CONSTITUTIONAL IMPLICATIONS REVISITED

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I INTRODUCTION

It is intriguing how lawyers react so differently to very inventive judicial decisions. When I first heard about the High Court's recognition, in *ACTV* and *Nationwide News*,[1] of an implied freedom of political communication, I was somewhat shocked. Any purported discovery of a major unwritten constitutional principle that was not even noticed by our best legal minds for nearly a century is inherently suspicious. It seemed obvious to me that the Court had changed the system of government established by our Constitution in a substantial way, without asking me or my fellow Australians whether we approved of the change, as required by s 128. When I read the judges' reasoning, I was not persuaded that they had identified a genuinely 'necessary' implication that no-one (except Lionel Murphy) had previously noticed. I explained why I was not persuaded in print.[2]

Many lawyers disagree with my assessment of the legal merits of these decisions. They regard the implied freedom of political communication as legally well founded, even from an orthodox originalist perspective such as my own.[3] On the other hand, I am sure that many other lawyers shared Michael Chesterman's reaction. He admits that he was 'prompted to condone any loose thinking by the court on account of believing that the outcome of the cases, at least in general terms, was refreshingly creative and beneficial in terms of legal policy'.[4] I commend his frankness, and understand the reasons for his reaction. I also understand why, from this perspective, my own reaction might be considered excessively 'legalistic'. When judges bring about highly desirable legal change through reasoning that is prima facie plausible, to challenge the soundness of their reasoning might seem pedantic.[5]

I did not agree that this change was highly desirable. I did not regard the decision to invalidate Parliament's first serious effort to control political advertising as politically 'progressive', for reasons that others have thoroughly explained.[6] But I probably went

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1 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

2 J Goldsworthy, 'Implications in Language, Law and the Constitution', in G Lindell, *Future Directions in Australian Constitutional Law* (1994) 150; 'The High Court, Implied Rights and Constitutional Change' (March 1995) 39 *Quadrant* 46; 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23 *Monash University Law Review* 362.

3 See, eg, S Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133; J Kirk, 'Constitutional Implications (II): Doctrines of Equality and Representative Democracy' (2001) 25 *Melbourne University Law Review* 24, esp 44-57.

4 M Chesterman, 'Book Review' (1998) 3 *Media and Arts Law Review* 227, 228.

5 I do not mean to imply that Professor Chesterman thinks this, or anything else that I criticise in this article.

6 G N Rosenberg and J M Williams, 'Do Not Go Gently Into That Good Right: The First Amendment in the High Court of Australia' (1997) *The Supreme Court Review* 439; T D Campbell, 'Democracy, Human Rights, and Positive Law' (1994) 16 *Sydney Law Review* 195; D Tucker, 'Representation-Reinforcing Review: Arguments about Political Advertising in Australia and the United States' (1994) 16 *Sydney Law Review* 274; D Cass, 'Through the Looking Glass: The High Court and the Right to Speech' (1993) 4 *Public Law Review* 229. See also text to and following n 109 below.

further than most of them, in that my disapproval was not confined to the way the majority dealt with the issue of political advertising. I also rejected the notion that their assumption of the general power to enforce their understanding of freedom of political communication was politically 'progressive'.[7] I have asked myself how much my negative reaction reflected my disapproval not only of any 'loose thinking', but also of the policy outcome, in *ACTV* and *Nationwide News*. I do not believe that my policy views were the primary influence. I objected to the decisions mainly because they seemed to me to override one of the presuppositions of the system of government established by our Constitution, and in doing so, to exceed the limited scope of the High Court's authority to manufacture constitutional law.

Since then, I have reacted in much the same way to *Kable's* case, which recognised an implied requirement that state courts must pass a strict 'character test' in order to exercise federal jurisdiction, and to *Kirk's* case, which held that a 'Supreme Court' must, by definition, have jurisdiction to review the decisions of inferior courts and administrators for jurisdictional error.[8] I believe that the Court's decision to recognise an implied freedom of political speech, although legally erroneous, is legally more defensible than either of these holdings. I agree with George Winterton that the reasoning in *Kable* was 'barely even plausible', [9] and I think the same of the reasoning about privative clauses in *Kirk*.[10] The decision in *Kirk* is particularly ironic, because in order to protect the authority of state Supreme Courts to correct jurisdictional errors by inferior courts, the High Court exceeded its own jurisdiction. On the other hand – and this is the pertinent point – I do not regard their outcomes as undesirable from a policy perspective. I accept that both decisions have strengthened the rule of law, as their admirers have claimed.

Lawyers' different reactions to decisions like these sometimes reflect different degrees of tolerance or even approval of judges straying from strict legal logic in order to implement judicial policies perceived to be desirable. How much this ought to be tolerated or approved is a topic that I explore elsewhere.[11] I will return briefly to that issue in my Conclusion. In the meantime, I revisit the question of the nature of implications and the proper methodology for identifying them. Debate about the legal foundations of the implied freedom of political speech may for practical purposes be otiose, but my interests have always been theoretical as well as practical. The study of implications can illuminate the nature of constitutional interpretation in general, both as it is actually practiced, and as an aspect of the ideals of constitutionalism and the rule of law.

II THEORIES OF CONSTITUTIONAL MEANING AND INTERPRETATION

It is often said that judges must sometimes – and at the appellate level, often – act creatively in order to decide legal disputes, when the applicable law is insufficiently determinate to prescribe their decision. They must make new law that supplements the

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7 For my reasons, see especially, J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346 (summarizing his earlier work); J Goldsworthy, 'The Constitutional Protection of Rights in Australia', in G Craven (ed), *Australian Federation; Towards the Second Century* (1992) 151.

8 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Kirk v Industrial Relations Tribunal of NSW* (2010) 239 CLR 531.

9 G Winterton, 'Justice Kirby's Coda in Durham Holdings' (2002) 13 *Public Law Review* 165, 170.

10 For my reasons, see the opening paragraphs of J Goldsworthy, 'The Limits of Judicial Fidelity to Law' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305.

11 Ibid.

pre-existing law. This is true, but also trite: we all know it. What should also be acknowledged is that the law is not always or wholly indeterminate. It often has a determinate meaning, which limits or even eliminates scope for judicial creativity. Indeed, this is a necessary truth about any law. Since nothing meaningless can be a law, any law necessarily has some meaning, and its meaning is part of what it is.[12] Moreover, its meaning must pre-exist judicial interpretation. Otherwise it could not guide behaviour until judges interpreted it, and it could not guide them either. In other words, it could not *be law* until they interpreted it. If laws could have determinate meanings only after and as a result of judicial interpretation of texts, then the judges would be the only real lawmakers. Law would be like the rules of baseball as seen by the umpire who supposedly said 'it ain't nothin' 'til I call it'.

All this must be true of the Constitution. The interesting and difficult question, debated by constitutional theorists in the United States but rarely here, concerns the nature of the Constitution's meaning. Let us call this 'the question of meaning'. The right answer to this question supplies the crucial distinction between when the Constitution determines the answer to a dispute, and when it requires judges to be creative. The question can be answered in various ways. It might be said that the meaning or content of the Constitution is constituted by:

> (a) the literal meaning of the numbers, words and punctuation marks that constitute the text, determined by the linguistic conventions of either:
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> (i) the period when the Constitution was drafted and enacted, or
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> (ii) contemporary society; or
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> (b) not only (a)(i), but also certain kinds of evidence of the intentions or purposes of people who had some part in creating or enacting the text;[13] or
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> (c) not only (a)(ii), but also contemporary understandings of the purposes that the Constitution serves or should serve today.

An essential task for constitutional theory is to explore reasons for choosing between these alternatives. For example, (a)(ii) is unacceptable because it is inconsistent with adherence to the original meaning of legal 'terms of art', such as the phrase 'peace, order and good government' in ss 51 and 52 of the Constitution.[14] Many other examples could be given.

More broadly, answer (a) is subject to the fatal objection that it cannot accommodate the inexplicit components of constitutional meaning. The meaning of any constitution is undoubtedly richer than the literal meaning or meanings of its text. Many philosophers of language now regard literal meanings as 'typically quite fragmentary and incomplete, and as falling far short of determining a complete proposition even after disambiguation'.[15] Our words often provide only the bare bones of what our utterances mean. As Felix Frankfurter once said of statutory interpretation (and constitutional interpretation is the same), the most fundamental question is 'what is below the surface of the words and yet fairly a part of them?'[16] This is a vital but under-theorised issue

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12 J Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 10.

13 The details of what kinds of, and whose, intentions should count are deliberately left vague.

14 For elaboration, see J Goldsworthy, 'Interpreting the *Constitution* in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 681-83.

15 D Sperber and D Wilson, 'Pragmatics', in F Jackson and M Smith (eds.), *The Oxford Handbook of Contemporary Philosophy* (2005) 468 at 477, emphasis added. See also A Marmor, 'The Immorality of Textualism' (2005) 38 *Loyola University Law Review* 2063.

16 F Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 *Columbia Law Review* 527, 533.

raised by constitutional interpretation. It inspires one of the main arguments in favour of answer (b), which is a version of originalism.

Many constitutional lawyers dismiss originalism far too casually, citing long-discredited clichés about the 'dead hand of the past', the supposed impossibility of collective legislative intentions, and so on. Some of those lawyers settle for a complacent, pragmatic approach, in which constitutional interpretation is guided by a variety of relevant considerations, such as text, structure, history, precedent, and contemporary prudential and ethical values, which, after some inarticulate, intuitive process of weighing and balancing, somehow help judges to reach conclusions.[17] Let us call this 'pluralism'.

