's thesis was that US jurisprudence provides a clear pathway for an alternative construction of free speech in Australia without proportionality, and suggested a model on that basis. Gray has argued for years that the Court should consider United States jurisprudence in more detail, also noting that one should remain aware of textual and cultural differences.[440] For instance, he supported application of aspects of *First Amendment* public employees doctrine, a position supported by Jemimah Roberts argued that the system advanced by the SCOTUS would provide 'clarity and consistency' to Australian courts required to assess burdens on the speech of public employees.[441]

Gray has also highlight unappreciated similarities between the two jurisdictions, such as how neither jurisdiction contains an absolute protection and both are subject to regulation.[442] He has also argued that a variety of doctrines and elements of US jurisprudence should be considered, from fundamental theory to the 'void for vagueness', 'chilling effects', and 'overbreadth' doctrines, to the different scrutiny standards. Some of these have been explored before, with Andrew T. Kenyon and Chris Dent both having written about the chilling effect in Australia, the US, Malaysia, and Singapore.[443] Kenyon and Dent have

[435]Ibid 854.
[436]*RAV v St Paul*, 505 US 377 (1992) ('RAV').
[437]Meagher, 'Fighting Words' (n 432) 857.
[438]Ibid 857.
[439]Meagher, 'Common Law Right' (n 301) 300.
[440]Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 163; Gray, 'The 1st Amendment' (n 14) 143.
[441]Jemimah Roberts, 'Constitutional 'borrowing' and freedom of expression: Can Australia learn from the US First Amendment?' (2019) 44(1) *Alternative Law Journal* 56, 59, 61.
[442]Gray, 'Bikie Laws' (n 322) 285.
[443]Andrew T. Kenyon, 'Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore, and Australia' (2010) 4 *International Journal of Communication* 440 ('Kenyon 1'); Chris Dent and Andrew T. Kenyon,

primarily focused on criticising Australian defamation law, although given their analysis of the chilling effects doctrine, it does appear that Gray is not alone in advocating its application in Australian jurisprudence**.**

Alice Drury has written about electoral campaign financing and free speech, discussing *First Amendment* cases extensively in the process.[444] Drury proposed abandoning the legal formalism and textualism omnipresent in Australian jurisprudence, a view she says 'has been cited *ad nauseum* in relation to judicial review of legislative acts under the Commonwealth Constitution'.[445] In its place, constitutional interpretation should be open to extra-constitutional theories and ideas. This argument is complemented by another issue Drury takes up – that of the constantly-repeated statement that the implied freedom of political communication is distinct from the *First Amendment* (and thus incomparable) because it is an institutional implied freedom, rather than an explicit, personal right.

The conclusion we are supposed to make is that this difference accounts for the breadth and depth of protections the *First Amendment* provides, so the implied freedom could not possibly lead to a similar level of protection. Drury argued explicitness has nothing to do with bread and depth in *First Amendment* jurisprudence. Constitutional debates in the US House and Senate did not discuss the purpose of the *First Amendment*, and actual historical accounts have since shown an intention for 'a very limited conception of free speech extending protection no further than under English common law prohibiting prior restraints upon publications but retaining punishment for libel'.[446] Drury argued the *First Amendment*'s 'scant words' led to the Supreme Court essentially being *required* to utilise 'extra-constitutional theories' to develop a complex and normative free speech guarantee.[447] If the Supreme Court could develop the *First Amendment* under all these circumstances, so too can the High Court develop an implied freedom.

Comparison from the United States perspective is not common as the SCOTUS has historically been, and remains, resistant to comparative law.[448] William G. Buss is one of the few US scholars to have engaged in such an effort.[449] Gerald N. Rosenberg and John M. Williams have also analysed the role of

'Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers' (2004) 9 Media & Arts Law Review 90 ('Kenyon 2').

[444]Alice Drury, 'Money Politics: Judicial Review of Electoral Communication Expenditure Limits in Australia' (2015) 39(2) *University of Western Australia Law Review* 294.

[445]Ibid 308.

[446]Ibid 311.

[447]Ibid.

[448]Adrienne Stone, 'The comparative constitutional law of freedom of expression' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) 418 ('Stone's comparative law').

[449]William G. Buss 'American Constitutional Law and the Implied Freedom of Political Communication' (2006) 34 *Federal Law Review* 421 ('Buss 2'); William Buss, 'Constitutional Words About Words: Protected Speech and "Fighting Words" Under the Australian and American Constitutions' (2006) 15 *Transnational Law & Contemporary Problems* 489.

the *First Amendment* in the High Court (albeit Williams is Australian).[450] Both found the High Court early on were clearly influenced by the *First Amendment* based on the number and pattern of citations. Buss said this was natural given the High Court's history of citing foreign cases as well as the 'paramount in longevity and extensiveness' position of American free speech jurisprudence.[451] Notably, American scholars seem just as in the dark as to the Court's reasoning as Australian scholars. Both Rosenberg & Williams, and Buss, are unclear as to the theoretical basis for the Court's decisions.[452] Rosenberg & Williams speculated that the High Court may have on their own happened to coincide with reasoning that arose in US case law and so cited US cases in support of their analysis.

There is no doubt among the American scholars that the basis for the implied freedom is representative democracy rather than 'government'. Having considered *Lange*, Buss found the idea of the *Australian Constitution* protecting only 'government' and not 'democracy' dubious, noting a similar sentiment among Australian scholars.[453] Buss noted widespread disagreement with the concept of the *Australian Constitution* not setting up a democracy, criticising *McGinty* which was criticised by Anthony Gray and others.[454] To that point, Gray highlighted a remarkable result in *McGinty* – a judgment deciding the *Australian Constitution* prohibited denial of the franchise to people on the basis of gender, race, property ownership or education was actually a *dissenting* opinion.[455] So democracy being fundamental to the *Australian Constitution* is widely agreed upon between Australian and American scholars.

Buss has also argued in the same vein as Meagher that the High Court made mistakes in its assessment of *First Amendment* law, perhaps due to insufficient research - the High Court created a distinction that does not exist. Buss argued the *First Amendment* did not confer a 'right', and literally only contained a freedom of speech. It was an explicitly *negative* freedom which literally said in its text, 'Congress shall make no law'.[456] Further, characterizing the *First Amendment* as horizontal was incorrect, since all *First Amendment* rights are protected only against actions by the state (the 'state action' doctrine)', making it a vertical freedom.[457] Any such rights exist because of judicial interpretation, not because of any explicit protections in the *US Constitution* which literally do not exist.[458] The conclusion drawn is that *First*

[450]Gerald N. Rosenberg and John M. Williams, 'Do Not Go Gently into That Good Right: The First Amendment in the High Court of Australia' (1997) *The Supreme Court Review* 439.
[451]Buss, 'Buss 2' (n 449) 425; Rosenberg & Williams (n 450) 451-452.
[452]Buss, 'Buss 2' (n 449) 425; Rosenberg & Williams (n 450) 451.
[453]Buss, 'Buss 2' (n 449) 426-7; Rosenberg & Williams (n 450) 456.
[454]Buss, 'Buss 2' (n 449) 427. Also see footnote 34 of that paper for cross-referencing academic discussion of a non-democracy being able to take away female representation.
[455]Gray, 'The Protection of Voting Equality in Australia' (n 1) 565.
[456]Buss, 'Buss 2' (n 449) 439.
[457]Ibid 441.
[458]Ibid 440.

Amendment law is not as distinct as the High Court decided it was, and for Buss, Rosenberg & Williams, there is ample room post-*Lange* for the implied freedom to develop, just as American constitutional law eventually did despite narrow interpretations persisting for so long.

O Conclusion & Gaps

The body of Australian constitutional free speech scholarship is, despite the almost 30-year history of the field, quite small. Those contributing to it have all added depth and contributed significantly to the understanding of the implied freedom in a variety of ways. Critics and minimalists such as Aroney and Meagher have challenged the very basis of the implied freedom and the developmental path it took. This gave the field a chance to consider the methodology that arrived at the creation of the implied freedom in the first place and provided debate on the future of the implied freedom. This led to some distinct schools of thought on what form free speech in the *Australian Constitution* should take. Scholars like Anthony Gray and Adrienne Stone advanced and developed living tree interpretation. They also provided depth to the scope of the implied freedom, particularly with discussion of speech categories, new tests for the implied freedom, and how the implied freedom relates to electoral law, due process, and other areas.

However, there are some gaps in the research, as one might expect from a traditionally ‘responsible government’ nation historically opposed to protection of civil liberties. There is little research on constitutional freedom of association. This remains the case despite there being several cases that directly involve matters of association. Gray’s dedication has kept this issue alive in scholarship, but there is a need for more work. The issue of whether artwork is protected or not remains completely unresolved. There are virtually no extant papers directly dealing with the issue of constitutional free speech and artwork/literature in the *Australian Constitution*. There are less cases dealing with this matter than there are dealing with association, which is perhaps why there is such a lack of research in the area, but this means there is a significant gap in scholarship. There are a variety of papers that deal with censorship in Australia, but do not discuss constitutional freedoms or the protection thereof. Consequently, more research is needed in order to determine the role of freedom of expression under the implied freedom, if any.

Another area that requires more research is that of the comparative aspect of Australian constitutional free speech jurisprudence. In our field there is a substantial amount of citation and reliance-upon not just American constitutional law, but also European and Canadian law. This is a particularly notable gap because comparative law and citation of international jurisdictions occurs in almost every single

Australian free speech case. There is already a significant amount of commentary and debate surrounding the role of proportionality, but there is a need for greater exploration of how *First Amendment* principles relate to Australian jurisprudence. Particularly those that have already been incorporated into Australian law since *ACTV*.

The existing body of Australian free speech scholarship has seen a variety of contributions by Australian and international scholars. There are many papers which cover issues not related to the implied freedom, such as defamation law and the chilling effect, although many of these papers often do not address the implied freedom at all. In implied freedom discourse itself, the bulk of the research is devoted to matters of constitutional interpretation and whether implications should continue to exist. There is a consistent but small body of research relating specifically to freedom of association. There is little to no research involving freedom of expression, beyond the work of Adrienne Stone, and works that address it in passing related to federal and state censorship. Overall, the status of Australian free speech scholarship indicates that there are significant gaps, some of which this work will attempt to address.

CHAPTER III THEORY

The authors of the *Australian Constitution* considered the *US Constitution* to be 'an incomparable model'[459] yet refused to adopt a bill of rights. They supported 'responsible government', a model which all the authors had lived under and which was a British colonial legacy throughout the colonies.[460] According to this model the Ministers of the executive are made responsible to the Parliament by including them in it, rather than making them independent.[461] According to Dixon, this would create a responsible government which would not restrict civil rights, or they would lose the confidence of either the legislature or public.[462] The refusal to include explicit civil rights protection was further reinforced by their desire for legislative action to be unrestricted, apart from distributing powers between the Federal and State governments. A Bill of Rights was deemed undemocratic as it threw doubt on the 'wisdom and safety' of elected representatives.[463] Politicians such as Sir Robert Menzies describing responsible government as 'the ultimate guarantee of justice and individual rights'.[464] Parliamentary supremacy – the doctrine that power should be concentrated in an unrestricted parliament – was also a core reason for not including civil liberties (but was overruled in *Lange*).[465]

The desire to concentrate power at the expense of human rights can be demonstrated with reference to the early drafts of the *Australian Constitution* in the decade prior to federation. An early draft by Inglis Clark in 1890 included some rights but was roundly rejected by states' rights advocates like Robert Garran who described them as 'an interference with state rights, on behalf of popular rights' and ‘better dispensed with’.[466] Among those supporting Garran's argument was the Premier of Western Australia, who was opposed to equal protection and other rights.[467] Sir John Forrest was worried that if Asian & African migrants & refugees were protected constitutionally, Western Australia could not discriminate against them enough to prevent them from organising.[468] A right of association would simply be an interference with a State’s ability to expand its discriminatory power.

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[459]Brian Galligan and Emma Larking, 'Rights protection: The Bill of Rights Debate and Rights Protection in Australia's States & Territories' (2007) 28 *Adelaide Law Review* 178.
[460]Sir Owen Dixon, 'Two Constitutions Compared' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) 102.
[461]Ibid.
[462]Ibid.
[463]Ibid.
[464]Sir Robert Menzies, *Central Power in the Australian Commonwealth: an examination of the growth of Commonwealth power in the Australian Federation* (University Press of Virginia, 1967) 52.
[465]Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211, 230.
[466]Hilary Charlesworth, 'Who wins under a bill of rights?' (2006) 25 University of Queensland Law Journal 40.
[467]Ibid.
[468]Ibid.

A A history of suppression

Australia is increasingly isolated since New Zealand,[469] Canada (constitutionally),[470] and even the United Kingdom have all now protected human rights explicitly.[471] When even the UK - the source of responsible government and parliamentary supremacy theory - saw the necessity to protect human rights explicitly, the human rights void in Australia must be called into question. Australian courts will find foreign judgments less persuasive than ever before due to the impact of human rights protections. This isolation has already been described by Kirby J, where the explicit guarantees of freedom of speech in the United States, Canada, New Zealand, and the United Kingdom have rendered Australia's constitutional situation 'peculiar and now virtually unique'.[472]

Supporters of responsible government claim that a constitutional bill of rights would be too restrictive on the government's ability to legislate freely and would be 'undemocratic' because of its limitations on the power of elected governments.[473] Yet it is for the very purpose of limiting power that one protects civil liberties, because otherwise the state acquires disproportionate power at the expense of the people (who are responsible for them obtaining power in the first place). Without adequate protection minorities may be in danger of persecution if a majoritarian system develops. Brian Burdekin (former Australian Human Rights Commissioner) said 'it is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community'.[474] Persecution of minorities by exercise of arbitrary government power is evidenced by the removal of Australian Aboriginal children from their homes by State agencies.[475] Anti-association laws as in South Australia allowed criminalisation of any organisation the Attorney-General decided was a risk ‘to public safety and order’.[476]

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[469] *New Zealand Bill of Rights Act 1990* (NZ).
[470] *Canadian Bill of Rights*, SC 1960, c 44.
[471] *Human Rights Act 1998* (UK) c 42.
[472] *Coleman* (n 2) 81.
[473] Malcolm Farr, 'State rights push wrong – Ruddock slams campaign', The Daily Telegraph (Sydney), 7 April 2006, 17.
[474] Brian Burdekin, 'Foreword' in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centire for International and Public Law, Australian National University, 2002) v.
[475] Robert van Krieken, 'The 'stolen generations' and cultural genocide: the forced removal of Australian Indigenous children from their families and its implications for the sociology of childhood' (1999) 6(3) *Childhood* 297; Colin Tatz, 'Genocide in Australia' (2007) 1(3) *Journal of Genocide Research* 315; Bain Attwood, 'The Stolen Generations and genocide: Robert Manne's *In denial: the Stolen Generations and the Right*' (2001) 25 *Aboriginal History* 163, 170-171; Also see historian Paul Bartrop's comments that the Stolen Generations policy can be called a genocide 'relatively easily' in Rosemary Sorensen and Ashleigh Wilson, *Stolen Generations listed as Genocide* (24 March 2008) The Australian <https://web.archive.org/web/20080326183546/http://www.theaustralian.news.com.au/story/0%2C25197%2C23421344-2702%2C00.html>.
[476] Gray, ‘Bikie Laws’ (n 322) 280.

This is all addition to a rising trend of governments in Australia aggressively wielding power in relation to refugees, 'war on terrorism' measures, and literary censorship.[477] All of this indicates that Menzies' 'ultimate guarantee' was a minimal, paper-thin concession to the people, quieting dissent and enabling concentration of government power. Harry Evans, Clerk of the Senate, in 2006 warned of the dangers of the current 'tendency to power concentration and one-person government' that 'has proceeded further in Australia than in its sister countries in the so-called Westminster world' – a trend that threatens federalism itself.[478] If a government has very few restrictions on its power, it can decide to restrict expression or association with impunity. When such incidents occur, one is left to wonder what happened to the wisdom and safety of elected representatives that Sir Dixon guaranteed us in the 1940s.

B Rationale

It is against this backdrop that the High Court, in *Nationwide News* and *ACTV,* found implied freedoms in the *Australian Constitution* as a matter of necessity. In *Nationwide News* Brennan J argued the founding fathers chose *not* to use the Westminster model by adopting a Constitution that only the people could change. This necessitated a constitutional freedom of political communication, which existed to limit laws of the Commonwealth.[479] Likewise, in *ACTV* the majority decided the *Australian Constitution* provided for a representative democracy and some form of free speech was therefore required.[480] As early as *Attorney-General (Cth) (ex rel McKinlay) v Commonwealth* one can find references to the *Australian Constitution* setting up a representative democracy, so it is unsurprising that Australia has been described as one of the oldest continuous representative democracies.[481] Mason CJ said in *Nationwide News* that this conclusion was 'incontestable'.[482]

The House of Representatives is required by *Australian Constitution* s 24 to be 'directly chosen by the people of the Commonwealth'.[483] One also finds in s 7 that the Senate must be 'directly chosen by the people'.[484] It is clear in s 25 that 'chosen' means 'chosen by vote at an election'.[485] Gaudron J stated in *ACTV* that ss 7 and 24 are predicated upon 'a free society governed in accordance with the principles of representative parliamentary democracy'.[486] Her Honour also stated that 'representative democracy is a

[477]Galligan & Larking (n 459) 180.
[478]Ibid 179, 180.
[479]*Nationwide News* (n 47) 20.
[480]Nicola Roxon MP 'Does Australia have the democratic tools required to maintain a healthy democracy?' (2004) 110 Freedom of Information Review 20, 22; *ACTV* (n 21).
[481](1975) 135 CLR 1 ('McKinlay'); Gray, 'The Protection of Voting Equality in Australia' (n 1) 577.
[482]*ACTV* (n 21) 238.
[483]*Australian Constitution* s 24.
[484]*Australian Constitution* s 7.
[485]*ACTV* (n 21) 238.
[486]Ibid 210.

fundamental part of the Constitution – as fundamental as federalism and as fundamental as the vesting of power in an independent federal judiciary'.[487] These decisions still hold precedential value.

The judiciary had established, contrary to parliamentary supremacy, that the legislature was not intended to encroach upon rights and freedoms fundamental to a democratic society.[488] Gaudron J referred to the maintenance and operation of the democratic society which the *Australian Constitution* sets up, and that democratic principles are 'enshrined in the Constitution' in a dissenting opinion in *Kruger*.[489] Her Honour stated it was 'settled constitutional doctrine' that the Constitution provided for a 'democratic government' which depends on freedom of communication and political matters.[490] While this was a dissenting opinion, it is preceded by earlier majority decisions and appears to have been confirmed by later decisions. As noted in Chapter I since the case of *Lange* parliamentary supremacy is no longer part of Australian constitutional law. This means that doctrine is no longer authoritative in Australia for those critical of human rights protection.

It has been argued that civil liberties and democracy are invalid because they are not literally written in the *Australian Constitution*.[491] With respect, this no longer matters - implications are settled constitutional doctrine. Mason CJ stated outright in *ACTV* that implications are acceptable.[492] Since then the implied freedom has been almost universally supported by the High Court. Besides that fact, a literalist view would deny federalism itself, the basis 'from which the Court has implied restrictions on Commonwealth and State legislative powers'.[493] Mason CJ noted that even Dixon J had justified an implication by necessity, and that looking to the framing of the *Australian Constitution* it could plainly be seen.[494] The High Court has been drawing implications since its first years in a multitude of cases.[495] While literalism is sometimes said to have succeeded in the 1920s, the Court still referred to the use of

[487]Ibid.
[488]Zoë Robinson, 'A Comparative Analysis of the Doctrinal Consequences of Interpretive Disagreement for Implied Constitutional Rights' (2012) 11(1) *Washington University Global Studies Law Review* 93, 102.
[489]*Kruger* (n 94) 71.
[490]Ibid.
[491]Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 258.
[492]Ibid 134.
[493]Ibid.
[494]Ibid.
[495]*R v Smithers; Ex parte Benson* (1912) 16 CLR 99 (implication of free movement from the act of federation). See also the doctrine of implied immunities in *D'Emden v Pedder* (1904) 1 CLR 91, *Municipal Council of Sydney v Commonwealth (Municipal Rates Case)* (1904) 1 CLR 208, *Federated Amalgamated Government railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488, and *Attorney-General (Qld) v Attorney-General (Cth)* (1915) 20 CLR 148. See the doctrine of reserve powers in *Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469.

implications at the time.[496] Dixon J stated that prohibiting implications from text would 'defeat the intention of any instrument' – and most of all one could not prohibit implications from written texts, 'the last' to which such a prohibition could be applied.[497] Two decades later the Court actually found implications in the *Australian Constitution*, with Dixon J again stating that 'I do not see why we should be fearful about making implications'.[498] This occurred again and again in subsequent decades leading up until the present day.[499] It is no longer possible to argue constitutional implications are invalid. This is a settled point.

Another common issue is the criticism of implied civil liberties as 'judicially devised' or tyrannical.[500] Andrew Fraser described the implied freedom as enabling the government to act 'despotically, if need be'.[501] Aroney has argued for decades that the court is exercising 'judicial tyranny', a usurpation of the all-powerful parliament's duty by 'unelected judges'.[502] With respect, parliamentary supremacy is currently a dead doctrine since *Lange*, and was questionable prior to that by the existence of a Constitution in the first place. Furthermore, it is the duty of courts to interpret laws – without an understanding of how law operates, it would be hard to formulate views about where and when the parliament should act.[503]

French CJ pointed out that these critics have an unusual view of how statutory and constitutional interpretation works. His Honour said that judges do not fumble around like children picking up rocks off the ground – instead, they interpret via principles and invocation of criteria which are broadly understood by all three branches of the government.[504] There is no agreement on what constitutes 'judicial activism' in the first place. Some view judicial activism as helping other branches of government achieve goals, while others seeing it as judges using the Court to achieve a desired social result, and others simply

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[496] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) CLR 129, 146 (Knox CJ, Isaacs, Rich and Starke JJ).
[497] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681.
[498] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *R v Kirby; Ex parte Boilermakers Society of Australian (Boilermakers)* (1956) 94 CLR 254; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85.
[499] *Victoria v Commonwealth* (1971) 122 CLR 353; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581.
[500] Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 252.
[501] Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the *Australian Constitution*' (1994) 16 Sydney Law Review 213, 222 ('Popular Sovereignty').
[502] Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 269; Nicholas Aroney, 'Towards the 'Best Explanation' of the Constitution' (2011) 30(1) *University of Queensland Law Journal* 145, 164.
[503] Stone, 'The Nature of the Freedom of Political Communication' (n 119) 382.
[504] Chief Justice RS French, 'Judicial Activism – The Boundaries of the Judicial Role' (Paper presented at Lawasia Conference 2009, Ho Chi Minh City, Vietnam, 10 November 2009) 6 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10Nov09.pdf>.

describe obiter dicta as a form of activism.[505] In any case, judges are the least powerful of all branches and if their role were to be restricted every time someone did not like a judgment, one can only wonder what would be left for the Court to do.[506]

The judiciary should not strive to become decision-making robots with no opinions. What is important is that judges remain independent of political, social or economic pressure, fearless in the face of criticism, and impartial in the sense that they should not be susceptible to intimidation or temptation.[507] A judge that makes decisions keeping in mind the safety and security of the extant power structure would truly be a poor one, as the judiciary are a counter-balance against what would otherwise be unchecked power by a political elite ruling on behalf of the people.[508] Either way there is an uninterrupted line of cases since the first years of federation validating the methodology in *ACTV* and *Nationwide News*.

There is also an uninterrupted line of cases supporting the democratic system set up by the *Australian Constitution* and popular sovereignty serving as the basis of it. In *Mulholland v Australian Electoral Commission*'s unanimous decision Kirby J said that 'directly chosen by the people' was borrowed from the *US Constitution*, and that the usage of the word 'people' rather than the term 'electors' was specifically chosen as it 'enshrines the democratic ideal to which Ch I of the Constitution gives expression'.[509] A 4:3 majority in *McCloy* stated that 'equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*'.[510] In *Brown v Tas* similar sentiments regarding representation and democracy prevailed. [511]

Kiefel CJ, Bell and Keane JJ stated the implied freedom 'is indispensable to the exercise of political sovereignty by the people of the Commonwealth.'[512] While their Honours were hesitant to refer to democracy, they openly supported popular sovereignty. In Gageler J's judgment his Honour referred to *ACTV* where it is said that a law should not:

> go beyond what is reasonably necessary for the preservation of an ordered and democratic society, or for the

[505]Chief Justice RS French, 'Judicial Activism – The Boundaries of the Judicial Role' (Paper presented at Lawasia Conference 2009, Ho Chi Minh City, Vietnam, 10 November 2009) 7 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj10Nov09.pdf>.
[506]Ibid 6, 11.
[507]S.P. Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 *Washington University Journal of Law & Policy* 29, 100.
[508]Ibid 106; Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (The Constitution Society, first published 1752, 1998) <http://www.constitution.org/cm/sol.htm>.
[509]*Mulholland* (n 161) 222.
[510]*McCloy* (n 4) 207.
[511]*Brown v Tas* (n 224) 359.
[512]Ibid.

> protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society.[513]

His Honour did not accidentally fumble democracy into his judgment. Nettle J stated that association was clearly 'essential to the maintenance of representative democracy'.[514] This means a 4:3 majority supported popular sovereignty as the basis of the constitution, and three justices argued democracy was enshrined in the *Australian Constitution*. This is a legal fact that has not been overturned and is well established by precedent.

C Sovereignty

In *Nationwide News* and *ACTV* it was argued that upon Federation, sovereignty shifted to the people of Australia and the Commonwealth Parliament only held power (policed by the judiciary) in trust.[515] The right to vote reflected an intention that 'a legitimate ruler's authority is exercised at the pleasure of an equal people, all of who have retained their sovereignty'.[516] If the people are sovereign, then their liberty must be secured in order to protect their political life, and consequently their ability to hold the government accountable. Mason CJ,[517] and Gaudron J in *ACTV*,[518] appeared to support this view. In *Nationwide News* Deane and Toohey JJ also described support for this doctrine,[519] and while their Honours did not directly describe it in *ACTV*, they affirmed their previous judgment in that case.[520] These first two cases provided majority support for this doctrine, which is not unlike the US tradition. Gray points out that in dissent Murphy J in *McKinlay* stated that s 24 of the *Australian Constitution* is clearly taken from the *US Constitution*, something openly stated by Kirby J as part of the majority in *Mulholland*.[521]

Consider the US *Declaration of Independence* which stated that to secure 'life, liberty and the pursuit of happiness' that 'Governments are instituted among Men, deriving their just powers from the consent of the governed'.[522] While not itself a binding document, SCOTUS Justice Clarence Thomas supported use of the *Declaration of Independence* as a reference point for ‘higher-law’ principles and for interpretation

[513] *ACTV* (n 21) 169; *Brown v Tas* (n 224) 385.
[514] *Brown v Tas* (n 224) 408.
[515] Robinson (n 488) 102.
[516] Mark Carter, 'Reconsidering the Charter and Electoral Boundaries' (1999) 54 *Dalhousie Law Journal* 53, 74.
[517] *ACTV* (n 21) 137.
[518] *ACTV* (n 21) 210-211.
[519] *Nationwide News* (n 47) 71-72.
[520] *ACTV* (n 21) 168.
[521] Gray, ‘The Protection of Voting Equality in Australia’ (n 1) 563; *Mulholland* (n 161) 222.
[522] *Declaration of Independence* (15 March 2017) Mobile Friendly Historic Documents, Declaration of Independence Paragraph 2 <https://uscon.mobi/ind/2.html>.

of the *US Constitution*.[523] It is an uncontroversial statement that the *Declaration of Independence* was an influence on the *US Constitution*, which was itself influential on the *Australian Constitution*.[524]

The most prominent critic of popular sovereignty as the basis for an implied freedom is Nicholas Aroney, who has argued similarly to Andrew Fraser for decades that the people do not hold sovereign power in Australia.[525] They argue the *Australian Constitution* gained legal force as an exercise of British sovereignty via the UK Parliament.[526] It is argued that 'agreement of the people' and a referendum supporting the *Australian Constitution* gave no legal force at all to the *Commonwealth of Australia Constitution Act.*[527] Because the *Australian Constitution* was an Imperial statute, the people of Australia had no sovereign power, refuting the requirement for protection of speech. This view is sourced from Dawson J's dissenting judgment in *ACTV*, where "the legal foundation of the *Australian Constitution* is an exercise of sovereign power by the Imperial Parliament".[528]

Aroney contended the Court renounced popular sovereignty in *Lange* and thus the concept of representative democracy, by restricting interpretation to the 'text and structure' of the *Australian Constitution*.[529] It was conceded that this view has not always been followed by the High Court in cases such as *Brown v Tas*, *Coleman, McCloy*, *Mulholland*, and *APLA Limited v Legal Services Commissioner* ('APLA')[530] returning to the principles from *ACTV*, as noted above.[531] Even if this were not the case, Dawson J's judgment still doesn't entirely line up with the critics' view.

His Honour still described Australian society as a democratic one, and did agree that the *Australian Constitution* set up a representative democracy because it required direct popular election.[532] His Honour also further stated that representative democracy was mandated by the *Australian Constitution*.[533] So

[523]Kirk A. Kennedy, 'Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas' (1997) 9 Regent University Law Review 33, 34.
[524]Ibid 34-35.
[525]Fraser, 'Popular Sovereignty' (n 470); Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 258; Aroney, 'Representative Democracy Eclipsed' (n 286) 80; Nicholas Aroney, 'Lost in Translation: From Political Communication to Legal Communication?" (2005) 28(3) *University of New South Wales Law Journal* 833, 835; Aroney, 'Representative Democracy Eclipsed' (n 286) 157.
[526]Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 257; Fraser, 'Popular Sovereignty' (n 470) 216.
[527]Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 257.
[528]*ACTV* (n 21) 180.
[529]Aroney, 'Towards the Best' (n 282) 157.
[530](2005) 219 ALR 403. This was a case about a legislation prohibiting legal practitioners from publishing advertisements about personal injuries and related services.
[531]*Mulholland* (n 161) 222*; McCloy* (n 4) 207; Brown v Tas (n 224) 359.
[532]*ACTV* (n 21) 182-184.
[533]Ibid 187.

while his Honour did not support popular sovereignty, his *ACTV* judgment did not necessarily disavow democratic values.

Mason CJ easily dispensed with the critics' argument, anyway. Despite the Imperial Parliament's action, the *Australian Constitution* itself created a system for Australia where representatives exercised sovereign power on the people's behalf.[534] The procedure for amending the *Australian Constitution* required a successful double-majority referendum.[535] Even if one refused to accept these points, the *Australia Act 1986* (UK) was the death blow of British legal sovereignty in Australia and it made quite clear that ultimate sovereignty lied solely with the Australian people.[536] Mason CJ noted the legislative and executive branches are chosen directly by the people, can only exercise their powers as representatives of the people, and are ultimately accountable to the people for what they do.[537]

It is now well settled that the *Australian Constitution* sets up a representative democracy at the behest of a sovereign people. [538] These principles are still the basis for the implied freedom. When Deane & Toohey JJ in *Nationwide News* said 'all powers of government ultimately belong to, and *are derived from*, the governed' (emphasis added), their meaning was clear.[539] This has evolved over time but as demonstrated, recent judgments still indicate it to be the case.

D Evolving interpretation

Dawson J once stated that freedom of movement and communication were integral to any free society, but because the founders did not seek out to protect them they should not be protected at all.[540] One must consider the era of British colonialism the founders lived in - one of 'modernizing, post-feudal constitutional regimes, mostly monarchies that balanced land-owning and industrializing interests through various forms of representative and responsible government'.[541] If we attribute 'representative and responsible government' to them the question must be asked – representative of what and responsible to whom? The clear answer to this question was propertied white males.[542] Similarly, the *US Constitution* tacitly excluded women and was interpreted as allowing slavery, the German Imperial Constitution

[534]Ibid 137.
[535]Ibid.
[536]Ibid.
[537]Ibid.
[538]William Bartlett 'The Raised Spectre of Silencing "Political" and "Environmental" Protest' (2017) 36(1) *The University of Tasmania Law Review* 1, vii.
[539]*Nationwide News* (n 47) 70.
[540]*ACTV* (n 21) 186.
[541] Terrell Carver, 'Varieties of Constitutionalism: A Response to "Sinicised Marxist Constitutialism" by Chengyi (Andrew) Peng' in Matthew Johnson (ed), *The Legacy of Marxism: Contemporary Challenges, Conflicts and Developments* (Bloomsbury Publishing USA, 2012) 171, 178.
[542] Ibid 171, 179.

institutionalised aristocratic 'Junker' class privilege and a strong monarchy, and the United Kingdom saw constant and continuous struggles for recognition, electoral reform and enfranchisement.[543] These are the governments that Karl Marx was critical of for their exclusion of not just working class voters, but also peasant farmers and other excluded classes of society, including colonial subjects.[544] The context the founders wrote the constitution in was a drastic departure from the socio-economic conditions of today.

The founding fathers' intent *is* relevant, though. Gray said the founders mandated no particular model, and in *McGinty* three judges (out of six) agreed.[545] Originalism was used here to oppose voter equality because 'it imported into the Constitution values which the Constitution does not adopt'.[546] Aroney argued that 'the idea of constitutional guarantees of rights was remote from the political and constitutional thought of the era'.[547] This was an entirely correct statement, but the wrong conclusion. Yes, the *Australian Constitution* was written without a model – it *only* sets up a representative democracy - but it is because it lacks a specific model that it can evolve.

The relevance of the founders' intent does not lie in the oppressive, exclusionary politics of 19th century England. It is unusual to conclude that the authors of the *Australian Constitution* intended no interpretation whatsoever to take place. The founders' intent is relevant because they *did not* impose any values, meaning the concept of representation and what it means for a society to be democratic is able to evolve as society's expectations change. This is a view that the High Court has generally shared, confirmed by Gleeson CJ's approach in *Roach v Electoral Commissioner* as part of a 4:2 majority,[548] and by a 4:3 majority in *Rowe v Electoral Commissioner*.[549] In *Roach* Gleeson CJ found the meaning of words in a constitution can change over time.[550] This was confirmed in *Rowe*.[551] These views confirm Toohey J's earlier dissenting opinion from *McGinty* that democracy and representative government should not be frozen in time as society's expectations and ideas of democracy evolve.[552] Much from *McKinlay* and *McGinty* is outdated, and the High Court has since adopted to some extent Gray's 'living

[543]Ibid.
[544]Ibid.
[545]Gray, 'The Protection of Voting Equality in Australia' (n 1) 564.
[546]*McGinty v Western Australia* (1996) 186 CLR 140, 188. ('McGinty').
[547] Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 261.
[548](2007) 233 CLR 162 ('Roach').
[549](2011) 243 CLR 1 ('Rowe').
[550]*Roach* (n 548) 173 (Gleeson CJ); 188-9 (Gummow, Kirby and Crennan JJ).
[551]Gray, 'The Protection of Voting Equality in Australia' (n 1) 566-7.
[552]Ibid 564.

tree' interpretation.[553] This means the expectations of the people is an important consideration in democratic standards.

E The Test

The test for political communication has evolved – in the early years there were a number of variations attested.[554] Having stabilised after a unanimous decision handed down in *Lange* it grew from two-stages to three, with debates over the use of proportionality in the third stage.[555] The *Lange* test enabled the court to decide whether a law breached the implied freedom of political communication in *Lange* as follows: Firstly, whether the law effectively burdens political communication about government or political matters either in its terms, operation or effect.[556] Secondly, whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the referendum process.[557]

Note that the communication in question must be 'about government or political matters in terms, operation or effect'.[558] This is quite narrow. In *Coleman,* the scope of this test was expanded somewhat to include insulting words.[559] *Coleman* showed that communications protected under the *Lange* test were not actually restricted only to that which directly concerned politicians, parliaments, and electoral matters. The most recent formulation of the test occurred in *Brown v Tas* – any law that is accused of infringing political communication would be examined according to the following tests as formulated by Kiefel CJ, Bell and Keane JJ:

> 1. Does the law effectively burden freedom of communication about government or political matters in terms, operation or effect?
>
> 2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
>
> 3. Is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? [560]

[553]Ibid 564.
[554]Stone, 'Limits of Text' (n 344)
[555]*Lange* (n 85).
[556]*Lange* (n 85) 567-568.
[557]Ibid.
[558]Ibid.
[559]*Coleman* (n 2) 51, 82.
[560]*McCloy* (n 4) 194 was used for the first question; Brown v Tas (n 224) 364 for an updated formulation of the second and third.

The third question is often thought to represent proportionality testing, a method drawn largely from European law which considers whether a law is suitable, necessary and adequate in its balance.[561] Its status is unclear – the majority agreed it was applicable, but were divided as to whether it was required, with Gageler J refusing to use it and adopting a US-style test.[562]

F The end of proportionality

Proportionality as a method for deciding questions of human rights is popular in civil law jurisdictions, particularly in the European Union. In Australian case law it has been variously used and rejected by High Court justices, as noted previously in this work. The rise of proportionality across many jurisdictions lies in contrast with the United States which largely resisted its use. Justice Hugo Black, for instance, denied that a balancing test between free speech and property rights was necessary. His Honour argued the *First Amendment* had already been weighed and balanced by those who 'wrote and adopted' it, stating that *First Amendment* protections 'shall not be abridged'.[563] Black J's criticisms mainly related to ambiguity – it wasn't clear to his Honour exactly what was being weighed (values, principles, ideals), how weighting occurred (what metric exactly), and who did or should do the weighing (legislators, judges, or others).[564]

Black J was countered in his day by Justices Felix Frankfurter and John Marshall Harlan II who argued that rights were never absolute and always required balancing. Competing interests of free speech and national security must be balanced, with both framing constitutional rights as nothing but private interests whose operation and protection in any given occasion depended on them being balanced against competing government interests.[565]

But reduction of free speech questions to an array of interests means that protections depend on weight being given to conflicting interests, and therefore permanently conditional on circumstances and balancing.[566] This makes constitutional free speech law somewhat vague and unstable, unable to render consistent decisions on free speech, and makes the principle of *stare decisis* difficult to apply given the extremely case-by-case nature of the resulting body of law. Of course, in the originating jurisdiction of proportionality this has never been a problem since the law of precedent is not observed, but in a common law jurisdiction a reliable, consistent body of law must be able to form.

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[561]Gray, 'The Protection of Voting Equality in Australia' (n 1) 572.
[562]Brown v Tas (n 224) 390.
[563]*Speiser v Randall*, 357 US 513, 531 (1958).
[564]Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7(3) *I•CON* 468, 470.
[565]Ibid.
[566]Ibid.

The vague state of flux introduced into Australian free speech law clearly assists the High Court's refusal to commit to any clear definition or stance on scope or theory. It is certainly a good test for those preferring something flexible enough to forbid association and enact widespread censorship. These problems are a fine tool for those worshipping at the altar of strict textualism, because, as Laurent Frantz argued, 'the balancing test assures us little, if any, more freedom of speech than we should have had if the *First Amendment* had never been adopted'.[567] This is for reasons already discussed, but it is also in part because application of balance can easily lead to free speech being dismissed in favour of a competing interest.

Suitability in Australian constitutional law asks whether the provisions in the law can realise the purpose of that law.[568] Necessity means considering whether there are reasonable, practical alternatives to achieving a goal without burdening political communication.[569] Determining adequacy in balance means assessing whether the law 'goes too far' relative to the stated purpose of the act.[570] In all three of these metrics there are debates and inconsistencies between justices choosing to apply the proportionality test, and Justice Black's criticisms of this sort of test come to light.

For instance, in *Brown v Tas* Kiefel CJ, Bell & Keane JJ in their joint opinion engage in necessity analysis. They saw no problem with doing so as members of the judiciary, and said the court must look at practicable alternatives.[571] Nettle J however argued that generally it is for the legislative branch to consider necessity, not the Court, and it is not within the Court's power to engage in assessments of the approach of one legislation over another.[572] Nettle J only proceeded on the basis that in necessity analysis, the Court may only determine whether another law existed that burdened political communication to a lesser extent than the law at issue and only on that basis rule on necessity.[573]

All four of these justices were in the majority and yet differed drastically. Kiefel CJ, Bell & Keane JJ argued that analysing and comparing provisions from different legislations and determining their merit is acceptable for the court to do, but Nettle J rejected it as "a review of the relative merits of competing legislative models" is the exclusive domain of Parliament.[574] Furthermore, Gageler J as the fifth member of the majority said proportionality was entirely optional, chose not to use it and created his own test

[567]Laurent B. Frantz, 'The First Amendment in the Balance' (1962) 71 *Yale Law Journal* 1424, 1448.
[568]*Brown v Tas* (n 224) 418.
[569]Ibid 371.
[570]Ibid 423.
[571]Ibid 371-373.
[572]Ibid 418.
[573]Ibid.
[574]Ibid 420.

from scratch. Here, Justice Black's criticisms come to light – is it for the legislative branch or the judiciary? His Honour did not necessarily answer, saying instead the question was too ambiguous, leading to procedural and doctrinal difficulties as in *Brown v Tas*.

