Freedom of Speech and the Constitution

Australian Capital Television and the Application of Constitutional Rights

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The case of *Australian Capital Television v Commonwealth*[1] has already attracted a great deal of commentary.[2] Much of this discussion has been concerned with the way in which the High Court grounded the implied right of free speech in the Constitution. Other critics have worried about the correctness of the actual decision — whether it properly took account of all the concerns, in particular the state's interest in protecting the political process. In this note I am not concerned with the way in which the Court did or should have drawn implications from the Constitution. And while I am interested in that part of the Court's judgment which applied the implied right, it is the form or structure within which this was done that attracts my attention rather than the merits of the actual decision.

The legal reasoning at work in constitutional adjudication, like all legal reasoning, is a matter of the application of general principles regarding what ought to be done to a particular set of circumstances. This bringing together of a universal with the particular is usually treated in law as a two-stage affair. First the law has to be found. In the case of constitutional analysis this involves the interpretation of the relevant constitutional provisions. Secondly, the law as interpreted has to be applied to the facts of the case; the Constitution has to be made to speak to the particular occasion. My intention is to give an account of how this second stage works with regard to constitutional rights.[3]

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1 (1992) 177 CLR 106.

2 See especially the papers by Barendt, E, Zines, L, Coper, M, Campbell, T and Tucker, D, in the *Symposium: Constitutional Rights for Australia?* (1994) 16 *Syd LR* 145, Douglas, N, "Freedom Of Expression Under The Australian Constitution" (1993) 16 *UNSWLJ* 315 and Cass, D, "Through the Looking Glass: The High Court and the Right to Free Speech" (1993) 4 *Public LR* 229.

3 In separating application so sharply from interpretation I rely on the fact that this is a commonplace of legal practice. It is doubtful whether this distinction can be sustained in other contexts. I have in mind two influential accounts in twentieth century philosophy which for different reasons reject this distinction: Gadamer, H G's account of hermeneutics in *Truth And Method* (1992) especially at 274–304 and Wittgenstein, L's discussion of rule following *Philosophical Investigations* (1958) s143–242. These criticisms have found their way into legal theory; for some references among many see, Leyh, G (ed), *Legal Hermeneutics* (1992), Sherman, B, "Hermeneutics in Law" (1988) 51 *Modern LR* 386, Eskridge, W, "Gadamer/Statutory Interpretation" (1990) 90 *Columbia LR* 609 (on Gada-

The attractions of such an account are, I think, two-fold. First, it will make clearer the intellectual framework within which the application of constitutional rights occurs. Second, as it is not always appreciated that this framework has a normative dimension, it is of some interest to identify and discuss, if only in general terms, a number of the values and concerns involved.

I

Before we consider *Australian Capital Television v Commonwealth* it will prove instructive to compare the way in which the constitutional right of free political discourse was applied in that case with the approach which the High Court took in a number of earlier "rights cases". For this purpose let me remind you of two well known cases from the 1940s — *Adelaide Company of Jehovah's Witnesses v Commonwealth* (the *Jehovah's Witness* case)[4] and *Gratwick v Johnson*.[5]

In the *Jehovah's Witness* case the Court faced the problem of whether or not certain provisions of the *National Security (Subversive Associations) Regulations* 1940 (Cth) contravened section 116 of the Constitution — the constitutional provision which guarantees the right to practise religion free of government interference. As far as one can bring together the various judgments, the Court approached the task of applying section 116 as follows:

1. This case involves a clash of interests — the individual interest in the freedom of religion versus the interest of the state in its self-preservation. As section 116 does not establish an absolute right to freedom of religion the question for the Court becomes — do these regulations *unduly* infringe the constitutional guarantee?[6]
2. If religious freedom is to be protected by law the state must continue to exist. Restricting conduct which is inconsistent with the maintenance of civil government, it follows, is not a breach of section 116.[7]
3. The crucial issue for the Court is thus can these regulations be characterised as laws necessary to protect the existence of the community? Or, more particularly, can these regulations be sufficiently connected to the legitimate goal of preventing individuals or groups subverting the war effort?[8]

To the modern reader it is step 2 in this argument which is a little puzzling. For while the problem was originally set up as one which involved a clash of interests (freedom of religion versus state security) all the tension is removed from this confrontation if these interests are contained within their separate categories. Once it is acknowledged that the freedom guaranteed by section

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mer) or Marmor, A, *Interpretation and Legal Theory* (1992) ch 7 and Patterson, D, "The Poverty of Interpretive Universalism" (1993) 72 *Texas LR* 1 (on Wittgenstein). But all of this has had no apparent effect upon legal practice.