Pluralism is intellectually impoverished and incapable of answering the question of meaning. It makes no attempt to distinguish between interpretation as a process of:

(1) revealing or clarifying pre-existing meaning;
(2) supplementing that meaning in order to resolve indeterminacies; and
(3) changing that meaning in order to improve the constitution (a possibility that is discussed later).[18]

Pluralism also lacks the capacity to distinguish between express meaning and implied meaning. All the ingredients or 'modes' of interpretation are jumbled together in a single, undiscriminating melange.

Pluralism provides a plausible account of interpretation when it is concerned with processes (2) and (3). In those contexts, pluralism seems inescapable. In deciding how to supplement or change the meaning of a constitution, many considerations are necessarily relevant. But insofar as interpretation is concerned with revealing or clarifying the pre-existing meaning of a constitution, pluralism is analytically bankrupt. Worse, it seems to deny what we have seen is a necessary truth: that a law necessarily has a meaning that pre-exists judicial interpretation. If it were true that a constitution always has multiple possible meanings, from which judges must choose, judges would have almost unlimited discretion. For example, historical meanings could be endorsed if they are consistent with contemporary values (in other words, if the judges approve of them), and repudiated if they are not. The existence of other relevant considerations multiplies the available alternatives. Perhaps that is why those of a pragmatic bent like this approach: it leaves just about everything to the supposed practical wisdom of the judges, who are free to decide when to conserve and when to innovate. But if judges can always choose between many different meanings, depending on how they weigh and balance many competing relevant considerations, then a constitution has no meaning until they give it one. That amounts to a theory of legal indeterminacy that is far too radical to be plausible.

If, as I have argued, the Constitution must have a meaning, and if in many instances (such as those involving legal terms of art and inexplicit content) that meaning necessarily depends partly on original meaning and intent, then logic and consistency demand that this is its meaning for other purposes too. Any other approach is intellectually and legally unprincipled.

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[17] See, eg, Kenny S, 'The High Court of Australia and Modes of Constitutional Interpretation', in *Statutory Interpetation; Principles and Pragmatism For a New Age* (Education Monograph 4, Judicial Commission of New South Wales, 2007) 45.

[18] See text to nn 78-80, below.

III INEXPLICIT CONTENT: ELLIPSES, IMPLICATIONS AND PRESUPPOSITIONS

Consider the following examples of the inexplicit components of constitutional meaning. First, constitutional provisions can include ellipses: they can omit details that are conveyed by the context. For example, 'everyone has gone to Paris' means 'everyone in some contextually defined group has gone to Paris', not 'everyone who has ever lived has gone to Paris'.[19] Similarly, the Commonwealth Parliament's express power to make laws 'with respect to taxation' is a power to make laws 'with respect to Commonwealth taxation' and not 'with respect to all taxation [including state taxation]'.[20] Section 92 is notoriously elliptical: it provides that interstate trade, commerce and intercourse shall be 'absolutely free', which is now rightly understood to mean something like 'absolutely free from discriminatory protectionism' and not 'absolutely free from all constraint'.[21] Another example may be the opening words of s 71, that the judicial power of the Commonwealth 'shall be vested in' various courts, which have been interpreted to mean 'shall be vested exclusively in' those courts.[22] A fourth example is the phrase 'prevented ... from voting' in s 41: the High Court relied on contextual and purposive evidence to interpret this as meaning 'prevented ... from exercising a right to vote', the right having to be found elsewhere in the Constitution.[23]

Secondly, a Constitution can also include or depend on presuppositions (tacit assumptions) and other implications. As I use the term, presuppositions differ from what the philosopher HP Grice famously called 'implicatures'.[24] The latter are meanings that a speaker deliberately attempts to communicate through implication, by providing the audience with clues that they need to 'read between the lines'. Grice's best known example involves a professor who, asked to provide a reference for a student seeking an academic position in Philosophy, says (damningly) that he writes good English and regularly attends tutorials.[25] Deliberate implications are rare in legal texts, because lawyers usually attempt to be as explicit as possible to avoid any chance of misunderstanding. But presuppositions, or tacit assumptions, are not deliberately communicated by implication. Instead, they are taken for granted: they are so obvious that they do not need to be mentioned or (sometimes) even consciously taken into account.[26]

If background assumptions are not grasped, almost anything we say is open to being misunderstood in unpredictable and bizarre ways. To use an example I have discussed previously: if I order a hamburger in a restaurant, and carefully list all the ingredients I want, I do not think it necessary to specify that they should be fresh and edible, the meat not frozen, and so on. If I thought about this at all, I would expect it to be taken for granted. Even if I did specify those requirements, I would not think to add that the hamburger should not be encased in a cube of solid lucite plastic that can only be broken by a jackhammer.[27] My order implicitly requires a hamburger that can be immediately eaten without much difficulty.

The meaning of legal texts also inevitably depends on tacit assumptions that are taken for granted. Despite the attempts of lawyers who draft such documents to be very

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19 See J Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates* (2010) 236-38.

20 *The Constitution of the Commonwealth of Australia* s 51(2).

21 Or 'absolutely free from all unreasonable constraint'. See *Cole v Whitfield* (1988) 163 CLR 360.

22 See, eg, *NSW v Commonwealth* (the *Wheat* case) (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434;

23 *R v Pearson; ex parte Sipka* (1983) 152 CLR 254, 278 per Brennan, Deane and Dawson JJ.

24 HP Grice, *Studies in the Way of Words* (1989) 22-57, 138-43 and 268-82.

25 Ibid 33.

26 See J Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 150.

27 J Searle, 'Literal Meaning', in J Searle, *Expression and Meaning* (1979) 117 at 127.

explicit, some dependence on presuppositions is inescapable. They include simple common sense, which is why the old 'golden rule' requires that provisions sometimes be understood non-literally to avoid patent absurdities.[28] They may also include pre-existing legal principles such as *mens rea*, which is usually held to be implicit in statutes creating new criminal offences even without any express reference to it.[29] All the presumptions used in statutory interpretation can arguably be justified on this ground, in principle if not always in practice: the context provided by the general law often implicitly limits language that, read literally, would be over-inclusive.[30] They include the presumption that statutes are not intended to extend beyond territorial limits, to be retrospective, to over-ride fundamental common law freedoms, and so on.

It may be that constitutions rely on background assumptions more than other legal instruments, because they must be 'expressed in general propositions wide enough to be capable of flexible application to changing circumstances'.[31] Their method 'is rather to outline principles than to engrave details'.[32] Gaudron J once remarked that some fundamental doctrines are not expressed 'either because they are assumed by the Constitution, or because what they entail is taken to be so obvious that detailed specification is unnecessary'.[33] Jack Balkin has acknowledged that constitutional drafters sometimes 'leave things silent ... because certain matters go without saying [or] because they are implicit in the structure of the constitutional system'.[34]

One example may be the power of judicial review itself. This power was undoubtedly presupposed by the framers although it is not explicitly granted by the Constitution.[35] Another example of a tacit assumption may be the role of *stare decisis* in constitutional interpretation. As Balkin suggests, 'a common law system of precedents was entirely foreseeable and indeed is implicit in the constitutional framework of a country with a common law tradition'.[36] Other suggested presuppositions, or perhaps implications, that have been inferred from the Constitution include implied legislative powers, the separation of judicial power, and implications protecting the states from certain kinds of federal laws, which one judge described as 'tacit' or 'underlying assumptions'.[37]

Sometimes individual provisions are plainly based on tacit assumptions. Section 7 of the Australian Constitution empowers the federal Parliament to increase or decrease the number of Senators for each state, subject to a guarantee that 'equal representation of the several Original States shall be maintained'. This guarantee conspicuously fails to mention new states, which can be established by the federal Parliament under s 121, subject to 'such terms and conditions, including the extent of [their] representation in either House of Parliament, as it thinks fit'. Does it follow that Parliament could give a new state more Senators than the original states each have? Obviously not, given what we know about the intended role of the Senate; an undoubted purpose of s 121, when read with s 7, is to enable new states to be given fewer – but not more – Senators than the original states.

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28 J Bennion, *Statutory Interpretation* (2nd ed) 407.

29 *R v Tolson* (1889) 23 QBD 168 at 187; see also Lord Diplock in *Sweet v Parsley* [1970] AC 132 at 162-3.

30 For many examples, see Bennion, above n 28, Parts XVI, XVII, XXIII, and XXIV.

31 *Australian National Airways v Commonwealth* (1945) 71 CLR 29 at 81 per Dixon CJ.

32 *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 348 per Barton J; see also ibid 338 per Griffith CJ, and *Jumbunna Coal Mine No liability v Victorian Coal Miners' Association* (1908) 6 CLR 309, 343 per Barton J.

33 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 108 CLR 577, 650.

34 J Balkin, *Living Originalism* (2011) 204.

35 See C Saunders, *The Constitution of Australia, a Contextual Analysis* (2010) 75.

36 See Balkin, above n 34, 714.

37 *Victoria v Commonwealth* (1971) 122 CLR 353, 403 per Windeyer J.

These examples provide powerful support for originalism. Ellipses and presuppositions are difficult if not impossible to explain except in terms of original intention or purpose. A major challenge for anyone who rejects originalism is to provide a plausible alternative account of these commonplace aspects of legal meaning and interpretation. I am not aware of any serious effort to do so.

It is rare for legal implications to be logically entailed by express words.[38] Most legal implications therefore depend on some ingredient in addition to the words of the text, and this can only be evidence of their intended meaning or purpose. Ellipses depend on our understanding that speakers intend to communicate more than their bare words mean literally. Gricean implicatures depend on evidence of the speaker's intention to communicate something by implication.[39] Even when we say that something is implicit in or presupposed by an utterance, in the sense that it is taken for granted, we are saying that the speaker took it for granted. Texts cannot meaningfully be said to take anything for granted, at least not when their meaning is confined to literal meaning, severed from their authors' intentions. Strictly speaking, words do not have intentions or purposes. Only the people who use them do, and in the case of a constitution, it is natural to think that the pertinent people are those who founded it. For this reason, the orthodox view is that a Constitution is based on or embodies 'unwritten' or 'structural' principles, such as representative democracy, federalism, the rule of law and the separation of powers, only if and insofar as its provisions were intended by the framers to implement those principles.

