Engineers is Dead, Long Live the Engineers!

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1. *Introduction*

The High Court's recognition of a constitutionally implied freedom of political discussion marks the end of the reign of the *Engineers' Case*.[1] The overarching notion of the freedom and its origins in the concept of representative democracy are inconsistent with the literalist approach to constitutional interpretation advocated in that decision. Ironically, this has not been made clear by the judges achieving the demise, the engineers of a new Constitution, but by the judges hoping to retain a foothold for the *Engineers' Case* in the emerging jurisprudence of the High Court.

The decisions of the High Court in *Theophanous v The Herald & Weekly Times Ltd*,[2] *Stephens v West Australian Newspapers Ltd*[3] and *Cunliffe v Commonwealth*[4] are the latest manifestations of the revolution in the High Court's approach to interpreting the Constitution. Each case builds upon the decisions of the Court in *Nationwide News Pty Ltd v Wills*[5] and *Australian Capital Television Pty Ltd v Commonwealth*.[6] The latter decisions established that the Constitution embodies an implication of freedom of political discussion[7] born out of representative government. The former cases develop that implication and, most importantly, take it beyond the realm of Commonwealth legislative power into the heart of the common law. They establish that the implication of freedom of political discussion is fundamental to Australian law in that it may override not only Commonwealth laws but State laws and the common law.

Underlying several recent High Court decisions,[8] including those involving freedom of political discussion, is the issue of judicial activism versus judicial

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1 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

2 (1994) 68 ALJR 713 (hereinafter "*Theophanous*").

3 (1994) 68 ALJR 765 (hereinafter "*Stephens*").

4 (1994) 68 ALJR 791 (hereinafter "*Cunliffe*").

5 (1992) 177 CLR 1 (hereinafter "*Nationwide News*").

6 (1992) 177 CLR 106 (hereinafter "*Australian Capital Television*").

7 Above n5 at 51 per Brennan J, "freedom to discuss governments and governmental institutions and on political matters" at 73 per Deane and Toohey JJ, "freedom of communication of information and opinions about matters relating to the government of the Commonwealth" at 94 per Gaudron J, "freedom of political discourse"; above n6 at 139 per Mason CJ, "freedom of communication in relation to public affairs and political discussion" at 149 per Brennan J, "freedom of discussion of political and economic matters" at 168 per Deane and Toohey JJ, "freedom within the Commonwealth of communication about matters relating to the government of the Commonwealth" at 212 per Gaudron J, "freedom of political discourse" at 233 per McHugh J, "right of the people to participate in the federal election process". See also the extracts quoted in above n2 at 716; above n4 at 798, 814, 843.

8 The most prominent example is *Mabo v Queensland (No 2)* (1992) 175 CLR 1. A less dra-

restraint. More generally, the role of the judiciary in shaping the common law and in interpreting the Constitution has come into question.

It is clear not only to constitutional commentators but also to the people generally[9] that the High Court has created a new and significant protection for political expression. This freedom was not plucked out of a void but is, arguably, founded in the structure and the text of the Constitution. Nevertheless, it cannot be denied that the implication is not such an obvious inference from the Constitution that its creation was inevitable. The implication did not exist for over 90 years from Federation. Nor, until Justice Murphy joined the Court, were there any sustained suggestions that implications of this type might exist.[10]

The intersection of the themes raised by *Theophanous*, *Stephens* and *Cunliffe* lies at the *Engineers' Case*. It is not an exaggeration to say that the case has been the cornerstone of Australian constitutional jurisprudence.[11] A central question addressed by this article is whether that cornerstone still rests in place.

Theophanous, *Stephens* and *Cunliffe* will be examined insofar as they relate to the implied freedom of political discussion before the most significant constitutional issues raised by the decisions are analysed. *Theophanous* and *Stephens* will be examined together as they raise similar issues in developing the implied freedom. *Cunliffe* will be looked at separately because its significance lies primarily in its application of the implied freedom. *Nationwide News* and *Australian Capital Television* will not be reviewed except to the extent that they are pertinent to the above discussion.[12]

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matic, but equally significant indication of the High Court's activism in reshaping the common law is *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

9 See the extensive press coverage of *Theophanous, Stephens* and *Cunliffe* in *The Australian, The Australian Financial Review* and *The Sydney Morning Herald*, especially on 13 and 14 October 1994.

10 *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369 at 388; *Buck v Bavone* (1976) 135 CLR 110 at 137; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 88; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 157; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 267; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 311–2; *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 at 565; *Sillery v R* (1981) 35 ALR 227 at 234; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 108–9; *Gallagher v Durack* (1983) 152 CLR 238 at 249; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581–2. Cf *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 569, 579, 592, 615, 625–6, 636-7. See generally Coper, M, *Encounters with the Australian Constitution* (1988) at 324–31. The High Court had earlier recognised an implied right of access to government and to the seat of government in *R v Smithers; Ex parte Benson* (1912) 16 CLR 99.

11 Craven, G, "The Crisis of Constitutional Literalism in Australia" in Lee, H P and Winterton, G (eds), *Australian Constitutional Perspectives* (1992) at 1; Williams, G, "Civil Liberties and the Constitution A Question of Interpretation" (1994) 5 *PLR* 82 at 101.

12 *Nationwide News* and *Australian Capital Television* have been the subject of discussion and analysis elsewhere. See the articles contained in *Symposium: Constitutional Rights for Australia?* (1994) 16 *Syd LR* 145, as well as Cass, D Z, "Through the Looking Glass: The High Court and the Right to Speech" (1993) 4 *PLR* 229; Creighton, P, "The Implied Guarantee of Free Political Communication" (1993) 23 *UWAL Rev* 163; Douglas, N F, "Freedom of Expression Under the Australian Constitution" (1993) 16 *UNSWLJ* 315; Jones, T H, "Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia?"

2. Theophanous *and* Stephens[13]

A. The Facts

Theophanous arose out of a defamation action brought by Dr Andrew Theophanous, a member of the House of Representatives, chairperson of the Joint Parliamentary Standing Committee on Migration Regulations and chairperson of the Australian Labor Party's Federal Caucus Immigration Committee. On 8 November 1992, The Herald & Weekly Times Ltd, the first defendant, published in its newspaper the *Sunday Herald Sun* a letter to the editor written by the second defendant, Mr Bruce Ruxton. The letter, entitled "Give Theophanous the shove", accused the plaintiff of "bias" and "idiotic antics" in respect of his involvement in the immigration debate.

The Herald & Weekly Times Ltd pleaded a defence based upon the implied freedom of political discussion recognised in *Nationwide News* and *Australian Capital Television.* The matter was removed to the High Court, where the Court was required to decide whether the defence was valid. If the implication could act as a defence, the Court then needed to consider how the defence would operate.

Stephens also involved a defamation action. That action was brought by six members of the Legislative Council of Western Australia in relation to three articles published in the *West Australian* newspaper. The articles set out statements by another member of the Legislative Council of Western Australia alleging that an interstate and overseas trip undertaken by the plaintiffs was a "junket of mammoth proportions". A similar defence was raised as in *Theophanous* above.

B. The Majority

i. Mason CJ, Toohey and Gaudron JJ

The leading judgment in both *Theophanous* and *Stephens* is the joint judgment of Mason CJ, Toohey and Gaudron JJ. With the support of Deane J, they formed the majority in both cases.

The joint judgment in *Theophanous* accepted that a limited implication of freedom of communication had been created by *Nationwide News* and *Australian Capital Television.* The implication did not protect freedom of expression generally but was restricted to political discussion. It could be distilled from the "provisions and structure of the Constitution, particularly from the concept

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(1994) 22 *Fed LR* 57; Kennett, G, "Individual Rights, the High Court and the Constitution" (1994) 19 *MULR* 581; Lee, H P, "The Australian High Court and Implied Fundamental Guarantees" [1993] *Public Law* 606; McDonald, L, "The Denizens of Democracy: The High Court and the 'Free Speech' Cases" (1994) 5 *PLR* 160; O'Neil, R M, "Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill of Rights Really Matter?" (1994) 22 *Fed LR* 1; Smallbone, D A, "Recent Suggestions of an Implied 'Bill of Rights' in the Constitution, Considered as Part of a General Trend in Constitution Interpretation" (1993) 21 *Fed LR* 254; Speagle, D, *"Australian Capital Television Pty Ltd v Commonwealth"* (1992) 18 *MULR* 938; Williams, above n11.

