WHITHER THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION?

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In recent years, the implied freedom of political communication has become one of the more frequently litigated constitutional issues in the High Court of Australia. That is remarkable given the relatively recent recognition of the implied freedom, the differences of judicial opinion that attended its formulation, and forceful criticisms of the doctrine. Critics have said that the doctrine is the product of impermissible judicial activism, and so uncertain and ambiguous in its application that it has failed and will go on failing. This paper explains why it might be thought that, despite such differences of judicial opinion and the difficulties and uncertainties that are said to have attended the doctrine's application, the implied freedom of political communication is soundly based in accepted constitutional principle. It also explains how the recent invocation of structured proportionality analysis as a test of 'appropriateness and adaptedness' is likely to result in increased certainty in the doctrine's application.

I INTRODUCTION

Last year, in the midst of a matter about a public servant with a penchant for publicly criticising her employer,[1] it occurred to me that the implied freedom of political communication has become one of the more frequently litigated constitutional issues in the High Court of Australia. And that is surely a remarkable development given the implied freedom's relatively recent and problematic gestation.

Some academic commentators, like Professor James Allan and Professor Jeffrey Goldsworthy, have criticised the doctrine as the product of impermissible judicial activism that flies in the face of the framers' intention to exclude express

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1 *Comcare v Banerji* (2019) 267 CLR 373 ('*Banerji*').

constitutional guarantees of rights and freedoms.[2] Others have described it as uncertain and ambiguous and as giving untrammelled power to each judge to make of it what he or she thinks fit.[3] The test of 'reasonably appropriate and adapted' has also been derided as 'mysterious',[4] 'cumbersome and inexact'[5] — a 'ritual incantation, devoid of clear meaning'[6] and offering 'no guidance as to its intended application'.[7] And, memorably, one former justice of the High Court once denounced the implied freedom as a 'noble and idealistic enterprise which has failed, is failing, and will go on failing'.[8]

As is always the case, however, there are two sides to the story, and so my object in this paper is twofold: first, to suggest that, despite such problems as may have emerged during the initial development of the implied freedom, and the supposed uncertainty of its precise content, there are satisfactory answers to most of the criticisms thus far levelled against it; and secondly, to posit why and how the technique of structured proportionality analysis offers the prospect of greater certainty and refinement.

II PROBLEMS IN INITIAL DEVELOPMENT

A Nationwide News *and* Australian Capital Television

As is well known to Australian constitutional lawyers, recognition of the implied freedom began with the High Court's decisions in *Nationwide News Pty Ltd v Wills* ('*Nationwide News*')[9] and *Australian Capital Television Pty Ltd v Commonwealth* ('*Australian Capital Television*')[10] in 1992, and, in one sense, culminated five years later in the Court's decision in *Lange v Australian Broadcasting Corporation*

2 See, eg, James Allan, 'Constitutional Interpretation Wholly Unmoored from Constitutional Text: Can the HCA Fix Its Own Mess?' (2020) 48(1) *Federal Law Review* 30; James Allan, 'Implied Rights and Federalism: Inventing Intentions while Ignoring Them' (2009) 34(2) *University of Western Australia Law Review* 228 ('Implied Rights and Federalism'); Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23(2) *Monash University Law Review* 362; Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 150 ('Implications in Language, Law and the Constitution'). See also Tom D Campbell, 'Democracy, Human Rights, and Positive Law' (1994) 16(2) *Sydney Law Review* 195.

3 *Monis v The Queen* (2013) 249 CLR 92, 181–4 [243]–[251] (Heydon J) ('*Monis*').

4 Ibid 182 [246] (Heydon J).

5 Ibid 195 [283] (Crennan, Kiefel and Bell JJ).

6 *Coleman v Power* (2004) 220 CLR 1, 90 [234] (Kirby J).

7 *Monis* (n 3) 213 [345] (Crennan, Kiefel and Bell JJ).

8 Ibid 184 [251] (Heydon J).

9 (1992) 177 CLR 1 ('*Nationwide News*').

10 (1992) 177 CLR 106 ('*Australian Capital Television*').

('*Lange*').[11] But in order to put that process of development in context, it assists to recall two fundamental developments in Australian constitutional law that preceded and informed it.

The first was *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* ('*Engineers' Case*'),[12] in 1920, in which the majority overthrew the implied immunities doctrine and the doctrine of implied reserved powers. Their reasoning embraced principles of constitutional construction which place the significance of express stipulations above what were described as implied limitations derived from 'vague, individual conception[s] of the spirit of the compact'[13] arrived at 'on the opinions of Judges as to hopes and expectations respecting vague external conditions'.[14]

The second development was Dixon J's recognition in *West v Commissioner of Taxation (NSW)*,[15] in 1937, that the *Engineers' Case*, properly understood, did not exclude constitutional implications derived from the text and structure of the *Constitution*,[16] leading in turn to the recognition in *Melbourne Corporation v Commonwealth* ('*Melbourne Corporation Case*'),[17] in 1947, of a pared down form of the implied immunities doctrine derived from the text and structure of the *Constitution*.[18]

Taken together, these two advancements proclaimed the criticality of the text of the *Constitution* and, at the same time, the inherent limitations of attempting a strictly textual approach to its interpretation: the text is sacrosanct but the necessary generality of some of its provisions means that the Court cannot avoid implicational ascription of more specific content when the need arises.[19]

In the result, when the High Court came to decide *Nationwide News* and *Australian Capital Television* in 1992, it was not in any sense unprecedented, or out of the ordinary, for the Court to draw constitutional implications derived from the text and structure of the *Constitution*. It was then, as it remains now, an authoritatively established technique of constitutional interpretation.

11 (1997) 189 CLR 520 ('*Lange*').

12 (1920) 28 CLR 129.

13 Ibid 145 (Knox CJ, Isaacs, Rich and Starke JJ).

14 Ibid.

15 (1937) 56 CLR 657.

16 Ibid 681–2.

17 (1947) 74 CLR 31.

18 Ibid 81–3 (Dixon J).

19 See, eg, Cheryl Saunders and Adrienne Stone, 'The High Court of Australia' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 36, 51. See also Adrienne Stone, 'Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28(1) *Oxford Journal of Legal Studies* 1, 8–11.

Nationwide News was first argued some six months before *Australian Capital Television* but was brought back for further argument with *Australian Capital Television*, and the decisions in each case were handed down on the same day. As will be recalled, the issue in *Nationwide News* was whether a provision of the *Industrial Relations Act 1988* (Cth) which made it an offence to use words calculated to bring a member of the Industrial Relations Commission or the Commission itself into disrepute was a valid exercise of the conciliation and arbitration power.[20] It was held, by majority, that it was not. But each member of the majority got there by a different route.