IV IMPLICATIONS FROM UNINTENDED REFERENCE

Patrick Emerton, in an important contribution to the theory of originalism, contests my thesis that 'utterances of people well known not to intend something should be interpreted to imply that they did intend it only as a last resort, if there is no other way of making sense of their utterance'.[40] He asserts that 'it is possible for a word to refer to something even if its so referring would be at odds with the desires, expectations and intentions of the one who uttered the word'.[41] He describes this as an implication arising from an 'unintended reference'.[42] But even if this really is an implication of some kind, it is clearly not the kind of implication I was discussing in the passage he quotes, and I do not see how it can falsify my thesis. My thesis is that if people are well known not to intend something, their utterances 'should be interpreted to imply that they did intend it only as a last resort [etc]'.[43] To assert that an implication can arise from an 'unintended reference' (his words) is to speak of an implication that is unintended, and not of an implication 'that they did intend' (my words). Emerton and I seem to be concerned with implications of quite different kinds.

Later, Emerton discusses the example of the hamburger encased in unbreakable plastic, mentioned previously.[44] A customer orders a hamburger, obviously assuming that it will be a hamburger that can be readily eaten, and the waiter hands him one that is encased in unbreakable lucite plastic, saying 'here is the hamburger that you

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38 Some 'conventional' implications are expressed by words.

39 See above n 24.

40 J Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 182, quoted by P Emerton, 'Political Freedoms and Entitlements in the *Australian Constitution* – An Example of Referential Intentions Yielding Unintended Legal Consequences' (2010) 38 *Federal Law Review* 169, 170.

41 Emerton, ibid.

42 Ibid.

43 Ibid.

44 Ibid, 174-79; and see above n 27.

ordered'. Emerton claims that the waiter's statement is a counterexample to my thesis that 'utterances of people well known not to intend something should be interpreted to imply that they did intend it only as a last resort'.[45] He says that the waiter's 'words have a content that is at odds with what [he] would actually like to communicate'.[46] Although the waiter 'obviously' does not want to use the word 'hamburger' with the same referential content that it had in the customer's order, he does use it with that content.[47] This is because, by using the phrase 'the hamburger that you ordered', the waiter signals that he is using the words with that same content, and therefore finds his words 'inheriting content that is, to a certain extent, independent of his intentions'.[48]

I am unconvinced. What is it that the waiter is well known not to intend, which his statement ('here is the hamburger that you ordered') nevertheless implies that he does intend? It is surely not that he has satisfied the customer's order: the waiter expressly asserts this, and does not imply it. Normally people who make an unqualified assertion imply that they sincerely believe it. Does the waiter imply that he sincerely believes that he has satisfied the customer's order, even though it is obvious that he did not intend to do so? There is a difficulty: given that the waiter's assertion is not only false but obviously false, either the waiter's linguistic competence or his sincerity must surely be in doubt. If he seems linguistically incompetent, we should interpret his statement as misconceived: it is based on a misunderstanding of the referential content of the customer's order. If he seems insincere, we should interpret his statement as either a joke or a lie. If it is a joke then it does not imply that the waiter sincerely believes that he has satisfied the customer's order. His intention to make a joke cancels the implication of sincerity that would otherwise have been conveyed. Could it be a lie? It is, of course, possible to imply that one intends something that one does not intend, just as it is possible to expressly say that one intends something that one does not intend. Lies can be communicated impliedly as well as expressly. But my thesis, which Emerton challenges, concerns situations where it is well known that the speaker does not intend something: where a lie about his or her intention is transparent. Is it possible for someone to imply that they have a belief that they know they are well known not to have? Perhaps it is: after all, someone can expressly assert that they have a belief that they are well known not to have. Perhaps, then, if neither linguistic incompetence nor a jocular intention is involved, this is a case where a statement should be interpreted as falsely implying that the speaker has an intention that he is well known not to have. But is that not an interpretation of 'last resort'? My thesis that 'utterances of people well known not to intend something should be interpreted to imply that they did intend it only as a last resort' was originally followed by the explanation that, if a statement must be interpreted as implying such a thing, either the speaker's linguistic competence or his sincerity must be put in doubt.[49] I therefore reaffirm that thesis.

But perhaps this focus, on implications that someone intends something they are well known not to intend, is too narrow. Earlier, Emerton explains that he rejects my broader proposition that 'no implication (other than perhaps a strictly logical implication) can be drawn from a legal text which is at odds with the actual intentions of the authors of that text'.[50] His argument is that 'it is possible for a word to refer to something even if its so referring would be at odds with the desires, expectations and intentions of the one

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45 Ibid 178.
46 Ibid.
47 Ibid.
48 Ibid 177-78.
49 Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 157.
50 Emerton, above n 40, 169.

who uttered the word'.[51] But I have never denied this. Indeed, I have often made exactly the same point:

> In deciding what a statutory or constitutional provision means, the law-makers' enactment intentions may be critical. But once its meaning has been determined, and the question is how it applies [i.e., what it refers to] in a particular case, their further intentions are irrelevant. The law consists of the provision which the law-makers actually enacted, and not their possibly mistaken beliefs about its meaning or proper application.[52]

I discussed several examples, including the term 'psychopathic personality' in an American law enacted in 1952 that was intended to apply to homosexuals. I pointed out that today, the law would rightly be held not to apply to them, regardless of the law-makers' application (i.e., referential) intentions. If law-makers intended to use a term to refer only to a particular medical condition, then they are stuck with this even if it turns out that they had mistaken beliefs about the condition.[53] Clearly, I did not mean to include this phenomenon of the unintended reference of words within the category of implications that depend on evidence of authorial intention. Emerton is working with a broader conception of implication than mine. At the end of his article, he acknowledges that while it 'seems reasonable' to describe 'the working out of the consequences that flow from the referential intentions that the framers had' as 'the working out of an implication', 'it is not one of the four sorts of implication identified by Goldsworthy'.[54]

The difference between an unintended reference, and an implication that depends on evidence of authorial intention, proves crucial to what Emerton succeeds in demonstrating in his article. He undertakes to show that 'the political freedoms and entitlements that the High Court has purported to find ... can be understood as implications arising from such "unintended" reference'.[55] I freely acknowledge that he succeeds in providing a powerful argument that ss 7 and 24 of the Constitution now guarantee that women may vote, even though these provisions did not do so in 1900. His argument is an originalist one. It is that the law-makers may have used the words 'people of the Commonwealth' to refer to those categories of people who, at any particular time, generally play an active role in civic affairs and political decision-making.[56] When these categories change over time, so does the reference of those words. I welcome his conclusion, and applaud the reasoning that leads to it. As I once said, 'I would be only too pleased to be shown' that *obiter dicta* holding that women are now constitutionally entitled to vote are consistent with the principle of original, intended meaning, perhaps for some 'reason that I have overlooked'.[57] I acknowledge that Emerton has now shown this. I also accept his criticism that in my own lengthy examination of this issue, I was 'insufficiently sensitive to the existence of social and political kinds' that are distinct from legally constituted kinds.[58] But I do not accept that he succeeds in showing that the freedom of political communication established in *ACTV*, *Nationwide News* and *Lange* is

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51 Ibid 170.

52 Goldsworthy, 'Originalism in Constitutional Interpretation', above n 12, 30.

53 For this reason I plead not guilty to the charge of a 'failure to consider the importance' of interpretation depending on 'the nature of the things that are talked about', as well as the intentions of those doing the talking: Emerton, see above n 40, 171.

54 Ibid 202.

55 Ibid 170.

56 His argument must be adjusted to take into account the decision in *A-G for NSW; ex rel McKellar v Commonwealth* (1977) 139 CLR 527. There, the High Court held that in s 24 the expression 'people of the Commonwealth' cannot include people in the Territories, because otherwise the prescribed formula for allocating electorates among the States would be unworkable.

57 Goldsworthy, 'Originalism in Constitutional Interpretation', above n 49, 48.

58 Emerton, above n 40, 200.

implicit in the requirement of a direct electoral choice. I will explain why in what follows.

V 'NECESSITY' AS THE TEST FOR GENUINE AND SPURIOUS IMPLICATIONS

It is useful to reflect on what the Court is doing when it ascribes an implication to the Constitution. Is it always purporting to discover a genuine implication – one that the Constitution already includes – or is it sometimes adding a spurious implication – something that is really new – to the Constitution?

I have noted elsewhere that lawyers routinely use idiosyncratic legal terminology that describes terms being 'implied into' or 'read into' legal texts, and judges 'making implications' by 'implying' legal powers or legal limits.[59] This is idiosyncratic because, in ordinary English, terms that are genuinely *implied by* a text are *inferred from* it, and implications are *made* by the author of a text, not by its reader or interpreter. To speak of terms being *implied into* or *read into* a text by an interpreter is to use oxymoronic expressions that, in trying to have it both ways, defy ordinary English.[60]

It might be argued that these peculiar legal expressions are merely convenient lawyers' shorthand to describe the discovery of genuine implications. But this seems implausible, because it is only marginally more convenient (quicker and easier) to say that a term 'was implied into' a text, rather than that it was 'found to be implied by' the text. The best explanation is that these idiosyncratic legal expressions function as euphemisms, by blurring the distinction between the discovery of genuine implications and the insertion of spurious ones.[61] On this view, lawyers sometimes know that judges are really inserting terms into legal texts in order to improve them, but are reluctant openly to say it.

