Dignity and the Australian Constitution

Scott Stephenson*

Abstract

Today dignity is one of the most significant constitutional principles across the world given that it underpins and informs the interpretation of human rights. This article considers the role of dignity in the *Australian Constitution*. The starting point is the 2019 decision of *Clubb v Edwards*, which marked the arrival of dignity in Australia. In that case, the High Court of Australia found that laws restricting protests outside of abortion facilities were justified under the implied freedom of political communication partly on the basis that they protect the dignity of persons accessing those facilities. The article argues that dignity was used in two ways in the Court's decision: first, as a means of distinguishing natural persons from corporations; and second, as one purpose that a law can pursue that is compatible with the implied freedom. The article develops and defends the first use of dignity, while identifying some challenges that arise with the second use of dignity.

I Introduction

Since the middle of the 20th century, dignity has become one of the most significant principles in both public international law and domestic public law across the world.[1] The reason being that dignity is 'a central organizing principle in the idea of universal human rights'.[2] As the recognition of human rights has spread around the globe at the domestic and international level, so too has the recognition of dignity — sometimes understood as a foundation for human rights, sometimes as a freestanding right and sometimes as a principle that guides the interpretation of other human rights.[3] This seismic shift in the legal landscape has largely passed

* Senior Lecturer, The University of Melbourne Law School, Victoria, Australia. Email: scott.stephenson@unimelb.edu.au; ORCID iD: https://orcid.org/ 0000-0002-5305-3304.
Thanks to Rosalind Dixon, Adrienne Stone and Lulu Weis for their exceptionally helpful comments and suggestions.

1 For an overview of its spread across the legal texts of the world, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 664–75.

2 Ibid 675. For example, the Preamble to the Universal Declaration of Human Rights begins by stating that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world …': *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Preamble para 1.

3 For a summary of the different connections between dignity and human rights, see McCrudden (n 1) 680–81.

by Australia due to the lack of a national bill of rights.[4] While the International Court of Justice, the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, the Federal Constitutional Court of Germany, the Supreme Court of the United States, the Supreme Court of Canada, the Supreme Court of Israel, the Constitutional Court of South Africa and many other courts have issued important judgments on the meaning and use of dignity,[5] the High Court of Australia has said almost nothing about the concept.[6]

The High Court's 2019 decision in *Clubb v Edwards*[7] is, therefore, a major development because it represents the first time that the concept of dignity has been used to help interpret the *Australian Constitution*. The case involved a challenge to the constitutional validity of Tasmanian and Victorian legislation prohibiting protests held outside facilities where abortions are provided. The plaintiffs contended that these laws infringed the implied freedom of political communication. The Court dismissed the challenge, with a number of judges holding that the laws were enacted for the purpose of protecting the dignity of persons accessing the facilities and that this purpose is compatible with the constitutionally prescribed system of representative and responsible government. The protection of dignity thus now appears to be a principle with a degree of constitutional recognition in Australia, capable of justifying the imposition of restrictions on the implied freedom.

This article interrogates the introduction of dignity into the Australian constitutional landscape, advancing three claims. First, the High Court's decision in *Clubb* suggests there are two different ways in which dignity might be used in Australia. It can be used in the broad manner mentioned above — to identify one purpose that a law can pursue that is compatible with the constitutionally prescribed system of representative and responsible government (dignity as a legitimate purpose). But it can also be used in a narrower manner as a means of distinguishing the position of natural persons and corporations under the implied freedom. Natural persons have an interest that corporations do not — the protection of their dignity (dignity as a distinctive characteristic). In *Clubb*, Kiefel CJ, Bell and Keane JJ gesture towards this second use of dignity when they distinguish the case from the situation in *Brown v Tasmania*,[8] where the Court invalidated legislation prohibiting protests near the site of forestry operations.[9] The protests outside abortion facilities generated a form of harm that was not generated

---

4 While it is not necessary for a country to have a bill for rights for dignity to be a relevant principle of public law, the concept most commonly enters a legal system through a bill of rights, which explains the High Court of Australia's comparatively late engagement with the concept.

5 For an overview of these decisions, see McCrudden (n 1) 682–94.

6 Prior to *Clubb v Edwards* (2019) 366 ALR 1 ('*Clubb*'), there have been a very small number of cases where the Court has discussed the concept of dignity, though none of these discussions have directly related to the interpretation of the *Australian Constitution*: see, eg, *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218; *Maloney v The Queen* (2013) 252 CLR 168.

7 *Clubb* (n 6).

8 *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*').

9 *Clubb* (n 6) 23–4 [82].

in the case of protests outside forestry operations — harm to the dignity of persons accessing abortion facilities.[10]

Second, the article develops and defends the narrower use of dignity as a distinctive characteristic. It argues that corporations have generated two challenges under the implied freedom that have presented difficulties for the High Court in recent years. One is the extent to which the political communication of corporations is protected under the implied freedom. Evaluating the Court's decisions in *Unions NSW v New South Wales*[11] and *McCloy v New South Wales*,[12] the article suggests that the Court has not identified a satisfactory legal, as opposed to a factual, means of justifying its conclusions as to when legislatures can restrict the political communication of corporations. It argues that dignity as a distinctive characteristic might provide such a justification. The second challenge is the extent to which restrictions on political communication can be imposed to protect corporations from harm. The article argues that dignity as a distinctive characteristic, as gestured towards in *Clubb*, is a useful and justifiable way of differentiating between, on the one hand, the scope of the legislature's ability to protect corporations from harm and, on the other hand, the scope of the legislature's ability to protect natural persons from harm.

Third, the article considers two issues that arise with the broader use of dignity as a legitimate purpose. One issue is the uncertainty that surrounds the meaning of dignity. As dignity has many different, and sometimes contradictory, aspects, the Court will need to provide further guidance as to what the term means in the Australian constitutional context. This will be no easy task. Take, for example, the aspect of dignity that was the focus of *Clubb* — the prevention of unwanted messages being forced upon people. The difficulty is that almost every political protest involves forcing unwanted messages upon people — people passing the protest in the street, people entering the legislative building, and so on. It cannot therefore be the case that the prevention of unwanted messages being forced upon people is compatible with the constitutionally prescribed system of representative and responsible government in all circumstances. It must be understood as the protection of *particular* messages being forced upon *particular* people in *particular* circumstances.

The second issue that arises with the broader use of dignity as a legitimate purpose is the uncertainty that surrounds the use of dignity. In Australia, there is a risk that dignity will only be recognised as relevant to the law's purpose, not also the law's effect on speakers, due to the limited scope of the implied freedom of political communication. The article identifies two related problems with this path. One is that it creates a partial and distorted conception of dignity. As *all* natural persons are understood to have dignity, it is misleading to recognise the dignity of listeners and disregard the dignity of speakers. The other is that it flips the principal objective of dignity on its head. Dignity is understood, first and foremost, as a justification for the existence of rights and freedoms, not as a justification for

---

10 Ibid.
11 *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions NSW*').
12 *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*').

their abrogation. If the High Court were to use dignity only as a legitimate purpose, it would turn the concept solely into a vehicle for limiting rights and freedoms.