Mason CJ's judgment was significant in at least three respects. To start with, it made no mention of any implied freedom of political communication. It proceeded from the orthodox canon of construction that, in order to say of an impugned law that it is valid, the law must be capable of characterisation as one with respect to the head of legislative power pursuant to which it was enacted, and that is to be decided according to whether the law is sufficiently connected to the subject matter of the head of power.[21]

Secondly, however, and more heterodoxly, based on Mason CJ, Deane and Gaudron JJ's earlier reasoning (Brennan J agreeing) in *Davis v Commonwealth*,[22] Mason CJ posited that, in order to say of the impugned law that it was sufficiently connected to the head of legislative power, it was necessary to be able to say of it that it was reasonably appropriate and adapted, or proportionate, to the pursuit of an end within power.[23] As will be appreciated, that was a test that had previously been restricted to purpose powers, such as the defence and external affairs, and regarded as inapposite in the case of subject powers like conciliation and arbitration.

Thirdly, the judgment seemed to recognise a limited right of free speech, in some respects like the United States First Amendment right of free speech, in holding that whether a law is appropriate and adapted or proportionate to the pursuit of an end within power is to be decided according to whether the means selected by the law for achieving the end are reasonably proportionate to its achievement; and that, in determining whether that is so in the context of the incidental scope of a substantive legislative power, the Court must 'take account of and scrutinize with great anxiety the adverse impact, if any, of the impugned law' on what Mason CJ

20 *Industrial Relations Act 1988* (Cth) s 299(1)(d)(ii).

21 *Nationwide News* (n 9) 27.

22 (1988) 166 CLR 79, 99–100 (Mason CJ, Deane and Gaudron JJ, Brennan J agreeing at 117) ('*Davis*'). Arguably, *Davis* constitutes the High Court's earliest iteration of freedom of expression as having some constitutional or 'quasi-constitutional status', the Court there holding that laws requiring consent of the Bicentennial Authority for the use of designated phrases was an 'extraordinary power to regulate the use of expression in everyday use' that fell beyond the Commonwealth's power to make laws for the celebration of the Bicentennial: see the discussion in Adrienne Stone, 'Expression' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 952, 954–5, quoting *Davis* (n 22) 99 (Mason CJ, Deane and Gaudron JJ).

23 *Nationwide News* (n 9) 30–1.

described as 'such a fundamental freedom as freedom of expression … in relation to public affairs and freedom to criticize public institutions'.[24]

On that basis, Mason CJ concluded that because the impugned law applied as much to words that were true as to words that were false, it was so disproportionate to the legitimate object of protecting the standing of the Commission as to be beyond legislative power.[25]

McHugh J similarly made no reference to any implied freedom of political communication. His Honour reasoned, like Mason CJ, that a law purporting to be passed in exercise of the incidental power for the protection of a body that has been created by Parliament in exercise of an express power is not fairly within power if it provides for a regime of protection that is grossly disproportionate to the need to achieve the objects of the power, and that a law will be so grossly disproportionate if it constitutes an 'extraordinary intrusion' into freedom of speech.[26]

Brennan J's analysis was different. It closely followed Sir Maurice Byers' argument in *Australian Capital Television*,[27] and, in hindsight, presents as the fons et origo of the resolutive iteration of the implied freedom of political communication later settled upon in *Lange*.

Brennan J expressly rejected Mason CJ's reasoning that the Court was permitted to decide according to the adverse impact of the impugned law[28] on what Mason CJ had termed 'such a fundamental freedom as freedom of expression'.[29] As Brennan J reasoned, although the Court would interpret a law in light of a presumption that Parliament does not intend to abrogate human rights and freedoms, the Court cannot deny the validity of legislation merely on the ground that it impinges on human rights and freedoms or trenches upon political rights which the Court considers should be pursued; not least for the reason that, at common law, there is no right to free discussion of government or other relevant freedoms or immunities, and, in any event, such freedoms and immunities as are recognised at common law are, generally speaking, liable to impairment or abrogation by legislation.[30]

Critically, Brennan J perceived the essence of the matter to be that the *Constitution* has, by ss 7, 24, 64 and 128 and related sections, constitutionally entrenched the system of representative government; and, as his Honour observed, it would make a mockery of the system of representative government if the people were not free to engage in public discussion from which they derive their political judgments.

24 Ibid 34.

25 Ibid.

26 Ibid 101, quoting *Davis* (n 22) 100 (Mason CJ, Deane and Gaudron JJ).

27 *Australian Capital Television* (n 10) 109–113.

28 *Nationwide News* (n 9) 43–4.

29 Ibid 34.

30 Ibid 48.

On that basis, Brennan J reasoned, it was necessarily implicit in the text of the *Constitution* that the legislative powers conferred on the Parliament by s 51 are subject to an implied limitation that restricts 'legislative or executive infringement of the freedom to discuss governments and governmental institutions … except to the extent necessary to protect other legitimate interests',[31] and even then not so as substantially to impair the capacity or opportunity of the Australian people to form political judgments required for the exercise of their constitutional functions.[32] And that, his Honour said, is a question of degree to be decided case by case, the material considerations being the practicability of achieving the object of the law by a less severe curtailment of the freedom of political communication, and the extent to which the impugned law protects other interests.[33]

Deane and Toohey JJ, in a joint judgment, and Gaudron J writing separately, reasoned like Brennan J — albeit in terms less explicitly tethered to the text of the *Constitution* — that all grants of legislative power with s 51 of the *Constitution* must be read as subject to the *Constitution* as a whole, and thus 'fundamental implications of the doctrines of government upon which the *Constitution* as a whole is structured'.[34] Of central importance among those doctrines, their Honours said, is the doctrine of representative government — 'government by representatives directly or indirectly elected or appointed by, and ultimately responsible to, the people of the Commonwealth'[35] — which implies a freedom of communication of information and opinions about matters relating to the government of the Commonwealth between the represented and their representatives and between the represented.[36]

In contrast, Dawson J flatly rejected the idea of an implied freedom of speech or political communication. His Honour proceeded from the premise that the received learning of the Court was that characterisation of law as one with respect to a head of power is to be determined according to whether the law is sufficiently connected to the subject matter of the power, and that it is only in the case of a purpose power that reasonable proportionality provides a test of validity.[37] In the case of a subject power, like the conciliation and arbitration power, the test of reasonable proportionality is of little assistance and dangerous, inasmuch as it invites the Court to act upon its own views of the desirability of the impugned law rather than on the law's connection to the subject matter of legislative power.[38]

