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# WHAT IS 'POLITICAL COMMUNICATION'? THE RATIONALE AND SCOPE OF THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

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*[The aim of this article is to identify what counts as 'political communication' for the purposes of the implied constitutional freedom of political communication. This is done for two reasons. The first is to delimit the scope of the implied freedom. The second is to clarify whether racial vilification is 'political communication', which is the initial step that must be taken in order to assess the constitutionality or otherwise of current Australian racial vilification laws. It is, however, necessary and desirable to establish a sound theoretical basis for the implied freedom before these questions can be properly considered. To this end, it is argued that a minimalist model of judicially-protected popular sovereignty underpins the implied freedom and is the rationale that must guide its interpretation and application. The analysis undertaken demonstrates that a generous zone of 'political communication' must attract constitutional protection and that racial vilification will in certain circumstances amount to 'political communication'.]*

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## I INTRODUCTION

For judges the question is not whether freedom of speech is in principle a matter of rights or of utility, but what theory or view of the matter is taken by the *Constitution*, as revealed by its text, history, and legal precedent.<sup>1</sup>

This article has two parts, but aims to answer one important question: namely, what counts as 'political communication' for the purpose of the implied freedom of political communication?<sup>2</sup> My interest in addressing this question is twofold. First, whilst the High Court in *Lange v Australian Broadcasting Corporation* unanimously agreed that the implied freedom was part of Australian constitutional law and enunciated a single test for constitutionality,<sup>3</sup> it did not endorse a definition of 'political communication'. The definition ultimately adopted will delimit the proper scope of the implied freedom. Secondly, the article will clarify whether racial vilification, a particularly controversial species of communication, can be considered 'political communication'. This is important as it is the first step that must be taken to assess the constitutionality or otherwise of current Australian racial vilification laws.<sup>4</sup>

It is, however, necessary and desirable to establish a sound theoretical basis for the implied freedom before the question of what counts as 'political communication' can be properly considered. This is done in Part II, where I examine the

<sup>1</sup> Eric Barendt, *Freedom of Speech* (1985) 6.

<sup>2</sup> The implied freedom of political communication will be called the 'implied freedom' in the remainder of the article. Moreover, the literature on the First Amendment to the *United States Constitution* naturally talks in terms of 'free speech' and this terminology tends to characterise discussion in this area in Australia. In the Australian context however, where speech is not expressly mentioned and only political *communication* attracts constitutional protection, it is more accurate to speak of 'freedom of communication' rather than speech. Consequently, I will adopt this terminology in this article. It should be noted however that this distinction is not just a matter of linguistic precision. As George Williams explains, '[i]n some respects, such as in its application to non-verbal or symbolic communication ... the implied freedom may be of wider scope than the guarantee of "freedom of speech" in the First Amendment to the *United States Constitution*': George Williams, *Human Rights under the Australian Constitution* (1999) 166.

<sup>3</sup> (1997) 189 CLR 520, 567–8 (citations omitted) ('*Lange*'), where the Court outlined the following test:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid.

<sup>4</sup> See Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) 238–43.

'classic trio'<sup>5</sup> of rationales that underpin most free speech and communication guarantees — the search for truth, the promotion of individual autonomy and the argument from democracy or self-government — and conclude that none fit well with the text and structure of the *Constitution* or our freedom of communication tradition. I favour a particular conception of popular sovereignty and argue that it is the rationale that must guide the interpretation and application of the implied freedom. The departure point for this analysis is the *Lange* decision which clarified the textual basis of the implied freedom. In doing so, the case confirmed that the implied freedom exists not in the nature of a positive right, but as a means to secure more effective representative and responsible government.<sup>6</sup> I will not, therefore, discuss in any great detail the pre-*Lange* case law, except where necessary to develop and articulate my argument and to understand the reasoning employed in *Lange*. Nor will this article consider the nature and application of the *Lange* test for constitutionality or engage in debate as to the merits or otherwise of the constitutional reasoning from which the implied freedom was derived.<sup>7</sup> The logic of the *Lange* decision will, however, be closely examined.

While no bright line exists between political and non-political communication, a workable and principled definition can be located if the rationale of the implied freedom is kept firmly in mind. My analysis will show, for two reasons, that the rationale requires a generous zone of 'political communication' to attract constitutional protection. However, securing the theoretical basis for the implied freedom and identifying what it requires will not alone determine whether a particular communication is 'political' in the relevant constitutional sense. Consequently, in Part III of the article, a test is proposed to this end. It states that a communication is 'political' and thus constitutionally protected if the subject matter of the communication may reasonably be relevant to the federal voting choices of its likely audience. The 'likely audience' test is then applied to a range of real controversies and hypothetical communications, some of which involve varying degrees of racial vilification. From this, a broad conception of 'political communication' emerges and it is demonstrated that some, *but not all*, instances of racial vilification count as 'political communication'.

<sup>5</sup> See generally Tom Campbell, 'Rationales for Freedom of Communication' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (1994) 17.

<sup>6</sup> *Lange* (1997) 189 CLR 520, 561.

<sup>7</sup> See Nicholas Aroney, *Freedom of Speech in the Constitution* (1998) chs 4, 5; Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the *Australian Constitution*' (1994) 16 *Sydney Law Review* 213; 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* (1994) 150; Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23 *Monash University Law Review* 362.

## II THE RATIONALE OF THE IMPLIED FREEDOM UNDER THE AUSTRALIAN CONSTITUTION

The non-existence of a clear textual principle of free speech in the *Australian Constitution*, therefore, not only allows consideration of the kinds of foundational questions about free speech not permitted in many other countries, but quite possible [sic] demands it.<sup>8</sup>

### A Locating the Rationale: The Inadequacy of Constitutional Text and Structure

It is necessary to locate the theoretical basis for the implied freedom in order to articulate the core matter (the range of communications that attract constitutional protection) and chart the trajectory of the implied freedom. It is also desirable because it allows the constitutional freedom to develop incrementally and in a manner more likely to be coherent and principled.<sup>9</sup> The greater clarity, consistency and predictability achieved when constitutional doctrine develops in this manner will assist legislators (in framing laws), judges (in applying the implied freedom), lawyers (in advising clients) and the citizenry (in recognising and utilising the zone of constitutionally-protected communication). Moreover, the High Court will be required in future controversies to consider some of the difficult questions that surround the interpretation and application of the implied freedom. Defining the scope of 'political communication' is one such question.<sup>10</sup> How a judge will answer these questions will necessarily be informed by his or her view as to the rationale of the implied freedom, whether or not that theoretical commitment is explicitly articulated.<sup>11</sup>

<sup>8</sup> Frederick Schauer, 'Free Speech in a World of Private Power' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (1994) 1, 2. But see Adrienne Stone, 'Freedom of Political Communication, the *Constitution* and the Common Law' (1998) 26 *Federal Law Review* 219, 235, where Stone warns against the High Court endorsing a theory of the implied freedom too quickly: 'There are serious competing visions of freedom of speech and to make a choice between them at this point is a relatively risky enterprise which should be avoided where possible'.

<sup>9</sup> This approach is perhaps 'ambitious', for as Adrienne Stone points out, '[t]he stakes of a single decision are ... high': Stone, 'Freedom of Political Communication, the *Constitution* and the Common Law', above n 8, 238. If such an underlying, general principle can be reasonably discerned from the history, text and structure of the *Constitution*, then judges, lawyers and the citizenry will benefit from the greater clarity and consistency that flows from the development of constitutional doctrine in the manner described above. Moreover, Stone notes that Richard Posner, amongst others, considers that common law 'bottom up' reasoning 'requires some kind of theory to determine whether one case is relevantly "like" another': at 240.

<sup>10</sup> The other key unresolved question is how the *Lange* test for constitutionality will be applied. While a single test for constitutionality was outlined in *Lange*, in later cases, some judges endorse a two-tiered approach that more strictly scrutinises laws that target ideas, rather than the mode of 'political communication': see *Levy v Victoria* (1997) 189 CLR 579, 614 (Toohey and Gummow JJ), 619 (Gaudron J), 647 (Kirby J) ('*Levy*'). The two-tiered approach first appeared in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 235 (McHugh J) ('*ACTV*'). On this point, see Adrienne Stone, 'Case Note: *Lange*, *Levy* and the Direction of the Freedom of Political Communication under the *Australian Constitution*' (1998) 21 *University of New South Wales Law Journal* 117, 131-4.

<sup>11</sup> Stone notes that 'the High Court has precluded, and intended to preclude, the development of a theoretical or philosophical basis for free political communication': 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, 696 (emphasis omitted).

In *Lange*, the High Court made it clear that ‘the freedom of communication which the *Constitution* protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*.’<sup>12</sup> Yet the constitutional text and structure alone do not reveal the rationale behind the implied freedom. Consequently, it is necessary to move beyond its strictures to search for an answer.

As Adrienne Stone has persuasively argued, the Court’s exclusive reliance on the text and structure of the *Constitution* in defining and developing the implied freedom is unsustainable.<sup>13</sup> She illustrates her point in relation to the standards of review that the Court must at some point choose to employ when applying the *Lange* test. Namely, should it favour a proportionality test or something more akin to the American notion of strict scrutiny?<sup>14</sup> Her contention is that such a choice depends on extra-constitutional values and ideas such as the rationales of freedom of communication itself<sup>15</sup> and the appropriate level of judicial deference to Parliament,<sup>16</sup> the very kinds of values and ideas that a purely textual approach necessarily eschews. This criticism holds for the other key question of concern to this article: what counts as ‘political communication’ for the purpose of the implied freedom? To this end, I will examine the text, structure and history of the *Constitution* and Australia’s freedom of communication tradition and argue that the rationale of the implied freedom is a particular conception of popular sovereignty.

## B The ‘Classic Trio’ of Communication Rationales

### 1 The Trio’s Influence on the Implied Freedom Jurisprudence of the High Court

It is argued below that Australia’s freedom of communication tradition makes it clear that the ‘classic trio’ of communication rationales are not the primary justifications for the implied freedom.<sup>17</sup> There have, however, been a number of cases where judges have considered one or more of these rationales to be relevant to the interpretation of the implied freedom. This part of the article will critique those judgments and explain why the ‘classic trio’ does not sit well with this tradition. In doing so, the proposition that they must *all* ‘be taken into account, to some extent at least, in any discussion of the theoretical basis for the implied freedom of political communication’<sup>18</sup> will be challenged.