4 (1943) 67 CLR 116.

5 (1945) 70 CLR 1.

6 Above n4 at 131 per Latham CJ, at 149 per Rich J, at 154–5 per Starke J, at 157 per McTiernan, at 159 per Williams J.

7 Id at 131–2 per Latham CJ, at 149–150 per Rich J, at 155 per Starke J, at 160 per Williams J.

8 Id at 132 per Latham CJ, at 155 per Starke J, at 160–1 per Williams J.

116 cannot be allowed to undermine the security of the state then Rich J, for example, can say rather breezily: "[a]ny competition between governmental powers and liberty under the Constitution can be reconciled and made compatible. They co-exist without invasion of their respective spheres of action".[9]

It is not that the claim that individual rights can only be achieved in an ordered society is absurd. Far from it. Readers of modern political philosophy will find this a familiar idea. It is rather that the acceptance of this general point by the Court would appear to make its reasoning all too categorical and to channel the attention of the judges away from a number of central issues. Once the case came to turn on the question of whether the regulations were necessary for the defence of the Commonwealth this appeared to foreclose further inquiry into such matters as the effect of the interference upon the religious freedom of the Jehovah's Witnesses or some assessment by the Court of the appropriateness of these particular regulations as a means of prosecuting the war.

Gratwick v Johnson dealt with an order made under the *National Security (Land Transport) Regulations* 1944 (Cth) which forbade interstate rail travel without a permit. The Court had to decide whether this order contravened section 92 of the Constitution — the requirement that intercourse between the States be absolutely free. The Court's response may be rendered as follows:

1. The freedom guaranteed by section 92 is not absolute; it does not require that interstate intercourse be free from all legislative control.[10]
2. The crucial distinction here is between laws which are directed against the movement of persons interstate and laws which only regulate this movement as an indirect consequence.[11]
3. Here the order *directly* restricts the freedom protected by section 92 and is thus invalid.[12]
4. While it is conceivable that the exigencies of conducting the war could justify this degree of regulation, the facts which would support this claim were not established.[13]

Again it is step 2 which seems unsatisfactory. The categories taken from section 92 learning at that time of direct and indirect regulation would appear to keep the Court from the real issues, namely, some assessment of the adequacy of the means chosen by the Commonwealth to promote the security of the state and the effect of this law upon the basic right of freedom of movement.

I am not suggesting that the judges in these two cases were able to come to a decision without *any* regard for legislative ends and means. In considering the question of whether a constitutional right is unduly infringed, a reviewing court — whether it openly acknowledges it or not — is always forced to form *some* assessment of the legislative goals and of the means being used to achieve them. It must at some stage of the analysis ask itself such questions as: just how worthy are the ends which the government says that it is attempting to

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9 Id at 150.
10 Above n5 at 13 per Latham CJ.
11 Id at 13–4 per Latham CJ, at 17 per Starke J.
12 Id at 14–5 per Latham CJ, at 16 per Rich J, at 17 per Starke J, at 20 per Dixon J, at 21 per McTiernan J.
13 Id at 12 per Latham CJ, at 16 per Rich J, at 20 per Dixon J.

achieve; how closely tailored are the means to these legislative purposes; and are there any less drastic means which might have been chosen?

What does appear odd about the *Jehovah's Witness* case and *Gratwick v Johnson* is that at a crucial stage of their reasoning the judges turned the application of constitutional rights into a problem of characterisation and asked whether the law before them, on a proper reading of it, could be said to fit into this or that legal category. Was its true character such that it could be described as, say, a law necessary for the defence of the Commonwealth or a law which directly restricted interstate movement? *Australian Capital Television v Commonwealth*, on the other hand, exemplifies a less formal approach; one which sees the application of constitutional rights as more a matter of the weighing or balancing of competing interests and less a process of finding the "true nature" of the law under challenge.