13 The following discussion does not examine dicta in *Theophanous* and *Stephens* on the law of qualified privilege.

of representative government which is enshrined in the Constitution".[14] The implied freedom enhanced the efficacy of representative government by protecting the "free flow of information and ideas and of debate" so as to enable the Constitution to better equip "the elected to make decisions and the electors to make choices".[15]

Mason CJ, Toohey and Gaudron JJ stated:

> The interrelationship of Commonwealth and State powers and the interaction between the various tiers of government in Australia, the constant flow of political information, ideas and debate across the tiers of government and *the absence of any limit capable of definition to the range of matters that may be relevant to debate in the Commonwealth Parliament and to its workings* make unrealistic any attempt to confine the freedom to matters relating to the Commonwealth government.[16]

More than any other statement in *Theophanous*, this demonstrated the enormous potential scope of the implication. There was no point in closing the gate because the horse had already bolted. The joint judgment accepted that no prescriptive limit could practicably be applied to the implication.[17] This undermined the value in describing the subject matter of the implication as merely political discussion, as opposed to discussion generally.

Despite the above, the joint judgment suggested that the implication might be limited by determining, on a case by case basis, whether forms of discussion lay within or outside the freedom. It would no doubt be possible to determine whether a particular statement falls within the ambit of the implication. A prescriptive limit would be extremely difficult to determine under this approach. It seems likely that a link between discussion and implication would be drawn in an increasing number of areas, thereby gradually extending the reach of the freedom.

Although the implication was drawn from the need to ensure the "efficacious working of representative democracy",[18] it was not tied to the text of the Constitution, such as, sections 7 and 24.[19] Without a textual link or at least a fleshing out of the bones of representative democracy, the implication remained vague and imprecise.[20] Given that, in the absence of explanation,

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14 Above n2 at 716.

15 Id at 717.

16 Ibid (emphasis added). See also ibid, where Mason CJ, Toohey and Gaudron JJ stated "that it is not possible to fix a limit to the range of matters that may be relevant to debate in the Commonwealth Parliament".

17 See above n6 at 141 per Mason CJ at 149 per Brennan J. It is arguable that the generality of the words "political discussion" mean that any such limitation could only have been arbitrarily drawn.

18 Above n2 at 717. See above n6 at 145 per Mason CJ.

19 Sections 7 and 24 of the Constitution provide, respectively, that the members of the Senate and House of Representatives shall be "directly chosen by the people".

20 Even the example chosen by Mason CJ, Toohey and Gaudron JJ demonstrates the difficulties of delimiting the implication. Drawing upon the ideas of entertainment and politics, they argued that the difference between the two would mean that "comment by a television entertainer would not ordinarily attract the constitutional protection because the comment would not, in the ordinary course, constitute political speech": above n2 at 718. It was recognised, however, that if the entertainer were engaging in comment on the political process the comment would be protected by the freedom. Difficulty emerges when an en-

what representative democracy entails is unclear,[21] precision or certainty cannot be expected of an implication derived from that concept. Where the Court applies a fundamental value embodied in the Constitution, such as representative democracy, it must identify clearly its understanding of the value so as to engender certainty and to avoid its decisions assuming an arbitrary appearance.[22]

In describing the implication, Mason CJ, Toohey and Gaudron JJ stated:

> For present purposes, it is sufficient to say that "political discussion" includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, e.g., trade union leaders, Aboriginal political leaders, political and economic commentators.[23]

The width of the freedom was further demonstrated by the adoption of Barendt's statement that: "'political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about."[24]

The freedom is therefore not limited to "political matters" in any narrow sense but may extend to matters of public affairs and public opinion.[25] Despite the assertion in the joint judgment that the implication "does not extend to freedom of expression generally",[26] it must be questioned whether the freedom created by the implication will reach far short of a general freedom of communication.[27]

The scope of the freedom meant that it was hardly surprising that the publications complained of in *Theophanous* and *Stephens* were found to be protected. Indeed, it was stated that the content of the letter in *Theophanous* was at "the very centre of the freedom of political discussion".[28]

The structure of the Australian Constitution and the implied nature of the freedom suggest that the freedom is a restriction on legislative and executive power rather than a source of positive rights for individuals.[29] The joint judgment

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tertainer satirises political events in a way designed only to entertain. It would seem likely that expression of the kind in Monty Python's Election Special sketch (Monty Python, *The Final Rip Off* (1987), (Compact Disk)) would be protected by the freedom.

21 See above n2 at 759–60 per McHugh J.

22 An interpretative approach based upon applying the fundamental values embodied in the Constitution need not be less certain than the traditional literalist approach of the Court (Williams, above n11 at 92).

23 Above n2 at 718. The use of "For present purposes" is significant in that it suggests that the ambit of the freedom may differ in other circumstances.

24 Ibid, quoting Barendt, E, *Freedom of Speech* (1985) at 152.

25 The joint judgment referred to commercial speech, perhaps in light of the possible challenge to the Commonwealth's legislative restrictions on tobacco advertising. It was stated in above n2 at 718 that commercial speech without political content will ordinarily fall outside the freedom.

26 Id at 716. See above n6 at 141 per Mason CJ.

27 See Australian Constitutional Commission, *Final Report of the Constitutional Commission* (1988), Vol 1, at 513, 515; Coper, M, "The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur" (1994) 16 *Syd LR* 185 at 188; Douglas, above n12 at 355; Williams above n11 at 100.

28 Above n2 at 717.

29 In above n6 at 150, Brennan J described the implication as "an immunity consequent on a

left this issue open.[30] This meant that perhaps the most fundamental issue arising in respect of the implication remains unresolved. It is easy to envisage that an implication that endows individuals with positive rights may have far greater ramifications than an implication that protects individuals from excesses of government power.

A central question in *Theophanous* and *Stephens* was the extent to which, if any, the implied freedom might shape the common law. There was little High Court dicta on this point. The paucity of material was demonstrated by the joint judgment referring only to the extrajudicial writings of Sir Owen Dixon.[31]

Mason CJ, Toohey and Gaudron JJ argued that where the Constitution is at variance with the common law, the common law must yield to the Constitution. In an approach that differed markedly from that of Gaudron J in *Australian Capital Television*,[32] it was stated that the ambit of constitutional freedoms must be determined by "what is necessary for the working of the Constitution and its principles".[33] The common law could at most be a guide. The rejection of the common law as a marker of the limits of the freedom meant that the common law had to be recast in line with the content of the implication, rather than vice versa. Without a strong textual or structural link with the Constitution or guidance from a conception of representative democracy, this left the boundaries of the implication in the hands of its creators.

The plaintiff's strongest argument was recognised as being that the framers of the Constitution believed that fundamental freedoms "were best left to the protection of the common law in association with the doctrine of parliamentary supremacy".[34] This was rejected as a basis for restricting the scope of the implication primarily because the beliefs held by the framers 100 years ago were recognised as "hardly a sure guide in the very different circumstances which prevail today".[35]

Mason CJ, Toohey and Gaudron JJ held the common law of defamation to be inconsistent with the implied freedom. They referred to the "chilling effect"

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limitation of legislative power". See also above n5 at 50–51 per Brennan J at 76 per Deane and Toohey JJ.

30 The use of the word "freedom" in describing the implication suggests a positive right. This is reinforced by the fact that the implication has frequently been described as a "freedom of" political discussion or a "freedom to" engage in political discussion rather than a "freedom from" legislative or executive interference in political discussion. The consistent use of this language might perhaps be a factor in any subsequent characterisation of the implication as a positive right.

31 Dixon, O, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *ALJ* 240.

32 In above n6 at 217, Gaudron J stated: "As the implied freedom is one that depends substantially on the general law, its limits are also marked out by the general law. Thus, in general terms, the laws which have developed to regulate speech, including laws with respect to defamation, sedition, blasphemy, obscenity and offensive language, will indicate the kind of regulation that is consistent with the freedom of political discourse." Gaudron J continued at 218 by stating: "And, of course, what is reasonable and appropriate will, to a large extent, depend on whether the regulation is of a kind that has traditionally been permitted by the general law." See also above n5 at 95 per Gaudron J.

33 Above n2 at 719.

34 Ibid.

35 Id at 720.

defamation laws have on political discussion and the inadequacy of the available defences. The balance achieved by the common law between the protection of reputation and the need for free public discussion differed from the balance they determined was imposed by the implied freedom.