Adequacy in balance also encounters problems. When the Court attempts to determine the adequacy in balance by considering different factors there is always a question about the metric and the scale they are using. Balancing requires asking questions about whether a right should be restricted, and if so, how an acceptable restriction should look – balancing against valid communal interests.[575] A larger communal interest may appear to require greater restrictions on rights, so determining the scale requires empirical questions about variety of interests and their size, the number of people affected, the length of time in the case, the intensity or the urgency of the matter for communal interests.[576]

In *Brown v Tas*, Nettle J considered the interests of private corporations, environmental protesters, members of the public, and the police. The number of people and the amount of time they would be affected, and the urgency of the provisions were all considered vs the rights being restricted. After considering these, his Honour determined a large scale, stating the provisions finally to be 'far-reaching and broad-ranging'.[577]

Çalı argued that these questions, while empirical, can only be answered subjectively. The example Çalı gives is a hypothetical decision to displace a group of individuals from their homes in order to build a power plant. Here, the scale could weigh the benefits of the power plant against the costs of people being displaced; or the balance could be the economic benefits of the power plant to the entire region or country vs the costs to a small group of individuals.[578] This test works on a small scale, but on a large scale it becomes difficult to determine the relevance of different concerns.[579] It is difficult to determine what else should be included – society's morals and values, national security, welfare of the people, or fundamental principles of the state. It is one thing to consider these when establishing rights, but when using them to restrict rights, objectivity is thrown out the window. The balance is much more likely to be 'arbitrary and subject to the personal viewpoints of the decision-maker and the judge'.[580]

[575]Başak Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) *Human Rights Quarterly* 251, 264.
[576]Ibid.
[577]*Brown v Tas* (n 224) 423.
[578]Çalı (n 575) 264.
[579]Ibid.
[580]Ibid 265.

In *Brown v Tas*, Gageler J raised similar concerns to Çalı and Hugo Black, arguing that adequacy in balance was far too open and vague to be useful because it required a degree of arbitrariness and value judgment.[581] His Honour argued in line with Black that proportionality gives no guidance as to how balancing should occur, lacking any sort of indication as to metric, appropriate weighting, or gauging.[582] Of course when a case involves a large scale matter, there are political, cultural and economic issues surrounding it that cannot be neatly fit into empirical boxes, and attempts to do so require considerable interpretation and subjectivity. Gageler J argued the only way to fix this test would be to refine or significantly change it, but it would become too complex and too algorithmic for his tastes.[583] Instead, his Honour chose simply to abandon proportionality altogether.[584]

One of the core issues raised by critics of proportionality is not that it allows restriction of free speech *per se*, but that it *too easily* allows restriction of speech, and to a much more significant extent. There are notable examples of the European Court using proportionality to approve acts of censorship. In the case of *Otto-Preminger-Institut* a private cinema was raided by Austrian police under article 188 of the *Austrian Penal Law* (forbidding disparagement of a church or religious community) at the request of the Roman Catholic Church, who had decided the film was blasphemous.[585] The *Otto-Preminger Institut für audivisuelle Mediengestaltung* was an organisation named after German director Otto Preminger whose purpose was to promote creativity, challenging thought and entertainment through film. Preminger's history provides a good background to contrast the issues with proportionality against.

Preminger himself was no stranger to censorship and accusations of blasphemy by religious organisations. Having spent much of his career in the United States during the years of the Catholic Legion of Decency and the Hays Code, Preminger himself was a major figure in the struggle against blasphemy-related censorship, and film censorship broadly.[586] In fact, his film *The Moon is Blue* was banned in the United States under similar circumstances as in *Otto-Preminger-Institut*, whereupon Preminger, who had done his research into the First and Fourteenth Amendments, made the argument that his films were entitled to the same protection as newspapers.[587] Preminger ultimately succeeded, with few states continuing to contest the resulting Court decisions. Now, there were a few issues at play surrounding the ban of *The Moon is Blue*. Most relevantly to our discussion here is that Catholic organisations and churches began

[581] *Brown v Tas* (n 224) 376.
[582] Ibid.
[583] Ibid 377.
[584] Ibid 389-340.
[585] *Otto-Preminger-Institut v Austria*, 295-A European Court of Human Rights (ser. A) (1994).
[586] Barry Forshaw, *Sex and Film: The Erotic in Britsh, American, and World Cinema* (Palgrave Macmillan, 2015) 42.
[587] Ibid 44.

a campaign against the film, arguing it was an attack on morality and the family, and so offensive to Christianity that priests during sermons told the masses that it would be a mortal sin to watch it.[588] The Court did not agree, and Preminger's work helped pave the way for broad protection of films under the *First Amendment*.

After the ban was lifted, Preminger made an interesting point. He noted that many Americans were not Catholics, and while Catholics might feel obliged to follow their priests, or might be genuinely offended by the film, that is no reason why the adherents of other religions – or atheists – should have their viewing dictated by a particular faith group.[589] Apparently the Court in *Otto-Preminger-Institut* did not agree, as a 6 (out of 9) judge majority decided that seizure and confiscation of the film was not only legitimate, but that there was in fact no violation of free speech due to art 10(2) of the European convention on human rights (protecting the rights of others).[590] The majority accepted without any reasoning or justification as to why, the prior judgment of the Austrian courts that the film (*Das Liebeskonzil*) 'lacked any artistic merit that could outweigh offense to the public'.

Because the film and its content had been advertised publicly, that meant that there was in fact an offense to the public.[591] Because Catholicism was (at the time) by far the largest religion in Austria, that meant the authorities were more justified than they might otherwise be, on balance, because of the proportion of Austrians likely to be offended by the film.[592] The minority did not agree. They argued that seizure and confiscation of the film not only failed the necessity element, but argued that the majority's reasoning for banning the film could only apply if the speech was so abusive and so pervasive as to deny the freedom of religion for adherents of Catholicism.[593]

Either way, there was a structural problem on both sides. While the majority and minority disagreed about whether art 10(2) could extend to protecting religious people from speech, the minority did not ultimately see it as significant because they agreed with the majority that 'it is necessary in a democratic society to set limits to the public expression of such criticism of abuse'.[594] So the minority did not agree that there was a valid textual limitation, but did agreed that it was implicitly valid by virtue of democratic values.

[588]Ibid.
[589]Ibid 45.
[590]Tsakyrakis, 'Proportionality: An Assault on human rights?' (n 564) 478.
[591]Ibid.
[592]Ibid.
[593]*Otto-Preminger-Institut v Austria* (n 585) 9, 11.
[594]Ibid 6.

Censorship of media to protect one's personal views can be justified, but for the minority it was a matter of whether that censorship was balanced – in this case it was not, but it could be elsewhere.

The conclusion the majority made here – that there is a right of protection for religious feelings – appears to run contrary to one of the central rationales for free speech in the first place. Such protection would not be restricted only to religion according to the Court's logic. While it may be the case that people of some religion or personal view could be offended, one cannot seek protection against that discomfort without denying others their own freedom of religion (for people of other religions, or without one).[595] Obviously, such a protection conflicts with freedom of expression in any form as well, for those being censored on behalf of a religious group. This issue was not in dispute in *Otto-Preminger-Institut* since the minority agreed that protection of religious feelings was a public interest worth balancing against free speech.

And what is a public interest? The Court quantified the valid public interest in *Otto-Preminger-Institut* as valid on the basis that 87% of Austrians were Roman Catholic.[596] So on balance, the Court took a majoritarian view, stating that protecting the public from offense was an adequate reason on balance to allow censorship of speech. Consider their reasoning in the immediately prior stage of necessity testing, where the Court cited a rule from the earlier case of *Handyside v United Kingdom.*[597] They said the demands of pluralism, tolerance and open-mindedness, being required for a 'democratic society', made it necessary to seize material that shocks, offends, or disturbs the government or population.[598] This then fed into their majoritarian approach to balancing. The matter of public offense was not a matter of textualism by the European Court, because the minority supported it too by claiming it *was* implied and had no supporting explicit text.

One wonders how this decision would have been made in 2017, with only 56.9% of Austrians being Roman Catholic.[599] If it is merely a numbers game, presumably censorship would suddenly be unacceptable if Roman Catholics constituted only 24% of the population. Suppose that *Das Liebeskonzil* instead made light of Eastern Orthodox Christian theology. With Eastern Orthodox Christians being only 8.8% of Austrians, would the Court see this as enough of a public interest worthy of balancing against

[595]Tsakyrakis, 'Proportionality: An Assault on human rights?' (n 564) 480.
[596]*Otto-Preminger-Institut v Austria* (n 585) 56.
[597]5493/72) [1976] ECHR 5 (7 December 1976) ('Handyside').
[598]*Otto-Preminger-Institut v Austria* (n 585) 49.
[599]Catholic Church of Austria, 'Statistik: 2017 wieder leichter Rückgang bei Kirchenaustritten' (9 January 2018) <https://www.katholisch.at/aktuelles/2018/01/09/statistik-2017-wieder-leichter-rueckgang-bei-kirchenaustritten>.

free speech?[600] Perhaps not, given the majoritarian reasoning of the Court. What if, as Tsakyrakis supposes, that 87% of Austrians harboured violently racist feelings against Eskimo people, such that they felt strong moral indignation and uncontrollable fear?[601] Whether these feelings would be protected or not depends on a whole range of considerations about individual people's feelings, assumptions that must be brought to bear and value judgments accompanying them. While tolerance of minority views has been accepted by at least one High Court Justice as being a fundamental part of the character of the Australian constitutional system, there is no guarantee that an Australian Court will not decide on a similar basis to *Otto-Preminger-Institut*.[602] It is, after all, case-by-case.

And what are views worthy of balancing, anyway? Virtually anything can be assessed as needing to be considered against speech. As noted elsewhere in this thesis, there are those who argue that any action by an elected government is a democratic act, so long as that government was elected. Including even censorship laws that could result in criminal charges at the behest of an organisation that deems something to be objectionable, as in Austria. So, what we find with proportionality is an assessment of the relative "weight" of values, assumptions, and concepts – an assessment that does not lend itself to a particularly objective argument, often vague and opaque as to reasoning. This vague opacity is, as noted in previous chapters, a common feature of implied freedom judgments in Australia.

In *Brown v Tas* Gageler J argued that proportionality was not constitutionally required and its adoption was because the Justices in *McCloy* favoured it, not because it was indicated by the constitutional principles behind the freedom of political communication.[603] There are a number of reasons why his Honour went back to the early implied freedom judgments and adopted a US-style test.

Note that the Australian and United States Constitutions also lack any sort of equivalent to art 10(2) that explicitly requires protection of the rights of others. In such a jurisdiction, the usage of a balancing test is understandable, but a balancing test is clearly not required of a jurisdiction that does not set out explicitly or implicitly something akin to art 10(2). As noted in scholarship, it is arguable as to whether even the EU's own jurisprudence requires, or should use, a balancing test at all.[604] The United States has instead forged a different path, involving recognition of different speech categories with levels of scrutiny depending on the nature of the speech and the nature of the restriction. Much of that system has been

[600]Peter Mayr and Markus Rohrhofer, 'In Österreich leben mehr Orthodoxe als Muslime' (13 September 2018) *DerStandard* <https://www.derstandard.at/story/2000087224491/in-oesterreich-leben-mehr-orthodoxe-als-muslime>.
[601]Tsakyrakis, 'Proportionality: An Assault on human rights?' (n 564) 482.
[602]*Clubb* (n 250) 486.
[603]*Brown v Tas* (n 224) 376.
[604]See Tsakyrakis, 'Proportionality: An Assault on human rights?' (n 564) 480; Çalı (n 575) 265; Stavros Tsakyrakis, '*Proportionality: An Assault on human rights?*: A rejoinder to Madhav Khosla' 8(2) *I•CON* 307;

critically adopted into Australian free speech jurisprudence and openly developed by Gageler J as the 'calibration test'.

A categorical approach such as the SCOTUS developed avoids many of the problems with proportionality. The question of whether the 87% of Eskimo-haters' feelings should be considered is avoided entirely. It would simply be a matter of determining if *Das Liebeskonzil* falls into a protected category, then determining if there is a compelling enough government interest to allow restriction. Instead, proportionality testing means the Court must find a way to assign values to the views of the Eskimo-haters, and then weigh them against competing considerations. If it were simply a matter of numbers, that could be easily solved. It if were more complex, and the Court would not want to simply validate racism as Tsakyrakis contends, then it would be a matter of assigning their views very little weight, making them easy to override – possible, but also hopelessly ad hoc.[605]

Where is the precision? The depth of reasoning? The minority in *Otto-Preminger-Institut* agreed with censoring publicly offensive views but was against 'going too far' in doing so. In this case the offense stemmed from the mere knowledge that there were people watching *Das Liebeskonzil* privately, and the only way to be protected from that offense was to restrict the watching of the film by anyone in any conditions. These problems were addressed quite neatly by the SCOTUS which reversed a conviction for disturbing the peace by 'offensive conduct' due to words printed on a jacket.[606] Here, Harlan J, even as a noted supporter of balancing tests, dismissed public offense in the majority opinion as relevant, saying that those offended could avoid further offense by simply looking away.[607] In the end, the SCOTUS largely abandoned proportionality for all the above problems and moved towards the spectrum of scrutiny now in use.[608]

With structured proportionality being used frequently in the High Court, international jurisdictions have been relied upon. This includes use of US *First Amendment* jurisprudence, something not considered radical in Australia.[609] Yes, in *Monis* three justices said 'there is little to be gained by recourse to jurisprudence concerning the *First Amendment*'.[610] The High Court has differed significantly on the

[605]Tsakyrakis, 'Proportionality: An Assault on human rights?' (n 564) 482-3.
[606]*Cohen v California* 403 US 15 (1971).
[607]Ibid 21; Tsakyrakis, 'Proportionality: An Assault on human rights?' (n 564) 483.
[608]Gray, 'The 1st Amendment' (n 14) 7.
[609]Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 165.
[610]*Monis* (n 201) 207.

relevance of American constitutional principles.[611] The Court drew distinctions between the *First Amendment* and the implied freedom that will be discussed below.

G Australia & the US

Three main distinctions have been made by the Court: rights vs freedoms, positivity vs negativity, and vertical vs horizontal. Adrienne Stone calls these distinctions 'troublesome'.[612] The primary distinction drawn was rights vs freedoms – the *First Amendment* a right, and political communication merely a freedom.[613] William G. Buss noted the court in *Lange* was wrong to call the *First Amendment* an express 'right', as it contained only a 'prohibition of action by Congress which would "abridge" the freedom'.[614] The explicitness of the *First Amendment* did not distinguish it because the *US Constitution* contained only an explicit limit on legislative power, just as *Lange* characterised the implied freedom as 'a restriction on legislative power'.[615] While the *First Amendment* has been interpreted as conferring some private rights, they only exist impliedly as a result of interpretation by the SCOTUS.[616] While the *Australian Constitution* contain no references to free speech, *Lange* proceeds in the assumption that the implied freedom does exist. If personal rights can be conferred by an explicit freedom, Buss argued that there is no good reason why they cannot be conferred by an implied one.[617]

1 Positive vs Negative

Another distinction is negative vs. positive, where negative rights provide freedom from interference, rather than a positive right to have governments do or provide things.[618] In *Lange* it was said that ss 7 and 24 of the *Australian Constitution* prevent legislative or executive power from infringing on communication – a negative protection.[619] Even in Australian scholarship it has been argued that the *First Amendment* is a positive protection distinct from the implied freedom because breaches are a cause of action, a position the High Court has expressed.[620]

This may not be accurate. The *US Constitution* was described as 'a charter of negative rather than positive liberties' by Posner J, and the 'exclusively negative cast' of the *First Amendment* has been acknowledged

[611]Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 164.
[612]Stone, 'The Nature of the Freedom of Political Communication' (n 119).
[613]*Lange* (n 85) 560.
[614]Buss, 'Buss 2' (n 449) 439.
[615]Ibid 440.
[616]Ibid.
[617]Ibid 441.
[618]Susan Bandes, 'The Negative Constitution: A Critique' (1990) 88(8) *Michigan Law Review* 2271, 2274; Stone, 'The Nature of the Freedom of Political Communication' (n 119).
[619]*Lange* (n 85) 560.
[620]Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 163.

in Australian scholarship before.[621] This generally bears out in American Court decisions despite some limited exceptions relating to contracts & property.[622] Positive rights relate to social and economic guarantees such as those in Constitutions of South Africa, Brazil, Colombia and others that set up benefits for the poor going far beyond limiting government power.[623] The *First Amendment* is more accurately described as a negative right, especially given it requires only that 'Congress shall make no law' – a set of 'freedoms from' that secure the conditions necessary for government accountability.[624]

The distinction is not always useful. A right explicitly phrased in a negative way such as the *First Amendment* might require some affirmative action to be enforceable – some resources may need to be allocated to ensure public access to forums and information.[625] For instance, police may be required to protect public speakers from violence.[626] Or the government may have a burden to clean and care for the streets as an indirect consequence of *First Amendment* unrestricted leafleting.[627]

The negative/positive divide posits a hard distinction between action and inaction. Strict adherence to this distinction might lead one to consider a predominantly negative freedom to be positive if any affirmative government action is needed. This is problematic because action can easily be recast as inaction and vice versa. Consider that failure to apply brakes while driving a car (inaction) can also be regarded as driving without applying the brakes (action), and that government 'inaction' almost always occurs in the context of government action such as budgeting or legislation.[628] The SCOTUS even noted that taking a person into custody, holding them against their will, and leaving them there can be taken as both action and inaction at the same time.[629] The *First Amendment* is clearly not a positive provision, but the point remains that the distinction between negative and positive is not nearly as useful or practical as it first seems. In either case, as later chapters will show, the *First Amendment* is demonstrably not the infinitely scoped, chaotic frontier that critics often perceive it to be.[630]

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[621] *Jackson v City of Joliet*, 715 F. 2D 1200, 1203 (7th Circuit), *cert. Denied*, 465 US 1049 (1983); Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (2010) *University of Melbourne Legal Studies Research Paper*, No. 476, 12.

[622] David P. Currie, 'Positive and Negative Constitutional Rights' (1986) 53 *University of Chicago Law* Review 864, 887.

[623] Daniel M. Brinks and Varun Gauri, 'The Law's Majestic Equality? The Distributive Impactr of Judicializing Social and Economic Rights' (2014) 12(2) *Perspectives on Politics* 375, 376.

[624] *United States Constitution* amend I; Tabatha Abu El-Haj, '"Live Free or Die" – Liberty and the First Amendment' (2017) 78(4) *Ohio State Law Journal* 917, 919, 921.

[625] Bandes, 'The Negative Constitution: A Critique' (n 618) 2282.

[626] *Downie v Powers* 193 F.2d 760, 763-64 (10th Circuit, 1951).

[627] *Schneider v New Jersey* 308 US 147, 163 (1939).

[628] Stone, 'The Nature of the Freedom of Political Communication' (n 119).

[629] Ibid.

[630] Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 163.

2 Vertical vs Horizontal

The last distinction involves vertical vs horizontal rights - vertical being limited to rights vs the state, and horizontal allowing private actors to sue each other. The High Court characterized the *First Amendment* as horizontal and political communication as vertical. This requires a distinction between public and private actors, meaning one must always take the step of determining their status.[631] Private individuals can perform public functions, and the state may obligate or encourage a private actor to do something – in either of these cases it is unclear if the actor is public or private.[632] In the US constitutional rights are generally understood as operating vertically, including the *First Amendment*, and the 'state action' doctrine has arisen to attempt to deal with this problematic distinction.

The High Court in *Lange* nonetheless said the distinction was clear, comfortable to dismiss decades of US jurisprudence demonstrating problems with the distinction and the necessity to deal with them. With respect, the High Court's assessment of US jurisprudence was incorrect. Under the state action doctrine, individual rights are protected only against action of the 'state', i.e. the federal, state, or local government – this is a fact clearly indicated by the position in US case law.[633] Scholars note the state action doctrine actually functions to ensure that constitutional rights have less impact on private individuals than in other countries.[634] There are instances of horizontality in US law but only government compulsion or formal control of the private actor will allow it.[635] To that extent this doctrine is still a restriction on government power, not private action. The Supreme Court has largely used this doctrine to prevent expansion into private affairs, not facilitate it (and has been criticised for doing so by those favouring more horizontality).[636] The *First Amendment* cannot accurately be characterised as horizontal.

Stone notes that the Court's failure to appreciate this has undermined their analysis of political communication entirely.[637] There is no basis for the High Court to distinguish constitutional *First Amendment* jurisprudence on any of the above bases.[638] However, as with the lack of theory or

[631]Stone, ‘The Nature of the Freedom of Political Communication’ (n 119).
[632]Ibid.
[633]Buss, ‘Buss 2’ (n 449) 441, citing *The New York Times Co v Sullivan* 366 US 254 (1964) ('NY Times').
[634]Gabor Halmai, 'The Third Party Effect in Hungarian Constitutional Adjudication' in Andras Sajo and Renata Uitz (eds), *The constitution in private relations: expanding constitutionalism* (Eleven International Publishing, 2005) 99, 100; Mattias Kumm and Victor Ferreres Comella, 'What Is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect' in Andras Sajo and Renata Uitz (eds), *The constitution in private relations: expanding constitutionalism* (Eleven International Publishing, 2005) 241, 245; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1008) 3 *Public Law* 423, 427.
[635]Gillian E. Metzger, 'Privatization as Delegation' (2003) 103 *Columbia Law Review* 1367, 1417.
[636]Ibid 1421-1422.
[637]Stone, ‘The Nature of the Freedom of Political Communication’ (n 119).
[638]Buss, ‘Buss 2’ (n 449) 442.

justification in general in implied freedom cases, these issues have seen little consideration and discussion by the High Court. This is also true of their position regarding democracy.

H Democracy is not a system, but a category

The discourse around democracy is divided. Is has been called a set of principles and procedures designed to realise values such as liberty, equality, fraternity and justice.[639] Some reject democracy as simply "a set of techniques designed to ensure the rule of the most powerful under the guise of popular consent".[640] There are those arguing against particular models like representation, seeing "the reduction of democracy to such terms as a lamentable departure made necessary by mass politics, the military-industrial complex, etc".[641] While it is beyond the scope of this thesis to define democracy (if that is at all possible), this area plays an important role in Australian free speech law as its rationale. The views of Karl Marx on democracy will be used to criticise the High Court's theoretically inadequate, hesitant decisions, which have led to the public being deprived of freedoms they could otherwise enjoy were the court to continue developing the participatory model of representative democracy hinted at in the early cases.

Karl Marx's views of democracy often contradicted the work of modern Marxists and do not easily fit into any of the above categories – neither the clear advocates, nor the qualified or wholesale critics. Marx's view of democracy contradicted those who called it a superstructure over the base of capitalism, no more than a set of practices and procedures translating economics into socio-political terms.[642] As argued in Chapter II, there are problems with this analogy, such that Engels himself saw fit to comment on. There is a viable basis for Marxist theories of law that do not reject development of jurisprudence as it can play a role in reducing class oppression.

Marx also contradicted the views of qualified critics arguing democracy was only legitimate when direct, criticising them for being radical individualists. Marx did not necessarily believe participation entailed every individual rather than participation by representation.[643] Marx's views also contradicted Leninists, who supported a version of the elitist model. Marx found this model distasteful as it assumed harmony of social interests, and prioritised economic rights over political rights (a result of Lenin's economic

[639]Patricia Springborg 'Karl Marx on Democracy, Participation, Voting and Equality' (1984) 12(4) *Political Theory* 537.
[640]Ibid.
[641]Ibid.
[642]Ibid; Miguel Abensour, *Democracy Against the State: Marx and the Machiavellian Movement* (Polity, 7 February 2011) xxiii-xxiv.
[643]Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639).

determinism).[644] Marx's case for democracy relied on advocacy of popular control from below, rather than control of society by an elite group of guardians, and in such a society he thought it critical for the people to have legitimate representative power, liberty and political freedoms.[645]

According to Springborg, this was both startling and conventional – startling because his arguments for democracy were almost identical to those he made for communism a year after advocating for democracy.[646] Conventional because while his arguments differed significantly from other proponents of democracy, his conclusions were often similar. For Marx, democracy was not an economically determined superstructure. It was a complex set of ideas, values, and institutions - the 'essence of every political constitution, socialized man under the form of a particular constitution of the state'.[647] This meant that a variety of systems, scenarios and contexts could be described as democratic. It is the achievement and expression of ideas, values and institutions that make a society democratic, not the enactment of a particular political or economic model. As Stephen J once stated, there is no 'fixed or precise' definition of democracy.[648]

To reinforce this point, according to a 2017 survey at least 123 different countries could be considered as representative or electoral democracies. [649] Considering only orthodox liberal democracies, they still vary drastically. Executive power sees differences in concentration of power, relationships between executive and legislative branches, two-party vs multiparty systems, majoritarian & disproportional vs proportional systems, and different systems of dealing with interest groups, from competition to cooperation.[650] There are also differences between unitary vs federal, centralised vs decentralised, differences in numbers of legislative houses, constitution or no constitution, degree of separation of powers, and level of independence of central banks.[651] Even with a constitution, there is a divide between rigid, difficult to amend constitutions vs easily amended, flexible constitutions.[652] The only real constants

[644] Jie Lu and Tianjian Shi, ‘The battle of ideas and discourses before democratic transition: Different democratic conceptions in authoritarian China' (2014) 36(1) *International Political Science Review* 1; Joseph V. Fermia, *Marxism and Democracy* (Oxford University Press, 1993) 123.
[645] Gholam Khiabany and Milly Williamson, 'Free speech and the market state: Race, media and democracy in new liberal times' (2015) 30(5) *European Journal of Communication* 571, 573.
[646]Springborg, ‘Karl Marx on Democracy, Participation, Voting and Equality’ (n 639), 538.
[647]Ibid, 539.
[648]*McKinlay* (n 450) 56-57.
[649]Arch Puddington and Tyler Roylance, *Populists and Autocrats: The Dual Threat to Global Democracy* (18 January 2017) Freedom House, 20 <https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf>.
[650]Arend Lijphart, *Patterns of Democracy, Government Forms and Performance in Thirty-Six Countries* (Yale University Press, first published 1999, 2012 ed) 3-4.
[651]Lijphart (n 619) 3-4.
[652]Ibid.

are the existence of a legislature, a judiciary, an executive and elections in some form. Yet these are features that extend beyond the scope of democracy.

Winston Churchill is often quoted from an address to the House of Commons as saying that 'democracy is the worst form of Government except for all those other forms that have been tried from time to time'.[653] Apologies to Churchill must be delivered, because democracy is not truly a form of government. A country being democratic doesn't mean following a prescribed model because democracy is not a byproduct of capitalism or institution - it is the 'essence' of politics, framed by Marx in taxonomic terms as the genus to which all other forms of constitution are related as species.[654] In this way democracy has a unique relationship with politics, one not shared by monarchies and aristocracies. It is a concept that realises 'the essence of every state', a constitutional form that distinguishes itself from those systems that are solely juridical entities.

It is not a legal scripture proclaimed by a document but a concept that frames politics itself, a lens in which the people view themselves and the society they set up. It is a goal of maximising the people's ability to achieve their goals and actualise their potential. Crennan J stated in *Rowe* that "a democratic nation is characterised as one in which political equality and liberty are secured, however variously, by different electoral systems".[655] His Honour by this statement appeared to share Marx's taxonomic view of democracy as a concept that is essential to politics, rather than being simply a set of legal entities that arose to serve the needs of capitalists.[656] This poses the question of what exactly falls into the category of democracy.

I Democratic forms

Models vary significantly, and range from more common liberal concepts of democracy, to guardianship democracies and beyond. Those that are most common in the world today will be discussed. In the American constitutional tradition democracy is summarised by Abraham Lincoln's view, 'a government by the people of the people' whether that implies participation or simply a state set up by the people to administer on their behalf.[657] Fred D'Agostino described this as 'the democratic formula' – a government

[653]Winston Churchill & Richard Langworth (ed), *Churchill by Himself: The Definitive Collection of Quotations* (PublicAffairs, 2008) 574.
[654]Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639), 538; Sarah Maddison, Redefining democracy, in Clive Hamilton & Sarah Maddison (eds), *Silencing Dissent: How the Australian government is controlling public opinion and stifling debate* (Allen & Unwin, 2007) 41.
[655]*Rowe* (n 549) 344.
[656]Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639), 538.
[657]Fred D'Agostino, *The Sinews of a Free Society: Autonomy, Democracy, and Education* (20 January 2017) University of Queensland library <https://espace.library.uq.edu.au/view/UQ:10386/Maddox_festschri.htm>.

of people, set up by the people and not a particular interest group (as in oligarchy, fascism, etc) or concept (as in a theocracy), and prioritising the interests of the people above all else (rather than for an ideal such as nationalism or racism, or glorifying a monarch or a god).[658] D'Agostino included autonomy – that is, the government must be self-governing.[659] There is more, however, to this concept of autonomy than relations between polities.

A democratic society should be politically autonomous but in a philosophical sense, individuals themselves must be autonomous. This is because liberty means they have the freedom to do as they please, being free from oppression, commands and threats of others.[660] In order to for society to be governed 'of, by and for the people' there must be autonomous citizen-subjects, because a person who does not self-govern cannot participate.[661] In a non-democratic society those governed by others cannot act or speak on their own behalf as expressions of their own will and choice, while those who govern do not acknowledge the actions or demands of the people.

Individuals who do not self-govern can only be subject to the state, and therefore the state cannot be democratic because it does not encompass those individuals as people through which the collective governing is done.[662] This concept of autonomy was made clear in the *US Constitution* where the founders committed to the statement 'we the people'.[663] While the Founding Fathers left many without recognition, they issued a 'plausible promissory note to finish the *project* of self-government which their creative gesture was meant to initiate' – this 'promissory note' being the idea of liberty, equality and justice for all.[664]

The resulting constitution and society that was established contained elements that made the promissory note seem like a project to be taken seriously – and thus over the last few centuries Americans took it upon themselves to develop society and redeem the promissory note issued by the Founding Fathers with subsequent reforms and amendments through a variety of avenues.[665] Democracy was not simply a society set up left as is, a project that required a continual effort to develop. Nowhere in the *US Constitution* is 'democracy' mentioned at all.[666] D'Agostino's concept of democracy lines up with Marx's own. Democracy not as a prescribed model or point of law, but a principle that fundamentally informs

[658]Ibid.
[659]Ibid.
[660]Ibid.
[661]Ibid.
[662]Ibid.
[663]Ibid.
[664]Ibid.
[665]Ibid.
[666]*United States Constitution*.

politics, a project that evolves over time, extending popular control and sovereignty and eliminating restraints on it.[667]

1 *Mill & Participation*

For John Stuart Mill, a democratic society required true freedom, which in turn meant individuals should be able to pursue their own good so long as they do not prevent others from doing the same. Mill thought a democratic society involved the whole of the people exercising control over the legislature – as 'government of the whole people, by the whole people, equally represented'.[668] Self-government and 'the power of the people over themselves', when not coupled with liberty, could be misleading – the 'people' who exercise power might hold more power than others, and self-government more like 'government of each by all the rest'.[669] The will of the people can practically mean the will of the majority or the will of the most politically active in society, and therefore minorities can be oppressed.[670] Suggested precautions against tyranny were three categories – protection of conscience, individual thought and opinion, protection of the ability to choose one's own life, tastes and pursuits, and protection of association for any purpose that does not harm others.[671]

The only time it would be acceptable for the state to exercise power over citizens against their will would be to prevent harm from being inflicted on others – government paternalism was entirely rejected by Mill. Broad freedoms were preferred to protect individual liberty and autonomy, thus enabling the government of and by the whole people described by Gray.[672] Mill argued direct participation of citizens in government should be encouraged to build the people's confidence in their ability to govern themselves, as well as develop intellectual talents and moral values. Since he viewed direct participation as essentially impossible in a large society, he argued in favour of a representative model.[673]

Whatever the specifics of the model, the participatory theory of democracy is one of the three models common in the discourse of democracy in Australia.[674] The participatory model sets itself against all versions of liberal democracy that see active politics as the domain of government, interest group leaders

[667]Hal Draper, 'Marx on Democratic Forms of Government' (1974) 11 *Socialist Register* 101, 104.
[668]Gray, 'The Protection of Voting Equality in Australia' (n 1) 580.
[669]Mill, 'On Liberty' (n 341) 5.
[670]Ibid 7.
[671]Ibid 22.
[672]Frank Cunningham, *Theories of Democracy: a critical introduction* (Routledge, 2002) 28.
[673]John Stuart Mill, *Considerations on Representative Government* (Oxford University Press, first published 1861, 1991) 256.
[674]Glenn Patmore, 'Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia – Three Possible Models' (1998) 7 *Griffith Law Review* 97 ('Making Sense').

and the ruling class.[675] Other models see apathy and political inactivity on the part of ordinary citizens as an important and typical feature of democracy.[676] For those theorists informed by Schumpeter and his followers, democracy for the elitist and catallactic schools of thought is equated solely to the act of voting.[677] For the participatory theorists, representation and competitive voting in elections are seen as a necessary evil, which should be replaced with decision-making by discussion in the public in order to reach a consensus.[678] Participatory theorists owe a lot to the works of Jean-Jacques Rousseau, and favour his social contract theory.[679] Here, government exists not only to serve and protect the needs of individuals by ensuring that their interests are met and actually enhanced, but it also to promote and aid personal development of individuals.[680]

Participationists advocate protection of and popular involvement in decision-making in everyday-life, from the courtroom (juries), to socialist and social democratic theories of workplace democracy and self-management.[681] Participatory democrats therefore advocate more freedom for individuals so that they can be involved in as many issues as they like, directly or through public debate by discussion, protest, or other means. Participatory theory is diverse in its sources ranging from Aristotle, Mill, Rousseau, Dewey, and Marx to anarchists such as Michael Taylor or Pierre-Joseph Proudhon who advocated the people directly governing themselves without the mediation of state agencies or officials at all.[682] Whatever the level of sovereignty and delegated government advocated, participationists view democracy as control by citizens of their own affairs, with association and expression being of supreme importance.[683] They focus primarily on self-determination and self-development, rejecting the idea that democracy is primarily about selection and organisation of political elites.[684] The people are active participants in political life via their social existence but also through organisation. Much like the Lincoln-esque view of democracy advocated by D'Agostino, participatory democracy is described by scholars as a project that identifies obstacles to realising a democratic society and finding ways to overcome them.[685]

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[675]Cunningham (n 672) 28, 123.
[676]Ibid.
[677]Ibid.
[678]Ibid.
[679]Ibid.
[680]Patmore, ‘Making Sense’ (n 674) 104.
[681]Ibid.
[682]Cunningham (n 672) 126; Nadia Urbinati and Mark E. Warren, 'The Concept of Representation in Contemporary Democratic Theory' (2008) 11 *Annual Review of Political Science* 387, 392.
[683]Cunningham (n 672) 28, 137.
[684]Urbinati (n 682) 392.
[685]Cunningham (n 672) 28, 140.

2 *Guardians, Elitists, and Protectivists*

Democracy is so debated that there is no one concept that dominates or is universal. Chinese citizens understand democracy through an authoritarian guardianship discourse influenced by both Confucian and Leninist traditions - accordingly, a majority of Chinese citizens see the Chinese government as a democracy.[686] Certain values and institutions (such as civil rights and elections) have already been ingrained in older democracies - so discourses on democracy may be distinctly different elsewhere.[687] American adolescents for example have distinct thoughts on the weighting of individual rights vs equality, whereas in Latin American and African democracies people may prioritise political or socio-economic guarantees.[688] Robert A. Dahl noted a common alternatives to democracy is 'government by guardians', an old model demonstrated by the Leninist and Confucianist models.[689] These traditions have been repackaged into an alternate discourse on democracy, leading to China's 'democracy with Chinese characteristics' and Chinese citizens that favour democracy while simultaneously reporting high trust in Communist Party of China ('CPC') governance.[690]

Radically different to participatory theory, guardianship discourse and associated comparative research shows that democracy in the minds of ordinary Chinese people does not match the liberal democratic theories of Mill, de Tocqueville, Rousseau et al.[691] Underlying Chinese guardianship is the 'minben' doctrine, requiring those in power to be virtuous and work only for the people's welfare, prescribing the rulers to pursue collective benefit, and pay close attention to popular demands.[692] This is recognised as 'minzhu' (democracy), which in general has a quite positive connotation under CPC rule and has been propagated nationally since 2013 as one of 12 'socialist core values'.[693] Research has shown only 11.2% of chinese citizens consider free speech as important in a democratic society, but 72% consider it to be of critical importance that the government pay close attention to the popular opinion.[694]

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[686]Lu and Shi (n 644); Doh Chull Shin, 'Assessing Citizen Responses to Democracy: A Review and Synthesis of Recent Public Opinion Research' (CSD Working Papers, UC Irvine, 29 June 2015) <https://escholarship.org/uc/item/89k3z6q2> 3; Yue-han Chu & Min-Hua Huang, 'Solving An Asian Puzzle' (2010) 21(4) *Journal of Asian Democracy* 114; Min-Hua Huang, Yun-han Chu, and Yu-tzung Chang, 'Popular Understanding of Democracy and Regime Legitimacy' (2013) i(1) *Taiwan Journal of Democracy* 147; Tianjian Shi, *The Cultural Logic of Politics in Mainland China and Taiwan* (Cambridge University Press, 2015).

[687] Shin (n 686) 7.

[688]Lu and Shi (n 644) 5.

[689] Robert A Dahl, *Democracy and its Critics* (Yale University Press, 1989) 52.

[690]Lu and Shi (n 644), 6-7; Heike Holbig and Gunter Schucher, '"He who says C must say D" – China's Attempt to become the "World's Largest Democracy"' (GIGA Focus Asia, GIGA German Institute of Global and Area Studies, June 2016) 2-4.

[691]Lu and Shi (n 644) 7.

[692]Ibid, 7.

[693]Holbig and Schucher (n 693) 3.

[694]Lu and Shi (n 644) 9.

36% considered elections to be an important feature of democracy, whereas 46.18%) considered it more important for a democratic government to focus on making decisions based on the collective interests of the people.[695] While guardianship discourse has possibly prevailed in China due to successful propaganda, a well-regulated education and media system that indoctrinates people with this discourse, and suppression of other theories of democracy, Lue & Shi note this discourse also prevails in Singapore without these conditions.[696] Whatever the reason, guardianship democracy is predicated on government not necessarily being 'by' or 'of' the people, but 'for' them – an integral component of not only liberal concepts of democracy, but also Marx's.

The guardianship model of democracy is not unlike the 'elitist' theory discussed by Jack L. Walker where democracy is conceived mainly in procedural, juridical terms - a system where the political leaders (the 'elite') attempt to anticipate public desires and shape policy in an effort to be re-elected.[697] It is boiled down to a means of political adjustment to social pressure and systematic manipulation, with society being reduced to two classes.[698] Firstly, the elite political entrepreneurs who possess manipulative skills and political-ideological drive. It is argued that this is not authoritarian so long as there is limited, peaceful competition between the elite for positions in the bureaucracy.[699] Secondly, there are the people (the ruled) who are a formless, homogenous mass of 'apolitical clay' who need leadership, 'inert followers' who have little knowledge and interest in public affairs and cannot be trusted with political power.[700]

According to this model, stability and efficiency - not maximisation of the popular sovereignty and power - are the primary goals of a democracy.[701] There is no concern with human development or creating a genuine community where people can realise their potential.[702] Participation by the people is actually discouraged and apathy favoured, with increased political participation being considered destabilising as mass participation by Dahl's ignorant lesser species 'homo civicus' would cause society to break down

[695] Ibid.
[696] Jie Lu, John Aldrich and Tianjian Shi, 'Revisiting Media Effects in Authoritarian Societies: Democratic Conceptions, Collectivistic Norms, and Media Access in Urban China' (2014) 42(2) *Politics & Society* 253, 254.
Lu and Shi (n 644) 18.
[697] Jack L. Walker, 'A critique of the Elitist Theory of Democracy' (1966) 60(2) *The American Political Science Review* 285, 286.
[698] Ibid.
[699] Ibid
[700] Ibid.
[701] Ibid 289.
[702] Mill, 'Considerations on Representative Government' (n 673), 39; Walker (n 697) 288; Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639) 543.

into a violent failure.[703] Indeed, Lipset argued that there are 'profoundly anti-democratic tendencies in lower class groups' and goes so far as to blame the people for the rise of individuals such as Hitler.[704]

In this model, the people have no power, reduced to pulling at lever at election time to 'produce a government'.[705] Political life involves no social dimension or participation – democracy is simply a competition between members of the ruling class, the people serving merely as a tool to curb their excesses via the occasional vote.[706] Glenn Patmore argued that in this view, the people do receive some protections, but only the bare minimum necessary 'to keep those in charge in check' – some freedom of discussion, freedom of the press, and universal suffrage.[707] Discussion is only relevant in the context of information between the electors and the elected, a mechanism to allow votes to be cast.[708]

Patmore described a slightly more moderate 'protective' democracy that does value some participation.[709] While human rights have a more prominent focus, democracy is still viewed merely as an apparatus for holding the ruling class accountable.[710] The formation of opinions and ideas directly about politics is important here, and the participation of the people critical, but only important insofar as they aid the people's ability to vote and endorse or remove their rulers.[711] For protectivists, the protected participation is the vote - the people are encouraged to be active, but their participation is only important in relation to 'representative government'.[712]

It may be argued by elitists and protectivists that the people cannot be trusted with political power, or by guardians that socio-economic rights are more important. By contrast Harry S. Truman said laws forbidding dissent do not actually prevent subversive activities, but merely drive them into secret and dangerous channels, leading to underground movements and government striking out blindly in fear of revolt.[713] Suppressing the people's sovereignty or autonomy may lead to the very revolt and civic breakdowns that the elitists and guardians in their paternalistic paranoia seek to prevent. While a majoritarian guardianship or paternalistic elitist or protectivist democracy might today suppress a minority, today's minority could be tomorrow's majority.