I turn now to *Australian Capital Television v Commonwealth* and start my analysis with the judgment of Mason CJ. I take up his argument at the half way mark, at the stage after he found a constitutional right of free speech.[14] The way in which he applied this right to the facts of the case may be summarised in point form as follows:

1. The guarantee of free speech is not an absolute right. It will not always prevail over competing interests.
2. It is up to the government to justify its restrictions on free speech.
3. In this area a distinction should be made between restrictions which target the content of ideas and those which merely go to the means of communication. A higher standard of justification is needed for the first type of restriction.
4. Here the law deals with political discussion during an election. As this goes to the content of ideas the Court must scrutinise these requirements with "scrupulous care".
5. The claims made on behalf of its legislation by the government should not be accepted at face value (that is that the laws were passed to free the political process from corruption and distortion). Due weight should be given to the legislative judgment about these matters but ultimately the question of constitutionality is one for the court. Experience shows that the advantages of free speech generally outweigh any detrimental consequences.
6. The provisions of the Act dealing with "free time" discriminate between political actors to the advantage of elected politicians and their parties.
7. As the government failed to show a compelling or even a reasonable justification for its Act, it offends against the constitutional right.

To comment in turn upon most of these points. Step 1 expresses the familiar idea that behind a constitutional right invariably stands a number of competing interests. It is not enough to show that the law infringes the right, because in the appropriate circumstances rights, even constitutional rights, may not apply. The question is not whether the right is infringed but whether the right is *unduly* infringed. The crucial issue of which party bears the onus

14 Above n1 at 142–7.

of proof is dealt with in step 2. Mason CJ draws here upon a basic principle of public law, namely, that it is up to the state, in this case the Commonwealth, to justify its law. The Commonwealth must establish both that it has the power to pass the law and that there are no constitutional limits to this power.

The standard of proof which the Commonwealth must satisfy is discussed in steps 3 and 4. Borrowing from American case law, a distinction is drawn between the content of ideas on the one hand and their mode of expression on the other. A higher level of scrutiny, and thus a higher standard of proof, a compelling rather than a reasonable justification, is demanded of laws which restrict the content of ideas. It could be said that the restrictions in this case deal with the means of communication for they are addressed to the time and manner of radio and television broadcasting. But the specificity of their scope, that they pick out matters relating to political discussion at election time, leads Mason CJ to find that they are really directed at the content of ideas. While the difference here between content and form is not readily apparent, drawing the distinction correctly did not matter ultimately to Mason CJ's decision. For as step 7 indicates he found that the Commonwealth had not even satisfied the lower standard of proof.

Steps 5 and 6 deal with the ends which this law was intended to serve (the reduction of corruption and undue influence on the election process) and the particular means which the Commonwealth had chosen to achieve these ends. Mason CJ felt that he could dispose of these matters by (A) asserting the principle of judicial review (that issues of constitutionality are ultimately for the court), (B) referring generally to history and to what our experience shows about attempts to restrict free speech and (C) drawing attention to a side effect of the law, that it operated in a discriminatory way.

Brennan J also saw the problem of application as one of balancing competing interests but the way he approached this task proved much more favourable to the Commonwealth. He applied the constitutional right as follows:[15]

1. The law is valid if the restrictions which it imposes are proportionate to the legitimate interests which the law is intended to serve.
2. If the law is *not disproportionate* to these objects then even though it restricts free speech it is valid.
3. In its review of how Parliament assessed these matters the Court should allow the lawmaker a "margin of appreciation".[16]
4. These measures are not disproportionate as they do not deny voters the opportunity to form political judgments. Moreover, Parliament could reasonably have made an adverse assessment of the value of political advertising on television.