This led to the question of how the implication would realign the imbalance in the law of defamation. The joint judgment did not accept the test adopted by the Supreme Court of the United States in *New York Times Co v Sullivan*.[36] The *New York Times* test, namely that a publication is not actionable unless it is made with knowledge of falsity or with reckless disregard for the truth or falsity, was found to give insufficient weight to reputation.

It was held that the implied freedom will protect political discussion from incurring liability in an action of defamation where the defendant can establish that:

1. it was unaware of the falsity of the material published;
2. it did not publish the material recklessly, that is, not caring whether the material was true or false; and
3. the publication was reasonable in the circumstances.

As a constitutional defence, the above cut through all inconsistent State laws and the common law.

It is unclear whether this defence is available whenever a defamation action is brought in respect of political discussion or whether it can only be pleaded where the plaintiff is also a political figure or public official. The unqualified language used to describe the defence[37] suggests the former while the discussion of the defence in the context of the *New York Times* "public figure" test suggests the latter. In discussing *New York Times*, the joint judgment stated: "we should indicate our preliminary view that these extensions [to *New York Times*], *other than the extension to cover candidates for public office*, should not form part of our law."[38]

In the face of this uncertainty the correct course is to limit the holding of the Court to what was necessary to decide the case. The ratio would therefore be that the defence is available in respect of actions brought by political figures and public officials. As such, the defence might be termed the political figure defence.

Misgivings might be had if the defence were limited to political figures in future decisions. The subject matter of the implied freedom is political discussion generally, rather than political discussion in the context of political figures. There would therefore seem to be no reason in principle why the freedom should not protect political discussion where it impinges upon the reputation of persons not involved in the political process.

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36 376 US 254 (1964).

37 For example, above n2 at 725. See also the range of persons listed in id at 718.

38 Id at 723–4 (emphasis added). Also indicative of the narrower test is the following comment in id at 724, again in the context of *New York Times*: "The practical consequence of all this is that the plaintiff who is a public official faces greater obstacles than our existing law of defamation places in the path of the plaintiff." See also above n2 at 753 where Deane J summarises the findings of the joint judgment.

The joint judgment held in *Theophanous* that the defence pleaded by The Herald & Weekly Times Ltd was not bad in law. On the other hand, the defence pleaded in *Stephens* was bad in law as it did not fully comply with the political figure defence.

An important distinction between *Theophanous* and *Stephens* was that *Theophanous* involved a Federal politician while *Stephens* involved State politicians. This gave rise to the following issues:

1. Did the implied freedom, in arising out of the Commonwealth Constitution, apply to discussion about State political matters?
2. Might a counterpart implication be drawn from the relevant State Constitution?

The answer to both questions was yes. The implied freedom was found to extend to "discussion of political matters relating to government at State level"[39] and it was held that a counterpart implication could be derived from the *Constitution Act* 1889 (WA). This counterpart implication was based upon the doctrine of representative democracy expressed in both the provisions and the structure of the Constitution of Western Australia. Mason CJ, Toohey and Gaudron JJ relied upon the State implication in creating the political figure defence applied in *Stephens*.

ii. Deane J

The judgment of Deane J deserves to be examined separately because he went much further than the joint judgment in his reasoning and in his vision of the Constitution.[40] His approach to the relevance of the intentions and beliefs of the framers of the Constitution was very different to that of the other members of the Court.[41] He considered the argument that the implication of rights from the Constitution is inconsistent with the framers' intentions and actions in not including a bill of rights, and therefore that rights should be determined by the common law or by the legislature, to be "flawed at every step".[42] The argument both reversed ordinary principles of construction and misconstrued the intentions of the framers. Elevating the importance of the intentions of the framers in the process of constitutional interpretation "unjustifiably devitalises its provisions by effectively treating its long dead framers rather than the living people as the source of its legitimacy".[43]

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39 Above n3 at 768.

40 Like the joint judgment, Deane J found that the implied freedom of political discussion extended, even without a counterpart implication in the relevant State Constitution, to the legislative powers and laws of a State. He argued that "it would border on the absurd if State laws continued, or enacted pursuant to legislative powers continued, by the Constitution [ss 106, 107 and 108]" could undermine the implied freedom: above n2 at 741.

41 This divergence was also evident in Deane J's dissenting judgment in *New South Wales v Commonwealth* (*"The Incorporation Case"*) (1990) 169 CLR 482 at 511.

42 Above n2 at 741.

43 Ibid. As a result of recent High Court decisions, particularly *Australian Capital Television*, it has become increasingly recognised that the Constitution derives its efficacy from the "will of the people". See *University of Wollongong v Metwally* (1985) 158 CLR 447 at 476–7 per Deane J; *Leeth v Commonwealth* (1992) 174 CLR 455 at 486 per Deane and Toohey JJ; above n5 at 70 per Deane and Toohey JJ; above n6 at 138 per Mason CJ; Lindell, G, "Why is Australia's Constitution Binding? the Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Fed LR* 29 at 37, 49; Williams, above n11 at 95–6.

The Constitution was characterised as "a living force", Deane J arguing that the present legitimacy of the Constitution "lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people".[44] Even if it could be established that the framers intended that their failure to follow the United States model by including a bill of rights should impede the implication of constitutional rights, such an intention would be irrelevant. He argued:

> Moreover, to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations.[45]

The Court was urged to take "full account of contemporary social and political circumstances and perceptions", including a "widespread public perception" that defamation proceedings brought by politicians are to the profit of such officeholders and to the detriment of political criticism.[46] Like the joint judgment, he found that the law of defamation, including the available defences, had a significant "chilling" effect on political discussion. He argued that this amounted to a "deterrence of the making of even wellfounded critical statements".[47]

Deane J regarded the critical question as being the extent to which the curtailment of free political discussion could be justified in the context of a defamation action brought against a political figure. He, like Mason CJ, Toohey and Gaudron JJ, refused to apply *New York Times Co v Sullivan*. Unlike the joint judgment, however, Deane J found that *New York Times* should not be applied, not because it weighed the balance too much in favour of freedom of political discussion, but because it weighed the balance too much in favour of reputation. Even the *New York Times* test could have a "chilling" effect on political discussion due to the perceived risk or actual threat of defamation proceedings. He stated:

> I would hold that the effect of the constitutional implication is to preclude completely the application of State defamation laws to impose liability in damages upon the citizen for the publication of statements about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office. I would also hold that the constitutional implication's protection of the freedom of the citizen to be informed by, and to participate in, public and vigorous discussion and criticism of the official conduct of those entrusted with the exercise of the powers of government also precludes completely the application of such laws to impose liability in respect of such statements or comments upon those responsible for the conduct of the press and other media outlets through which such public discussion and criticism must, in our society, largely take place.[48]

It was left open whether the implication might preclude or qualify the effect of defamation laws upon political discussion about the private conduct of

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44 Above n2 at 743.

45 Id at 744. Deane J applied a lengthy quote from Inglis Clark, *Studies in Australian Constitutional Law* (1901) to support this contention: Above n2 at 744.

46 Above n2 at 745.

47 Id at 747.

48 Id at 752. Deane J accepted that freedom of political discussion "is largely dependent upon

persons, such as public figures, who "have thrust themselves to the forefront" of political events in order to influence those events.[49]

In the result, despite going substantially further than the reasoning in the joint judgment, Deane J lent his support to that judgment to form a majority in both *Theophanous* and *Stephens*.

C. *The Minority — Brennan, Dawson and McHugh JJ*

The minority held the defences pleaded in *Theophanous* and *Stephens* to be bad in law. While Brennan J found the implied freedom to be inapplicable in the circumstances, Dawson and McHugh JJ, in separate judgments, adopted a more narrow approach in finding that no implication of the type argued for existed.

A significant difference between the majority and the minority lay in perceptions of the role of the Court. Except for Deane J, the majority skirted over this issue. The minority, on the other hand, pressed the issue strongly in a vigorous dissent.