Some judges refuse to concede this. Windeyer J disapproved of the expression 'making implications', when he said: 'I would prefer not to say 'making implications', because our avowed task is simply the revealing or uncovering of implications that are already there'.[62] In *McGinty*, Brennan CJ agreed: 'Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis'.[63] They were insisting that implications must be genuine, not spurious, in my sense of those terms.

Although legal scholars and judges occasionally question it, the test most commonly used to identify implications in legal instruments is that they must be 'necessary'.[64] I have argued elsewhere that two different kinds of 'necessity' can be found in British and Australian case-law on implications, whether statutory or contractual.[65] One is practical necessity (or in contract law, business efficacy): it

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59 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 623 [39] (Gleeson CJ, Gummow and Hayne JJ); 629 [64] (Kirby J).

60 J Goldsworthy, 'Justice Windeyer on the Engineers' Case' (2009) 37 *Federal Law Review* 363, 371-72.

61 See Goldsworthy, above n 10.

62 *Victoria v Commonwealth* (the *Payroll Tax Case)* (1970) 122 CLR 353, 402.

63 *McGinty v Western Australia* (1996) 186 CLR 140, 168; approved in *Kruger v Commonwealth* (1997) 190 CLR 520, 567 (Gummow J).

64 For doubts, see *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 452-54 [384-89] (Hayne J); J Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 170; J Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645, 651-52, 656-57 and 676.

65 Discussed in J Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 168–70. See also E Peden, *Good Faith in the Interpretation of Contracts* (2003) 60–71.

consists of an alleged implication being practically necessary to enable some or all of the provisions of a legal instrument to be efficacious or achieve their intended purposes.[66] This can be called the 'practical necessity test'. The other is a kind of determinative necessity: it consists of interpreters being compelled to acknowledge an alleged implication because it is so obvious as not to be reasonably deniable. In contract law, the question has sometimes been said to be whether the court is 'necessarily driven' to the conclusion that some term is implied.[67] Lord Esher used the term in this sense when he said: 'necessary Implication means, not natural Necessity, but so strong a Probability of Intention, that an Intention contrary to that, which is imputed ... cannot be supposed'.[68] The term 'necessary' is used loosely here: what is really required is not that the implication cannot *possibly* be denied, but that it cannot *reasonably* be denied. Isaacs, Barton and Rich JJ said that 'necessary intendment only means that the force of the language in its surroundings carries such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable'.[69] Since a genuine implication depends on evidence that the author or speaker had a certain communicative intention, this amounts to a requirement that such an intention is, in the circumstances, obvious. This might be called the 'obviousness test'.[70]

In modern constitutional cases, the High Court has favoured the 'practical necessity' test. In *ACTV*, Mason CJ famously said that implications may be derived from the actual terms of the Constitution if 'the relevant intention is manifested according to the accepted principles of interpretation', but that 'structural rather than textual' implications 'must be logically or practically necessary for the preservation of the integrity of [some constitutional] structure'.[71] In *Lange*, the Court said that the implied freedom of communication 'can validly extend only so far as is necessary to give effect to ss 7, 24, 64, 128 and related sections of the *Constitution*'.[72] In *MZXOT v Minister for Immigration and Citizenship*, the Court rejected an argument that Chapter III of the Constitution impliedly confers on it a power to remit matters to other courts in order to protect its ability to properly discharge its essential constitutional functions. All the judgments approved of the statement in *Lange* requiring necessity,[73] and all refer repeatedly to the requirement that a suggested implication must be 'necessary' or 'essential' to the carrying out of constitutional functions.

Kirby J has explained that, because of the danger of the Constitution being altered without the democratic endorsement of the electors, 'this Court has exercised great restraint in deriving implications. Effectively, implications have been confined to those

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66 The version found in contract law is called the 'business efficacy' test: see Starke, Seddon and Ellinghaus, *Cheshire & Fifoot's Law of Contract* (6th Australian ed, 1992) 212–13. As for statutes, see *Slipper Island Resort Ltd v Minister of Works & Development* [1981] 1 NZLR 136, 139.

67 *Hamlyn* v *Wood* (1891) 2 Q.B. 488, 494 per Kay LJ, quoted with approval by Lord Atkinson, speaking for the Judicial Committee of the Privy Council, in *Douglas* v *Baynes* (1908) AC 477, 482. See also *Nelson* v *Walker* (1910) 10 CLR 560, 586 *per* Isaacs J; H Lucke, 'Ad Hoc Implications in Written Contracts' (1973) 5 *Adelaide Law Review* 32, 34.

68 *Wilkinson v Adam* (1813) 1 Ves & B 422, 466; 35 ER 163, 180; quoted by Kirk, 'Constitutional Implications (I)', above n 64, 649.

69 *Worrall* v *Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28, 32.

70 See Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 168; Peden, above n 65, 61–3.

71 (1992) 177 CLR 106, 135.

72 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567; see also *Coleman v Power* (2004) 220 CLR 1, 48-9 [89] (McHugh J).

73 *MZXOT* v Minister for Immigration and Citizenship (2008) 233 CLR 601, 623 [39], 635 [83-96] and 656 [171].

matters deemed truly necessary to give effect to the express constitutional provisions'.[74] Callinan J made very similar remarks in *APLA*.[75]

But as a test for genuine implications, the practical necessity test is dubious. Since it is possible for a provision that is essential to the practical efficacy of a legal instrument to have been omitted due to any number of possible mistakes by its framers, its practical efficacy cannot by itself prove that it was included by implication. For example, if the framers erroneously believed that the provision was not practically necessary to achieve any of their purposes, it is hardly plausible to regard it as an implicit assumption or any other kind of implication. Surely the framers' error would show that the Constitution needs to be amended to correct a deficiency, not that it already includes something they deliberately excluded from it. When what we have said or written turns out to be deficient, genuine implications do not magically spring up to protect us from our mistakes.[76] This strikes me as incontestable.

It follows that the obviousness test should be preferred to that of practical efficacy as the test for genuine structural implications. Instead of asking whether the alleged implication is practically necessary for the instrument to operate effectively, we should ask whether or not it is so obvious as not to be reasonably deniable. This test is perfectly suited to the recognition of presuppositions, because – as I explained earlier – they are 'taken for granted' precisely because 'they are so obvious that they do not need to be mentioned or (sometimes) even consciously taken into account'.[77] In some cases, of course, practical necessity might constitute evidence of obviousness.

On the other hand, spurious implications, which are not really there to be discovered, are not necessarily illegitimate, although calling them implications is misleading. Elsewhere, I have acknowledged that the difficulty of amending constitutions might be a reason for judges to be more creative when interpreting them, compared with other laws.[78] Consider the extent to which judges should remedy failures on the part of the constitution's framers to expressly provide for problems. They may have failed to anticipate a problem, because it was very unlikely to arise, or because they were too busy, or insufficiently astute, to do so. When interpreting statutes, judges are often reluctant to rectify failures of that kind, preferring to leave it to the legislature to do so. But when dealing with a constitution, it is arguable that they should be more willing to provide a solution. If, because of the framers' oversight, a constitution might fail to achieve one of its main purposes, the potential consequences are grave. They include the danger of constitutional powers being abused, of the democratic process or the federal system being subverted, of human rights being egregiously violated, and so on. If the constitution is extremely difficult to amend formally, or if amendment requires action by the very politicians whose misconduct needs to be checked, there may be good moral reasons for the judges to act. True fidelity to the constitution might justify this. As the great American jurist Learned Hand observed: 'In construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking.' But because this is 'a dangerous liberty, not lightly to be resorted to', it is essential that the need be 'compelling' and the interpolated provision be confined 'to the need that evoked it'.[79]Whether or not the judges should rectify a legal instrument, by in effect inserting some provision into it, is a different question from whether or not the provision can plausibly be regarded as already implicit

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74 Ibid 635 [83].

75 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 484.

76 Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 168–70.

77 See above n 26.

78 The following passage is taken from J Goldsworthy, 'Conclusions', in J Goldsworthy (ed), *Interpreting Constitutions, A Comparative Study* (2006) 321, 324.

79 L Hand, *The Bill of Rights* (1958) 29; see also ibid, 14 where he uses the term 'interpolate'.

in it. If judges decide to rectify a legal instrument, they should frankly acknowledge what they are doing, and not hide behind make-believe implications – unless they are morally justified by extraordinary circumstances in concealing what they are doing.[80]

In what follows, I assume that when some provision is logically or practically necessary for the Constitution to be efficacious or achieve one of its intended purposes, but is not a genuine implication, judges might nevertheless be justified in inserting it – 'implying it' or 'reading it' (to revert to that peculiar legal terminology) – into the Constitution.

I say they 'might' be justified, because not everything that is practically necessary for a law to be efficacious should be 'read into' it. Compare everyday requests and instructions. They implicitly extend to many incidental actions that are necessary to comply with them. For example, if I ask my son to 'bring some mustard' to the dinner table, he may have to do many things not expressly mentioned, such as turning on the kitchen light, opening the refrigerator door and shifting other items on the same shelf out of the way.[81] This is the uncontroversial basis of the implied incidental power that has been held to accompany every express grant of legislative power.[82]

On the other hand, requests and instructions should not be regarded as implicitly authorising any actions at all that might turn out to be necessary to comply with them. To the contrary, hypothetical examples show that they are often subject to implicit qualifications, which impose side constraints on efforts at compliance. In the case of my son being asked to bring some mustard to the table, if he were to discover that we had run out of mustard, he should not regard my request as implicitly authorising him to break into our neighbours' house and steal theirs, or (if he has no driver's licence) to drive illegally to a shop in order to buy some mustard. In these circumstances, any argument that my request implicitly authorises whatever is necessary to comply with it would be met by a much stronger argument, that it is implicitly subject to side constraints inherent in background assumptions prohibiting burglary and other unlawful actions.[83]

In principle, the same must be true of efforts to implement laws. If it turns out that a law simply cannot be effectively implemented without violating some side constraint that the lawmaker would undoubtedly not want to be violated, then the lawmaker has unintentionally created a dilemma that must be resolved in some other way.