Step 3 indicates that Brennan J favoured a less exacting scrutiny of the law by the Court than did Mason CJ. More decisively, he had a different view of the appropriate standard of proof, and of who, in fact, bore the onus of proof. For him it was enough if the law was reasonably proportionate; it did not require a higher standard of justification. And as step 2 indicates the onus of proof was, in effect, not on the Commonwealth to show that its law was proportionate

15 Id at 157–162.
16 Id at 159.

to its objectives but on the opponents of the legislation to show that it was disproportionate. Step 2 can perhaps be seen as a manifestation of the principle of constitutionality; an interpretive principle to date much more at home in American rather than Australian constitutional law.[17]

The approach to the application of the right adopted by the joint judgment of Deane and Toohey JJ differs to some extent from that of Mason CJ and Brennan J. In summary it reads as follows:[18]

1. Freedom of speech is not an absolute right. It is to be exercised under the law of an ordered and democratic society.
2. Regard must be had to the character of the impugned law. If the law has the character of a law restricting political communication it is harder to justify than a law on some other subject matter which indirectly affects political discourse.
3. A law which is characterised as directly affecting political discourse can still be justified as in the public interest if it is either (A) conducive to free speech or (B) does not go beyond what is reasonably necessary for the preservation of an ordered and democratic society or for the vindication of claims of persons to live peacefully and with dignity.
4. Here the law does not satisfy 3(A) and with regard to 3(B) it goes beyond what is reasonably necessary in that it distorts the political process. The free time provisions favour existing political parties and completely exclude non-candidates and their organisations.

Step 2 deals with the required standard of proof but in place of the distinction between form and content favoured by Mason CJ (and McHugh J), Deane and Toohey JJ rely on the distinction, not unfamiliar to legal analysis, between direct and indirect — between laws which limit political discussion directly and laws which only indirectly or remotely have this effect. Although in their hands it is not clear just what follows for the standard of proof in each case from making this distinction. For even laws which directly restrict political discourse can be justified, according to step 3, if they are *reasonably* necessary.

In step 3 Deane and Toohey JJ attempt to impose some rigour upon the process of justification. Their two part formulation is drawn with the limits already established by the general law on free speech in mind (that is the laws on sedition, defamation, offensive language, obscenity, blasphemy et cetera). But it is not clear that any purpose is served by specifying the possible interests involved in this way. One would think that in future cases either the formula will prove unnecessarily restrictive or that it will be read so expansively as to apply to *all* legislative goals which are found to be "reasonably necessary".

The last judgment I will discuss is that of Gaudron J.[19] Her remarks on the application of the right are as follows:[20]

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17 For a discussion of this principle and for the references to its use in other Australian judgments Burmester, H, "The Presumption Of Constitutionality" (1983) 13 *Fed LR* 277.

18 Above n1 at 169–176.

19 I will not refer to the judgment of McHugh J as when applying the right he followed closely the approach of Mason CJ. And I do not discuss the opinion of Dawson J as finding no implied right in the first place he had no call to apply it.

20 Above n1 at 214–221.

1. The right to free political discourse is not absolute.
2. As the powers conferred by section 51 of the Constitution are given "subject to the Constitution" they can only be exercised to regulate political discourse to the extent that such regulation is "reasonably and appropriately adapted" to an end within the scope of these powers. Just what is considered reasonable here will depend to a large extent on what has been traditionally permitted as a limit on free speech by the general law.
3. The challenged law in this case cannot be regarded as reasonably and appropriately adapted to the regulation of radio and television (that is valid under section 51(v)) for it does not deal with broadcasting or advertising *generally*. Nor can it be said to be reasonably adapted to the regulation of Commonwealth elections (and thus valid under provisions which allow for this) for the effects of its provisions extend beyond candidates and political parties.

Gaudron J in step 2 brings together two questions which are usually kept quite distinct in constitutional analysis, namely, the question of Commonwealth power and the question of possible constitutional limits to this power. The merging of these two issues would seem to be an unsatisfactory way to understand and apply a constitutional right, for it grants it no separate existence. All the force of the right is taken up into the larger question of whether or not the law, *considered overall*, is an appropriate means to an end within power. Moreover, it should be pointed out that her approach to characterisation overlooks a distinction which has traditionally been used by judges when carrying out this process — namely, the distinction between laws operating directly on the subject of a power, which require no further connection to this subject matter, and laws which operate on a power only incidentally, which do call for some further connection.[21]

That her approach is unsatisfactory can be seen in step 3. What proves decisive for Gaudron J is that if based on the broadcasting power the law does not apply to broadcasting *generally*. And if based on the power to regulate elections it does not limit itself to regulating candidates and their parties. But this law cannot be rendered invalid simply by reason of its limited scope — that it applied to political advertising at election times and not to all advertising. For any law will deal only with *some* aspects of its subject matter. And there seems no reason in principle to insist that the powers which permit the regulation of elections be restricted to laws about candidates and their organisations.