The article is divided into three parts. Part II advances the first claim by providing an overview of the High Court's invocations of dignity in *Clubb*. Part III makes the second claim by analysing the Court's approach to corporations and the implied freedom, and the role that dignity as a distinctive characteristic has played and could play in the future. Part IV puts forward the third argument by highlighting the challenges that the Court will need to confront if it intends to use dignity as a legitimate purpose.

II The Two Uses of Dignity in *Clubb*

The High Court in *Clubb*, particularly the joint judgment of Kiefel CJ, Bell and Keane JJ, invokes dignity in two different respects. First, it is used in a broad manner to identify one of the purposes or objectives of the law: that is, the law is designed to protect the dignity of persons accessing abortion facilities. Second, it is used in a narrow manner to identify a distinguishing characteristic of natural persons, implicitly differentiating the position of natural persons from corporations: that is, protests targeted at natural persons can cause a type of harm that does not arise in respect of protests targeted at corporations — namely, harm to dignity. To understand the two uses of dignity in *Clubb*, it is necessary to consider the decision in some detail.

The case involved challenges to the constitutional validity of Tasmanian and Victorian legislative provisions prohibiting protest activities within a 150 metre radius of a facility where abortion services are provided ('safe access zones'). The Victorian law stated that the dignity of persons accessing abortion services was part of the rationale for the prohibition:

> The purpose of this Part is—
>
> (a) to provide for safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing and respect the privacy and dignity of—
>
> (i) people accessing the services provided at those premises; and
>
> (ii) employees and other persons who need to access those premises in the course of their duties and responsibilities …[13]

The law also defined the prohibited protest activities in a way that might be understood as relating to the dignity of persons accessing abortion services, stating that the prohibited activities included

> communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is *reasonably likely to cause distress or anxiety* ...[14]

---

13 *Public Health and Wellbeing Act 2008* (Vic) s 185A.

14 Ibid s 185B(1) (emphasis added). By contrast, the Tasmanian law defined prohibited protest activities to include 'a protest in relation to terminations that is able to be seen or heard by a person

The laws were challenged on the basis that they violated the implied freedom of political communication doctrine ('implied freedom'). The implied freedom is a limitation on power that is derived from the fact that the *Australian Constitution* provides for a system of representative and responsible government.[15] It prohibits state and federal legislatures from enacting legislation that burdens political communication unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[16]

In 2015 in *McCloy*, a majority of the High Court drew on authorities from European jurisdictions to adopt a structured proportionality analysis for evaluating a law's compatibility with the implied freedom.[17] Other judges have resisted the move,[18] arguing that structured proportionality analysis is inconsistent with, inter alia, the rationale for the implied freedom and the common law approach to adjudication.[19] These criticisms have prompted other judges to defend the use of structured proportionality analysis, with, for example, French CJ and Bell J stating in one case that '[t]he adoption of [structured proportionality analysis] in *McCloy* did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law'.[20] While the subject has produced several years of contestation between members of the High Court, there are signs that the debate has reached an impasse, with one of proportionality's strongest opponents, Gageler J, stating in *Clubb* that '[m]y own reservations about structured proportionality have been outlined in the past. Nothing is to be gained by me elaborating further on those reservations'.[21]

In *Clubb*, Kiefel CJ, Bell and Keane JJ summarise the test set out in *McCloy* in the following terms:[22]

> Does the law effectively burden the implied freedom in its terms, operation or effect?
>
> If 'yes' to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

---

accessing, or attempting to access, premises at which terminations are provided': *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1).

15 See, especially, *Australian Constitution* ss 7, 24, 64, 128.

16 *Coleman v Power* (2004) 220 CLR 1, 50 [93] (McHugh J) ('*Coleman*'). For the purposes of this article, it is not necessary to consider whether the implied freedom also applies to the actions of the executive.

17 *McCloy* (n 12) 193–5 [2]–[3].

18 See, eg, the judgments of Gageler J: *McCloy* (n 12) 234–8 [140]–[149]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 71–2 [99]–[101] ('*Murphy*'); *Brown* (n 8) 376–7 [157]–[161]; *Clubb* (n 6) 39–40 [160]. See also the judgments of Gordon J: *Murphy* (n 18) 122–4 [294]–[305]; *Brown* (n 8) 464–8 [429]–[438]; *Clubb* (n 6) 101–4 [389]–[404].

19 For an analysis of these arguments, see Adrienne Stone, 'Proportionality and its Alternatives' (2020) 48(1) *Federal Law Review* 123.

20 *Murphy* (n 18) 52 [37].

21 *Clubb* (n 6) 39–40 [160]. Though Gageler and Gordon JJ have continued to express their reservations in subsequent decisions: see, eg, *Comcare v Banerji* (2019) 372 ALR 42, 72 [96] (Gageler J), 86 [161] (Gordon J).

22 *Clubb* (n 6) 10 [5].

> If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Structured proportionality analysis enters at the third stage:

> The third step of the *McCloy* test is assisted by a proportionality analysis which asks whether the impugned law is 'suitable', in the sense that it has a rational connection to the purpose of the law, and 'necessary', in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is 'adequate in its balance'. This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom.[23]

For Kiefel CJ, Bell and Keane JJ in *Clubb*, the concept of dignity was relevant to the second question (the legitimacy of the purpose) and the third question's second and third elements (the law's 'suitability' and 'adequacy in its balance'). For the legitimacy of the law's purpose and the law's adequacy in its balance, the three judges invoked dignity in a broad manner as an interest held by the people (either by persons accessing abortion services or by the people generally). For the law's suitability, their Honours invoked dignity in a narrower manner as a type of harm that natural persons might suffer.

In relation to the legitimacy of the purpose, Kiefel CJ, Bell and Keane JJ noted that one purpose of the Victorian legislation is 'the preservation and protection of the privacy and dignity of women accessing abortion services. Privacy and dignity are closely linked; they are of special significance in this case.'[24] This purpose, their Honours stated, is 'readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[25] Their Honours elaborated on what dignity means by reference to the writings of Aharon Barak, former President of the Supreme Court of Israel. Indeed, Barak is the only person cited in their judgment on the meaning of dignity. Their Honours state:

> Generally speaking, to force upon another person a political message is inconsistent with the human dignity of that person. As Barak said, '[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others'.[26]

In other words, the three judges concluded that the legislation's purpose is to protect the dignity of persons accessing abortion services because it prohibits political messages from being forced upon those persons.

---

23 Ibid 10 [6].

24 Ibid 17 [49]. On privacy as a legitimate purpose, see *Monis v The Queen* (2013) 249 CLR 92 ('*Monis*').

25 *Clubb* (n 6) 17–18 [51].