There are a number of reasons why, in most liberal democracies, speech, expression and communication attract strong legal and constitutional protection.

<sup>12</sup> (1997) 189 CLR 520, 561.

<sup>13</sup> Stone, ‘The Limits of Constitutional Text and Structure’, above n 11, 696–9.

<sup>14</sup> Ibid 699–707.

<sup>15</sup> Ibid 696–8.

<sup>16</sup> Ibid 699.

<sup>17</sup> See below Part II(C)(2).

<sup>18</sup> Chesterman, *Freedom of Speech in Australian Law*, above n 4, 22.

As noted in the introduction, the 'classic trio' are the search for truth<sup>19</sup> (and its associated 'marketplace of ideas' metaphor),<sup>20</sup> the right to self-determination or individual autonomy<sup>21</sup> and the argument from 'democracy and self-government'.<sup>22</sup> Frederick Schauer has also made a modified argument on the basis of truth. He considers the argument from truth to be flawed,<sup>23</sup> but notes that the 'focus on the possibility and history of error makes us properly wary of entrusting to any governmental body the authority to decide what is true and what is false, what is right and what is wrong, or what is sound and what is foolish'.<sup>24</sup> To this list we could add 'tolerance',<sup>25</sup> 'the flourishing of plurality ... the efficient allocation of resources ... [and even] the intrinsic worth of the communicative experience'.<sup>26</sup>

In the twin High Court decisions from which the implied freedom was derived,<sup>27</sup> there was much enthusiasm for the American First Amendment cases and their underlying premises. Of particular attraction to at least four members of the Court was the notion that laws that target the idea rather than the mode of communication require a more exacting level of judicial scrutiny.<sup>28</sup> This approach reflects the key First Amendment principle that governments cannot be trusted to regulate communication (or speech), so that any regulation must be sufficiently content and viewpoint neutral.<sup>29</sup> There was also support for the argument on the basis of truth, which states that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.<sup>30</sup>

<sup>19</sup> See John Stuart Mill, *On Liberty* (1859); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982) 15–34; Wojciech Sadurski, *Freedom of Speech and Its Limits* (1999) 8–16; Barendt, *Freedom of Speech*, above n 1, 8–14.

<sup>20</sup> See *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J in dissent).

<sup>21</sup> See Edwin Baker, *Human Liberty and Freedom of Speech* (1989); Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy and Public Affairs* 204, 214–22; Schauer, *Free Speech*, above n 19, 60–72.

<sup>22</sup> See Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1965); Alexander Meiklejohn, 'The First Amendment Is an Absolute' [1961] *Supreme Court Review* 245; Schauer, *Free Speech*, above n 19, 35–46.

<sup>23</sup> Schauer, *Free Speech*, above n 19, 33. Schauer identifies two major flaws of the argument from truth. First, 'it rests on an assumption about the prevalence of reason, for which the argument offers no evidence at all': at 33. Second, 'a strong version of the argument ... elevate[s] the search for knowledge to a position of absolute priority over other values', which makes it 'unworkable', whilst a weaker version that recognises 'the quest for knowledge is a value that ought to be considered ... says very little': at 33.

<sup>24</sup> *Ibid* 34.

<sup>25</sup> See Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986) 10.

<sup>26</sup> Campbell, 'Rationales for Freedom of Communication', above n 5, 17.

<sup>27</sup> The two decisions were *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*') and *ACTV* (1992) 177 CLR 106.

<sup>28</sup> *Nationwide News* (1992) 177 CLR 1, 76–7 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 143 (Mason CJ), 234–5 (McHugh J).

<sup>29</sup> '[The] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content': *Police Department of the City of Chicago v Mosley*, 408 US 92, 95–6 (1972). See also Lawrence Tribe, *American Constitutional Law* (2<sup>nd</sup> ed, 1988) 789–804; Cass Sunstein, *Democracy and the Problem of Free Speech* (1993) 4–14.

<sup>30</sup> *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J in dissent). See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 131 (Mason CJ, Toohey and Gaudron JJ), 182–3 (Deane J) ('*Theophanous*'), where these judges endorsed the United States Supreme Court case of *New York Times v Sullivan*, 376 US 254 (1964). Stone has pointed out that a

The approach of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* evinced, moreover, an express distrust of government regulation of communication,<sup>31</sup> a close approximation of the modified truth argument made by Schauer. The least surprising endorsement, considering the textual origins of the implied freedom, was an approximation of the argument from 'democracy and self-government' commonly associated with the First Amendment theory of Alexander Meiklejohn.<sup>32</sup> Indeed, Mason CJ wrote the following under the sub-heading 'Freedom of Communication as an Indispensable Element in Representative Government':

Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion ... Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives ... Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives.<sup>33</sup>

In these seminal cases, the Court showed a desire to align the core content and future development of the implied freedom with the trajectory of the First Amendment. A number of commentators have criticised the haste with which the High Court imported First Amendment jurisprudence and its underlying rationales into the embryonic constitutional freedom.<sup>34</sup> As Stone notes:

the High Court rather quickly allied itself with a philosophical tradition based on suspicion of government, a choice which does not necessarily follow from its identification of the freedom of political communication with representative government.<sup>35</sup>

This enthusiasm was surprising considering that the derivation of the implied freedom owed more to the pre-*Charter*<sup>36</sup> jurisprudence of the Canadian Supreme Court than American constitutional law, a point acknowledged by Brennan J in *Nationwide News Pty Ltd v Wills*<sup>37</sup> and Mason CJ in *ACTV*.<sup>38</sup> The pre-*Charter*

key influence on this decision was the notion of the 'marketplace of ideas': Stone, 'Freedom of Political Communication, the *Constitution* and the Common Law', above n 8, 234.

<sup>31</sup> (1992) 177 CLR 106, 145.

<sup>32</sup> See, eg, *Nationwide News* (1992) 177 CLR 1, 48–51 (Brennan J), 72–5 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 138–40 (Mason CJ), 159 (Brennan J), 210–12 (Gaudron J), 230–3 (McHugh J).

<sup>33</sup> *ACTV* (1992) 177 CLR 106, 138–9.

<sup>34</sup> See Eric Barendt, 'Free Speech in Australia: A Comparative Perspective' (1994) 16 *Sydney Law Review* 149, 164–5; Deborah Cass, 'Through the Looking Glass: The High Court and the Right to Political Speech' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (1994) 179, 184–91; Stone, 'Freedom of Political Communication, the *Constitution* and the Common Law', above n 8, 234–5; Tom Campbell, 'Democracy, Human Rights and Positive Law' (1994) 16 *Sydney Law Review* 195, 206–7; Gerald Rosenberg and John Williams, 'Do Not Go Gently into That Good Right: The First Amendment in the High Court of Australia' [1997] *Supreme Court Review* 439, 448–56, 458–64.

<sup>35</sup> Stone, 'Freedom of Political Communication, the *Constitution* and the Common Law', above n 8, 235.

<sup>36</sup> The *Charter* referred to is the *Charter of Rights and Freedoms*. The *Charter* is contained in sch B, pt I of the *Constitution Act 1982*, being sch B to the *Canada Act 1982* (UK) c 11.

<sup>37</sup> (1992) 177 CLR 1, 48–50.



constitutional architecture of Canada bore a close similarity to our own, particularly as it too did not contain the kind of American-style free speech guarantee underpinned by a range of rationales.

In any event, if given free reign, these First Amendment principles had the potential to bend the implied freedom completely out of shape. The development of a new constitutional defence to defamation in *Theophanous v Herald & Weekly Times Ltd*<sup>39</sup> and the stunning expansion in the scope of communications accorded constitutional protection in *Theophanous*<sup>40</sup> and *Cunliffe v Commonwealth*<sup>41</sup> might now be considered manifestations of a constitutional freedom unhinged from its textual moorings.<sup>42</sup>

The *Lange* decision, however, did much to ground the implied freedom within the text, structure and history of the *Constitution*. On the one hand, the Court confirmed the essence of the earlier decisions, declaring that

ss 7 and 24 and the related sections of the *Constitution* necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.<sup>43</sup>

At the same time, the Court firmly rejected the notion that the development of the implied freedom could proceed by reference to a free-standing, extra-constitutional principle of representative democracy. In doing so, the Court asserted the primacy — indeed *exclusivity* — of the text and structure of the *Constitution* to this new interpretive enterprise.<sup>44</sup> In stating that the relevant question was not what was required by representative and responsible government but rather what the terms of the *Constitution* prohibit, authorise and require,<sup>45</sup> the Court put the implied freedom on a more secure constitutional footing.

By highlighting this aspect of the implied freedom and distinguishing it from the First Amendment in these two important respects, the Court in effect rejected the sway that American precedents previously held in this area. As my analysis will make clear, the rationales of truth, individual autonomy, self-government and so on were not made irrelevant in the Australian context, but the reasoning

<sup>38</sup> (1992) 177 CLR 106, 140–1. See also *Nationwide News* (1992) 177 CLR 1, 48–50 (Brennan J). For a critique of the use made of Canadian precedents by Mason CJ and Brennan J in *ACTV* and *Nationwide News* respectively, see Williams, above n 2, 171–2.

<sup>39</sup> (1994) 182 CLR 104, 136–7 (Mason CJ, Toohey and Gaudron JJ), 185 (Deane J). See also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 234 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J) ('*Stephens*').

<sup>40</sup> Political communication was defined as 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about': *Theophanous* (1994) 183 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ), quoting Barendt, *Freedom of Speech*, above n 1, 152.

<sup>41</sup> (1994) 182 CLR 272, 298–9 (Mason CJ), 336 (Deane J), 379–80 (Toohey J), 387 (Gaudron J) ('*Cunliffe*').

<sup>42</sup> See *McGinty v Western Australia* (1996) 186 CLR 140, 230–6 (McHugh J).

<sup>43</sup> *Lange* (1997) 189 CLR 520, 560.

<sup>44</sup> See above nn 13–16 and accompanying text for Stone's criticism of this exclusively text-based interpretive approach.

<sup>45</sup> *Lange* (1997) 189 CLR 520, 567.