II

Now that I have considered *Australian Capital Television v Commonwealth* in some detail I would like to offer three general observations concerning the application of constitutional rights.

1. The review of legislation in the light of a constitutional right raises many issues which the Court is not competent to assess and which are not

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21 See Zines, L, "Characterisation of Commonwealth Laws" in Lee, H P and Winterton, G (eds), *Australian Constitutional Perspectives* (1992) at 42ff.

legitimately for a court to decide. The legislature by enacting the law has made its judgment as to what is appropriate in the circumstances. The reviewing Court, of course, is required to oversee this legislative judgment, but it is to do this on the basis of limited criteria. It must ask, and only ask, does the law infringe the constitutional right? However, as I have noted, this question cannot be answered without the judges coming to some view of the presumed legislative goals and the means which Parliament has chosen to achieve these goals. With this type of question judges can draw little guidance from the constitutional text. The application of a right is never simply a matter of subsuming the particulars of the case under a general constitutional principle.

However, what makes the application of constitutional rights possible is that the details of the case can be connected up, as our examples have shown, with a more specific and concrete structure of meaning; an intellectual framework which will help to guide the judges to a result and furnish them with the means of justifying their decision. The substantive content for this structure will come, to a large extent, from the subject matter under discussion. In our example the Court could and did draw upon material in our legal and political tradition which dealt with the right of free speech. But apart from this, and less obviously, the role which this structure of meaning plays can be seen in the assumptions made, often implicitly, concerning the onus and standard of proof. Without these assumptions a decision by the Court in, say, *Australian Capital Television v Commonwealth* would not have been possible. Nobody, let alone the Court, could establish with certainty whether the measures chosen by the Parliament would or would not improve the electoral process. In these conditions of ignorance the Court could only come to a decision because it approached its work within a framework which made available to it certain understandings concerning the burden of proof.[22] The Court was furnished with standards of proof of different weight — for example compelling necessity, reasonable justification, not disproportionate, et cetera — and with presumptions which allocated the responsibility of proving specific issues to one or other of the parties.

2. As we have seen, this framework of meaning will often feature two types of argument. First, an approach which treats the problem of application as one of weighing or balancing the relevant concerns. The Court is expected to take account of all of the competing interests and to form some assessment, not of the best way of reconciling them, but of whether or not the lawmaker's judgment about these matters was reasonable. However, there is also a different style of argument at work here — a more formal or categorical approach. For the Court, at times, also carries out what our judges like to call the process of characterisation. It asks the question — how should the law under challenge be described? Does it deal with the subject matter of a constitutional right? Is it a law, for example, which has the character of directly affecting free speech? Is it a law which targets the content of ideas? Et cetera. Once the law is allocated to its appropriate category then either the work of the Court is done or if there is a call for further evaluation there is

22 For a detailed discussion of strategies for dealing with the "burden of ignorance" see Gaskins, R, *Burdens of Proof in Modern Discourse* (1992).

clearly less scope with this approach for the judges to make some overall assessment of the particular interests involved.[23]

There is no doubt that the characterisation approach can be used in an inappropriate way. That was the point of my discussion of the *Jehovah's Witness* case and *Gratwick v Johnson* at the start of the paper. My criticism of Gaudron J's remarks in *Australian Capital Television v Commonwealth* is also along these lines. But it would be a mistake to see this type of argument as one which is *in principle* out of place in the application of rights. Both the balancing and the characterisation approach have their place.