31 Ibid 51.

32 Ibid 47–50.

33 Ibid 51–2.

34 Ibid 69 (Deane and Toohey JJ). See also at 94 (Gaudron J).

35 Ibid 70 (Deane and Toohey JJ). See also at 94 (Gaudron J).

36 Ibid 72–4 (Deane and Toohey JJ).

37 Ibid 89.

38 Ibid.

As may be recalled, the question in *Australian Capital Television* was whether provisions of the *Broadcasting Act 1942* (Cth) prohibiting political advertising during an election period were invalid. Other things being equal, therefore, one might have supposed that Mason CJ would decide the case as he did *Nationwide News*, by reference to what he had there described as 'such a fundamental freedom as freedom of expression … in relation to public affairs and freedom to criticize public institutions'.[39] Instead, Mason CJ embraced the idea that the freedom of *political communication* is so indispensable to the efficacy of the system of representative and responsible government as to be necessarily implicit in the *Constitution* as a central element of the political process.[40] And, invoking what was in effect established United States First Amendment jurisprudence, Mason CJ held that, where a restriction directly targets ideas or information, only a compelling justification will warrant the burden it imposes on free communication, and, even then, it must be no more burdensome than is reasonably necessary to achieve protection of the competing public interest.[41]

McHugh J reasoned like Mason CJ, but on a more restricted basis. His Honour held that because ss 7 and 24 of the *Constitution* were to be read against the background of the institutions of representative and responsible government, they were to be read as referring to a process which commences when an election is called and ends with the declaration of the poll, although within that period including all those steps that are directed to the people electing their representatives.[42] That followed from what McHugh J stated was the constitutional right of the people to 'convey and receive opinions, arguments and information concerning matter intended or likely to affect voting in an election for the Senate or the House of Representatives'.[43] Thus, his Honour concluded, a law which seeks to prohibit or regulate the content of electoral communications can be upheld only on grounds of compelling justification, of which, in the case of the impugned law, there was none.[44]

Brennan J reprised his analysis of the implied freedom in *Nationwide News* and stated that for the reasons which he gave there he would hold that 'the legislative powers of the Parliament are so limited by implication as to preclude the making of a law trenching upon [the] freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the *Constitution*'.[45] His Honour re-emphasised his view that the freedom is not a personal freedom but a restriction on legislative power. He held that, 'in order that a law may validly restrict a freedom of communication about

39 Ibid 34.

40 *Australian Capital Television* (n 10) 138–40.

41 Ibid 143.

42 Ibid 231–2.

43 Ibid 232.

44 Ibid 235.

45 Ibid 149.

political or economic matters, the restriction must serve some other legitimate interest and it must be proportionate to the interest to be served'.[46]

Likewise, Deane and Toohey JJ's and Gaudron J's approaches in *Australian Capital Television* closely followed their respective reasonings in *Nationwide News*, and each of them held that the impugned law was invalid.[47]

Once again, however, Dawson J stated that he could find no warrant in the *Constitution* for the implication of any guarantee of freedom of communication that operated either to confer rights on individuals or to limit the legislative powers of the Commonwealth.[48] He considered that the only question was whether, because the heads of legislative power in s 51 are subject to the *Constitution*, the impugned law was incompatible with sections of the *Constitution* that provide for the direct choice of Members of Parliament.[49] And, in his Honour's view, they were not.[50]

B *The Position after* Nationwide News *and* Australian Capital Television

As may now be appreciated, the differences in reasoning between members of the Court in *Nationwide News* and *Australian Capital Television* were considerable. But in view of McHugh J's substantive alignment with the majority in *Australian Capital Television*, it did not appear at the time that the differences went as deep as they did. Two years later, however, the general lack of consensus became very apparent in *Theophanous v Herald & Weekly Times Ltd* ('*Theophanous*') where the issue was whether the common law and statutory defences of qualified privilege were subject to the implied freedom of political communication.[51] The majority, comprised of Mason CJ, Toohey and Gaudron JJ, and Deane J writing separately, held that they were, while the minority, comprised of Brennan J, Dawson J and McHugh J, held that they were not, each for different reasons.

Breaking new ground, in a joint judgment with Toohey and Gaudron JJ, Mason CJ held that the implied freedom of political communication was not just a restriction on Commonwealth legislative and executive power but also that it shaped and controlled the common law and thus the common law and state statutory defences of qualified privilege.[52] Nor was it confined, their Honours held, to matters relating to the government of the Commonwealth, but included 'discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public

46 Ibid 150.

47 Ibid 167–77 (Deane and Toohey JJ), 203–224 (Gaudron J).

48 Ibid 184.

49 Ibid 187.

50 Ibid 191.

51 (1994) 182 CLR 104 ('*Theophanous*').

52 Ibid 125–6, 140.

officers and those seeking public office'.[53] It also included 'discussion of the political views and public conduct of persons who [were] engaged in activities that ha[d] become the subject of political debate' — for example, trade union leaders, Aboriginal political leaders, and political and economic commentators — and was 'not exhausted by political publications and addresses'.[54] As such, their Honours said, it applied to all communications relevant to the development of public opinion on a wide range of issues and shaped and controlled the common law and state statutory defences of qualified privilege in defamation proceedings concerning all such communications.[55]

Deane J, consistently with his earlier judgments, characterised the implied freedom of political communication as based on the doctrine of representative government that forms part of the fabric of the *Constitution*, and, like Mason CJ, Toohey and Gaudron JJ, concluded that the curtailment of freedom of political communication involved in the unqualified application of state defamation laws to statements about official conduct or suitability of a member of Parliament or holder of high Commonwealth public office, including judges, was inconsistent with the *Constitution*.[56]

Brennan J adhered to his more limited conception of the implied freedom, as expressed in *Nationwide News* and *Australian Capital Television*, as an implied limitation on the exercise of Commonwealth legislative power derived from the text of the *Constitution* which prohibits the exercise of legislative or executive power in a manner that infringes the ability to discuss governments and government institutions except to the extent that such a restriction is necessary to protect other legitimate interests.[57] And in contrast to the other majority judges, Brennan J rejected the notion that the implied freedom of political communication prevailed over the common law of defamation. He reasoned that, although the *Constitution* prevails over the common law, there is no inconsistency between the *Constitution* and common law rules which govern the rights and liabilities of individuals inter se: because the *Constitution* deals with the structure and powers of orders of government and does not purport to deal with the rights and liabilities of individuals inter se.[58]

McHugh J reached a similar result, but by another route marking a sharp departure from his Honour's apparent support of the implied freedom in *Nationwide News* and *Australian Capital Television*. He stated that the only thing that could relevantly be concluded about the *Constitution* was that ss 1, 7, 24, 30 and 41 gave effect to aspects of the institution of representative government. They did not imply anything about representative democracy — which his Honour conceived of as a