It follows that even if voting is the quintessential democratic right, a broader range of communicative experiences and opportunities must be accorded constitutional protection before that act can be said to be meaningful.<sup>68</sup> For Meiklejohn, the forms of thought and expression included 'education', 'philosophy and the sciences', 'literature and the arts' and 'public discussions of public issues'.<sup>69</sup>

It appeared for a time that the implied freedom jurisprudence would follow this trajectory. The *Theophanous*,<sup>70</sup> *Stephens v West Australian Newspapers Ltd*<sup>71</sup> and *Cunliffe*<sup>72</sup> trilogy of cases heralded a significant expansion in the range of communications considered 'political' and the creation of a new constitutional defence. In *Theophanous*, the joint judgment of Mason CJ, Toohey and Gaudron JJ made clear that 'political communication' was not limited to information required to cast an informed vote but 'refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'.<sup>73</sup> The rationale for the implied freedom quickly came to resemble the Meiklejohn argument from democracy and self-government.

The *Lange* decision confirmed, however, that the implied freedom only protects communications necessary to make informed federal voting choices without addressing or delineating the precise scope of 'political communication'. It is reasonable to assume that the Court, by insisting upon a nexus between communication and federal voting choices and rejecting any notion that the *Constitution* contained a free-standing principle of representative democracy, favoured a narrower conception of constitutionally-protected communication than that advanced by Meiklejohn.<sup>74</sup> Indeed, if the argument from democracy and self-government underpinned the implied freedom, it would transform a limitation on power into a comprehensive and independent right to free speech and communication. This is perfectly consistent with the absolute terms of the First Amendment, but it cannot be supported by the textual origins of the implied freedom, nor is it justified in terms of its limited instrumental purpose.<sup>75</sup>

Moreover, it seems clear that the Court in *Lange* considered that our constitutional system of representative and responsible government takes voters as it finds them. As the Court explained, the choice provided for in ss 7 and 24 of the *Constitution* must be a true choice.<sup>76</sup> This entails 'an opportunity to gain an

<sup>68</sup> Ibid. See *Aboud v Detroit Board of Education*, 431 US 209, 231 (1977), where the Supreme Court noted that 'our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters ... is not entitled to full First Amendment protection.'

<sup>69</sup> Meiklejohn, 'The First Amendment Is an Absolute', above n 22, 257.

<sup>70</sup> (1994) 182 CLR 104.

<sup>71</sup> (1994) 182 CLR 211.

<sup>72</sup> (1994) 182 CLR 272.

<sup>73</sup> (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ), quoting Barendt, *Freedom of Speech*, above n 1, 152.

<sup>74</sup> See *Lange* (1997) 189 CLR 520, 559–62. For further discussion of this point, see below Part II(A).

<sup>75</sup> See below Part II(C)(2).

<sup>76</sup> *Lange* (1997) 189 CLR 520, 560.

appreciation of the available [political] alternatives',<sup>77</sup> not the assumption that voters will be intellectually enriched through exposure to the broad range of speech and communication that Meiklejohn argued ought to attract constitutional protection. A democracy undoubtedly benefits from a citizenry with 'the knowledge, intelligence, sensitivity to human values [and] capacity for sane and objective judgment'<sup>78</sup> that such communicative exposure may engender. It may be highly socially *desirable* to bestow constitutional protection upon works of philosophy, science, literature and the arts, but it can hardly be claimed that it is 'necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*.'<sup>79</sup> The implied freedom, therefore, has no constitutional role to play in imbuing the voter with the personal qualities that permit the casting of an enlightened and well-reasoned ballot.

C *A Minimalist Model of Judicially-Protected Popular Sovereignty: The Rationale of the Implied Freedom*

At the outset, I want to define my use of the term 'popular sovereignty', for it is a notoriously elusive concept in the context of Australian constitutional law. There is still a lively academic debate as to what makes our *Constitution* legally binding, but I am not here using 'popular sovereignty' in the sense of asserting it as the ultimate constitutional *grundnorm*.<sup>80</sup> Rather, it is a principle that flows from a constitutional system where the people have both the authority to elect representatives to exercise public power on their behalf and the power to disapprove any proposed changes to the *Constitution*. Like the principles of federalism, responsible government and the rule of law, popular sovereignty permeates the *Constitution* and assists in its interpretation,<sup>81</sup> particularly those provisions that establish our system of representative and responsible government from which the implied freedom is derived.

<sup>77</sup> *ACTV* (1992) 177 CLR 106, 187 (Dawson J).

<sup>78</sup> Meiklejohn, 'The First Amendment Is an Absolute', above n 22, 256.

<sup>79</sup> *Lange* (1997) 189 CLR 520, 561 (emphasis added).

<sup>80</sup> A number of High Court judges have stated both judicially and extra-judicially that popular sovereignty underpins the legitimacy of the *Constitution*: *ACTV* (1992) 177 CLR 106, 137–8 (Mason CJ); *Theophanous* (1994) 182 CLR 104, 176 (Deane J); *Leeth v Commonwealth* (1992) 174 CLR 455, 484 (Deane and Toohey JJ); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J); Chief Justice Murray Gleeson, *The Rule of Law and the Constitution* (2000) 6. Cf *ACTV* (1992) 177 CLR 106, 181 (Dawson J); Simon Evans, 'Why Is the *Constitution* Binding? Authority, Obligation and the Role of the People' (2004) 24 *Adelaide Law Review* (forthcoming).

<sup>81</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 542 (Gleeson CJ), 557–8 (McHugh J), 574–5 (Gummow and Hayne JJ). See Justice Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 245.

Popular sovereignty as a principle that guides constitutional interpretation can, however, cut both ways — it can work either to limit or extend the operation of a constitutional right, depending on the nature of that right and the context in which it arises. As George Williams explains:

it can be argued that the sovereignty of the people is exercised in accordance with the *Constitution* by the people's representatives in Parliament, who in this capacity should be given the maximum scope to implement the wishes of the people as they see them ... Under this approach, the ability of Parliament to implement its mandate is to be preferred to ... judicial review ...

On the other hand, in the latter guise the doctrine of popular sovereignty might support a role for the High Court as a buffer between governmental power and the people. The doctrine suggests that the Court has a role to play in ensuring that the people remain sovereign and in resisting any exercise of government power that would, for example, undermine the electoral process by which the people exercise this sovereignty. In this way, popular sovereignty can serve as an effective counterpoint to the view that the *Constitution* should be applied to maximise the power of a parliament.<sup>82</sup>

I argue that a conception of popular sovereignty that embodies elements of both versions described above is the rationale of the implied freedom.<sup>83</sup> This conception acknowledges that the conditions for the exercise of sovereignty by the people are ultimately determined and enforced by the judiciary, for it is they who define and apply the implied freedom. When discharging this role however, the courts must keep firmly in mind that the primary purpose of the implied freedom is to secure the effective functioning of our constitutional system of representative and responsible government — that is, to guarantee the democratic framework through which 'the people's representatives in Parliament ... [can] implement the wishes of the people as they see them'<sup>84</sup> subject to the *Constitution*. This is the rationale of judicially-protected popular sovereignty.<sup>85</sup>

However, this protection ought not to involve the judiciary taking a more expansive and proactive role in securing what they consider to be the optimum conditions for the exercise of popular sovereignty. A more limited, supervisory judicial role is apposite for the following three reasons.<sup>86</sup> First, it fits best with the history and logic of the *Constitution*. Second, the freedom of communication tradition in Australia underlines why this conception of judicially-protected popular sovereignty underpins the implied freedom. Third, it properly recognises the limited institutional capacity of the judiciary to determine what is necessary

<sup>82</sup> Williams, above n 2, 230 (citations omitted).

<sup>83</sup> In making this argument, I am not suggesting that my conception of 'popular sovereignty' ought to be the rationale that informs the interpretation of every constitutional right. On the contrary, it is now orthodox practice for the High Court to give a broad construction to constitutional rights, even those that also restrict legislative power. This is consistent with an expansive conception of judicially-protected popular sovereignty that sees a more active role for the judiciary to check arbitrary government action: see *ibid*.

<sup>84</sup> *Ibid*.

<sup>85</sup> I am grateful to Adrienne Stone for making valuable suggestions regarding the use of different terms in this area and their respective connotations.

<sup>86</sup> But see Williams, above n 2, 230–1 for the argument that a more expansive conception of judicially-protected popular sovereignty ought to guide the interpretation of the implied freedom.

for the effective operation of representative and responsible government under the *Constitution*.

For the remainder of the article I will refer to this rationale as the 'minimalist model of judicially-protected popular sovereignty'. It is a minimalist model in that it reserves an important but limited role for the judiciary in guaranteeing the basic democratic framework that secures the sovereignty of the people and provides the conditions for its meaningful exercise.

### 1 *Constitutional History and Logic*

If there was one controlling idea that permeated the drafting of the *Constitution*, it was the faith the framers placed in responsible government to deliver efficient, democratic and just governance.<sup>87</sup> The history and tradition of the *Constitution* is one of trust, not distrust, of government. This found constitutional expression in a number of important ways. For example, the architecture for representative and responsible government was provided by ss 7, 24 and 64, but key aspects of its content and evolution were left to Parliament. To this end, a number of constitutional provisions detailing, for example, elector qualifications, voting systems and election formulae were to remain in force 'until the Parliament otherwise provides'.<sup>88</sup> Moreover, although the mechanism for altering the *Constitution* is ultimately entrusted to the people, any proposed amendment must be instigated by Parliament.<sup>89</sup>

The absence of a Bill of Rights in the *Constitution* was also no accident,<sup>90</sup> and there are both orthodox and other reasons for the omission. The orthodoxy states that the freedoms and liberties were not unimportant to the framers, but that they 'accepted the view that individual rights were, on the whole, best left to the protection of the common law and the supremacy of parliament'.<sup>91</sup> The other reasons were more sinister, at least by contemporary standards:

they sought to establish the means by which the rights of other sections of the community could be abrogated. In this respect the framers were driven by a desire to maintain race-based distinctions, which today would undoubtedly be regarded as racism.<sup>92</sup>

<sup>87</sup> See Moore, above n 60; Sir Owen Dixon, 'Two Constitutions Compared' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (2<sup>nd</sup> ed, 1997) 100, 101–2; Sir Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 54; Aroney, above n 7, 55–6; Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1997) 162–70; *ACTV* (1992) 177 CLR 106, 136 (Mason CJ), 186 (Dawson J); *Kruger v Commonwealth* (1997) 190 CLR 1, 61 (Dawson J) ('*Kruger*').

<sup>88</sup> See, eg, *Australian Constitution* ss 7 (The Senate), 24 (Constitution of House of Representatives), 29 (Electoral divisions), 30 (Qualification of electors), 34 (Qualifications of members); Moore, above n 60, 78–9.

<sup>89</sup> *Australian Constitution* s 128.