Brennan J argued that, unlike in the development of the common law, judicial policy, that is, a consideration external to the text or structure of the Constitution, has no role to play in the interpretation of the Constitution. He argued that the "notion of 'developing' the law of the Constitution is inconsistent with the judicial power it confers".[50] This meant that there was no scope for drawing implications from the Constitution by referring to extrinsic sources.[51]

This was consistent with the approach of Dawson J, and was, in both cases, very different to the methodology of Deane J. Where Deane J emphasised his vision of the Constitution as a "living force", Dawson J remarked that the implied freedom had "entirely escaped attention during the 93 years since federation".[52]

Dawson J went further than Brennan J in applying the notion of extrinsic sources to show that freedom of political discussion could not be implied from the Constitution. He argued that the implication could only be drawn from impermissible sources such as by having reference to "the nature of our society".[53] He concluded:

> To draw an implication from extrinsic sources, which the first defendant's argument necessarily entails, would be to take a gigantic leap away from the *Engineers' Case*, guided only by personal preconceptions of what the Constitution should, rather than does, contain. It would be wrong to make that leap.[54]

The judgments of Dawson and McHugh JJ and Deane J were diametrically opposed on the significance of the intentions and beliefs of the framers of the Constitution. It was implicit for Dawson J that:

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the freedom of the media": Ibid.

49 Ibid, quoting *Gertz v Robert Welc, Inc*, 418 US 323 (1974) at 345.

50 Above n2 at 728.

51 Brennan J cited *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 331; above n5 at 4145; above n6 at 181–2.

52 Above n2 at 753.

53 Id at 756, quoting *McGrawHinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670 per Murphy J.

54 Above n2 at 756.

> [I]f those who drafted the Constitution had believed that the existing defamation laws impaired the representative government for which they sought to provide, it is inconceivable that they would not have sought to correct the situation explicitly.[55]

McHugh J argued that constitutional implications may only be derived from representative government to the extent that the institution is embodied in the text or structure of the Constitution. It did not follow as a matter of necessary implication that, because some provisions of the Constitution give effect to aspects of representative government, representative government is itself part of the Constitution. Representative government was distinguished from representative democracy, the latter being a wider concept describing a wide range of political institutions. To imply representative democracy was therefore, even to a greater extent than representative government, to give the High Court the power to shape the political institutions and processes embodied in the Constitution. This was seen as likely to endanger the nation's confidence in the High Court as the "final arbiter of what the Constitution means".[56] McHugh J charged the majorities in *Nationwide News* and *Australian Capital Television* with unintentionally departing from the method of constitutional interpretation laid down by the *Engineers' Case*.

Dawson and McHugh JJ denied the existence of any implied freedom that might abrogate the defamation laws of Australia. They argued from a traditional textual approach to interpretation of the Constitution owing much to the *Engineers' Case*. Attention was given to sections 7 and 24[57] of the Constitution in finding that the minimal requirements of representative government laid down by the instrument were insufficient to support the implication. A more limited implication based upon these minimal requirements might exist but in any event could not extend to strike down the impugned laws. McHugh J's narrow line of reasoning did not bear out the possibility of a broad implication based upon his judgment in *Australian Capital Television*, where he had left open the question of whether the Constitution embodies "a general right of freedom of communication in respect of the business of government of the Commonwealth".[58]

Like the majority, but unlike Dawson and McHugh JJ, Brennan J held that an implication of freedom of political discussion can be derived from the system of representative government established by the Constitution. The implication arose out of one aspect of representative government, namely "the need for the people of the Commonwealth to form and to exercise political judgments".[59] He maintained that the implied freedom is not a personal right but an immunity from legislative power.[60] A two-stage test was laid down for deter-

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55 Id at 755. See, for the extra-judicial views of Dawson J on this subject, Dawson, D, "Intention and the Constitution Whose Intent?" (1990) 6 *Aust Bar R* 93. McHugh J accepted that the Constitution could be interpreted by taking into account "the background circumstances that were present to the mind of the makers of the Constitution": Above n2 at 758. For example, he stated that the rule of law could be applied in construing the Constitution: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 cited.

56 Above n2 at 758.

57 See above n19.

58 Above n6 at 232 per McHugh J.

59 Above n2 at 732.

60 See above n29.

mining whether a law that impinges upon the freedom is valid. First, the law must satisfy the test of proportionality, that is, it must be "appropriate and adapted to achieving a purpose within legislative power".[61] Second, the restriction must be imposed by the law "merely as an incident to the achieving of that purpose".[62]

The characterisation of the implication as an immunity from legislative power led inexorably to the question of what effect the implication might have on the common law. Brennan J accepted that the Constitution prevails over the common law in case of inconsistency, but argued, like Gaudron J in *Australian Capital Television*,[63] that the Constitution and the common law "are bound in a symbiotic relationship" such that the common law may inform the text and thereby the implications of the Constitution.[64]

No inconsistency arose, however, between the implied freedom and the common law of defamation. Brennan J found, in the central point of distinction between his judgment and that of the majority, that:

> there is no express inconsistency between the Constitution and those rules of the common law which govern the rights and liabilities of individuals inter se. That is because the Constitution deals not with the rights and liabilities of individuals inter se but with the structure and powers of organs of government, including powers to make laws that deal with those rights and liabilities.[65]

As the constitutional implication did not purport to affect common law rights and liabilities between individuals, the common law and the Constitution did not overlap. There are problems with this reasoning. Why the lack of an "express inconsistency" could restrict the ambit of an implication was not made clear. Moreover, it was circular to argue that the implication could not affect the rights and liabilities of individuals inter se because the Constitution, including the implied freedom, does not deal with the rights and liabilities of individuals inter se.

Brennan J went even further in arguing that if the implication and the common law of defamation covered the same ground, they would not be inconsistent because, axiomatically, the common law already provided an appropriate balance between free political discussion and the protection of reputation.[66]

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61 Above n2 at 733. As in above n6 at 158–9, Brennan J stated that the Court must give the legislature a "margin of appreciation": Above n2 at 736. In regard to the process of proportionality, see generally *Commonwealth v Tasmania* ("*Tasmanian Dam Case*") (1983) 158 CLR 1 at 172, 259–61, 278; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289, 303, 311–2, 324, 336, 346; *Davis v Commonwealth* (1988) 166 CLR 79 at 100; *South Australia v Tanner* (1989) 166 CLR 161 at 165, 178; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 573–4; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-4; Above n5 at 28–9, 95, 101; *Polyukhovich v Commonwealth* ("*War Crimes Case*") (1991) 172 CLR 501 at 592–3; Above n6 at 217–8; *Minister for Resources v Dover* (1993) 116 ALR 54 at 64–7, 71, 73–5; above n4 at 797–8, 809–14, 827–31, 839, 841–2; Bayne, P, "Reasonableness, Proportionality and Delegated Legislation" (1993) 67 *ALJ* 448 at 449–52; Fitzgerald, B F, "Proportionality and Australian Constitutionalism" (1993) 12 *U Tas LR* 263.

62 Above n2 at 733. Brennan J stated this second limb in above n6 at 150 as being that the law "must serve some other legitimate interest". See also id at 157.

63 See above n32. See also above n5 at 51 per Brennan J.

64 Above n2 at 727.

65 Id at 733–4.

66 According to Brennan J in above n3 at 782: "The common law is not only consistent with the system of representative government prescribed by the Constitutions of the Commonwealth

He argued that to decide otherwise, that is, to find that the tort of defamation goes beyond what is appropriate and adapted to the purpose of protecting personal reputation, would be to follow the forbidden route of applying judicial policy.

In common with the majority, Brennan J rejected the use of *New York Times Co v Sullivan*. He concluded that the decision should be distinguished given its "uniquely American historical background".[67] He similarly rejected the use of decisions on the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights, arguing that there was no relevant parallel in the Constitution with those instruments.

In *Stephens*, Brennan J found that the implied freedom could affect the legislative powers of the States. The comment complained of in *Stephens* did not, however, come within the ambit of the freedom because the "performance by members of the Western Australian Parliament of their official functions is irrelevant to the government of the Commonwealth".[68] He also derived a corresponding implication from the *Constitution Act* 1889 (WA). For the reasons he gave in *Theophanous*, this implication could not affect the common law of defamation.

3. Cunliffe[69]

A. *The Facts*

Cunliffe involved a challenge to the validity of Part 2A of the *Migration Act* 1958 (Cth).[70] Part 2A regulated the giving of "immigration assistance"[71] and the making of "immigration representations".[72]

Subject to certain exceptions, section 114F(1) prohibited persons, including legal practitioners, from giving immigration assistance unless registered under the *Migration Act*. Sections 114F(1) and (3), in connection with sections 114B and 114C, had the further effect of prohibiting legal practitioners not registered under the Act from giving immigration assistance in the form of advice for the purpose of the preparation or lodging of an entrance application or for

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and of the States; it also provides the flexibility of application which is essential to balance the important interests of personal reputation and free speech and which the necessary rigidity of consitutional formulae cannot provide."