26 Ibid 17 [51] (citations omitted).

This understanding of dignity is also invoked in *Clubb* when Kiefel CJ, Bell and Keane JJ considered the law's adequacy in its balance. Their Honours held that the law did not pursue its 'purpose by means that have the effect of impermissibly burdening the implied freedom'[27] and stated:

> The implied freedom is not a guarantee of an audience; a fortiori, it is not an entitlement to force a message on an audience held captive to that message. As has been noted, it is inconsistent with the dignity of members of the sovereign people to seek to hold them captive in that way.
>
> A law calculated to maintain the dignity of members of the sovereign people by ensuring that they are not held captive by an uninvited political message accords with the political sovereignty which underpins the implied freedom. A law that has that effect is more readily justified in terms of the third step of the *McCloy* test than might otherwise be the case.[28]

By contrast, when Kiefel CJ, Bell and Keane JJ evaluated the law's suitability, their Honours gestured towards an alternative, narrower conception of dignity. On the question of suitability, Mrs Clubb argued that the law had no rational connection to its legitimate purpose on the basis that it targeted 'on-site protests'.[29] She submitted that as protest outside of premises where abortions occur has been a characteristic feature of political debate about abortion, the law targeted political communication at the very location where it is most effective. In making this argument, Mrs Clubb drew on the 2017 decision in *Brown*,[30] where the High Court invalidated a Tasmanian law restricting protest activities near forestry operations. In that case, there was some discussion of the fact that there is a long history of political protests at environmental sites in Australia,[31] which suggested that the law imposed a considerable burden on political communication.[32] In *Clubb*, Kiefel CJ, Bell and Keane JJ rejected the analogy for a number of reasons, including the lack of evidence of the 'special efficacy of on-site protests as a form of political communication'.[33] However, they said that the most important reason for distinguishing the two cases is that '[t]he on-site protests against forest operations discussed in *Brown* did not involve an attack upon the privacy and dignity of other people as part of the sending of the activists' message.'[34] Their Honours observed that the restriction on protest activities only applied within safe access zones and that, '[w]ithin those zones, the burden on the implied freedom is justified by the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom.'[35]

Here Kiefel CJ, Bell and Keane JJ use dignity to identify a type of harm caused by the protest activities — 'an attack upon the privacy and dignity of other people'.[36] In doing so, their Honours implicitly distinguished the position of

---

27 Ibid 27 [96].
28 Ibid 27 [98]–[99].
29 Ibid 23 [80].
30 *Brown* (n 8).
31 Ibid 346–7 [32]–[37].
32 Ibid 353–9 [61]–[87], 371–3 [139]–[146].
33 *Clubb* (n 6) 23 [81].
34 Ibid 23–4 [82].
35 Ibid.
36 Ibid.

natural persons from that of corporations. The reason why the harm to dignity was relevant in *Clubb*, but not *Brown*, is that in *Brown*, the protests were targeted at forestry operations (that is, corporations and their activities), while in *Clubb*, the protests were targeted at persons accessing abortion services (that is, natural persons and their activities). This distinction is discussed in greater detail below in Part III of the article.

Kiefel CJ, Bell and Keane JJ reached a broadly similar set of conclusions in relation to the Tasmanian law. Their Honours found that the Tasmanian law's purpose is also to protect the dignity of women accessing abortion services even though it is not expressly stated in the *Reproductive Health (Access to Terminations) Act 2013* (Tas).[37] And their Honours found that this purpose helps establish that the law satisfied the third step of the *McCloy* test.[38]

In separate judgments, Gageler J, Nettle J and Edelman J also invoked dignity in the first, broad manner, concluding that the protection of dignity is a legitimate purpose. In relation to the Tasmanian law, Gageler J concluded that its purpose is

> to ensure that women have access to premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity. The purpose so identified is unquestionably constitutionally permissible and, by any objective measure, of such obvious importance as to be characterised as compelling.[39]

In relation to the Victorian law, Nettle J stated:

> The protection of the safety, wellbeing, privacy and dignity of the people of Victoria is an essential aspect of the peace, order and good government of the State of Victoria and so a legitimate concern of any elected State government.[40]

Mrs Clubb submitted that the protection of dignity is not a legitimate purpose 'because all political speech has the potential to or does affect the dignity of at least some others'.[41] Nettle J rejected this submission on the basis that it

> misconceives the nature of the implied freedom. It is a freedom to communicate ideas regarding matters of political controversy to persons who are willing to listen. It is not a licence to accost persons with ideas which they do not wish to hear, still less to harangue vulnerable persons entering or leaving a medical establishment for the intensely personal, private purpose of seeking lawful medical advice and assistance. A law which has the purpose of protecting and vindicating 'the legitimate claims of

---

37 Ibid 30 [120]. Although the protection of dignity is not expressed in the terms of the Act, counsel for the respondent did describe the purpose of the legislation as being to 'preserv[e] the privacy and dignity of women', citing the Second Reading Speech where the Attorney-General said that the purpose was to protect 'people's rights of privacy and freedom from abuse': Elizabeth Avery and Scott Wilkie, 'Respondents' Submissions', *Preston v Avery*, Case No H2/2018, 3 August 2018, 4 [24] <https://www.hcourt.gov.au/assets/cases/05-Hobart/h2-2018/Preston-Avery_Res.pdf>.

38 *Clubb* (n 6) 32 [126], [128].

39 Ibid 48 [197].

40 Ibid 67 [258].

41 Ibid 67–6 [259].

> individuals to live peacefully and with dignity', as is the case here, is consistent with the implied freedom.[42]

Finally, Edelman J held that it is legitimate for Parliament

> to make laws for peace, order and good government, including those laws that provide substantive aspects of a free and democratic society and laws that guarantee social human rights, such as 'respect for the inherent dignity of the human person'.[43]

III Dignity as a Distinctive Characteristic

This part of the article seeks to develop and defend the narrow manner in which dignity is used in *Clubb* — as a means of differentiating natural persons and corporations. In other words, dignity as a distinctive characteristic of natural persons. In order to do so, it is necessary to set out the challenge that corporations pose for the implied freedom of political communication — what is called in the article the 'corporate challenge'. The corporate challenge, in its most basic form, has two dimensions.[44] The first dimension is whether the political communications of corporations are entitled to protection under the implied freedom. Can a law that restricts the freedom of corporations to communicate about political matters ever violate the implied freedom? And, if so, when? The second dimension is whether the protection of corporations from harm is a justification for restricting political communication under the implied freedom. Can a law that restricts the freedom of natural persons to communicate about political matters ever be justified on the basis that it protects corporations from harm? And, if so, when? The article will consider each of these questions in turn.

A *Are Corporations Entitled to Protection under the Implied Freedom?*

The extent to which corporate speech is protected under the implied freedom is an issue that has existed since the doctrine's establishment in 1992. Indeed, the implied freedom's very first two cases concerned the speech of media corporations.[45] The High Court has always held that laws burdening the ability of corporations to engage in political communication are capable of violating the implied freedom. However, the issue took on a new salience in the 2010s as the limits of protection for corporate speech began to be tested in the United States ('US') and, soon after, in Australia.