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[703] Walker (n 666) 287.
[704] Ibid 292.
[705] Patmore, ‘Making Sense’ (n 674) 105.
[706] Ibid 104.
[707] Ibid 106.
[708] Ibid 107.
[709] Ibid 100.
[710] Ibid.
[711] Patmore, ‘Making Sense’ (n 674) 101.
[712] Ibid.
[713] Harry S. Truman, 'Special Message to the Congress on the Internal Security of the United States' (Speech delivered at the Congress of the United States, Washington DC, 8 August 1950) <http://www.presidency.ucsb.edu/ws/?pid=13576>.

And any groups that might be targeted by such governments may have their own valuable role to play in society but once the government has the power to suppress the voice or actions of some, it gains the power to do so to all. Truman noted that those advocating for breaking down the fundamental guarantees found in the *US Constitution* 'forget that if the Bill of Rights were to be broken down, all groups, even the most conservative, would be in danger from the arbitrary power of government'.[714] Truman was correct to argue that such a state of affairs challenges the integrity of a democratic society. The participatory model's approach, supported at different times by High Court justices, enables a democratic society to flourish, but to do so it requires meaningful protection of free speech (including association).

J Free speech in a democracy – justifications

Whether a so-called guardianship democracy shutting down protest and censoring with impunity in China, or a paternalistic 'responsible government' in Australia criminalising association and censoring media via state and federal cooperation, those threatening expression and association cannot genuinely be said to be governments 'for' the people. In any case, there are many justifications for expression and association.

D'Agostino's concept of autonomy necessarily requires freedom of expression as people must be free to gather, to create their own speech-acts and products, and to witness said acts and products. Association must also be protected – if people cannot gather, travel, and assemble then they cannot act on their own behalf. Similarly, Mill viewed expression and association as two of the three most important liberties to protect in any democratic society. Freedom of expression in Mill's view encompassed:

> the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions ... belongs to that part of the conduct of an individual which concerns other people; butt, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.[715]

Mill saw association as the freedom of 'combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived'.[716] These liberties typically only affect those who participate in or enjoy them, and because of this Mill thought that people should be able to engage in them free of any sort of interference by others, and by the state.[717] Mill did not discuss the specific mechanics of how to protect these liberties, just that they must be free of state regulation and there must be limits on what a democratically mandated

[714]Ibid.
[715]Mill, 'On Liberty' (n 341) 22.
[716]Ibid 23.
[717]Cunningham (n 672) 28.

government could legislate.[718] Or else the integrity and legitimacy of the democratic state would be significantly damaged. Citizens empowered to govern themselves prefer to do so with knowledge, meaning that restrictions on expression stifle public debate and the exploration of unconventional ideas.[719]

1 *Truth*

For Mill there were several justifications for free speech - relating primarily to the value of truth. Censoring expression was seen as a particularly evil act, robbing humanity - a true opinion censored deprives the people of a chance to fix a mistake, whereas a wrong opinion censored deprives society of the chance to have that opinion refuted.[720] Censorship implies infallibility in the censor, even though all individuals are fallible, and we do not always know the truth no matter how confident we are.[721] Certainty should exist as a result of one having had a free discussion, weighing the opinions and value of different points of view.[722] 'Dangerous' opinions must be allowed to be expressed because they cannot be determined as dangerous without free discussion, and because if such a view was true the act of censorship becomes more dangerous to society than the speech.[723] Extreme views in society (such as Christian ethics in Mill's view) also need balancing and correcting, and this can be best achieved via free speech.[724]

This 'marketplace of ideas' has since been adopted in United States jurisprudence.[725] Marx also argued for the free exchange of ideas, although argued free speech was not freedom from lies, inaccuracy or distortion. Nonetheless, the affairs of the people and government must be able to be discussed openly for democracy to be a ‘real living spirit’ rather than a marketing phrase.[726] Engels argued the marketplace of ideas was necessary to establish ‘democracy from below’, because “freedom of the press, the free competition of ideas – this means giving free reign to the class struggle in the field of the press”.[727] This was also the basis from which Draper argued in the 60s during the Free Speech Movement on California campuses. John Hart Ely made a similar argument about the *US Constitution*, where guaranteeing certain

[718]Ibid.
[719]Mill, ‘On Liberty’ (n 341) 24.
[720]Ibid 76.
[721]Ibid 115-6.
[722]Ibid 79.
[723]Ibid 82.
[724]Ibid 110. See 108-115 for the full argument.
[725]Eric Barendt, ‘Freedom of Speech’ (n 5) 7.
[726]Khiabany and Williamson (n 645) 573.
[727]Friedrich Engels, *The Debate on the Law on Posters* <http://marxists.anu.edu.au/archive/marx/works/1849/04/22c.htm>

rights prevents democratic ‘malfunctions’ that only serve to further entrench the powerful or oppress minorities.[728]

Mill's argument could be criticised for relying on a binary view of speech being 'true' or 'false'. It stands to reason for many topics there is no right or wrong - just subjective opinion. Another criticism of Mill's arguments is that there may be situations where legal systems prefer to protect other values, such as hate speech being criminalised in western Europe for the protection of ethnic minorities.[729] Such laws may also include prohibition of neo-fascist and racist political movements in order to impede their growth, although Mill’s philosophy can call into question the wisdom of these bans.[730] Suppression of speech and association, even with a reasonable-sounding justification, may drive suppressed views underground only to surface again later, without having been held accountable by public debate.[731]

Barendt argued this counter departed from the argument to truth, despite it being in line with Mill's view. If the government suppresses speech and drives it underground, the public is robbed of the opportunity to debate about it themselves, and this can in fact lead to the growth of an ideology despite efforts to suppress it. The German government suppresses certain forms of speech and certain political ideologies (such as nazism) in an effort to suppress ethno-nationalist politics, and yet ethno-nationalists and right-wing extremists have experienced at times what some describe as a renaissance.[732] For Mill, if the people cannot find the truth themselves, society cannot truly be democratic.

2 *Self-Fulfillment*

Self-fulfillment is another justification for free speech, where restrictions inhibit our personality and its growth.[733] The ability to hear different positions, explore options, and expose oneself to many different ideas, including controversial ones, is said to promote self-fulfillment. This manifests as development of independent judgment, considerate decision-making and autonomy, qualities which could not be developed in society without free expression.[734] This theory is somewhat problematic as a justification for free speech however as it is difficult to distinguish from justifications for other freedoms which may also be supported via self-fulfillment.[735] For example, one may argue pornography plays a role in

[728]Adrienne Stone, ‘Review Essay. Disagreement and an Australian Bill of Rights’ (2002) 26 *Melbourne University Law Review* 478, 487.
[729]Eric Barendt, ‘Freedom of Speech’ (n 5) 8.
[730]Ibid.
[731]Ibid 9.
[732]Samuel Salzborn, 'Renaissance of the New Right in Germany? A Discussion of New Right Elements in German Right-wing Extremism Today' (2016) 119 (Vol 34, No. 2) *German Politics and Society* 36.
[733]Eric Barendt, ‘Freedom of Speech’ (n 5) 17.
[734]Kent Greenawalt, 'Free Speech Justifications' (1989) 89 Columbia Law Review 143.
[735]Eric Barendt, ‘Freedom of Speech’ (n 5) 14.

satisfying sexual needs and thus be considered for protection based on self-fulfillment; it lends itself more readily to argument for general moral autonomy.[736] Both relate to self-fulfillment but are distinct, and yet it remains difficult to determine if one is truly making an argument for free speech specifically or for moral autonomy generally. This also makes it difficult to determine the scope of protection.

Alexander Meiklejohn argued self-fulfillment was not a concern of the *First Amendment*, a provision which he argued did not protect free speech at all, only public power and governmental responsibility.[737] In the United States, Meiklejohn clearly lost this argument. Courts concluded the *First Amendment* did in fact protect 'all of the possible free speech values'.[738] In Australia, Meiklejohn's view was successful, with free speech having been limited to protecting the self-government and autonomy of the state - the 'heart and soul' of Meiklejohn's concept.[739]

Thomas Scanlon's position was that government should not suppress speech in order to prevent people from forming beliefs or commit harmful acts as a result of those beliefs.[740] This theory is reflected in a number of US Supreme Court judgments showing that measures targeting the content of particular ideas or discriminating between varieties of speech will be subject to strict scrutiny.[741] However, Scanlon himself eventually reconsidered his position, stating that some paternalistic grounds may be acceptable, such as limitations on cigarette advertising.[742] This justification for free speech is important in that suppression of speech prevents people from making up their minds by accessing ideas, artworks, and information.[743]

3 *Citizen Participation*

It has been said by US jurists before that free speech is actually a duty central to the political life of citizens, so preserving free speech is necessary to protect democracy.[744] This has also been associated with Meiklejohn, who thought that the primary purpose of the *First Amendment* was to protect the right of citizens to understand and communicate about politics (and hence where the High Court's idea of 'political communication' may have come from).[745] It appears to have been adopted by the High Court of Australia in its rationale for the implied freedom, although we cannot know for sure as discussion of

[736]Ibid.
[737]Meiklejohn, 'The First Amendment is an Absolute' (n 370) 255.
[738]Buss, 'Buss 3' (n 449) 457.
[739]Ibid 457.
[740]Thomas Scanlon, *'A Theory of Freedom of Expression'* (1972) 1 Philosophy and Public Affairs 204, 213.
[741]Eric Barendt, 'Freedom of Speech' (n 5) 16.
[742]Ibid 17.
[743]Ibid 18.
[744]*Whitney v California* 274 US 357 (1927).
[745]Meiklejohn, 'The First Amendment is an Absolute' (n 370) 263.

Meiklejohn's views on expression (including for education, academia and art/literature), or his total disavowal of censorship, simply did not arise.

Argument from democracy and participation is one of the most influential justifications in recent decades, with unrestrained speech protecting against abuse of office as better informed citizenry can yielding a better government and thus better decision-making.[746] However this utilitarian argument could equally be used to suppress speech if it were decided that censorship was the best way to protect participation and democracy.[747] This point is noted as a weakness of Meiklejohn's argument – if democracy is the rationale for free speech, one will need to argue against the regulation or suppression of speech by *elected representatives*.[748]

Springborg countered this, arguing democracy was more than just a series of acts by the legislature.[749] Barendt's counter-argument was that everybody has a right to participate in public debate and discourse, and a society could hardly be democratic if it privileged a particular view.[750] Is a government that controls discourse and determines who can participate truly democratic simply because an election was held? It is doubtful, especially if wide portions of society were suppressed (calling into question the elections themselves, let alone the democratic nature of the society itself).

4 *Suspicion of Government*

It has been argued that governments have a history of suppressing speech critical of them – they simply cannot be trusted with the ability to regulate speech.[751] This argument is a purely negative position which does not enable distinction of protectable and unprotectable speech, and existing only to reinforce other justifications.[752] Private institutions can also pose great dangers to free speech, such as the Inquisition that suppressed Galileo's teachings, or mass media lobbying for harsher intellectual property law and technology like Digital Rights Management ('DRM'). [753]This means that media corporations and market forces sometimes pose a greater threat to speech than governments.[754] This has led to some European

[746]Greenawalt (n 734) 146.
[747]Eric Barendt, 'Freedom of Speech' (n 5) 19.
[748]Ibid.
[749]Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639) 542.
[750]Eric Barendt, 'Freedom of Speech' (n 5) 19-20.
[751]Ibid 21.
[752]Ibid 22.
[753]Ibid.
[754]Jack M. Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1, 17.

jurisdictions requiring free speech rights and values to be protected in private law disputes even where it entails restricting the interests of private corporations.[755]

These laws do rely on government to protect free speech via public regulatory bureaucracies, however, and turn private spaces into government-regulated ones.[756] Consider a recent case the US President blocking individuals on Twitter. It was ruled that the President could not block people from accessing his Twitter account and therefore prevent individuals from criticising the executive and accessing official communications.[757] The Court ruled the President's Twitter account constituted a public forum, being a method of delivering official communications controlled by the government.[758] Note however that Twitter is a privately owned corporation and the President's account is hosted on privately owned and maintained servers. Therefore, the *First Amendment* has been used to, in a way, convert privately owned property into a constitutionally protected public forum. Through this public-private speech issue one can see how an argument to suspicion of government should not stand alone as it is somewhat one-dimensional in nature. It should therefore be made only as an element of other arguments for free speech.

5 *Australian High Court model*

The High Court has not made it clear which model of democracy they prefer and there is little to no scholarship on this question. Patmore argued the High Court made it difficult to determine their intentions for human rights, in neither *Theophanous* nor *Lange* articulating a theory of democracy, their understanding apparently incomplete and intuitive.[759] The High Court's interpretation can just as easily be described as protectivist as participatory.[760] Dan Meagher argued the rationale for the implied freedom was a 'minimalist model of judicially-protected popular sovereignty', protecting only speech and association for the purpose of elections and voting choices.[761] In this interpretation the High Court established a protectivist model of democracy in Australia. While describing Mason CJ, Toohey J, Deane J and Gaudron J as participationists, Patmore agreed that Dawson J and Brennan J delivered protectivist views in *Theophanous*.[762] In addition to these two, Brennan J described political communication as merely enabling the people's role as a check on government action, protecting discussion of government,

[755] Eric Barendt, 'Freedom of Speech' (n 5) 22.
[756] Ibid.
[757] *Knight First Amendment Institute at Columbia University v. Trump*, No. 17 Civ. 5205 (NRB) (SDNY May 23, 2018).
[758] Ibid.
[759] Patmore, 'Making Sense' (n 674) 107.
[760] Anthony Gray, 'Government funding of non-government organisations and the implied freedom of political communication: The constitutionality of gag clauses' (2013) 48(4) *Australian Journal of Political Science* 456, 459; Maddison (n 654) 28.
[761] Meagher, 'What is 'Political Communication'?' (n 284) 459, 462, 467
[762] Patmore, 'Making Sense' (n 674) 110.

its actions, institutions and little else.[763] His Honour therefore only valued participation in politics as valuable where it related to elections - a clearly protectivist view.[764]

Dawson J took the view that there was no constitutional freedom of speech, only communication.[765] His Honour argued the democratic nature of government rested solely on institutional and bureaucratic structures, with communication being a necessity of those structures.[766] Freedoms were only needed where they allowed the making of a choice by casting an informed vote, so speech protection was unnecessary.[767] McHugh J in dissent went further and sided with the elitists, arguing that Australia was not in fact a democracy at all.[768] His Honour did not view expression as being protected, and argued the *Australian Constitution* was characterised by competition between members of the political class for votes (in the elitist vein).[769] Overall, in *Theophanous* there were four participationists, two protectivists, and one elitist. Thereafter participatory theory did not have the influence one would expect. The Brennan Court arrived, delivering a unanimous opinion apparently favouring protectivist theory.

The Court now conceived of the constitutional system as a 'representative government' that protected political communication only to the extent necessary to enable voters to make an informed choice at the ballot box.[770] It has been said that the positions of Alexander Meiklejohn were influential on the Australian High Court.[771] The language used by the High Court in these decisions certainly seems to reflect Meiklejohn’s theory, but Meiklejohn supported a view of democracy centred on public participation in the political process, a 'town meeting' theory that prioritised an informed public.[772] Meiklejohn also conceded that four categories of speech must be protected at minimum in order for people to be able to cast informed votes, some of which remain unprotected in Australian jurisprudence.

Firstly, 'freedom of education' was necessarily because education 'in all its phases' enabled citizens to have an informed and cultivated mind, and the wisdom, independence, and dignity required in voters.[773] Secondly, academic free speech was critical, including philosophy and the sciences.[774] Thirdly, 'literature

[763]Ibid 111.
[764]*Theophanous* (n 61) 190.
[765]Ibid 190.
[766]Patmore, ‘Making Sense’ (n 674) 113.
[767]Ibid 113.
[768]*Theophanous* (n 61) 196.
[769]Ibid 204; Patmore, ‘Making Sense’ (n 674) 115.
[770]Patmore, ‘Making Sense’ (n 674) 117.
[771]Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' (2012) 3 *University of Illinois Law Review* 683, 704; Buss, ‘Buss 2’ (n 449) 422; Rosenberg and Williams (n 450) 457; Meagher, 'What is 'Political Communication'?' (n 284) 451.
[772]Rosenberg and Williams (n 450) 457.
[773]Meiklejohn, ‘The First Amendment is an Absolute’ (n 370).
[774]Ibid.

and the arts' were required because they enabled citizens to have sensitive and informed appreciation and response socio-political, moral and ethical values in society.[775] The fourth category, public discussions of public issues, is the only one the High Court has seen fit to protect, with no justification, theory, or reasoning as to why.[776]

Civil liberties are now often conceived of in the High Court as incidental to institutional arrangements as opposed to the majority participatory view expressed earlier, but we cannot truly be sure what model Justices prefer.[777] Failure to explore this has stifled development of free speech jurisprudence in Australia while the Court delivers decisions with little to no theoretical justification for its positions. This has led to a pseudo-protectivist status quo that has provided little remedy to the consistent problems challenging association and expression in Australia.

K Marx, Democracy, and Law

Marx's theory of democracy and the democratic swindle will be used to demonstrate and criticise the inadequacy of the Australian High Court's post-*Lange* approach. Marx's concept of democracy was framed in the classical theories of popular sovereignty, similar to the way Justices such as Kiefel CJ, Bell and Keane JJ in *Brown v Tas*,[778] the majority in *McCloy*,[779] or *Mason CJ* in ACTV saw democracy.[780] Hegel once argued that the state could only truly exist as an entity formally empowered by a monarch that embodies that function:

> it is only as a person, the monarch, that the personality of the state is actual ... and that a people ceases to be that indeterminate abstraction which, when represented in a quite general way, is called the people.[781]

This sort of legal formalism has been adopted in some quarters in Australian constitutional theory as well. Scholars such as Aroney point to the existence of the Governor-General as fulfilling the formalism advocated by Hegel and criticised by Marx,[782] arguing there is no popular sovereignty, that the *Australian Constitution* does not set up a democracy or even a representative government, and that it is the Governor-General that formalises acts of Parliament. The High Court, even with its anti-theoretical position on free speech, has rejected this position. Mason CJ emphasised that the legislature and executive were directly

[775]Ibid.
[776]Ibid.
[777]Patmore, 'Making Sense' (n 674) 120.
[778]*Brown v Tas* (n 224) 359.
[779]*McCloy* (n 4) 207.
[780]*ACTV* (n 21) 138.
[781]Karl Marx, *Critique of Hegel's Philosophy of Right* (28 May 2018) Marxists Internet Archive <https://www.marxists.org/archive/marx/works/1843/critique-hpr/ch02.htm#003> ('Critique of Hegel's Philosophy').
[782] Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (n 20) 258.

chosen by the people and neither could exist without that, including the Governor-General [783] Furthermore, the Governor-General is merely a repository of executive power, holds no power personally, and can only act with the advice of the Executive Council, an entity whose existence depends exclusively on the direct choice of the people.[784] With respect, the office of the Governor-General does not fulfill the formalist role attributed to it by Aroney.

Marx argued that the most logical form of the state is one in which the formal and material principles coincide and the people both rule and are ruled.[785] A democratic society is not simply a constitutional form but a society whose principles actually govern and have force and meaning. The state is merely a self-determination of the people, so a distinction between civil and political in a democratic society is a distinction that can no longer exist when democratic principles reign.[786] Democratic societies bear laws and often bear constitutions and both these and the state itself are determined wholly by the people.[787] A democratic society is one governed only by virtue of the people's choices. A constitution, a legislature, an executive – these are formal legal provisions, existing as a result of the people sharing in deliberation and debate on social, cultural and political matters.[788] They are the result of a society 'directly chosen by the people' as it were. If different formal legal provisions or institutions arise, it will be due to popular choices, not because of a formal head of state, or an Imperial act of parliament.

Similar sorts of formalism have been employed by members of the Australian High Court before in order to deny protections of basic civil liberties. Gummow J argued in *Kruger* that neither freedom of association nor freedom of movement were necessary for the efficacy of a democratic system,[789] and that the *Australian Constitution* protected only ‘responsible and representative government’, continuing the idea that the Australian government and its legal underpinning is not democratic in nature. In that same case, another four Justices considered association as protected, but only as a nebulous corollary, with little real justification for this status.[790]

This was a consistent line that continued in many cases subsequent to *Kruger* as noted in Chapter 2. Heydon argued association was not even an element of the implied freedom of political communication, and that even a general freedom of political communication was not supported by the *Australian*

[783] *ACTV* (n 21) 137.
[784] Ibid.
[785] Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639) 540.
[786] Ibid.
[787] Marx, ‘Critique of Hegel’s Philosophy’ (n 781).
[788] Ibid; Fermia (n 644) 103;
[789] Kruger (n 94) 157.
[790] Ibid 45, 68, 96, 115.

Constitution. Except for that which was strictly necessary for a 'representative and responsible government' to function.[791] The corollary view as expressed by Gummow, Hayne, Crennan and Bell JJ was due to association being unable to stand on its own, not strictly necessary for a democratic society to function.[792] This sort of thinking continued in cases such as *Tajjour*.[793] To arrive at the point of view that a democratic society would not require significant protection of association, or that the *Australian Constitution* isn't even a democratic document in the first place requires a quite literalist and democratic formalist view.

This view seems to require a very particular set of provisions to exist in a constitution in order for that constitution and the system it sets up to be viewed as a democratic one. The particular requirements of a democracy are deemed as unfulfilled by the *Australian Constitution* in spite of the document making the composition of its entire political system contingent on direct choice by the people. Of course, here we have a type of literalism where because the term 'democracy' is not literally written into the *Australian Constitution,* even a requirement of direct choice by the people is not interpreted as necessarily a democratic provision. One would think the phrasing 'directly chosen by the people' is clear,[794] however interpretation can render this differently, leading to drastically different results.

Interpreted the right way, 'the people' does not have to mean 'all of the people' but could simply mean 'some of the people'. A government that can only govern, be appointed and staffed by consent of the people might be a democratic society – unless, of course, one sees a requirement for just *some people at all* to have a hand in choosing the government. That means one could then easily see the *Australian Constitution* as setting up a system 'representative' only of those that have the ability to directly choose members of parliament in the first place. Of course, democracy is not merely a constitutional form at all, and has never been. It cannot be boiled down to a set of phrases in a legal document.

As Marx argued, democracy is a set of values that govern decision-making. But those values cannot simply govern decision-making in some way, they must do so in a way that has actual force and meaning. They must do so in an authentic, powerful way that does not lead to the values of democracy being paid mere lip service to. If one can only accept the democratic nature of the *Australian Constitution* if the word "democracy" is literally written into the document, it remains difficult to see how any sort of democratic standard could still arise. Those who argue that there must be a specific legal form setting up

[791] Wainohu (n 192) 251.
[792] Ibid 230.
[793] *Tajjour* (n 200) 576.
[794] *Australian Constitution* s 7.

a specific set of procedures written in a specific way in order for a system to be recognized as a democratic, make an argument that lends itself to the sort of interpretive practices that prevent democratic values from being recognized in the first place.

Even if a protection exists in a literal manner, this does not mean it will be protected the way one might initially think, as interpretation can still render what appears to be a thorough protection into something that has little if any role in law. Consider that s 116 of the Australian Constitution literally protects what has been described as 'a robust protection for free exercise' of religion, forbidding imposition of religious observance on the public, forbidding establishment of a state religion, guaranteeing free exercise of religion and preventing religious tests on public office.[795] Despite all the debate around explicitness vs implication, and 'rights' vs 'freedoms' in Australian free speech jurisprudence, even when a literal protection arises the High Court was still able to read s 116 down as 'not, in form, a constitutional guarantee of the rights of individuals' but instead simply an 'express restriction upon the exercise of Commonwealth legislative power'.[796]

This occurred despite s 116 explicitly protecting free exercise of religion, and this interpretation has been observed as greatly reducing the potential for s 116 to provide a significant protection for free exercise of religion at all.[797] In fact, interpretation has read down what would appear to be, in a literal sense, quite comprehensive protections, to the point where s 116 has never operated since the *Australian Constitution* was enacted.[798] As the adage goes, where there is a will, there is a way – and in the case of constitutional civil rights, if there is a will to render something obsolete, it matters little how formalized it is in the text of a legal document. Emphasis on text *per se* while rejecting implications and extra-legal matter such as legal scholarship and other literature is an approach that lends itself to a democratic swindle at best, and establishment of autocratic, authoritarian institutions as Marx observed in the 19th century.

What is both more useful and more practical for their Honours would be to adopt a living tree approach, one. Not only that, but their Honours should recognise that the *Australian Constitution* sets up a democracy by virtue of the popular sovereignty enshrined in ss 7 and 24. To ensure constitutional integrity, it is not enough that their Honours protect the lone category of 'political' communication. Broader freedoms of speech and association must be protected in their own right, and in meaningful, authentic ways that ensure significant protections that do not merely protect the interests of those with wealth and

[795] Paul T. Babie and Arvind P. Bhanu, 'Freedom of Religion and Belief in India and Australia: An Introductory Comparative Assessment of Two Federal Constitutional Democracies' (2018) 39(1) *Pace Law Review* 1, 23.
[796] *Black v Commonwealth* (1981) 146 CLR 559, 605.
[797] Babie and Bhanu (n 795) 26.
[798] Ibid 28.

power in the way that traditional interpretive methods have. There are a variety of ways to do this, and there are some minimum requirements.

Marx recognised that political participation required suffrage. Individuals must be able to vote on proposals or in elections – some actual power and effect must be given to those participating or else the participation is merely advisory and not necessarily democratic. Because, of course, "voting is the immediate, the direct, the existing relation of civil society to the political state".[799] The unity of the social and political is symbolised by the vote and it connects civil society to the representative element, but a society confining participation in political life to the mere periodic election of deputies is missing significant elements of democracy.[800] A democracy doesn't necessarily require the participation of every single member of society as individuals in the decision-making process in order for it to be democratic.

Even a direct democracy may be directly democratic without every single individual participating.[801] Even in Australian elections where voting is obligated by law, not every single individual participates. This does not make the process undemocratic because many individuals do not participate or have no desire to do so. This was a spurious debate, in Marx's view.[802] Either the people are an integral part of the state or they are not part of it at all, regardless of the directness or indirectness of power.

In Australia, it was clearly established by constitutional doctrine that the people were in fact integral to the state, and if this is the case then Marx's view is highly relevant. If the people are integral to the state, they participate in politics through their actual social existence.[803] The dichotomy between political participation as all or not all is false and goes hand in hand with the abstract separation of civil society and the state, which

> falsely presumes the political to be constituted by single political acts performed by individuals, focusing exclusively on the legislature as the locus of popular participation.[804]

The social existence of individuals is a representation of society by the state. To paraphrase Marx - just as the shoemaker is my representative insofar as he fulfills my social need, so is the baker, and the

[799]Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639) 538.
[800]Fermia (n 644) 73; Karl Marx, Loyd David Easton (ed) and Kurt H. Guddat (ed), *Writings of the Young Marx on Philosophy and Society* (Doubleday, 1967) 200; Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639) 545.
[801]Richard Norman Hunt, *The Political Ideas of Marx and Engels: Marxism and Totalitarian Democracy, 1818-50* (Springer, 2016) 83; Patricia Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (1984) 12(4) *Political Theory* 537, 538; Fermia (n 644) 73.
[802]Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639) 542.
[803]Marx, 'Critique of Hegel's Philosophy' (n 781).
[804]Springborg, 'Karl Marx on Democracy, Participation, Voting and Equality' (n 639) 542.

filmmaker or the activist.[805] These are all activities representative by virtue of what these people are and do – this is to say that the state is not an independent entity, but it is the result of the people's will. It is a part of society which is itself a collectivity wherein the whole is greater than the sum of its parts. So, protection of free speech and association entails recognition of the fact that the people are what constitutes and determines the existence of the state and the *Australian Constitution* itself.

Democracy cannot and should not be boiled down under analysis to a simple juridical or political model. It is a complex array of systems and concepts that combine, an idea that transcends any one model but has characteristics of its own. A democratic society is complete when the whole people are recognised as a part of that society and participate through a range of means, including through voting but also through their various roles in society. The people are representatives of one another as they fulfill social needs and roles, which are integral parts of the operation of society. Those roles may not involve discussion or interaction with the legislature but may involve a variety of issues that affect society in other ways, and thus affect the state.[806] A democratic society is constituted by the people, who allow the existence of the state and its observance of the *Australian Constitution*.

And yet the people, being integral to the state and participating in politics through their social existences are not recognised as such by current Australian free speech doctrine. If the people are integral to the state, then their very social existence is participation in politics and thus the products of their social existence and discussion thereof are also political. This makes it even more difficult to draw a meaningful distinction between ‘political communication’ and ‘non-political communication’. The two often mix within the same conversations, situations, acts, and media. As scholars and jurists alike have argued, it is in fact dangerous to try to draw lines between them and protect one but not the other, as one runs the risk of privileging those with power in society and granting them the ability to decide what is and is not proper. The *Australian Constitution* does not require protection of speech impliedly to focus on ‘political communication’. It can protect a variety of categories of speech directly, without the need to create a democratic swindle and implement freedom of speech as a mere tool to protect ruling class power.

Literary-artistic expression can be protected without being restricted to that which is "political enough". Association is also an integral element of existence and participation in society and yet is relegated to impotence as a corollary of an already problematically narrow freedom. Instead, it is fully capable of being protected as a standalone freedom, sourced directly from ss 7 and 24 of the *Australian Constitution*.

[805]Marx, ‘Critique of Hegel’s Philosophy’ (n 781).
[806] SCOTUS authorities to this effect will be explored in following chapters.

These issues will be discussed in more detail in later chapters of this work. The basis of these freedom is democracy, and a government unresponsive to the needs of the people and being unwilling to meet them significantly harms the legitimacy of Australian democracy and the institutional integrity of the *Australian Constitution*.

L Ineffective jurisprudence and the democratic swindle

Anthony Gray said a key aspect of a democratic government obtaining legitimacy relates to whether that government is in fact truly representative of the people, highlighting accountability to the electorate.[807] This is highly relevant in the context of constitutional freedoms. Judicial review of malapportionment is important in terms of accountability by way of it ensuring that the operation of elections is effectively tied to the expression of actual majority will, not just the cosmetic appearance of a majority.[808] It is argued by Gray that the legitimacy of elections depends on more than the simple ability of individuals to turn up to the booth and check a box, or for parties to be able to run in an election.[809]

There may be institutional problems occurring that cannot be addressed by protection of a person's ability to write a few numbers on a piece of paper in a designated space and put the piece of paper into a designated box. Simple concessions to democratic accountability are not enough, Gray argued.[810] A democratic system is not adequately protected if liberties are so narrow as to become ineffective. The High Court acknowledged the *Australian Constitution* reflects the concept of 'representative democracy' – this is not a 'free standing principle' on its own – it explicitly reflects the requirement that governance in Australia be democratic via direct choice of the people.[811]

Marx and Engels argued that constitutions became the legal means for the powerful to curtail the freedoms of the people.[812] They criticised highly restrictive and repressive constitutions in France and Germany for giving too much to the ruling class and not enough to the people.[813] The *Australian Constitution*, protecting democracy with few explicit civil rights, lends itself to a situation where the people's freedom is curtailed by those with privilege and power. Consider critical views - the implied freedom undisputedly protected conduct of the entire executive branch in *Lange*.[814] It is not just ministers

[807]Gray, ‘The Protection of Voting Equality in Australia’ (n 1) 580-581.
[808]Ibid 581.
[809]Ibid.
[810]Ibid.
[811]Ibid.
[812]Natalie Fenton and Des Freedman, 'Fake Democracy, Bad News' (2018) 54 *Socialist Register* <https://socialistregister.com/index.php/srv/article/view/28588#.WeCR2UyZNyo> 5; Khiabany and Williamson (n 645) 573.
[813]Khiabany and Williamson (n 645) 573.
[814]Meagher, 'What is 'Political Communication'?' (n 284) 459.

and the public service either, but the legislature itself and all its agents and employees.[815] Neither association nor communication by the people are protected except where it relates to people voting during a federal election. Under this analysis, those who hold power in the government set up by the *Australian Constitution* are fully protected verbally and non-verbally.

Robert Menzies in a way was correct in his broad, sweeping proclamations about how powerfully rights were protected in Australia by a system that he claimed guaranteed them – because for him, as a wealthy, white politician – indeed, the Prime Minister – these rights *were* guaranteed. The same was not true for the Australian people, however. These freedoms universally agreed-upon as extending to the executive branch – people such as Menzies – meant that the government was protected *from* the people who, according to critics, are not really protected except when they put their ballot into the box. Political communication must protect association and expression if the *Australian Constitution* sets up a democratic system. As the people's very social existence is their participation in politics, they cannot then participate in politics if their expression and association are curtailed.

Association and protest, discussion of economic and socio-political issues in song, film or some other literature are the most common ways people engage in politics. Without them the *Australian Constitution* does not safeguard democratic integrity, but retrains the people, safeguarding the ruling class from activism and criticism.[816]

Marx criticised constitutions that regulated freedoms in such a way that the wealthy and powerful found themselves unhindered and able to act freely without having to concern themselves with the rights of anyone else in society.[817] Hal Draper described this as the democratic swindle, the way in which post-revolutionary European governments presented a facade of democracy to restrain the democratic will of the people.[818] For Draper this term included methods by which those in power used and abused democratic forms for the purposes of ‘stabilizing its socio-economic rule’ and how the legislature was used to limit and frustrate the democratic process.[819] Marx believed democracy was genuine where it meant popular control from below, legitimate representative power and liberty.[820]

There were quite effective attempts to increase the legislative and executive powers of government and decrease the representative powers of the electorate - the franchise was restricted, movement and

[815]Ibid 460.
[816]Khiabany and Williamson (n 645) 574.
[817]Ibid 573.
[818]Ibid.
[819]Draper (n 667) 118.
[820]Khiabany and Williamson (n 645) 573; Draper (n 667) 111; Fermia (n 644) 111.

association unprotected, censorship active, and political repression frequent.[821] While there isn't a great deal of political repression happening in present-day Australia, association is regularly abrogated, censorship is active, and electoral malapportionment is problematic in some jurisdictions. Increasingly narrow analyses and decisions in free speech jurisprudence and scholarship reveal themselves as attempts to increase the legislative and executive power of the government and decreasing the representative powers of the electorate. Advocates of parliamentary supremacy and responsible government do this openly.

If the electors cannot freely organise to express their views, pressure the government, or even portray an issue publicly without fear of censorship, it is difficult to suggest that such a society is representative, let alone democratic. Not unlike Marx's criticisms of constitutions in *The Eighteenth Brumaire*, the laws of the *Australian Constitution* are being regulated by the judiciary so that they grant freedom of political communication in such a manner than the ruling class finds itself both fully protected and immune from complaints levelled at them by the people.

Freedoms preserved for the sake of democracy must be genuine. They will not be practical or meaningful if they come in the form of minimal concessions. The democratic structure that the *Australian Constitution* sets up sees its integrity compromised by this. Consider interpretation of the implied freedom of political communication. According to *Levy*, 'political communication' can and does include 'non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth'.[822] It is stated by Meagher that *Levy* and *Lange* only protect non-verbal conduct as far as it is necessary for people to travel to the ballot box and associate in order to cast their vote by placing it in the box.[823] This is an example of the democratic swindle in action. The suggestion that the people do have the right to movement and association, but that it only covers the ability to get to a polling booth and number some boxes on a piece of paper is a minimum concession to democracy.

Public power is limited by this construction, and it expands the power of the state. Association is essential for the maintenance of a democratic society. If the people do not have the right to associate and be exposed to others associating themselves, then a fundamental avenue through which people identify themselves and find their place in society is absent.[824] If association only protects the ability to go to the ballot box and vote, while the executive and legislature are free to associate as they wish and abrogate

[821]Khiabany and Williamson (n 645) 573.
[822](1997) 189 CLR 579, 595.
[823]Meagher, 'What is 'Political Communication'?' (n 284) 460.
[824]*Roberts v United States Jaycees*, 468 US 609, 619 (1984) (‘Jaycees’).

civil rights, that interpretation is clearly a democratic swindle. A judicial framework is not being used to protect the institutional integrity of Australian democracy under ss 7 and 24 of the *Australian Constitution*.

It is instead being used to provide the state with a way to act in its own interests while appearing to act in the interests of the people. While the *Australian Constitution* may protect association in some form, the actual protection itself is rendered worthless by decisions which consolidate the power of the state. Minimal concessions have been given to support a media where commerce, complicity and caution are prioritised, recasting citizens as mere consumers in what Natalie Fenton and Des Freedman refer to as a 'shrink-wrapped democracy that celebrates only the most pallid forms of participation and engagement with all political nutrients removed'.[825]

The people then nominally have freedoms betrayed by interpretation that reduces them almost to the point of meaninglessness, allowing the government to censor and even criminalise speech and association. For the democracy mandated by the *Australian Constitution* to be maintained effectively, the people's participation in state power must be recognised as present in their social existence. Protections must be genuine, not an 'exercise in convincing the maximum of the people that they are participating in state power by means of minimum concessions to democratic forms'[826]. A High Court decision has recently echoed this, noting that freedoms should be effective and meaningful in practice.[827]

But political communication itself is still ineffective in application and association has yet to be recognised at all. While *Monis* saw argument that little can be gained from *First Amendment* jurisprudence, there is in fact much to be gained by examining its history alone. Considering how the *First Amendment* has developed over time, it becomes clear that its current scope and breadth was only arrived at by interpretation. The *First Amendment* was initially a quite narrow protection itself that applied to little other than political speech.

Artwork saw little to no protection for many decades, and even film was not protected, for the first five or six decades of its existence being considered purely commercial. Association was not protected at all – that did not arrive until the 1950s, and it only arrived in an *implied* manner, which runs somewhat counter to the argument that these freedoms are incomparable to the *Australian Constitution*. American association law was developed entirely by implication and case law alone into a comprehensive protection with multiple categories of association, each with their own fully developed tests. There is much of relevance to Australian constitutional civil liberties in United States jurisprudence, and so we

[825]Fenton (n 812) 5.
[826]Khiabany and Williamson (n 645) 575.
[827]*Brown v Tas* (n 224) 367.

turn now to that very topic in order to lay groundwork for subsequent chapters on freedom of association and expression in the *Australian Constitution*.

CHAPTER IV US JURISPRUDENCE

The scope of the *First Amendment* as broader than the implied freedom has been noted by the Court before.[828] The perception by scholars critical of applying *First Amendment* jurisprudence appears to be that it contains 'absolute terms', that it is a near-infinite in scope protection that would not allow for any speech to be regulated or restricted.[829] In fact, there is such hostility in some quarters that in *Monis* Crennan, Kiefel and Bell JJ said plainly that little could be gained from it.[830] With respect, this is clearly incorrect. References to it are common despite reservations, and in terms of Australian free speech jurisprudence are not considered to be unusual or controversial.[831]

The SCOTUS approach is also practical, effective, and a useful point of reference for the development of civil rights in Australian constitutional law, particularly matters of speech such as with association and expression. As a result, the purpose of this chapter is to examine *First Amendment* jurisprudence in order to locate principles that can be, critically, adopted into Australian jurisprudence. A secondary goal of examining *First Amendment* jurisprudence is that of determining what has already been brought into Australian law via standing precedent. When one examines *First Amendment* principles one can see principles that are eerily familiar. In some cases, there are almost verbatim versions of these principles that have popped up throughout Australian implied freedom decisions, and in some cases do not originate with *First Amendment* citations.

To some extent this is a problem tied to the Court's refusal to engage in theory or really explore its positions, and so discussion of principles *per se* did not always arise even when outcomes were clearly influenced by *First Amendment* case law. If principles have already been critically adopted, so can other principles. Furthermore, there are a variety of problems with existing Australian free speech jurisprudence that will be detailed specifically in Chapters Five and Six. It is suggested in this work that some of the problems detailed in this thesis can be addressed by critically adopting *First Amendment* principles. A variety of these principles have been developed in order to deal with specific problems – such as the vagueness doctrine or the chilling effects doctrine. Doctrines such as these have been commented on by Australian scholars before and their usefulness should not be lost to the High Court. Gageler J has adopted *First Amendment* principles and considered them with some depth, and it has aided his branch of Australian free speech jurisprudence greatly. However, it remains the case that application of *First* Amendment principles is inconsistent and as I noted in prior chapters, in cases such as *Monis* we

[828] *ACTV* (n 21) 144.
[829] Meagher, 'What is 'Political Communication'?' (n 284) 450; *Monis* (n 201) 207.
[830] *Monis* (n 201) 207.
[831] Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 165.

see High Court Justices Crennan, Kiefel and Bell JJ arguing the irresponsible view that that there is little to be gained from the *First Amendment* in Australia. Their Honours are more than willing to consider principles from entirely different legal systems, such as with application of European-style proportionality – they should be open to American jurisprudence as well.