67 Above n2 at 738.

68 Above n3 at 770.

69 The following discussion does not examine issues raised in above n4 relating to section 92 of the Constitution and the powers of the Commonwealth under s51(19), (27) and (39) of the Constitution.

70 Part 2A was inserted by *Migration Amendment Act (No 3)* 1992 (Cth).

71 Section 114B provided: "a person gives immigration assistance if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist an entrance applicant by: (a) preparing, or helping to prepare, the entrance application; or (b) advising the entrance applicant about the entrance application; or (c) preparing for proceedings before a court or review authority in relation to the entrance application; or (d) representing the entrance applicant in proceedings before a court or review authority in relation to the entrance application".

72 Section 114H(4) provided: "a person makes immigration representations if he or she makes representations to, or otherwise communicates with, the Minister, a member of the Minister's staff or the Department (whether directly or indirectly and whether orally or in writing) on behalf of an entrance applicant in relation to the entrance application".

the purpose of proceedings before or review by a review authority. An application, including an application by a legal practitioner, for registration as a migration agent could be rejected where the character or qualifications of the applicant were unsatisfactory.

An unregistered person asking for or receiving a fee or other reward in giving immigration assistance was, under section 114G(1), liable to 10 years imprisonment. Under section 114H(1), the same term applied to unregistered persons asking for or receiving any fee or other reward for making immigration representations.

Individuals, including legal practitioners, were exempted from the prohibition in section 114F(1) under section 114F(5) provided the immigration assistance was not given:

(a) for a fee or other reward;

(b) in his or her capacity as an employee of, or a voluntary worker for, another person or organisation; and

(c) in the course of, or in association with, the conduct of a profession or business.

An issue before the Court was whether Part 2A, and in particular the provisions outlined above, infringed the implied freedom of political discussion recognised in *Nationwide News* and *Australian Capital Television*. The Court split four to three in favour of the validity of the legislation, with Toohey J departing from the majority in *Theophanous* and *Stephens* in finding for the legislation. Except for McHugh J, the judgments in *Cunliffe* made no significant reference to *Theophanous* or *Stephens*[73] but instead relied upon *Nationwide News* and *Australian Capital Television*.

B. The Majority — Brennan, Dawson, Toohey and McHugh JJ

Brennan J found that the implied freedom may protect citizens and, in principle, others entitled to vote in Australian elections. The institution of representative government did not, however, require that aliens be entitled to the benefit of the freedom given that aliens have "no constitutional right to participate in or to be consulted on matters of government in this country".[74] He also argued that it is "fundamentally erroneous" to regard the implied freedom as creating a personal right.[75] The freedom is instead negative in character in being a limitation on legislative power.[76]

Insofar as Part 2A infringed upon a citizen's ability to give immigration assistance or to make immigration representations, Brennan J found that the provisions of the Act were "not expressed as restrictions on political discussion".[77] The implied freedom did not extend to Part 2A merely because

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73 The only significant mention of either case is of *Theophanous* in above n4 at 852 per McHugh J. Gaudron J in above n4 at 847–8 fn 54 made incidental reference to *Theophanous*. This suggests that, with the exception of McHugh J, the judgments in *Cunliffe* were written before those in *Theophanous* and *Stephens*.

74 Above n4 at 815.

75 Id at 814.

76 See above n29.

77 Above n4 at 815.

it regulated an "activity the control of which might be politically controversial".[78] The implication could not "impair, much less sterilise, the exercise of a power which might become the subject of political debate".[79] Part 2A was held to be valid as it did not inhibit communications of a political kind except, perhaps, in a manner "manifestly incidental" to the protection of aliens.[80]

In separate judgments, Dawson and McHugh JJ accepted that a limited implication of freedom of political discussion might be drawn from sections 7 and 24 of the Constitution based upon the requirement that the members of the Commonwealth Parliament be "directly chosen by the people". This implication was, however, insufficient to invalidate Part 2A of the Act. Dawson J stated that he knew of: "no foundation for the suggestion that, when the advice in question concerns participation in an administrative process, access to that advice is an essential feature of representative government."[81]

Dawson J went further in stating that, within the boundaries of any implied limitation,[82] the Commonwealth could prescribe the form of representative government to be applied to Australia. To find otherwise and to draw a broader implication from outside the Constitution, that is, from extrinsic sources, would be to commit the "heresy which was exposed and rejected as long ago as the *Engineers' Case*".[83] As in *Theophanous* and *Stephens*, Dawson J gave great weight to his view that the framers had consciously decided not to insert a bill of rights into the Constitution, including any right that might have protected political discussion.[84] It was for the Parliament to determine whether political discussion might be abridged, not the High Court.

Toohey J differed from the other members of the majority in that he found that Part 2A placed a restriction upon the political discussion protected by the implied freedom.[85] He differed from the minority in that he found that the restriction was not so disproportionate to the end to be achieved as to render the legislation invalid. While acknowledging that restrictions on the implied freedom "are difficult to justify", Part 2A was valid because, quoting the test adopted by Deane J and himself in *Nationwide News*,[86] the legislation aimed

78 Ibid.
79 Ibid.
80 Id at 816.
81 Id at 835.
82 For example, the limitation might prevent the Commonwealth from legislating for the election of Parliamentarians by means of an electoral college: above n6 at 227 per McHugh J.
83 Above n4 at 833.
84 Dawson J cited Moore, H, *The Constitution of the Commonwealth of Australia* (2nd edn, 1910) at 614–5; La Nauze, *The Making of the Australian Constitution* (1972) at 227.
85 While recognising that aliens may gain the protection of Australian law, Toohey J did not decide whether aliens might claim the benefit of the implied freedom: above n4 at 842.
86 The test devised by Deane and Toohey JJ in above n5 at 77 was: "A law [with respect to the prohibition or control of communications relating to the government of the Commonwealth] ... can be justified as consistent with the prima facie scope of the implication only if, viewed in the context of the standards of our society, it is justified as being in the public interest for the reason that the prohibitions and restrictions on communication about relevant matters which it imposes are conducive to the overall availability of the effective means of such communication in a democratic society or do not go beyond what is reasonably necessary for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a

to improve the standard of communications in a manner "conducive to the overall availability of effective means of such communications".[87] In other words, the legislation was valid because it did "not go beyond what is reasonably necessary ... for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity" in an ordered and democratic society.[88]

Curiously, Toohey J stated that "it should be said that nothing in the scheme adopted constitutes a restriction on political discussion".[89] It is, however, apparent from his approach that he found there to be a restriction upon political discussion but that this did not render Part 2A invalid because the restriction satisfied the test for validity. If there had been no such restriction, there would have been no need for Toohey J to decide whether Part 2A could be justified under the implied freedom.

C. *The Minority — Mason CJ, Deane and Gaudron JJ*

In separate judgments, Mason CJ, Deane and Gaudron JJ adopted a wide view of the implied freedom. Deane J stated:

> [T]he freedom of the ordinary citizen of this country to support and assist, by encouragement and advice, an applicant for admission as a visitor, an ordinary immigrant or a refugee lies within the central area of the freedom of political communication and discussion which the Constitution's implication protects.[90]

The provision of immigration assistance and the making of immigration representations were viewed as being "among the most important of all political communications and political discussions in this country".[91] Deane J based this statement upon Australia's recent history of receiving immigrants and the fact that more than 40 percent of Australians were either born or had at least one parent who was born outside Australia.

Mason CJ held that "[n]on-citizens who are actually present within this country, like citizens, are entitled to the protection afforded by the Constitution and the laws of Australia."[92] The implied freedom could be invoked by aliens within Australia "particularly when they are exercising that freedom for the purpose, or in the course, of establishing their status as entrants and refugees or asserting a claim against government or seeking the protection of government".[93]

Deane J did not go so far. An alien could only receive the benefit of the implied freedom indirectly where the benefit "flows from the freedom or immunity of those who are citizens".[94] Aliens were therefore protected "to the extent necessary to ensure that the freedom of citizens to engage in discussion and obtain information about political matters is preserved and protected".[95]

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society". See also above n6 at 169, 174 per Deane and Toohey JJ.

87 Above n4 at 844, quoting above n5 at 77 per Deane and Toohey JJ.

88 Above n4 at 844, quoting above n6 at 169 per Deane and Toohey JJ.

89 Above n4 at 845.

90 Id at 824. See id at 822.

91 Id at 822.

92 Above n4 at 799. As in above n2 at 719, Mason CJ left open the issue of whether the implied freedom might confer positive rights: above n4 at 799.