The first dimension of the corporate challenge came into sharp focus in the US with the well-known case of *Citizens United v Federal Election Commission*,[46]

---

42 Ibid.

43 Ibid 131 [497].

44 To avoid any doubt, the claim is not that these two challenges are exhaustive. There may be other challenges that relate to the intersection between corporations and the implied freedom of political communication.

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

46 *Citizens United v Federal Election Commission*, 558 US 310 (2010) ('*Citizens United*').

a 2010 decision of the US Supreme Court. The case involved a federal law that prohibited corporations and unions from undertaking independent expenditures on speech that advocated for the election or defeat of a candidate or that amounted to 'electioneering communication', which was defined to mean broadcast communications referring to a candidate for federal office made within 30 days of a primary election or 60 days of a general election. By a majority of five judges to four, the US Supreme Court held that the prohibitions violated the First Amendment to the *United States Constitution*, which provides that 'Congress shall make no law … abridging the freedom of speech'.[47]

Writing for the majority, Kennedy J stated that '[p]olitical speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."'[48] Among the reasons his Honour gave for this conclusion was that it levels the playing field between wealthy and non-wealthy corporations:

> Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. … [T]he result [of the prohibition] is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government.[49]

As wealthy corporations generally have greater access to government than non-wealthy corporations, the prohibition exacerbates the imbalance between the two by removing one of the means by which non-wealthy corporations can counteract their disadvantage: by 'presenting both facts and opinions to the public'.[50] Kennedy J held that Congress is limited to the enactment of laws suppressing freedom of speech that prevent quid pro quo corruption.[51] Other forms of influence over elected representatives are an integral part of democratic politics and thus protected under the First Amendment. Quoting himself in an earlier case, Kennedy J said:

> Favoritism and influence are not … avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.[52]

In dissent, Stevens J drew a sharp distinction between corporations and natural persons:

> In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous

---

47 *United States Constitution* ('*US Constitution*') amend I ('First Amendment').

48 *Citizens United* (n 46) 349, citing *First National Bank of Boston v Bellotti*, 435 US 765, 777 (1978).

49 *Citizens United* (n 46) 355.

50 Ibid.

51 Ibid 359.

52 Ibid, citing *McConnell v Federal Election Commission*, 540 US 93, 297 (2003).

> contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.[53]

His Honour continued:

> Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the 'speakers' are not natural persons, much less members of our political community, and the governmental interests are of the highest order.[54]

Citizens United was an important development for Australia's implied freedom for two reasons. First, it gave corporations seeking to challenge Australian laws restricting their political activities a favourable decision from an influential foreign court. While the High Court has always stressed that the implied freedom is not the same as the First Amendment, the Court has continually drawn on US case law to help articulate the scope and limits of the implied freedom, sometimes analogising to the position in the US and sometimes distinguishing from it.[55] The influence of the US has arguably not diminished over time. In *Clubb*, for example, Gageler J drew on US authorities for his analysis of 'the appropriate level of scrutiny and corresponding standard of justification'[56] for laws imposing restrictions on a person's ability to protest.[57] His Honour criticised the submissions of both parties to the case for failing to reflect 'the richness of the approach in the United States' and for failing to relate 'adequately … that approach to the implied freedom of political communication'.[58] As this last statement suggests, the High Court has sought to employ US authorities in a detailed and nuanced manner.

Second, *Citizens United* gave corporations seeking to challenge Australian laws restricting corporate political activities a set of arguments that are couched partly in general terms capable of application to the Australian context. While the particular features and history of the US's constitutional system feature prominently in the judgments,[59] the entire decision did not turn on them. Take, for instance, Kennedy J's argument that extending freedom-of-speech protections to corporations levels the playing field by allowing small corporations to speak about the connections between government and large corporations. This argument is a general one capable of application to Australia. To avoid any doubt, the article's claim is not that the argument is a meritorious one that *should* be accepted in

---

53 *Citizens United* (n 46) 394.

54 Ibid 424.

55 See, eg, *ACTV* (n 45) 143–4 (Mason CJ), 150, 159 (Brennan J), 181–2, 186 (Dawson J), 213–14 (Gaudron J), 228, 231, 239, 240–41 (McHugh J); *Nationwide News* (n 45) 43 (Brennan J), 73, 79 (Deane and Toohey JJ).

56 *Clubb* (n 6) 44 [178].

57 Ibid 44–5 [178]–[182], 47–9 [192]–[198], 49–51 [202]–[206].

58 Ibid 47 [192].

59 There is, for instance, an extensive discussion of the US Supreme Court's previous case law on whether Congress can discriminate between natural persons and corporations for the purposes of the First Amendment: see the conflicting interpretations of that case law by Kennedy J (for the majority) and Stevens J (in dissent): *Citizens United* (n 46) 342–65 (Kennedy J), 432–46 (Stevens J).

Australia, but simply that *Citizens United* supplied parties with arguments that *might* be accepted in Australia. As in the US, Australia has small corporations (for example, charities, think tanks, lobby groups) that can and do speak out about the influence that large corporations have on government.

It did not take long for corporations in Australia to take inspiration from *Citizens United* and to draw on its arguments and findings to challenge Australian laws restricting corporate political activities. Just three years after *Citizens United*, a corporation sought to rely on the US Supreme Court's decision before the High Court to invalidate a New South Wales ('NSW') law under the implied freedom. *Unions NSW* involved an electoral law that, inter alia, prohibited political parties, politicians and candidates for political office from accepting donations unless they were from an individual enrolled to vote (that is, the provision banned political party donations from corporations and other artificial legal persons).[60] As Keane J explained,

> the plaintiffs relied upon *Citizens United v Federal Election Commission* to argue that political communications by corporations and industrial organisations should not be treated differently from those of enrolled voters simply because such organisations are not natural persons entitled to vote.[61]

The joint judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ expressed some sympathy for the position that, similar to Kennedy J in *Citizens United*, natural persons are not the only actors relevant to the operation of a democratic system of government. Their Honours stated:

> Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy.[62]

The discussion of the issue, however, stopped there, avoiding any further statements that might be relevant to the extent to which corporate expression is protected under the implied freedom. The reason their Honours were able to stop at that point is due to the way in which the joint judgment identified the burden on political communication imposed by the NSW law. Instead of holding that the burden was a restriction on the political communication of *corporations*, the joint judgment held that the ban on corporate donations burdened the political communication of *political parties and candidates* by restricting the funds they had to spend on political communication.[63] As a result, it was not necessary to consider the extent to which the political communication of corporations could be restricted.