The upshot is this. A genuine structural implication is one that satisfies the obviousness test. This is because, since the lawmakers did not expressly mention it, they must be shown to have taken it for granted, which requires that it was too obvious to need mentioning or perhaps even noticing. A structural provision that satisfies the test of practical necessity but not that of obviousness was presumably omitted because of some mistake on the lawmakers' part. The Court may be justified in correcting that mistake, to ensure that the law is efficacious, by inserting the provision into it ('making an implication'), provided that it does not violate one of the lawmakers' other purposes or commitments. (In what follows, I will not rely on this proviso, although I could have attempted to.)

The implied freedom of political communication does not satisfy the obviousness test.[84] For reasons explained below, the framers deliberately chose not to include a bill of

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80 See J Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, at 183; Goldsworthy, above n 10; Goldsworthy, 'Should Judges Covertly Disobey the Law to Prevent Injustice?' (2011) 46 *Tulsa Law Review* (forthcoming).

81 W Sinnott-Armstrong, 'Two Ways to Derive Implied Constitutional Rights', in J Goldsworthy and T Campbell (eds), *Legal Interpretation in Democratic States* (2002) 231.

82 L Zines, *The High Court and the Constitution* (5th ed, 2008) ch 3.

83 For this reason, Sinnott-Armstrong – who originally provided this example – was wrong to discount the relevance of original intent or meaning in resolving it: see Sinnott-Armstrong, above n 81, at 232.

84 See especially the discussion in section VI, below (under Sections 2 and 2*).

rights in the Constitution.[85] Rather than taking it for granted that the courts would protect a constitutional guarantee of free speech, that took the opposite for granted. They entrusted to parliaments, not courts, the responsibility for striking the necessary balances between competing rights, and between rights and other community interests, because they knew that this requires political rather than legal judgment, and political judgment should be accountable to the electorate. This allocation of responsibility was a basic presupposition that they shared with their intended audience at the time they enacted the Constitution. It might no longer be obvious today, but it was obvious to their immediate audience and to every generation of Australian lawyers until the 1980s. That is why the existence of such a guarantee was not even raised in argument before then, even though there were important cases in which it might have proved decisive if it had been.[86]

The implied freedom can only be justified, if at all, either by the practical necessity test, or by Emerton's reliance on the unintended reference of the words 'directly chosen by the people'.

VI ARGUMENTS FROM PRACTICAL NECESSITY

Arguments from practical necessity usually involve the following steps, even if the first is assumed:

> 1. A legal instrument includes by implication any norm that is logically or practically necessary for it to be efficacious or fulfil one of its intended purposes;
>
> AND EITHER:
>
> 2. A purpose of the Constitution, or some part of it, is *x*.
>
> 3. *Y* is practically necessary for the Constitution to achieve *x*.
>
> OR:
>
> 2*. The Constitution confers some right, power, privilege or immunity;
>
> 3*. *Y* is practically necessary for the efficacy of that right, power, privilege or immunity.
>
> AND:
>
> 4. Therefore, the Constitution includes *y* by implication.

All these steps warrant more detailed discussion. I have already queried step 1, and suggested that it requires amendment along the following lines:

> 1. Any norm that is logically or practically necessary for a legal instrument to be efficacious or fulfil one of its intended purposes is either: (a) included in that instrument by implication, if it also satisfies the obviousness test; or (b) should be inserted into that instrument by the judiciary, provided that it does not violate some other purpose or commitment of those who made it.

A *Steps 2 and 2**

Step 2 concerns the purposes of the Constitution, or some part of it. The first point to note is that this depends on the framers' intentions, because it depends on their having intended the Constitution to achieve some purpose. As previously observed, legal texts

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[85] This is acknowledged by four Justices: *ACTV* at 592 per Mason CJ; 631 per Dawson J; and 665-66 per McHugh J; *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 at 700-1 per Brennan J.

[86] Most notably, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

do not strictly have purposes; only the people who use them do. When we attribute a purpose to a legal provision, we are really attributing it to the law-makers who enacted the provision. If we could attribute to a provision or text whatever purposes we would prefer it to have, we could make it mean whatever we wanted: we could hold it to imply anything at all, simply by pretending that it had the requisite purpose. So evidence of the framers' intentions is crucial to this step of the argument.

The difference between steps 2 and 2* is that the former is concerned with the fulfilment of general, possibly very abstract, purposes, whereas the latter is concerned with the efficacy of specific provisions. Step 2 requires inferring a purpose from one or more provisions – and perhaps from the Constitution as a whole – by a process of extrapolation or induction, and then treating that general purpose as if it is a free-standing constitutional norm. The supposed purpose might be to implement some abstract principle that is only partially protected by the express provisions from which it is inferred.[87]

An American example of this kind of reasoning is the judgment of Douglas J in *Griswold v Connecticut*, who reasoned that because the Bill of Rights expressly protects several rights that could be regarded as aspects of a more general right to privacy, it protects that general right as well.[88] An Australian example is the judgment of Deane and Toohey JJ in *Leeth v Commonwealth*, who suggested that 'the existence of a number of specific provisions which reflect the doctrine of legal equality serves to make manifest ... the status of that doctrine as an underlying principle of the Constitution as a whole'.[89]

The suggestion is that, if a number of specific provisions appear to be instances of a general principle, they can be evidence that the principle as a whole is part of the constitution. I have no absolute objection in principle to this possibility. The question is how we should understand the nature of such inductive arguments, and of the implications they purport to reveal. Inductive arguments are inferences to the best explanation of some observed phenomena: they seek to explain the observed in terms of the unobserved. When used in science, for example, an inductive argument might take some observed regularities to be evidence of an underlying causal relationship that can be expressed by a general physical law. In the legal context, what is the nature of this unobserved (unexpressed) thing, which is the counterpart of the causal relationship? Legal provisions are the products not of mindless causal processes governed by physical laws, but of intentional human action. The legal equivalent of the underlying causal relationship revealed by scientific induction is therefore the law-maker's intention or purpose.

In other words, an inductive argument is persuasive only if particular provisions that selectively instantiate some general principle are evidence that the framers intended the principle itself, and not just the particular provisions, to be judicially enforceable. An implication is justified when there is sufficient evidence of the existence of such an intention. The catch, of course, is that if this is what the inductive argument points to, then other evidence that such an intention could not have existed will defeat the argument. Inductive arguments are defeasible, not conclusive: although they may constitute evidence of something, they can be defeated by stronger counter-evidence.

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87 For discussion of this kind of argument see Mark Walters, 'Written Constitutions and Unwritten Constitutionalism', in G Huscroft (ed), *Expounding the Constitution, Essays in Constitutional Theory* (2008) 245, 263; J Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 178-82; W Sinnott-Armstrong, above n 81, 234-38.

88 *Griswold v Conecticut* (1965) 381 US 479, 484; discussed by Sinnott-Armstrong, above n 80, 234-35.

89 *Leeth v Commonwealth* (1992) 174 CLR 455, 502.

A comprehensive review of the evidence will often reveal that the framers intended to pursue some general purpose, or implement some general principle, only by particular means and to a limited extent. As Terrance Sandalow pointed out:

> By wrenching the framers' 'larger purposes' from the particular judgments that revealed them, we incur a loss of perspective, a perspective that might better enable us to see that the particular judgments they made were not imperfect expressions of a larger purpose but a particular accommodation of competing purposes. In freeing ourselves from those judgments we are not serving larger ends determined by the framers but making room for the introduction of contemporary values.[90]

This is why the quoted suggestion of Deane and Toohey JJ in *Leeth* was utterly implausible.[91] We know that, although the framers of the Constitution deliberately protected particular rights to equality, they did not intend to protect a general principle of equality. This is because they included provisions designed to permit both racial and sexual discrimination,[92] and rejected a proposed clause to guarantee equality in general partly because they did not wish to proscribe racial discrimination.[93]

When the provisions of a legal instrument expressly cover only some instances of a potentially broader class, it is usually more plausible to infer that its limited coverage was deliberate, and to ascribe to it an implication that it excludes members of the class not expressly covered. That implication is expressed by the maxim *expressio unius est exclusio alterius*.

Judges are surely bound not only by the framers' ends, but by the means they selected to achieve those ends. That is why it has been said that the framers' decisions to omit provisions from the Constitution are entitled to as much respect as their decisions to include provisions.[94] Otherwise a constitution is just a set of abstract objectives, which the judges can choose to implement in any way they think fit. There is then no limit to the implications they can find. All the provisions of the Constitution could, collectively, be regarded as instantiating such abstract principles as 'democracy', 'freedom' or even 'justice', and anything not mentioned that (in the opinion of the judges) helps secure democracy, freedom and justice could then be regarded as impliedly guaranteed.[95] That was one of Justice Lionel Murphy's rhetorical gambits, when he based implied rights on propositions such as that '[i]t is a Constitution for a free society',[96] and a 'democratic society [is] contemplated by the Constitution'.[97]

The implausible and unconfinable nature of such reasoning is why, primarily at the urging of McHugh J, the High Court came to disapprove of reliance on such abstractions as 'representative democracy' as a basis for implications such as freedom of political communication and equality of voting power.[98] The Constitution was not intended to

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90 T Sandalow, 'Constitutional Interpretation' (1981) 79 *Michigan Law Review* 1033, 1046.

91 Goldsworthy, 'Implications in Language, Law and the Constitution', above n 2, 181-82. Jeremy Kirk attempts valiantly to make their position seem at least respectable, but even his criticisms are devastating: Kirk, 'Constitutional Implications (II): Doctrines of Equality and Representative Democracy', above n 3, 31-43.

