Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue

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INTRODUCTION

I have argued at length elsewhere that the Constitution can plausibly be said to include an implication only if there is evidence that the founders had the requisite intention. My argument was based on a more general theory of implications, in everyday life as well as law. Except for implications of strict logical entailment, what any utterance implies necessarily depends on something more than just the words uttered. My theory is that the 'something more' is persuasive evidence that the speaker or author meant more than his words alone convey, provided that the evidence is readily available to his intended audience.[1] Stephen Donaghue has recently attempted to refute my theory, and to show that implications can be found in the Constitution regardless of the founders' intentions, either by reasoning inductively, or by identifying what is practically necessary for the text to make sense.[2] In this article I will respond to Donaghue's criticisms.

Before doing so, some terminology used in my and Donaghue's previous discussions needs to be explained. Any utterance has a literal or 'sentence meaning', which is constituted by the dictionary meanings of its component words and rules of grammar. But the meaning which we attribute to an utterance is rarely as narrow and restricted as that. 'Utterance meaning', as distinct from 'sentence meaning', is determined by contextual as well as textual factors — information concerning when, where, by whom, and for what apparent purpose the words were uttered. That contextual information appears to be relevant because it illuminates the intentions of the speaker or author. It is therefore tempting to equate utterance meaning with a third kind of meaning, 'speaker's meaning', which is the meaning which the speaker or author intended the utterance to have. But I regard that equation as mistaken. Utterance meaning is sentence meaning, modified or supplemented only by contextual evidence of the speaker's meaning which is readily available to the intended audience. Utterance meaning differs from speaker's meaning because of that evidential constraint.[3]

If this distinction between utterance meaning and speaker's meaning seems puzzling, consider the following example. Suppose that on the basis of all the

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1 J Goldsworthy, 'Implications in Language, Law and the Constitution', in G Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 150 and 'The High Court, Implied Rights, and Constitutional Change', *Quadrant*, March 1995, 46.

2 S Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133 (hereinafter called 'Donaghue').

3 For a more detailed account, see J Goldsworthy 'Implications in Language, Law and the Constitution' op cit (fn 1) 150–61, and J Goldsworthy 'Marmor on Meaning and Interpretation' (1995) 1 *Legal Theory* 439.

evidence readily available to them, both textual and contextual, the speaker's intended audience interprets her utterance to mean x, but much later it is discovered by her biographer that she wrote in her private diary that she intended the utterance to mean y. Assume that the diary entry can be believed. Was the true meaning of her utterance x or y? In my opinion it is x, notwithstanding the discovery of the diary entry, because evidence of the speaker's meaning which was not readily available to her intended audience is irrelevant.

It is a fact of linguistic practice that although contextual evidence of speakers' meanings helps to determine the meanings of their utterances, there is still a difference between the two kinds of meaning. If there were not, it would be impossible to say to someone: 'you may have meant y, but you said x.' When Humpty-Dumpty claims, in 'Alice in Wonderland', that his words mean whatever he intends them to mean, he is right only up to a point. We can use words to mean something quite different from what they conventionally mean (as in the case of sarcasm), but only if sufficient contextual evidence of our intention to do so is readily available to our intended audience. If it is not, then the meaning of what we say will differ from what we mean to say. A speaker's meaning is wholly subjective, and in some cases may be known only by the speaker; but the meaning of an utterance is public, consisting of what it conveys to its intended audience.

I have argued that the meaning of a legal text, such as the Constitution, is its utterance meaning rather than its speaker's meaning. This generates a theory of statutory and constitutional interpretation which can aptly be described as 'moderate originalism', as opposed to 'extreme originalism'. Common law courts are willing to admit some, but not all, evidence of what the law-makers intended their laws to mean. One reason for that discrimination is that evidence of the law-maker's intentions is irrelevant to the meaning of the law if that evidence is not readily available to the law-maker's intended audience. As well as being consistent with everyday linguistic practices and understandings, this exclusion of esoteric evidence of intentions is essential to the rule of law.[4]

Moderate originalism provides a plausible explanation of what constitutional implications are, and what kind of evidence justifies their discovery, without being vulnerable to common objections to extreme originalism.[5] But a response to Donaghue's criticisms may be required in order to dispel doubts as to the soundness of that explanation.

[4] See J Goldsworthy 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, especially Parts 2 and 3.

[5] Id, Parts 4 and 5.