The joint judgment in *Unions NSW* proceeded to find the ban on donations unconstitutional on the basis that it was not rationally connected to the purpose that

---

60 *Unions NSW* (n 11).
61 Ibid 570 [99].
62 Ibid 551 [30].
63 Ibid 554 [38].

was said to justify it; namely, the prevention of undue or corrupt influence being exerted on the political process.[64] There was no rational connection because the ban was selective in its application and 'the basis for the selection was not identified and is not apparent'.[65] The joint judgment noted that if the purpose for the ban had been to address the threat of corruption posed by corporations, it was not connected to that purpose because '[t]he terms of [the ban] are not directed to corporations alone. They extend to any person not enrolled as an elector, and to any organisation, association or other entity.'[66]

While the High Court managed to avoid directly addressing the first aspect of the corporate challenge in *Unions NSW*, the issue came back to the Court a mere two years later in *McCloy*.[67] That case concerned, inter alia, a NSW electoral law provision that made it unlawful for a 'prohibited donor' to make a political donation and for a person to accept a political donation from a prohibited donor. A prohibited donor was defined to include corporations in particular industries, including property development.[68] As in *Unions NSW*, the plaintiffs once again invoked US authorities, including *Citizens United*, to support their argument. In *McCloy*, the plaintiffs submitted that

> gaining access through political donations to exert persuasion is not undue influence. This mirrors what was said by Kennedy J, writing the opinion of the Court in *Citizens United v Federal Election Commission*, that '[i]ngratiation and access ... are not corruption'.[69]

In contrast to *Unions NSW*, the joint judgment of French CJ, Kiefel, Bell and Keane JJ in *McCloy* expressed no sympathy for this line of argument.[70] Their Honours noted that there are 'different kinds of corruption'.[71] In addition to 'quid pro quo' corruption where financial assistance to an elected official is exchanged for favourable treatment by that official, there is what the joint judgment calls 'clientelism', which refers to 'an office-holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest'.[72] The joint judgment in *McCloy* held that, unlike in the US,[73] Australian legislatures can enact statutes that have as their object the prevention of clientelism.[74] Their Honours stated that '[q]uid pro quo and clientelistic corruption threaten the quality and integrity of governmental decision-making' and that '[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution'.[75] Their Honours also noted that, unlike in the US, the implied freedom does not confer

---

64 Ibid 557 [51].
65 Ibid 558 [53].
66 Ibid 558 [55].
67 *McCloy* (n 12).
68 The prohibition also included persons who are close associates of a corporation: ibid 199 [15].
69 Ibid 204 [35]. See also ibid 182.
70 Ibid.
71 Ibid 204 [36].
72 Ibid.
73 Ibid 205–6 [41].
74 Ibid 206 [42].
75 Ibid 205 [38], 207 [45].

'a personal right to make personal donations as an exercise of free speech'.[76] Finally, they held that it is permissible for a legislature to impose special restrictions on property development corporations. The economic interests of property developers are dependent on government decisions to a greater extent than other persons in the community (for example, they rely on the government for decisions related to zoning of land and development approvals) and there is an established history in NSW of property developers seeking to influence government by way of donations.[77] As a result, the joint judgment in *McCloy* held that the case could be distinguished from *Unions NSW*.[78]

Two observations can be made about the first dimension of the corporate challenge following the High Court's decisions in *McCloy* and *Unions NSW*. First, the extent to which corporate political communication should be protected under the implied freedom is an issue of considerable complexity. On the one hand, corporate political communication must enjoy some level of protection under the implied freedom if only for the reason that it is often essential to facilitating political communication between electors. The role of media corporations in disseminating information and opinion about political matters is the most obvious example, but it is possible that all corporations play a role, at least to some extent. It could be argued that when non-media corporations take public stances on political matters, as they have done in recent years in Australia on issues such as same-sex marriage and carbon taxes, they are making significant contributions to political discourse in a manner similar to media corporations. The importance of corporations to the facilitation of political communication has been recognised by the High Court since it first established the implied freedom.[79]

On the other hand, the ability of corporations to engage in political communication appears to be particularly apt for legislative restriction. Corporations cannot vote in federal and state elections and therefore any interest they have in facilitating political communication is derivative of, and subsidiary to, the interests of electors. Furthermore, corporations can present a considerable threat to a system of representative and responsible government. Where business operations are highly dependent on government decisions, there is a risk that corporations will seek to exercise improper influence over government. Further, because corporations' resources to spend on lobbying and speech can far exceed the resources of most electors, this exacerbates the risk that corporations may attempt to distort the actions of government in their favour. The need to allow legislatures to respond to these risks was recognised by the High Court in *McCloy*.[80]

The second observation about the first dimension of the corporate challenge is that the High Court has struggled to find a legal, as opposed to a purely factual, means of reaching and justifying its conclusions about the extent to which the implied freedom permits legislatures to single out corporate political communication for special regulation. In *McCloy*, the joint judgment identified two

---

76 Ibid 205 [40].
77 Ibid 208–9 [48]–[53].
78 Ibid 210 [55]–[56].
79 *ACTV* (n 45).
80 *McCloy* (n 12) 208–9 [48]–[53].

related legal reasons. First, the position in Australia is different from that in the US, where corporations enjoy greater freedom to engage in political communication, due to the First Amendment. Second, the implied freedom is a limitation on power — unlike in the US, where the First Amendment confers a right to free speech. However, neither legal reason determines or justifies the High Court's conclusions.

Even if the *US Constitution* provides greater protection to corporations than the *Australian Constitution* does, this point is of minimal assistance because all it justifies is a lower limit — Australian legislatures can regulate corporate speech more than US legislatures. It provides no justification for the particular conclusions that the High Court has reached about what Australian legislatures can regulate under the *Australian Constitution*. Similarly, the distinction between rights and limitations is of minimal assistance — at best, it justifies the same lower limit that Australian legislatures can regulate more than US legislatures can regulate. Indeed, it is not clear that the distinction is at all relevant in this context. As mentioned above, the joint judgment in *McCloy* draws on the rights/limitation distinction to conclude that the implied freedom does not confer 'a personal right to make political donations as an exercise of free speech'.[81] But this line of reasoning conflates two separate issues. The question of whether the implied freedom is a right or a limitation is distinct from the question of whether political donations constitute political communication. The answer to one does not depend on the answer to the other. It is entirely consistent to say that the implied freedom is a limitation on power *and* that political donations constitute political communication.

The upshot is that the High Court's most persuasive means of reaching and justifying its conclusions about the extent to which legislatures can regulate corporate political communication is factual rather than legal. Legislatures can limit corporate political communication to prevent clientelistic corruption when clientelistic corruption is, on the facts before the court, shown to be a demonstrable threat to representative democracy. In *McCloy*, the most persuasive reason for concluding that the NSW Parliament could ban donations from property developers was the considerable body of evidence establishing a link between property developers and corruption in NSW.[82] The object of this article is not to evaluate the advantages and disadvantages of relying on facts to determine and justify the scope of a constitutional limitation on power, but it is important for the purposes of this article to note that this approach is not without potential difficulties. A fact-centric approach gives rise to a number of challenging questions. What happens to the scope of the constitutional limitation if the facts change? Does a fact-centric approach mean that the scope of the constitutional limitation differs between jurisdictions in Australia? What evidence is necessary to make a conclusion about the scope of the constitutional limitation?[83] The argument is not that these questions are impossible to answer or that it is possible to avoid

---

81 *McCloy* (n 12) 205 [40].