<sup>90</sup> See John La Nauze, *The Making of the Australian Constitution* (1972) 227–32; Dixon, above n 87, 101–2; Menzies, above n 87, 54. But see Aroney, above n 7, 56, in which the point is made that the *Constitution* 'entrenches many of the key provisions of the *Bill of Rights 1689* and the *Act of Settlement 1701*' (citations omitted).

<sup>91</sup> *Kruger* (1997) 190 CLR 1, 61 (Dawson J).

<sup>92</sup> Williams, above n 2, 25. For a discussion of the racially-motivated objections that led to the absence of a Bill of Rights in the *Constitution*, see Williams, above n 2, 25–7, 41–3; Irving,

The true motivations of the framers for eschewing rights-protective provisions do not, however, change the nature of the constitutional system they established. Indeed, our system of representative and responsible government was perfectly consistent with the faith the framers had in parliamentary government and the common law to secure their interests whilst excluding those persons considered unworthy from similar judicial and democratic protections. It is a system grounded in the centrality of Parliament, a powerful executive and a judiciary that ensures that both branches act within the parameters of the *Constitution* and, where possible, safeguards the liberty of the individual.

This history and logic is such that '[i]f the *Constitution* is silent on a subject, then it is up to the Parliament, from time to time, to deal with that subject — or not to deal with it — as it thinks fit'.<sup>93</sup> It does not, of course, preclude the making of implications.<sup>94</sup> However, it is reasonable to suggest that the content and development of those implications should be grounded in and informed by this constitutional history and logic. While the implied freedom operates as a restriction on legislative and executive power, the Court emphasised in *Lange* that it is only to the extent 'necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'.<sup>95</sup> This is consistent with a minimalist model of judicially-protected popular sovereignty and the view of Sir Edmund Barton that the aim of the *Constitution* was 'to enlarge the powers of self-government of the people of Australia'.<sup>96</sup>

## 2 The Freedom of Communication Tradition in Australia

There is a temptation to consider the legal protection of freedom of communication in Australia to be a post-1992 phenomenon, but Australia has a freedom of communication tradition like any other liberal democracy. As the Court noted in *Lange*, '[w]ithin our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the *Constitution*'.<sup>97</sup> On one level, this merely states the obvious, but on a deeper level, it is an important statement regarding the hierarchy of constitutional values in Australia. With a few notable exceptions,<sup>98</sup> the *Constitution* provides for only *residual* protection of individual liberties such that 'everybody is free to do anything, subject only to the provisions of the law'.<sup>99</sup> For the most part, individual liberties exist only to the extent that they are accorded common law protection and are not contrary to statute. This underlines the constitutional logic outlined above.

above n 87, 162–9; John Williams and John Bradsen, 'The Perils of Inclusion: The *Constitution* and the Race Power' (1997) 19 *Adelaide Law Review* 95, 105–9.

<sup>93</sup> Gleeson, above n 80, 70.

<sup>94</sup> See *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85 (Dixon J); *Victoria v Commonwealth* (1971) 122 CLR 353, 401–2 (Windeyer J); *ACTV* (1992) 177 CLR 106, 133–6 (Mason CJ).

<sup>95</sup> *Lange* (1997) 189 CLR 520, 561 (emphasis added).

<sup>96</sup> *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 17 (Edmund Barton), cited in *Lange* (1997) 189 CLR 520, 557.

<sup>97</sup> *Lange* (1997) 189 CLR 520, 567.

<sup>98</sup> *Australian Constitution* ss 51(xxxi), 80, 116, 117.

<sup>99</sup> *Lange* (1997) 189 CLR 520, 564, quoting *A-G (UK) v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 283 (Lord Goff).

Interestingly, freedom of communication is not expressly protected at common law,<sup>100</sup> though judges have shown an increased willingness to enunciate common law principles in a manner protective of this liberty.<sup>101</sup> Indeed, a number of common law rules and remedies can *prima facie* operate to restrict freedom of communication. These include the laws of defamation, blasphemy, obscenity, contempt, parliamentary privilege and prior restraints.<sup>102</sup> Similarly, statutory laws exist proscribing a range of communicative conduct, including that which amounts to racial vilification<sup>103</sup> or sex discrimination<sup>104</sup> or is commercially misleading or deceptive.<sup>105</sup>

On closer inspection however, a number of these common law rules and statutory laws have competing effects — they restrict some forms of communication, while protecting and even enhancing others. For example, the common law defence of qualified privilege permits the media, or any other publisher, to make defamatory communications to a wide audience on government or political matters, provided the publication was reasonable and not actuated by malice.<sup>106</sup> The oral and written statements made during parliamentary proceedings are, moreover, absolutely privileged.<sup>107</sup> In these contexts, common law rules protect and enhance freedom of communication. Similarly, laws that proscribe racist and sexist communications tend to have the corresponding and inverse effect of giving, increasing or protecting the voice of those who are the subject of this conduct.<sup>108</sup> This indirectly protects and enhances the freedom of communication opportunities of those effectively silenced by the racist and sexist communications of others.

<sup>100</sup> See Sir Gerard Brennan, 'Foreword' in Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) vii, vii: 'There is no common law right to free speech which trumps other legal rights but there is a general freedom of speech because of the common law principle that "everybody is free to do anything, subject only to the provisions of the law"' (citations omitted).

<sup>101</sup> See Chesterman, *Freedom of Speech in Australian Law*, above n 4, 7–13.

<sup>102</sup> On the free communication implications of these common law rules, see Barendt, *Freedom of Speech*, above n 1, 173–7 (defamation), 167, 260 (blasphemy), 244–79 (obscenity), 220–3 (contempt), 1, 175, 222 (parliamentary privilege), 114–44 (prior restraints).

<sup>103</sup> On the free communication implications of Australian racial vilification laws, see Chesterman, *Freedom of Speech in Australian Law*, above n 4, 220–9, 243–7.

<sup>104</sup> On the issue of sex discrimination and free communication, see Anne Scahill, 'Can Hate Speech Be Free Speech?' (1994) 4 *Australasian Gay and Lesbian Law Journal* 1, 19–23; Jenny Gentles, 'A Legal Remedy for Sexual Injustice' (1995) 5 *Australasian Gay and Lesbian Law Journal* 65, 70–7.

<sup>105</sup> On the issue of free communication and commercial speech, see Chesterman, *Freedom of Speech in Australian Law*, above n 4, 46–8; Barendt, *Freedom of Speech*, above n 1, 54–63.

<sup>106</sup> *Lange* (1997) 189 CLR 520, 571–3. For a discussion of the expanded common law defence of qualified privilege established in *Lange*, see Chesterman, *Freedom of Speech in Australian Law*, above n 4, 96–102; Sally Walker, '*Lange v ABC*: The High Court Rethinks the "Constitutionalisation" of Defamation Law' (1998) 6 *Torts Law Journal* 9.

<sup>107</sup> *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Imperial Act Application Act 1969* (NSW) s 6; *Constitution Act 1975* (Vic) s 19(1); *Defamation Act 1889* (Qld) s 10(1); *Constitution Act 1934* (SA) s 38; *Parliamentary Privileges Act 1891* (WA) s 1; *Defamation Act 1957* (Tas) s 10(1); *Legislative Assembly (Powers and Privileges) Act 1992* (NT) ss 4, 6; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 24(3).

<sup>108</sup> See Owen Fiss, *The Irony of Free Speech* (1996) 15–18.

What is important is that these common law rules and statutory laws embody their own context-specific freedom of communication rationales. In broad terms, the law of defamation recognises the importance of the value of truth, whilst the purpose of its associated defences of qualified and absolute privilege (at least on the occasions specified above) is to promote democracy and self-government. On the other hand, the communication rationales that underpin racial vilification and sex discrimination laws include the promotion of tolerance, plurality, individual autonomy, truth, and maybe even the efficient allocation of resources. They explain why laws that proscribe misleading and deceptive communications exist.

While political communications do not attract constitutional protection in Australia for the primary purpose of seeking truth or promoting tolerance or individual autonomy,<sup>109</sup> it is wrong to conclude that these important rationales have no place or role in our constitutional order. They are located within an eclectic range of common law and statutory rules, and operate to protect and enhance freedom of communication in these varied, sub-constitutional contexts. This is consistent with, and is a manifestation of, the hierarchy of constitutional values in Australia outlined above.

Therefore, it is evident that within the Australian legal system, freedom of communication is protected and promoted at a number of different levels and for different reasons. The *Constitution* — specifically ss 7, 24, 64 and 128 — is more concerned with the efficacy of parliamentary government than the interests of the individual. Consequently, it protects only those communications *necessary* to secure the effective functioning of this system.<sup>110</sup> Individuals, on the other hand, are left with the freedom to communicate as they choose within that space ‘left unburdened by laws that comply with the *Constitution*.’<sup>111</sup> This may explain why the Court in *Lange* was so keen to abandon the constitutional defamation defence created in *Theophanous*<sup>112</sup> and the notion of private rights arising from the *Constitution*. However, the notion that *Theophanous* provided a constitutional remedy and *Lange* did not fails to withstand closer scrutiny.<sup>113</sup>

Our freedom of communication tradition therefore confirms why the implied freedom is not a positive right but merely a restriction on legislative power that

<sup>109</sup> But see Stone, ‘Rights, Personal Rights and Freedoms’, above n 53, 374, where Stone argues that individual autonomy may well be an underlying rationale of the implied freedom. See above Part II(B)(2)(b).

<sup>110</sup> This is not to suggest that, because it attracts constitutional protection, ‘political communication’ is necessarily more important or valuable than other forms of communication. As Cass Sunstein notes, ‘this would be an absurd conclusion. It is because constitutional protection against politics is peculiarly necessary when political speech is involved’: Sunstein, above n 29, 135–6.

<sup>111</sup> *Lange* (1997) 189 CLR 520, 567.

<sup>112</sup> *Ibid* 568–75.