CONTEXT AS EVIDENCE OF INTENTION

Donaghue agrees that the literal, sentence meanings of the provisions of the Constitution are not the only meanings which can legitimately be attributed to it, and that contextual information, as well as dictionary meanings and grammatical rules, must be taken into account.[6] But he denies that this contextual information is relevant only because and in so far as it constitutes evidence of the founders' intentions.[7] I must say that I do not understand why. His disagreement seems to be inspired largely by my statement that 'it may be reasonable to attribute to a speaker an implicit assumption which she did not in fact implicitly assume. Hearers only have access to evidence of speaker's meanings, and not to those meanings themselves.'[8] According to Donaghue, this very significant 'concession', which I was 'forced' to make, 'water[s] down the concept of speaker's meaning', and leads to the conclusion 'that implications may be made by drawing on contextual factors that are not *in any real sense* reliant upon original intent':

> It is misleading and unnecessary to require these contextual factors to be "filtered" through the watered down version of speaker's meaning before they can be used in construing an utterance. They are direct evidence of utterance meaning, and *in no way depend upon the speaker's subjective intention.*[9]

But I have not 'watered down' the concept of speaker's meaning. My argument has never been that the meaning of a legal text is its speaker's meaning. Rather, I have argued in favour of utterance meaning, which is what all the evidence, textual and contextual, that is readily available to the speaker's intended audience, suggests was the speaker's meaning. What Donaghue calls a 'concession' is in fact an essential element of my theory; moreover, his conclusion does not follow from it. The fact is that we can never have direct evidence of the contents of other people's minds in the same sense in which we can have direct evidence of the contents of their bodies, which can be cut open and inspected. The only evidence of what is in their minds is indirect and defeasible: even if they tell us what their intentions are, they may be lying or deceiving themselves, and if they do not tell us, we have to rely on evidence which is even more indirect and uncertain. It is inevitable that this kind of evidence will sometimes mislead us into attributing to a speaker an intention which he or she did not have. But so what? Whenever we rely on circumstantial evidence to support the conclusion that something exists, there is a possibility of error. That possibility, even when it eventuates, does not demonstrate that our interest in the evidence is really independent of our interest in that thing.

Donaghue's error is clearly revealed in an example which he borrows from me, in an attempt to illustrate his point. If someone says 'I took your cheque to

[6] Donaghue, op cit (fn 2) 136–7 and 140–1.
[7] Ibid.
[8] J Goldsworthy, 'Implications in Language, Law and the Constitution' op cit (fn 1) 160, quoted by Donaghue, op cit (fn 2) 139.
[9] Id, 140–1, emphases added.

the bank', we take this to mean that the speaker took the cheque to a financial institution and not to a river bank. Moreover, we do so because we know that this is what is normally done with cheques, and without needing any other, more specific evidence of the particular speaker's intention. So far so good. Donaghue's error lies in suggesting that this shows how contextual information (our background knowledge of the normal handling of cheques) is used to determine utterance meaning *independently* of speaker's meaning. His error is clearly revealed when he concedes that this background knowledge might be over-ridden by 'any accessible evidence of the speaker's actual meaning . . . [I]f sufficiently clear [e.g., the speaker turns out to be an eccentric miser who stores cheques in a tin buried in a river bank] such evidence could . . . make it possible for the phrase to mean that the cheque had in fact been taken to a river bank.'[10] But how could this additional information about the particular speaker's meaning 'over-ride' our background knowledge of the normal handling of cheques if, as Donaghue claims, the latter constitutes 'direct evidence of utterance meaning, *and in no way depend[s] upon the speaker's subjective intention*'[11]? If it in no way depends on the speaker's intention, then why is it in any way affected by direct evidence of that intention? It is clear, surely, that it is over-ridden because it is used for the same purpose as the evidence which over rides it — to illuminate the speaker's meaning.[12] In the absence of evidence to the contrary, our knowledge of the normal handling of cheques justifies attributing to the speaker an intention to inform us that he took the cheque to a financial institution; but if we did have contrary evidence, we would attribute a different intention to the speaker.