53 Ibid 124.

54 Ibid.

55 Ibid 131, 140–1.

56 Ibid 163, 184–5.

57 Ibid 147, quoting *Nationwide News* (n 9) 51 (Brennan J).

58 *Theophanous* (n 51) 153.

wider concept — and did not imply anything about the form of government in the states or territories.[59] McHugh J further proclaimed, with a degree of emphasis not apparent in his Honour's reasoning in *Australian Capital Television*, that the majority judgments in *Nationwide News* and *Australian Capital Television* propounded a principle that should be rejected because, if accepted, it would have far reaching ramifications for the federal system of striking down not only federal legislation but also state legislation and common law principles and doctrines. And, McHugh J said, he could find nothing in the text of the *Constitution*, in the convention debates, or in accepted principles of constitutional interpretation that suggested that state legislation or common law principles were liable to be overturned by a principle of representative government or representative democracy implied by the *Constitution*.[60]

Dawson J remained of the view that there was no implied freedom of political communication. As his Honour reasoned, the argument that the *Constitution* contained such an implied freedom, and that the law of defamation must be modified to accommodate it, failed on its first premise.[61] The *Constitution*, his Honour stated, contained no express guarantee of freedoms, except of course for the s 92 guarantee of absolute freedom of interstate trade and commerce, and, his Honour said, any implication of the kind contended for could not be drawn from the *Constitution* because, as is apparent from the convention debates, those who framed the *Constitution* considered it to be one of the 'virtues of representative government that no such guarantee was needed'.[62] Nor could such an implication be drawn from *outside* the *Constitution*, Dawson J said, without trenching on established principles of interpretation and constitutional implication that had been settled since the *Engineers' Case*. It would be wrong, his Honour said, to draw an implication from extrinsic sources 'guided only by personal preconceptions of what the *Constitution* should, rather than does, contain'.[63] And since there was no guarantee of freedom of political communication, there was no call for the Court to identify exceptions to it — either in the interests of an ordered society or in the interests of representative government — and no balancing process was required.

C *Other Matters before* Lange

On the same day that the Court handed down judgment in *Theophanous*, it also handed down judgment in *Stephens v West Australian Newspapers Ltd* ('*Stephens*').[64] Based on what their Honours had written in *Theophanous*, Mason CJ, Toohey and Gaudron JJ, and Deane J, again writing separately, held that the freedom of communication about political matters implied in the *Constitution* extended to the public discussion of the performance, conduct and

59 Ibid 199–202.

60 Ibid 205.

61 Ibid 191.

62 Ibid 193.

63 Ibid 194.

64 (1994) 182 CLR 211.

fitness for office of members of a state legislature;[65] a freedom of communication about political matters was also implied in the *Constitution Act 1889* (WA);[66] and it extended to criticism of the performance, conduct and fitness for office of a Member of Parliament so as to provide a defence to an action in defamation.[67] Likewise, for the reasons given in *Theophanous*, Brennan J, Dawson J and McHugh J dissented.[68]

But the tide of division was beginning to turn. A year later in *McGinty v Western Australia*,[69] the issue was whether the *Commonwealth Constitution* or constitutional instruments of the State of Western Australia contained an implication affecting disparities of voting power among holders of the franchise for the election of Members to State Parliament, and whether the wide disparity between the numbers of electors in metropolitan and non-metropolitan electorates offended implications of representative democracy found in the *Commonwealth* or *State Constitution*. It was held by majority, with only Toohey J and Gaudron J dissenting, that it did not.

D *The Synthesis Attained in* Lange

Passing then over some further developments and differences, one comes to the defining authority of *Lange*. Remarkably, it resolved all the previous doctrinal differences as to the existence and content of the implied freedom; and, all the more remarkably, did so as a unanimous joint judgment of all seven justices following so closely after deep divisions demonstrated in *Theophanous* and *Stephens*.

After observing that the Court was satisfied that what had previously been said concerning the implied freedom required reconsideration in order to settle both constitutional doctrine and the contemporary common law of Australia governing the defence of qualified privilege,[70] their Honours set about the task. And, just four large steps later, they had achieved it.

First up, consistently with the views previously expressed by at least Brennan J, Dawson J and McHugh J, they laid down that, although ss 7 and 24 of the *Constitution* necessarily protect the kind of freedom of political communication that enables people to exercise a free and informed choice as electors, those provisions do not confer personal rights. They impose a 'limitation or confinement on laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected'.[71] The limitation or confinement is not

65 Ibid 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J).

66 Ibid 234 (Mason CJ, Toohey and Gaudron JJ).

67 Ibid 257 (Deane J).

68 Ibid 235–6 (Brennan J), 258 (Dawson J), 259 (McHugh J).

69 (1996) 186 CLR 140.

70 *Lange* (n 11) 556.

71 Ibid 560, quoting *Theophanous* (n 51) 168 (Deane J).

absolute but limited to what is necessary for the effective operation of the system of representative and responsible government mandated by the *Constitution*.[72] It operates as a restriction of legislative power, but it will not invalidate a law enacted to satisfy some other legitimate end if the object of that other law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and is reasonably appropriate and adapted to achieving that legitimate object or end.[73] And as their Honours stated, although some members of the Court had previously expressed the test as one of whether the law is 'reasonably appropriate and adapted to the fulfilment of a legitimate purpose', and others had favoured different expressions including proportionality, there is no need to distinguish between those concepts — apparently meaning thereby to convey that they are to be regarded as the same.[74]

Secondly, the Court held, consistently with the views previously expressed by Brennan J, Dawson J and McHugh J and contrary to views previously expressed by Mason CJ, Toohey and Gaudron JJ (Deane J writing separately), that the *Constitution* did not displace the common law but was and is informed by it, and so the

> factors which affect the development of the common law [must] equally affect the scope of the freedom which is constitutionally required. '[T]he common convenience and welfare of society' is the criterion of the protection given to communications by the common law of qualified privilege … [and] the content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society. That requires … a balance [to be struck] … between absolute freedom of discussion … and the reasonable protection of the persons … involved, directly or incidentally, in the activities of government or politics.[75]

Accordingly, in any given case, the question whether a publication of defamatory matter is protected by the *Constitution* or is within a common law or state legislative exception to actionable defamation must be the same.[76]

Thirdly, in a passage of the joint judgment that bears close resemblance to Brennan J's explication of the implied freedom in *Nationwide News*, and yet simultaneously expressly acknowledges the central point of Dawson J and McHugh J's objections to the majority reasoning in *Nationwide News*, *Australian Capital Television* and *Theophanous*, the Court in effect repudiated the broader conception of freedom of communication that had been asserted by Mason CJ, Deane and Toohey JJ and Gaudron J in *Nationwide News* and *Australian Capital Television*, declaring in its place that the *Constitution* gives effect to the institution of representative government only to the extent that the text and structure of the

72 *Lange* (n 11) 561.