<sup>113</sup> See Adrienne Stone, ‘The Common Law and the *Constitution*: A Reply’ (2002) 26 *Melbourne University Law Review* 646, 653–5. But see Greg Taylor, ‘Why the Common Law Should Be Only Indirectly Affected by Constitutional Guarantees: A Comment on Stone’ (2002) 26 *Melbourne University Law Review* 623. See also Stone, ‘Rights, Personal Rights and Freedoms’, above n 53, 400–17, where Stone argues that the High Court was incorrect to hold that the implied freedom restricted legislative and executive power but not, except indirectly, the common law. She states that this occurred because the Court mistakenly viewed this as a necessary consequence of the characterisation of the implied freedom as a ‘negative’ right.



need only be applied for this limited, instrumental purpose. Conversely, there is the emerging principle that constitutional rights and guarantees must be given a broad construction, even when they operate to restrict legislative power.<sup>114</sup> This has been the High Court's approach to the interpretation of s 51(xxxi) for some time<sup>115</sup> and has, more recently, been applied to s 80 by some judges.<sup>116</sup> This may well reflect an increased willingness of the Court to draw inspiration from jurisdictions like the United States and Canada, whose jurisprudence 'is pervaded with the objective of protecting the individual from arbitrary governmental interference.'<sup>117</sup>

There is, moreover, a strong argument that the High Court should take a more active and expansive role when interpreting a constitutional right such as s 117, which operates to protect the liberty of the individual.<sup>118</sup> However, there is a key difference between the implied freedom and a constitutional guarantee like s 117 relevant to its interpretation. The rights component of s 117 has a *direct* operation, and its purpose is to protect the individual from arbitrary state action.<sup>119</sup> This is not, however, the nature or purpose of the implied freedom, as was made clear in my earlier discussion.<sup>120</sup> The implied freedom is a limitation on legislative power and exists only to the extent necessary to facilitate more effective parliamentary government as guaranteed by the *Constitution*. The High Court has consistently read constitutional limitations on power narrowly, except when the operation of those provisions has a direct effect upon the individual.<sup>121</sup> This provides a further reason why the High Court should take a more supervisory role in relation to the implied freedom than would properly be the case when interpreting and applying a positive constitutional right.

### 3 The Limited Institutional Capacity of the Judiciary

The third reason why a minimalist model of judicially-protected popular sovereignty is the primary rationale of the implied freedom is the limited

<sup>114</sup> See *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 603 (Gibbs J), 614–15 (Mason J), 652–3 (Wilson J); Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) 409; *Cheng v The Queen* (2000) 203 CLR 248, 277–8 (Gaudron J).

<sup>115</sup> See *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349–350 (Dixon J); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ); *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, 303 (Mason CJ, Deane and Gaudron JJ).

<sup>116</sup> See *Cheng v The Queen* (2000) 203 CLR 248, 277–8 (Gaudron J), 307 (Kirby J) and the interpretive approach of Kirby J in *Re Colina*; *Ex parte Torney* (1999) 200 CLR 386, 405 ('*Re Colina*') and *Brownlee v The Queen* (2001) 207 CLR 278, 304. In *Re Colina*, Callinan J recognised that s 80 was a constitutional guarantee: at 438–9. It is also well established that constitutional guarantees are generally to be given a broad construction. On this point, see *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

<sup>117</sup> Williams, above n 2, 233.

<sup>118</sup> *Ibid* 230–4.

<sup>119</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461, 485 (Mason CJ), 503 (Brennan J), 522 (Deane J), 541 (Dawson J), 554 (Toohey J), 566–7 (Gaudron J). See further Williams, above n 2, 123–7.

<sup>120</sup> See above Part II(B)(2)(b).

<sup>121</sup> See *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 603 (Gibbs J), 614–15 (Mason J), 652–3 (Wilson J); *Cheng v The Queen* (2000) 203 CLR 248, 277–8 (Gaudron J).

institutional capacity of the judiciary to determine what is necessary for the effective operation of representative and responsible government under the *Constitution*. The difficulty is that a question of this nature will often have as much to do with politics and sociology as the law. As Campbell observes:

This must be a highly speculative matter of political science and political philosophy which is very dependent on what particular conception of representative government is involved and what are the economic realities of effective communication.<sup>122</sup>

The legislation struck down in *ACTV* is a classic example. It sought, among other things, to prohibit political advertising on television during an election period. The High Court had to determine the likely effect of this law on the freedom of political communication, and ultimately whether it would 'make the Australian system more or less representative'.<sup>123</sup>

There may, therefore, be legitimate separation of powers concerns if the judiciary ignores the political nature of this task and second-guesses the judgement of Parliament on a question that takes it beyond its field of expertise and experience. Cass Sunstein has made this point in relation to the First Amendment and the problem of determining what kinds of speech lie at the core of that constitutional guarantee:

It is for this reason that constitutional law is not political philosophy, and that some constitutional rights are 'underenforced' through the judiciary ... On these matters, an aggressive judicial role in the service of the best theory would strain judicial competence and legitimacy.<sup>124</sup>

The notion of the judiciary 'underenforcing' a constitutional right is apposite to the implied freedom. In this regard, it echoes one aspect of the American political question doctrine that counsels against the judiciary examining an issue when the 'resolution of the question demand[s] that a court move beyond areas of judicial expertise'.<sup>125</sup> In the context of the implied freedom, it cannot of course amount to the refusal to exercise jurisdiction, as it is the constitutional duty of the Court to determine its proper limits.<sup>126</sup> However, the High Court can and should exercise this jurisdiction in a manner that defers to Parliament on

<sup>122</sup> Campbell, above n 34, 203.

<sup>123</sup> Ibid.

<sup>124</sup> Sunstein, above n 29, 151.

<sup>125</sup> *Goldwater v Carter*, 444 US 996, 998 (1979). The political question doctrine also requires that the judiciary avoid questions that are committed by the *Constitution* to another arm of government or would create the possibility of 'multifarious pronouncements by various departments on one question': *Baker v Carr*, 369 US 186, 217 (1962). In the Australian context, see Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 795–6.

<sup>126</sup> *ACTV* (1992) 177 CLR 106, 144 (Mason CJ).

questions that arise in its interpretation and application that are not reasonably susceptible to traditional legal reasoning.<sup>127</sup>

#### D Provisional Conclusion

My analysis has suggested that while the 'classic trio' of rationales are not the primary justifications for the implied freedom, they do inform the content and development of a range of common law and statutory rules. In this way, important individual and more general democratic concerns find expression and promotion at the sub-constitutional level. The rationale of the implied freedom is a minimalist model of judicially-protected popular sovereignty. This rationale fits best with the text, structure and history of the *Constitution*, our freedom of communication tradition and the limited judicial capacity to determine what is required to secure the effective operation of our constitutional system of government. The identification of the rationale of the implied freedom establishes the framework necessary to determine the proper scope of 'political communication' after *Lange*, and whether racial vilification can be so considered.

### III WHAT COUNTS AS 'POLITICAL COMMUNICATION' AFTER *LANGE*?<sup>128</sup>

#### A The Scope of the *Lange* Decision

In *Lange*, the High Court did not define 'political communication' for the purpose of the implied freedom, but insisted that, to attract constitutional protection, a nexus must exist between a communication and federal voting choices ('the nexus requirement').<sup>129</sup> A narrower conception of 'political communication' than the one endorsed in *Theophanous*<sup>130</sup> is more consistent with this line of reasoning,<sup>131</sup> though any possible narrowing is qualified in two important respects. First, the Court established that the implied freedom was not confined to election periods.<sup>132</sup> Second, through the system of responsible government, the implied freedom covers the conduct of the entire executive —

<sup>127</sup> There have been instances where the High Court has employed this approach. See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, 138–43 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 296 (Mason CJ and Brennan J). See also Rosenberg and Williams, above n 34, 477, where the authors state that (citations omitted):

if justices of constitutional courts wish to decide cases that have major policy ramifications, they must have a solid grasp of existing behaviour ... it is incumbent upon them to be informed about practice. If they are not, then they should either defer to the legislature or, if appropriate, remand the case to lower courts for further development of the empirical record. This is particularly the case in democratic countries like Australia where there is no bill of rights and courts traditionally defer to parliamentary actions.

<sup>128</sup> See generally Chesterman, 'When Is a Communication "Political"?', above n 53.

<sup>129</sup> (1997) 189 CLR 520, 560.

<sup>130</sup> '[It] refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about': *Theophanous* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ), quoting Barendt, *Freedom of Speech*, above n 1, 152.

<sup>131</sup> See Stone, 'Rights, Personal Rights and Freedoms', above n 53, 377–8.

<sup>132</sup> *Lange* (1997) 189 CLR 520, 561.

not just 'Ministers and the public service ... [but also] the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.'<sup>133</sup> Moreover, the decision in *Levy v Victoria* made it clear that 'political communication' includes 'non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth'.<sup>134</sup>

Whether the implied freedom embraces a freedom of movement and association is less certain. However, considering the tenor of the *Lange* reasoning and its insistence that an implication must be firmly rooted in the text and structure of the *Constitution*, the better view is that these freedoms are 'merely ancillary to, and therefore parasitic upon, the freedom of political communication'.<sup>135</sup> In other words, freedom of movement and association receive constitutional protection to the extent necessary to enable citizens to give and receive 'political communications' needed to cast an informed vote at a federal election.<sup>136</sup> Indeed, this is the essence of the *Lange* decision.<sup>137</sup>

The nexus requirement makes it clear that although racial vilification can amount to 'political communication', it will not *always* be so.<sup>138</sup> The difficult question is how to determine when a subject matter — in this instance racial vilification — is relevant to making a voting choice at a federal election or referendum. Whilst *Lange* left this question open, it would appear correct to state that the range of matters that may be relevant to federal voting choices cannot be fixed.<sup>139</sup> This approximates the view taken on this point by the joint judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous*.<sup>140</sup> For example, the turning away of the *MV Tampa* from Australian waters by the federal government and its associated refugee policy dominated the 2001 federal election in the same way that terrorism appears set to dominate the 2004 federal election. Neither issue has truly been on the federal political radar before,<sup>141</sup> though a communication

<sup>133</sup> *Ibid.*

<sup>134</sup> (1997) 189 CLR 579, 595 (Brennan CJ). For a discussion of symbolic speech, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3<sup>rd</sup> ed, 2002) 1184–92.

<sup>135</sup> Blackshield and Williams, above n 134, 1179.

<sup>136</sup> See *Kruger* (1997) 190 CLR 1, 91 (Toohey J), 115–16 (Gaudron J), 142 (McHugh J).

<sup>137</sup> *Lange* (1997) 189 CLR 520, 560, 571.

<sup>138</sup> On this point, see Chesterman, *Freedom of Speech in Australian Law*, above n 4, 238–40; Chesterman, 'When Is a Communication "Political"?'', above n 53, 16–18. Stone considers it unlikely that the High Court would count hate speech as 'political communication': Stone, 'Rights, Personal Rights and Freedoms', above n 53, 399 fn 136.