LAWS AS COMMUNICATIONS

Donaghue's second main argument is that laws, including the Constitution, should not be interpreted as if they were 'communicative enterprises' — attempts to communicate the intentions of those who made them.[13] To me it is deeply counter-intuitive to think that when people enact laws they do not attempt to communicate anything, or that if they do, the interpretation of their laws should be based on the pretence that they do not. How strong are his reasons for making this counter-intuitive suggestion? His first reason is in fact not a reason at all. It is that 'laws need not be viewed communicatively simply because there is no sensible alternative. An alternative source of meaning is provided by the sentences themselves.'[14] In other words, laws have sentence meanings, fixed by social conventions which are quite independent of their speakers' meanings, and therefore can have meanings even if they are not

[10] Id, 141.
[11] Id, 140, quoted in the text to fn 7.
[12] For powerful arguments supporting this conclusion, see P D Juhl, *Interpretation, An Essay in the Philosophy of Literary Criticism* (1980) 90–9.
[13] Donaghue, op cit (fn 2) 143. The second argument is the subject of Part III of his article, titled 'A Noncommunicative Constitution?'.
[14] Id, 143.

treated as attempted communications. But this is merely an argument that it is *possible* to treat laws noncommunicatively, and not that it is *correct* to so treat them. Moreover, I have never denied that possibility, and I have certainly never argued that laws should be understood communicatively 'simply because there is no sensible alternative'. I have always acknowledged that a well constructed text necessarily possesses sentence meanings, which are objectively determined by the social conventions which fix dictionary meanings and rules of grammar. But I have argued that sentence meanings are too thin — too insubstantial — to exhaust the meaning of the Constitution, and Donaghue clearly agrees with me since he argues in favour of implications which cannot be derived from sentence meanings alone. Our disagreement concerns what kind of additional meaning the Constitution contains: I argue that it is best explained in terms of an attempt to communicate speaker's meanings, and Donaghue disagrees. But since the fact that the Constitution has sentence meanings cannot be a reason to think that it does not have an additional, richer meaning — which Donaghue accepts — it also cannot be a 'reason for not viewing the Constitution as a communicative enterprise.'[15]

Other reasons offered by Donaghue for declining to regard the Constitution as a communication governed partly by evidence of the founders' intentions are: first, that in this regard there is no good reason for Australians today to be ruled by 'the dead hand of the past';[16] secondly, that the meanings of constitutional provisions necessarily change over time, and therefore cannot be fixed by the founders' intentions;[17] thirdly, that it is either impossible or too difficult to identify who the founders were, and which of their intentions should be counted;[18] and fourthly, that the High Court has not adopted my approach, and given 'primacy to the pursuit of original intent.'[19] I have recently addressed these large issues elsewhere, and cannot repeat my arguments in detail here. In a nutshell, the 'dead hand' objection fails because it is the essence of law that decisions are governed by norms laid down in the past, and the 'changing meaning' thesis fails because it overlooks various ways in which the meaning or application of constitutional provisions can legitimately change over time consistently with a moderate originalist theory such as mine.[20] As for the alleged conceptual and practical difficulties involved in identifying the founders' intentions, they are greatly exaggerated.[21] Donaghue

[15] Donaghue does refer to a recent article by Heidi Hurd, who advocates a noncommunicative theory of law: 'Sovereignty in Silence' (1990) 99 *Yale LJ* 945. But he does not rehearse her arguments, other than the one I have just rejected. As for those other arguments, Joseph Raz has rightly responded that 'Hurd shows the need to relax the conditions Grice asserts for successful communication to take place. Clearly the difficulties she points to affect not only legislation but other ordinary instances of communication (which are not face to face)': J Raz, 'Intention in Interpretation', in R George (ed), *The Autonomy of Law, Essays in Legal Positivism* (1996) 249, 284 (fn 18).

[16] Donaghue, op cit (fn 2) 143–7.

[17] Id, 147–50.

[18] Id, 151–4.

[19] Id, 154–6.

[20] J Goldsworthy, 'Originalism in Constitutional Interpretation', op cit (fn 4), especially ss 5 and 6.