73 Ibid 561–2.

74 Ibid 562.

75 Ibid 565–6.

76 Ibid 566.

Constitution establish it.[77] The relevant question is not what is required by representative and responsible government but what the terms and structure of the *Constitution* prohibit, authorise or require.[78] And inasmuch as 'the requirement of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the *Constitution*, the implication can validly extend only so far as is necessary to give effect to these sections'.[79]

Lastly, in the final section of the joint judgment, the Court held, as it were contrary to McHugh J's reasoning in *Stephens*, that the implied freedom applies at all levels of government, Commonwealth, state and local, and, contrary to Brennan J's reasoning in *Theophanous*, that the implied freedom applies to the common law which governs the rights and liabilities of persons inter se, and, therefore, that the common law rules of qualified privilege must be developed to reflect the requirements of ss 7, 24, 64 and 128 of the *Constitution*.[80]

III CRITICISMS OF THE IMPLIED FREEDOM

A *Judicial Activism or Orthodox Implication?*

So much, therefore, for the problems encountered in the development and resolution of the implied freedom. *Lange* put a line in the sand, and, although there have been other problems since then, they have by and large been concerned with application of the doctrine as opposed to its existence and content.

But what then of the criticisms that the development and settlement of the implied freedom doctrine was the product of unwarranted judicial activism that defied the absence from the *Constitution* of an express guarantee of rights and freedoms?

In a cleverly amusing, but plainly serious, criticism of the implied freedom published some years after *Lange* was decided, Professor James Allan posed the question of why, if the framers of the *Constitution* intended there to be something as fundamental as a freedom of political communication capable of trumping statutes of the democratically elected Parliament, the framers did not make explicit mention of it in the *Constitution*, rather than crossing their fingers and hoping that the explicitly laid down provisions for a system of representative democracy would sufficiently imply their intentions that, some nine decades down the road, a majority of the High Court might 'discover' or 'find' the meaning or insinuation of an implied freedom that lay buried in the text and structure of the *Constitution*?[81] And Professor Allan added, sardonically, is not the answer to that conundrum all

77 Ibid 566–7.

78 Ibid 567.

79 Ibid.

80 Ibid 571–2.

81 Allan, 'Implied Rights and Federalism' (n 2) 230. See also Goldsworthy, 'Implications in Language, Law and the Constitution' (n 2); Campbell (n 2).

the more obvious given that we know from the convention debates that the framers of the *Constitution* were well aware of the express guarantees of rights and freedoms included in the *United States Constitution*, only after discussion and debate, chose not to include any similar sort of bill of rights-type provisions in the *Constitution*, because of the framers' faith in British institutions of parliamentary sovereignty.[82]

Similar reasoning had earlier led Professor Jeffrey Goldsworthy, a prominent and persistent critic of the implied freedom, to observe in relation to *Nationwide News* and *Australian Capital Television* that some High Court justices were 'paying mere lip service to the need for evidence of authorial intention, purporting to discover constitutional implications even when the evidence is clearly to the contrary'.[83]

As will be apparent, Professor Allan's and Professor Goldsworthy's points are not unlike the concerns expressed by Dawson J and McHugh J in *Theophanous* that they could find nothing in the text of the *Constitution* or in the convention debates, or in accepted principles of constitutional interpretation, which suggested that state legislation or common law principles are liable to be overturned by a principle of representative government or representative democracy implied by the *Constitution*.

But there are perhaps two possible answers to their concerns. The first is that, although the technique of constitutional interpretation authoritatively laid down in *Engineers' Case* puts the significance of express stipulations above the vagaries of implied limitations derived *dehors* the *Constitution*, it is also the received learning of the Court, and, as I earlier indicated, has been so since at least the *Melbourne Corporation Case*, that the Court may draw implications logically necessitated by the text and structure of the *Constitution* despite the framers intentionally excluding express stipulations to the effect of those implications.

Hence, as Mason CJ observed in *Australian Capital Television*, although the framers' adoption of the 'principle of responsible government was perhaps the major reason for their disinclination to incorporate … comprehensive guarantees of individual rights', the existence of that sentiment and the influence which it had in shaping the *Constitution* are no answer to the sort of case that the plaintiffs presented in *Australian Capital Television*.[84] Thus, although there is no foundation in the *Constitution* for the implication of *general* guarantees of rights and freedoms, the *Constitution*'s adoption of a system of representative government necessarily implies the existence of a *specific* guarantee of freedom of expression in relation to public and political affairs:[85] for, since freedom of political communication is an essential concomitant of representative and responsible government, freedom of political communication is necessarily implicit in the

82 Allan, 'Implied Rights and Federalism' (n 2) 230.

83 Goldsworthy, 'Implications in Language, Law and the Constitution' (n 2) 150.

84 *Australian Capital Television* (n 10) 135–6.

85 Ibid.

Constitution's prescription of the system of representative and responsible government.

The second possible answer is, as we have seen, that, until *Lange* resolved the implied freedom, the essential difference between the majority on the one hand and Dawson J and McHugh J on the other was that what the majority considered to be necessarily implicit in the text and structure of the *Constitution* was the need to maintain and protect the system of representative and responsible government, some aspects of which were prescribed by the *Constitution*, whereas Dawson J and McHugh J took the view that the only aspects of the system of representative government necessarily implicit in the text of the *Constitution* were those prescribed by ss 7 and 24. The essence of the synthesis attained in *Lange* was that what is, relevantly, necessarily implicit in the text and structure of the *Constitution*, is all of the aspects of the system of representative government for which ss 7, 24, 64 and 128 and related sections provide in some respects.

Certainly, the existence of that implication is contestable in the sense identified by Professor Allan. For syntactically, providing for some aspects of representative government and not others at least as much bespeaks a constitutional intention to leave the other unmentioned aspects of representative government subject to change at the will of the Parliament, as it does a notion that the unmentioned aspects of the system of representative government are so bound up with the mentioned aspects that they should be regarded as necessarily implicit in them.

Ultimately, however, it is, I think, more a matter of logic than syntax, for logically it is very difficult to suppose that ss 7, 24, 64 and 128 say no more about the constitutionally immutable system of representative government than what those sections explicitly provide for. As both Dawson J and McHugh J accepted in *Australian Capital Television*, by providing for representative elections for Members of Parliament, the *Constitution* must surely be understood as providing for meaningful, effective elections of Members of Parliament, and in this country, as in other Western democracies with which we share British political traditions, it is axiomatic that it is not possible to have meaningful, effective elections unless there is freedom to communicate regarding political and economic matters directly and indirectly pertinent to elections.[86] And once that point is reached, there is then but a short way to the conclusion that the implied freedom operates at all times in relation to all political and economic matters in the broad sense that has been recognised.