<sup>139</sup> However, one topic that appears outside the scope of the implied freedom is the discussion of religious matters, on account of the protection it receives from s 116 of the *Constitution*: *Hariklanakis v Skalkos* (1999) 47 NSWLR 302.

<sup>140</sup> (1994) 182 CLR 104, 123.

<sup>141</sup> The only previous occasion where it might be said that the issue of terrorism was on the federal political agenda was the bombing of the Hilton Hotel in Sydney on 13 February 1978 during the Commonwealth Heads of Government Meeting. See further Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) ch 6. However, that event did not have the same domestic political impact as the recent attacks in New York City and Bali and the ongoing 'War on Terror'. Stone has made a similar point regarding, inter alia, the issue of gun control following the Port Arthur massacre in 1996: see Stone, 'Rights, Personal Rights and Freedoms', above n 53, 385.

on these topics would now be manifestly 'political'. These examples underline the fluid and enigmatic nature of federal politics, and suggest that the subject matters that attract constitutional protection must remain open to honour the constitutional imperative established in *Lange*.<sup>142</sup>

The existence of the nexus requirement emphasised in *Lange* also does not in principle preclude 'commercial speech' or 'entertainment' from constituting 'political communication' in certain instances.<sup>143</sup> For example, the broadcasting of a song on a youth radio network by a fictional character satirising a controversial federal politician might well constitute 'political communication',<sup>144</sup> as it certainly has the potential to influence the federal voting choices of its listeners.<sup>145</sup>

In any event, the most difficult issue is determining the *strength* of the nexus needed before a communication ought to be considered 'political'. This is particularly important for the area of racial vilification, where many communications take place in the workplace, neighbourhood or sporting arena — occasions where there is no obvious connection to federal elections. It presents a significant challenge for the High Court, as assessing the impact of a law upon the communicative processes connected to federal parliamentary government requires the use of analytical skills not usually employed by judges and involves more than traditional legal reasoning. This is not a lament, but merely an observation.<sup>146</sup> This interpretive challenge is, however, no more or less demanding than the one posed, for example, by s 92 of the *Constitution* and the economic analysis that the section necessarily entails.<sup>147</sup> The High Court must in time develop a principled way of distinguishing between communications that 'could affect [voter] choice in federal elections'<sup>148</sup> and those that cannot. The method chosen must be informed by and serve to further the rationale of the implied freedom discussed above.

<sup>142</sup> This argument finds some support in *Lange* (1997) 189 CLR 520, 570–1, where the Court endorsed a passage from the judgment of McHugh J in *Stephens* (1994) 182 CLR 211, 264.

<sup>143</sup> But see *Theophanous* (1994) 182 CLR 104, 123–5 (Mason CJ, Toohey and Gaudron JJ), where their Honours said that entertainment and commercial speech would not generally count as political communication. For a discussion on this point, see Chesterman, *Freedom of Speech in Australian Law*, above n 4, 46–9.

<sup>144</sup> However, on these facts, the Queensland Court of Appeal held that this communication did not amount to political communication for the purpose of the implied freedom: *Australian Broadcasting Corporation v Hanson* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, McMurdo P and McPherson JA, 28 September 1998) ('*Hanson*').

<sup>145</sup> See below nn 187–91 for a detailed discussion and critique of this case.

<sup>146</sup> But see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 331–8, where Callinan J, though accepting the authority of *Lange*, said he would not have found an implied freedom of political communication. His Honour disagreed with the reasoning by which the implied freedom was derived and also because the analysis that it necessarily requires strays far from the kind usually associated with judicial proceedings.

<sup>147</sup> In assessing whether a law infringes s 92, the Court must determine whether it imposes on interstate traders discriminatory burdens of a protectionist kind by conferring on local traders a commercial or market advantage: *Cole v Whitfield* (1998) 165 CLR 360, 407–8. The High Court made clear that this inquiry would involve an assessment of both the legal and practical effects of the law. The latter entails looking at the actual economic effects of an impugned law. On the difficulty of this s 92 analysis, see Zines, above n 114, 151–3.

<sup>148</sup> *Lange* (1997) 189 CLR 520, 571.

B *A Minimalist Model of Judicially-Protected Popular Sovereignty and the Scope of 'Political Communication'*

At first blush, a minimalist model of judicially-protected popular sovereignty seems to mandate the narrowest possible conception of 'political communication'. The implied freedom is, after all, a restriction on the legislative and executive powers of the Commonwealth, and it is implicit in this rationale that, subject to the *Constitution*, 'the people's representatives in Parliament ... should be ... [able] to implement the wishes of the people as they see them.'<sup>149</sup> So, prima facie, the less communication that is constitutionally protected, the greater the scope of Parliament's powers. This could be secured by insisting upon a very strong nexus between the communication and federal voting choices. For example, the speaker in an open and public forum must have *intended* to communicate on a subject matter of direct relevance to the next federal election. This approach, however, fails to focus on voter behaviour which is the essence of the constitutional imperative established in *Lange*. It would also be extremely difficult to apply and would likely lead to the drawing of artificial and unsustainable lines between political and non-political communication.<sup>150</sup>

Indeed, on closer inspection, a minimalist model of judicially-protected popular sovereignty requires that more, rather than less, political communication be constitutionally protected. The ultimate goal of the implied freedom is to secure and provide for the meaningful exercise of the sovereignty of the people through the effective operation of our system of constitutional government, which is promoted by a broad-ranging and informed political discourse.<sup>151</sup> However, it must be borne in mind that while a broad conception of 'political communication' would seem to widen the operation of the implied freedom (given that the implied freedom restricts power), expanding the range of communications considered 'political' does not itself effect a corresponding diminution of legislative and executive power. That ultimately turns on the level of judicial deference shown to Parliament when a court decides whether a law is constitutional, notwithstanding that it may restrict political communication.<sup>152</sup>

<sup>149</sup> Williams, above n 2, 230.

<sup>150</sup> It would involve an assessment by a court as to the subjective intention of a speaker and a reasonably precise definition of when a matter is of *direct* relevance to federal voting choices. The former question is notoriously difficult to answer and may be unanswerable without direct testimony from the speaker, and then only if we can be certain that they are speaking truthfully. The latter would require a court to engage in the extremely difficult — perhaps impossible — task of drawing a reasonably precise and principled distinction between communications that may have a direct effect on federal voting choices and those that could only have an indirect effect. The amorphous nature of political discourse and the unpredictability of voter attitudes and behaviour makes any distinction of this type a subjective and value-laden assessment.

<sup>151</sup> Stone has also argued that if the High Court took seriously the logic of the implied freedom as outlined in *Lange*, with its commitment to what enables electors to make a 'true' electoral choice, a much broader definition of 'political communication' must follow: Stone, 'Rights, Personal Rights and Freedoms', above n 53, 389.

<sup>152</sup> The scope of the implied freedom ultimately depends on the test of constitutionality that a court employs when determining whether a law that infringes 'political communication' is nevertheless constitutional by being reasonably appropriate and adapted to serve a legitimate end consistent with the system of representative and responsible government guaranteed by the *Constitution*: *Lange* (1997) 189 CLR 520, 567–8. A test that more closely scrutinises a law would, for exam-

*C How Strong Must the Nexus Requirement Be to Count as 'Political Communication'?*

The rationale of the implied freedom requires that a broad conception of 'political communication' be judicially recognised. The difficult question is how broad that conception can be without going beyond what the *Constitution* can reasonably support. Michael Chesterman has argued that *Lange*, in contrast to the majority views in *Theophanous* and *Cunliffe*, 'explicitly limited "political discussion" to communications which are "calculated to affect choices"'.<sup>153</sup> However, the critical word, 'calculated', is not mentioned in the *Lange* judgment. Instead, the High Court stated that the implied freedom protects political and governmental communications 'that *might* be relevant'<sup>154</sup> or '*could* affect [voters'] choice in federal elections or constitutional referenda'.<sup>155</sup> 'Calculated' implies intention, while 'might' and 'could' carry no such subjective connotation. This use of terminology by the Court is important, as it casts the question in a significantly different light. It necessarily entails a broader conception of 'political communication' than one in which 'calculated' is the operative standard.

While the definition of 'political communication' remains an open question,<sup>156</sup> *Lange* stated that a narrow view should not be taken regarding the subject matters that may attract constitutional protection.<sup>157</sup> However, by endorsing the following passage in *ACTV*, the Court may have envisaged something approaching a *direct* nexus between the communication and federal voting choices: 'legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election'.<sup>158</sup>

In other words, only 'explicitly political communication'<sup>159</sup> attracts constitutional protection. If this is so, the conception of 'political communication' is narrowed considerably. Moreover, a strictly construed nexus requirement would inferentially preclude discrete state political and governmental matters from constitutional protection. At the time of writing however, it is far from clear that

ple, make a finding of invalidity more likely and effect a corresponding expansion in the scope of the implied freedom.

<sup>153</sup> Chesterman, *Freedom of Speech in Australian Law*, above n 4, 50 (emphasis added).

<sup>154</sup> *Lange* (1997) 189 CLR 520, 561 (emphasis added).

<sup>155</sup> *Ibid* 571 (emphasis added). The High Court also uses the phrase 'which *enables* the people': at 560–1 (emphasis added).

<sup>156</sup> There has been some discussion of the scope of 'political communication' in the post-*Lange* case law. The High Court has confirmed that symbolic speech may count as 'political communication': *Levy* (1997) 189 CLR 579, 594 (Brennan CJ), 613 (Toohey and Gummow JJ), 622–3 (McHugh J), 638 (Kirby J). Toohey and Gaudron JJ have also endorsed a broad, *Theophanous*-style definition of 'political communication': *Kruger* (1997) 190 CLR 1, 90–1 (Toohey J), 114 (Gaudron J). But see Chesterman, *Freedom of Speech in Australian Law*, above n 4, 44.

<sup>157</sup> *Lange* (1997) 189 CLR 520, 570–1.

<sup>158</sup> *Ibid* 560, quoting *ACTV* (1992) 177 CLR 106, 187 (Dawson J).