93 Above n4 at 799.

94 Id at 819.

95 Ibid. Deane J recognised that the distinction between the direct protection to which citizens

Mason CJ adopted the test of proportionality in determining whether Part 2A, in impinging upon the freedom, could nevertheless be upheld. In his view, the:

> burden or restriction is justifiable if it is reasonable in the sense that it is reasonably appropriate and adapted to the preservation or maintenance of an ordered society under a system of representative democracy and government, the efficacy of which depends upon the exercise of that very freedom.[96]

Unlike in the process of characterisation,[97] Mason CJ was not prepared to allow the Parliament a "certain margin" in infringing upon the freedom.[98]

Gaudron J adopted a similar test to that of Mason CJ in arguing that the Court must consider "whether the law *is* reasonably appropriate and adapted to the relevant purpose".[99] Consequently, where a law impinges upon political discussion it may be valid where the infringement:

> is no more than a limited and incidental by-product of a genuine regulatory scheme or if it operates in an area in which discussion has traditionally been curtailed in the public interests, as, for example, with the law of sedition. Beyond that, some pressing public interest would have to be shown for the law to be valid.[100]

Mason CJ held Part 2A to be invalid insofar as it applied to legal practitioners. The requirements of competence and integrity for registration could not be supported under the test of proportionality given that similar standards already applied for admission as a legal practitioner. The legislation was also "Draconian" in its prohibition of an unregistered legal practitioner or other individual from providing voluntary immigration in the circumstances set out in sections 114F(1) and (5).[101] This prohibition was held to be "grossly disproportionate" to the end to be achieved.[102] The "scope and extent of the alleged mischief" sought to be remedied by Part 2A had not been sufficiently established by the Parliament to outweigh this conclusion.[103]

According to Deane J, the test of the validity of a law trenching upon the implied freedom was the same as that devised by himself and Toohey J in *Nationwide News*.[104] The test did not involve the Court invoking legislative

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are entitled and the indirect protection potentially available to noncitizens "will ordinarily be of no practical significance": ibid.

96 Id at 799. This was similar to the test employed by Mason CJ in above n6 at 143–4 in respect of a restriction on an activity or mode of communication by which ideas or information are transmitted.

97 See above n4 at 796–8 per Mason CJ.

98 Id at 800. Cf above n6 at 158–9 per Brennan J; above n2 at 736 per Brennan J.

99 Above n4 at 848 (emphasis in original). This was the same test applied by Gaudron J in above n5 at 95 and above n6 at 218. The test may be distinguished from the test of proportionality applicable in the process of characterisation, that is, "whether the law is reasonably capable of being viewed as appropriate and adapted to achieving the purpose in question": above n4 at 848 per Gaudron J. See above n61.

100 Above n4 at 848.

101 Id at 794, 803.

102 Id at 803.

103 Id at 802.

104 Above n86. In above n4 at 821, Deane J explained that the phrase "does not go beyond what is necessary" in the test for validity should be read in the following sense (quoting *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109 at 283–4): "'necessary' in this context implies the existence of a pressing social need, and that interference

power, but was a fundamental aspect of the "judicial function directly or indirectly entrusted to them by the Constitution adopted by the people as the compact of our nation".[105]

In applying the implication of freedom of political discussion, Deane and Gaudron JJ found that certain provisions in Part 2A were invalid. The provisions precluding legal practitioners from giving advice or making representations for a fee in the conduct of court proceedings could not be supported. Neither could the restriction upon a person giving voluntary immigration assistance under sections 114F(1) and (5) of the Act. Deane J described the latter prohibition as having the potential to be "arbitrary and extreme".[106]

4. *Comment: A New Constitutional Framework?*

A. *The Implication of Freedom of Political Discussion*

i. Scope and Content

Cunliffe demonstrates the potential reach of the implied freedom of political discussion. That is, the freedom might extend to the discussion involved in every interaction, whether administrative or otherwise, between the people of Australia, including citizens and non-citizens, and government. A majority consisting of Mason CJ, Deane, Toohey and Gaudron JJ found that the implication protected the giving of immigration assistance and the making of immigration representations.[107]

It is clear from *Theophanous* and *Stephens*, as it was from *Nationwide News* and *Australian Capital Television*, that the origins of the implication lie in the system of representative democracy laid down by the Constitution. In *Cunliffe*, however, sight was lost of the notion that the "raison d'être" of the freedom "is to enhance the political process (which embraces the electoral process and the workings of Parliament), thus making representative government efficacious".[108]

There is little in the decisions in *Theophanous* or *Stephens* that would lead one to expect that the implied freedom would extend to the provision of immigration assistance to aliens. The connection with representative democracy, as the concept might be understood from the Constitution, is tenuous and problematic. This is especially true in respect of Mason CJ's lone finding in *Cunliffe* that an alien could directly gain the benefit of the implication. By virtue of their status, aliens are not entitled to participate in the processes of representative

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with freedom of expression should be no more than is proportionate to the legitimate aim pursued."

105 Above n4 at 821.

106 Id at 823.

107 While Mason CJ, Deane and Gaudron JJ held that the impugned legislation was invalid, Toohey J differed in that he found that the infringement could be justified under the test for validity. This meant that in the result the legislation was held to be valid by a majority consisting of Brennan, Dawson, Toohey and McHugh JJ.

108 Above n6 at 145 per Mason CJ.

government laid down by the Constitution, such as, the election of members of the Commonwealth Parliament.[109]

In *Cunliffe* Brennan J stated that a topic or mode of discussion is not protected by the implication simply because its regulation might be politically controversial.[110] On the other hand, the reasoning of Mason CJ, Toohey and Gaudron JJ in *Theophanous* suggests that the implication may protect discussion on a topic of political debate, including the public conduct of persons whose activities have become the subject of that debate.[111] The fact that political and legal debate[112] has surrounded the giving of immigration assistance to aliens, such as Cambodian boat refugees, may explain the majority finding in *Cunliffe* that such assistance fell within the ambit of the freedom.

However one explains or rationalises the majority finding in *Cunliffe*, it bore out the statement of Mason CJ, Toohey and Gaudron JJ in *Theophanous* that "it is not possible to fix a limit to the range of matters that may be relevant to debate in the Commonwealth Parliament".[113] It is conceivable that, in its largely unbounded state, the implication might extend to other fields of debate and controversy such as racial vilification[114] and contempt of court.

As McHugh J argued in *Theophanous*, representative democracy speaks for a spectrum of institutions. Unless the text or structure of the Constitution is taken to indicate which form or elements of representative democracy are implied, the Court must be left with the opportunity to determine the form and ambit of the freedom. The majority in *Theophanous* and *Stephens*, implicitly for the joint judgment and explicitly for Deane J, was prepared to work from its own conception of representative democracy informed by contemporary circumstances. This is perhaps an explanation for the surprising majority finding in *Cunliffe*. Without a clearly defined concept of representative government or a definite link to the Constitution uncertainty is inevitable.[115]

ii. Covering Old Ground?

There is more than a hint of Murphy J in the approach of the majority in *Theophanous* and *Stephens*.[116] Deane J's judgment in particular is reminiscent of Murphy J's willingness to challenge constitutional orthodoxy to protect civil liberties.[117] It is unfortunate that the contribution of Murphy J was not recognised by Deane J, or indeed by any other member of the majority in any of the decisions dealing with the implied freedom of political discussion.[118]

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109 Constitution, s7 and 24.

110 Above n4 at 815.

111 Above n2 at 718.

112 See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

113 Above n2 at 717.

114 See Attorney-General (Cth), *Racial Hatred Bill to be Introduced* (News Release, 31 October 1994).

115 See Cass, above n12 at 237.

116 See Jones, above n12 at 76; Kennett, above n12 at 598–600.

117 Compare, eg, Deane J's vision of the Constitution as a "living force" and Murphy J's statement in *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 668 that "Constitutions are designed to enable a society to endure through successive generations and changing circumstances".