Professor Zines once posited that the *Lange* formulation of the implied freedom is to some extent chimerical in that, as he put it, it is impossible to believe that someone with no prior knowledge or understanding of the system of representative and responsible government could discover it within the text and structure of the *Constitution*.[87] But I suggest that the answer to that is, as we have seen, that the

86 Ibid 187 (Dawson J), 230–2 (McHugh J).

87 Leslie Zines, 'Dead Hands or Living Tree? Stability and Change in Constitutional Law' (2004) 25(1) *Adelaide Law Review* 3, 15.

Constitution is informed by the common law and so by British parliamentary institutions.

The framers of the *Constitution*, like other Australians at the time of federation, regarded themselves as British and admired and respected British parliamentary institutions.[88]

Furthermore, although drafted in Australia, and in large part approved by referendum of the Australian peoples,[89] the *Constitution* took effect as an Act of the Imperial Parliament.[90] The provisions of the *Constitution* are thus to be understood as framed in the language of the common law and so in light of the common law's history; which of course includes British parliamentary institutions and conventions.[91] It therefore requires no going beyond the terms and structure of the *Constitution* to comprehend that it is those parliamentary institutions and conventions that comprise the essence of the system of representative and responsible government which the *Constitution* entrenches.

B *Other Criticisms of the Implied Freedom*

The implied freedom has further been criticised for a different reason. In *Monis v The Queen* ('*Monis*'), one member of the Court observed that the 'unclarity' of the doctrine meant that the courts had been given a 'virtually untrammelled power to make of it what each judge wills'.[92]

Bearing in mind that judge's conclusion that the implied freedom required that Monis should be left free to send letters to relatives of servicemen killed in action in Afghanistan (in which Monis virulently criticised Australia's involvement in that conflict and the part played by the deceased soldiers in combatting Islamist terrorism), it is perhaps understandable that the judge was so critical of the doctrine.[93] After all, how could it be that the system of representative government prescribed by the *Constitution* necessitated the invalidation of laws calculated to protect grieving relatives of fallen Australian soldiers from the unsolicited and unwelcome abuse of someone like Monis? Would it not be better to abandon the doctrine of implied freedom altogether than be forced to that conclusion? But perhaps the answer is that the plurality in *Monis*, like the Court of Appeal of the

88 See *Sue v Hill* (1999) 199 CLR 462, 523–4 [158]–[160] (Gaudron J); Robert Randolph Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus & Robertson, 1897) 123–4.

89 See Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "the People" and the Australian Constitution: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36, 49–52. See also *Victoria v Commonwealth* (1971) 122 CLR 353, 395–6 (Windeyer J).

90 See Owen Dixon, 'The Law and the Constitution' (1935) 51(4) *Law Quarterly Review* 590, 597; *Australian Capital Television* (n 10) 137–8 (Mason CJ). Cf *A-G (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

91 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 9th ed, 1939) 23.

92 *Monis* (n 3) 182 [244] (Heydon J).

93 Ibid 184 [251] (Heydon J).

Supreme Court of New South Wales from whose decision the appeal in *Monis* was brought,[94] were correct:[95] the implied freedom did not require that result.

Of course, of itself that answer is not a sufficient response to the complaint that the implied freedom has varied over time and that the appropriate and adapted test is in terms mysterious, open textured, and short on certainty. But, that said, the phenomenon of doctrinal variations over time is hardly novel nor necessarily obnoxious. It is generally accepted to be an essential and valued aspect of the common law that its doctrines can and do develop and vary over time as they are applied on a case by case basis in new and different circumstances.[96] Open textured tests of constitutional validity are seemingly inevitable with any form of constitutional guarantee or limitation. And the appropriate and adapted test is one with a long and respected pedigree.

Writing in the common law tradition under the pseudonym 'Publius', in the late 18th century, Alexander Hamilton identified the maxim that 'the means ought to be proportioned to the end' as one of the 'primary truths', and applied it to constitutional controversies surrounding defence, taxation and federal power generally.[97] Relating that maxim to Congress's power to make laws 'necessary and proper for carrying into Execution' the powers vested in 'the Government of the United States',[98] Marshall CJ famously opined in *McCulloch v Maryland*: 'Let the end be legitimate, let it be within the scope of the *constitution*, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the *constitution*, are constitutional.'[99]

The specific concept that powers to legislate for a purpose are limited to the adoption of means 'appropriate' and 'adapted' to that purpose has thus been influential in Australian constitutional and statutory interpretation since Federation.[100]

Just as significantly, developments in the application of the implied freedom since its recognition in *Lange*, particularly the recent adoption of proportionality testing as a structure for determination of appropriateness and adaptedness, have arguably gone a way towards eliminating perceived mystery and the alleviation of other difficulties.

94 *Monis v The Queen* (2011) 256 FLR 28.

95 *Monis* (n 3) 207 [324], 210 [333]–[334], 216 [353] (Crennan, Kiefel and Bell JJ).

96 Cf Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) ch 8 §7.

97 Alexander Hamilton, 'The Federalist No 31: The Same Subject (concerning the General Power of Taxation)' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed Ian Shapiro (Yale University Press, 2009) 191, 191.

98 *United States Constitution* art I § 8.

99 17 US (4 Wheat) 316, 421 (1819). See also at 423; *Juilliard v Greenman*, 110 US 421, 440 (Gray J for the Court) (1884); Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124(8) *Yale Law Journal* 3094, 3106–10. Cf *United States v Fisher*, 6 US (2 Cranch) 358, 396 (Marshall CJ for the Court) (1805).

100 See HB Higgins, 'McCulloch v Maryland in Australia' (1905) 18(8) *Harvard Law Review* 559.

IV THE EVOLUTION OF PROPORTIONALITY ANALYSIS

Such is the level of certainty that *Lange* established as to the scope and content of the implied freedom that, since *Lange* was decided, there have been relatively few disputes as to whether an impugned law burdens the implied freedom. In the bulk of implied freedom cases post *Lange*, it has either been readily apparent or accepted that the impugned law did to some extent burden the implied freedom, and the issue has been whether the impugned law is reasonably appropriate and adapted or proportionate to the achievement of a legitimate object consistent with the system of representative and responsible government mandated by the *Constitution*.