[21] Id, s 5.

undermines his own argument by admitting that many doctrines 'were capable of being incorporated into the Constitution by pre-supposition [one kind of implication]' *because* they 'were common ground between the framers, and indeed the Australian people.'[22] Precisely — and that is just about all I need. As for the fourth matter, the use made by the High Court of the founders' intentions, I have set out elsewhere the evidence which demonstrates that the Court has in general, and even in the implied freedoms cases, adopted a version of originalism.[23]

I would add one further thought. According to Donaghue:

> There is no evidence that the people of Australia thought that they were adopting a Constitution the meaning of which was governed by anything other than the words contained in the document. Even if this was their understanding at that time, no reason has been advanced for this choice remaining binding upon a new generation of people who have not voted for the Constitution.[24]

This is a potentially damaging argument for someone who favours implied freedoms. If the meaning of the Constitution is not 'governed by anything other than the words contained in the document', then there is no basis for implied freedoms. Donaghue needs to show that the meaning of the Constitution *is* governed by more than the words contained in the document. The question is: what is the nature of the necessary additional ingredient? Donaghue has doubts about the legitimacy of judges overturning 'the political decisions of representatives elected within the last three years' on the ground that they are inconsistent with 'political decisions made 100 years ago and incorporated into the Constitution', adopted after a referendum in which 'most women and minority racial groups were excluded.'[25] But if so, would it not be even more objectionable for such decisions to be overturned because they are inconsistent with political principles espoused by unelected judges, which have never been adopted by *anyone* in a referendum? Donaghue sometimes seems to believe that in doing this, the judges would merely be giving effect to the understandings of today's Australians, whose acceptance of the Constitution, he believes, makes it binding.[26] But he must meet the same demands he makes of originalists. He requires originalists to provide evidence that the voters who endorsed the Constitution in 1899 'thought that they were adopting a Constitution the meaning of which was governed by [more] than the words contained in the document.'[27] It is therefore reasonable to require him to provide evidence that Australians today, in accepting the Constitution, understand it to mean more than its words alone convey — and if so, what they understand it to mean. That is a very tall order, since he concedes that 'the idea of public acceptance is in many ways quite artificial. . . . [One poll] found that 33 per cent of Australians did not even know

[22] Donaghue, op cit (fn 2) 165.
[23] J Goldsworthy, 'Originalism in Constitutional Interpretation' op cit (fn 4) ss 2 and 3.
[24] Donaghue, op cit (fn 2) 144.
[25] Id, 143.
[26] Id, 146: 'The Constitution is binding only because the people accept it . . .'
[27] Id, 144.

that Australia has a written Constitution',[28] and undoubtedly the other 67 per cent know very little of its actual provisions. What Australians today understand the Constitution to mean — or, more accurately, what they would understand if they were asked, and went to the trouble of reading it, and perhaps also of learning something of its history and interpretation — would be an impossibly speculative and insecure foundation for implied freedoms.

No doubt that is why, in the end, Donaghue does not base implied freedoms on the 'understandings', such as they are, of contemporary Australians. Instead, he argues that such freedoms can be justified either by inductive reasoning, or by resort to 'presuppositions' (which seems to be another way of referring to 'practical necessity'). But as I will now demonstrate, neither of these alternatives is independent of the founders' intentions.

INDUCTIVE REASONING

Donaghue argues that when the High Court claims that some implications are 'logically necessary', it should be understood as claiming that those implications are derived by inductive, as opposed to deductive, logic. He explains that '[t]he inductive argument in the constitutional context is that because a number of provisions found in the document appear to embody a certain theme, these provisions should be seen as evidence that the theme itself is part of the Constitutional document.'[29] I have no objection in principle to this. The problem is how we should understand the nature of such inductive arguments, and of the implications they can be used to support. Inductive arguments use observations as evidence of the existence of something more than, or beyond, the observations themselves: in Donaghue's words, they point 'from the nature of the observed to the nature of the unobserved.'[30] An inductive argument does not create or constitute the unobserved thing — it is merely evidence of its existence. When used in science, for example, an inductive argument might take observed regularities to be evidence of a causal relationship, but the causal relationship does not owe its existence to the inductive argument. In the constitutional context, what is the nature of this unobserved thing — this implication? The provisions of a law are the products not of mindless natural processes, but of intentional enactment; the legal equivalent of the underlying causal relationship revealed by scientific induction is therefore the law-maker's intention. In other words, what Donaghue calls an inductive argument is persuasive only if and in so far as constitutional provisions linked by a common theme are evidence that the founders intended that theme, and not just the particular provisions, to be judicially enforceable. An implication is constituted by plausible evidence of the existence of that kind of intention. The catch, of course, is that if the right kind of

[28] Id, 146, fn 87.
[29] Id, 158.
[30] Id, 157.

original intention 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: they constitute evidence of something, but can be defeated by stronger counter-evidence.