The relevance of American jurisprudence has been recognised at a macro level in terms of general relevance, and at the micro level there are many references and direct applications of *First Amendment* case law.[832] This is a tradition that continues post-*Monis*, and from the very beginning, we see ample references in *ACTV* and *Nationwide News*. The Court in *ACTV* referred to US case law to support the fundamental basis of the implied freedom.[833] Across several decisions,, Anthony Gray found that the following aspects of *ACTV* were all supported by favourable citation of *First Amendment* case law:[834]

- The content/content-neutral distinction regarding restrictions on speech
- Freedom of speech not being absolute
- Following the traditional American suspicion towards government motives for curbing free speech
- establishing constitutional implications
- establishing the importance of voters being able to make informed decisions
- reasonable time, place and manner restrictions

Gray noted that in *Nationwide News* some members of the Court actually relied on US precedent to find provisions invalid.[835] In *Theophanous* the Court made use of the landmark *New York Times Co v Sullivan* in deciding that the common law of defamation could not abrogate the implied freedom, and specifically argued that even though the *First Amendment* is broader, that is 'not a reason for concluding that the United States ... approach is irrelevant or inappropriate to our situation'.[836] Elsewhere the Court relied on *First Amendment* decisions to establish the implied freedom could protect symbolic acts like flag burning as well as false, unreasoned and emotional communications.[837] Subsequent High Court decisions saw advocacy of American 'public forum' and 'overbreadth' doctrines, with imprecise articulations of these theories appearing in judgments of McHugh J, as well as Toohey J & Gummow J.[838]

[832]Ibid 164.
[833]Gray, 'First Amendment & Implied Freedom' (n 304) 152.
[834]Ibid.
[835]Ibid.
[836]*NY Times* (n 633); *Theophanous* (n 61) 130; Gray, 'First Amendment & Implied Freedom' (n 304) 153.
[837]*Levy* (n 90) 594, 623.
[838]Gray, 'First Amendment & Implied Freedom' (n 304) 153; *Clubb* (n 250) 507-508.

Coleman saw extensive use of American authorities with three justices only validating the relevant provisions via citation of *First Amendment* jurisprudence. Gummow & Hayne JJ specifically stated that 'support for the construction we have given can be had from considering what has been said in the Supreme Court of the United States', indicating a clear willingness to rely on *First Amendment* jurisprudence and that much could be gained from doing so.[839] Gray noted their Honours cited *Chaplinsky* – *w*hich broke down the restrictable categories of speech – and proceeded to read down provisions using it, albeit noting it had to be adapted.[840] Kirby J in *Coleman* agreed. US jurisprudence continued to be cited in cases such as *Clubb* which post-dated *Monis*.[841]

In *McCloy* the Court referred to the *First Amendment* favourably, albeit with the reservation that they accepted 'levelling the playing field' as a legitimate justification for restricting free speech.[842] It was also in *McCloy* that Nettle J cited *Valeo* to support the principle that political campaign contributions constituted a form of communication.[843] His Honour also referred to the US position on provisions that give discretion to law enforcement officials, calling it 'not dissimilar'.[844] In *Banerji*, Gageler J distinguished United States case law in the context of public employees and free speech.[845] While Edelman J made note that the implied freedom was more restricted than the *First Amendment*, his Honour relied on it elsewhere.[846] *San Diego v Roe* was used to establish that a law targeting those 'uniquely qualified to comment' on an issue imposed a deep burden on free speech.[847]

That means his Honour cited US cases more than *Monis* itself. In *Clubb, Hill v Colorado* was cited by Kiefel CJ, Bell & Keane JJ to demonstrate the sensitivity and vulnerability of those attempting to access abortion clinics for their own use.[848] Their Honours also relied on a Nettle J comment from *Brown v Tas* that cited several American cases alongside Australian cases, including *Hill v Colorado*.[849] Their Honours in both cases relied on *Hill v Colorado* to demonstrate that free speech was not an entitlement to force a message on a captive audience.[850] Gageler J relied on American authorities to demonstrate fundamental principles of judicial restraint in Australian constitutional law.[851] Comparison and positive

[839]*Coleman* (n 2) 75.
[840]*Chaplinsky* (n 432).
[841]Gray, 'First Amendment & Implied Freedom' (n 304) 153.
[842]Ibid 154.
[843]*McCloy* (n 4) 263.
[844]Gray, 'First Amendment & Implied Freedom' (n 304) 154; *Brown v Tas* (n 224) 293.
[845]*Comcare v Banerji* (2019) 93 ALJR 900, 925 ('Banerji').
[846]Ibid 936.
[847]Ibid 942.
[848]*Clubb* (n 250) 473.
[849]Ibid 474-475; citing Nettle J in *Brown v Tas* (n 224) 415. Both cited *Hill v Colorado*, 530 US 703 (2000).
[850]*Hill v Colorado*, 530 US 703 (2000).
[851]*Clubb* (n 250) 479.

usage of American cases continued throughout Gageler's judgment.[852] In fact, his Honour stated that *First Amendment* case law can be instructive in considering the implied freedom, and its case law and related scholarship 'have been drawn upon extensively by the High Court from the earliest articulation of the implied freedom'.[853] Reference to the *First Amendment* was appropriate and should be continued as the implied freedom developed, but with constant vigilance in ensuring it is not uncritically translated.[854]

Immediately following that point, his Honour discussed reasonable time, place and manner restrictions and levels of scrutiny as US concepts imported into Australian law since *ACTV*, *Mulholland*, and *Hinch*.[855] Gordon J also applied *First Amendment* law, citing *Washington State Grange v Washington State Republican Party*.[856] Edelman J agreed with Gageler J, arguing 'that a legal doctrine originated in a foreign legal system does not render it unsuitable or inapplicable if it is adapted to local circumstances'.[857] In fact, his Honour said the concept of a law being 'reasonably appropriate and adapted' was imported into Australia from the United States in the first place, having arrived in the United States from radical German legal theorists.[858] Foreign doctrines can become a part of a local jurisprudence, and that is acceptable, so long as it is adapted correctly.[859] Edelman J followed this point by engaging so heavily in comparison with US jurisprudence that he actually concluded his judgment on a comparative note.[860]

The High Court's overall approach to United States jurisprudence is somewhat strange as there are competing, standing, views in precedential decisions. On the one hand, aspects of First Amendment jurisprudence have already made their way into Australian case law as noted above. On the other hand, we have the unusual situation of Justices having openly rejected the use of any United States jurisprudence whatsoever, but subsequently relying on it anyway. For instance, recall in *Monis* when Crennan, Kiefel and Bell JJ stated nothing could be gained from citing US jurisprudence. Considering their Honours made such a clear statement it is a little strange that in *Clubb*, in a joint judgment with Keane J, they did in fact find things to gain from citing US jurisprudence. Their Honours cited *Hill v Colorado* in that case,[861] and as I noted they also relied in that decision on a Nettle J judgment that cited

[852]Ibid 481.
[853]Ibid 487.
[854]Ibid.
[855]Ibid.
[856]*Clubb* (n 250) 520.
[857]*Clubb* (n 250) 545.
[858]Ibid.
[859]Ibid.
[860]Ibid 554-555.
[861]Ibid 473.

US cases heavily. In *McCloy*, which also post-dated *Monis*, Kiefel J and Bell J both joined a joint judgment that approved SCOTUS decisions in relation to preventing corruption.[862]

With Kiefel CJ, it is not the case that she was simply opposed to citing it, and then changed her mind post-*Monis*. This is demonstrably the case as her Honour relied on US jurisprudence before *Monis* in the case of *Wotton* to justify restrictions on prisoner speech.[863] This is all part of what Anthony Gray described as an 'inconsistent and confusing history of the use of *First Amendment* case law', with sporadic, and certainly erratic, application of it.[864] With respect, it appears that certain justices simply 'cherry-pick' from US jurisprudence. If a point from *Hill v Colorado* can be interpreted favourably, it will be cited, but the context of that point, the theory supporting it, and the SCOTUS' rationale, will be discarded when inconvenient. This approach has been harmful to development of the implied freedom because there is much to learn that certain justices simply refuse to consider. Their Honours will simply proclaim the entire body of US jurisprudence to be irrelevant any time their previous applications of it reveal flaws in their current methodology.

For example, consider the use of the 'political' criterion. Anthony Gray noted the United States has no such distinction in its free speech jurisprudence, except in the category of speech by public servants which distinguishes speech on matters of 'public concern' from speech on other matters.[865] Gray argued that this has been criticised heavily in *First Amendment* scholarship – criticism reflected in case law.[866] The fact that this distinction is deliberately avoided throughout the rest of *First Amendment* jurisprudence is not considered, however. When the High Court cites *First Amendment* cases whose decisions rely in some way on there *not* being a politicalness standard, this important point of theory is simply ignored. If it is addressed, it is simply decided that the *First Amendment* should be distinguished because of its perceived horizontality, explicitness, or positivity. These arguments do not stand up when examined, as detailed in chapter 3 above. Clearly, this is at least part of the reason these arguments are put aside whenever something useful from the United States needs to be cherry-picked.

The comments from *Monis* that *First Amendment* jurisprudence offers little to Australian jurisprudence and should not be cited were, with respect, demonstrably wrong. A multitude of judgments across three decades, and in some of the most influential cases of all demonstrate that *First Amendment* jurisprudence has shaped, and continues to shape, Australian free speech jurisprudence. International jurisdictions

[862] *McCloy* (n 4) 204-205.
[863] *Wotton* (n 270) 33.
[864] Gray, 'First Amendment & Implied Freedom' (n 304) 157.
[865] Ibid 162.
[866] Ibid.

played a central role in the very origin of Australian free speech jurisprudence in the first place. They remain an important source of knowledge and experience for the High Court, which continues to draw on international jurisdictions to this day. For the purposes of establishing its relevance to Australian jurisprudence, the criticism of detractors that the *First Amendment* is 'absolute' and unlimited in scope must be addressed. The *First Amendment* is indeed broader than the implied freedom, but if one examines the history of the *First Amendment* one finds that it only became that way by development and interpretation.

A Evolution of speech over time

The scope of the *First Amendment* has been drastically expanded over time – its current breadth a result of SCOTUS developments in the mid-to-late 20th century.[867] For many years cultural material was censored or prohibited from distribution or sale to the public with little protest by the courts so long as it was a category unprotected by the *First Amendment*. Unprotected categories were summed up in *Chaplinsky* as, 'the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace'.[868] The first step of free speech testing in the United States involved determining if a protected category was burdened. The evolution of the *First Amendment* can illustrate how interpretation can drastically change a freedom regardless of explicitness or impliedness, and so that is where we begin.

Since *Chaplinsky*, the scope of categories has changed significantly. Some forms of speech can be regulated to varying extents. Libel is now protected to some extent by the *First Amendment* whether the plaintiff is a public official or a private individual.[869] 'Lewd' speech is now immune from censorship, and 'fighting words' includes only speech inflammatory to the point of imminent violence just as in *Coleman*.[870] Besides these, there are other unprotected forms of speech. Child pornography,[871] 'true threats of violence',[872] and intellectual property are all areas with permissible restrictions on free speech.[873] Obscenity slowly narrowed with film, print media and most recently, computer games becoming protected. While the scope of obscenity was reduced significantly in the latter half of the 20th century, it remains a part of US free speech jurisprudence, and is an excellent example for illustrating

[867] Ibid 147.
[868] *Chaplinsky* (n 432).
[869] Eric Barendt, 'Free Speech in Australia: A Comparative Perspective' (1994) 16 *Sydney Law Review* 152.
[870] Ibid.
[871] *New York v Ferber*, 458 US 747 (1982).
[872] *Virginia v Black*, 538 US 343 (2003).
[873] *Harper & Row v Nation Enterprises*, 471 US 549 (1985); *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562 (1977).

how the *First Amendment* went from being somewhat ineffectual and focused on political communication, to being a valuable, efficient device for protection of speech.

Obscenity was the source of much censorship in media for many years. One of the first major examples of this was in the Hicklin test, which defined obscenity as material that would 'deprave or corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'.[874] The Hicklin test for obscenity was overturned in 1957 when the Supreme Court ruled in favour of a new test, 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest'.[875] Furthermore, it was in this case (‘*Roth’*) that the Supreme Court first ruled obscenity was not protected by the *First Amendment*. So, the *First Amendment* is broad, but it doesn't protect everything, and it is for the courts to determine what exactly it protects.

Without *First Amendment* protection, the government is free to censor. This was the case in the film industry as early as 1897, where the State of Maine prohibited the exhibition of boxing films.[876] Films of all kinds continued to be variously prohibited, or edited, by government institutions for many years, and this was reinforced by the Supreme Court's ruling in 1915 that films were not protected by the *First Amendment*, describing them as not speech but 'a business, pure and simple, originated and conducted for profit' and not 'as part of the press of the country or as organs of public opinion'.[877]

The Supreme Court at that time considered the *First Amendment* as a piece of law that primarily protected the media and the ability of the press to communicate about politics to the public. Protectable speech was viewed as 'the press of the country' and 'organs of public opinion', rejecting films as simply a matter of business and spectacle.[878] The Supreme Court was not at that time interested in protecting anything that was not overtly and directly political, as the Australian High Court is now. Even when it came to publication of literature, in a 1936 decision the Supreme Court still seemed to focused on political communication and protection of speech insofar as it affected people's choices at the ballot box.[879] Sutherland J, in describing the purpose of the *First Amendment*, cited a test formulated by Cooley J:

[874] *Rosen v United States*, 161 US 29, 43 (1986).
[875] *Roth v United States*, 354 US 476, 489 (1957). ('Roth')
[876] Barak Orbach, 'Prizefighting and the Birth of Movie Censorship' (2009) 21 *Yale Journal of Law and the Humanities* 251.
[877] *Mutual Film Corporation v Industrial Commission of Ohio*, 236 US 230 (1915) ('Mutual Film Corporation').
[878] *Joseph Burstyn, Inc. v Wilson*, 343 US 495, 500 (1952) (‘Burstyn’).
[879] *Grosjean v American Press Co., Inc.*, 297 US 233, 250 (1936). ('Grosjean').

> The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters *as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.* (emphasis added)[880]

It was clearly established that the *First Amendment*'s purpose was to protect speech that might affect political choices 'as seems absolutely essential' – not just any speech was protectable, lining up with the Supreme Court's position in *Mutual Film Corporation* that in order to be protectable, speech must be clearly and directly informative about public affairs or politics in some way. This contention is further supported by the fact that Sutherland J followed this quote with the statement that newspapers, magazines and other journals were protected because they 'shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity' and they cannot then be censored by law because 'informed public opinion is the most potent of all restraints upon misgovernment'.[881]

This continued for almost 40 years until *Joseph Burstyn, Inc. v. Wilson* ('Burstyn') where it was ruled that movies did actually qualify as protected speech, being meaningful vehicles for conveying ideas - the same criteria that excluded them in *Mutual Film Corporation*.[882] Because of *Burstyn*, the rampant activity of government censorship & classification boards was halted. The Court departed from previous ideas about protectable speech, quoting a decision from *Winters v New York*[883]:

> The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.[884]

In *Winters* the Court argued this to justify prohibiting distribution of a magazine that contained mostly stories about criminal deeds and violence, but in *Burstyn* the Court reversed their position on film (and artwork more broadly) using this same line of thought. 'It cannot be doubted that motion pictures are a significant medium for the communication of ideas' said Clark J, noting that films can affect public attitudes, opinions, and behaviour in a range of ways from directly altering their political or social doctrine, to subtly shaping their thoughts (which is itself characteristic of artistic expression).[885] Clark J also noted that the importance of film as 'an organ of public opinion' not lessened by the fact it was designed as entertainment.[886] While it was argued by censorship-advocates that film carries a 'greater

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[880] Ibid 249-250.
[881] Ibid 250.
[882] *Burstyn* (n 836) 495; Jason K. Albosta, 'Dr. Strange-rating or: How I Learned that the Motion Picture Association of America's Film Rating System Constitutes False Advertising' (2009) 12(1) *Vanderbilt Journal of Entertainment and Technology Law* 121.
[883] 333 US 507 (1948). ('Winters').
[884] *Burstyn* (n 836) 501.
[885] Ibid.
[886] Ibid.

capacity for evil among the youth', Clark J stated that even if true, that would not justify censorship.[887] In other cases the *First Amendment* has been found to prevent the government from censoring works said to be offensive,[888] morally improper,[889] or even dangerous (in some circumstances).[890] In *Texas v Johnson* the Supreme Court described accurately what by 1989 had become the new governing principle of the *First Amendment* – that 'the government may not prohibit the expression of an idea simple because society finds the idea itself offensive or disagreeable'.[891]

In *Roth*, sexually explicit content was extended protection unless it lacked 'redeeming social importance' and since then obscenity has effectively been redefined to audiovisual hardcore pornography.[892] There are additional requirements that unprotected speech be 'patently offensive' and as a whole must lack 'serious literary, artistic, political, or scientific value'.[893] Computer games were open to censorship until recently (likely due to their youth as an artform). In the case of *Brown v Entertainment Merchants Association* ('Brown v EMA'), a California law banning the sale of sufficiently 'violent' computer games to anybody under the age of 18 was overturned by the Supreme Court.[894] According to Scalia J, computer games 'communicate ideas – and even social messages – through many familiar literary devices … and through features distinctive to the medium' and this is enough to confer *First Amendment* protection and thus disallow their censorship or prohibition.[895]

In *Brown v EMA*, California acknowledged that computer games qualified for protection but argued the high level of violent options available to a player in games rated "18" caused those games to 'lack serious literary, artistic, political or scientific value for minors'.[896] Scalia J argued that while the free speech clause of the *First Amendment* existed 'principally to protect discourse on public matters', the court had 'long recognised that it is difficult to distinguish politics from entertainment, and dangerous to try'.[897] Computer games, his Honour noted, communicate ideas and social messages through all the familiar literary devices (characters, plot, dialogue, music, etc) and also through features unique to the medium such as interaction with a virtual world.[898] The Court had in fact approved legislation regulating speech

[887] Ibid 502.
[888] *Texas v Johnson*, 419 US 397, 414 (1989).
[889] *Hannegan v Esquire*, 327 US 146, 149 (1946).
[890] *Regan v Taxation with Representation of Washington*, 461 US 540, 548 (1983).
[891] *Texas v Johnson* (n 846) 414.
[892] Barendt, 'Free Speech in Australia: A Comparative Perspective' (n 869) 103.
[893] *Miller v California*, 413 US 15, 39 (1973) ('Miller'); Albosta (n 882) 123.
[894] *Brown, et al. v. Entertainment Merchants Association, et al.* 564 US 786 (2011) (Scalia J).
[895] Ibid.
[896] *Brown v EMA* (n 894) (Scalia J).
[897] Ibid.
[898] Ibid.

for distribution to minors, particularly that which would present sexually explicit material that would be 'obscene from the perspective of a child'.[899]

But violence is not obscenity, and so the California law was attempting to regulate and censor a protected category of speech. [900] In Australia, one could more easily justify the *Brown v EMA* law via proportionality, making an argument about the necessity of protecting children or perhaps arguing about the impact on them. Consider Scalia J's point in *Brown v EMA* rejecting the notion of balancing the value of a particular speech category against its social costs and then punishing that category if it fails the test.[901] His Honour said 'a legislature may not revise the "judgment [of] the American people" embodied in the *First Amendment*, "that the benefits of its restrictions on the Government outweigh the costs"'.[902] In the US as in Australia, Scalia J noted many texts traditionally given to children were full of intense violence.

His Honour specifically cited the wicked queen in Snow White being made to dance in red hot slippers until she died, Hansel & Gretel killing their captor by baking them in an oven, or Cinderella's stepsisters having their eyes pecked out by doves.[903] In highschool reading lists contain works such as Homer's Odyssey, Dante Alighieri's Inferno, and Golding's Lord of the Flies which all contain such violent acts as boiling a person's eyes out with red hot stakes (and describing the results in detail), schoolboys being murdered by other children, and people being submerged in boiling pitch to avoid being impaled on spears by devils.[904] Computer games often contain similar such content. Scalia J argued it is not the violence itself or its effects that the government objects to, but the ideas expressed by that violent speech. So a majority of the Court ruled the California law would be invalid unless it could survive strict scrutiny, by demonstrating a compelling government interest, one which must be narrowly drawn and can only serve that interest in particular.[905] Specifically there must be an 'actual problem' to be solved, and restriction of the protected speech must be actually necessary to the solution.[906]

No problem could be identified as research did not show any link between violence and aggression in individuals playing computer games, and the necessity aspect failed because government intervention was simply not needed. Industry self-regulation, similar to music industry self-regulation in Australia,

[899] Ibid; *Ginsberg v. New York*, 390 US 629 (1968).
[900] *Brown v EMA* (n 894) 786; *Cohen v. California*, 403 US 15, 20 (1971); *Roth* (n 875).
[901] *Brown v EMA* (n 894) 786.
[902] Ibid.
[903] Ibid.
[904] Ibid.
[905] Ibid.
[906] Ibid; *United States v Playboy Entertainment Group, Inc*, 529 US 803, 822-823 (2000).

was effective enough to inform parents already.[907] Here the Court referred to industry-run organisations like the MPAA (Motion Picture Association of America) or ESRB (Electronic Software Rating Board) who classify films and computer games. Their ratings occasionally lead to retailer boycotts or games not being allowed to be sold or distributed by MPAA or ESRB members. These industry associations have existed for decades – the MPAA was initially formed in 1922 under a different name for the purpose of controlling the content of films.[908] While submission to the MPAA or ESRB is voluntary, the judiciary has noted 'the negative economic impact of not obtaining a satisfactory rating is clear and severe'.[909] There are also limits to classification – the ESRB, for instance, stated no computer game 'can be more graphic or vulgar than an R-rated movie or album with explicit lyrics'.[910] If so, it will be refused classification and a boycott by many stores will ensue.

Examples of these boycotts are well documented – such as in the case of *BMX XXX*, a computer game with an ESRB "M" rating.[911] Yet this did not prevent any individual from purchasing the game, nor vendors from selling the game. While private organisations fulfil the role of censors and occasionally suppress a film or a game, any organisation or individual can freely access this "banned" material if they wish. The material is controlled, and society informed of its content via widespread publicity. The people are not threatened with fines or even prison sentences merely for showing a movie or selling a computer game. Creators can make what they wish without fear of being punished or fined by the state. This is a far cry from when obscenity was expansive and only strictly political speech was protectable. Just like with freedom of expression, US association jurisprudence has also expanded over time through interpretation.

B US approach to association

Association in United States jurisprudence was sourced by interpretation from the *First Amendment*:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[912]

Note that the *First Amendment* does not explicitly contain freedom of association because it originated in case law. The SCOTUS noted in *National Association for the Advancement of Colored People v*

[907] *Brown v EMA* (n 894).
[908] Albosta (n 882) 125.
[909] *Miramax Films Corp v Motion Picture Association of America*, 560 NYS 2d 730, 731 (NY Sup. Ct. 1990) ('Miramax').
[910] Anthony Ventry, 'Application of the First Amendment to Violent and Nonviolent Video Games' (2003) 20 Georgia State University Law Review 1146.
[911] Ibid.
[912] *United States Constitution* amend I.

Alabama ('NAACP') that at no point did the *First Amendment* mention ‘association’, and yet ruled in its favour, deriving it from the text of the First and Fourteenth amendments.[913] Group association was a primary avenue for advocacy, often the only way to make one's views heard, with the content being advanced or discussed by association immaterial.[914] Douglas J argued in a subsequent case that association was essential in order to maintain a free society because it ensured government’s responsiveness to the will of the people as they could bring about change if necessary.[915] His Honour said meeting for peaceable political action cannot be proscribed, and that a free society is made up of innumerable organisations that associate and through which opinions are mobilised, and social, economic, religious, educational and political programs formulated.[916] Tabatha Abu El-Haj noted that association is an efficient mechanism to broadcast ideas and form preferences, and that the view of the Supreme Court was that association was an important aspect of democracy.[917] This view is demonstrated by Roberts CJ who stated 'the reason we have extended *First Amendment* protection is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others'.[918]

Two distinctive categories of association have since been developed: the choice to enter into and maintain intimate human relationships (intimate association), and the right to associate for the purpose of engaging in *First Amendment*-protected activities (expressive association).[919] It is the latter of these two categories that most obviously relates to association in Australia, although the similarity is somewhat under appreciated. This elaboration on association came about in a 1984 case called *Roberts v United States Jaycees* ('Jaycees').[920]

In *Jaycees*, the appellant was a nonprofit whose stated goal was to pursue educational and charitable purposes with a view towards promoting the growth of men's civic organisations and fostering a belief in the members 'a spirit of genuine Americanism and civil interest' as well as personal development and achievement.[921] Bylaws of the Jaycees disallowed chapters from admitting women as anything beyond associate members, but chapters in Minneapolis and St. Paul began doing so anyway and soon found themselves subject to sanctions for 10 years.[922] In 1978, they were told that their charters would be

[913] *National Association for the Advancement of Colored People v Alabama*, 357 US 449, 450 (1957) (‘NAACP’).
[914] Ibid 460.
[915] *Gibson v Florida* (n 7) 562-63.
[916] Ibid 562-63.
[917] Tabatha Abu El-Haj, 'Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association' (2014) 56(3) *Arizona Law Review* 53, 71.
[918] *Rumsfeld v Forum for Academic & Institutional Rights, Inc.*, 547 US 47, 68 (2006).
[919] Gray, 'Bikie Laws’ (n 322) 285.
[920] *Jaycees* (n 824).
[921] Ibid.
[922] Ibid.

revoked, and charges of discrimination were filed in Minnesota.[923] Soon after the Jaycees found themselves compelled to accept women as regular members and appealed, contending that their freedom of association was violated because the State was interfering with their selection of 'those with whom they wish to join in a common endeavour' and that the state was unduly intruding into their relationships with one another.[924]

The rationale for the distinction between the two types of association was described with some detail by Brennan J, delivering the opinion of the court. Two lines of decisions affirmed in *Jaycees* led to different types of association. The first concluded that the choice to enter and maintain certain types of intimate human relationships should be protected from State interference in order to protect individual and personal liberty.[925] US Courts had long recognised that the because the intent of the Bill of Rights was to protect individual liberty, the *First Amendment* implied that 'the formation and preservation of certain kinds of highly personal relationships' were protected.[926] These relationships were said to play an important role in developing, sharing, and promoting shared ideals and beliefs, and so they act as a buffer between the individual and the power of the State. So constitutional protection of intimate association was a way of protecting an individual's ability to define their own identity and their place in society.[927] Intimate association relates to associations involving marriage, childbirth, educating cohabitation, and in general:

> deep attachments and commitments to the necessarily few other individuals with whom one shares a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life[928]

The boundaries of intimate association have not been clearly delineated although El-Haj said it has been generally assumed this category is limited to families and family-like relationships.[929] Douglas O. Linder suggested that an organisation such as a four-couple bridge club or a college fraternity/sorority might satisfy the Court's criteria for intimate association and so a prohibition on single-sex organisations on-campus might not be constitutional.[930] This very scenario played out in 2006 at the City University of New York with a fraternity, although the claim for intimate association rights ultimately failed on the

[923]Ibid.
[924]Ibid.
[925]Ibid 618.
[926]Ibid 618.
[927]Ibid 618.
[928]Ibid 619.
[929]El-Haj (n 917) 69.
[930]Douglas O. Linder, 'Freedom of Association After Roberts v United States Jaycees' (1984) 82 Michigan Law Review 1878.

basis of size, purpose, level of selectivity and inclusion of non-members.[931] The fraternity was not found to be selective enough – women were not allowed although virtually anybody else would be allowed, the small size was only due to the local college population being mostly commuters, not because of fraternity policy, non-members were freely included in fraternity business and its purpose was said to be too generic.[932] Existing scholarship seems to indicate this issue is still open.[933]

Intimate associations can be determined by the following elements: relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.[934] Other factors may also include policies, congeniality, purpose, and other factors that may be circumstantially relevant.[935] In *Jaycees* Brennan J found that the Jaycees, being a large business enterprise, lacked any of these qualities. Intimate association, being a protection of diversity in ideals and beliefs and their ability to develop and be transmitted,[936] is necessary for the maintenance of a representative democracy. This was accepted by the SCOTUS and it is on this basis that intimate association can be drawn from ss 7 and 24 of the *Australian Constitution*. A person's ability to engage in intimate association clearly has a connection to their social and political views and thus their decisions at the ballot box.

The other category is expressive association, a right to associate 'for the purpose of engaging in those activities protected by the *First Amendment* – speech, assembly, petition for the redress of grievances, and the exercise of religion'.[937] Brennan J explained that within the *First Amendment* there was a 'corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends'.[938] Several features of the Jaycees, however, rendered them unable to pass this test either. Their size was noted as being quite large (approximately 400 each), and apart from age and sex there was not a single criteria for membership in the Jaycees in any chapter in the country, locally or nationally.[939] Membership was so vague that officers found no instance had ever occurred where someone was denied for something other than age or sex.[940] The Court could find no point at which the admission of women to full membership in the club imposed any burden at all on the

[931]Clinton N. Daggan, 'Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York' (2008/9) 58 *New York Law School Review* 627.
[932]Ibid.
[933]Ibid 636.
[934]*Jaycees* (n 824) 620.
[935]Ibid.
[936]Ibid 619.
[937] Ibid 618.
[938] Ibid 622.
[939] Ibid 621.
[940] Ibid.

male members' freedom of expressive association.[941] The State's compelling interest in fighting gender discrimination served as an exception to the *First Amendment* rights of the Jaycees, and where they could not satisfy either the intimate or expressive association tests, Minnesota's anti-discrimination laws would prevail.

In 1995 the Supreme Court ruled a group could exclude potential members if their presence would prevent that group from advocating a particular point of view but this would not have saved the Jaycees.[942] To be successful, the party in question must be able to show that it engaged in expressive association.[943] As noted above there needs to be some degree of exclusivity and selectiveness in membership and participation. The expressive conduct can be public or private.[944] The people involved do not need to associate at all material times for the purpose of spreading a certain message, so long as they do actually associate, nor does every member need to have a consistent point of view on the issues that they do discuss.[945]

A mission statement, a constitution, or some such document describing the values of the group was enough to satisfy the court that expressive conduct was being engaged in since *Boy Scouts of America v Dale* ('Boy Scouts').[946] The Boy Scouts of America ('BSA') discovered Dale was homosexual and he was fired from his position as an assistant Scoutmaster.[947] The Supreme Court relied upon *Jaycees* in making its decision, with Rehnquist CJ reflecting Mill's warning about majoritarianism, contending that protection of association is needed to preserve democracy by preventing the majority from imposing or stifling the views or of those whose views are unpopular.[948] The Boy Scouts prevailed where the Jaycees did not because they held an official position that homosexuality was immoral.

Thus the Court overturned a law forcing the New Jersey BSA to accept Dale, arguing that as an organisation they have a *First Amendment* right to choose which message they send, where having an openly gay activist as an assistant Scoutmaster would violate that right.[949] Government cannot restrict association through the use of anti-discrimination laws if it forces them to include a message that they are opposed to. This case solidified the point that association was a limitation on state power, only applying if the appropriate test could be satisfied. So, the *US Constitution* has changed drastically from

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[941] Ibid 626.
[942] *Hurley v Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 US 557 (1995).
[943] *Boy Scouts of America v Dale*, 530 US 640 (2000).
[944] Ibid 648.
[945] Ibid 655.
[946] Ibid.
[947] Ibid.
[948] Ibid.
[949] Ibid 655-658.

its original position without freedom of association at all. This development has been shaped by more fundamental *First Amendment* principles.

Viewpoint-discrimination will generally render a law invalid; content-discrimination is not necessarily invalid but will need a compelling justification.[950] The SCOTUS stated that this is because no official can determine what is an acceptable political, religious, national, or other matter of opinion and they cannot force citizens to follow what they deem as an acceptable view.[951]

This doctrine was critical to the development of freedom of association, as well as the place of artistic expression in free speech. It was also a rejection of the value judgments by Heerey J and Sundberg J in the Australian Federal Court, where both argued anti-capitalist politics were not protectable due to not being mainstream enough. Before considering the compatibility of this doctrine with Australian jurisprudence, it must first be demonstrated how the SCOTUS deals with burdens on protected categories of speech.

C A Spectrum of Scrutiny

The most important development in *First Amendment* doctrine in the latter half of the 20th century was the rise of a spectrum of scrutiny.[952] On one end of this spectrum is strict scrutiny, thought to be virtually always fatal to a law.[953] Laws subject to strict scrutiny are those that involve things such as content discrimination, political issues, and matters of public concern.[954] The test of strict scrutiny requires that a law must be justified by a 'compelling government interest', and must be narrowly drawn to serve that interest.[955] Scalia J correctly points out that it is rare that a regulation will survive strict scrutiny.[956] What constitutes a 'compelling' government interest is still unclear; it cannot simply be any legitimate government interest. Recall SCOTUS skepticism in *Brown v EMA* that there was a compelling interest when there was a lack of evidence showing an actual problem. Scalia J was also critical of a paternalistic State prescribing what parents ought to want for their children.[957]

[950] Gray, 'The 1st Amendment' (n 14) 148.
[951] *Barnette* (n 15) 642.
[952] Ashutosh Bhagwat, 'The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence' (2007) 3 *University of Illinois Law Review* 783, 784.
[953] Ibid 784.
[954] *Brown v EMA* (n 894) (Scalia J); Bhagwat (n 952) 784; Gray, 'The 1st Amendment' (n 14) 148.
[955] *Brown v EMA* (n 894).
[956] Ibid.
[957] Ibid.

At least three laws have survived strict scrutiny.[958] Both *Yulee* and *Burson* related to elections, while *Holder* related to anti-terrorism laws. In *Yulee*, the petitioner was a judge running for election disciplined by the Florida Bar for publishing an online letter personally soliciting contributions to her electoral campaign.[959] The SCOTUS ruled that the State Government of Florida's interest in preserving public confidence in the integrity of the Florida judiciary was compelling, and without the *Yulee* provisions, the public could lose confidence in a judge's ability to deliver justice.[960] As judges are required to be impartial in regard to parties, without the *Yulee* provisions there was a risk of the judiciary diminishing the integrity of the Supreme Court of Florida.

Burson involved content-based restrictions on political communication banning the solicitation of votes, and display or distribution of campaign materials, within 100 feet of the entrance to a polling place – provisions accused of violating the *First Amendment*.[961] The SCOTUS ruled that the Tennessee State legislature's interest in protecting the right to vote freely and effectively was compelling, and that this justified the creation of "*some* restricted zone around polling places".[962] In *Burson*, the 100-foot zone was considered just enough to be constitutional as it was reasonable and did not significantly restrict constitutional protections – Blackmun J said that was enough, and the government did not need to prove empirically that its provisions were perfectly tailored.[963] In *Holder*, the provisions were restrictions on providing material support to foreign terrorist organisations, and they applied to provisions of legal services and advice to individuals subject to a federal crime for violating those provisions.[964] The SCOTUS ruled that protecting the national security and safety of the United States and its citizens from terrorist threats was a compelling interest.[965] Very few laws violating the *First Amendment* have passed strict scrutiny though, so this test is quite a high standard.

On the other hand the Court can also choose to apply the quite low standard of rational basis review, where laws will be upheld as long as they can be "rationally related to a legitimate state interest".[966] Rational basis review is rarely utilised in *First Amendment* cases. One such case where rational basis review operated was when strip clubs in South Bend, Indiana were required by law to have their dancers

[958] *Burson v Freeman*, 504 US 191 (1992) ('Burson'); *Holder v Humanitarian Law Project*, 561 US 1 (2010) ('Holder'); *Williams-Yulee v Florida Bar*, 575 US ___ (2015) ('Yulee').
[959] *Yulee* (n 958).
[960] Ibid.
[961] *Burson* (n 958) 192.
[962] Ibid.
[963] Ibid.
[964] *Holder* (n 958).
[965] Ibid.
[966] *City of New Orleans v Duke*, 427 US 297, 303 (1976); *Washington v Glucksberg*, 521 US 702, 728 (1997); Bhagwat (n 952) 786.

wear, at minimum, pasties and g-strings to cover their bodies.[967] Scalia J decided that dancing, not being protected by the *First Amendment*, was therefore not subject to strict scrutiny.[968] The provisions were acceptable because moral opposition to nudity enabled the legislation to be rationally connected to a legitimate state interest (preservation of public morality).[969] Rational basis review is a test of 'judicial deference', and inappropriate in a variety of situations.[970]

As a result an intermediate standard was developed.[971] Intermediate scrutiny favours government action over free speech claims – of 111 different cases subject to intermediate scrutiny, the government's regulations were upheld 73% of the time, a rate that applied evenly across nine different categories classified by Ashutosh Bhagwat.[972]

Intermediate scrutiny generally relates to restrictions on speech that are "content-neutral" and relates to the "time, place and manner" of speech instead, generally on public property. One of the most important cases when discussing intermediate scrutiny is *Ward v Rock Against Racism* ('Ward'), the case where the current test was developed.[973] To survive scrutiny, the law must be neutral as to the content of speech being regulated, narrowly tailored to serve a significant government interest, and must leave open "ample alternative channels for communication of the information".[974] Unlike with strict scrutiny, 'narrowly tailored' in intermediate scrutiny only means the provisions must not be broader than necessary to achieve the government's goal.[975] This is the principle of 'overbreadth'.

D Overbreadth & Vagueness

Overbreadth deals with scope – if a law is broader than reasonably necessary, intermediate scrutiny can operate to invalidate that law, such as with a university speech code prohibiting a large variety of categories.[976] In general, a person complaining about an unconstitutional law is required in the US to show that it is unconstitutional *as applied to them* – unconstitutionality as applied to others is no grounds for complaint, essentially.[977] The overbreadth doctrine grants an exception to that rule, where

[967] *Barnes v Glen Theatre, Inc.* 501 US 560, 580 (1991).
[968] Ibid 561.
[969] Ibid.
[970] *United States v. Carolene Products Company*, 304 U.S. 144, 152 (1938).
[971] Bhagwat (n 952) 788.
[972] Ibid 809.
[973] *Ward v Rock Against Racism*, 491 US 781 (1989) (‘Ward’).
[974] Ibid 791.
[975] Ibid 800.
[976] Gray, 'The 1st Amendment' (n 14) 149.
[977] Alfred Hill, 'The Puzzling First Amendment Overbreadth Doctrine' (1997) 25(4) *Hofstra Law Review* 1062, 1064; *United States v Raines*, 362 US 17, 21 (1960).

constitutionality complaints can be brought by those with no grounds *per se*, so long as they can show the law invaded the constitutionally protected conduct or speech of others.[978]

This doctrine was first adopted in *Broadrick v Oklahoma*, where overbreadth was required to be substantial, 'judged in relations to the statute's plainly legitimate sweep'.[979] There are two ways that a law can be overbroad – either on its face, or as applied. Facially, a law will be overbroad if, when restricting something unprotected, it also restricts protected speech. In *Broadrick* this was considered to be fundamental, where it was said laws regulating the *First Amendment* should be narrowly drawn enough 'to address only the specific evil at hand'.[980] In the aforementioned university case – *Doe v University of Michigan* – the Court gave an example of facial overbreadth where an ordinance forbade citizens from assaulting, striking, or in any way criticising or insulting police officers.[981]

This was overbroad because, while it did restrict conduct which was obviously unprotected by the *First Amendment*, it also forbade them from engaging in the constitutionally protected act of criticising and insulting them.[982] Facial overbreadth can also invalidate statutes punishing speech or conduct solely for being 'offensive' or 'unseemly'.[983] The government simply cannot prohibit broad classes or forms of speech if, in doing so, they prohibit protected conduct or speech. This is the case even if those broad classes or forms of speech can be legitimately regulated.

As for overbreadth *as applied*, this can be demonstrated by *Doe v UM*. In three separate occasions in a year, there were comments made by students during classes about either minorities or LGBT people. In the first of these instances a student making sexually discriminatory comments was forced to attend a hearing but was not convicted by the panel. In the second and third cases the students were coerced by the university into writing public letters of apology. All three of these instances involving protected forms of speech – academic speech in the first instance, political satire poetry in the second (artwork), and a political opinion in the third.[984] The university did not consider whether the speech was protected by the *First Amendment*. Nor did they appear at any time to interpret their regulations in a manner compatible with the *First Amendment*.[985] Essentially, the University handled these matters in a way 'constitutionally

[978]Hill (n 977) 1064.
[979]*Broadrick v Oklahoma*, 413 US 601 (1973). ('Broadrick'); *Board of Trustees of State University of New York v Fox*, 492 US 469, 485 (1989) ('SUNY').
[980]*Broadrick* (n 979) 611; *Doe v University of Michigan*, 721 F. Supp 852, 864 (ED Mich, 1989). ('Doe v UM').
[981]*Doe v UM* (n 980) 864.
[982]Ibid.
[983]Ibid.
[984]Ibid 866.
[985]Ibid.

indistinguishable from a full blown prosecution'.[986] While the regulations could have been applied in a way compatible with the *US Constitution*, they were not. That made them overbroad *as applied*.