Unsurprisingly, given a test as open textured as that, during the period following *Lange* there have been differences and disagreements as to how to assess appropriateness and adaptedness, and, for a while, there was little sign of consensus. But that began to change with Kiefel J's judgments in *Monis* and *Tajjour v New South Wales*,[101] in which her Honour, joined by Crennan and Bell JJ, invoked a test for assessing appropriateness and adaptedness,[102] to some extent modelled on European proportionality analysis,[103] which has since found favour with a majority of the Court.[104]

To begin with, other members of the Court eschewed that approach. But in *McCloy v New South Wales* ('*McCloy*'), the plurality comprised of French CJ, Kiefel, Bell and Keane JJ expressly adopted it.[105]

Admittedly, in *Murphy v Electoral Commissioner* in the following year, French CJ and Bell and Keane JJ appeared to temper their enthusiasm for the analysis.[106] But Kiefel J adhered to it, and held that that the impugned law was not invalid, because there were not any obvious and compelling alternatives, and was adequate in its balance, because the restrictive effect of it on the implied freedom was balanced by the certainties and efficiencies of the action which it achieved.[107]

101 (2014) 254 CLR 508 ('*Tajjour*').

102 *Monis* (n 3) 213–15; ibid 570–2.

103 See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012); Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85, 87–8; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21(1) *Melbourne University Law Review* 1, 4.

104 See, eg, *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *Clubb v Edwards* (2019) 267 CLR 171 ('*Clubb*').

105 *McCloy* (n 104) 194–6 [2]–[5].

106 (2016) 261 CLR 28.

107 Ibid 62–4 [69]–[74].

That led, a year later, in *Brown v Tasmania* ('*Brown*'),[108] to the plurality of Kiefel CJ, Bell and Keane JJ together returning to the *McCloy* approach, and, on that basis, determining that the impugned law in issue was invalid — as lacking in necessity because there was an obvious and compelling alternative less restrictive of the implied freedom.[109] By contrast, Gageler J and Gordon J expressly rejected proportionality analysis as unhelpful,[110] while Edelman J decided the matter on the basis that the impugned law did not burden the implied freedom.[111]

Then, a further two years later again, in *Clubb v Edwards* ('*Clubb*'), all members of the Court apart from Gageler J and Gordon J adopted the *McCloy* analysis. Responding to submissions that it was unnecessary to go through all the steps of the analysis in order to conclude that the impugned law was justified, the plurality once more comprised of Kiefel CJ, Bell and Keane JJ observed that the kind of proportionality analysis applied in *McCloy* and *Brown* accords with the foundational authority of *Lange* and addresses the abstract and indeterminate language of the second limb of the *Lange* test: by explaining how the conclusion as to whether a burden on the implied freedom is 'undue' is reached.[112] It provides the means by which rational justification for the legislative burden on the implied freedom may be analysed and serves to encourage transparency in reasoning to the answer. It recognises that, to an extent, the process involves value judgment, and it serves to reduce the extent of the subjectivity of that process rather than attempting to conceal what would otherwise be an impressionistic or intuitive perception of what is 'reasonably appropriate and adapted'.[113]

Writing separately, Edelman J agreed. As his Honour observed, the recognition of *McCloy* style proportionality testing as a structure for decision making is not at all antithetical to the common law process, but is entirely consistent with it, in that it forces judges to confront issues in a structured way and thereby explain and justify the approach that is taken.[114]

A year later, in *Comcare v Banerji*, all members of the Court except Gageler J and Gordon J confirmed their acceptance of the *Clubb* formulation of the process.[115]

Surprisingly, perhaps, the process of proportionality analysis so adopted has been almost as much criticised as the implied freedom itself. Most notably, Sir Anthony Mason has described it and its balancing process as 'a rather cumbersome edifice which at the end of the day, at the last step, delivers nothing more than a value

108 (2017) 261 CLR 328 ('*Brown*').

109 Ibid 370–1 [130]–[138]. I did likewise, albeit with a misplaced emendation: see at 418–9 [282], 422–3 [290].

110 Ibid 376–9 [160]–[166] (Gageler J), 464–7 [429]–[437] (Gordon J).

111 Ibid 482 [491].

112 *Clubb* (n 104) 202 [74].

113 Ibid 199–202 [64]–[74].

114 Ibid 333 [469].

115 *Banerji* (n 1) 400 [32] (Kiefel CJ, Bell, Keane and Nettle JJ), 451 [188] (Edelman J).

judgment'.[116] Gordon J has expressed similar concerns.[117] In her Honour's view, questions concerning the implied freedom should be approached on a case by case basis and, consistently with the common law method of adjudication, there can be 'no "one size fits all" approach'.[118] Gageler J has said that it appears to him that proportionality analysis is an 'all-encompassing algorithm'[119] that is too open-ended and provides no guidance as to how 'the incommensurables to be balanced are to be weighted or as to how the adequacy of their balance is to be gauged'.[120] In his Honour's view, the appropriate test of justification of a law which burdens the implied freedom is that the measure of justification must be 'calibrated to the nature and intensity of the burden' that the impugned law imposes on the implied freedom.[121]

With respect, there is force in these criticisms, and in others like them. No one pretends that proportionality analysis does not involve the weighing of incommensurables, or, therefore, that it does not involve elements of value judgment. But that said, the same is also surely true of unstructured case by case ad hoc balancing and of tests such as whether the justification of an impugned law is 'calibrated to the nature and intensity of the burden' that the law imposes on the implied freedom. Such defects are thus, relatively speaking, essentially neutral. And perhaps more to the point, over the last 20 years or so, academic lawyers and other commentators have generated a large volume of high-quality academic writing which supports the conclusion that structured proportionality analysis is productive of distinct advantages in the application and development of the implied freedom compared to ad hoc characterisation and the shibboleth of calibrated justification.

Among them, Professor Adrienne Stone's 1999 paper, 'The Limits of Constitutional Text and Structure',[122] stands out as prescient. In it, Professor Stone argued that, although the High Court's *Lange* commitment to text and structure as the sole progenitors of the implied freedom was a welcome development, constitutional text and structure could not alone provide applicable tests for the justification of an impugned law's impingement upon the implied freedom. What was required was case by case development of more defined tests, while, in the meantime, proportionality analysis offered a structure capable of minimising the

116 Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) *Public Law Review* 109, 121. See also Ronald Sackville, 'An Age of Judicial Hegemony' (2013) 87(2) *Australian Law Journal* 105, 118.

117 *Brown* (n 108) 464–5 [430].

118 *Banerji* (n 1) 440 [161].

119 *Brown* (n 108) 377 [161].

120 Ibid 377 [160], citing Frederick Schauer, 'Proportionality and the Question of Weight' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 173, 177–8, 180.

121 *Tajjour* (n 101) 580 [151]; *Brown* (n 108) 378 [164].

122 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668.

risk of precipitant commitment to rules later being found to be inapposite in unforeseen circumstances.

More recently, with the benefit of developments in *McCloy* and *Brown* that accord to Professor Stone's 1999 predictions, she has conjectured that structured proportionality and tests such as calibrated scrutiny are reconcilable in a form of proportionality analysis well suited to further development of the law.[123] And I dare say that Professor Stone might be right about that; although, regrettably from my perspective, I shall not be there to see it occur.