I doubt that there is any other plausible way in which an inductive argument can be understood in the constitutional context. What else could be regarded as being part of the Constitution, in addition to the written provisions which are taken to be evidence of its existence?[31] Donaghue is silent on this crucial issue: he assumes that inductive arguments can be made, without explaining why — without offering any theory of the nature of the implications which those arguments supposedly reveal. But without at least a tentative theory, resort to an inductive argument makes little sense.

Donaghue doubts the validity of inductive arguments for another reason: 'it is possible for the specific provisions to be generalised in a range of different ways', and 'there does not appear to [be] any logical basis upon which one level of generality ... should be preferred to another.'[32] On my originalist understanding of inductive arguments, this is less of a problem. If these arguments are best understood as providing evidence of original intentions, then they can be supplemented or qualified by other evidence of those intentions, which can rule out many generalisations that would otherwise be logically open. In other words, Donaghue's difficulty with inductive arguments partly stems from his failure adequately to theorise them: without any conception of what it is that they are evidence of, they are completely open-ended and indeterminate. Be that as it may, he suggests that the problem of proliferating generalisations may mean 'that the provisions that are included in the Constitution cannot be generalised', and that the inductive strategy 'may not be legitimate.'[33] He therefore goes on to consider implications based on practical necessity.

PRESUPPOSITION

In the end, all attempts to justify the High Court's implied rights jurisprudence come down to the idea that implications such as that of freedom of political speech are practically necessary for the effective operation of the Constitution. Donaghue's argument is different only in that he attempts to connect the notion of practical necessity to that of presupposition, as it is used in contemporary philosophy of language.

According to Donaghue, doctrines can be 'pre-supposed by the *text*, whether or not they were pre-supposed by the *framers*.'[34] (It is therefore not clear why he says on the next page that many doctrines underlying the

[31] For a more general argument that any aspect of a text is relevant to the interpretation of that text only in so far as it is evidence of the author's intentions, see Juhl, op cit (fn 12), ch. 4.
[32] Donaghue, op cit (fn 2) 160 and 161.
[33] Id, 162.
[34] Id, 164, emphasis in original.

Constitution 'were capable of being incorporated into the Constitution by pre-supposition' *because* they 'were common ground between the framers, and indeed the Australian people'.[35] This is an originalist justification, consistent with my own approach.) He endorses the following analysis: 'Surface sentence A pragmatically presupposes a logical form L, *if and only if* it is the case that A can be felicitously uttered *only* in contexts which entail L.'[36] As he later paraphrases this requirement, '[i]f a statement *can only be sensibly made* if certain conditions are fulfilled, the fulfilment of these conditions is implied by making the statement.'[37]

In other words, *L is presupposed by sentence A only if sentence A does not make sense apart from L.* This is an extremely demanding requirement. Although Donaghue says that 'there is no need for a pre-supposition to be as obvious as Goldsworthy suggests an implicit assumption must be',[38] his own requirement is far more stringent than mine. Applied to the implied freedom of political speech, it surely cannot be satisfied: it requires that it would *not make sense* to attempt to establish a representative democracy without conferring power on the courts to protect that freedom.[39] To meet this requirement, it would have to be shown that all the arguments which have been made against giving such powers to judges (because it is undemocratic and so on) are not only wrong, but senseless! Try telling that to Jeremy Waldron, who recently published a brilliant critique of proposals to arm judges with such powers.[40] Of course, someone like Donaghue might not be persuaded by Waldron's arguments, but to reject them as senseless — rather than as merely mistaken — would itself be senseless. And if arguments such as Waldron's do make sense — as, of course, they do — then it could make sense to establish a representative democracy without giving judges the power to enforce freedom of political speech. That this could make sense is confirmed by the fact that many representative democracies of this kind have in fact been established: their existence is surely not senseless! This completely destroys Donaghue's argument based on the notion of pre-supposition. (It is not necessary to adduce the considerable evidence that our founders did not intend to give

[35] Id, 165.

[36] Id, 164, emphasis added.

[37] Id 165, emphasis added. This is surely an overstatement. If there is good evidence, available to the intended audience, that the speaker believed that it could sensibly be made without these conditions being fulfilled, and that he intended that they not be fulfilled, there is surely no justification for regarding his statement as containing the presupposition. Once again we are back to authorial intentions: the need for a presupposition, in order to make sense of a statement, is evidence that the presupposition exists only if it can be assumed that the speaker is sensible. Otherwise every stupid statement would be automatically 'self-correcting': it would be impossible for stupid people to say anything senseless, because their statements would always include by implication everything needed to make them sensible!