<sup>159</sup> See Stone, 'Rights, Personal Rights and Freedoms', above n 53, 384, where Stone uses the term first coined by Robert Bork to define a category of Australian 'communications about the behaviour, policy and personnel of the federal Parliament or federal executive or about the referendum procedure.'

this is the case.<sup>160</sup> In any event, on this approach, a website<sup>161</sup> or pamphlet<sup>162</sup> that published vicious anti-Semitic propaganda denying the Holocaust and claiming that it was a lie concocted for economic and strategic political gain would not appear relevant to federal political and governmental matters, and would therefore fall outside the scope of 'political communication'. An employer calling an employee a 'lazy black bastard' in the workplace would also fall outside the scope of 'political communication',<sup>163</sup> as would a newspaper article reporting a decision made by a state government department to remove an Aboriginal child from the care of a white family and place them in the custody of an Aboriginal relative, where the accompanying photo misleadingly depicts the relative as living in a 'primitive' camp.<sup>164</sup>

It is probably true to say that none of these communications relate *directly* to 'the functioning of [federal] government in Australia and ... the policies of political parties and candidates for election.'<sup>165</sup> Yet a person who visits the anti-Semitic website or reads the pamphlet may be so sickened or enraged that at the next federal election they choose to vote for the Australian Labor Party partly because of their policy to introduce criminal sanctions for racial vilification.<sup>166</sup> Similarly, a person reading the above newspaper article may not appreciate the federal-state distinction and decide to vote for One Nation at the next federal election because they believe the party will not support Aboriginal interests.<sup>167</sup> Moreover, sustained exposure to racial vilification in the workplace may stir an employee's own racist views and lead to a vote for a far-right, anti-immigration candidate.

The important point is that, in each of the above scenarios, it is *possible* that these communications will affect the federal voting choices of a particular

<sup>160</sup> The federal election nexus requirement established in *Lange* would seem inconsistent with the principle in *Stephens* that purely state political matters may count as political communication. This view was supported by Brennan CJ and McHugh J: *Levy* (1997) 189 CLR 579, 596 (Brennan CJ), 626 (McHugh J). However, in the same case, Kirby J favoured the opposite conclusion: at 643–4. Four judges in *Roberts v Bass* (2002) 212 CLR 1 seemed to favour the view that discrete state political matters may count as 'political communication': at 29–30 (Gaudron, McHugh and Gummow JJ), 58 (Kirby J). For a discussion of this issue, see Geoffrey Lindell, 'The Constitutional and Other Significance of *Roberts v Bass* — *Stephens v West Australian Newspapers Ltd* Reinstated?' (2003) 14 *Public Law Review* 201, 201.

<sup>161</sup> See *Toben v Jones* (2003) 129 FCR 515 ('*Toben*').

<sup>162</sup> See *Jones v Scully* (2002) 120 FCR 243 ('*Scully*').

<sup>163</sup> See *Rugema v J Gadsten Pty Ltd* [1997] EOC ¶92-887 ('*Rugema*'). Chesterman has made a similar point regarding *Rugema*: Chesterman, *Freedom of Speech in Australian Law*, above n 4, 239–40.

<sup>164</sup> See *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352.

<sup>165</sup> *Lange* (1997) 189 CLR 520, 560.

<sup>166</sup> Robert McClelland, of the Australian Labor Party, proposed the private member's Bill entitled the Racial and Religious Hatred Bill 2003. If passed, the Bill would create three federal offences. It would be a crime to threaten property damage or physical harm to another person or group because of their race, colour, religion or national or ethnic origin. Engaging in public acts that have the intention and likely effect of inciting racial or religious hatred against a person or group would also be a crime.

<sup>167</sup> See Chesterman, *Freedom of Speech in Australian Law*, above n 4, 239, where Chesterman notes that the emergence of the One Nation Party in Australian federal politics and its discriminatory policies 'illustrate[s] the potential overlap between racial vilification and political communication.'



person or group of persons.<sup>168</sup> A communication is made no less 'political' by its author not intending nor understanding its capacity to affect federal voting choices. As the High Court made clear in *Lange*, the constitutional imperative assigned to the Court by ss 7, 24, 64 and 128 of the *Constitution* in relation to the implied freedom is to identify for protection those communications that 'may' or 'might' *in fact* affect federal voting choices. However, if the argument is taken to its logical conclusion, *every* communicative act could be 'political'. If this is so, the implied freedom becomes a comprehensive and autonomous guarantee of free communication and the Meiklejohn conception of 'political communication' emerges. As noted earlier, this conception cannot be supported by either the textual origins and limited purpose of the implied freedom or the constitutional reasoning at the heart of the *Lange* decision.<sup>169</sup>

On the other hand, for the High Court to draw definite lines where none exist would also betray the *Lange* constitutional imperative. To narrow the spectrum of 'political communication' to those matters that may, according to a judge, 'properly influence the outcome of those elections'<sup>170</sup> runs the risk of the Court defining 'political communication' in terms of what it *ought* to be, not what it is.<sup>171</sup> Much 'political communication' emanates from, and is properly the discourse of, the citizenry. For example, for a judge to state that a protest against duck-hunting 'relate[s] to the discrete State issue of the appropriateness of the relevant Victorian laws'<sup>172</sup> may be strictly correct, but it presupposes that a voter can and will make fine distinctions between state and federal issues. It is an assessment by the politically enlightened given judicial imprimatur. Even so, it fails to focus on how the communication may *in fact* affect the voter, which *Lange* makes clear is the key criterion for determining whether a communication is 'political'. This blurring of the federal-state divide is, of course, compounded by the 'increasing integration of social, economic and political matters in Australia'.<sup>173</sup> A voter may appreciate the federal-state distinction but still choose to vote at the federal level against the political party that enforced the relevant Victorian duck-hunting law.<sup>174</sup>

<sup>168</sup> See *ibid* 240, where Chesterman makes a similar point in relation to *Rugema*.

<sup>169</sup> See above nn 70–9 and accompanying text. Stone has argued that the logic of the implied freedom as defined in *Lange* requires a particularly broad conception of 'political communication'. To this end, she considers that four categories of communication ought to be constitutionally protected: 'explicitly political communication', 'potential subjects of government action', 'communication that influences attitudes towards public issues' and 'communication that develops qualities desirable in a voter': Stone, 'Rights, Personal Rights and Freedoms', above n 53, 383–7. The problem with this definition is that *every* communicative act could be 'political'.

<sup>170</sup> *Kruger* (1997) 190 CLR 1, 69 (Dawson J) (emphasis added).

<sup>171</sup> See Chesterman, 'When Is a Communication "Political"?', above n 53, 12, where Chesterman correctly notes that the view expressed by Dawson J in *Kruger* (1997) 190 CLR 1, 68–9 implies that it is up to the High Court, not the citizen, to determine the scope of 'political communication'. In this regard the Court 'performs part of the state's function of "high-minded parliamentarian"'.

<sup>172</sup> *Levy* (1997) 189 CLR 579, 596 (Brennan CJ).

<sup>173</sup> *Lange* (1997) 189 CLR 520, 572.

<sup>174</sup> The decision in *Levy* did not turn on this issue, as the High Court held that the impugned Victorian regulation that restricted public access to land reserved for duck hunting was reasonably appropriate and adapted to a legitimate purpose (the protection of public safety) consistent with representative and responsible government: *Levy* (1997) 189 CLR 579, 597 (Brennan CJ),

The adoption of a narrow conception of 'political communication' would, moreover, radically undercut the rationale of the implied freedom. This is because the determination of what is 'political communication' is as much a question of politics and sociology as it is one of law, and is not susceptible to traditional legal reasoning. An attempt to narrow the definition of 'political communication' would therefore be predicated upon the erroneous assumption that a court has the expertise and experience to draw a line between political and non-political communication. The court should acknowledge the amorphous nature of the concept, the possibility that a broad range of matters may count as 'political communication' and its own limited institutional capacity to determine a question of this kind.<sup>175</sup> Of course, the precise scope of 'political communication' is not revealed in making this point and the application of the implied freedom requires that the question be answered. However, the adoption of a narrow conception would lead to the High Court seeking to define and *control* the concept in terms of what it ought to be rather than what it is. A minimalist model of judicially-protected popular sovereignty requires judicial deference in this context, and involves keeping the categories of political communication open and broad.<sup>176</sup>

#### D *A Test for Determining when a Communication Is 'Political'*

##### 1 *The 'Likely Audience' Test*

The above analysis reveals the impossibility of drawing precise lines in this area. The text and structure of the *Constitution* and the limited purpose of the implied freedom do not support the Meiklejohn conception of 'political communication'. On the other hand, a conception that is too narrow would serve to undermine its rationale. A middle ground needs to be located and that position must articulate the strength of the nexus requirement (to honour the *Lange* constitutional imperative) and outline a workable test for its consistent application. Moreover, the rationale of the implied freedom requires the relevant test to carve out a generous zone of constitutionally-protected 'political communication'. First, this recognises both the breadth of matters that may constitute 'political communication' and the limited institutional capacity of the judiciary to determine this issue. Second, and more importantly, it provides the conditions for the sovereignty of the people to be meaningfully exercised through an informed and wide-ranging political discourse.

The nexus requirement can be defined in terms of the intention of the communicator.<sup>177</sup> However, as noted earlier, a communication is made no less political

608 (Dawson J), 614–15 (Toohey and Gummow JJ), 619 (Gaudron J), 627 (McHugh J), 648 (Kirby J).

<sup>175</sup> See above Part II(C)(3).

<sup>176</sup> Another argument to support a broad definition of 'political communication' is advanced by Stone: 'the line should be drawn more generously to allow for the possibility of error, especially given difficulties that courts might experience in distinguishing between political and non political speech': Stone, 'Rights, Personal Rights and Freedoms', above n 53, 389.

<sup>177</sup> On this point, see Chesterman, *Freedom of Speech in Australian Law*, above n 4, 51.

if its author neither intended nor understood its capacity to affect federal voting choices.<sup>178</sup> The intention of a communicator is not relevant to voter behaviour even when their communication has in fact affected a federal voting choice.

On the other hand, the following proposition articulates a defensible, middle ground position: for the purpose of the implied freedom, a communication is considered '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*. This proposition is consistent with the nexus requirement and its emphasis on voter behaviour, yet keeps the subject matters that may attract constitutional protection open and broad, as required by the rationale of the implied freedom. It means, however, that subject matter alone will determine whether a communication qualifies for constitutional protection *irrespective of the context* in which it is made.

As a result, any number of private, social or work-related communications may fall within the scope of the implied freedom. It might be thought that the often private nature of such exchanges or the nature of the relationship between the relevant participants makes these communications unsuitable for constitutional protection. If the *Lange* constitutional imperative and the rationale of the implied freedom are to be taken seriously however, it is the capacity of a communication to affect federal voting choices that determines whether or not it attracts constitutional protection. The kinds of 'political' dialogue that regularly occur between family, friends and work colleagues in a private and informal context are often the key communications that shape an individual's federal voting choices.