Some critics charge that the technique of structured proportionality analysis is unnecessarily formulaic and an unwarranted restriction on judicial freedom. But, as against that, it is to be observed that the deployment of formulae in the application of common law principle is hardly unprecedented or, for that matter, very often inutile, and experience suggests that such constraints on judicial freedom are more often than not conducive to the rule of law.[124]

Admittedly, the last step in the analysis — assessing adequacy in balance — involves a value judgment. But that is not all it provides. As some commentators have observed, as well as certainty in approach, and consequent greater consistency in the reasoning process, the order in which the steps of the analysis are undertaken — proceeding from the most legalistic consideration (of suitability or rational connection) to the least legalistic and most value laden consideration (of adequacy in balance) means that, in cases capable of being decided on the basis of suitability or necessity (as occurred in *Brown*), the structure affords the advantage of avoiding recourse to the value-laden assessment of adequacy in balance.[125]

It is true of course that the conception of adequacy in balance is open-ended in the sense that it provides little guidance as to how 'the incommensurables to be balanced are to be weighted or as to how the adequacy of their balance is to be gauged'.[126] But the same is true of the equally open textured notions of 'calibrated scrutiny' and 'appropriateness and adaptedness', and that will remain so unless and until a priori detailed categories or rules of the kind that permeate the United States First Amendment jurisprudence are developed.

Lastly, there is the criticism of structured proportionality analysis that it is a mode of reasoning principally concerned with protection of constitutional rights deriving from the European legal tradition and, therefore, is unsuited to an Australian constitutional context that is largely devoid of constitutional rights. This idea is not new — in *Roach v Electoral Commissioner* Gleeson CJ warned against the dangers

123 Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123.

124 See Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67, 71–2.

125 Shipra Chordia, 'The Trajectory of Structured Proportionality in Implied Freedom of Political Communication Cases: Brown v Tasmania', *Australian Public Law* (Blog Post, 2 November 2017) <https://auspublaw.org/2017/11/the-trajectory-of-structured-proportionality/>.

126 *Brown* (n 108) 377 [160] (Gageler J), citing Schauer (n 120) 177–8, 180.

of 'uncritical translation' of proportionality into the Australian constitutional context[127] — and it gained renewed prominence in *Clubb* when Gordon J, drawing on the work of American legal scholar Frederick Schauer, observed that not only is the implied freedom of political communication not a personal right, but the conceptual origins of structured proportionality find no readily identifiable equivalents in the Australian constitutional structure or jurisprudence.[128]

As has elsewhere been observed, however, the Australian conception of 'balancing' in the final stage of the analysis is distinguishable from its European counterpart. It borrows from the analytical techniques of the Europeans but applies them in a manner pertinent to the Australian constitutional context.[129] To illustrate the point, the German approach to proportionality — which is perhaps the most influential form of proportionality reasoning known among Western liberal democracies — proceeds from the premise that constitutional rights should be given the fullest expression possible consistent with the legal and factual circumstances.[130] Such a conception of rights is wholly foreign to Australian constitutionalism, and the application of such a form of proportionality analysis in the Australian constitutional context would undoubtedly constitute a novel and potentially transformative development.[131] But that is not the approach that the majority of the High Court has adopted. In contrast to European notions of 'adequacy in balance' directed to the 'optimis[ation]' of constitutional rights, the test of 'adequacy in balance' in the Australian context is essentially a 'state-limiting'[132] or a 'thinner' notion of proportionality consisting of a set of tests for judicial intervention.[133] And as Justice Susan Kiefel, writing extrajudicially, has recently observed in effect, that accords with received doctrine as to the role of courts in determining the reach of legislative power.[134] The same notion of proportionality tailored to the Australian constitutional context was also important to Edelman J's adoption of proportionality reasoning in *Clubb*[135] and it is

127 (2007) 233 CLR 162, 178 [17].

128 *Clubb* (n 104) 306 [392]–[393] (Gordon J), citing Schauer (n 120) especially at 176–7, 178. See also *McCloy* (n 104) 236 [145] (Gageler J), 288–9 [339] (Gordon J); *Brown* (n 108) 376–7 [160] (Gageler J), 466 [433] (Gordon J).

129 *Brown* (n 108) 417 [278] (Nettle J).

130 See, eg, Robert Alexy, *A Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2002); Adrienne Stone, 'Judicial Reasoning' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472, 485; Stone, 'Proportionality and Its Alternatives' (n 123) 132; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *Cambridge Law Journal* 174, 176.

131 Stone, 'Proportionality and Its Alternatives' (n 123) 134.

132 Rivers (n 130) 176, quoted in ibid 135.

133 Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92, 100.

134 Susan Kiefel, 'Standards of Review in Constitutional Review of Legislation' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 488, 505.

135 *Clubb* (n 104) 331–2 [465]–[467].

consistent with wide recognition in the academic literature of the intrinsic adaptability of proportionality both to different legal systems and *within* them.[136]

Finally, and perhaps most persuasively from my point of view, the capacity of structured proportionality analysis to interrogate initial intuitions and provide a framework for analysis of considerations likely to affect judicial decisions tends to promote impartiality and candour. As both Kiefel CJ and Edelman J have written in effect, it ensures that the reasoning process is more fully exposed:[137] by demanding identification of the factors on the basis of which the balance is struck and necessitating explanation of how they are weighted. And by so requiring the Court to identify the steps of its reasoning and the factors by reference to which, and the method by which, it balances competing interests, it conduces to a degree of rationality and restraint that would otherwise not be apparent.

V CONCLUSION

That brings me back, therefore, to where I began, and so to my conclusion.

It is that, like other judge-made law, the doctrine of the implied freedom of political communication is necessarily less than perfect. But despite its rocky beginnings, it is not a construct of reprehensible 'activist judges'. It is an implication that, consistently with the received, high technique of Australian constitutional interpretation, is rightly regarded as necessarily implicit in the text and structure of the *Constitution*. True it is that its application involves value judgments and the weighing of incommensurables. And in the scheme of things, that will remain so until a more categorical or rules-based approach emerges from case by case analogical development. But, in the meantime, the process of structured proportionality analysis, which for the time being finds favour with a majority of the Court, offers the prospect of consistency and transparency of application conducive to principled development.

136 See, eg, Barak (n 103) 502; Jacco Bomhoff, 'Beyond Proportionality: Thinking Comparatively about Constitutional Review and Punitiveness' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 148; Jackson (n 99) 3148; Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551, 563–5.

137 See, eg, Kiefel, 'Proportionality: A Rule of Reason' (n 103); *Clubb* (n 104) 333 [469] (Edelman J).