[38] Id, 164.

[39] Donaghue claims that responsible government 'is practically necessary in order to make sense of a number of other provisions that *were* included': id, 165 , emphasis in original. I do not think that even this claim is justified (dictatorial rule by a Governor-General may be extremely undesirable, but it makes sense), but it is required by his stringent definition of presuppositions.

[40] J Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18.

judges the power to enforce such freedoms, because Donaghue's argument does not depend on the contrary proposition: textual pre-suppositions, according to him, are independent of authorial intentions — they depend solely on their being necessary for a statement to make sense.)

PRACTICAL NECESSITY

Ultimately, Donaghue's defence of the implied freedom of political speech comes down to the usual argument that the freedom is practically necessary for the effective operation of representative government. But there are two fatal objections to this argument. First, it depends on the founders' intentions, because it depends on their having intended the Constitution to establish a representative democracy. Any argument that an implication is necessary for legal provisions to function effectively depends on what constitutes their 'effective functioning'. That depends on their purposes, which in turn depend on the intentions of those who enacted them. Strictly speaking, words don't have purposes — only the people who use them do. When we attribute a purpose to a provision, we are really attributing it to the law-maker who enacted the provision — so it depends on 'the dead hand of the past' after all! If we could attribute to a provision whatever purposes we would prefer it to have, we could make it mean whatever we wanted — we could hold it to imply anything whatsoever, simply by pretending that it had the requisite purpose.

As I have argued elsewhere, it is difficult to justify respecting the founders' intention to pursue some general purpose, such as the establishment of a representative democracy, but not their intimately linked intention to do so only by particular means and to a limited extent.[41] The available evidence strongly suggests that their intention was to continue to rely on the traditional methods of protecting freedoms with which they were familiar, that is, the common law, constitutional conventions, parliaments, and the electoral process, rather than judicial review. Even if their belief that these methods are sufficient to maintain representative government was erroneous, how can the Constitution plausibly be interpreted to include an implication contrary to it? This would require the following reasoning:

1. The law-makers wanted the law they created to achieve x;
2. The law-makers did not expressly include y, partly because they did not believe that y is necessary to achieve x;
3. The law-makers were wrong: y is necessary to achieve x;
4. Therefore, the law includes and has always included y by implication.[42]

[41] J Goldsworthy, 'Implications in Language, Law and the Constitution' op cit (fn 1), 180.

[42] This in fact appears to be the reasoning of Sir Anthony Mason, in 'The Interpretation of a Constitution in a Modern Liberal Democracy', in C Sampford and K Preston (eds) *Interpreting Constitutions, Theories, Principles and Institutions* (1996) 13, 26–7.

What an extraordinary conclusion! The law-makers' supposed error is taken to show, not that the law they made needs to be amended, but that it already includes something which they consciously excluded from it, because they ought to have included it! If there is any precedent for such reasoning in the annals of the common law, I would be very interested to see it.[43]

But put this first objection aside. As powerful as it is, a second objection is even more powerful. The 'lion in the path' of any argument that judicial enforcement of freedom of political speech is practically necessary for the effective operation of our representative democracy is that while extensive free speech is necessary, a judicially enforceable freedom is obviously not.[44] My provocative use of the word 'obviously' is deliberate. It is obviously not necessary, because 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, arguably the world's most eminent student of 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.*[45]

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.[46] It is sometimes said that there is only one political party in the United States, the party of property, and that it has two branches, Democratic and Republican. Although this is a great exaggeration, it makes judicial enforcement of the First Amendment seem rather insignificant, if not positively harmful, in terms of its overall contribution to representative democracy.

The upshot is that proponents of implied freedoms can reasonably hope to show that our representative democracy would be *improved* by a judicially

[43] To defend this reasoning on the ground that the founders had an over-arching intention that any provision subsequently thought to be practically necessary for the fulfilment of any of their other intentions should be held to be part of it, even if they themselves did not believe and probably would not agree that the provision is practically necessary, is to agree with me that implications depend on the founders' intentions, and to adopt a kind of originalism. But it is extremely implausible to suggest that the founders intended to give the High Court a blank cheque to add to the Constitution whatever future judges might happen to believe is necessary for its effective operation, regardless of whether or not the founders believed or would have agreed that it is.