This means officials do not have free reign when making decisions. If a licensing scheme exists, then there must be regulatory standards guaranteeing 'effective judicial review'.[987] Decisions of a regulatory body issuing licenses must be sufficiently narrowly tailored or they run the risk of being overturned. The overbreadth doctrine exists to ensure that free speech is authentically protected in a way that preserves the sovereignty of the people – it is not a legalist, textualist doctrine. It has been argued that an overbreadth-like approach has been expressed in subtle, somewhat loose terms by the Australian High Court before.[988] If a law is applied to prohibit speech unacceptably, it does not matter how the provisions are worded – it will be unconstitutional. If the provisions are too vague, in *First Amendment* jurisprudence that can also be a problem.

Vagueness operates to make a law unenforceable (void) if it is so vague that it cannot be understood clearly, or if the terms cannot be defined easily. This is a constitutional rule that was first described in detail in *Connally v General Construction Co*, where Sutherland J set the standard as follows:

> a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law[989]

In subsequent cases vague laws have been considered problematic because vagueness lends itself to arbitrary and/or discriminatory applications, doesn't allow individuals to make sure they are behaving lawfully, and makes judicial review difficult.[990] Vagueness has also been used to strike out laws banning words that 'breach the peace' or so-called 'loitering' offences which punish 2 or more people for being in a public place together.[991] A law must be written explicitly or it may be ruled unconstitutional.

The first way is through a law not stating specifically enough what is required or prohibited, leading to citizens not knowing what the law actually requires of them.[992] Secondly, if a law doesn't specify the procedure required to be followed. For instance, ‘loitering' laws did not specify procedures or

[986]Ibid 866.
[987]*Thomas v Chicago Park District*, 534 US 316, 323 (2002).
[988]Gray, 'The 1st Amendment' (n 14) 153.
[989]*Connally v General Construction Co*., 269 US 385, 391 (1926).
[990]Gray, 'The 1st Amendment' (n 14) 149. Specifically, Gray's references to *Roberts v United States Jaycees* 469 US 609, 629 (1984), *Gooding v Wilson* 405 US 518 (1972), and *City of Chicago v Morales et al* 527 US 41 (1999). Also see *Grayned* (n 16) 104-109.
[991]Gray, 'The 1st Amendment' (n 14) 149.
[992]*Connally v General Construction Co*. (n 989); *Coates v Cincinnati*, 402 US 611, 614 (1971); *Grayned* (n 16) 104-109; *Federal Communications Commission v Fox Television Studios, Inc.*, 567 US 239 (2012) ('FCC v Fox TV').

requirements for police officers to arrest people and gave so much discretion that the law was unconstitutionally vague. This is because that complete discretion:

> furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure[993]

This doctrine sources from the due process requirements of the Fifth and Fourteenth Amendments of the *US Constitution*, of which the *Australian Constitution* has no explicit equivalent (although Chapter III may contain due process impliedly). Anthony Gray noted the vagueness doctrine was plainly rejected in *Brown v Tas* on the basis that there was no equivalent principle in Australia and that uncertainty or unlawful use of a law didn't make it unconstitutional.[994] With respect, this is somewhat of a strange point for the Court to make given that they have openly referred to rule of a law as a fundamental constitutional principle in Australia several times, and that it is implicit in a number of High Court judgments besides.[995]

Due process, of course, has been described as an aspect of the rule of law principle, or at least overlapping with it.[996] Gray also argued highly persuasive jurisdictions such as the Canadian Supreme Court and European Court of Human Rights linked vagueness to rule of law.[997] There is room for the High Court to adopt the principles of the vagueness doctrine as part of Australian constitutional law as rule of law is already an existing doctrine supported by the highest authorities. The High Court may have been too quick to dismiss the relevance of vagueness. With respect, the Court was wrong to state there was no source for such a principle. Rule of law is settled constitutional doctrine in Australia and there is significant support by international judicial and scholarly authorities for vagueness being a part of it.

E The Chilling Effect

Vagueness can also lead to what is called the 'chilling effect' in the United States. For example, the Federal Communications Commission ('FCC') had a prohibition on what it called 'indecent words'.[998] The policy did not give broadcasters notice of what would be considered indecent, and the FCC was inconsistent as to what it decided was indecent. The Commission maintained a 'presumptive prohibition' on the words

[993] *Kolender v Lawson*, 461 US 352, 360 (1983).
[994] Gray, 'The 1st Amendment' (n 14) 156-157, 169.
[995] Ibid 169.
[996] Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248; Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 36; Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30(1) *Sydney Law Review* 101.
[997] Gray, 'The 1st Amendment' (n 14) 170.
[998] *FCC v Fox TV* (n 992).

'fuck' and 'shit', but they were not considered indecent depending on context.[999] Such as when they occurred during news interviews or in artistic & educational works. The Court of Appeal had found an inherent vagueness in FCC policy that forced broadcasters to choose between simply not airing anything controversial, or risking 'massive fines or possibly even loss of their licenses'.[1000] Obviously, most broadcasters simply chose not to air controversial programs, or anything containing words that someone in the FCC decided were objectionable. This is where the Court said there was 'ample evidence in the record' that 'this harsh choice had led to a chill of protected speech'.[1001]

The SCOTUS declined to rule on the overall constitutionality of the FCC's regulations which were supported by the landmark case of *FCC v Pacifica*.[1002] In *FCC v Fox TV* Kennedy J, delivering the opinion of the Court, said that the Court's prior ruling in *Pacifica* 'should be overruled because the rationale of that case has been overtaken by technological change and the wide availability of multiple other choices for listeners'.[1003] So it is possible that should the issue of these regulations come before the Court in future, they will be overturned. The FCC's practices demonstrably led to a chilling effect in news broadcasting in the United States, as noted by the SCOTUS. Gray summarised the chilling effect as the threat of prosecution being a powerful deterrent to speech.[1004] Where vagueness occurs, a chilling effect may also occur, as nobody knows if they can be prosecuted, leading to a situation where the general public, or a particular sector of the public, becomes frightened to speak.

In general, any laws that are overbroad or vague could lead to a chilling effect. The first time this concept was referred to within the framework of US constitutional jurisprudence was in *Wieman v Updegraff* by Frankfurter J.[1005] Justice Brennan in dissent summarised the Court's usage of the chilling effect as part of an 'overriding duty to insulate all individuals from the "chilling effect" upon exercise of *First Amendment* freedoms generated by vagueness, overbreadth and unbridled discretion'.[1006] Leading scholars such as Frederick Schauer reflect in their work that the chilling effect also carries weight in defamation law.[1007] Andrew T. Kenyon noted a 'wealth of academic legal scholarship' examining aspects of the chilling effect in not just the US and Australia, but elsewhere, accompanied by corresponding court

[999]Ibid.
[1000]Ibid.
[1001]Ibid.
[1002]*Federal Communications Commission v Pacific Foundation*, 438 US 726 (1978). ('Pacifica').
[1003]*FCC v Fox TV* (n 992).
[1004]Gray, 'The 1st Amendment' (n 14) 149.
[1005]*Wieman v Updegraff*, 344 US 183, 195 (1952).
[1006]*Walker v City of Birmingham*, 388 US 307, 344-45 (1967) (Brennan J, dissenting).
[1007]For example, see Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) 58 *Boston University Law Review* 685.

judgments.[1008] In Canada it was argued that the chilling effect should not be imported verbatim into Canadian law, and adapted it into its own analysis.[1009] Comparative works have shown that with the relative strength of Australian defamation law there has been an observed chilling effect.[1010] Kenyon notes the different approaches to editorials in the US and Australia, where one can tell that American editors are much more confident in publishing commentary, whereas hesitance in Australian editorials is clear – statements seen in US articles could simply not be published in Australia without a very high defamation risk.[1011] The Australian Court's emphasis on 'politicalness' in *Lange* could have had a chilling effect too, Kenyon argued, when considering examples of defamatory material.

The history of the chilling effect in Australia is uneven. Anthony Gray pointed out six High Court justices in several judgments that approved of the chilling effect doctrine in *Nationwide News* as well as *Roberts v Bass*, while simultaneously relying on *New York Times Co v Sullivan* to make decisions.[1012] In *Brown v Tas* however, the Court acknowledged the chilling effect but did not use it, and Gordon J was not favourable towards it in her judgment either.[1013] Gray argued that her Honour 'merely admitted differences between the *First Amendment*, namely the fact it was a right rather than a freedom' and that it was not confined by the same standards.[1014] There has yet to be a conclusive rejection of the chilling effect doctrine in Australian jurisprudence, so its usage remains open for now. Additionally the Court has shown willingness to consider the practical effect of legislation in determining constitutionality rather than simply the plain word of the provisions.

For protection of speech to be authentic, the practical effects of laws *must* be considered. What is the point of protecting communication in any form when a law, by virtue of its operation, serves to stifle speech? This is an issue that has been recognised elsewhere – the United States, England, and Canada – and has been illustrated as having value in multiple aspects of jurisprudence. It has been demonstrated empirically to be a problem. The High Court should consider chilling effects if it truly seeks to uphold democratic legitimacy and popular sovereignty under the *Australian Constitution*.

Overbreadth, vagueness, and chilling effects are not the only tools available to be used by the SCOTUS. There are also 'forum' based distinctions, and the public-private distinction may be relevant in terms of protected categories of expression - for example, *City of Ladue v Gilleo* ('City of Ladue') overturned a

[1008] Kenyon, ''Kenyon 1' (n 443) 442; *Iorfida v MacIntyre* (1994) 21 OR (3d) 186, 37-38.
[1009] *Iorfida v MacIntyre* (1994) 21 OR (3d) 186, 37-38.
[1010] Dent and Kenyon, 'Kenyon 2' (n 443) 124, 128.
[1011] Ibid.
[1012] Gray, 'The 1st Amendment' (n 14) 152-153.
[1013] *Brown v Tas* (n 224) 151, 465.
[1014] Gray, 'The 1st Amendment' (n 14) 171.

municipal ban on signs posted on entirely private property, applying the *Ward* test.[1015] Standards are not the same in private and public forums – regulating speech in a public forum, i.e. a public street, will require strict scrutiny, but speech occuring in a non-public forum will generally require only intermediate scrutiny.[1016] Even when intermediate scrutiny does apply in public, the standards for intermediate scrutiny can still differ depending on the public-private distinction. Other versions of intermediate scrutiny have developed such as for commercial speech in *Central Hudson* – similar to the *Ward* test, but regulations can be content-based to an extent.[1017] Elsewhere one finds intermediate scrutiny testing for mass media regulations,[1018] charitable and political contributions and solicitation,[1019] regulation of sexually oriented businesses,[1020] and speech of government employees.[1021]

The US approach provides a variety of tools and a high degree of flexibility. Strict scrutiny is a test that provides a good tool for cost-benefit analysis of provisions, and for discovering less obvious, illicit motives such as white supremacy as in a cases under the Warren Court.[1022] On the other hand, rational basis review is an efficient test for relatively uncontroversial laws whose burden on free speech is quite low. Intermediate tests such as the *Ward* test provide a good method for handling matters that do not fall into either extreme. In fact, a version of this test has been utilised in standing precedents delivered by the Australian High Court.

F First Amendment Jurisprudence by Stealth

There is a line of standing precedents stretching back to *ACTV* that imported SCOTUS scrutiny standards into Australian constitutional jurisprudence. In fact, this has occurred largely without directly citation of *First Amendment* jurisprudence, except in the initial cases. This line begins with some basic expressions of implied freedom testing by Mason CJ in *ACTV* and carries through to judgments where Gageler J in cases such as *Brown v Tas* and *Banerji*. His Honour began developing his ‘calibration’ test in *Tajjour*.

Gageler J stated justification must not simply given by the government and then taken at face value – it must be evaluated by the Court to determine if it is sufficient or not.[1023] Having determined a burden

[1015] *City of Ladue v Gilleo*, 512 US 43 (1994).
[1016] Gray, 'The 1st Amendment' (n 14) 149.
[1017] *Central Hudson Gas v Public Service Commission of New York*, 447 US 557 (1980).
[1018] *Turner Broadcasting System, Inc v FCC*, 512 US 622 (1994) is the leading case in this area.
[1019] Bhagwat (n 952) 798-99.
[1020] *City of Renton v Playtime Theatres, Inc*, 475 US 41, 47-48 (1986).
[1021] A balancing test has been adopted in *Pickering v Board of Education*, 391 US 563 (1968), however this is being developed into an aspect of intermediate scrutiny - see Bhagwat (n 952) 795-96.
[1022] Stephen A. Siegel, 'The Origin of the Compelling State Interest Test and Strict Scrutiny' (2006) 48(4) *American Journal of Legal History* 355, 395, 398.
[1023] Ibid 579.

exists or not (step 1), one must determine whether the law is justified – first by determining the legitimacy of the law's purpose, and then by determining whether the law is able to be sufficiently justified. This frames the implied freedom as a guarantee against "undue" burdens.[1024] His Honour noted while the court may have variously used proportionality and aspects of a United States style categorical approach, neither test has been overtly adopted as a formal methodology.[1025] This meant that no precedent actually required the use of proportionality testing, leaving his Honour free to abandon it entirely in favour of an alternative that remains in use to this day in B*anerji*.[1026]

Originally built off of judgments in *ACTV*, *Levy*, *Hinch*, and *Wotton*,[1027] used previously in *Brown v Tas, Tajjour*, and elsewhere,[1028] Gageler J has continued his use of the 'calibration test'.[1029] His Honour described this test as expanding on observations made in *ACTV* by Deane and Toohey JJ, who observed that a law restricting political communication will be a lot harder to justify.[1030] The way justification is determined depends on the 'nature and intensity of the burden' on political communication. That means a spectrum exists, with some laws requiring 'close scrutiny'. Close scrutiny means that a law must be justified by a 'compelling public interest' - that is, a public (government) interest which is something pressing, necessary or crucial.[1031]

Close scrutiny requires that provisions must be enacted in a way no more restrictive than reasonably necessary.[1032] This sets a high standard for a government interest, requiring its implementation to be 'closely tailored to the achievement of that purpose'.[1033] Laws that require close scrutiny will be laws such as those prohibiting association for the purposes of engaging in political communication,[1034] those that engage in discrimination against a particular political viewpoint,[1035] and those that restrict political communication in the conduct of an election whether state or federal,[1036] or of public servants.[1037]

[1024] Ibid.
[1025] Ibid 580.
[1026] (2019) 93 ALJR 900, 925.
[1027] *Wotton* (n 270).
[1028] *Brown v Tas* (n 224) 389; *Tajjour* (n 200); *Mulholland* (n 161).
[1029] Banerji (n 845) 924.
[1030] *Brown v Tas* (n 224) 389; *ACTV* (n 21) 169.
[1031] *Tajjour* (n 200) 580; Brown v Tas (n 224) 389; *Unions NSW v New South Wales* (2019) 264 CLR 595, 621 ('Unions NSW 2'); *Jaycees* (n 824) 925.
[1032] *Tajjour* (n 200) 580; *Brown v Tas* (n 224) 389; Unions NSW 2 (n 1031) 621.
[1033] *Brown v Tas* (n 224) 390.
[1034] *Tajjour* (n 200) 584.
[1035] *Brown v Tas* (n 224) 390.
[1036] Unions NSW 2 (n 1031) 621.
[1037] *Jaycees* (n 824) 924.

Not every law will require close scrutiny. The other end of the spectrum involves laws that can be justified simply by proving that the government's behaviour can be rationally related to a legitimate end.[1038] Some laws may fall somewhere in between the two ends. Justice Gageler has primarily dealt with laws requiring close scrutiny, although there is an established standard for the other end of the spectrum and something resembling intermediate scrutiny tests has begun to develop. This involves content-neutral time, place and manner restrictions, which require less scrutiny than if they were discriminatory against content or viewpoints.[1039] His Honour placed particular emphasis on viewpoint discrimination in this test, arguing that it is a major factor because of the degree of risk suffered by political communications that are unhelpful, inconvenient, or mainly held by a minority.[1040] Therefore, viewpoint discrimination carries a lot of weight in determining whether close scrutiny is needed or not – this led to the provisions in *Brown v Tas* requiring close scrutiny because of viewpoint discrimination.[1041] Those provisions did not survive close scrutiny because they were not narrowly tailored enough to serve the government's interest, and they went beyond the requirement for minimum restriction of the implied freedom.[1042]

It is worth tracing this test back to its original source. The Deane & Toohey JJ comments from *ACTV* were useful, but Gageler J noted the importance of judgments in *Levy* (Gaudron J) and *Mulholland* (Gleeson CJ) to his spectrum of scrutiny test as well.[1043] The cited comments by Gaudron J in *Levy* show that Mason CJ and McHugh J were instrumental in the development of Gageler J's test, as Gaudron cited both extensively as well.[1044] Her Honour argued a distinction was made by the Court in three different cases between laws engaging in content-discrimination and those which only regulate the time, place, or manner of communication.[1045] McHugh and Mason's judgments, cited by Gaudron J, in *ACTV,* were the basis for her referral to a distinction between content-discriminating laws and content-neutral laws.

Going back to the original judgment by McHugh J one finds his Honour quoting *Valeo*, noting different categories where 'reasonable time, place and manner regulations which do not discriminate among speakers or ideas' required a lower level of scrutiny.[1046] Obviously McHugh J thought the *First Amendment* tests could be critically adapted for use in Australian jurisprudence. His Honour did so with

[1038] *Tajjour* (n 200) 580; Brown v Tas (n 224) 390.
[1039] *Clubb* (n 250) 484.
[1040] *Brown v Tas* (n 224) 390.
[1041] Ibid.
[1042] Ibid 397.
[1043] Ibid 390. Gageler J referred to judgments by Gaudron J in *Levy* (n 90) 618-619 and by Gleeson CJ in *Mulholland* (n 161) 200.
[1044] *Levy* (n 90) 618-619.
[1045] Ibid.
[1046] *ACTV* (n 21) 234; *Valeo* (n 274) 18.

ease, and in fact noted that the Constitution of the United States was in fact "a more valid analogy" than a variety of jurisdictions, before proceeding to adapt another SCOTUS decision.[1047]

Mason CJ also argued different classes of speech required different levels of justification, with the highest level requiring a test resembling strict scrutiny, with words taken almost verbatim from *First Amendment* jurisprudence his Honour cited.[1048] Those laws that involve 'restrictions on communication which target ideas or information' or on the 'character' thereof, will be 'extremely difficult to justify'.[1049] These laws require 'a compelling justification' and the restrictions on ideas or information must be 'no more than is reasonably necessary to achieve the protection ... which is invoked to justify the burden'.[1050] His Honour also said some laws required a lower level of justification, citing several US cases while explaining the lower standard,.[1051] Deane and Toohey JJ in their joint judgment also made clear at least one category of speech – the political – is harder to justify restricting than others, and in order to pass the provisions must 'not go beyond what is reasonably necessary'.[1052]

Four justices in the very first of the Australian free speech cases adapting *First Amendment* jurisprudence. Two of those justices (Mason CJ and McHugh J) explicitly relied on *Valeo* and other cases, taking strict and intermediate scrutiny almost verbatim to adapt them for usage in Australian constitutional jurisprudence. Another two (Deane & Toohey JJ) supported the distinction drawn between different levels of speech and appeared to support delineating at least one category at the higher level, citing some US jurisprudence to support this decision. These justices arrived at the conclusion that the system of protection used in the US could be adapted into Australian constitutional jurisprudence, and having done so, obviously thought that this was the best way to protect speech in Australia.

These principles have already been incorporated into Australian constitutional law. This means that there is good domestic authority in Australia for subsequent justices to continue building on a) the content discrimination/content-neutral distinction, b) different levels of scrutiny (tests) for different types of speech, and c) particular categories of speech requiring testing at different levels of scrutiny. As a result of those early cases, High Court Justices were able to keep building on all three of those aspects of free speech jurisprudence without having to directly cite or rely on US juriprudence. They have become an established feature of Australian jurisprudence beginning in ACTV through to *Banerji*. This is evidenced

[1047] *ACTV* (n 21) 240.
[1048] Ibid 241-242.
[1049] Ibid 242.
[1050] Ibid.
[1051] Ibid.
[1052] Ibid 169.

by the fact that Justice Gageler, who has established a *First Amendment* style test in Australian constitutional law, rarely cites US jurisprudence directly when discussing authorities for his test.

The Gageler 'calibration' test relies primarily on a long-standing series of precedents that have never been overturned, rather than relying directly on persuasive SCOTUS arguments. With his Honour's continual usage of this test, a firm ground exists for its usage and evolution in future as a potential standard used by all Justices. In fact, Gageler specifically stated in *Clubb* that this is a '*precedent-based* calibrated scrutiny' test (emphasis added), and that he has explained it so regularly and with such clarity that there was simply no more that needed to be said "in support of it at the level of constitutional and adjudicative principle".[1053] As far as Gageler J is concerned, the use of the levels of scrutiny is settled constitutional doctrine. Most importantly, its use has never once been challenged at any point by another member of the High Court, and its use has rarely if ever been criticised in scholarship. On the contrary, scholars such as Anthony Gray appear to endorse it.

G Conclusion

When we turn to the question of continued reliance on *First Amendment* jurisprudence for development of Australian free speech law, Justice Gageler said reference to it was appropriate and should be continued, so long as it is considered critically due to the danger in '"uncritical translation' of any foreign doctrine". [1054] Presently, his Honour is the only one applying this test. I contend that the use of proportionality testing should not continue in Australian constitutional free speech law. Instead a different, more practical model also capable of providing a robust protection of speech should be adopted for use in testing freedoms of association and expression under *Australian Constitution* ss 7 and 24. Explanation of that model will follow in-depth reasons for its adoption in both association and expression will follow in subsequent chapters, with each chapter including a proposed model adapted from Gageler J's calibration test and from *First Amendment* jurisprudence where useful.

First Amendment jurisprudence has a lot to offer Australian constitutional free speech jurisprudence. I have noted several doctrines that could be of use in developing Australian free speech jurisprudence. In some cases, these doctrines are already part of Australian free speech jurisprudence. A current member of the High Court has recognised that the usage of doctrines originating in the *First Amendment* body of law is a beneficial endeavour. His Honour has rarely if ever been criticised for his recognition and adoption of these principles. It is as noted by scholars such as Gray and Stone, uncontroversial, and as

[1053] *Clubb* (n 250) 484.
[1054] Ibid 487.

such it should not be too controversial to consider other elements and critically translate them into an Australian context. With that in mind, some of these principles will serve as the basis of a new model for Australian free speech and association under the *Australian Constitution* in Chapters Five and Six. We therefore turn to the matter of freedom of association and its place in the *Australian Constitution*.

CHAPTER V FREEDOM OF ASSOCIATION

Freedom of association in the *US Constitution* exists by implication from the text of the *First Amendment* (and to a lesser extent, the Fourteenth Amendment).[1055] If freedom of association can exist as a freedom in its own right, derived directly from the text of the *US Constitution*, shouldn't it be possible to derive freedom of association directly from the text of ss 7 and 24 of the *Australian Constitution*? This is the central question of this chapter which has three main purposes. Firstly, to illustrate the inefficacy of the corollary model and challenge its basis. Secondly, this Chapter will seek to establish that freedom of association is capable of being a standalone freedom rather than simply being a corollary. Thirdly, a model for testing freedom of association cases in Australia will be proposed - informed by principles of association drawn from the *US Constitution*.

The formulation of Australian constitutional freedom of association is still unknown – that is, if association is even protected. Claims by politicians such as Sir Robert Menzies that Australia's civil rights protections 'are as adequately protected as they are in any other country in the world'[1056] would leave us to believe that association is protected. At the time of Menzies' quote association was not protected. One wonders about Menzies' understanding of his claim of civil rights parity with other countries given that during his tenure as Prime Minister he attempted to ban a political party.[1057] Surely he must have known that this would not be possible in a number of countries at the time? The United States already had a basic freedom of association by that point, while prior to ACTV the common law had not been kind to freedom of association.

Perhaps Menzies was referring to the United Kingdom, which does not have a strong culture of civil rights in law. Lord Hewart CJ once said the right of assembly 'is nothing more than a view taken by the Court of the individual liberty of the subject' and that 'English law does not recognise any special right of public meeting for political or other purposes'.[1058] In recent decades this was drawn back, first by the House of Lords allowing peaceful protests,[1059] and secondly after introduction of European law. Of course, the *Human Rights Act 1998* (UK) could always be repealed post-Brexit, but this seems unlikely. Internationally there are also protections. Treaties such as the ICPCR protect a range of freedoms that have never been protected in Australia.

[1055] Ibid 610, 623; *NAACP* (n 913) 450.
[1056] Menzies (n 464) 54.
[1057] *Communist Party* (n 9).
[1058] *Duncan v Jones* [1936] 1 KB 218, 222.
[1059] See *DPP v Jones* [1999] 2 AC 240.

A range of implied due process rights suffer a variety of unanswered questions.[1060] Freedoms of expression and association are also explicitly contained within the ICPCR.[1061] The *US Constitution* contains explicit protections of civil rights unprotected in Australia, as does the European Convention on Human Rights which has legal force in the UK.[1062] Menzies' comment was clearly not the case in 1967 and it is not the case now.

As we have seen in chapter I, High Court justices in *ACTV* spoke of representative democracy necessarily requiring freedom of association.[1063] Since then the High Court has, with little to no reasoning or theory behind it, largely settled on association as a 'corollary' to the implied freedom of political communication. Not all justices even agree that there is protection of association at all. This leads us back to the question of why the court has decided, apparently out of nowhere, that association is a corollary, and why it should not be a standalone freedom. That question was asked by Anthony Gray, and it is that question we now turn to.

A Standalone

The corollary interpretation has led to confusion. For Dan Meagher, the essence of *Lange* was that freedom of association (and movement) was parasitic and ancillary to political communication,[1064] and that protection only existed as far as people needed to be able to cast informed votes at an election.[1065] Meagher contended that ‘political communication’ included non-verbal conduct, but cast doubt on this including movement or association.[1066] This means a political march through the streets would not be protected. Yet a march may involve masses of people gathering in public to show solidarity and draw attention to their cause via their presence, displaying banners, occupying public spaces, and more actions.

In both verbal and non-verbal ways, the protesters are engaging in conduct which communicates ideas about the government or the politics of the Commonwealth. There is legal authority in *Tajjour* since Meagher wrote this article that appears to dispute his interpretation of the corollary. Gageler J stated when the Court referred to a corollary that:

[1060] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14-15.
[1061] Ibid 21-22.
[1062] *United States Constitution*; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) ('ECHR'); *Human Rights Act 1998* (UK) (c42).
[1063] *ACTV* (n 21) 212.
[1064] See *Kruger* (n 94) 91, 115-116, 142 for the source of the ‘parasitic’ and ‘ancillary’ comments.
[1065] Meagher, 'What is 'Political Communication'?' (n 284) 460.
[1066] Ibid 460.

> this should not be read as suggesting that the constitutional protection of freedom of association for governmental or political purposes is in doubt. They should not be read as suggesting that it is secondary or derivative.[1067]

This clearly disagrees with the argument that it is parasitic or ancillary.[1068] Yet to some extent Meagher had a point about the corollary's limited nature, although perhaps not in the way that he intended. The corollary did not protect association in *Mulholland, Totani, Wainohu, Tajjour,* or other cases. In *Brown v Tas*, association was not mentioned at all, not even as a corollary, despite dealing with directly with matters of association.

Entire groups of people could have been subjected to prison sentences for the mere fact of them associating, and yet the Court did not mention association whatsoever. Meagher's assertion that association and movement are ancillary protections that exist merely to bolster political communication does have an air of truth to it. Not necessarily because his argument *per se* is correct, but because association as a corollary has completely failed to protect anything beyond which Meagher suggested. There has yet to be a single case decided on its basis, and it remains an unreliable, under-theorised and underdeveloped freedom. In *Brown v Tas*, Gageler J cited *Levy* and did not mention association but argued there was no doubt that assembly and movement were protected by the implied freedom.[1069] It was taken as being a core element of the democratic society that the *Australian Constitution* protects, and yet still only an aspect of 'political communication'. The corollary has been mostly ineffective in the High Court and little if any reasoning or justification has been given as to why the freedom of association should not stand alone.

Gageler J stated in *Tajjour* that there was simply no foothold in the *Australian Constitution* for a standalone freedom of association.[1070] In spite of this argument, there are legal authorities (albeit *obiter dicta*) that suggest a constitutional basis for freedom of association implied in the *Australian Constitution*, noted by Gray as supported by influential academic authorities.[1071] Gray argued that these legal and academic authorities have perhaps avoided recognition as there hadn't yet been any cases that turned specifically on the issue of freedom of association.[1072] Mirko Bagaric argued it is unlikely that cases making such submissions will be granted special leave.[1073] Respectfully, Gageler J's position in *Tajjour* regarding freedom of association is not persuasive when one traces its origin - statements by Gummow

[1067] *Tajjour* (n 200) 553.
[1068] Ibid 578.
[1069] *Levy* (n 90)*; Brown v Tas* (n 224) 383.
[1070] *Tajjour* (n 200) 576.
[1071] Gray (n 294) 158.
[1072] Ibid.
[1073] Bagaric (n 312) 12; *Tajjour* (n 200).

and Hayne JJ, and Heydon J in *Mulholland* as well as comments in *Wainohu* by Gummow, Hayne, Crennan and Bell JJ, Heydon J, and agreed with by French CJ and Kiefel J in that case. Hayne J cited these quotes from *Wainohu* that association can only be a corollary (but with no reasoning as to why), and then proclaimed that this argument 'should not be revisited'.[1074]

Before considering the elements from *Wainohu*, the comments from *Mulholland* must be addressed. Hayne J cited his joint judgment with Gummow J. Here, it is said that "there is no such 'free-standing' right to be implied from the Constitution'.[1075] This is expanded on a little, stating that freedom of association to some extent may exist as a corollary, but there was no argument whatsoever, no law, theory, doctrine, principle or reason given as to why this may be the case.[1076] Hayne J cited Heydon J from *Mulholland*, whose opinion was a plain agreement with Gummow and Hayne JJ.[1077] So where does the concept of association being a corollary *only* come from? It appears as if the Court were influenced by American scholarship.[1078] Gray noted the SCOTUS position that association was an implicit corollary to other rights, worthy of protection only when those other rights are at risk.[1079] However, the SCOTUS spent many years detailing the workings of association under the *US Constitution* whereas the High Court simply dismissed it.

No real reasoning or context was given for Gummow, Hayne, Crennan and Bell JJ's statement in *Wainohu* that association could not stand alone. Heydon J's judgment calling freedom of association non-extent was a significant departure from High Court interpretation and doctrine.[1080] His Honour gave no reasoning why – it was simply stated. With every judgment in Wainohu, no real reasoning was given as to why association could not stand alone. *Wainohu* does not make it clear by any means that association cannot be protected by similar justification for political communication. It remains open to debate given the history of divergent views in the High Court on this matter, a fact recognised by French CJ.[1081]

In Murray Wesson's view the Court simply did not want to discuss it.[1082] Recall French CJ's seemingly sympathetic refusal to address it from *Tajjour*. His Honour initially assumed such a freedom could exist and was worthy of examination before dismissing it as unnecessary, having already invalidated the

[1074] *Tajjour* (n 200) 566.
[1075] *Mulholland* (n 161) 234.
[1076] Ibid.
[1077] Ibid 364.
[1078] Gray, 'The 1st Amendment' (n 14) 155.
[1079] Ibid.
[1080] Tarsha Garvin, 'Case Note: Extending the Reach of Kable: Wainohu v New South Wales' (2012) 34 *Sydney Law Review* 395, 401.
[1081] See *Tajjour* (n 200).
[1082] Murray Wesson, 'Tajjour v New South Wales' (n 321) 104.

provisions. This was followed up by citation of *Wainohu*, which does itself contradict a line of standing precedents reaching back to the early days of *Kruger* and *ACTV* in Australian free speech jurisprudence. There is clearly a debate, but his Honour apparently did not wish to engage with it. Despite involving the type of law that should be a defining case for this issue, these cases say little about association. *Wainohu* for instance was decided on principles from *Kable v Director of Public Prosecutions*.[1083] Despite multiple lines of case law supporting association and some academic support, there has yet to be a case decided on that basis.[1084] In general association is rarely mentioned.

In *Kruger* Gaudron J seemed to agree with Gageler J's sentiment noted above that being a corollary did not make association inferior or less robust – essentially equal in nature because one could not exist without the other. Elsewhere, Callinan J's judgment in *Mulholland* was called a rejection of association because his Honour said it was 'not necessary'.[1085] Subjected to close examination however, Callinan J's thoughts on association are unclear. His Honour did not refute the argument that ss 7 and 24 imply freedom of association. Consider the facts. The appellant argued that secrecy of affiliation within a political party should be constitutionally protected, even though disclosure of names was only required to verify qualifications.[1086] His Honour concluded such a protection fell "far short of being necessary" and even if it was, it would survive.[1087]

This is the entirety of Callinan J's response regarding association. One could argue what was called unnecessary was constitutional protection of secrecy of affiliation. Further, his Honour's stance in *Mulholland* was just as unclear. If his Honour did reject association, his comments were supported by no reasoning or justification. There is little that can be learned from these judgments, unfortunately.

B Unjustified and unchallenged?

It could be that the Court views association as implicit in political communication.[1088] Gaudron J's judgment in *Kruger* appeared to follow this reasoning as noted previously. Since *Kruger* the High Court has largely followed this view rather than the standalone view of McHugh J and Kirby J. High Court justices have at times denied arguments by plaintiffs for not being supported by enough reasoning.[1089] With respect, members of the High Court are not beyond reproach and their statements must be properly

[1083] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 ('Kable').
[1084] Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 154-156.
[1085] Gray, 'Bikie Laws' (n 322) 283.
[1086] Ibid 335.
[1087] Ibid.
[1088] Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 151.
[1089] See *Tajjour* (n 200).

justified. While it is not being suggested here that these judgments should be ignored, given the lack of reasoning they should not be given much weight.

One can hardly look to cases like *Wainohu*, *Tajjour* and *Mulholland* and conclude that the debate is over. No reasoning contrary to standalone association has been given, and the *Australian Constitution* can support it. There are academic authorities supporting its necessity. It is odd to suggest that in a democratic society where the people's interests and ability to express their political power are to be protected, with a constitution set up to achieve this task, that no such protection exists. This means that critics claim there is no democracy in the *Australian Constitution*, making arguments that could support stripping women of the right to vote. It is clearly a democracy, it is widely accepted as one in scholarship, and there are enough standing precedents to support that claim solely through case law.

If a democratic society is to be maintained, freedom of association must be protected, and not simply in principle.[1090] There is a serious problem of omission in the High Court which has exacerbated this legal and theoretical gap. Mirko Bagaric explained the omission in *Tajjour* as due to how parties framed their dispute and the resulting questions the court had to ask. [1091] Omission in *Brown v Tas* could be due to the Court considering association as implicit, as noted before. Truly, it is difficult to know the reasons why these omissions occur. It may be speculated that the Court is hesitant to explore these are are implied freedoms, and do not wish to extend implications too far. This has been, as noted elsewhere in this thesis, an issue with political communication taken up by Aroney.

In other jurisdictions, it is uncontroversial to find implications where there is a good legal and doctrinal basis. For example, the ECHR does not actually contain the right to silence or a privilege against self-incrimination, and yet the European Court has found that they are both implied by the right to a fair trial.[1092] The SCOTUS has recognised quite a list of rights implied by the *US Constitution*, including:

- The right to travel interstate implied by the Fifth Amendment;[1093]
- The right to travel internationally implied by the Fourteenth Amendment;[1094]
- The rights to contract, engage in common occupations, acquire useful knowledge, to marry, establish a home, and the right to have children via the term 'liberty' in the Fifth Amendment and elsewhere in the *US Constitution*;[1095]

[1090] Khiabany and Williamson (n 645).
[1091] Bagaric (n 312) 11; *Tajjour* (n 200).
[1092] Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (The Federation Press, 2016) 160.
[1093] *Crandall v. Nevada*, 73 U.S. 35 (1867).
[1094] *Kent v. Dulles*, 357 U.S. 116 (1958); confirmed in *Shapiro v. Thompson*, 394 U.S. 618 (1969).
[1095] See McReynolds J in *Meyer v. Nebraska*, 262 U.S. 390 (1923).

- The right to have children educated as per parental wishes via the term 'liberty' in the *US Constitution*;[1096]
- The right to association via the Fourteenth Amendment;[1097]
- Freedom of thought and belief;[1098]
- Right to privacy;[1099]
- The right to an abortion, drawn from the *US Constitution* generally and not linked by Blackmun J to any specific amendment;[1100]

This list has not led to procedural chaos, a legislative or executive unable to operate effectively. High Court justices themselves have shown that the right to association is implied quite easily and directly from ss 7 and 24 of the *Australian Constitution* via similar doctrine to that which the political communication is drawn from. Yet the High Court went from debating the matter to avoiding it completely, even when the subject matter demands it. As I described of *Totani* in chapter 2, it could be that there is simply hesitance to discuss something unsettled. Recall that French CJ said that, while freedom of association may exist, he would rather decide on a basis with ' a surer footing in the decisions of this Court'.[1101]

This situation has isolated the High Court internationally. One struggles to find a human rights instrument that does not recognise association and expression independently. The European Convention on Human Rights protects expression in article 10 and association in article 11.[1102] The ICPCR protects expression in article 19, the right to assembly in article 21, and the right to association in article 22.[1103] The Universal Declaration of Human Rights protects expression in article 19 and association and assembly in article 20.[1104] As with international law, Australia is also isolated by the domestic law of other nations.

The *US Constitution* protects association as a standalone implied right drawn from the First and Fourteenth amendments.[1105] The Canadian Charter of Rights and Freedoms protects expression in s 2(b),

[1096] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[1097] *NAACP* (n 913) 449.
[1098] *Barnette* (n 15) 624.
[1099] See Brandeis J's dissenting opinion in *Olmstead v. United States*, 277 U.S. 438 (1928); eventually confirmed by the majority in *Griswold v. Connecticut*, 391 U.S. 145 (1965).
[1100] *Roe v. Wade*, 410 U.S. 113 (1973).
[1101] *Totani* (n 180) 93.
[1102] ECHR (n 1062) art 10-11.
[1103] *International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171* (entered into force 23 March 1976), art 19, 21-22.
[1104] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) art 19-20. ('UDHR').
[1105] Emerson (n 6).

assembly in s 2(c), and association in s 2(d).[1106] The New Zealand legislative bill of rights protects expression in s14, assembly in s16, association in s17, and movement in s18.[1107] The South African Constitution protects expression in s 16, assembly in s 17, and association in s 18.[1108] The Indian Constitution protects expression in s 1(a), and recognises assembly, association and movement in s (b), (c), and (d) respectively.[1109] The list goes on – one finds these rights separately recognised from Turkey to Brazil.[1110]

When a law directly burdens association, but only incidentally burdens political communication, the standard of review and level of protection is greatly decreased. Association is 'downgraded' to a lesser concern, a burden on it not to be taken as seriously. As George Williams and David Hume have said, it has 'a limited constitutional vitality'.[1111] Consider the consorting cases, where association suffers a direct burden, but communication does not. A law directly targeting association, but not political communication may be able to pass – while the majority overturned the law in *Wainohu*, it was done so solely based on *Kable*. The majority rejected the plaintiff's assertion that the law infringed political communication, and Heydon J said the Act 'is not concerned with political communication'.[1112] The usage of criminal law to abrogate freedom of association is an issue that many commentators and critics have taken issue with.[1113] So long as a law isn't concerned with political communication then it will not be concerned with association. The corollary has led to association being minimised, its 'constitutional vitality' so restricted that even a law that directly affects it cannot be assessed. Williams and Hume rightfully called this impractical, arguing it must be remedied with a freedom derived directly from the *Australian Constitution* in order to 'sustain the free, genuine choices which the constitutionally prescribed systems contemplate'.[1114]

Another deficiency in association discourse is emphasis on "politicalness". Burdens on associations that do not occur for the purpose of politics may simply be ignored and thus people's ability to decide restricted. Consider the example of a musical performance. Music, and artwork broadly, often has

[1106] Canada Act 1982 (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms'), s 2(b)-(d).
[1107] *New Zealand Bill of Rights Act 1990* (1990) (NZ), s 14, 17-18.
[1108] *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2, s 16-18.
[1109] *Constitution of India*, s 1(a)-(d).
[1110] *Constitution of the Republic of Turkey*, art 26, art 33 (expression and association respectively); *Constitution of the Federative Republic of Brazil*, art 5 (broken down into many different sub-sections).
[1111] George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 217.
[1112] Greg Martin, 'Jurisprudence of Secrecy: *Wainohu* and Beyond' (2012) 14 *Flinders Law Journal* 189, 197.
[1113] Ibid 202.
[1114] Williams and Hume (n 1111) 217-218.

political content and does not 'exist independently of commercial and hence political realities'.[1115] Popular entertainment of many kinds, including music, has varying 'economic and political dynamics' and this cannot be changed by 'ideological decree',[1116] or for that matter by decree of the judiciary. So, if an artist – say the Australian hip hop group 'The Herd' performed in public – they may perform songs that are overtly political. Consider the following lyrics from the song '77%':

> 'Captain Cook was the very first queue-jumper
> It was immigrant labour that made Australia plumper
> Enough is enough, whiteys go pack your stuff
> Don't wanna live in England? That's fucking tough
> I'm sick and tired of this redneck wonderland
> Most of you stay silent and I can't understand
> I just can't understand (understand)'[1117]

This clearly engages the listeners in politics and may affect their decisions at the ballot box. Where music itself does not exist free of political and economic dynamics, neither does the performance of that music. A public performance by The Herd may attract a crowd, and although that crowd may not be associating *for the purposes* of politics, their association *for the purposes of expression* may play a significant role in shaping their political choices. If freedom of association is reshaped as a standalone freedom, it is not enough for association to be protected as simply 'political association'. Association beyond the political may still be significant for the maintenance of representative democracy. Public assemblies for the purposes of expression – performances of music, theatre, or other gatherings should be protected. These are valuable assemblies and associations despite lack of protection by political communication. Association must be drawn directly from ss 7 and 24 which require a representative and democratic system without requiring all forms of association to be strictly political to gain protection.