118 Compare with above n6 at 212 fns 5, 6 per Gaudron J. See Coper, above n27 at 192.

The implied freedom of political discussion clearly owes much, if not in reasoning then in historical lineage, to the freedom of communication recognised by Murphy J in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*,[119] *McGraw-Hinds (Aust) Pty Ltd v Smith*[120] and *Miller v TCN Channel Nine Pty Ltd.*[121] In *Ansett Transport Industries*, Murphy J stated:

> Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States (which now derive their authority from Ch. V of the Constitution. From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution ...[122]

This dicta could easily have been taken from any of the recent decisions of the High Court, particularly *Australian Capital Television*, concerned with the implied freedom of political discussion.

The most significant difference between the freedom of communication recognised by Murphy J and the freedom of political discussion is that the former was not limited to political discussion but encompassed communication generally. However, even this distinction is arguable given the potential scope of the latter freedom.

The most potent criticism levelled at Murphy J's implication of freedom of communication is that it is illegitimate because it is extra-constitutional, that is, lacking an "adequate constitutional foundation".[123] This criticism was levelled against the majority in *Theophanous* by Dawson and McHugh JJ.

iii. Extrinsic or Intrinsic?

Dawson and McHugh JJ argued that the implied freedom recognised by the majority in *Theophanous* and *Stephens* is extra-constitutional, that is, derived from extrinsic sources,[124] as it could not have been derived by legitimate inference from the text, structure and history of the Constitution. One can only speculate about whether the concept of representative democracy upon which the implication is based does exist in the Constitution or whether it and thereby the implication have been constructed from sources external to the instrument.

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119 (1977) 139 CLR 54 at 88.

120 (1979) 144 CLR 633 at 670.

121 (1986) 161 CLR 556 at 581–2. Cf at 569, 579, 592, 615, 625–6, 636–7.

122 Above n 119 at 88. See also above n121 at 581–2.

123 Winterton, G, "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 *FLR* 223 at 235. See also Bickovskii, P, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 *FLR* 460; Williams, above n11 at 96–7.

124 According to Brennan J in *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 231: "Any implication affecting the specific powers granted by the Constitution must be drawn from the Constitution itself. It is impermissible to construe the terms of the Constitution by importing an implication from extrinsic sources ...." See above n5 at 44 per Brennan J; above n6 at 181–2 per Dawson J.

The position of the majority is that the implication may ultimately be inferred from the system of representative democracy embodied in provisions of the Constitution such as sections 7 and 24.[125] A concept of, or at least elements of, representative government certainly exist in the Constitution. What is uncertain without explanation from the bench is whether the implication is a legitimate inference from such a concept or whether it cannot stand before the charge of Dawson and McHugh JJ. This dilemma may only be resolved when the majority makes clear its understanding or vision of the form of representative democracy embodied in the Constitution.

In *Cunliffe*, the inclusion of advice and assistance to aliens within the protection of the implied freedom of political discussion divorced the implication from its roots in representative democracy. This suggests that, in at least this application, the implication could not have been inferred from the Constitution and was therefore extra-constitutional. Such a conclusion depends upon the absence of persuasive reasoning linking the application of the freedom to the text, structure and history of the Constitution. Without some explanation of what is meant by representative democracy, it is difficult to see that the application of the implied freedom in *Cunliffe* would be any less extra-constitutional than the implication of freedom of communication recognised by Murphy J.

B. *Visions of the Constitution*

i. Whose Intent?

Deane J characterised the Constitution as a "living force" deriving its legitimacy not from its framers or the people who voted for the Constitution in the referenda of 1899 and 1900, but from the fluid concept of the people of Australia.[126] He was alone on this point.[127] Even Mason CJ, Toohey and Gaudron JJ described the plaintiff's "strongest" submission as being an argument based upon the intentions and beliefs of the founders of the Constitution.[128] It is worth noting, however, that they subsequently rejected this argument.

This issue raises the questions of whether the Constitution is to be interpreted as a forward looking or a backward looking document and whether, in taking one path over the other, the interpreter stands on granite or sand. That is, is the instrument to be interpreted according to the intentions of its founders, assuming that such intentions can be coherently determined, or is it to be interpreted in the light of modern norms? To take the latter path is to open a Pandora's box containing conundrums of legitimacy and democracy.[129] For example, it could be argued that an unelected and unrepresentative High Court is actually undermining representative democracy in applying the concept to invalidate legislation passed by the people's representatives.

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125 Above n19.

126 See above n43.

127 Mason CJ did, however, state in above n6 at 138 that the *Australia Acts* "marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people". See above n43.

128 Above n2 at 719. See above n6 at 135–6 per Mason CJ.

129 See Campbell, T D, "Democracy, Human Rights, and Positive Law" (1994) 16 *Syd LR* 195 at 204–7; Coper, above n27 at 190–1; Stokes, M, "Constitutional Commitments not Original Intentions: Interpretation in the Freedom of Speech Cases" (1994) 16 *Syd LR* 250 at 251.

The process of the High Court interpreting the Constitution gains much of its legitimacy from the fact that the Court is interpreting the Constitution rather than attempting to define and apply modern trends. There is an invisible line, perhaps conforming with the abstract notion of extrinsic versus intrinsic constitutional sources, across which the High Court should not tread in interpreting the Constitution.

Like the joint judgments in *Theophanous* and *Stephens*, Deane J did not detail his understanding of representative democracy or link the implication to the text of the Constitution. However, unlike the joint judgment, Deane J sought to fill the void left by this approach. For him, it had to be recognised that the Constitution derives its efficacy from the people of Australia and not from its framers. It was thus permissible to have regard to contemporary developments to give content to the implication.[130] Under this approach, the implication would have no fixed meaning but would ebb and flow with social and political developments. The correct approach to constitutional interpretation would lie not in understanding the past but in examining the present.

Mason CJ, Toohey and Gaudron JJ's rejection of the intentions of the framers as a basis upon which to interpret the ambit of the implied freedom suggests that their approach was not very different to that of Deane J. Where Deane J was explicit in his use of modern social and political circumstances, they were implicit. This is particularly evident in their creation of the political figure defence and in their rejection of the *New York Times* test. Deane J's approach is obviously preferable if only because the true reasoning of the Court is revealed by stripping away the facade of disinterested legalism.[131] Jaffe encapsulated this point well:

> If the judges can be persuaded to allow underlying policy questions to be brought out into the open, these questions would then become arguable and, in that way, subject to a higher degree of rational consideration and control.[132]

Where the values underlying a decision are not articulated the danger exists that the decision will continue to be applied under the doctrine of precedent even where those values are no longer supported.[133]

The value of the question raised by Brennan J about whether judicial policy should or should not be applied in interpreting the Constitution is ques-

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130 This approach does not conform with the High Court's disclaimer in *Commonwealth v Tasmania* (*"Tasmanian Dam Case"*) (1983) 158 CLR 1 at 58–9 in which it stated that its decision dealt with "strictly legal questions" and that its judgment did "not reflect any view of the merits of the dispute". Contemporary developments may rarely be divorced from the merits of a case.

131 Craven, above n11 at 9; Galligan, B, *Politics of the High Court: a study of the judicial branch of government in Australia* (1987) at 3041. This facade may enable the High Court to reach a socially desirable result without appearing to act as a legislature. See Coper, M, "Interpreting the Constitution: A Handbook for Judges and Commentators" in Blackshield, A R (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) at 60, 65.

132 Jaffe, L L, *English and American Judges as Lawmakers* (1969) at 92. See also Evans, G, "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in Hambly, A D and Goldring, J L (eds), *Australian Lawyers and Social Change* (1976) at 73; Zines, L, "A Judicially Created Bill of Rights?" (1994) 16 *Syd LR* 166 at 184.

133 Mason, A, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Fed LR* 1 at 5.

tionable. Judicial policy, that is, reliance upon external values such as community sentiment as perceived by a judge, has always been apparent to varying degrees in High Court decision-making. The following passage, in a private letter from Dixon J to Latham C J in 1937 on section 92 of the Constitution, exemplifies this:

> In cases relating to transport and the other "means" "implements" and "agencies" of commerce, if not in all cases, I think that it is almost clear that we must proceed by arbitrary methods. No doubt there will be limits but political and economic considerations will guide the instinct of the court chiefly. In time the thing will work back to some principle or doctrine but what it will be I am unable to foretell.[134]

Such a comment is, of course, unexceptionable. In a less private moment, Dixon J stated:

> it has often been said that political rather than legal considerations provide the ground of which the restraint [of Commonwealth or State legislative power] is the consequence. The Constitution is a political instrument. It deals with government and government powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.[135]

According to Sir Anthony Mason, judges may have "reference to values which they perceive to be desirable, accepted community values".[136]

The interpretation of the Constitution necessarily involves judges, hopefully explicitly rather than implicitly, applying their own views of community needs.[137] It is now well recognised that judges make law. According to Lord Reid:

> There was a time when it was thought almost indecent to suggest that judges make law they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more. [138]

In the same way judges will inevitably play a creative and not strictly legalistic role in interpreting the Constitution. It is beyond time that the fairy tale of "strict and complete legalism" be recognised as such and that the role of judicial policy in the process of constitutional interpretation be understood.[139]

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134 Bennett, J M, *Keystone of the Federal Area: A historical memoir of the High Court of Australia in 1980* (1980) at 67.