[44] Every argument I have seen in support of the implied right to freedom of political speech has overlooked this distinction: for a recent example, see Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' op cit (fn 42) 26–7.

[45] R Dahl, *Democracy and Its Critics* (1989), 189–91, emphasis added.

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

enforceable freedom of political speech, but not that it depends for its very existence or survival on such a freedom. But the former is plainly insufficient for their purposes. Showing that something would improve the Constitution is a very long way from showing that it is already implied by the Constitution.

The argument from practical necessity is usually bolstered by an appeal to hypothetical extreme cases. For example, what if 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 survival of representative democracy in Australia really would be threatened. Donaghue alleges that I (and McHugh J) are 'committed to the belief that sometimes rights which are essential to the maintenance of representative democracy may be taken away, if the institutions to which their protection is entrusted fail. They are also committed to the argument that the Court should not attempt to prevent this.'[47] This is a misunderstanding. As I have pointed out elsewhere, even Justice Dawson, who denies that the Constitution includes a general freedom of political speech, would invalidate hypothetical legislation of this extreme kind. Members of Parliament could not be 'directly chosen by the people', as sections 7 and 24 of the Constitution expressly require, if people were denied access to the information required to make a genuine choice.[48] Furthermore, if there were a real threat to democratic government, emanating from another branch of government, which was not inconsistent with any express constitutional provision, the Court could appeal to the common law doctrine of necessity, to an implied duty to preserve the Constitution, or perhaps to a common law power of rectification in order to prevent the frustration of its most basic purposes.[49] There is no need to fear that the Court would be unable to make a plausible claim to have legal authority to deal with such a threat. (Whether it would have real power to do so is, of course, another matter, but we can be sure that the resolution of the crisis would not depend on legalities.) The point is that none of the implied rights cases have involved such a threat, and judicial enforcement, on a regular basis, of a general freedom of political speech is not necessary to deal with it.

It is sometimes argued 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 freedom of political speech, and if it does, then the freedom must be generally enforceable, even in cases involving much less draconian legislation. But this argument is fatally flawed. There is a difference between, on the one hand, enforcing express provisions which require that the people directly choose their representatives, and therefore 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

[47] Donaghue, 163–4.
[48] J Goldsworthy, 'The High Court, Implied Rights and Constitutional Change', op cit (fn 1) 52.
[49] J Goldsworthy, 'Implications in Language, Law and the Constitution' op cit (fn 1) 183.

freedom of political speech, which invalidates all laws deemed to infringe it, whether or not they prevent a genuine electoral choice. For example, the law of defamation before the High Court's decision in *Theophanous v Herald and Weekly Times Ltd*[50] 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.[51] It is beside the point that the concept of a 'direct choice' is somewhat vague, and therefore that it is impossible to draw a clear dividing line between restrictions of free speech which do, and those which do not, prevent a genuine electoral choice. Many conceptual distinctions, including legal ones, are vague, but we do not therefore dismiss them as illusory. There is an undeniable difference between day and night, even though at dusk and dawn it is impossible to draw a clear dividing line between them. The existence of hard cases, in the region where one vague concept merges into another, is compatible with the existence of a much larger number of easy cases, where the application of the two concepts is straightforward. Lawyers should not be panicked by the prospect of hard cases into losing their grip on the conceptual distinction in question.

CONCLUSION

Donaghue attempts to provide a more sophisticated defence of the implied freedom of political speech than the usual, simplistic argument that the freedom is practically necessary for the effective functioning of representative democracy. He does so by introducing into the debate the notions of inductive logic and presupposition. I have argued that, on closer inspection, these notions do not assist the case in favour of the implied freedom. That is why, in the end, Donaghue's defence does depend on the simplistic argument, which is subject to two powerful objections which to me seem decisive. The second objection is particularly powerful: it is that the argument rests on a premise which is obviously false, namely, that it is impossible to have a genuine representative democracy in which judges do not have power to enforce a constitutionally entrenched freedom of political speech. Proponents of the implied freedom must respond to the two objections. A good start would be to acknowledge their existence. One thing is certain: the simplistic argument just won't do.

[50] (1994) 182 CLR 104; 68 ALJR 713.

[51] It might be wondered whether, on a particular occasion, a genuine electoral choice was denied because the law of defamation prevented the publication of information which might have led to 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 because it is arguable either way that the founders entrusted the policy decision to Parliament.