92 *The Constitution of the Commonwealth of Australia* s 25, with respect to race, and s 30, read in the light of s 41 and the third paragraph of s 128, with respect to female suffrage.

93 L Zines, *Constitutional Change in the Commonwealth* (1991) 46.

94 The Hon M Gleeson, *The Rule of Law and the Constitution* (2000) 70.

95 See Sinnott-Armstrong, above n 81, 241.

96 *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369, 388.

97 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 87. See discussion in J Goldsworthy, 'Commentary', in M Coper and G Williams (eds), *Justice Lionel Murphy, Influential or Merely Prescient?* (1997) 259, 267.

98 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 202; *McGinty v Western Australia* (1996) 186 CLR 140, 232 and 235.

establish a representative democracy all by itself, and therefore was not intended to include everything necessary for that purpose. The framers adopted the Westminster system of representative democracy, in which democratic control of the executive government depends more on constitutional conventions, which are not judicially enforceable, than on laws. In the Westminster system, for example, executive powers are formally vested in the Crown; they are exercised in reality by the Prime Minister and Cabinet because of conventions which have developed over centuries but have mostly never been made into laws that courts can enforce. Conventions are enforced by political rather than legal means, and in the case of democratic control of the executive, by Parliament's power over governmental revenue and expenditure. Some of these conventions are given legal force in our Constitution, but by no means all. Therefore, the notion that representative democracy is a general principle established by the Constitution, so that everything necessary to establish it must be judicially enforceable, is false.

As for the protection of rights, the constitutional tradition we inherited from Britain was obviously not opposed to rights such as freedom of speech, but was opposed to judges having power to protect them from interference by legislation. With a few exceptions, our framers relied on other mechanisms for protecting rights, including constitutional conventions; the common law; presumptions of statutory interpretation; and community attitudes, of tolerance and respect for rights, expressed through the ballot box.[99] The framers pursued the protection of rights by particular means and to a limited extent, because competing principles or values were at stake.

This well established constitutional position formed part of our framers' mental framework, and few saw any reason to question it. It was a presupposition of the system of government they established. We know that they borrowed heavily from the American Constitution, but chose not to incorporate a Bill of Rights. They deemed it not only unnecessary but also unwise, generally speaking, to fetter parliaments with such limitations. They deemed it unnecessary because, given the progress of liberal ideas under British institutions, a democratic political system was considered the best possible guarantor of liberties. They thought it unwise because, as the many lawyers and politicians among them often pointed out, judicial interpretations of abstract constitutional guarantees could have unpredictable and undesirable consequences.

One might disagree with the framers' approach to this issue, but it is neither unreasonable nor demonstrably mistaken. There are occasions when laws are clearly unjust or undemocratic, and other things being equal, it would be a good thing if judges could strike them down. This can make it hard to understand why anyone would oppose giving judges the power to do so. The reason is that it is very difficult, and perhaps impossible, to give judges power to strike down only laws that are clearly unjust or undemocratic. However the power is worded, the judges will strike down many laws whose merits are debatable. In a healthy democratic society, cases of clear injustice are rare; in most cases, whether or not the law violates some basic right is open to reasonable arguments on both sides. The whole point of having a democracy is that in these debatable cases, the opinion of the majority rather than of an unelected elite is supposed to prevail. This is not necessarily because the majority is more likely to decide these cases correctly. It is because of the respect that is due to ordinary people, and their right to participate on equal terms in political decision-making that affects their lives as much as anyone else's. As Jeremy Waldron argues:

> If a process is democratic and comes up with the correct result, it does no injustice to anyone. But if the process is non-democratic, it inherently and necessarily does an

[99] On constitutional conventions, see G Marshall, *Constitutional Conventions, the Rules and Forms of Political Accountability* (1984) 201.

> injustice, in its operation, to the participatory aspirations of the ordinary citizen. And it does *this* injustice, tyrannises in *this* way, whether it comes up with the correct result or not.[100]

This is no small problem. A Bill of Rights must be written in broad terms, including rights to free speech, due process of law, equality before the law, and so on. But no such right can be absolute. This is just as true of rights such as free speech, which underpin electoral choices and democratic representation, as it is of rights of a more personal nature.[101] The right to free speech, for example, must sometimes give way to considerations of public safety, national security, unbiased adjudication in courts, people's reputations or rights to privacy, confidentiality, public decorum, and so on. But it is impossible to decide in advance and set out in a constitution how the rights it protects should be weighed against such competing interests. The power of judges to interpret and enforce rights is therefore the power to decide a vast number of controversial questions of public policy, and to substitute their decisions for those of our elected representatives. Thus, the price to be paid for giving judges power to invalidate a few laws that are clearly unjust or undemocratic is that they must also be given power to overrule the democratic process in a much greater number of cases where the requirements of justice or democracy are debatable. The consequence may be to confine democratic self-government 'to the interstitial quibbles of policy that remain to be settled after some lawyerly elite have decided the main issues of principle'.[102]

Step 2* is easier to justify than step 2, because it is less prone to permitting judicial amendment of the Constitution. When a provision confers a right, power, privilege or immunity, it is often entirely reasonable to infer that something necessary for the effective enjoyment or exercise of that right, power, privilege or immunity is so obvious that it was included by implication. As previously noted, everyday requests and instructions implicitly encompass many incidental actions that are necessary to comply with them but too numerous and difficult to anticipate to be enumerated (recall the 'mustard' example).[103] That is the basis of the implied incidental power.[104] Similarly, if the vindication of an express right truly depends on the protection of some incidental right, then it will often be plausible to construe the former as encompassing the latter. For example, if people have a right to vote in an election, but for practical reasons are able to vote only at a particular polling station, it would be reasonable to construe the right as overriding any attempt to prevent them from attending that polling station in order to vote.

B *Steps 3 and 3**

The most common problem with these steps is that the claim of necessity may be false. It is all too easy for judges to attribute necessity to some norm that is, at best, arguably desirable or reasonable. In *APLA Ltd*, Hayne J rejected an argument in favour of an implied freedom on the ground that:

> Demonstrating only that it would be reasonable to imply some constitutional freedom, when what is reasonable is judged against some unexpressed a priori assumption of what

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[100] J Waldron, in 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 50. See also J Goldsworthy, 'The Constitutional Protection of Human Rights in Australia', above n 7, 172, and T Campbell, 'Democracy, Human Rights, and Positive Law', above n 6.

[101] J Waldon, *Law and Disagreement* (1999) ch 13.

[102] J Waldron, 'A Rights-Based Critique of Constitutional Rights', above n 99, 49.

[103] Sinnott-Armstrong, above n 81, 232, 241-42.

[104] See above n 82.

> would be a desirable state of affairs, will not suffice ... The plaintiffs point only to matters that may make the asserted freedom desirable.[105]

Gleeson CJ and Heydon J said much the same thing.[106] In *Bennett v Commonwealth*, Kirby J observed that:

> Considerations of appropriateness or the avoidance of ... arguable injustice will not ordinarily be sufficient, of themselves, to justify imposition of an implied limitation on the constitutional text.[107]

This has always been my main objection to the proposition that the Constitution includes an implied freedom of political communication. Let us start with step 3. The notion that a judicially enforceable constitutional right to this freedom is necessary for the existence of representative democracy seems falsified by the existence of many flourishing democracies that have had no judicially enforceable right to free speech. Australia had an effective representative democracy for nearly a century, as did Canada until 1982, and many other western nations still have such democracies, in the absence of a judicially enforceable freedom. As Robert Dahl, one of the world's most eminent authorities on democracy, has said:

> No one has shown that countries like the Netherlands and New Zealand, which lack judicial review, or Norway and Sweden, where it is exercised rarely and in highly restrained fashion, or Switzerland, where it can be applied only to cantonal legislation, are less democratic than the United States, nor, I think, could one reasonably do so.[108]

Indeed, judicial interpretation of the First Amendment is at least partly responsible for one of the main obstacles to full, and perhaps even adequate, representative democracy in the United States: the practically uncontrolled and ever increasing influence of money, and therefore of very wealthy individuals and corporations, on political discussion and on politicians who desperately need funding to be competitive.[109] It is sometimes said that there is only one political party in the United States, the party of property, which has two branches, Democratic and Republican. Although this is a great exaggeration, it makes judicial enforcement of the revered First Amendment seem somewhat insignificant, if not positively harmful, in terms of its overall contribution to representative democracy.

Consider the High Court's decision to invalidate legislation that prohibited paid political advertising during election campaigns, and required the media to provide, instead, 'free time' for broadcasts by political parties. The Court held, in effect, that this legislation unreasonably restricted the free speech of those who can afford political advertisements. But the legislation was defended partly on the ground that it enhanced democracy, by reducing the disproportionate influence of wealthy corporations and individuals both on political debate, and on governments beholden to them for their financial support. The question is not whether that defence was sound, but whether it was reasonably arguable, and as Justice Brennan held in dissent, it surely was.[110] Otherwise

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105 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] and 454 [393].

106 Ibid, 352 [33].

107 *Bennett v Commonwealth* (2007) 235 ALR 1, 34.

108 R Dahl, *Democracy and Its Critics* (1989) 189-91.

109 See, eg, R. Dworkin, 'The Curse of American Politics', (October 17, 1996) *New York Review of Books*, 19, in which he calls for the reversal of the decision in *Buckley v Valeo* (1976) 424 U.S. 1.

110 See T D Campbell, above n 6.

the existence of similar legislation in many other western democracies would be very hard to explain.