At times it is conceded that the characterisation approach must be supplemented with the balancing approach. All of the judges in *Australian Capital Television v Commonwealth*[24] asserted that the right of free speech was a qualified right; in other words that its application called for a further step, namely, some weighing of the relevant interests. Even when the characterisation approach is resorted to directly, it cannot be applied in complete isolation from the social context. Despite Latham CJ's much quoted remark, the true nature of a law cannot be ascertained simply by examining its terms.[25] At some stage of its analysis the Court will be forced beyond the text of the Act to consider and weigh broader social concerns.[26]

However, if the characterisation approach calls for the balancing approach the same is true in reverse. The overall framework for the application of constitutional rights *cannot* be provided by the balancing approach alone. For this type of argument tends to transform the issue of whether the law is *constitutional* into the issue of whether the law is *reasonable*.[27] And this is a change which can cut in two directions. It can work to expand the practice of judicial review by encouraging the review of legislation in the light of non-constitutional criteria (that is criteria which, whatever their merits, cannot be directly related to the constitutional text). In a case concerning the right of free speech, for example, the Court would not ask whether the law fell within the category of, say, regulating political discourse. The Court would be encouraged to omit this step and to evaluate directly the various social interests involved. Alternatively, the balancing approach can work to limit the scope of judicial review. For it allows non-constitutional interests to restrict the scope of constitutional rights. The

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23 Balancing and categorisation, as different and competing approaches to constitutional adjudication, is a topic much written about in the context of the American Supreme Court. For a recent and thorough discussion of this literature see Sullivan, K, "Categorization, Balancing, and Government Interests" in Gottlieb, S (ed), *Public Values in Constitutional Law* (1993). My discussion of this topic here can only be brief and in general terms.

24 All that is except Dawson J.

25 *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373 at 424. A nice example of this point is Latham CJ's own judgment in *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390. Despite the claim that he would characterise the Act in question solely by way of its legal terms he could not avoid talking about the "real object" of the Act, its "unpleasant consequences" and what in the circumstances would be "practicable" (at 399–400).

26 This is not to say that finding the true character of the law will always be controversial. Easy cases are possible wherever there is general agreement that the meaning of the statutory words and the demands of the social context point in the same direction.

27 This point is well argued by Alexander Aleinikoff, T, "Constitutional Law in the Age of Balancing" (1987) 96 *Yale LJ* 943.

right to a fair trial, for instance, may be limited by such "rational" criteria as the financial cost to the Government or some other particular social concern.

But the Court's task is to assess the *constitutionality* of the law and not its overall reasonableness; or at least this is how we presently understand the practice of judicial review. The Court is called upon to review the work of the legislature in the light of constitutional values, not in the light of all of the possible relevant concerns — moral, political or whatever. The characterisation approach, despite its tendency towards formalism, accords better with these present understandings. There is, of course, always the risk that adopting this approach will blinker the Court from seeing some important aspect of the case. But speaking generally, this delimiting of the context is the strength of the characterisation process. By restricting the relevant social and legal interests involved it both makes the Court's task more manageable and it works to maintain the distinction between constitutional review and some other kind of assessment of the law.

3. Finally, it should at least be noted that these rules about the burden of proof, and the procedures of characterisation and the balancing of interests, can be thought of in a different way. For while they provide the structure which allows the court to do its work they should not be treated merely as neutral means to this end. They can themselves be connected up to particular social values, most immediately the values concerned with establishing the appropriate role for a court of review in a democracy. If a particular presumption is seen to be out of step with these more basic values, in time it will be rejected. This was the fate, for example, of the idea that the rights provisions in the Constitution, unlike the grants of power, should receive a *narrow* reading.[28] These presumptions and techniques should be seen as translating, often surreptitiously, particular social values into legal procedures. It would be highly controversial if the Court was to announce that it favoured interest X, free speech say, over interest Y, the equality of political participation. But the same result can be achieved indirectly by adjusting the onus or standard of proof. For the decision that this is an area in which the Court should seek a "compelling justification", say, will have, and is meant to have, a decisive effect upon the outcome of the case. In these circumstances one would expect the constitutional challenge to succeed. There is nothing intrinsically wrong with this. However, it would be better for both judges and their critics if this aspect of law's methods was more openly acknowledged.

Postscript

Since this article was accepted for publication the High Court has applied the constitutional right of political communication in *Theophanous v Herald & Weekly Times Ltd*[29] and in *Cunliffe v Commonwealth*.[30] These cases are written about at length elsewhere in this issue of the *Review*. Here I remark upon

28 A principle of interpretation restated as recently as *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 at 603 per Gibbs J, at 614–5 per Mason J and at 653 per Wilson J.

29 (1994) 124 ALR 1.

30 (1994) 124 ALR 120.

them solely from the perspective of what they add to my discussion of the application of constitutional rights. For a number of matters are now clearer.