C Onward to freedom

If association is protected at all, it is only when communication is endangered – and even then, only when political enough. The democratic swindle in action – those in the executive and legislative branches can, at any given moment, point to this ‘corollary freedom’ and claim that freedom of association is protected. Meanwhile their ability to associate, as members of parliament, is not open to challenge. Yet the people remain subject to legislation at any time curtailing their ability to associate, such as the ‘consorting’ laws or complete protest bans such as in Queensland during the 1980s. Recall the Communist Party case,

[1115] John Shepherd and Peter Wicke (2005) ‘The Cabaret is Dead’: Rock Culture As State Enterprise—The Political Organisation of Rock in East Germany' In: T. Bennett, S. Frith, L. Grossberg, J. Shepherd and G. Turner, ed., *Rock and Popular Music: Politics, Policies, Institutions*, 1st ed. London: Routledge, 28.
[1116] Ibid.
[1117] *The Herd – 77%* (14 June 2018) Genius Lyrics <https://genius.com/The-herd-77-lyrics>.

where the ban of a political party was overturned solely on the basis of excluding judicial review. The idea of banning a political party was at no time excluded.

Association is essential to the maintenance of a democratic society – it is a person's 'freedom to combine his efforts with those of his fellow man and to act in common'.[1118] Protection of association is also a way to safeguard the ability of people to independently define their identity.[1119] This plays a critical role in the culture and traditions of the nation by 'cultivating and transmitting shared ideals and beliefs'.[1120] If association can only reliably protect going to the ballot box and voting there is clearly a democratic swindle in action. With such a narrow interpretation a judicial framework is being used to provide the government with a way to act in its own interests while appearing to act in the interests of the people.

The High Court has curbed public power and consolidated the power of the state and capital by restricting association to a corollary. The people nominally have freedom to engage in non-verbal conduct which communicates ideas about the government and politics. That freedom is betrayed by constitutional interpretation that has reduced it to the point where it has never, and likely will never, be the basis of a court decision. Any form of association that does not involve communication being restricted as well will not see protection. This would not be unusual – American cases regularly invalidate laws based on violating freedom of association, without these laws involving communication at all.[1121]

For example, Gray referred to the cases of *United States v Robel* where employment was refused to members of an unrelated organisation, and the case of *Healy v James* which was purely about association rights.[1122] Some cases involved *refusal* to speak – i.e. refusal to give names of members of organisations and refusal to swear oaths.[1123] None of these cases involved communication, and the 'corollary' would not be able to extend protection to them.

Alexis de Tocqueville argued lawmaker cannot possibly restrict association 'without attacking society itself'.[1124] It is not enough that there be *some protection at all* of association for the democratic sovereignty of the people to be maintained. If the *Australian Constitution* is to be maintained *authentically*, association must be a freedom that can a) be relied upon with regularity, b) be practical both in effect, and for the court to enforce, and c) have reasonable restrictions.

[1118] Alexis de Tocqueville, *Democracy in America* (Library of America, 2004) 220.
[1119] Ibid 619.
[1120] Ibid 618.
[1121] Gray, 'The 1st Amendment' (n 14) 165, 175.
[1122] Ibid 165.
[1123] Ibid.
[1124] de Tocqueville (n 1118).

If the freedom cannot be relied on, then what is its purpose? It is highly desirable under *stare decisis* that a point of law should be able to produce the same result in situations that are comparable. The corollary is incapable of doing that. In fact, it has proven incapable of *anything at all*. Meanwhile, the ability of those with institutional power to associate is unimpeachable. Those subject to anti-association laws, protest bans, and other restrictions are those who in theory, are the sovereign class in Australian society. The protection they are afforded is practically incapable of protecting them. This is the definition of a democratic swindle.

'Reasonable' restrictions do not indicate the sort of paternalistic and authoritarian laws that challenge association in Australia, many of which could not pass a standalone freedom. Laws criminalising mere association, an outright ban on protesting under the Bjelke-Petersen era in Queensland, or restrictions on indigenous Australians' intimate association with family members (as in *Kruger*). With several lawsuits having been brought against these laws, not even once was the corollary able to grant any protection. History shows it is not difficult for a government in Australia to pass such laws. The government of Queensland is free to criminalise association at its leisure so long as they are not also restricting political communication. As *Kruger* demonstrated, with the right wording and accompanying laws the government can forcibly separate families and forbid them from associating. They simply cannot restrict communications about government in the process.

The American experience indicates that these types of laws would not survive, and Gray noted the Supreme Court's hostility to criminalising mere association and their 'abhorrence of legislation involving guilt by association'.[1125] The corollary on the other hand has led to guilt by association being an acceptable principle in Australia. This could not survive a standalone freedom, something recognised by McHugh J and Kirby J previously. Its existence was seen as the only view that could be arrived at by directly interpreting ss7 and 24. When one reads the *Australian Constitution* and its background as a whole, one sees immediately that the rights of participation, association and communication exist due to the explicit requirement of federal elections.[1126]

In *ACTV* sovereign power in Australia lies in the people, who delegate this power to representatives to exercise on their behalf. This is reflected in ss 7 and 24-25 of the *Australian Constitution* by the fact that the Parliament is to be "directly chosen by the people of the Commonwealth".[1127] Mason CJ argued because of these powers, representatives are accountable to the people for what they do, and must take

[1125] Gray, 'The 1st Amendment' (n 14) 168.
[1126] *ACTV* (n 21) 227.
[1127] Ibid 137.

into account the views of the people.[1128] It was said that communication about politics is central to accountability, and only by communicating to politicians can citizens state their views on matters relevant to politics, criticise the government, seek to bring about change, or call for action.[1129] Communication in this way is central to a representative democracy in Mason's view, and without it representation fails its purpose, that is, government by the people that is responsive to the needs and wishes of the people – it would cease to be representative at all.[1130]

Association as an implied element of the *Australian Constitution* can be modelled in the same way. *Australian Constitution* ss7 and 24 make it clear that Australia is representative and so the people delegate their power to directly chosen representatives who govern on their behalf. The people must be able to hold representatives accountable for what they do. In a modern society association is central to the people's ability to hold the government accountable – peaceful non-compliance tactics, marches, picketing, sit-ins, and less formal situations like public meetings are for many people not just the best but the only effective way for them to be heard or bring about change[1131]. Other forms of association such as festivals may be an important way in which the people alter the social, cultural and political landscape of society.[1132]

It is generally accepted that these types of events constitution a form of representation about the society in which they occur.[1133] Associations as a form of cultural artwork make comment on the power relations of society, are public in nature, encourage citizens to participate in the creation and maintenance of activities as part of shared communal life, and facilitate the development of social capital.[1134] Using Mason CJ's model of political communication: Absent such a freedom of association, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people, and in that sense, would cease to be truly representative.

Unless one takes a majoritarian view, representation does not mean catering to 50.1% of adults who voted for the ruling party. In a 1991 survey, 42% of people said that members of "extreme" political groups

[1128] Ibid.
[1129] Ibid 138.
[1130]Ibid.
[1131] Barendt, 'Freedom of Speech' (n 5) 269.
[1132] Charles Arcodia, PhD and Michelle Whitford, PhD, 'Festival Attendance and the Development of Social Capital' (2006) 8(2) *Journal of Convention & Event Tourism* 1, 10.
[1133] Ibid.
[1134] Ibid 11.

should not be allowed to hold public rallies.[1135] In the same survey, 55% answered that the government should be allowed to ban any political party it sees "as a danger to Australia".[1136] This is a remarkable result considering the question framed it as only a matter of whether the government feels a party is dangerous. Without any external or independent criteria demonstrating them as being dangerous. 49.2% also said free speech should not be allowed for any association that believes things that are "highly insulting and threatening to particular segments of society".[1137] Today's political minorities and those who are considered "extreme" or "highly insulting" may someday be members of the political mainstream. What is considered extreme or highly insulting depends on the individual, the community, and the culture.

Dr. Martin Luther King Jr. was labelled an extremist in his time so often that he felt the need to address this charge himself.[1138] Who today would label the venerated Dr. King as an extremist? Clearly it was a common enough perception in his day, but that does not necessarily mean his ability to organise and protest should have been restricted. Members of parliament have the power to do so simply because *they* feel a group is going too far. So, it is logically and practically necessary to prevent this, or else the dangers of a majoritarian society, or the simple whims of authoritarian politicians as in Bjelke-Petersen, will continue to manifest and threaten the Australian democratic constitutional system.

In McHugh J's view association was central to the ability of the people to make reasoned and informed choices.[1139] His Honour referred to 'the constitutional *rights* identifiable in ss.7 and 24 of the *Australian Constitution* – freedom of participation, association and communication' (emphasis added).[1140] His Honour said 'those *freedoms* have been elevated to the status of constitutional rights' (emphasis added).[1141] These were foundational for the *Australian Constitution* and not to give them effect would sap its foundations.[1142] Association could stand alone, and this view was carried on in *Kruger* and *Mulholland* where it was also supported by Kirby J. This view is noted by Gray as having significant scholarly support.[1143]

[1135] Katharine Gelber, 'Freedom of Speech and Australian Political Culture' (2011) 30(1) *University of Queensland Law Journal* 135, 141.
[1136] Ibid.
[1137] Ibid.
[1138] Michael Leff and Ebony A. Utley, 'Instrumental and Constitutive Rhetoric in Martin Luther King Jr.'s "Letter From Birmingham Jail"' (2004) 7(1) *Rhetoric & Public Affairs* 37, 43.
[1139] *ACTV* (n 21) 234.
[1140] Ibid.
[1141] Ibid 233.
[1142] Ibid 231.
[1143] Gray, 'Bikie Laws' (n 322) 283.

If ss 7 and 24 do not directly imply association, they cannot contain political communication either. While that view does exist in scholarship, even the most hardline supporters of 'responsible government' will find it difficult to defend when every single decision since *ACTV* has upheld it. Association as a mere corollary, a tertiary adjunct, is a view that short-sightedly skips over the reasoning for the protection of the very principle of political communication in the first place. Gaudron J argued it was a corollary because individuals associating can communicate with one another while doing so.[1144] However, the legal status quo in Australia is 'not technically one of there being rights to protest, but of there being a working cultural tolerance of peaceful non-compliance tactics'.[1145] With the High Court being generally unwilling to discuss association Ricketts rightly points out that there is a concerning discourse in literature that 'privileges business rights over and above the freedom of peaceful assembly'.[1146] This coincided with an upsurge in the mining sector that saw campaigning and lobbying for harsher protest laws in New South Wales, supported by the Premier.[1147]

One could interpret Kirby J's comments from *Mulholland* as a corollary but given his Honour's consistent referral to ss 7, 24, and Ch I as the source of association, this does not appear to be the case. Since the Court cited democracy in its creation of the implied freedom, they must also protect freedom of association. His Honour argued the *Australian Constitution* was an evolving document that moves with the times.[1148] Kirby J also argued that we must protect other core elements of a democratic society, but the court should continue to evaluate laws on a case by case basis to avoid an absolute protection.

Freedom of association is closely related to free speech, and is so widely protected because its goal is similar: 'the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy'.[1149] Thomas Emerson foreshadowed Kirby's view and argued that a democratic society could not exist in the modern world without association.[1150] Particularly in the era of globalisation where individuals are more and more dominated by institutionalised forces, individuals must be able to join together to pursue common goals or make use of their abilities.[1151] This freedom must be given scope to determine its boundaries as well as what is protected in the first place.

[1144] *Kruger* (n 94) 127.
[1145] Ricketts (n 314) 235.
[1146] Ibid 238.
[1147] Ibid.
[1148] Gray, 'Bikie Laws' (n 322) 212.
[1149] Barendt, ‘Freedom of Speech’ (n 5) 272.
[1150] Emerson (n 6).
[1151] Ibid.

D Test

The US approach is closer to High Court jurisprudence than it seems, as an implied freedom. Association can exist on its own in an implied way in Australia as it does in the United States, which also demonstrates a practical approach. While Gray argued proportionality has proven highly effective in Europe,[1152] it is proposed here that a modified version of Gageler J's calibration test become the standard. Association occurs for a variety of reasons, not all of which require the same standard. Different levels of scrutiny will allow different tests for different circumstances. Something like the following is proposed:

1. Does the law burden freedom of association in any form, in terms or effect?

2. Is the burden on association justified under the required level of scrutiny?

The first question's "association in any form" phrasing should be understood as requiring a categorical approach, with the Court needing to determine if expressive or intimate association are burdened. Whether one of these categories will be burdened or not will require an approach not unlike that which the Court already follows. The second question is largely unchanged from Gageler J's analysis, although 'representative government' has been changed to 'representative democracy'. Without accepting the *Australian Constitution* sets up a democracy, there is little reason to find implied freedoms in the first place as they are reduced to purely institutional mechanisms that aid bureaucrats to set up elections. Of course, if the people are sovereign and the government rules on their behalf, then the people must be able to freely associate. That is their democratic right.

The second stage of this test requires determining which level of scrutiny is needed for justification. The level of scrutiny may be quite low, requiring something akin to rational basis review where the government merely needs to demonstrate the law has a rational relationship to a legitimate purpose. The level of scrutiny may also be quite high ('close' or 'strict' scrutiny), requiring an extraordinary or compelling government interest, and that the law be narrowly tailored to that interest. Narrowly tailored means the least restrictive means reasonably necessary. Few laws will survive this type of scrutiny, which will apply to, for example, laws that discriminate based on a specific class (race, nationality, religion etc), viewpoint, or content.

Reasonable time, place, and manner restrictions on association are allowed – and if a law is content-neutral and viewpoint-neutral, it may be the case that a lower standard of scrutiny is required. Secondly, it must be narrowly tailored to serve a significant government interest. Here 'narrowly tailored' means a lower standard, only requiring that regulations are not 'substantially broader than necessary to achieve

[1152]Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 169.

the government's interest'.[1153] Categorical or overbroad bans on association will likely not be upheld in this standard, but otherwise restrictions can survive. Intermediate scrutiny requires that restrictions leave open ample alternative channels for communication, to effectively reach the intended audience.[1154] Once the level of scrutiny has been decided upon, justification will commence.

For a law to be overturned, there must be a burden on intimate or expressive association, and the law must not pass justification. Applying this test to the scenario of former Queensland Premier Johannes Bjelke-Petersen is demonstrative of its benefits. On the fourth of September 1977, Bjelke-Petersen revealed a cabinet decision to the public, stating,

> Protest marches are a thing of the past. Nobody, including the Communist Party or anyone else, is going to turn the streets of Brisbane into a forum. Protest groups need not bother applying for permits to stage marches because they won't be granted.[1155]

The executive supported this decision, with the police vowing to uphold it.[1156] The legislature followed suit with an amendment to s 57A of the *Traffic Act* that was rushed through Parliament in just a few days.[1157]

The effect was draconian. Under the original Traffic Act, an applicant who was refused a permit to march by the police could appeal to a magistrate, but the amendment passed by the Parliament abolished this right to appeal, cutting the courts entirely out of the equation.[1158] Under s 57A of the Act, the only appeals possible would be directly to the Police Commissioner. With a new Commissioner who supported the Premier's policies entirely, this meant that there was no longer an avenue to secure protest permits, meaning the executive had found a way to ban protests.[1159] The Premier reiterated this fact shortly after announcing the ban:

> The day of the political street march is over. Anybody who holds a street march spontaneous or otherwise will know they're acting illegally. Don't bother applying for a permit. You won't get one. That's government policy now.[1160]

[1153] *Ward* (n 973) 800.
[1154] Bhagwat (n 952) 790.
[1155] Mark Plunkett and Ralph Summy, 'Civil Liberties in Queensland: a nonviolent political campaign' (1980) 1(6/7) *Social Alternatives* 74.
[1156] HF Akers, 'Civil Liberties – Why Queensland had to compromise on street matches?' (1981) 3(6) *Outlook* 14.
[1157] 1949 (Qld). Note that this section was omitted in 1992.
[1158] Plunkett and Summy (n 1155) 74.
[1159] Ibid.
[1160] Ibid.

Shortly after this ban came into effect, Bjelke-Petersen's coalition went on to win re-election in 1977.[1161] A vast protest movement began, leading to thousands of arrests over the following two years, with the Queensland Police eventually backing down and resuming the issue of marching permits.[1162] The wisdom and safety of elected representatives in Australia's responsible government system did not save Queenslanders in the late 1970s. In fact, it took intervention by unelected officials (police) for things to change.

Applying the test that I propose, legislative and executive action combined to create a clear burden on expressive association. Any organisation seeking to spread a message in public, with some selectivity and exclusivity in membership and participation would fit the criteria, and by being arrested their expressive conduct is thus burdened. In terms of justification, this law would require strict scrutiny. While the ban was viewpoint-neutral, it was not content-neutral. It was openly tailored to political marches specifically. Secondly, it was not framed in terms of time, place, and manner, but in terms of subject matter. There was certainly not an extraordinary interest behind a blanket ban on all political protest permits, and the means being undertaken were far from the least restrictive means reasonably necessary.

Australian 'consorting' laws may not survive either. They have not been uniform but have generally targeted members of motorcycle clubs and restricted their freedom of association significantly. Consider s 26 of the *Crimes (Criminal Organisations Control) Act 2012* (NSW). Anyone subject to a 'control order' commits an offence if they associate three or more times within a three-month period. The Western Australian, Queensland and Victorian acts contained similar provisions.[1163] South Australia went further, creating an offence for any person to associate with a member of a 'declared' organisation more than six times in a 12 month period.[1164] In Queensland anybody ‘in association with’ a declared organisation could have been charged with an offence carrying a minimum penalty of six months imprisonment, and a maximum of three years.[1165] Guilt by associate did result in arrests. Joshua Carew was arrested for being in association with a criminal organisation while having drinks with friends who were known to be members of the Rebels (a declared criminal organisation) and received the mandatory minimum sentence of six months.[1166]

[1161] Australian Government and Politics Database, *Parliament of Queensland, Assembly election* <http://elections.uwa.edu.au/elecdetail.lasso?keyvalue=798>.
[1162] Akers (n 1156).
[1163] *Criminal Organisations Control Act 2012* (WA); *Criminal Organisations Control Act 2012* (Vic); *Criminal Organisation Act 2009* (Qld).
[1164] *Serious and Organised Crime (Control) Act 2008* (SA) s 35.
[1165] *Criminal Code Act 1899* (Qld) s 60A(1); *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 (Qld).
[1166] Joshua Shane Carew v The Office of the Director of Public Prosecutions [2014] QSC 001.

While the public discourse focused on motorcycle clubs, a criminal organisation was defined as "any entity declared under a regulation to be a criminal organisation".[1167] This could have allowed the executive to declare a community organisation, trade union, or some other entity. Those punishable did not necessarily need to be members if they at any time sought membership, attended more than one meeting, or participated in any other way in the "affairs of the organisation".[1168] Perhaps an elderly couple and their child in a public place might be 'in association with' a criminal organisation and thus criminally liable, if the child had attended some meetings of a declared organisation. These guilt by association provisions compromised the integrity of the system of government provided for in the *Australian Constitution* and could not survive the test I propose.

While s60A might not target communication per se, it clearly burdened expressive association. Gray noted laws similar to this in US jurisprudence often fail the overbreadth test, stating that 'an Act could be unconstitutionally overbroad if it "literally establishes guilt by association alone".[1169] Even if content neutral, criminalising mere association meant were not narrowly tailored enough to survive scrutiny. Gray notes that specifically tailored, narrowly drawn provisions that justifiably interfere with association can be valid in the US.[1170] Accordingly, were the Queensland government to narrowly tailor its consorting legislation in scope, it might be successful. It is difficult to see how s60A above could possibly escape judgment as an unjustified response under the proposed test for freedom of association.

E Fair Restrictions

SCOTUS standards allow a range of restrictions. For example, federal law contains an equal protection provision that prohibits race from being considered in the creation or engagement in private contracts.[1171] In *Runyon v McCrary* it was ruled that freedom of association did not allow a school to refuse admission to students based on race.[1172] Freedom of association is also limited by the *Civil Rights Act of 1991*, meaning similar provisions in the Australian *Racial Discrimination Act 1975* (Cth) could survive.[1173] Sometimes restrictions can be beneficial to association – for instance, regulation of limited resources in order to maximise public usage such as with public spaces or the electromagnetic spectrum. So long as they are content and viewpoint-neutral, these can be construed as reasonable time, place and manner restrictions.

[1167] definition of "criminal organisation" (c).
[1168] *Criminal Code Act 1899* (Qld) s 60A(3)(e).
[1169] Gray, 'Freedom of Association and the Crime of Consorting' (n 308) 166.
[1170] Ibid.
[1171] 42 USC § 1981 (1991).
[1172] *Runyon v McCrary* 427 US 160 (1976).
[1173] 42 USC § 1981 (1991).

In *Brown v Tas* Gageler J cited two cases. In *Muldoon*,[1174] North J considered eviction statutes enacted to 'provide for the preservation, care and maintenance of the gardens and for the equitable use of them'.[1175] Enforcement provisions were obviously needed to achieve this.[1176] These sorts of restrictions can facilitate association by accommodating more people in a public place in high demand so long as they do not camp in the gardens or erect signage without a permit.[1177] A law passed to prevent association from occurring would likely require close scrutiny and be difficult to justify. If it discriminates based on content or viewpoint, even closer scrutiny would be required, but a *Muldoon* law is simple to justify as a restriction on freedom can sometimes prove to enhance it.[1178]

In Nettle J's *Brown v Tas* judgment, his Honour stressed authenticity of freedoms – the mere ability to communicate or associate *at all* is not the goal of protections. What was important to his Honour was whether the actual ability to communicate was restricted, not whether one avenue among many was restricted.[1179] Having options is irrelevant – what matters is whether one can communicate to the public effectively or not. In order for the implied freedom to operate effectively and have a practical purpose, the ability of the people to effectively have an impact on public opinion must be safeguarded.[1180] The ability of individuals to gather at a remote, isolated location, hold up some signs, and then go home would not be, in Nettle J's view, an adequate protection. Without the ability to communicate effectively these protections would be reduced to a democratic swindle.

Association is essential but not so transcendental that it overrides all else. [1181] As noted previously, the United States still contains a variety of limitations. For example, 'knowingly burning' flags 'while protesting various aspects of the Government's policies' was protected, but if doing so would be otherwise unlawful it would not. [1182] A restriction may not be a restriction on a freedom per se, but a matter of some other area of law disallowing that type of activity. For instance, s 70 of the *Queensland Criminal Code* prohibits forcible entry. This has an impact on association but is acceptable as forcible entry is prohibited to protect individuals' property and lives. However, there are legitimate issues around

[1174] *Muldoon v Melbourne City Council* (2013) 217 FCR 450.
[1175] Ibid, 379.
[1176] Ibid, 379.

[1177] *United States v Eichman*, 496 US 310 (1990) ('Eichman').
[1178] *Brown v Tas* (n 224) 385.
[1179] Ibid 407.
[1180] Ibid.
[1181] Ibid 408.
[1182] *Eichman* (n 1177).

freedom of association and private land ownership. Association may sometimes need to occur on or near a venue for it to have meaning, and this must be considered, particularly regarding political association.

Large swathes of land in the UK, previously public, are now owned or controlled privately under the guise of privatisation or public/private business initiatives.[1183] Locations with powerful symbolic value are increasingly less available. Those with wealth and power can simply acquire places of significance or public importance and shut down activity. Association is not just a physical act; it is beyond material. For many places there are powerful symbolic meanings associated.[1184] For an anti-war rally the act of holding the assembly in a war memorial lends the rally symbolic power to society at large. Because of this, association cannot always be protected adequately through designated public assembly areas.

Historical, cultural, geographical and other elements play a role in aiding the experience of a particular place to have expressive power reliant on the features of that space.[1185] For instance, the Strawberry Fields site in New York's Central Park is a place of pilgrimage understood by many as a place that is a coherent narrative of the music and ideas of John Lennon.[1186] Assemblies at Strawberry Fields carry a unique communicative power for the ideas Lennon advocated.[1187] Similarly, the historical site of the Battle of Gettysburg has its own symbolic power although it is simply fields, hills, woods, and rock-filled valleys punctuated by monuments. [1188] Overtly political assemblies are reported as occurring at Gettysburg.[1189] All these assemblies rely on their occurrence at the site of Gettysburg in order to achieve the symbolically relevant or numinous experiences.[1190] Without the ability to associate there, the power of a gathering might be lost.

Kiefel CJ, Bell & Keane JJ seemed to lead in this direction in *Brown v Tas*. Their Honours noted the history of political protests in Australia in spaces traditionally accessible to the public and on Crown land.[1191] Protests were one of the main catalysts for environmental protections in Australia, and many occur in places with legislative or regulatory protection.[1192] The High Court accepted that access to part

[1183] David Mead, *The New Law of Peaceful Protest: Rights and Regulations in the Human Rights Act Era* (Bloomsbury Publishing, 2010) 74.
[1184] John Eldridge and Tim Matthews 'The Right to Protest after Brown v Tasmania' on *AUSPUBLAW* (2 November 2017) <https://auspublaw.org/2017/11/the-right-to-protest-after-brown-v-tasmania/>.
[1185] Robert J Kruse II, 'Imagining Strawberry Fields as a place of pilgrimage' (2003) 35.2 *Area* 154, 155.
[1186] Ibid 156.
[1187] Ibid.
[1188] John B. Gattewood, 'Battlefield Pilgrims at Gettysburg National Military Park' (2004) 43(3) *Ethnology* 193, 211.
[1189] Nicole Hensley, Throngs of Confederate flag supporters and counter-protesters face off at Gettysburg (5 March 2016) *New York Daily News* <http://www.nydailynews.com/news/national/protesters-face-confederate-flag-gettysburg-article-1.2554307>.
[1190] Gattewood (n 1188) 208.
[1191] *Brown v Tas* (n 224) 346.
[1192] Ibid 346-347.

of a privately controlled forest was a necessary aspect of the political communication of the plaintiffs.[1193] The majority argued that the implied freedom could not confer a right of access where that right was legally forbidden, but just as freedoms are not absolute, the SCOTUS observed that the same is true of private rights.

In the United States some jurisdictions adopted an approach that protects both public and private rights. In California, cases have developed a flexible process using multiple factors such as: the extent to which the public is customarily entitled to access the property, the ordinary use, and the extent to which the proposed activity would be consistent with the usual activities carried out on the property.[1194] In *Pruneyard*, expressive association may be 'reasonably exercised, in shopping centers even when the centers are privately owned'.[1195] The Supreme Court noted that while private property rights were essential, they were not absolute and that equally fundamental was the right of the public to regulate them in the common interest.[1196] Notably *Pruneyard* was narrow, applying only to 'common areas' designed to encourage the public to congregate or relax.[1197] *Pruneyard* did not apply to any other area in a shopping centre or to any other type of private property. Compare an earlier case where a company that owned legal title to the whole town of Chickasaw, Alabama could not deny a person from handing out leaflets in the street in spite of their private property being highlighted by signage and warnings given.[1198] Corporate ownership was not enough to allow restriction of the inhabitants' fundamental liberties.[1199]

All circumstances must be considered, and the reasons in support of regulation of freedoms must be appraised.[1200] A narrow class of areas could reasonably benefit from some protection. The Australian High Court is well within reason to ensure protection of private property rights, but it is not necessarily the case that in all circumstances, freedoms should be abrogated by the mere existence of a property right. There may be circumstances that require a specific place for association to be effectively exercised as in *Brown v Tas.* Public usage of 'common areas' for quite narrowly drawn purposes of association as in *Pruneyard,* subject to reasonable regulation by the property owner, might not actually violate their property right in the first place. It is therefore submitted that while association must be protected under the *Australian Constitution*, the following limitations are permissible:

[1193] Ibid 367, 387, 400.
[1194] See cases like *Pruneyard Shopping Center v Robbins* 447 US 74 (1980) ('Pruneyard').
[1195] Ibid 80.
[1196] Ibid 85.
[1197] *Ralphs Grocery Co. v United Food and Commercial Workers Union Local 8*, 55 Cal 4th 1083 (2012).
[1198] *Marsh v Alabama* 362 US 501 (1946).
[1199] Ibid.
[1200] Ibid.

a) If the restrictions enhance the public’s ability to engage in association meaningfully; or

b) If the restrictions accommodate an extraordinary and urgent public matter; or

c) if the restrictions relate to private land, or crown land that needs to be regulated for some special reason (such as safety concerns where seasonal hunting occurs).

Restrictions should not include arbitrary, or generally, criminal consequences.

Freedom of association must be protected more effectively. As a corollary it has enabled consolidation of state and corporate power. In order to provide a meaningful protection, it is submitted that it is fully capable of being drawn from ss 7 and 24 of the *Australian Constitution* for the purposes of maintaining the constitutionally mandated system of representative democracy. European style proportionality should be abandoned in favour of a categorical approach, as should the 'political' criterion as it is yet another way in which association is reduced to impracticality. In the end, even overtly political forms of association will be more effectively protected as the Court will not need to go through each case with a fine-tooth comb to determine if conduct is 'political enough'. Finally, it should be recognised that there are limited circumstances where incompatibility between private and public rights must be remedied in order to preserve traditional public access. With reformulation the democratic system set up by the *Australian Constitution* can be maintained effectively by ensuring effective protection of the people's freedom to associate. However, to ensure effective maintenance of that system, freedom of expression must also be adequately protected.

CHAPTER VI FREEDOM OF EXPRESSION

After several decades of case law, it remains entirely unclear what speech is protectable and what is not. *Coleman* showed insult as clearly protected, and yet *Hanson* found insult in artwork unprotected on the grounds that the song did not contain any communication that was political.[1201] In Australia there is a history of censoring artwork. This is an ongoing issue with new forms of media, where computer games that may even be overtly and highly political in nature are banned whenever the Classification Board finds something objectionable. Beyond artwork, other areas whose status is unknown in Australia can be summarised with reference to Meiklejohn: 'education, science, philosophy, art and literature'.[1202]

Of these areas, it is art and literature that will be the primary focus of this chapter. Literary and artistic expression have an overwhelming depth and body of *First Amendment* jurisprudence to draw from. They are critically important in preserving the people's sovereignty, preserving the democratic system in the *Australian Constitution*, and ensuring that the people can engage with politics in the first place. As argued in previous chapters of this thesis, artwork is one of the primary means for participation in the social, political, and economic dimensions of society. Objectively speaking, artistic and literary expression comprise the primary means of communicating every single one of Meiklejohn's categories. One cannot communicate scientific or philosophical concepts without protecting literature, whatever media used – in film (documentaries), in physical media (books, comics, etc), in audio form (podcasts, lectures) and more. Artistic devices are critical to all categories as well – educational, scientific, or philosophical concepts and ideas are most communicated to the public via audio-visual means, be it in movies, series', or even YouTube videos.

It is not being argued in this thesis that artistic-literary expression is inherently political, or that all artistic-literary expression is political itself. It is argued instead that political and artistic expression are concepts that cannot easily be separated, and neither can Meiklejohn's categories be from artistic expression. As described in Chapter 2, the SCOTUS considers any media that communicates ideas and social messages through familiar literary devices as protectable, and it will be advocated in this chapter that such a view of free speech should be adopted in Australian jurisprudence.

It will be demonstrated that the communication of political and social ideas through literary devices in artwork is consistently censored and restricted in an unconstitutional manner in Australia. This unconstitutionality arises largely from the Court's focus on "political communication" as a mechanism

[1201] *Hanson* (n 76).
[1202] Stone, 'The Nature of the Freedom of Political Communication' (n 119) 378.

by which to protect speech, as much of the speech being censored and restricted is demonstrably political in nature. The 'political communication' standard should be dropped entirely from Australian free speech protection and replaced with more general protections using a categorical system inspired by Justice Gageler's precedential decisions in Australian High Court jurisprudence that have themselves been influenced by United States *First Amendment* jurisprudence.

Whether it is in computer games, music, or physical publications such as magazines or newspapers – one cannot easily separate politics from entertainment. Neither, it is argued in this chapter, can artistic expression be easily separated from political communication. The Australian High Court has adopted an inefficient, vague, impractical system of speech protection that has served the purpose of reinforcing the power of the ruling class in Australia, and not the purpose of protecting the Australian people's sovereignty under the democratic system set up by the *Australian Constitution*.

The focus on 'politicalness' is a democratic swindle and must be abandoned if a truly constitutional system of implied free speech protection is to continue. As such, this chapter will argue and demonstrate that politics, entertainment, and artwork cannot be effectively separated, and it is a futile effort to do so. Artistic-literary devices are the basis for many forms of expression and communication and failure to protect them is a failure to protect communication itself, and an inherently contradictory system as development of a protection that only protects the 'political' necessitates further distinction of concepts that cannot effectively be separated.

As a result, the system for censoring literary-artistic expression in Australia regularly violates the implied freedom of political communication and so the *Australian Constitution*. Media with significant social, political, and economic concepts and philosophies intended to be communicated to viewers and readers are regularly restricted to the detriment of those that live in Australia.

It will be argued that restricting and censoring artistic-literary expression is not only unconstitutional, but impractical. The breadth and scope of releases and publications across all forms can no longer be effectively regulated, and further attempts to do so have led to even more flagrant violations of the *Australian Constitution*. Automated systems for censoring media have led to releases being banned in Australia even when they were legal according to the very legislation that supported them being banned in the first place. So not only are artistic-literary forms of speech not currently protected by the implied freedom, but they are actively restricted by law up to and including criminal consequences. Practical considerations have meant that the unconstitutional dimensions of this system have been exaggerated in all forms except for in the music industry which is not subject to those restrictions.

The United States has avoided all these problems, and the High Court would be well advised to learn from them. Simply put, artistic-literary speech cannot be restricted there unless it is subjected to the highest form of scrutiny (strict scrutiny). As the levels of scrutiny are already an allowable, well-supported alternative to proportionality in Australian constitutional jurisprudence, it should not be difficult to begin applying this test to artistic-literary expression. Gageler J's test should be adapted to convert the 'implied freedom of political communication' into an 'implied freedom of speech'. This entails critically translating the categorical aspect of First Amendment principles to Australian jurisprudence, and thus protecting literary-artistic expression (and thus all Meiklejohn's categories). A new test will be proposed in this chapter with that goal in mind.

Due to the history of censorship in Australia contradicting the rationale for the implied freedom of political communication, it is proposed that the implied freedom should be reformed, both in terms of its test and its scope. It is proposed that the current system of speech regulation in Australia is impractical and inefficient for the executive and judiciary, it is not an authentic system for protection of the people's sovereignty. The free speech laws of Australia and the United States will be discussed in order to help determine the boundaries of expression in Australia and to formulate a new test. Firstly, we turn to the difficulties caused by free speech being confined to the 'political'.

A Politicalness

Beyond existing case law, there is little discussion of what speech the implied freedom protects. Perhaps the broadest concept of expression is contained in the ICCPR which protects 'information and ideas of all kinds, regardless of frontiers'.[1203] In terms of format it includes speech in oral, written, print, and artistic forms as well as 'any other media' of one's choice.[1204] The Australian High Court's position is comparatively narrow yet still vague. As with association, they are also generally unwilling to address this problem. This may be explained by the Court's fear of the implied freedom becoming an unlimited personal right, in the way they (incorrectly) view the *First Amendment*. This has led to a meandering approach with little theorisation or discussion, accompanied by repeated assertions that the implied freedom is unique and incomparable to other jurisdictions. High Court Justices sometimes take great pains to highlight this time every time they cites Canadian or United States case law despite the Court's

[1203] *International Covenant on Civil and Political Rights, opened for signature 16 December 1966,* 999 UNTS 171 (entered into force 23 March 1976), art 19.
[1204] Ibid.

heavy reliance at almost every turn on US jurisprudence in every aspect of free speech rulings *except* scope.[1205]

This has led to the strange situation where High Court justices, directly applying US jurisprudence, at the same time refuse to acknowledge that scope is a relevant consideration. This has led to a somewhat impractical and contradictory body of case law. Consider the ways that 'political' has been defined in the case law. It is limited to 'governments and political matters' but it is also broad, including matters beyond the functioning of government, including 'at the very least' social and economic matters and overall, the scope cannot be restricted.[1206] It isn't a general freedom of expression, except for when the Court decides that entertainment can't be separated from politics due to the impracticality of doing so.[1207] The implied freedom is limited to mainstream politics in *Brown v CRB*, but isn't in *Coleman*. The definition itself is unworkable.

For speech to be protected, it is not enough that it be connected to politics – it must be *political enough* to be protected. This leads to a situation where the Court must consider the level of politicalness for any given text in order to determine how legislation should apply. This is the position they have generally favoured. It is reflected in *Brown v CRB* where Heerey J argued that the content of an article about stealing for political purposes did not constitute political communication because it 'does not concern "political or governmental matters"'.[1208] It was said 'the advocacy of law breaking falls outside this protection and is antithetical to it' and that 'mere advocacy' or 'abstract teaching' of violence or crimes is not protected either.[1209] His Honour made speech protectable only if it were speech that 'exists to support, foster and protect representative democracy and the rule of law'.[1210]

That is to say, any conduct or speech that is 'not part of the system of representative and responsible government' will not constitute political communication.[1211] His Honour argued any speech or conduct outside the Australian political process cannot be protected.[1212] Sundberg J took a similar view, arguing the text in question was not political communication because, while it did contain political theory about capitalism and redistribution of wealth, it was only political in 'one sense of the word' and 'its true

[1205] For example, see *ACTV* (n 21) 141, 144; *Theophanous* (n 61) 120; *Lange* (n 85); *Mulholland* (n 161) 298; *Brown v Tas* (n 224) 475.
[1206] *Theophanous* (n 61) 120, 122 (Mason CJ, Toohey & Gaudron JJ); *Hinch* (n 265) 543.
[1207] *Theophanous* (n 61) 123, 125 (Mason CJ, Toohey & Gaudron JJ).
[1208] *Brown v CRB* (n 124) 246 (Heerey J).
[1209] Ibid.
[1210] Ibid.
[1211] Ibid.
[1212] Ibid.

character is not political because it is overwhelmingly a manual about how successfully to steal'.[1213] In addition his Honour said it did not relate to the exercise by the people of a free and informed choice as electors either.[1214]

A text, admitted as political, was not deemed to be political *enough* because the anarchist theory being advanced was built around radical expropriation of wealth. His Honour related the text to anarchist traditions that do not reject violence and advocate civil disobedience, with theorists such as Proudhon, Bakunin, and militant anarcho-syndicalists.[1215] His Honour then admitted "all this may in one sense be politics" but discarded it as apolitical anyway because of its relative unpopularity in Australia.[1216] From *Brown v CRB* we take the precedent that to constitute political communication, a text need not simply have social, economic or political relevance. It merely needs to be *the right kind* of politics.

In *Brown v CRB*, the text admitted by their Honours as political was simply not a political school of thought their Honours approved of, and thus the text was deemed apolitical despite all justices agreeing that the text *was* in fact political. One can hardly blame their Honours for this predicament, however. The High Court has handed down a system to lower Courts that gives no guidance as to scope, no definition as to what constitutes the ‘political’, and thanks to the adoption of proportionality, a series of decisions with minimal precedential value. This is a system of free speech protection so vague that judges simply end up making value judgments couched in value-neutral language. What other choice do they have?

In *Coleman*, McHugh J noted this very problem, citing Adrienne Stone's criticism of courts making value judgments disguised in value-neutral language. This occurs because the current tests require comparative evaluations of the content of speech vs the purpose of legislation.[1217] This appears to be exactly what occurred in *Brown v CRB*. Heerey & Sundberg J's decisions hinged entirely on a comparison of the text’s content vs the purpose of the 'classification' system in Australia. Both ruled that because the purpose of the language was to censor acts of speech containing potentially criminal acts, that the text in question was not political because its content related to potentially criminal acts (despite admitting it *was* political).

While Stone argued in 1999 that every decision the Court made would lead them down a path towards more theorisation and a set of governing values, this has yet to occur.[1218] Twenty years and dozens of cases later, and there is little more understanding of the scope or theory of speech in Australia today than

[1213] Ibid 258 (Sundberg J).
[1214] Ibid.
[1215] Ibid 246 (Heerey J).
[1216] Ibid.
[1217] *Coleman (n 2)* 84.
[1218] Stone, 'Limits of Text' (n 344) 704.

there was in 2009, or 1999. Stone's analysis of the reasons for the current set of tests and lack of theorisation appears to be correct. She argued the Court adopted a proportionality style test *because* of their anti-theoretical approach, as it meant they would not have to address how freedom of speech fit into the Australian legal system and other interests within Australian society.[1219] Weighing and analysis of these interests under the current tests only has to occur in very particular circumstances.[1220] Moreover the Court does not have to formulate a theory to justify its decisions, and as a result does not have to create rules to articulate it.[1221]

An additional benefit is that because an anti-theoretical approach means there are no governing standards or rules, judges are much less likely to disagree with one another, and are given a very high degree of flexibility at the point of application that allows them to avoid deciding the correctness of anything they do not wish to address.[1222] This explains why simple refusal to discuss issues or avoidance of any mention of them is so common in Australian free speech cases. With respect, their Honours were wrong to claim the text was not political in *Brown v CRB*.