The sheer effrontery of the claim that a constitutional right to freedom of political speech is necessary for the existence of representative democracy should be emphasised. The constitutional tradition we inherited from Britain, described previously, is very different from that of the United States. [111] It has recently been powerfully defended by the likes of Jeremy Waldron and Richard Bellamy.[112] The claim in question is that the United States' model of rights protection is not only more desirable, but necessary, if we are to enjoy the benefits of a genuine representative democracy. That is simply not plausible.

There is no necessity here. While extensive free speech is necessary, a judicially enforceable right to it is not. Freedom of speech, sufficiently ample to enable genuine electoral choices to be made, can be and has been effectively protected by cultural traditions and by the democratic process itself. That is partly why the implied freedom escaped the notice of Australian lawyers and judges from 1900 until 1992. Proponents of the implied freedom can reasonably hope to show that our representative democracy has been improved by the Court's 'discovery' of this implied freedom, but not that its very existence or survival depended on the discovery. But the former is plainly insufficient for their purposes. Showing that something would or did improve the Constitution is a very long way from showing that it is or should be held to be implied by the Constitution.

Emerton in effect renounces step 3, when he repudiates the proposition that the implied freedom is justified by its being necessary for representative democracy to flourish.[113] But he endorses step 3*, which asserts that the implied freedom of political speech is necessary to ensure that members of Parliament are 'directly chosen by the people', by ensuring that voters are able to make a genuine choice.[114] I do not see how these two positions can be consistent: how, that is, the implied freedom can be necessary for people to be able to genuinely choose their representatives, but not necessary for representative democracy to flourish. If my arguments against step 3 are persuasive, they are equally damaging to step 3*.

Emerton makes the perfectly reasonable point that 'the words direct choice must ... give rise to at least a minimal sphere of political freedom': 'an election simply will not be an instance of direct choice unless at least certain information is freely available for dissemination and discussion'.[115] But this takes the matter no further than Dawson J's position in *ACTV*. He denied that the Constitution includes a general right to freedom of political speech. But he acknowledged that Members of Parliament could not be 'directly chosen by the people', as ss 7 and 24 of the Constitution expressly require, if people were denied access to the information required to make a genuine choice.[116]

There is a crucial difference between, on the one hand, enforcing express provisions requiring that the people directly choose their representatives, which invalidate legislation restricting free speech only in extreme cases when it prevents them from doing so, and on the other hand, enforcing a free-standing right to freedom of political speech, which invalidates all laws deemed to infringe it, whether or not they prevent a genuine electoral choice. The first situation would arise if, for example, a government rammed legislation through Parliament to suppress any publication of the views of the opposition. If the Court could not invalidate the legislation, then the very possibility of

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111 See the discussion of Steps 2 and 2*, above.

112 Waldron, above nn 7, 99 and 100; R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2009).

113 Emerton, above n 40, 193 and 202.

114 Ibid 194 and 203.

115 Ibid 191-192.

116 J Goldsworthy, 'The High Court, Implied Rights and Constitutional Change', above n 2, 52.

genuine electoral choice in Australia really would be threatened. Dawson J would have invalidated hypothetical legislation of this extreme kind.[117]

It might be objected that, if it would be unconstitutional for Parliament to restrict political speech so drastically as to prevent a genuine electoral choice, then the Constitution must contain an implied right to freedom of political speech, and if so, then the freedom must be generally enforceable, even in cases involving much less draconian legislation. But that does not follow. The law of defamation before the High Court's decision in *Theophanous* may or may not have unreasonably restricted free speech, but no-one can seriously maintain that it prevented the people from making genuine electoral choices, and that every federal election from 1900 until 1994 was therefore invalid. It might be wondered whether, on a particular occasion, a genuine electoral choice was prevented because the law of defamation stopped the publication of information that might have persuaded voters to make a different choice. But it is equally possible that on some occasions a more relaxed defamation law would have prevented a genuine electoral choice by allowing public opinion to be manipulated by the publication of false information. It is precisely because it is reasonably arguable either way that the framers entrusted the policy decision to Parliament.

The Court has gone one huge step beyond enforcing the requirement of direct electoral choice. It has extrapolated from that requirement an implied freedom that it then applies largely independently of the requirement, invalidating laws deemed to infringe the freedom whether or not they prevent genuine electoral choices.[118] (The same objection can be made, *mutatis mutandis*, with respect to other constitutional provisions relied on in *Lange*.[119]) In other words, the implied freedom is vulnerable to the same kind of objection that McHugh J raised, to representative democracy being treated as a free-standing principle, independent of the constitutional provisions from which it is inferred, and which give it only partial effect.[120] Perhaps Emerton would agree with this, since he endorses Nicholas Aroney's proposal that the 'balancing' test be eliminated from the Court's jurisprudence insofar as it 'appeals to considerations independent of the constitutionally mandated requirement of direct choice'.[121]

What kinds of information and what means of communication are protected, and to what extent, are undeniably questions of degree. But only in a relatively extreme case would it be plausible to conclude that the people have been denied the ability to make a genuine electoral choice. The idea that an implication may be truly necessary only in a relatively extreme case has been adopted in other contexts. In *APLA*, Gleeson CJ and Heydon J observed that: 'The nature and extent of the freedom is governed by the

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[117] My argument is consistent with N Aroney, 'The Implied Rights Revolution – Balancing Means and Ends?', in HP Lee and P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent, Essays in Honour of George Winterton* (2009) 173, 182-84. Cf, J Kirk, 'Constitutional Implications (II): Doctrines of Equality and Representative Democracy', above n 3, 50-52.

[118] See, eg, the political advertising legislation invalidated in *ACTV* (above n 1) which could not seriously be argued to have made it impossible for the voters to make genuine electoral choices, even if it infringed free speech to some extent (which is debatable).

[119] *Constitution of the Commonwealth of Australia*, ss 1, 6, 7, 8 ,13, 24, 25, 28, 30, 49, 62, 64, 83 and 128: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557-58 and 561.

[120] On the other hand, the Court after *Lange* (see above n 72) is likely to require a closer connection between the political communication in question, and Commonwealth (as opposed to state) governmental and electoral decision-making.

[121] See Emerton, above n 40, 194, discussing N Aroney, 'The Implied Rights Revolution – Balancing Means and Ends?', above n 117, 187. On the other hand, Emerton claims to 'vindicate the general methodology and orientation' of the implied freedom of political communication 'as stated by the High Court in *Lange v Australian Broadcasting Corporation*': Emerton, above n 40, 169.

necessity which requires it',[122] and McHugh J said that '[b]ecause it arises by necessity, the freedom is limited to "the extent of the need"'.[123] McHugh J held that communications concerning the exercise of judicial power were not, in general, protected by the implied freedom, although 'in some exceptional cases, they may be'.[124]

In *McKinlay's* case,[125] five Justices held that the words 'directly chosen by the people' in s 24 were incompatible with gross inequalities in the sizes of electorates, but four of them did not require the strict equality urged by the plaintiffs.[126] They indicated a willingness to intervene in exceptional circumstances, but not otherwise. Stephen J referred to a 'spectrum' of possibilities with 'finite limits', and McTiernan and Jacobs JJ said 'it is a question of degree'.[127]

In *MZXOT*, it was argued that the High Court must have an implied power to remit matters to some other court, because this is necessary to prevent it from being swamped with so many cases that it is unable to discharge its essential constitutional responsibilities. In 2005 Parliament had, in fact, removed its power to remit certain immigration matters to the Federal Court and the Federal Magistrates Court. Gleeson CJ, Gummow and Hayne JJ concluded, in part, that 'the present magnitude of the burden thus placed on this Court is not such as to impair to a sufficiently significant degree the discharge of the other jurisdiction of the Court as to call into question the validity of the changes made in the 2005 Act'.[128] Kirby J agreed with them.[129] He added that '[e]ventualities can be conceived where a power of remittal ... might need to be implied to protect the essential constitutional character and function of this Court'.[130] 'For example, if the Federal Parliament were to repeal the universal special leave arrangements governing the appellate jurisdiction of this Court', or if it 'were to prevent all possibility of judicial review in mass jurisdiction subjects (such as migration decisions)', that might be the consequence.[131] But he rejected the plaintiff's argument that any statute that diverts proceedings to the High Court 'enliven[s] the necessity of a constitutional remedy by way of remittal'.[132] In his opinion, the postulated implied power would arise only in 'a case of necessity',[133] involving 'exceptional and apparently offensive legislation'.[134] But 'the circumstances revealed in these proceedings or otherwise known to the Court' did not give rise to that necessity.[135]

The approach correctly taken by the Court in *MZXOT* corresponds to the similarly cautious approach of Dawson J in *Australian Capital Television Pty Ltd* v *Commonwealth*.[136] In both instances, it is acknowledged that Parliament has authority to make laws that might affect a constitutionally significant matter (the workload of the High Court in *MZXOT*; political communication in *ACTV*); that in most cases, Parliament is entitled to decide whether or not a law's impact on that matter is justified by other considerations; that in an extreme case, its impact might be so severe that an essential

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122 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 350 [27].
123 Ibid 361 [66].
124 Ibid 361 [65].
125 *Attorney-General (Commonwealth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.
126 Ibid 57 (Stephen J), 61 (Mason J), and 35-6 (McTiernan and Jacobs J). The fifth Justice was Murphy J.
127 Ibid 57 and 36 respectively.
128 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 627 [53].
129 Ibid 628 [59].
130 Ibid 628 [60]; see also 643 [116].
131 Ibid 642 [112].
132 Ibid 642-43 [113].
133 Ibid 643-44 [118].
134 Ibid 646-47 [128].
135 Ibid 644 [119]. See also 647 [130] and 648 [134-136].
136 (1992) 108 ALR 577, 624.

constitutional function is frustrated (the Court's exercise of its constitutional jurisdiction; the voters' making of a genuine electoral choice); and that in such a case – but not otherwise – 'necessity' justifies an implication.