1. *Levels of argument*

A constitutional case involving the possible infringement of free speech could be said to proceed through the following stages:

A A right to free speech must first be found in the Australian Constitution. It continues to be the view of Dawson J that there is no such right.

B The right once found must be interpreted and its scope delimited. The majority appear content to define the right rather loosely as, say, the freedom to communicate in relation to public affairs or political matters.[31] On this point McHugh J now differs from the others. For him the right is restricted to matters necessary to make sense of sections 7 and 24 of the Constitution.

C The right as interpreted has to be applied. At the risk of over-intellectualisng this part of the process it now seems to involve two issues: (i) is the right infringed? and (ii) can any infringement be justified?

2. *Is the right infringed?*

In *Theophanous* and *Cunliffe* Brennan J separates himself from the other judges by the way in which he approaches this question. Mason CJ, Deane, Toohey and Gaudron JJ assume that the common law and the State and Territory laws on defamation infringe the constitutional right simply because these laws "chill" political speech. While for Brennan J it is not a matter of whether freedom of political discourse is "chilled by the law of defamation but whether the law of defamation, by chilling the publication of certain defamatory matter, is inconsistent with a constitutional implication".[32] In his view it is not. In *Cunliffe* the other judges applying the right simply assert that advice to non-citizens about immigration matters falls within the freedom. After all, they say, immigration advice is an issue so central to Australian politics that it is inherently political.[33] For Brennan J it is not so obvious that Part 2A of the *Migration Act* 1958 (Cth) inhibits communication of a political kind. As he points out, it does not restrict discussion *in general* about immigration laws or about the services provided to non-citizens.[34] One lesson to be drawn from these remarks is that it is crucial to the question of infringement just how the interest of free speech is initially set up. Of course, it can always be said that the more generally the right of free speech is defined the broader is its ambit or scope, but here we see a tendency going in the other direction. For when the protected interest is specifically defined — as, say, the freedom to discuss the competence of politicians or the freedom to give immigration advice to non-citizens — it would appear easier to assert that the right is infringed.

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31 Id at 132, 153–4, 160–1, 195, 201.
32 Above n29 at 38.
33 Above n30 at 132, 165, 201.
34 Id at 156.

3. *Can any infringement of the right be justified?*

Cunliffe is the more instructive on this point for, like *Australian Capital Television*, it concerns the validity of a Commonwealth law under section 51. It can be said that the judges in *Cunliffe* who apply the constitutional right return to the framework of analysis which they relied upon in the earlier case. Brennan J's analysis is the least elaborate. He simply asks himself whether Part 2A of the *Migration Act* controls the freedom to discuss political matters in a way which is not disproportionate to the achievement of the law's purpose — namely, the protection of aliens from exploitation.[35] Mason CJ, as before, adds the prior question of whether the Commonwealth law targets the content of ideas or merely regulates the means of their expression. As it is the latter a lower standard of proof applies. The Commonwealth can establish the validity of Part 2A if it can show that its regulation of political discussion is not disproportionate to the preservation of "an ordered society under a system of representative democracy".[36]

For their part Deane and Toohey JJ adopt their detailed "test" with its two parts which they set out in *Australian Capital Television*.[37] Though Deane J now emphasises the need to first identify the character of the law. For the "test" only applies if the law has the character of *directly* controlling political communication. If the curtailment of free speech is only indirect or incidental then a less stringent test for its validity is applied.[38] Gaudron J persists with her one-stage framework which concentrates upon the purpose of the law. Is the law's purpose to impair freedom or does it secure some end within power in a manner which is reasonably adapted to that end?[39] Though within this framework she now distinguishes between the indirect restriction of free speech — where an illegitimate purpose may be inferred if the "true purpose" is to restrict free discussion or if the law does not achieve the purpose it is said to have — and direct prohibition. With the latter, if the restriction is in an area previously unregulated, it is only valid if it clearly serves some overriding public interest by reasonable means.[40]