Heerey J argued that the text was not compatible with representative democracy in Australia and thus not protectable.[1223] Bashi Kumar argued the freedom to write, read and discuss views antithetical to the rule of law has 'more to do with the system of representative democracy than does a stifling of those views'.[1224] Tolerance of civil disobedience is considered 'the hallmark of any mature system of representative democracy' and criticism, disobedience or revolt considered 'part of this hallmark of any free society' (a position echoed by many scholars).[1225] Obviously, civil disobedience involves breaking the law, but reading or writing about doing do should not.

Kumar argued Heerey and Sundberg JJ's judgments were an example of an absolute minimal tolerance that existed in part due to a 'generational gap'.[1226] Elsewhere this gap has led to peaceful anti-nuclear

[1219] Stone, 'Limits of Text' (n 344) 700.
[1220] Ibid.
[1221] Ibid.
[1222] Stone, 'Limits of Text' (n 344) 702.
[1223] *Brown v CRB* (n 124) 246 (Heerey J).
[1224] Kumar (n 126) 301.
[1225] Ibid. Many other scholars adopt a similar position: Menachem Marc Kellner, 'Democracy and Civil Disobedience' (1975) 37(4) *The Journal of Politics* 899, 909, 911; Nik Heynen, 'Cooking up Non-violent Civil-disobedient Direct Action for the Hungry: 'Food Not Bombs' and the Resurgence of Radical Democracy in the US' (2010) 47(6) *Urban Studies* 1225, 1236-1237; David Spitz, 'Democracy and the Problem of Civil Disobedience' (1954) 48(2) *The American Political Science Review* 386, 401-402; David Lefkowitz, 'On a Moral Right to Civil Disobedience' (2007) 117(2) *Ethics* 202, 215; William Smith, 'Policing Civil Disobedience' (2012) 60(4) *Political Studies* 826; Emanuela Ceva, 'Political Justification through Democratic Participation: The Case for Conscientious Objection' (2015) 41(1) *Social Theory and Practice* 24, 24-25.
[1226] Kumar (n 126) 302.

protesters, and even Dr. Martin Luther King Jr, being labelled 'terrorists' despite playing a legitimate and meaningful role in political culture.[1227] Their Honours simply took a majoritarian view and supported censorship, rather than tolerance, of the text. With these types of value judgments occurring, free speech becomes a democratic swindle. An absolute minimal tolerance for expression, slimmed down until it gives little room for criticism unless it is a) acceptable to the vast majority and b) in a very particular format. This problem can be further demonstrated by examining the case of *Hanson*.

B Political Satire Isn't Political?

Hanson involved a song called "(I'm a) Back Door Man" by an artist known as Pauline Pantsdown satirising then federal Member of Parliament Pauline Hanson. The song was created by taking pieces of Hanson's speeches from various sources, piecing them together, and then setting it to a pop beat.[1228] Pantsdown was in fact a gay lecturer from the University of New South Wales (and a known activist in Sydney) and had previously used the same technique in 1998 to satirise Fred Nile of the Christian Democratic Party, known for advocating anti-homosexual politics.[1229] In fact, this technique is nothing new in music; Jon Stratton refers to the editing and 'tidying-up' of voice samples together as 'a part of the pop/disco/dance tradition of popular music', so even this particular element of the case was nothing unusual or new.[1230]

In creating this song, Pantsdown was inspired by German cabaret performers of the 1930s that satirized Hitler, using his unusual speaking style and Austrian accent to perform skits discussing innocuous events such as grocery shopping with fervour and hatred.[1231] This was transferred into a satire of Pauline Hanson, using the creation of a gay supremacist persona ('Pauline Pantsdown') to criticise homophobia in Australian society, to discuss gardening ('I like trees and shrubs and plants ... but I've put up the fence now so they can't get in') while also directly addressing racism itself.[1232]

The Queensland Court of Appeal however argued simply that it was 'grossly offensive' literature that sought not to criticise homophobia and racism, but 'cheaply denigrating' Hanson by convincing the general public that she was in fact an impotent gay man and a 'caring potato'.[1233] The Court stated there

[1227] Ibid.
[1228] *Hanson* (n 76); Andrew Elkin, 'Election notes' (1998) 6 *Index on Censorship* 152.
[1229] Jon Stratton, 'I Don't Like It: Pauline Pantsdown and the Politics of the Inauthentic' (2000) 4(4) *The Pacific Journal for Research into Contemporary Music and Popular Culture* 3, 9; Lawrence M. Bogad, 'Electoral Guerrilla Theatre in Australia' (2001) 45(2) *The Drama Review* 70, 75.
[1230] Stratton (n 1229) 14.
[1231] Bogad (n 1229) 75.
[1232] Ibid 76.
[1233] See the Court's argument that the song's objective was to convince the public of Hanson's sexual orientation and performance towards the end of the judgment in *Hanson* (n 76); Simon Hunt, '"My time as Pauline" – Pantsdown on

was 'no real room for debate' on this apparent fact.[1234] Scholarship tells another story. It is not within the scope of this thesis to give a detailed analysis of the socio-political value of "(I'm a) Back Door Man", but there are many scholarly works detailing its criticism of homophobia and racism extensively.[1235]

Haydon Manning and Robert Phiddian called this case a cautionary tale, showing how ill-equipped literalists are to cope with the ironies of satirical communications such as "(I'm a) Back Door Man".[1236] Manning & Phiddian argued the Queensland Supreme Court (and Court of Appeal) made a fool of itself by treating the lyrics of Pauline Pantsdown's work as literal assertions that would be taken seriously by a reasonable listener.[1237] How could their Honours possibly have misconstrued the context of the song so as to treat the lyrics as assertions of fact? The question is a good one, given the abundance of material on the matter.

Perhaps most ironically in the years since this case, Pauline Hanson has consistently been accused of the homophobia and racism Pauline Pantsdown criticised, and these accusations continue beyond her comments criticising LGBT members of society.[1238] It would appear as if the satire that Queensland courts were unable to recognise in their strict literalism, was part of a broader, continuing view in Australian society. Albeit this view now continues in a society where, even if someone comments directly on the political views of a politician in office, this comment may not be deemed as political enough for protection by the *Australian Constitution*.

Since *Hanson* did not make it to the High Court, the question remains as to what position the High Court would have taken. In *Monis*, the Court was evenly divided as to whether allegedly offensive protest letters were protectable or not. French CJ (Heydon J concurring) and Hayne J argued the purpose of free speech was to permit expression of unpopular or minority points of view, lest society become intolerant and

playing Hanson' (1 August 2016) <https://www.sbs.com.au/guide/article/2016/07/22/my-time-pauline-pantsdown-playing-hanson>.

[1234] *Hanson* (n 76).

[1235] Bogad (n 1229); Stratton (n 1185); Haydon Manning & Robert Phiddian, 'Censorship and the Political Cartoonist' (Politics Department, University of Adelaide 2004). Bruce Johnson, 'Two Paulines, Two Nations: An Australian Case Study in the Intersection of Popular Music and Politics' (2003) 26(1) *Popular Music and Society* 53.

[1236] Manning and Phiddian (n 1235) 17.

[1237] Ibid.

[1238] OIP Staff, 'Pauline Hanson: gays should leave Australia if they want to wed' (25 September 2016) <https://www.outinperth.com/pauline-hanson-suggests-gays-leave-australia-want-wed/>; Sana Nakata, 'Think of the children, but not for political gain' (14 March 2013) <https://www.smh.com.au/opinion/think-of-the-children-but-not-for-political-gain-20130314-2g1s0.html>; Annie Guest, 'Pauline Hanson making "discrimination, racism mainstream": Islamic Council of Queensland' (15 September 2016) <https://www.abc.net.au/news/2016-09-15/hanson-speech-makes-racism-mainstream/7846430>; Michael Brull, 'She's Back: The Racist Innovation In Pauline Hanson's Maiden Speech' (19 September 2016) <https://newmatilda.com/2016/09/19/the-stunning-racist-innovation-in-pauline-hansons-maiden-speech/>.

oppressive.[1239] Someone taking offense was not a legitimate reason to censor speech.[1240] As stated previously, this case is unreliable due to no majority having been formed. However, if one examines the literature from *Coleman* and compares it to the literature from *Hanson*, an argument could be made. McHugh J gave a sample of the text in *Coleman*:[1241]

> Of course not happy with the kill, the cops – in eloquent prose having sung in unison in their statements that the person was running through the mall like a madman belting people over the head with a flag pole before the dirty hippie bastard assaulted and [sic] old lady and tried to trip her up with the flag while ... while ... he was having a conversation with her before the cops scared her off ... boys boys boys, I got witnesses so KISS MY ARSE YOU SLIMY LYING BASTARDS.[1242]

This literature was accepted as political in nature despite its potentially offensive content. What is the difference? In *Coleman* it was the views and actions of the Townsville Police Department being criticised, whereas in *Hanson* it was the views and statements of a Federal Member of Parliament being criticised, in addition to allegedly widespread homophobia in Australian society itself. Both were laden with insults and invective and yet only *Coleman* was deemed to be a political text. One wonders if the text from Coleman were set to music, whether the Court still would have deemed it political.

C The Censorship System

Like *Hanson*, the literature in *Brown v CRB* was not considered to be political either. Unlike *Hanson* it was subject to the Office of Film and Literature Classification's ('OFLC') censorship system where the Classification Review Board did not even need to consider its politicalness. While music was not regulated by the OFLC, text publications, film, and computer games were. The OFLC did not need to consider political communication at all when reviewing media for classification and routinely banned material deemed worthy of censorship in the classification system. While the OFLC is now known as the Australian Classification Board (‘ACB’), their modus operandi remains unchanged. Regularly this leads to material with some sort of social, economic or political commentary being banned.

Every series, film, publication, and computer game must be classified in accordance with the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) ('Classification Act') before it can be publicly exhibited, sold, or hired.[1243] There are also guidelines contained in the *National*

[1239] *Monis* (n 201) 146.
[1240] *Monis* (n 201) 133 (French CJ), 162 (Hayne J).
[1241] *Coleman* (n 2) 35.
[1242] Ibid.
[1243] Derek Dalton and Catherine Schubert, 'When Classification Becomes Censorship: An Analysis of the Neutralisation and Resistance of Film Censorship in Contemporary Australia' (2011) 20(1) *Griffith Law Review* 34; Andrew M. Whelan, 'Australian media classification: depictions, descriptions, and child protection as logic of regulation' in A. Kirkegaard, H. Järviluoma, J. Knudsen & J. Otterbeck (eds), *Researching Music Censorship* (Cambridge Scholars Publishing, 2017) 185, 198.

Classification Code 2005 (Cth) ('*NCC2005*') which, ironically, begins with the statement that 'adults should be able to read, hear, see and play what they want'.[1244] This is followed by the introduction of various classifications given in accordance with the code. G, PG, M, MA 15+, R18+ and RC (Refused Classification) for both films and computer games, with films also having an X 18+ category (for pornographic films).[1245] For publications the categories are: Unrestricted, Category 1 restricted, Category 2 restricted, and RC.[1246]

Any material classified RC cannot lawfully be exhibited, advertised, sold or distributed in Australia.[1247] Despite the obfuscating terminology of the ACB's activities as 'refusing classification', Derek Dalton & Catherine Schubert have noted that that censoring & banning media is what is occurring in practice[1248]. The ministers responsible for the portfolios in this area at state and federal levels are called Censorship Ministers – there is little debate about their role[1249]. Being found to be in breach of censorship regulations, by possession, distribution, importation or otherwise can carry heavy penalties of up to $275,000 and ten years of imprisonment.[1250]

What counts as inappropriate is a matter of considering themes, violence, sex, language, drug use, nudity, context, and impact.[1251] The *NCC2005* states publications that will be issued an RC classification:

> describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults.[1252]

Anything seen to 'promote, incite or instruct in matters of crime or violence' or anything that describes or depicts a child under 18 in a way likely to cause offence to a reasonable adult will also be issued an RC classification.[1253] Note that each of the categories considered in classification also have their own associated criteria for RC classification contained in official guidelines. Prior to 2012 the *Guidelines for the Classification of Films and Computer Games 2005* (Cth) specified that any computer games exceeding the MA 15+ category and any film exceeding R18+/X18+ would be automatically issued an

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[1244] *National Classification Code* (Cth) s 1.
[1245] Ibid s 4.
[1246] Ibid s 2.
[1247] Dalton and Schubert (n 1243); Whelan, 'Australian media classification' (n 1199) 200; *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 6(b).
[1248] Dalton and Schubert (n 1243) 44.
[1249] Ibid.
[1250] Whelan (n 1243) 200.
[1251] *Guidelines for the Classification of Publications 2005* (Cth) s 4-5 ('Pubguide'); *Guidelines for the Classification of Films 2012* (Cth) s 8 ('Filmguide'); *Guidelines for the Classification of Computer Games 2012* (Cth) s 7 ('Gameguide').
[1252] *National Classification Code* (Cth) s 2-4.
[1253] Ibid.

RC.[1254] This meant that for several decades and prior to relatively recent updates in 2012, computer games were highly likely to be censored if they were not suitable for 15 year old children.

This was in spite of long-term studies showing, year after year, that children were actually a small percentage of those in Australia playing computer games, with the proportion of those over 18 being generally in the range of 70% or higher (a conclusion still supported to this day).[1255] More specifically, they could only contain limited nudity justified by context, aggressive coarse language could only be 'infrequent', drug use only allowed by context, sexual activity of any kind could only be implied and violence could only be limited and justified by context.[1256] This regime went almost entirely unchallenged, with the exception of *Brown v CRB* which challenged censorship provisions regarding publications. As of 2012 this legislation has been superceded by three different legislations providing guidelines for books, films, and computer games separately.[1257]

The Guidelines for films ('Filmguide'), publications ('Pubguide'), and computer games ('Gameguide') are all quite similar, with the *Gameguide* being the strictest. In terms of crime and violence, all three prohibit 'gratuitous, exploitative, or offensive depictions of violence with a very high degree of impact with are excessively frequent, emphasised or detailed', sexual violence and 'cruelty or real violence which are very detailed or which have a high impact' (with books also including descriptions as well as depictions).[1258] All prohibit 'detailed instruction in the use of proscribed drugs' and both the *Gameguide* and *Filmguide* prohibit promotion or encouragement of proscribed drug use.[1259] In terms of sexuality, all three ban depictions of bestiality, as well as 'gratuitous, exploitative of offensive depictions' of fetish activity and incest 'or other' fantasies which is deemed to be 'offensive or abhorrent'.[1260] Publications specifically contain guidelines prohibiting promotion or instruction relating to pedophile activity, or sexualised nudity or activity with minors.[1261] However, the *Gameguide* is far more strict in relation to sexuality, where any explicit or realistic depiction of sexual activity is forbidden, even if it is simulated.[1262] The *Gameguide* is also much more strict in relation to drug use, where games will

[1254] *Guidelines for the Classification of Films and Computer Games 2005* (Cth) 13.
[1255] Jeffrey E. Brand, Jill Borchand, Kym Holmes, 'Case study: Australia's computer games audience and restrictive ratings system' (2009) 73(1) *Communications and Strategies* 67; Jeffrey E. Brand, 'Digital Australia 2012' (Bond University, 2012) 7; Jeffrey E. Brand & Stewart Todhunter, 'Digital Australia Report 2016' (Interactive Games and Entertainment Association, 2016) 9; Jeffrey E. Brand, Stewart Todhunter & Jan Jervis, 'Digital Australia Report 2018' (Interactive Games and Entertainment Association, 2016) 6.
[1256] *Guidelines for the Classification of Films and Computer Games 2005* (Cth) s 10.
[1257] *Pubguide* (n 1251); *Filmguide* (n 1251); *Gameguide* (n 1251).
[1258] *Filmguide* (n 1251) 15; *Gameguide* (n 1251) s 13.
[1259] *Pubguide* (n 1251) 14; *Filmguide* (n 1251) 15; *Gameguide* (n 1251) s 13.
[1260] *Pubguide* (n 1251) 14; *Filmguide* (n 1251) 15; *Gameguide* (n 1251) s 13.
[1261] *Pubguide* (n 1251) s 14-15.
[1262] *Gameguide* (n 1251) s 13.

automatically be RC if they contain 'illicut or proscribed drug use related to incentives or rewards', or 'interactive drug use which is detailed and realistic'.[1263]

Censorship of computer games in Australia is so prevalent that in the first six months of 2015 alone more than 220 computer games were banned, *after* an R18+ category was introduced.[1264] This is particularly alarming when one recalls that one can potentially face criminal charges if they deal with forbidden material. Consider the case of the film *LA Zombie*, which was refused classification and forbidden from exhibition at the Melbourne International Film Festival. The Melbourne Underground Film Festival's organisers, arguing that compliance with the ban was immoral and showed the film anyway. The festival director's home was promptly raided, the copy of the film seized, and Richard Wolstencroft (the film director) arrested.[1265] While Wolstencroft was merely ordered to pay $750, he was liable for up to two years' imprisonment or a $28,668 fine under Victorian law.[1266] All these restrictions can occur regardless of how much social, political, or economic commentary is in a film, computer game, or publication. One wonders what happened to Menzies' ultimate guarantee of individual rights and justice during these events, because the 'guarantees' of responsible government certainly didn't help Mr. Wolstencroft.

The film in question involved zombies, containing significant social and political commentary (a hallmark of the zombie cinematic genre). Plot-wise, it was described as:

> the earthly journey of an alien zombie who travels through Los Angeles, mingling with the living and rendering aid to the deceased, before seeking solace in a cemetary to escape a world where it is neither understood nor accepted[1267]

In terms of commentary, writer/director Bruce LaBruce called it 'an allegory addressing the serious themes of homelessness and mental illness, while simultaneously revolting against the torture porn genre' of horror films.[1268] Scholarship has acknowledged the significance of this film's commentary and its benefit to LGBT discourse, with its use of sexuality as a materialist conceit to examine the relationships between sex, queerness, power, and new forms of sovereignty in society.[1269] The socio-political value of this film and its unique blending of genres are the reasons it was intended to be shown in the first place.[1270]

[1263] Ibid 13.
[1264] Lizzy Finnegan, *Australia has Banned Over 200 Games in Four Months* (01 July 2015) The Escapist, <http://www.escapistmagazine.com/news/view/141396-Australian-Government-Bans-220-Games-in-Four-Months>.
[1265] Dalton and Schubert (n 1243) 32.
[1266] *Classification (Publications, Films, and Computer Games) Enforcement Act 1995* (Vic) s9.
[1267] Dalton and Schubert (n 1243) 31-32.
[1268] Ibid.
[1269] Shaka Mcglotten and Sarah Vangundy, 'Zombie Porn 1.0: or, Some Queer Things Zombie Sex Can Teach Us' (2013) 21(2) *Qui Parle* 101.
[1270] Dalton and Schubert (n 1243) 32.

However, the film could not be shown as it had been issued an RC classification. While there is an uncut, pornographic version of this film, even hostile film critics noted that the theatrical version intended for film festivals and wider release did not include pornographic content.[1271] This situation is surely unconstitutional – that which is political communication cannot be lawfully banned by a federal or state government.

Censorship also occurs when censors do not understand commentary too subtle for those inexperienced with a medium. Take the example of *Fallout 3*, whose release by game developer Bethesda Game Studios ('Bethesda') was delayed globally because it was classified RC by Australian censors objecting to its 'realistic' portrayal of drug use.[1272] Specifically, the censors objected to the presence of the drug morphine in the game, forcing Bethesda to change its name in-game from 'morphine' to the fictional 'Med-X'.[1273] Graphical representations of the drug and the player using them were unchanged. Apparently, only the word mattered. This decision was met with immediate outcry from the public and the media, with 629 complaints to the ACB being made in the year of 2008-2009 alone.[1274] Many highlighted the ACB's inconsistency when ruling on games containing prescription drugs ("What are the syringes in *Bioshock* filled with – magic fairy dust?').[1275] Issues of consistency aside, the censors failed to appreciate the commentary behind drug use in Fallout 3.

In terms of mechanics, the function of morphine in the game was to mitigate the effects of injuries by increasing damage resistance by 25% - censors contended that this made it 'related to incentives and rewards' making it objectionable enough to ban the game.[1276] These benefits were designed specifically to be outweighed by the short and long-term drawbacks, however. In Fallout 3, every time the player uses Med-X, they risk acquiring the 'Med-X addiction' drawback which leads to a significant drop in the player's Agility and Intelligence statistics, one that can last up to 30 hours.[1277] Agility governs the player's performance in combat as well as their ability to use the game's stealth mechanics, and Intelligence governs the player's ability to improve their skills, as well as governing performance in the Medicine,

[1271] Boston Haverhill, *LA Zombie (2010)* Gore Press <http://www.gorepress.com/2010/09/30/la-zombie/>.
[1272] David P Marshall & Sue Morris, 'The Digital Games Industry' in Mark J. P. Wolf (ed), *Video Games Around the World* (MIT Press, 2015) 57.
[1273] Marcus Schulzke, 'Moral Decision Making in Fallout' 9(2) *The International Journal of Computer Game Research* <http://gamestudies.org/0902/articles/schulzke/>.
[1274] Daniel Golding, 'Stasis and entropy in Australian videogames classification discourse' in ACM, *Proceedings of The 9th Australian Conference on Interactive Entertainment: Matters of Life and Death'* (2013) 4.
[1275]Ibid.
[1276] Nukapedia + The Vault, *Med-X (Fallout 3)* (2013) <https://fallout.fandom.com/wiki/Med-X_(Fallout_3)>; Golding (n 1230).
[1277] Nukapedia + The Vault, *Med-X (Fallout 3)* (2013) <https://fallout.fandom.com/wiki/Med-X_(Fallout_3)>.

Repair and Science skills.[1278] Whereas drugs in games are usually one-dimensional, providing an immediate benefit to the player and nothing else, in *Fallout 3* drugs, including Med-X, may provide a short term benefit but come with far more negative side-effects as well as the possibility of long-term addiction.[1279]

Fallout 3 also contains a large amount of social, moral, and political commentary.[1280] Quests such as 'Tenpenny Tower' provide thorough commentary on racism, segregation, poverty, wealth and even ethnic cleansing.[1281] Matthias Kemmer argued that while censors emphasise the interactivity of games as making them uniquely dangerous, they are also repressing the narrative value of games.[1282] Kemmer argued that interactivity adds a degree of depth to commentary that other media cannot replicate by allowing a game to 'comment on, satirize, offset, subvert or otherwise transform the avatar's actions via narrative contextualisation'.[1283]

As such, when the player navigates tense negotiations between the various parties in the Tenpenny Tower quest, the game subverts the player's expectations and actions. This happens by classifying their actions as negative via the karma system unless they resolve the dispute by negotiating a truce.[1284] Even if the player does negotiate a truce and receives positive karma in the game, after a couple of days the ghouls and tower dwellers living together will in fact massacre each other.[1285] In creating this quest Bethesda sought to teach the player to consider real-life conflicts in-depth and avoid resorting to stereotypical or 'knee-jerk' thought patterns by showing the player how the unpredictability of the consequences of certain actions complicates ethical principles or motivations in practice.[1286]

There is clearly deep commentary on a variety of issues in *Fallout 3* and yet the game was simply banned because of a drug reference. Even though this reference came with subtle commentary via a

[1278] Nukapedia + The Vault, *Agility* (2013) <https://fallout.fandom.com/wiki/Agility#Fallout_3>; Nukapedia + The Vault, *Intelligence* (2013) <https://fallout.fandom.com/wiki/Intelligence#Fallout_3>. See *Fallout 3* heading in both articles.
[1279] Schulzke (n 1273).
[1280] Matthias Kemmer, 'The Politics of Post-Apocalypse: Interactivity, Narrative Framing and Ethics in Fallout 3' in Gerold Sedlmayr & Nicole Waller (eds), *Politics in Fantasy Media: Essays on Ideology and Gender in Fiction, Film, Television and Games* (McFarland, 2014) 102; Tom Cutterham, 'Irony and American Historical Consciousness in Fallout 3' in Matthew Wilhelm Kapell, Andrew B.R. Elliott, *Playing with the Past: Digital Games and the Simulation of History* (Bloomsbury Publishing USA, 2013) 313-314; Sarah Grey, 'Dissonance and dystopia: Fallout 3 and philosophy amidst the ashes' in *Online Proceedings for the Philosophy of Computer Games Conference 2009* (2009); Kathleen McClancy, 'The Wasteland of the Real: Nostalgia and Simulacra in Fallout' (2018) 18(2) *Game Studies* <http://gamestudies.org/1802/articles/mcclancy>.
[1281] Kemmer (n 1280) 109-110.
[1282] Ibid 101.
[1283] Ibid.
[1284] Ibid 110.
[1285] Ibid.
[1286] Ibid.

comprehensive system of drug addiction that ultimately provides more drawbacks than benefits to the player. A very similar situation happened in 2018, where the computer game *We Happy Few* was classified RC and banned after censors objected to the game's drug use mechanics, where players could take a drug known as 'Joy' in order to pass for noprmal in the game world.[1287] Stating "the game's drug-use mechanism of making game progression less difficult, constituted an incentive or reward for drug-use', the censors apparently didn't pay attention and somehow missed the contextualisation of drug-use within the game as part of a greater narrative based heavily on Aldous Huxley's *Brave New World* and Terry Gilliam's *Brazil.*[1288] *We Happy Few* developers Compulsion Games appealed this decision, pointing out that the drug-use, while mechanically beneficial at times, occurs within the context of a philosophical and political narrative about authoritarian government, mind control, and the effects on society and individual identity of psychiatric medication such as Zoloft.[1289]

While the ban of the game was ultimately overturned, other games have not been so lucky. The reality remains that it was at the leisure of censors to overturn the ban, and they only did so when forced to reconsider. In any case, a system exists where literature can simply be banned if a small group of individuals finds it objectionable, regardless of whether it constitutes political communication or not. Literature such as *Fallout 3* and *We Happy Few* demonstrate that their medium directly involves political communication. That the ban of *We Happy Few* was rescinded on appeal demonstrates this very fact, as censors had to admit the game’s core themes and mechanics were political communication.

This highlights the unconstitutionality of the existing censorship scheme in Australia under the *Classification (Publications, Films, and Computer Games) Act 1995* (Cth). Forms of art that are clearly able to communicate deep and clear socio-political commentary are burdened by a system that restricts and prohibits them simply because some members of parliament and a small group of censors working at their behest find said media objectionable.

D The Music Industry and Practicality

There are exemptions to classification for films and computer games if they are for scientific, educational, religious, etc purposes, but these exemptions only apply if the material would not be banned upon

[1287] Alice O'Connor, *We Happy Few dodges Australian censor's ban* (4 July 2018) Rock Paper Shotgun <https://www.rockpapershotgun.com/2018/07/04/we-happy-few-australian-ban-lifted/>.

[1288] Ibid; Matt Wales, *We Happy Few will release in Australia following successful appeal* (3 July 2018) Eurogamer.net <https://www.eurogamer.net/articles/2018-07-03-we-happy-few-will-release-in-australia-following-successful-appeal>.

[1289] O’Connor (n 1243); Wales (n 1244); Julia Alexander, *We Happy Few dev addresses Australia ban, tackling drug glorification* (15 June 2018) Polygon <https://www.polygon.com/e3/2018/6/15/17468872/we-happy-few-australia-ban-drug-addiction>; Alex Walker, *The Reasons Why We Happy Few's Ban Was Overturned* (16 July 2018) Kotaku Australia <https://www.kotaku.com.au/2018/07/we-happy-few-ban-classification-board-review-reasons/>.

classification anyway. Note that no film or computer game is exempt if it contains 'material that would be likely to cause the game to be classified M or a higher classification'.[1290] The only real purpose of the exemption then is to allow material to be released a little faster (as no classification would be needed). It is curious as to how representative democracy in Australia could be maintained when one of the primary means for popular discussion about social, political, and economic issues is subject to such a rigorous censorship system. Surely a democratic swindle is taking place, where the people are being promised freedom of speech and led into believing it will be maintained, where in practice even clearly political materials are criminalised.

There are ways that such a system could be made constitutional without even having to introduce an entirely new system. Music is the one realm of media that does not undergo censorship. Instead the Australian music industry, in the form of the Australian Music Retailers Association ('AMRA') and the Australian Recording Industry Association ('ARIA'), classify and label musical recordings voluntarily.[1291] The *Labelling Code of Practice* contains four levels of classification – Level 1, Level 2, Level 3, and 'Exceeding Level 3'.[1292] 'Exceeding Level 3' includes any music whose lyrics promote, incite, instruct, or 'exploitatively or gratuitously' depict drug abuse, cruelty, suicide, violence, sexual violence, child abuse, incest, bestiality, or 'any other revolting or abhorrent activity in a way that causes outrage or extreme disgust to most adults'.[1293]

The *Labelling Code of Practice* is only binding on Australian Recording Industry Association members who might release or distribute recordings, and Australian Music Retailers Association ('AMRA') members who might sell them. These guidelines are not legally binding, although ARIA and AMRA members are required to follow them. Those who are not ARIA or AMRA members can freely record, distribute, import, display, sell, etc any music they like, without criminal consequences – albeit their channels for doing so are significantly restricted without the help, contracts, and distribution channels gained by being a member of ARIA or AMRA. This is what Whelan and Cloonan refer to as 'market censorship', where media is restricted and rendered mostly inaccessible to the public via vendors & distributors collectively refusing to distribute and sell.[1294] Such a system allows for consumer

[1290] *Classification (Publications, Films, and Computer Games) Act 1995* (Cth) s 6B(3)(d).
[1291] Whelan, 'Australian media classification' (n 1199) 198.
[1292] *Labelling Code of Practice for Recorded Music Product Containing Potentially Offensive Lyrics and/or Themes* (March 2003) Australian Recording Industry Association & Australian Music Retailers Association <http://www.aria.com.au/pages/documents/ARIAAMRACodeFinalMarch2003updated26.09.17c.pdf> 6.
[1293] Ibid 7.
[1294] Whelan, 'Australian media classification' (n 1243) 198; Martin Cloonan, 'What is Music Censorship? Towards a Better Understanding of the Term' in Marie Korpe (ed), *Shoot the Singer: Music Censorship Today* (Zed Books, 2004) 3, 4.

information about content, without preventing freedom of expression, as unofficial channels can still legally import, distribute, possess, etc material that would otherwise be banned. Music's lack of government censorship in Australia can be explained with reference to the volume of releases.

There is such a high volume of releases that it would be impractical for government censors to have to listen to every single track and then classify them. In 2011-2012 alone, the number of domestically made Australian tracks released was 15910, with 92504 tracks from overseas being released.[1295] This number varies from year to year – lower numbers fall in the range of 2015-2016 where 68609 total tracks were released (12786 domestic), with 81202 tracks being released in the year before that (13768 domestic).[1296] Contrastingly, in 2011-2012 only 245 domestically made Australian computer games were released, and only 178 on 2015-2016.[1297] The number of publications has, between 2008-2016, hovered inside the range of a low of 15961 titles released in 2008 and a high of 28234 titles released in 2013.[1298] One can see a slight increase in the number of publications over time, and a slow increase in the market share of digital releases increasing significantly year after year from 4% in 2008 to 23% in 2016.[1299] Given this trend, these numbers are likely to increase as digital distribution leads to more and more international publications becoming available to Australians.

Censorship is becoming increasingly impractical as the number of releases in media begin to rival or even surpass those seen in music. Recall that 220 computer games were banned in the first four months of 2015. The reason for this occurring was made clear and public by a statement from the Attorney-General's Department in 2015, who said, ‘Due to the online explosion, there are hundreds of thousands – if not millions – of games currently available online’ and that "it is not realistic or practicable for the Classification Board to manually classify each of them."[1300]

The solution to this problem was the implementation of a tool made by the International Age Rating Coalition (‘IARC’).[1301] Instead of censors reviewing games, developers simply complete an automated

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[1295] *Supporting Australian Music: Annual Report 2011-2012* (2012) Australian Musical Performance Committee <http://www.aria.com.au/documents/ampcomreport2012V3.pdf> 13.

[1296] *Annual Report 2015-216* (2016) Australian Musical Performance Committee <http://www.aria.com.au/pages/documents/AMPCOMReport2015-16.pdf> 17.

[1297] *8679.0 – Film, Television and Digital Games, Australia, 2015-16* (15 June 2017) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/0/305292A649D1E49FCA2568A9001393B4?Opendocument>.

[1298] *Think Australian 2017: Your Guide to Australian Exhibitors and Books at the Frankfurt Book Fair* (2017) Books+Publishing <https://www.booksandpublishing.com.au/ThinkAustralian/ThinkAustralian2017.pdf> 5.

[1299] Ibid 6.

[1300] Finnegan (n 1264); Benjamin Sveen, *Australian bans 220 video games in 4 months as Government adopts new classification model* (30 June 2015) ABC News <https://www.abc.net.au/news/2015-06-30/australia-bans-220-video-games-in-four-months/6582100>.

[1301] Finnegan (n 1264); Sveen (n 1300).

online form that renders a rating for their product, calibrated to the requirements of Australian censorship.[1302] Censors will only review material if complaints are made by the general public – and the IARC tool is global, so Australian censors may be required to review a computer game even if a complaint is flagged to IARC by a person living in Germany, for instance.[1303] While the ACB highlighted the use of the IARC tool in the United States in its announcement, it is used in the US as part of an exclusively industry-run system that involves no government censorship whatsoever.[1304]

All of this highlights the absurdity of the current free speech standards in Australia. The ACB tacitly admitted via adoption of the IARC tool that it can no longer review content, requiring an industry-run tool to support its continued existence. The Australian censorship system violates the *Australian Constitution* by censoring and banning political communications. The Court faces similar impracticalities. It must examine every scenario individually and examine its content in fine detail any time it is presented with literature. Even if it were possible to distinguish politics from entertainment, the bar for politicalness is so high that even direct political satire of a member of parliament, or an article advocating anarchist theory, have not been deemed political enough for protection. This is an inefficient, impractical system, and a democratic swindle in its failure to uphold the principles supposedly guaranteed to the people who are sovereign. When one looks to the United States, there are simple solutions to these problems.

E The test, or: I'm in the middle of some calibrations

Freedom of expression can be made authentic, protected in a genuine way that serves the interests of the people. While proportionality testing may be useful in other areas of law, it cannot provide for an authentic protection of speech that preserves the people's sovereignty and democratic power. It forces the Court to make value judgments and arbitrary decisions, as well as requiring them to assess the merit of any given piece of artwork, a fundamental and currently vulnerable avenue for popular communication about politics and other areas. Furthermore, current methods enable a system that, due to its impracticalities in the modern world, is not only unworkable but leads to artwork being banned without censors ever having seen it in the first place. The categorical, spectrum of scrutiny approach in the US not only does away with the necessity for value judgments but gives the Court efficiency.

The SCOTUS-style system carried forth by Justice Gageler is more practical, it is theoretically based and developed, and is composed of a body of law guided by consistent decision-making. It is a test which, if "politicalness" is dropped, is fully capable of authentically protecting the people's sovereignty and the

[1302] Finnegan (n 1264); Sveen (n 1300).
[1303] Finnegan (n 1264); Sveen (n 1300).
[1304] *Miramax* (n 909).

democratic legitimacy of the *Australian Constitution*. Instead of pressing ahead with a system that simultaneously protects the ruling class and more easily censors the people's primary method of communicating ideas, the Court must act to create a system of authentic protection of speech. That entails a new test, merging Gageler J's calibration test with a US-style categorical approach. Something like the following is proposed:

1. Does the law burden a protected category of speech in terms or effect?
2. Is the law narrowly tailored enough to the type of government interest required, to be justified under the required level of scrutiny?

While Gageler J argued that the "appropriate and adapted" standard was still most appropriate because it did not limit the range of considerations for justifying a law and allowed for his gradations/levels of scrutiny, [1305] a test that enshrines calibration can still preserve the flexibility of gradation and justification his Honour required without being vague and unpredictable. This test has been tailored to incorporate the flexibility his Honour desires while specifying a methodology grounded in a theory of free speech.

In order to pass this test, a law must first be found to burden a protected form of speech. If the terms themselves do not burden speech, they may still be found to burden speech in practice – so this question is tailored to be flexible enough to allow for different kinds of burdens. Per question 1, the burden will depend on the category of speech restricted, and whether the law restricts expression because of its message, ideas, subject matter, or content. Protected categories involve speech that has literary, artistic, political or scientific value. By adopting a test like this the Court will no longer be required to make value judgments about texts before them. Clever drafting of a law will not always be enough to enable it to be legally valid. The type of speech burdened and the way it is burdened – directly or indirectly – will help us determine what level of scrutiny is required and what type of government interest is required.

At the lowest level of scrutiny is something akin to American rational basis review, where it has been noted in High Court judgments only a 'legitimate' interest is required. At the highest level, a compelling interest will be required. Intermediate scrutiny requires a significant government interest and comes with a variety of conditions previously detailed in this work. Note that this test does not directly ask whether a law is compatible with the constitutional system or not – this is because, whichever level of interest is required, a government interest will need to be compatible with the democracy set up by the *Australian Constitution* in order to be legitimate.

[1305] *Brown v Tas* (n 224) 379.

Once the level of scrutiny and the corresponding type of interest has been determined, the justification stage begins. The law can only be valid if the required type of government interest is valid, and if the interest and provisions pass the appropriate level of scrutiny for the type and category of speech in question. Some restrictions will be easier to justify than others, depending on whether something akin to rational basis review is required (as noted previously by the High Court), or whether intermediate or close scrutiny will be required. In terms of existing jurisprudence, this style of test has already been utilised by the High Court many times.

In terms of abandoning the category of politicalness, despite contrasts being drawn to American law regularly (and often incorrectly) in Australian free speech cases, the High Court showed its willingness in *Coleman* to at least consider a categorical approach, citing *Chaplinsky.* Specifically, the category of insulting or fighting words.[1306] Gleeson CJ said:

> reconciling freedom of political expression with the reasonable requirements of public order becomes increasingly difficult when one is operating at the margins of the term "political".[1307]

His Honour noted the difficulty and awkwardness of the "political" requirement. Any conduct of the kind prohibited by a public order offense – "indecency, obscenity, profanity, threats, abuse, insults, and offensiveness" is capable of being political in some way. [1308] To make things more difficult, determining the boundary between political and non-political can be exceptionally difficult. Gummow & Hayne JJ stated that 'fundamental rights are not to be cut down save by clear words' and that as in *Chaplinsky*, the curtailment of free speech that prohibits speech in public should be read down as 'narrowly limited'.[1309] Their Honours established speech in public is not to be restricted at all unless it is speech that is reasonably likely or intended to provoke unlawful physical retaliation, a conclusion that Kirby J agreed with.[1310] This approach rejected emphasis on 'politicalness' and instead simply considered whether speech was reasonably likely to provoke violence or not, and if it wasn't – it's protected by ss 7 and 24 of the *Australian Constitution*.

F Comparing the Remaining Limitations on Speech

The National Classification Code's 'Refused Classification' provisions would require close scrutiny, as they directly restrict protected categories (speech that has literary and artistic value) and are content based

[1306] *Coleman* (n 2) 76 (Gummow & Hayne J). But contrast this with Gleeson CJ at 31 [29] in *Coleman*, where Gleeson CJ distinguished United States jurisprudence with reference to an earlier judgment by Brennan CJ. Also see Gray, 'The 1st Amendment' (n 14) 153.
[1307] *Coleman* (n 2) 30-31.
[1308] Ibid.
[1309] Ibid 76.
[1310] Ibid 77.

in their implementation as well. *Brown v EMA* is informative here, as strict scrutiny was applied there, the government did not have a compelling enough justification, and the provisions were more restrictive than reasonably necessary. Government intervention simply was not reasonably necessary and informing the population of the content of literature was not a compelling enough justification to warrant the provisions which created a series of bans and penalties.[1311]

In Australia this means that the various classification legislations could see provisions invalidated by the High Court. In particular, previously noted provisions from the *National Classification Code*, the *Gameguide*, *Pubguide*, and *Filmguide*.[1312] Fallout 3 was subject to censorship and banned in Australia due to these provisions.[1313] Please note that while this occurred under the older scheme described previously in this chapter, provisions with almost verbatim wording continue to operate in the *Gameguide*.[1314] Since there is a joint State-Federal component to this scheme, that legislation could be affected as well.

We will use the framework as described in *Brown v Tas*.[1315] Now, under the current tests, the first major hurdle required to overturn this legislation is that it must be found to be 'political' communication. The only cases dealing with artwork have not found it to be protectable as speech in the first place, even if it was directly and overtly critical of sitting members of Australian parliament, and socio-political trends known to exist in Australia (*Hanson*). The only challenge so far to material being banned under censorship legislation – literature in *Brown v CRB* – was unsuccessful as the literature was not found to be political. Even the most overtly political literature or music, whether an anarchist polemic, or a satire of a sitting member of parliament, has not been able to be considered political enough for protection. This generally means the Court will not go any further, as the first step – determining whether there is a burden on political communication – has not been satisfied. A burden will not be found to exist when the burden is only on communication that is not political. It is not, after all, a protection of free speech per se, but only a protection of 'political' speech.