Consider a dinner conversation between two friends where one informs the other about the nefarious activities of their local federal member, or an informal exchange of emails between two employees discussing the wisdom or otherwise of Australia entering into a free trade arrangement with the United States. These communications may affect the federal voting choices of their likely audience even if that amounts only to one other person. On the basis of the *Lange* constitutional imperative and the 'likely audience' test they are 'political communication' par excellence.<sup>179</sup> It is, of course, unlikely that a court will have cause to pronounce upon the constitutional status of such private and informal communications, for a law that sought to curtail or had the effect of curtailing such fundamental discourse would be extremely politically imprudent. It is, nonetheless, an important constitutional safeguard should such egregious legislation ever come to pass.

The 'likely audience' test has further benefits. Firstly, constitutional protection will not turn on the size of a communication audience. A communication ought to count as 'political' whether it is published in a major daily newspaper, made in the newsletter of a political 'think tank' with a circulation of 100, or found in a pamphlet dropped in the letterboxes of a residential street. Its capacity to be reasonably relevant to the federal voting choices of its likely audience is the key

<sup>178</sup> But see Chesterman, 'When Is a Communication "Political"?', above n 53, 11.

<sup>179</sup> I am grateful to Adrienne Stone for this point.

issue. In this way, the 'likely audience' test takes voters as it finds them and therefore reflects the *reality* of political communication, not what it ought to be in the eyes of the politically enlightened or 'high-minded parliamentarian'.<sup>180</sup> For this reason, the test works better than a standard based on the reasonable or intelligent person, for what may affect federal voting choices is not always reasonable, rational or considered.<sup>181</sup>

Secondly, the incorporation of an objective standard prevents the development of an unlimited definition of 'political communication' which may occur if the subjective voting behaviour of a likely audience were determinative. It is quite possible that *every* communication may be relevant to the federal voting choices of at least one person in its likely audience.

Thirdly, the 'likely audience' test makes the difficult question of how the implied freedom should deal with a discrete state issue less problematic. If a communication on what is properly considered a purely state matter may reasonably be relevant to the federal voting choices of its likely audience, then it *is* 'political'. In conjunction with the 'increasing integration of social, economic and political matters in Australia',<sup>182</sup> this provides a powerful argument against the *prima facie* exclusion of state matters from the scope of the implied freedom. Moreover, it honours the rationale of the implied freedom by keeping the citizen *qua* voter as the focus, and aligns the scope of 'political communication' with what in fact affects federal voting choices.

## 2 The Application of the 'Likely Audience' Test

I will now apply the 'likely audience' test to a hypothetical situation and five real controversies in order to illustrate the range of communications that will attract constitutional protection under the test, and whether it is likely to include those involving racial vilification.

If a hypothetical article were published in *The Courier-Mail* in Brisbane, castigating the Commonwealth for not doing more to secure the welfare of the two Australians held at Guantanamo Bay, it would merit protection under the 'likely audience' test. Less certain would be an article in an Australian academic journal that simply denounced the putative legal blackhole at the same location, without an express Australian reference or connection. It is, however, arguable that the likely audience of an academic journal may still consider this United States government policy reasonably relevant to their federal voting choices, given the strong and consistent support of the United States position by the current Australian government.

Characterising the article that was considered in *Brown v Classification Review Board*<sup>183</sup> is similarly problematic. The article, entitled 'The Art of Shoplifting', was published in *Rabelais*, the La Trobe University student newspaper. It briefly espoused the evils of capitalism, before providing detailed instructions on

<sup>180</sup> Chesterman, 'When Is a Communication "Political"?', above n 53, 12.

<sup>181</sup> See *Levy* (1997) 189 CLR 579, 623 (McHugh J).

<sup>182</sup> *Lange* (1997) 189 CLR 520, 572.

<sup>183</sup> (1998) 82 FCR 225 ('*Brown*').

how to steal. The publication was clearly political in a general sense. The newspaper included articles on the pending execution in the United States of a black activist, the attitudes of the Victorian government towards homosexuals, access to university education, the governments of Nepal and South Africa and privatised prisons. The subject matter of the article was wide-ranging and polemical in nature, but its basic point was to advocate shoplifting as a political and ideological act or 'we may as well sell ourselves into bonded slavery now, or join the Liberal Party.'<sup>184</sup> The fact that only one of seven sections in the article was devoted to the anti-capitalism diatribe is not determinative when that section underlines the entire political premise of the article.

Nevertheless, is it 'political' in the relevant constitutional sense? The Full Federal Court held in the negative.<sup>185</sup> On balance, however, if a broad conception of 'political communication' is apposite for the reasons outlined above, a decent argument can be made that this article may reasonably be relevant to the federal voting choices of its likely audience, particularly in light of the prominence these sorts of political issues possess when many university students are actively debating and forming their political views and electoral preferences for the first time.<sup>186</sup>

On the other hand, notwithstanding the decision of the Queensland Court of Appeal to the contrary, the application of the 'likely audience' test to the communication in *Australian Broadcasting Corporation v Hanson*<sup>187</sup> is less problematic.<sup>188</sup> That case involved the broadcast on a national youth radio station (Triple J) of a song entitled 'Backdoor Man'. The song crudely lampooned the controversial federal politician, Pauline Hanson, whose political platform was based upon a strong resistance to the claims of Aboriginal people, restricting Asian immigration and dismantling the policy of multiculturalism. The singer was a satirical artist called Pauline Pantsdown who, during the course of the song, claimed she was a homosexual before stating '[b]ackdoor, clean up our own backdoor ... backdoor — all our fears will be realised'<sup>189</sup> and then 'I'm a backdoor man for the Klu Klux Klan with very horrendous plans.'<sup>190</sup> The highly critical subject matter of the song, which took aim at Hanson's policies at a time when her political fortunes were very much in the ascendancy, may reasonably be relevant to the federal voting choices of its likely audience. For

<sup>184</sup> Ibid 247 (Heerey J) (emphasis added).

<sup>185</sup> Ibid 238–9 (French J), 246 (Heerey J), 258 (Sundberg J).

<sup>186</sup> For a comment on this decision, see Adrienne Stone, 'The Australian Free Speech Experiment and Scepticism about the UK *Human Rights Act*' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 391, 403; Stone, 'Rights, Personal Rights and Freedoms', above n 53, 381–2.

<sup>187</sup> (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, McMurdo P and McPherson JA, 28 September 1998).

<sup>188</sup> The result, however, in *Hanson* was that the Queensland Court of Appeal dismissed an appeal against the injunction granted to the respondent to restrain the radio station from broadcasting the song. In relation to the relevance of the implied freedom, the Court said that preventing the broadcast of the song 'could not possibly be said to infringe against the need for "free and general discussion of public matters" fundamental to our democratic society': ibid 8.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid 3.

articulation of a theoretical basis for the implied freedom is not only necessary (even if the Court is reluctant to do so explicitly), but also desirable, as it allows the implied freedom to develop in a manner that is principled and coherent. To this end, in Part II I have shown that none of the 'classic trio' of rationales act as the primary justification for the implied freedom, although they do inform the content and development of a range of common law and statutory rules. My analysis demonstrates that a minimalist model of judicially-protected popular sovereignty is the rationale of the implied freedom. It translates to a more limited, supervisory judicial role in the interpretation and application of the implied freedom, and requires that a generous zone of 'political communication' attract constitutional protection.

In order to propose an answer to the question left open in *Lange*, in Part III I developed the 'likely audience' test to better define the scope of 'political communication'. This test honours the centrality of voter behaviour inherent in the nexus requirement established in *Lange*, so that the categories of 'political communication' remain open. Furthermore, as required by the rationale of the implied freedom, a broad conception of 'political communication' emerges from its application. The 'likely audience' test also ensures that not every communication is 'political' and, in doing so, prevents the scope of the implied freedom from moving beyond what the text, structure and history of the *Constitution* can support. It does, however, acknowledge the amorphous nature of 'political communication' while eschewing any attempt to draw narrow, unsustainable lines between the political and non-political. Additionally, the test provides a mechanism for a court to identify and accord constitutional protection to the reality of political communication, not just what passes for such in the circles of the 'politically enlightened'.

The application of the 'likely audience' test demonstrates that racial vilification *can* in certain circumstances amount to 'political communication'. This conclusion is relevant to the constitutionality or otherwise of current Australian racial vilification laws. These laws are primarily concerned with restricting certain ideas and information, not the modes by which they are transmitted. Therefore, when an instance of racial vilification falls within the scope of 'political communication', its proscription by a racial vilification law will *necessarily* infringe the implied freedom. However, there are a number of Australian laws that permit racial vilification if they fall within a defence based on free speech or public interest.<sup>201</sup> In these instances, it cannot be said that the relevant laws infringe the implied freedom. Of course, many instances of racial vilification are not so protected. Consequently, racial vilification laws will sometimes limit 'political communication' and infringe the implied freedom. The question is then whether the laws are reasonably appropriate and adapted to serve a purpose compatible with representative and responsible government.<sup>202</sup>

<sup>201</sup> *Racial Discrimination Act 1975* (Cth) s 18D; *Anti-Discrimination Act 1977* (NSW) s 20C(2); *Racial and Religious Tolerance Act 2001* (Vic) s 11; *Anti-Discrimination Act 1991* (Qld) s 124A(2); *Civil Liability Act 1936* (SA) s 73(1); *Anti-Discrimination Act 1998* (Tas) s 55; *Discrimination Act 1991* (ACT) s 66(2).

<sup>202</sup> On this point, see Chesterman, *Freedom of Speech in Australian Law*, above n 4, 240–3.

This is an important inquiry but one that is beyond the scope of this article. However, its resolution will turn on the test for constitutionality employed by the High Court. That choice of test will necessarily say much about what the Court considers to be the true rationale of the implied freedom.<sup>203</sup>

<sup>203</sup> For example, if a minimalist model of judicially-protected popular sovereignty is the rationale of the implied freedom as I have suggested, an American-style 'strict scrutiny' test for constitutionality may be incompatible with this rationale. For an argument in favour of 'strict scrutiny' of laws that proscribe communications which constitute racial vilification, see Wojciech Sadurski, 'Offending with Impunity: Racial Vilification and Freedom of Speech' (1992) 14 *Sydney Law Review* 163, 167–73.