Theophanous is less instructive on the issue of justification as it does not involve a Commonwealth law. Only Deane J deals directly with this issue. He applies his approach from *Australian Capital Television* with the rather alarming result that on the facts of this case State defamation laws cannot be justified in any form. For their part Mason CJ, Toohey and Gaudron JJ work directly with the "public figure defence" established in *New York Times v Sullivan*.[41] It must be said that their analysis of just which type of defamation laws are compatible with the right is less than persuasive. For a discussion of

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35 Ibid.
36 Id at 133.
37 Id at 163, 198. Interestingly Toohey J appeared willing to find Pt 2A conducive to free speech and thus as falling within the first part of the test.
38 Id at 163. Is it reasonably capable of being seen as necessary to a legitimate legislative aim?
39 Id at 201.
40 Id at 202.
41 376 US 254 (1964).

the merits or demerits of *New York Times v Sullivan* appears so far removed from what might be demanded by the Constitutional text.

4. *Balancing and categorisation*

As could have been predicted both types of argument are put to work in these new cases. All of the judges applying the right of free speech at some stage of their analysis understand the issues as a question of competing social interests.[42] But there is also frequent resort to legal categories. I have noted the continued application of concepts worked out in *Australian Capital Television*; in particular, the various approaches to justification with their different standards of proof, the distinction between the content of ideas and the mode of their expression and between the direct and the indirect regulation of free speech. *Theophanous* introduces a number of new categories. Protected political speech, as in the American case law, is distinguished now from entertainment and from commercial speech.[43] Further, the discussion of the competence or integrity of those holding "high office" is said to be different from similar contentions concerning other office-holders, and allegations concerning the public conduct of all office-holders is to be treated differently from public references to their private conduct.[44] All of these categories work to channel the legal argument away from any straightforward weighing of the competing social interests.

5. *Margin of appreciation*

As in *Australian Capital Television* the judges are divided as to just how closely the Court should scrutinise the impugned law. Brennan J repeats his view that, even in the area of possible infringement of constitutional rights, the lawmaker should be allowed a "margin of appreciation".[45] Mason CJ, Deane and Gaudron JJ explicitly reject such a deferential approach. For them the question for the Court is not is the law reasonably capable of being considered as appropriate and adapted to a legitimate end but, simply, *is* the law appropriate and adapted to that end.[46]

This issue of just how much tolerance the Court should grant to the lawmaker can be seen again in the way in which the judges in *Cunliffe* viewed certain "anomalies" brought about by the *Migration Amendment Act (No 3)* 1992 (Cth). It was noted, for instance, that lawyers already admitted to practice were now subject to further prescriptions of competence, that unregistered lawyers were restricted in the advice which they could give a relative or friend, that a voluntary worker for a charity could not give free immigration assistance in this capacity, and that a member of the clergy or a doctor could not provide voluntary immigration assistance in the conduct of their profession. For Mason CJ, Deane and Gaudron JJ these anomalies (though each judge was troubled by different ones) were the material out of which they built

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42 For an express acknowledgment of this see id at 133.
43 Above n28 at 13, 14.
44 Id at 56.
45 Above n29 at 39 and above n30 at 153.
46 Above n30 at 133, 164, 202.

their case against the Commonwealth law. While for Brennan and Toohey JJ these oddities either could be explained away[47] or they were not of sufficient magnitude to make the legislative scheme disproportionate to its objective.[48]

In sum, *Theophanous* and *Cunliffe* confirm a number of suggestions made in the body of the article. Interpreting the meaning of a constitutional right and applying this right are stages which can be and should be kept distinct. The application of a constitutional right will take place within a context whose content is given to a large extent by the subject matter under discussion. A point well illustrated by *Theophanous* and its use of the American "public figure defence". In addition, this context will be structured by various assumptions and "tests" concerning, in particular, the burden of proof. The judges at present do not speak with one voice about this framework of meaning. True, these disagreements may not be decisive to the outcome of any particular case, as there is sufficient flexibility within each approach for decisions to be made one way or the other. However, it would be a brave practitioner, or commentator, who did not allow their understanding of constitutional rights to be guided by this judicially endorsed vocabulary. Finally, underlying and informing the discussion of such notions as "compelling necessity", "appropriate and adapted", "direct and indirect", "margin of appreciation", et cetera is the larger issue of just what is the proper relationship of a court of review, the legislature and the people in a modern democracy.

47 Id at 197.
48 Id at 156, 198.