But let us assume the Court found Fallout 3 to constitute political communication. The next step would be to determine if the purpose of the law is compatible with 'representative government'. Determining purpose rather than interest requires examination of a somewhat narrower category, using the principles

[1311] *Brown v EMA* (n 894) 786.
[1312] *National Classification Code* (Cth); *Pubguide* (n 1251); *Filmguide* (n 1251); *Gameguide* (n 1251).
[1313] Marshall and Morris (n 1272) 57.
[1314] *Gameguide* (n 1251) s 13.
[1315] *Brown v Tas* (n 224) 67.

of construction and attempting to determine the motive behind a legislation.[1316] This step also requires compatibility, which not only applies to the purpose of the legislation, but also to the manner in which it has been enacted.[1317] In *Brown v CRB* the purpose of censorship provisions was found by French J to be an attempt to prevent literature from encouraging people to do crime, and prevent it from instructing them as to how to commit crimes.[1318] French J determined that this was a goal compatible with representative and responsible government.[1319] In the case of these provisions, the purpose of the legislation would likely be found to be something almost exactly like that in *Brown v CRB*, except where Fallout 3 was banned under provisions relating to prevention of realistic instruction/depiction of the crime of drug use rather than shoplifting.

This is not a difficult step to pass and in implied freedom case law it is virtually never the case that a law fails at this stage. All that needs to be established is whether Parliament had a motive that was not a particularly sinister one. Therein lies the flaw with seeking to determine a purpose rather than an interest. While this may appear at face value to be a minor distinction, the reality is that purpose requires examination of intent whereas determination of whether a government interest exists, does not. Purpose requires determining what the legislature intended, something which is not necessarily a valuable consideration in the realm of free speech laws. Obviously, the intent of the legislature will rarely if ever be found to be an abusive one. In the case of *Fallout 3*, just as in *Brown v CRB*, the Court would be most likely to find the legislation has a valid purpose.

How would proportionality apply? It would be a matter of determining suitability, necessity, and adequacy in balance. Suitability requires a rational connection to the purpose of the law, a step which is demonstrated by showing that the provisions can realise the purpose. Provisions banning all access to *Fallout 3* would be able to realise the purpose of preventing realistic instruction in the crime of drug use, so this element is easy for the censors to satisfy. Next, necessity requires determining whether there was a less restrictive means of enacting the legislation available. Is it necessary to ban access to material to achieve the government's purpose? They could, without much difficulty, argue that it is, saying that banning material instructing individuals as to how to commit a crime is the only way the government can achieve this purpose. Would the fines for distributing, selling, showing publicly, etc be necessary? This is less clear.

[1316] Ibid 51.
[1317] Ibid 54.
[1318] *Brown v CRB* (n 124) 240 (French J).
[1319] Ibid.

Similar provisions in relation to a protest ban were generally not accepted as necessary by the High Court in *Brown v Tas*, although whether this would be the case for censorship legislation is not necessarily identifiable. Proportionality is highly reliant on the individual facts of a case, and as such it is difficult to apply the decisions of previous cases in this context. Suffice to say that it is argued here it would not be unrealistic to see a Court uphold the provisions enacting a wholesale ban on all access to *Fallout 3*, although they may overturn the penalties for accessing it if those are deemed too harsh. In *Brown v Tas* the penalties were generally the focus of this aspect of necessity, rather than the ban itself.

Finally, adequacy in balance. Proportionality requires reducing civil rights to a mere private interest, to be balanced against the government purpose, in this case, of preventing the crime of drug use. As Justice Gageler has argued, this step is far too open-ended, with no real guidance as to how the various interests are to be weighted, or how the adequacy of their balance can even be measured in the first place.[1320] It is therefore difficult to determine how exactly the Court would approach this subject, particularly as proportionality has never been applied to censorship legislation. However, it is a tool that lends itself to minimising free speech, and it is quite easy for a Court to sanction censorship at this stage.

Remember the criticisms of the decision in *Otto-Preminger-Institut*, where the scale of balance was weighed heavily toward the majority Christians who had been demanding the material's ban. In this case, a Court may weigh several interests heavily against *Fallout 3* – possibly the interests of religious or anti-drug organisations, and the legislature and executive overall as a matter of crime prevention. Depending on who the Court considers necessary to take into consideration, it may not bode well for *Fallout 3* just as it did not in *Otto-Preminger-Institut*. Of course, the interests considered and balanced against freedom of expression are reliant solely on the judge making the decision, and the value judgments made in the process of writing that decision.

Under the new test proposed, it is a lot less likely the provisions allowing the ban of Fallout 3 could survive. The first step requires establishing whether a protected category of speech is burdened in terms or effect. Protected categories include speech that has literary, artistic, political or scientific value.[1321] In the case of *Fallout 3* we are considering artwork, although it will ultimately be for the Court to determine if computer games do constitute artwork, as the SCOTUS did in *Brown v EMA*. The second step is justification: is there a legitimate government interest, and can that interest satisfy the required level of scrutiny? First, we must determine the required level of scrutiny. As a protected category – artwork - is

[1320] *Brown v Tas* (n 224) 376-377.
[1321] Stone, 'The Nature of the Freedom of Political Communication' (n 119) 383-387.

directly burdened, and the provisions are restricting that artwork because of its content, that means the highest standard of scrutiny is required – close scrutiny.

To survive close scrutiny, the government must have a compelling interest, with legislation being the least restrictive as reasonably necessary. For the government interest to be compelling, there must be an actual problem to solve, an issue that is urgent or crucial. The government would need to show that realistic depiction of drug use in computer games has an actual connection to real drug use, and that it is a crucial, current problem needing to be solved. Even if they could demonstrate such a problem, the means enacted – censorship and criminal offences – are not demonstrably necessary, as industry-run methods of classification that do not involve government intervention have operated in Australia before without seeing spikes in drug use every time artwork is released depicting morphine use. Simply banning all media, under penalty of heavy fines or even potentially prison time depending on the circumstances, is a set of provisions far from the least restrictive necessary.

It would be a difficult proposal for these provisions to pass this test overall. Contrast the relative ease by which censorship provisions could pass the current standards (and have before). Currently, all that is necessary is for the Court to establish that the speech in question is not, in fact, political, and the judgment can end there. If it proceeds, the resulting steps are a lot more conducive to enabling government power than they are preventing it. Under the new test, decisions such as *Hanson* and *Brown v CRB*, neither of which are particularly strong precedents anyway, would need to be overturned. As noted, this standard would likely apply to the same effect for the Australian classification scheme's 'RC' provisions - a scheme that is now demonstrably inefficient and impractical anyway.

G Hate Speech

Worth considering is the debate around whether hate speech is protectable or not and while a detailed look is not within the scope of this work hate speech remains an issue, so a brief summary of how it might fit into my proposed framework follows. To illustrate, we shall consider the *Racial Discrimination Act 1975* (Cth) s 18c, a section often complained about by Members of Parliament who, tellingly, do not usually advocate free speech protection at the same time. This section has two parts. Firstly, it makes it unlawful for a person to do an act (in circumstances other than private) that is ‘reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people’.[1322]

[1322] *Racial Discrimination Act 1975* (Cth) s 18C (a).

Secondly, the unlawful act must be done 'because of the race, colour, national or ethnic origin of the other person or some or all of the group'.[1323]

Finally, s 18D provides that artistic works, scientific works, and publications are exempt from committing an unlawful act under this law so long as they are in good faith, are fair comments, and genuinely held beliefs on events or matters of public interest. But these exemptions do not always apply – there are several cases where the Court has found defendants' speech unlawful.[1324] Even if they did apply consistently, one may question whether the existence of restrictions on racially oriented speech are consistent with a constitutional protection of free speech as detailed previously in this paper. Anthony Gray described this issue as one of whether restrictions on racially oriented speech were content-based and if so, allowable. It is difficult to argue that these are not content-based restrictions, given that they operate only depending on the content of what was said.

Defences of these sorts of restrictions often refer to harm. More specifically, for example, the government of the State of New South Wales argued that anti-vilification laws were necessary to protect the 'right to a dignified and peaceful existence free from racist harassment and vilification' as well as associated harm that might come from such things.[1325] The State of Victoria's government said that these sorts of provisions were necessary because racial and religious hate speech can 'not only undermine people living in our community, they also threaten the fairness and tolerance of our society', and Katharine Gelber notes that the State of Queensland's government promoted their hate speech provisions by arguing they would make the speech much more socially unacceptable.[1326] Anthony Gray has noted that these arguments have been reflected in scholarship as well, with many focusing on the 'pain and damage caused by racist speech' and some even arguing in regard to potential long-term psychological harm caused by such speech, referring to it as 'spirit murder'.[1327]

A version of this harm argument for criminalisation or censorship of hate speech has even been argued in the SCOTUS before. Lackland Bloom noted that in *RAV*, Justice Stevens took the approach that the harm caused by hate speech was qualitatively distinct and more serious than the harm caused by other speech.[1328] As a result, his Honour argued that the state had a specific interest in prohibiting hate speech

[1323] Ibid s 18C (b).
[1324] *Jones v Toben* [2000] HREOCA 39; *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* [2001] HREOCA 2; *McMahon v Bowman* [2000] FMCA 3.
[1325] New South Wales Government, *Discussion Paper on Racial Vilification and Proposed Amendments to the Anti-Discrimination Act 1977*, Discussion Paper (1988) 1, 3.
[1326] Victorian Office of Multicultural Affairs, *Racial and Religious Tolerance Legislation: A Discussion Paper and a Model Bill* (2000) 1, 5; Katharine Gelber, 'Hate Speech in Australia: Emerging Questions' (2005) 28(3) *UNSW Law Journal* 861.
[1327] Gray, 'Racial Vilification and Freedom of Speech' (n 362) 188.
[1328] Bloom (n 14) 26; *RAV* (n 436) 433.

while not prohibiting other kinds of fighting words or personally insulting speech. [1329] Justice Scalia rejected this theory of harm as a defense for these prohibitions arguing that distinctive harm is only caused contingent on the viewpoint.[1330] Therefore prohibition of certain kinds of speech, as Bloom put it, 'boils down to an attempt to prohibit speech on account of discomfort with its message'.[1331] Bloom notes that in subsequent cases the Court ruled that the government must refrain from regulating speech when the specific ideology, opinion, or perspective of the speaker is the rationale for the prohibitions it enacts.[1332] Some content discrimination can be allowed of course, depending the place, time, and manner, and whether those restrictions are consistent with the purposes of the forum within which they're occurring. In any case, the harm defence for hate speech prohibitions carries with it some problems.

As Anthony Gray argued, there are many things beyond traditionally discriminatory factors that might also be extremely hurtful to an individual or group – comments targeting a person's intelligence, those who like particular games, members of a particular profession, those with larger ears or noses.[1333] These things could even lead to serious emotional harm, but nobody suggests that these types of comments should be banned in a democracy because as Scalia J argued, these are only harmful contingent on one's viewpoint. One might argue that certain peoples or groups should be protected from this sort of speech due to their vulnerability in society, but how is it decided that someone is vulnerable enough to warrant criminal sanctions for speech against them? As Gray argued, some types of vilification are singled out for special treatment, often for reasons such as the State Governments I previously noted, or such as is common in Europe with prohibitions on speech relating to Nazism – inconsistency with society's values.[1334]

Acceptable boundaries for compatibility with society's values cannot be drawn. Furthermore, it would be Members of Parliament drawing them, criminalising points of view that they personally find distasteful. Or worse, criminalising views that they themselves can freely advocate as privileged members of the legislature or executive without fear of criminal sanction. Applying the theory that I have developed in this paper in a free speech context, the people's sovereignty drawn from the democratic system set up by the *Australian Constitution* is not easily protected or upheld authentically when members of the ruling class freely decide which points of view are acceptable or not.

[1329] *RAV* (n 436) 433.
[1330] Ibid (n 415) 392-93.
[1331] Bloom (n 14) 27.
[1332] Ibid.
[1333] Gray, 'Racial Vilification and Freedom of Speech' (n 362) 188.
[1334] Ibid 189.

The government should not prescribe which ideologies, opinions, or points of view are acceptable. This is a danger that Australia is certainly not free from. Katharine Gelber has noted several instances where this has been a problem. US peace activist Scott Parkin was deported from Australia after being declared a 'national security risk', after participating in some protests and giving seminars. Parkin's visa was cancelled, he was detailed and deported, with the Attorney-General refusing to give reasons as to why this declaration was made or why parkin was deported, but critics argued this was clearly a case of the government deporting Parkin because they did not approve of his point of view.[1335] Gelber recounts another incident where the Melbourne City Council banned an artwork featuring Islamic terrorist groups from display, and another in Sydney where a commissioned artwork criticising the military was prohibited from display on the grounds of it being 'inappropriate' during the war on terrorism.[1336]

The Australian federal Parliament itself once proposed amendments to the *Public Service Act 1999* (Cth) that would have required permission from public servants to disclose any information that would be 'reasonably foreseeable' to be 'prejudicial' to the working of government - with no express exemptions.[1337] Gelber argued that these incidents are alarming because they demonstrate a preparedness by multiple levels of government in Australia to restrict any speech that they disagree with, or simply do not like. It is not for ruling elites to suppress certain views in a society established on the principle of popular sovereignty. This is even more problematic considering cases such as *Hanson*, where openly racist members of parliament can freely vilify whoever they like – even with speech normally criminalised under the *Racial Discrimination Act 1975* (Cth).

From a practical perspective, the ways of thinking responsible for these prohibited forms of speech are not necessarily reduced by prohibiting speech per se anyway. It is simply a bandage over a gaping wound, with Gray noting that 1920s and 1930s Germany had laws prohibiting hate speech, as did places such as Northern Ireland and Yugoslavia – places with all-too familiar histories of racial hatred and even genocide at times.[1338] Bolstering Gray's argument here is the fact that, despite many decades of comprehensive bans on speech and association relating to Nazism in Germany, acts of terrorism by neo-Nazis in Germany are higher than they have ever been since World War 2.[1339] In fact, at times neo-Nazis have

[1335] Gelber, 'Hate Speech in Australia: Emerging questions' (n 1326) 865.
[1336] Ibid.
[1337] Ibid.
[1338] Gray, 'Racial Vilification and Freedom of Speech' (n 362) 191-192.
[1339]Sylvia Poggioli, *With A Database, Germany Tracks Rise of Neo-Nazis* (11 October 2012) NPR <https://www.npr.org/2012/10/11/162663914/with-a-database-germany-tracks-rise-of-neo-nazis>.

won seats in regional parliaments, circumventing official bans on hate speech and Nazism specifically by simply adopting new terminology, labels, and logos.[1340]

This occurs alongside years of violent crimes committed by neo-Nazis, and the NPD – a neo-Nazi party – continues to promote violence and racial hatred.[1341] In fact, the NPD is small compared to the Alternative fur Deutschland party ('AfD') whose members have for years been criticised as a racist, neo-Nazi front, whose members are often openly racist and have committed a number of acts of violence.[1342] Neither in Australia has criminalisation of racial vilification prevented widespread racism in society, with the Member of Parliament from the *Hanson* case continuing to promote it publicly. These provisions have not prevented the threat of racially motivated violence in Australia, either. For instance, the director of Australia's domestic national security organisation ASIO Mike Burgess in 2020 described neo-Nazis as a real, growing, and enduring threat to Australian national security that maintains a presence throughout the country, with members of cells even training in combat.[1343]

As noted in an earlier chapter, Karl Marx supported a robust, free exchange of ideas but also argued that freedom of speech does not also entail freedom from lies, inaccuracy, or distortion. Nor does it mean a thoroughly padded environment that promotes and allows only the speech of those designated as acceptable by those with power. An authentic system of free speech protection that safeguards the people's sovereignty and their essential constitution of society is incompatible with the sort of viewpoint discrimination that these provisions entail. Therefore, the SCOTUS has so far seen fit to generally prohibit them under the *First Amendment*, and it is why ss 7 and 24 of the *Australian Constitution* can prevent them in an implied way.

To allow these prohibitions is to further entrench a democratic swindle, with minimal concessions to civil liberties serving as a convenient cover for the self-aggrandisement of those with power in society. It is not suggested here that racism, religious discrimination, et al are not significant problems in Australian society or elsewhere. There are however reasonable, less restrictive means by which to address these problems. Freedom of speech in Australia must not be subject to the whims and personal opinions of the ruling class, or else it risks becoming a minimal concession.

[1340] Ibid.
[1341] Eric Westervalt, *Discovery of Neo-Nazi Crime Spree Roils Germany* (17 November 2011) NPR <https://www.npr.org/2011/11/17/142466439/discovery-of-neo-nazi-crime-spree-roils-germany>.
[1342] Kate Connolly and Bethan McKernan, *German far-right party AfD accused of fuelling hate after Hanau attack* (21 February 2020) The Guardian <https://www.theguardian.com/world/2020/feb/21/german-far-right-party-afd-hanau-attack>.
[1343] Andrew Greene, *Neo-Nazis among Australia's most challenging security threats, ASIO boss Mike Burgess warns* (24 February 2020) ABC News < https://www.abc.net.au/news/2020-02-24/asio-director-general-mike-burgess-neo-nazi-threat-rising/11994178>.

Anthony Gray argued that 'the price we pay for democracy is that some people will exercise this right in an irresponsible way, but the solution for this is not (should not be) to ban someone saying it'.[1344] The people's sovereignty and freedom must be protected in a meaningful, authentic manner, one that does not amount to a democratic swindle, if the democratic system protected by the *Australian Constitution* is to be maintained.

Given the nature of these restrictions as a form of viewpoint-discrimination against a protected category of speech (political speech), the test for speech proposed in this work would require us to apply the standard of close scrutiny. That means the government would require a compelling justification and the provisions would need to be the least restrictive as reasonably necessary. It could be the case that provisions similar to 18c could operate were they restricted to employment and public operations & facilities such as in the US *Civil Rights Act* of 1964, which outlaws racial, religious, sexual, and other kinds of discrimination.

However, this law generally does not apply in matters of free speech – it is primarily a law relating to labour rights and elections. If the RDA is to remain untouched, it must be sufficiently narrowly written – 18c as it stands now would likely be overturned. It may be difficult for hate speech laws to pass if they create offences. This difficulty is important, though, as viewpoint discrimination can amount to state-sponsored persecution of people for their socio-political views. It is a standard that could help to prevent a return to the *Ransley* and *Sharkey* days of punishing people solely for their opinions.

It is necessary for the sake of preventing a democratic swindle and protecting popular sovereignty under the democracy of the *Australian Constitution* to hold laws like the *Racial Discrimination Act 1975* (Cth) to the highest standard. Sometimes in a democratic society we will be hurt, perhaps even seriously or psychologically so, by the things people say to us. But the alternative is government control over what can be said. This entails the people, the very constituting factor of Australian jurisprudence and society itself, suffering a high cost in terms of loss of speech and the ability to expose and themselves judge and critique ideas. It is for the people, not the government, to determine what is and is not acceptable for people to say in society. By contrast, however, we have the problem of campaign finance laws being considered free speech. These are laws that subject the people to suppression at the hands of a different kind of class power – that of the wealthy.

[1344] Gray, 'Racial Vilification and Freedom of Speech' (n 362) 189.

H Campaign Finance

Citizens United was a case decided in 2010 about whether the US Federal Election Commission ('FEC') could maintain laws restricting corporate contributions to election campaigns.[1345] In a 5-4 decision the Court ruled corporations possessed the same *First Amendment* rights to engage in political speech as natural persons.[1346] Practically *Citizens United* meant third party political spending could not be restricted, and public opposition to this decision went as high as 80%, with the press responding negatively too.[1347]

Australian jurisprudence has seen a similar result. The High Court of Australia was presented with the *Electoral Funding Act 2018 (NSW)* s 29(10) which capped third-party (private) political campaign spending at $500,000.[1348] The Court unanimously held that the legislation imposing a cap on campaign finance was unconstitutional on the grounds that it burdened the implied freedom of political communication. While this case did protect the ability of corporations and trade unions to spend on campaign finance, the High Court did not discuss corporate personality and constitutional rights, an issue central to the arguments of the majority in *Citizens United*. Kennedy J argued that corporations enjoyed the same protection of speech as individuals because identity-based restrictions were likely to be a means to control content, and that corporations, unions and other types of association were participants in the marketplace of ideas.[1349]

Corporations (nonprofit or otherwise) and the wealthy have come to dominate American elections and advertising. Of course, spending alone does not decide the outcome of elections – one can spend nearly a billion dollars and still lose. While Barack Obama's campaign ultimately raised more, Mitt Romney's campaign *actually spent* more: leading to $992mn down the drain when Romney failed to get elected.[1350] Unlimited funding potential is not necessarily the main problem, though. A deeper trend can result from cases like *Citizens United* and *Unions NSW 2*. A trend of power and politics, where third party campaigners give more power to party elites, disconnecting them further from the rank and file and giving them a degree of control over largely untraceable 'dark' money.[1351]

[1345] *Citizens United v. Federal Election Commission*, 558 US 310 (2010).
[1346] Darrell A.H. Miller, 'Guns, Inc.: *Citizens United*, *McDonald*, and the Future of Corporate Constitutional Rights' (2011) 86 *New York University Law Review* 887, 889.
[1347] Ibid.
[1348] Unions NSW 2 (n 1031) 606.
[1349] Miller (n 1346) 898.
[1350] Jeremy Ashkenas, Matthew Ericson, Alicia Paralapiano, and Derek Willis, 'The 2012 Money Race: Compare the Candidates' (2012) <https://www.nytimes.com/elections/2012/campaign-finance.html>.
[1351] Heather K. Gerken, 'Boden Lecture: The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties' (2014) 97(4) *Marquette Law Review* 903, 910, 916; Daniel I. Weiner, '*Citizens United* Five Years

Heather Gerken's research showed that PACs and nonprofit corporations set up after *Citizens United* began to function like 'shadow parties', raising money, pushing candidates and issues, with leadership that generally mirrors the leadership of the parties they were set up to promote.[1352] Gerken says third party campaigners have unique advantages – they can raise unlimited sums of money with little to no disclosure requirements, whereas political parties must spend a lot of time and effort on compliance with campaign finance requirements.[1353] This advantage means that money, and therefore power, continues to flow towards private, corporate entities run by party elites and former party campaign managers – further shifting the balance of power within the party from the members to party elites.

At the same time, elections are now 'high tech affairs that rely on a dizzying array of experts', and one must rely on a cadre of campaign professionals that are increasingly employed by private *Citizens United* type organisations.[1354] So while one might argue that modern technology has given the general public a greater voice, this voice has begun to be drowned out by financial and professional requirements Michael A. Livermore called integral to success in a modern election.[1355] So in spite of political elites not having the *formal* power to choose candidates themselves, they still manage to choose.

While third party campaigners are nominally independent, party officials are largely the ones running and organising them.[1356] At a state level unlimited funding led to an increasing power shift toward wealthy party elites in Wisconsin, and *Citizens United* enabled this federally.[1357] Free speech was used to empower corporations and wealthy donors to use their power and influence to dominate elections, who themselves end up in a position to further empower and deregulate the very same corporations that helped them get elected.[1358]

The numbers reflect all these arguments. In 2012-2014, just 209 individuals funded more than a third of all independent spending in the US, and during the 2014 election alone, the top 100 super PAC donors

Later' (2015) *Brennan Center for Justice at New York University School of Law* <https://www.brennancenter.org/sites/default/files/analysis/Citizens_United_%205_%20Years_%20Later.pdf> 7.

[1352] Gerken (n 1351) 918.

[1353] Ibid; Weiner (n 1351).

[1354] Michael A. Livermore, 'Political Parties and Presidential Oversight' (2015) 67(1) *Alabama Law Review* 45, 67; Joseph Fishkin & Heather K. Gerken, 'The Two Trends That Matter For Party Politics' (2015) 89 *New York University Law Review Online* 32, 37.

[1355] Girish J. Gulati, 'Super PACs and Financing the 2012 President Election' (2012) 49(5) *Society* 409, 409-10.

[1356] Gerken (n 1351) 914-5.

[1357] Ibid; Weiner (n 1351) 3, 6; Fishkin & Gerken (n 1354) 46.

[1358] Jim Sleeper, 'Speech Defects: How consumer marketing distorts democracy' (2018) *The Baffler* <https://thebaffler.com/salvos/speech-defects-sleeper> ('marketing distortion').

contributed almost 70% of all super PAC spending.[1359] At the same time, individual donations to candidates and parties within legal limits declined, as did small donations from average citizens, and as noted these were drastically outweighed by 'mega-donor' billionaires who sometimes end up in control of public finances post-election.[1360] With campaign finances & planning moving towards private entities such as super PACs, and so few individuals providing the bulk of funding, this means more wealth & power than ever before concentrated in the hands of party elites and wealthy donors with access to them by way of finance.

More decisions like *Unions NSW 2* could lead in this direction. It is possible that the Court was primarily concerned not with regulation of donations per se, but just discriminatory regulation, as discrimination against unions and affiliates was criticised. [1361] Edelman J was openly opposed to any caps on third party campaign spending. It remains to be seen how further decisions will deal with political campaign contributions and free speech in Australia post-*Unions NSW 2*. It is argued here that corporate speech should not be protected by an implied freedom of expression under ss 7 and 24 of the *Australian Constitution*.

Protection of campaign contributions as free speech has at its roots what Sleeper calls the 'essential deception' of equating the free market with free speech.[1362] Free speech as a market-driven ideology is one that primarily benefits those that promote and profit from it, leading to free speech hijacked on behalf of business - empowering corporations to use 'expensive megaphones in public debate'.[1363] This leaves ordinary people straining to be heard over the cacophony of corporate media and the associated privilege of the wealthy and powerful to access it.[1364] While a wealthy individual may do as they please and their impact will be more significant than another, granting the same rights to corporations leads to a much more drastic and disproportionate effect on society.

Granting corporations freedom of speech has already affected industrial relations in the United States. The United States Court of Appeal in 2013 followed *Citizens United* and applied the *First Amendment* 'right to refrain from speaking' to corporations, who now did not have to inform employees of their workplace rights.[1365] This occurred despite the fact the poster stated nothing but contents of legislation

[1359] Weiner (n 1351) 5.
[1360] Ibid.
[1361] Unions NSW 2 (n 1031) 64, 167.
[1362] Sleeper, 'marketing distortion' (n 1358).
[1363] Sleeper, 'marketing distortion' (n 1358); Jim Sleeper, 'First Amendment's slippery slope: Why are civil liberties advocates joining forces with the right?' (2018) *Salon* <https://www.salon.com/2018/08/03/free-speech-on-a-slippery-slope-why-are-civil-liberties-advocates-joining-forces-with-the-right/> ('Slippery slope').
[1364] Sleeper, 'marketing distortion' (n 1358); Sleeper, 'Slippery slope' (n 1363).
[1365] *National Association of Manufacturers, et al, v. National Labor Relations Board, et al* (No. 12-5068, May 7, 2013).

and ‘placed no other constraints on companies’ speech’ and that in 2003, the same Court confirmed the legality of the President issuing an order requiring private federal contractors to put up explicitly anti-union posters in their workplaces.[1366]

Protecting campaign contributions and the rights of corporations as free speech therefore has consequences for free speech. If the ‘marketplace of ideas’ is a justification for free speech, it becomes difficult for the market to operate to empower the people’s democratic and popular sovereignty when the freedom to speak becomes tied to concentrated wealth. With corporations dominating every aspect of modern life being given ‘expensive megaphones in public debate’ and third parties having a disproportionate influence on political life, regulation of campaign contribution may be needed to ensure the playing field is level and that economic elites do not distort and undermine the very basis of the *Australian Constitution* and the system it sets up – that is, the sovereignty of the people currently supporting a representative democracy.[1367]

These regulations also avoid the danger zones of viewpoint and content discrimination. Citing Burt Neuborne, Sleeper notes that the *First Amendment* is a guarantee of ‘citizens’ self-government against powerful entities’ - somewhat similar to the original protection of speech implicitly in the *Australian Constitution* – not a right to be governed and silenced by corporations invoking the *First Amendment* to weaken democracy and undermine the people’s sovereignty.[1368] This issue is a real danger in recognising corporations as entities protected by free speech provisions (whether explicit or implied). It becomes even more urgent when one considers the real ability to silence speech that corporations possess by creating a chilling effect on speech with the threat of litigation.

It can hardly be said that the prevailing economic system of our time (capitalism) does not favour those with large sums of currency. I previously referred to Jim Sleeper’s comments about corporations dominating every aspect of modern life, and wealth is what enables them to do that. As such, the corporation is the primary structure used by the wealthy elite to direct and develop capitalism. Now, consider the impact litigation can have on free speech. For example, recall the case of *Hanson* where a piece of art – in this case a song – was censored by an Australian Court as it was deemed to be defamatory and without artistic value. No longer were Australians allowed to obtain or even hear the song ‘Back Door Man’ by Pauline Pantsdown. The law of torts is a clear pathway to preventing one’s ability to speak

[1366] Ibid; Sleeper, ‘Slippery slope’ (n 1363); Haley Sweetland Edwards, ‘The Corporate “Free Speech” Racket’ (January/February 2014) *Washington Monthly* <https://washingtonmonthly.com/magazine/janfeb-2014/the-corporate-free-speech-racket/>.
[1367] Sleeper, ‘Slippery slope’ (n 1363).
[1368] Ibid.

or express their opinion and it is a pathway that as David Acheson & Ansgar Wohlschlegel argue is easily weaponized by wealthy plaintiffs.[1369]

One of the primary reasons for this is the cost of litigating torts. This is not simply a problem in Australia or the United States, but one common to many jurisdictions. For example, in England scholars have highlighted the problem with libel, where 'the shadow of the law' – threats and bullying backed up by the high cost of simply being involved in libel proceedings at all – is enough to silence journalists and private citizens.[1370] In the United States, David Boies argued that Americans are often discouraged from exercising their freedom of speech because even though they would be likely to win if sued, the actual process of getting to a judgment, or even a summary judgment, is a 'very large and expensive process'.[1371]

This becomes an even bigger problem when considering cases like *AvePoint, Inc. v. Power Tools, Inc.* where liability was imposed on a Twitter user for defamation based on a hashtag.[1372] Or cases such as in the United Kingdom, where a British Court held that an emoji could trigger liability for defamation on social media. This occurred in the case of politician Lord McAlpine suing popular public figure Sally Bercow. BBC had reported that 'a leading Conservative politician from the Thatcher years' was a named abuser in a child sexual abuse case, and many users assumed this referred to Lord McAlpine, which led to his name trending on Twitter and Sally Bercow tweeting "Why is Lord McAlpine trending?" with an innocent face emoji.[1373] The Court argued the emoji could be interpreted as a 'stage direction', an ironic marker intended to make readers assume McAlpine was actually guilty – once this finding of liability occurred, Bercow settled, admitted fault, and ultimately paid over $20,000 for an emoji.[1374]

In a Marxist sense this is all relevant in demonstrating how corporations and the ruling class broadly hold economic and legal power over speech. As Boies argued, it often doesn't matter if litigation brought by a wealthy opponent has any merit – what matters is that they can flex their economic muscles so as to silence speech with the threat of economic ruin merely by participation in legal proceedings. This means that to some extent, public speech is already distorted by economic matters – private individuals, and even public figures, are consistently under thread of litigation, leading to a chilling effect where people simply do not speak about some topics for fear of financial ruin. This alone is a problem that threatens

[1369] David J Acheson and Ansgar Wohlschlegel, 'The Economics of Weaponized Defamation Lawsuits' (2018) 47 *Southwestern Law Review* 101, 121.
[1370] Ibid 122.
[1371] David Boies, 'The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution' (1995) 39 *St Louis University Law Journal* 1207, 1208.
[1372] *AvePoint, Inc. v. Power Tools, Inc.* 981 F. Supp. 2d 496 (W.D. Va 2013).
[1373] Nicole Pelletier, 'The Emoji that Cost $20,000: Triggering Liability for Defamation on Social Media' (2016) 52 *Journal of Law & Policy* 227, 245.
[1374] Ibid 247.

the democratic sovereignty of the people, as powerful members of the ruling class, by virtue of their wealth, can silence most anyone with the threat of litigation. Protecting corporate speech in the form of political campaign financing threatens to further exacerbate that problem as members of the ruling class, with their wealth and power, can have the disproportionate influence over society, politics, and law with their 'expensive megaphones' that Sleeper is concerned about. The *Australian Constitution* cannot protect the people's sovereignty and a representative democratic system authentically while allowing an economic interpretation of free speech that privileges the wealthy and entrenches their power.

If the implied freedom is to authentically protect the people's sovereignty and the political system set up by the *Australian Constitution*, third party campaign finances should be considered a low priority category, likely subject to rational basis review in a form similar to that suggested by Gageler J.

H Conclusion

The current approach to expressive human rights in Australian jurisprudence is far from adequate. It is a system created for protecting the sovereignty and democratic power of the Australian people, and yet its limits remain unknown. In the face of an unknown, under-theorised system failing to achieve its own goals, the High Court presses ahead with a system of free speech protection that is increasingly impractical. If the Court truly seeks to protect the democratic sovereignty of the Australian people, and the legitimacy of the Australian constitutional system, there must be changes. The 'political' criterion should be abolished as it eliminates one of the primary methods used by the people to communicate their ideas and opinions not just to the public but also to each other. Who can say artwork has not shaped their views about society in some way?

Whichever the medium, communications about all aspects of society are an integral aspect of artwork. Not only that, but the current method of determining protection – a case-by-case analysis that may or may not produce protection. Protection which sometimes appears to hinge on whether the officers of the Court feel something is 'political enough' or not. It is, in fact, demonstrably not the case that a communication being political is enough for it to constitute a political communication. Even when a communication is, by the judge writing an opinion, admittedly political, that still has not been enough. As the people's social existence is also their political existence, one cannot and should not distinguish between the political and the non-political. As the Supreme Court of the United States has highlighted time and time again, it is dangerous to do so.

This system of protection is one that, in its current form assists those who wield institutional, economic and political power far more than it assists the people who it hypothetically serves to protect. The

legislative and executive branches may speak their minds freely. Of course, there are valid reasons for this to be the case, but when censorship of popular artwork remains active, the people's ability to respond to those branches' statements, or even form opinions about them in the first place, is stifled.

If we cannot record scathing political satires of sitting members of parliament, entire critiques remain unheard of in Australian society. If a computer game, book, or movie is banned because someone deems it offensive to depict, say, drug use or violence, how can commentary on those issues proceed? From where else can that criticism be made? Not every Australian will pick up a newspaper or consult the latest editorial in online print media. Young people are increasingly less likely to do so. It may be the case that an individual's political, economic, or social views could be shaped more by *Star Trek* than by the *Sydney Morning Herald*. They may become far more aware of, and interested in, the potential dangers of drug use and the power of pharmaceutical companies after playing 30 hours of *We Happy Few.*

Whether the material being viewed is entertainment or not, most forms of communicating scientific, social, economic, political, literary, and other ideas and messages to the masses require artistic-literary expression. Even in scientific scholarship, one finds literary and artistic considerations in formatting, presentation, wording, usage of media (such as images), and even concepts such as satire. For the average person, though, the most common starting point for knowledge or political and other ideas remains in works of artistic-literary expression – an area that, startlingly, remains almost entirely unprotected. Political communication – or indeed, any communication – cannot be effectively protected without first guaranteeing protection of artistic-literary expression as a base.

The High Court must abandon the political criterion, critically adopt a categorical test, and apply it to a new test – Gageler J's spectrum of scrutiny can serve as an effective basis for a new test. A model for that test has been proposed in this chapter and may serve as a basis for a more effective method of testing speech. The High Court should remain wary of some areas such as campaign finance, where uniform and open protection might serve to endanger the people's political sovereignty by way of consolidating corporate power and reducing their own.

CHAPTER VII CONCLUSION

There are significant problems with Australian free speech jurisprudence. The High Court has proceeded through thirty years of case law, giving little to no development of free speech and association. As of *Banerji* and its contemporary cases we have no greater understanding of the theoretical basis for 'political communication' than we did as of *Theophanous*. The theoretical basis and justification for association as a corollary is no better understood either. In fact, no comprehensive reasoning has ever been given by any member of the High Court for this outcome regarding association. In the few cases relating to censorship and its corresponding legislation, we find poorly-theorised decisions by lower Courts, who can barely be blamed for this result as the High Court gave them little to no guidance on how to approach such material. Guidance has been subsequently shouted from the rooftops by scholars, to no avail. High Court Justices, with a few exceptions, have remained largely uninterested and silent, apparently preferring to preserve the status quo and protect the legislative branch, to the detriment of the *Australian Constitution* and the people whose sovereignty it nominally protects.

Where artistic-literary expression goes unprotected, the people's ability to educate, express and discuss the society, economics, politics, and every aspect of their ability is abridged. Censorship is then not just a limitation on the ability of people to formulate, witness, and exchange views, but it is a limitation on democracy itself. People are far less able to engage and are corralled into narrower views than they might otherwise hold. This is achieved by censors acting as artistic curators, determining what is and is not an acceptable view for members of Australian society to be exposed to. This means constitutional popular sovereignty is undermined, and therefore so the *Australian Constitution* itself. Even the 'political' criterion is undermined here as a great variety of political communications may be stifled or even outright banned by censors taking up issue with media depicting ideas or acts, they find objectionable.

Further undermining the *Australian Constitution* is the lack of freedom of association. Meaningful protection of freedom of association is now rarely mentioned let alone recognised by the High Court at the time of writing. Association is demonstrably capable of being supported by the *Australian Constitution* in an implied manner – authorities such as the decisions of Justice McHugh and Justice Kirby support this, as noted in previous chapters. There are considerable scholarly, theoretical, and persuasive international arguments that further back up the necessity of protecting association. Without it, the people's ability to truly express power, wielded from below, and assert their authority is curtailed. When a situation exists where only the ruling members of society, those who wield positions of authority and power, can freely express themselves or associate – be it via government privilege or some other

means – a Constitution becomes a device for controlling and restricting the people's sovereignty and democratic power. With that in mind, the conclusions of this thesis are as follows.

The *Australian Constitution* must be recognised as protecting representative democracy via ss 7, 24, and 128. Legal and scholarly authorities support these sections as giving ultimate control of government to the people exclusively, meaning the basis of Australian governance is that of popular sovereignty - limited control from below, but control from below, nonetheless.

Democracy is not a specific model, but a complex series of values and interactions. Most importantly, in the Marxist sense it involves society being governed according to the people's choices. This may take a variety of forms in different constitutions and societies, but in Australia it takes the form of popular control over the form and structure of the government through direct appointment of officials and determination of the structure of the *Australian Constitution* itself.

Protection of free speech and association must be genuine and authentic. That means they must be reliable, consistent, practical, and not so narrow that they become unable to effectively protect the freedoms they nominally protect. Underdeveloped civil liberties that consist of minimal concessions may lead to a democratic swindle, empowering the ruling class and limiting the people's choices. This occurs by simultaneously protecting authorities from criticism, and enabling them to enact abusive laws with impunity, while espousing the values of a free society. When this occurs, the fundamental basis of a democratic society - the rationale for protecting those freedoms - is undermined. This is occurring in Australia in two areas.

The corollary interpretation of freedom of association is unsupported, inadequate, and impractical, as is the current formulation of free speech. Value judgments, impracticalities, vagueness, and seemingly arbitrary decisions have empowered authorities to enact abusive laws that achieve exactly what the implied freedom was set up to protect against. While there have been minimal concessions to liberty judgments, overall, laws restricting speech and association have continued to pass through the High Court with no difficulty whatsoever. A democratic swindle has been maintained.

It is hereby recommended that the High Court:

- Abandon the anti-theoretical approach. Recognise popular sovereignty and representative democracy as the basis for the implied freedom of political communication.
- Abandon the 'political' criterion in the implied freedom of political communication.

- Protect freedom of association as a standalone freedom drawn directly from ss 7, 24 and 128 of the *Australian Constitution*, without an attached 'political' criterion.
- Establish that while freedom of association need not be absolute, neither should private property rights. Certain public or historical places may need some limited association rights for freedom of association to be effective.
- In the context of these implied freedoms, abandon proportionality. Adopt a categorical approach for both the implied freedoms of speech and association. Categories should, for association, include intimate and expressive association. For speech, categories should include at least artistic and academic expression.
- Formalise an approach for testing laws and decisions incorporating levels of scrutiny as proposed in chapters five and six.

The High Court of Australia must follow through with its goal of protecting the sovereignty of the people and maintaining the democratic legitimacy of the *Australian Constitution*. To do so requires *authentic* protections – dispensing with the criterion of politicalness and protecting categories of speech such as artwork and academic publications. It also requires protecting association in its own right – not merely as a corollary that struggles to protect even the most basic forms of association. The United States arrived at similar conclusions after many decades of interpretation – a developed body of free speech jurisprudence did not simply spring into existence fully formed on the 4th of March 1789 (when the *US Constitution* first came into force). It was incumbent on the Supreme Court to develop its explicit *and* implied rights, just as it was in Canada, and just as it is now the task of the High Court in Australia. They would be well advised to spend more time examining United States jurisprudence in order to develop a genuine system of protections, rather than dismissing it out of hand because it is inconvenient for privileged members of parliament.

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