82 Ibid 208–9 [51]–[53].

83 Some of these questions, and particularly the last one, are considered in the scholarship of Anne Carter: see, eg, Anne Carter, 'Proportionality and the Proof of Facts in Australian Constitutional Adjudication' (PhD Thesis, The University of Melbourne, 2018).

reliance on facts in constitutional interpretation, but instead that there may be sound reasons not to determine and justify the scope of constitutional limitations on power *solely* by reference to facts.

In sum, the first dimension of the corporate challenge (that is, whether the political communications of corporations are entitled to protection under the implied freedom) is one of considerable complexity. It is not a question that appears to admit a simple binary answer, but rather one of degree (that is, legislatures can impose *some* restrictions on the ability of corporations to engage in political communication in *some* circumstances). Further, the Court has not developed a particularly persuasive *legal* means of justifying the answer to this question. The next part of this article considers the second dimension of the corporate challenge (that is, whether the protection of corporations can be a justification for restrictions on political communication) and argues that dignity as a distinctive characteristic is a persuasive legal means of justifying the answer to that question. It also suggests that dignity as a distinctive characteristic might provide a legal means of determining and justifying the High Court's answer to the first dimension of the corporate challenge (that is, the challenge just discussed).

B *Can the Protection of Corporations be a Justification for Restricting Political Communication?*

Two years after the decision in *McCloy*, the High Court was squarely faced with a case concerning the second dimension of the corporate challenge: *Brown*.[84] The case involved a constitutional challenge to the *Workplaces (Protection from Protesters) Act 2014* (Tas) ('*Protesters Act*').[85] The purpose of the *Protesters Act* was, according to the Tasmanian Government, to 'seek to regulate inappropriate protest activity that impedes the ability of businesses to lawfully generate wealth and create jobs'.[86] The case involved the question of whether the freedom of natural persons to communicate about political matters could be restricted in order to protect corporations from harm, in particular, economic harm.

Broadly stated, s 6 of the *Protesters Act* prohibited a 'protester' from doing any act on 'business premises' or a 'business access area' that prevents, hinders or obstructs the carrying out of a 'business activity'. Section 11 of the *Protesters Act* empowered a police officer to direct a person to leave a business premises or business access area without delay if the police officer suspected the person to be in contravention of s 6. A direction to leave a business premises or business access area could be imposed for a period of up to three months. Under s 11 it was an offence, inter alia, to fail to comply with a direction. Under s 8, it was also an offence to re-enter an area within four days of having received a direction to leave that area.

The *Protesters Act's* principal object was to protect forestry operations from anti-logging protesters.[87] As the High Court noted, there is a long history of

---

84 *Brown* (n 8).
85 *Workplaces (Protection from Protesters) Act 2014* (Tas) ('*Protesters Act*').
86 Quoted in *Brown* (n 8) 347 [36].
87 Ibid 341 [6].

protests at the site of forestry operations in Tasmania.[88] The two plaintiffs were persons charged with offences relating to a protest that occurred at the site of a forestry operation. Furthermore, the term 'business premises' in the *Protesters Act* was defined to include 'an area of land on which forestry operations are being carried out'.[89]

A majority of the High Court found that the *Protesters Act* was constitutionally invalid for violating the implied freedom. The joint judgment of Kiefel CJ, Bell and Keane JJ held that it is legitimate for a law to protect the business activities of corporations and other entities from harm from protest activities.[90] However, certain provisions of the Act were declared invalid for failing to be rationally connected to this purpose.[91] The prohibition on a person being in a business access area even where they did not present a threat of damage or disruption was, for example, declared invalid on this basis.[92] The main provisions of the *Protesters Act* were declared invalid for not being reasonably necessary for the attainment of the Act's purpose.[93] The principal provision — the prohibition in s 6 on protesters doing anything that prevents, hinders or obstructs business activities — was declared invalid on the basis that Tasmania failed to demonstrate why the provision was reasonably necessary given that there was existing legislation directed to the same purpose that imposed a lesser burden on political communication.[94] For Gageler J, the law also failed at this stage. As the restrictions were underinclusive and overreached,[95] the burden was greater than was reasonably necessary to protect forestry operations.[96] For Nettle J, the law failed at the last stage of proportionality analysis. The law was not adequate in its balance because the extent of the burden on political communication was 'grossly disproportionate' to the legislative purpose served by the measures.[97]

The High Court's decision in *Brown* set the stage for the challenge brought in *Clubb* and helps explain the narrow use of dignity as a distinguishing characteristic in that case. The plaintiffs' success in invalidating the protest suppression laws in *Brown* made it all but inevitable that other protest suppression laws would be subject to constitutional challenge. Less than six months after the Court's decision in *Brown*, the challenge in *Clubb* was initiated.[98] The case thus presented the Court with an acute difficulty. If it were to uphold Tasmania and

---

88 Ibid 346–7 [32]–[33].

89 *Protesters Act* (n 85) s 3.

90 *Brown* (n 8) 363 [101]–[102]. All other judges but one agreed on this point: see ibid 393–4 [216]–[217] (Gageler J); 414–15 [275] (Nettle J); 460–61 [412]–[413] (Gordon J). Edelman J did not need to consider the matter because he held that the law imposed no additional burden on the freedom of political communication: 502–3 [557].

91 Ibid 371 [135]–[136].

92 Ibid 371 [135].

93 Ibid 373 [146].

94 Ibid 372 [140], [142], 373 [146].

95 Ibid 394–7 [220]–[231].

96 Ibid 397 [232].

97 Ibid 422–3 [290].

98 The Notice of Constitutional Matter in Mrs Clubb's case was issued on 4 April 2018: High Court of Australia, 'Notice of Constitutional Matter', *Clubb v Edwards*, Case No M46/2018 <https://www.hcourt.gov.au/cases/case_m46-2018>.

Victoria's laws prohibiting protests outside of abortion facilities, it would need to find a basis for distinguishing these laws from the Tasmanian law prohibiting protests outside of forestry operations that it had invalidated in *Brown*. The High Court turned to dignity to make that distinction.

As mentioned above, in *Clubb* Kiefel CJ, Bell and Keane JJ note that, in contrast to the activities under examination in *Clubb*, '[t]he on-site protests against forest operations discussed in *Brown* did not involve an attack upon the privacy and dignity of other people as part of the sending of the activists' message.'[99] There is considerable merit in this use of dignity. It provides a legal means of determining and justifying conclusions about the second dimension of the corporate challenge. While it is legitimate for legislatures to burden political communication for the purpose of protecting corporations from harm, as the High Court confirmed in *Brown*, legislatures are entitled to impose greater burdens on political communication for the purpose of protecting natural persons from harm, as the Court held in *Clubb*. The reason is that natural persons have a characteristic that corporations do not — namely, dignity.[100] Natural persons are thus vulnerable to a type of harm that corporations are not — namely, threats to their dignity. Furthermore, threats to a natural person's dignity may lead to other forms of harm that are not relevant in the corporate context, as Kiefel CJ, Bell and Keane JJ note in *Clubb*. In response to the submission that the laws were directed to the prevention of no more than 'discomfit' or 'hurt feelings', their Honours said:

> Suggestions to that effect may have some attraction in the context of public conflict between commercial or industrial rivals or in the context of a political debate between participants who choose to enter public controversy. But they have no attraction in a context in which persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain.[101]

Not only is dignity a persuasive legal means of distinguishing corporations from natural persons, it is a constitutionally justifiable one. Given that the object of the *Australian Constitution's* system of representative and responsible government is to secure the participation and representation of the Australian people in government, it is arguably appropriate to resolve difficult questions about the scope and limits of the implied freedom, which is a requirement of that system, by reference to values and principles consistent with that object.[102] Dignity, when used in the narrow manner as a distinctive characteristic of natural persons that differentiates them from corporations, is one such value or principle. While dignity does not map perfectly on to this object (for example, non-Australians also have

---

99 *Clubb* (n 6) 23–4 [82].