135 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82.

136 An interview in Sturgess, G and Chubb, P, *Judging the World; Law and Politics in the World's Leading Courts* (1988) 345, at 346.

137 For example, in refusing to apply s92 of the Constitution in above n4 at 853, McHugh J took into account that there was a "real social need" for the legislation.

138 "The Judge as Law Maker" (1972) 12 *JSPTL* 22 at 22.

139 Dixon, O, "Upon Taking the Oath of Office as Chief Justice" in *Jesting Pilate* (1966) at 247. See McHugh, M, "The Law-making Function of the Judicial Process" (1988) 62 *ALJ* 15 and 116.

ii. The *Engineers' Case*

The High Court's foray into implied constitutional rights is part of the wider process of the High Court redefining its role in the Australian polity. The *Engineers' Case* was the most visible symbol of the traditional supposedly non-political approach of the Court. In prescribing a literalist approach in interpreting the Constitution, that is, an approach based almost exclusively upon analysis of its text,[140] the decision is inconsistent with the approach of the majority in *Theophanous* and *Stephens*.[141] This was recognised by Dawson and McHugh JJ in *Theophanous*. It is an inescapable conclusion from any analysis of the reasoning of the majority, which eschewed a literalist approach in favour of relying upon largely undefined fundamental values.

While the *Engineers' Case* does not stand for the proposition that implications cannot be drawn in interpreting the Constitution,[142] it could not be said that the implication of a freedom of political discussion from the nebulous concept of representative democracy is consistent with an interpretive approach derived from the principles of statutory construction and based upon an examination of the text of the Constitution. The following passage from the judgment of the majority in the *Engineers' Case* demonstrates just how far the Court has shifted from the paradigm established by that case:

> If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.[143]

While McHugh J suggested in *Theophanous* that the majority's departure from the interpretative approach dictated by the *Engineers' Case* was unintentional,[144] the departure, although not explicit, is so blatant that this hardly seems tenable.

The *Communist Party Case*[145] is a useful yardstick for measuring how far the High Court has come from the *Engineers' Case*.[146] In the former case the High Court invalidated the *Communist Party Dissolution Act* 1950 (Cth),

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140 See Craven, above n11 at 2–5; Williams, above n11 at 86–8.

141 A remnant of the *Engineers' Case* above n1 at 146 lies in the fact that the Court closed its mind to the use of foreign precedents in applying the implied freedom: cf above n6 Mason CJ, Toohey and Gaudron JJ stated in above n2 at 718 that foreign decisions should be treated with "some caution", while Brennan J argued at 736 that the assistance given by cases decided under other Constitutions is "extremely limited". There was also a general rejection by the Court of the test established by the Supreme Court of the United States in *New York Times v Sullivan*, 376 US 254 (1964). On the relevance of foreign precedents in construing the implied freedom, see Barendt, E, "Free Speech in Australia: A Comparative Perspective" (1994) 16 *Syd LR* 149 at 161, 164–5.

142 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681–2; *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 22–3; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 668–70; above n5 at 41–2 per Brennan J; above n6 at 133–4 per Mason C J.

143 Above n1 at 151–2. See Williams, above n11 at 86-8.

144 Above n2 at 761.

145 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. See generally Winterton, G, "The Significance of the *Communist Party Case*" (1992) 18 *MULR* 630.

146 See Williams, above n11 at 91.

which severely curtailed expression in respect of communism and association and affiliation with the Communist Party of Australia, a participant in both State and Federal elections. The Act was held to be invalid not by applying implied freedoms but because the Commonwealth was unable to substantiate a sufficient link between the legislation and the Commonwealth's defence power in section 51(6) of the Constitution. Fullagar J, for example, went so far as to state that there would be no impediment to any of the States enacting the legislation.[147]

Paterson, counsel for the Australian Communist Party, had put to the Court that the *Dissolution Act* was invalid because it interfered with the freedoms of the people embodied in the system of representative government created by the Constitution.[148] This submission withered in the light of the literalism of the *Engineers' Case*.[149] By contemporary standards, the argument would fall neatly into line with any of the recent decisions of the High Court recognising an implied freedom of political discussion.[150]

It is inconceivable that the *Communist Party Case* would be decided on the same basis today as it was in 1951. The *Dissolution Act* would be regarded as a severe infringement upon the implied freedom of political discussion, if not of other implications such as a freedom of association. This approach might now be regarded as orthodox. The suggestion in 1951 that freedoms of this sort might be implied from the Constitution was not taken seriously.

5. *Conclusion*

Theophanous and *Stephens* have transformed the implied freedom of political discussion recognised in *Nationwide News* and *Australian Capital Television* into a fundamental tenet of Australian law. Constitutional implications have been recognised as cutting across inconsistent common law principles, thereby overriding carefully constructed common law doctrines. The development of the common law in Australia may never be the same. Attention will need to be had to any possible inconsistency with a constitutional implication. This may become increasingly difficult as the High Court recognises other implications, such as freedoms of participation and association.[151]

The potential scope of the implied freedom of political discussion is unclear. *Cunliffe* shows that unless the freedom is tied closely to a defined concept of representative democracy it will become recognised, not as a freedom of political discussion, but as a freedom of expression. Uncertainty, and suggestions of arbitrariness, will characterise the implication until the freedom is either understood within an explanation of representative democracy or until it is recognised as amounting to a general freedom of expression. Without a sound constitutional basis for the latter, the former approach is to be preferred.

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147 Above n145 at 262.

148 Williams, G, "Reading the Judicial Mind: Appellate Argument in the *Communist Party Case*" (1993) 15 *Syd LR* 3 at 18.

149 Ibid.

150 Id at 19.

151 Above n6 at 212 per Gaudron J, 227, 231–2, 234 per McHugh J. See Williams, above n11 at 101–3.

The political connotations of the "discovery" of implied constitutional rights by the High Court make it natural for there to be suggestions that appointments to the Court should be subjected to greater scrutiny and consultation.[152] Future appointments will be crucial insofar as they may affect the delicate balance that has arisen within the Court on the issue of implied rights.[153] A majority favouring a generous scope for and application of the implication, namely Mason CJ, Deane, Toohey and Gaudron JJ, and an opposing minority, being Brennan J, Dawson J and McHugh J, have emerged. The implication is still freshly sown and, while it has undoubtably taken hold in High Court jurisprudence, there may still be scope for the implication to be greatly curtailed.

Any narrowing of the freedom might be attempted by placing the implication within the interpretative framework created by the *Engineers' Case*. It is doubtful whether this could be successful. Unless the freedom were severely restricted, the *Engineers' Case* and its brand of literalism could only conflict with the developing notion of overarching freedoms. A better course would be to recognise that the influence of the *Engineers' Case* has waned and that the engineers of Australia's developing constitutional framework should be encouraged to more explicitly lay the foundations for constitutionally implied freedoms by more closely examining and expounding the fundamental values such as representative democracy that are embodied in the Constitution.

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152 Under s72 of the Constitution, justices of the High Court are appointed by the Governor-General in Council, that is, the executive branch of the Federal Government. See generally Thomson, J A, "Appointing Australian High Court Justices: Some Constitutional Conundrums" in Lee, H P and Winterton, G (eds), *Australian Constitutional Perspectives* (1992).

153 The Commonwealth Attorney-General has indicated that he disagrees with the recognition of the implied freedom of political discussion: *The Sydney Morning Herald* (22 October 1994). Another relevant issue to any appointment is the meaning of "duties of customs and of excise" in s 90 of the Constitution. The Federal/State distribution of indirect tax revenue depends upon the resolution of this question. In *Capital Duplicators Pty Ltd v Australian Capital Territory* (No 2)(1993) 118 ALR 1 the High Court split four to three to maintain a broad definition of "excise" that favours the Commonwealth.