On the other hand, had the approach of the majority in *ACTV* been taken in *MZXOT*, the Court would have reasoned as follows: (a) it is practically necessary for the Court's exercise of its constitutional jurisdiction that it have sufficient time to do so; (b) therefore by implication, the Constitution guarantees that the Court has sufficient time to do so; (c) therefore, any law that reduces the time available to the Court to exercise its constitutional jurisdiction must be capable of being shown to the Court to be appropriate and adapted to fulfil some legitimate legislative purpose.

The difference between these two approaches is that the second one empowers the Court to review any legislation that has an impact on the constitutionally significant matter, and to decide whether the impact is justified, whereas the first approach empowers the Court to intervene only in a relatively extreme case when some constitutional function has been or will be frustrated. The first approach is more consistent with the structure of government that the Constitution was designed to establish, even if it is less consistent with the preferences of modern human rights advocates.

VII EMERTON ON THE REFERENCE OF 'DIRECTLY CHOSEN'

Patrick Emerton defends the implied freedom on the ground that it is part of the reference of the words 'directly chosen by the people', even though it was not intended by the framers.[137] He accepts that they intended representative democracy to depend not on constitutional requirements alone, but also on extra-legal constitutional conventions and practices. But he brushes this fact aside as of little significance. The framers used the words 'directly chosen' rather than other possible words such as 'directly elected'. If the words they used refer to something that they misunderstood – if they had false beliefs about what it referred to – then their misunderstanding must give way to what their words do refer to.[138] In fact, those words refer to acts that must be freely performed in an informed way. He therefore concludes that the words require the Court to protect freedom of political communication, as the Court held in *Lange*.

But Emerton's own theory surely leads to a different conclusion. He says that 'the framers used the words *directly chosen*, and therefore signalled a referential intention to locate their use of those words in a referential chain'.[139] This is an example of a point he emphasises earlier in his article, that 'words, on subsequent occasions of use, inherit content from earlier occasions of use'.[140] This happens when we appear to intend to use a word in the same sense that others have used it: with the same referential intentions that they had.[141] This is all true, but note that in this case, the referential chain that our framers latched onto began and continued within the British constitutional tradition in which there was no judicially enforceable right to freedom of communication. This means that Emerton cannot explain how the framers had false beliefs about the reference of those words, by showing that they latched onto a referential chain in which the words were used to refer to something they did not fully understand. This is because everyone who had previously used the words in the same referential chain almost certainly had the same beliefs as the framers.

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137 See the discussion of his general approach in section D, above.
138 See Emerton, above n 40, 193.
139 Ibid 193.
140 Ibid 176.
141 Ibid 179.

This objection to Emerton' argument can be strengthened by reliance on a related point that he accepts: 'the content of words may depend (at least in part) on implicit assumptions'.[142] The reference of phrases such as 'directly chosen by the people', as they are passed along a referential chain, cannot be determined in isolation from such assumptions. I have already explained some of the assumptions that our framers inherited from the British constitutional tradition. Those assumptions are implemented by other provisions of the Constitution, particularly those conferring various powers on Parliament to determine crucial aspects of our system of representative democracy, such as the right to vote.[143] There is a well-established principle of statutory and constitutional interpretation, that the meaning (including the reference) of any provision must be determined in the context of the entire instrument of which it forms part. The meaning of the requirement that the people must directly choose their representatives must be construed in the light of the Constitution as a whole, which was intended to institute a system of self-government in which Parliament makes policy decisions that include decisions about the system of representative democracy itself.

It might be possible to argue that, somehow, all or almost all previous speakers in the relevant referential chain had similarly false beliefs about the conditions necessary for voters to make a direct electoral choice. Emerton does not make such an argument, and may not want to, but does suggest how it might be attempted when he observes that 'a society's self-conception of its institutional arrangements, and of their salient features, may not always be correct'.[144] In that situation, 'we will be likely to misconceive what our words do and do not refer to, and hence will be unable to correct resultant errors in our belief and our assertions'.[145] Taking this lead, it might be suggested that, throughout British history, elections that were sincerely thought to involve 'direct choices' by electors were, in fact, not direct choices, because everyone (except, perhaps, for a few critics) was mistaken about the true nature of their own institutional arrangements and practices. I suggest that this is highly implausible. I have previously argued that the framers' beliefs about the essential preconditions for genuine electoral choices were not demonstrably mistaken or unreasonable.[146]

The reference of 'direct electoral choices', as used by the framers, was not 'direct electoral choices made in perfect conditions for the formation by every voter of a fully informed, fully rational and fully independent choice'. The framers knew that in the real world, even in a healthy democracy, direct electoral choices are inevitably made in imperfect conditions, which impose constraints on the receipt, and on the rational and independent consideration, of relevant information. Some of these constraints are inherent in the human condition: many (indeed, all) voters inevitably make their choices under conditions of partial ignorance, lapses in logic or excessive deference to the opinions of others. Other inevitable constraints result from laws designed to strike reasonable albeit controversial balances between competing rights and interests. The framers intended that Parliament should have the authority to strike those balances, even if many members of the community including judges disagree with its decisions. The reasoning underpinning the doctrine in *ACTV*, *Nationwide News* and *Lange*, if pushed to its logical extreme (the judicial quest for the perfect conditions for the making of genuine electoral choices), would have the following consequence. The Court would be required to determine the constitutional validity, not only of legal constraints on freedom of political communication, but also of legal constraints on access to governmental information, the expenditure of public funds on government advertising, legally

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142 Ibid 176.
143 See Aroney, above n 117, 179-180.
144 See Emerton, above n 40, 183.
145 Ibid 184.
146 See pp 25-26, above.

authorised concentrations of media ownership, the adequacy of public education in moulding the knowledge and critical thinking of future voters, and so on, in an ever widening circle. That is not a feasible judicial mission, yet any attempt to rule out these further implications of the underpinning reasoning is likely to be arbitrary.

VIII CONCLUSION

There are two main ways of resisting my arguments. One is to contest them on their merits, and engage in substantive debate. As to that, I can add nothing to what I have already said. The other way is to evade debate by dismissing the arguments as excessively technical, legalistic or even pedantic. While this response is rarely made explicit, I suspect that it often lurks in the background, because such arguments are found tiresome by proponents of 'progressive' judicial creativity. I will therefore try to explain, by way of conclusion, why I regard that response as wrong-headed.

First, my arguments merely elaborate on points that are neither inherently technical nor convoluted. They provide a theoretical defence of the approach adopted by Dawson J in *ACTV*, which was straight-forward and perspicuous. They do not require lawyers to embrace abstruse philosophical modes of analysis that are alien to common law reasoning.

Secondly, if it is possible for legal analysis to be excessively devoted to conceptual clarity and logical rigour, then it should be possible to identify some lesser or diluted degree of clarity and rigour that is optimal. This must be located somewhere on the spectrum between absolute clarity and rigour at one extreme (which is the usual but unachievable aspiration of scholars in any field), and blatant fantasy or make-believe at the other extreme. I cannot understand where on this spectrum the optimally diluted degree of clarity and rigour could possibly be located.

It cannot be the case that 'anything goes': that any rationalisation of a desired outcome, no matter how flimsy and obviously contrived, is acceptable. Even the most fervent supporters of increased constitutional protection of human rights must accept that there are criteria distinguishing sound legal arguments from unsound ones. After all, they often want to criticise judicial reasoning they disapprove of, and not only on the ground that they dislike its results. So virtually everyone accepts that legal argument should be logically guided and constrained by legal concepts, rules and principles. If so, it must be useful to seek to identify and clarify those concepts, rules and principles.

I see this as a particularly important task for legal scholars. The essential mission of every discipline within a University is the pursuit of truth about its subject-matter, through enquiry and reasoning that aspire to depth, rigour, consistency and clarity. The first and most important objective of scholarly legal research is therefore not advocacy of a cause, but the pursuit of truth about the law. Advocates may fabricate ingenious but specious legal arguments to advance a cause; legal scholars should not. Law Schools are also not law reform commissions, although recommendations for law reform can be an invaluable outcome of their research. Nor are they cheer squads for the High Court, or for judicial decisions regarded as politically progressive.

It is entirely legitimate for scholars to defend a relatively pragmatic approach to law and adjudication, aimed at deflating unwarranted pretensions of legal reasoning to logical rigour and objective truth, and emphasising the role of judicial choice, political and moral value judgment, and so on. But such a defence should itself be based on a rigorous enquiry into the truth about legal reasoning and adjudication. And please do not tell me there is no such thing as truth. If that were so, we might as well practice astrology.

Legal scholars must therefore be concerned with identifying and clarifying the concepts, rules and principles that do and should govern legal reasoning. But once we embark on that enterprise, I can see no principled way of compromising the aspiration for

complete clarity and rigour – no principled way of deliberately blunting the cutting edge of analysis – except by making an exception to avoid extreme injustice.

This issue boils down to whether, and if so when, a specious legal rationalisation of a desirable outcome should be knowingly endorsed. I think that only three alternatives are worth considering:

> (a) never;
> (b) only to avoid extreme injustice;
> (c) it depends in every case on weighing and balancing the value of logical analysis on the one hand, and of the desirable outcome on the other. In other words, the more desirable the outcome, the less logically compelling its legal rationalisation needs to be. This assessment requires a mature, pragmatic wisdom that most experienced appellate judges possess.

I have defended the second of these options elsewhere.[147] I would be very interested to consider arguments in favour of the third.[148]

[147] See Goldsworthy, above n 10.

[148] For one attempt, see J Brand-Ballard, *Limits of Legality; the Ethics of Lawless Judging* (2010), discussed in J Goldsworthy, 'Should Judges Covertly Disobey the Law to Prevent Injustice?', above n 80.