100 While it is possible to argue that entities other than natural persons (eg, states) have some forms of dignity (eg, what Valentini calls 'status dignity'), the most common understanding of dignity is one that is inherent to natural persons ('inherent dignity'): Laura Valentini, 'Dignity and Human Rights: A Reconceptualisation' (2017) 37(4) *Oxford Journal of Legal Studies* 862.

101 *Clubb* (n 6) 19 [59].

102 On the use of values in constitutional interpretation in Australia, see Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018).

dignity), it is broadly consistent with this object. This is because it prioritises the interests of one group that seeks to participate in and be represented by government (that is, natural persons) over another group that seeks to participate in and be represented by government (that is, corporations) in circumstances where the *Australian Constitution* recognises the former group, but not the latter — when the *Constitution* speaks of 'the people' in ss 7 and 24, it is referring to natural persons, not corporations.

While the High Court's invocation of dignity as a distinctive characteristic in *Clubb* is used to address the second dimension of the corporate challenge, it is possible to see how it could also be used in relation to the first dimension — that is, whether the political communications of corporations are entitled to protection under the implied freedom. Indeed, this understanding of dignity could provide a more cogent justification for the Court's current approach. As argued above, the Court has struggled to find a legal, as opposed to a factual, means of determining and justifying the conclusions it has reached about the extent to which legislatures can regulate corporate political communication consistently with the implied freedom. Dignity as a distinctive characteristic could assist because there are some restrictions on political communication that amount to an affront to the dignity of natural persons, but not corporations, and, therefore, may be more justifiable in relation to corporations than natural persons.

Take, for example, the issue in *Unions NSW* and *McCloy*: political donations. A natural person's ability to make donations to a political party or political cause is a way for that person to signal their support for the party or cause's views. It is, in other words, a form of self-expression. The ability to engage in self-expression is essential to human flourishing and is thus an aspect of human dignity.[103] Corporations have no corresponding interest. Dignity would, therefore, provide a means of distinguishing the position of corporations and natural persons at law. It would be possible to hold, for example, that legislatures could restrict most or even all donations from corporations, but not natural persons, on the basis that natural persons must remain free to make at least small political donations because small donations are a form of self-expression — a way of expressing support for a cause or a political party's views — and therefore an aspect of their dignity.[104]

In sum, the narrow understanding of dignity as a distinctive characteristic is arguably a justifiable way of helping respond to the corporate challenge that has come into sharp focus in recent years. While the High Court has only used it to respond to the second dimension of the corporate challenge (that is, the extent to which legislatures can restrict political communication to protect corporations), the article has suggested that it could also be used to respond to the first dimension (that is, the extent to which legislatures can restrict the political communication of

---

[103] For a discussion of the connection between human flourishing and human dignity, see John Kleinig and Nicholas G Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32(5) *Law & Philosophy* 539.

[104] This line of reasoning would not necessarily prevent legislatures from banning large political donations from both natural persons and corporations because the legislature's interest in preventing corruption could justify the minimal impingement on dignity of banning natural persons from making large, but not small, donations.

corporations). To avoid any doubt, the argument is not that dignity is the *only* way of responding to these challenges; instead, it is that dignity is a relevant and defensible way of responding to these challenges. While dignity as a distinctive characteristic is, therefore, a potentially useful and justifiable one in the Australian constitutional context, the other understanding of dignity as a legitimate purpose faces a number of issues. The next part of the article considers these issues.

IV Dignity as a Legitimate Purpose

It will be remembered that, in *Clubb*, the High Court also uses dignity in a broad manner as one legitimate purpose or reason a law can have for burdening freedom of political communication. The Court characterised the legislation in *Clubb* as being for the purpose of, inter alia, protecting the dignity of persons accessing abortion services or, more broadly, the dignity of the sovereign people.[105] It then held that this purpose is compatible with the constitutionally prescribed system of representative and responsible government.[106] The particular aspect of dignity that was relevant in *Clubb* was, according to the Court, the proposition that it is inconsistent with a person's dignity to force an unwanted message upon them.[107] This part of the article considers two sets of issues that arise with this broad understanding of dignity as a legitimate purpose. First, there are the issues arising from uncertainty associated with the meaning of dignity. Second, there are the issues arising from uncertainty associated with the use of dignity.

The objective of this part of the article is not to establish that no case can be made in favour of using dignity in this broad manner. To the contrary, recognising dignity as a legitimate purpose might yield important benefits. For example, it might help attach an appropriate level of importance and weight to particular categories of government action. It allowed the High Court in *Clubb* to recognise the full significance of the interests that were being protected by the Victoria and Tasmania legislatures. One might even be able to make the argument that the constitutionally prescribed system of representative and responsible government *requires* the protection of dignity in order for the people to be able to fulfil their roles set out in ss 7, 24 and 128 of the *Australian Constitution* in a meaningful way.[108] The objective of this part of the article is, instead, to highlight two issues that the Court will need to address if it continues to use dignity as a legitimate purpose and to demonstrate that there are no straightforward responses to those issues.

A *The Meaning of Dignity*

One challenge with using dignity in a broad manner as a legitimate purpose is to determine what is actually meant by the term. Dignity as a distinctive characteristic uses the term to perform a specific function — that is, to distinguish natural

---

105 *Clubb* (n 6) 27 [98]–[99].
106 Ibid.
107 Ibid 17 [51].
108 If, however, the Court continues to confine the scope of the implied freedom to what the text and structure of the *Australian Constitution* require, it will be difficult to make this argument.

persons from corporations. In comparison, dignity as a legitimate purpose potentially encompasses a wide range of understandings of the term. In *Clubb*, Kiefel CJ, Bell and Keane JJ said, 'to force upon another person a political message is inconsistent with the human dignity of that person'.[109] However, it appears their Honours understood that meaning of dignity to be simply one instance of a wider concept. They go on to state: 'As Barak said, "[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others".'[110] This broader understanding of dignity is even more apparent in the judgments of Nettle J, who describes the legitimate purpose as being '[t]he protection of the safety, wellbeing, privacy and dignity of the people of Victoria',[111] and Edelman J, who describes the legitimate purpose as being the provision of the 'substantive aspects of a free and democratic society and laws that guarantee social human rights, such as "respect for the inherent dignity of the human person".'[112]

The challenge is that dignity can refer to a range of ideas and interests, some of which are mutually inconsistent.[113] This definitional challenge has long been recognised. In 1983, Schachter noted that dignity's 'intrinsic meaning has been left to intuitive understanding' and that a lack of clarity about its meaning is apt to cause problems: 'Without a reasonably clear general idea of its meaning, we cannot easily reject a specious use of the concept, nor can we without understanding its meaning draw specific implications for relevant conduct.'[114] Little progress has been made since the 1980s. Writing in 2008, McCrudden's extensive survey of the use of dignity in adjudication around the world revealed that:

> In practice, very different outcomes are derived from the application of dignity arguments. This is startlingly apparent when we look at the differing role that dignity has played in different jurisdictions in several quite similar factual contexts: abortion, incitement to racial hatred, obscenity, and socio-economic rights. In each, the dignity argument is often to be found on both sides of the argument, and in different jurisdictions supporting opposite conclusions.[115]

Recognising dignity as a legitimate purpose is going to present the High Court with many difficult questions about the precise meaning of dignity. Can a law restricting freedom of political communication for the purpose of suppressing offensive speech be characterised as a law that has the protection of dignity as its

---

109 *Clubb* (n 6) 17 [51].

110 Ibid (citations omitted). Kiefel CJ, Bell and Keane JJ's discussion of 'the dignity of members of the sovereign people' at 27 [99] might also be evidence of a broader invocation of the concept.

111 Ibid 67 [258].

112 Ibid 131 [497].

113 See, eg, McCrudden (n 1); George Kateb, *Human Dignity* (Harvard University Press, 2011); Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 117; Valentini (n 100).

114 Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77(4) *American Journal of International Law* 848, 849.

115 McCrudden (n 1) 698.

purpose?[116] What about a law restricting freedom of political communication for the purpose of promoting racial equality? Or one for the purpose of respecting religion? The Court already struggles with determining what is and is not a legitimate purpose,[117] and the recognition of dignity arguably adds another layer of complexity to that task given its ambiguity. Since dignity is, as McCrudden notes, used 'in different jurisdictions supporting opposite conclusions',[118] comparative materials will be of limited assistance in resolving this issue.

One response might be to take a capacious view of dignity. If a law can be plausibly understood as being for the purpose of protecting dignity, a court should conclude that the law has a legitimate purpose and focus its analysis on determining whether the other aspects of the structured proportionality analysis are satisfied. However, this response will not suffice in the Australian constitutional context because not every pursuit of dignity is compatible with the constitutionally prescribed system of representative and responsible government. Take the aspect of dignity at issue in *Clubb* as an example. The High Court held that the laws were for the purpose of protecting dignity because the laws were directed to protecting people from having unwanted messages forced upon them. However, almost *every* political protest has the effect of forcing an unwanted message upon other people — upon people walking past the protest in the street, upon persons entering the legislative building, and so on. But a law that had the purpose of suppressing political protest per se would, without more (for example, without being limited to the suppression of *violent* protest), be incompatible with the constitutionally prescribed system of representative and responsible government. Due to the limited scope of the implied freedom, it is not possible to adopt a capacious definition of dignity — it has to be refined and narrowed. The protection of people from unwanted messages is not always a legitimate purpose because that would include laws that have as their purpose the suppression of all political protest. It is only legitimate for a law to have that purpose when it is directed to protecting *particular* people from *particular* unwanted messages in *particular* circumstances. The High Court will need to specify what it means by dignity before it can be usefully employed to help identify when a law has a legitimate purpose and when it does not, and that will be no easy task.

B *The Use of Dignity*

Uncertainties also exist with respect to the way in which dignity is used in rights and freedoms adjudication. A striking feature of dignity is that it is used simultaneously to justify the protection of human rights and freedoms and to justify the imposition of limitations on human rights and freedoms. In other words, dignity is relevant to both sides of the equation. Take political communication as

---

[116] In other words, does the recognition of dignity as a legitimate purpose render the decision in *Coleman* (n 16) incorrect? In that case, a majority of the High Court held that the suppression of offensive speech is not a legitimate purpose.

[117] Compare *Coleman* (n 16) with *Monis* (n 24).

[118] McCrudden (n 1) 698.

an example.[119] The ability to express one's views about political matters is protected in part on the basis that self-expression is essential to one's dignity.[120] At the same time, restrictions on the expression of political views are justified in part by the idea that certain forms of political communication threaten the dignity of other people.[121] In these circumstances, there are a number of different ways in which a court might respond. It could place the concept of dignity to one side and focus on other criteria for resolving the dispute. It could weigh the competing dignity interests and resolve the dispute in favour of the side with the strongest dignity interest. Or it could deem some dignity interests to be worthy of constitutional protection, but not others.

One response might be to say that, in the Australian constitutional context, this issue does not arise because dignity can only be used on one side of the equation — as a justification for restrictions on political communication (that is, as a legitimate purpose) — for two, related reasons. First, for a purpose to be legitimate, it merely has to be *compatible* with the constitutionally prescribed system of representative and responsible government. However, for dignity to be used on the other side of the equation — as a justification for the protection of political communication — it would need to have some basis in the text and structure of the *Australian Constitution*. The reason being that the implied freedom is an implication derived from the constitutional text and structure and therefore the scope of its protection extends only as far as the text and structure require.[122] As there is little in the *Constitution's* text and structure to support the proposition that the protection of dignity is an essential feature of the system of government,[123] the protection of dignity cannot be a justification for the constitutional protection of political communication. Second, the implied freedom is a limitation on power, not a personal right. This means that the focus of analysis is not on the law's effect on individuals and their dignity, but the law's effect on political communication generally. As the joint judgment stated in *Unions NSW*,

> it is important to bear in mind that what the Constitution protects is not a personal right. *A legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally.* The freedom is to be understood as addressed to legislative

---

[119] Waldron and Seglow, for example, see dignity as lying on both sides of the debate about hate speech. Waldron thinks that the dignity interests in favour of restricting hate speech are stronger than those in favour of allowing it: Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2014) 139–43. Seglow thinks that the dignity interests in favour of allowing hate speech are stronger than Waldron suggests: Jonathan Seglow, 'Hate Speech, Dignity and Self-Respect' (2016) 19(5) *Ethical Theory and Moral Practice* 1103, 1107–8.

[120] See, eg, the Supreme Court of Canada's articulation of the connection between freedom of expression and dignity: *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927, 976.

[121] Indeed, this is exactly what occurred in *Clubb* (n 6).

[122] See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[123] One possible argument is that a system of representative and responsible government requires protection of the dignity of the people, but the problem with this understanding of representative and responsible government is that it is arguably so capacious as to include almost anything (ie, if representative and responsible government requires the protection of the dignity of the people, presumably it also requires protection of the safety, wellbeing, prosperity, happiness, etc of the people).

> power, not rights, and as effecting a restriction on that power. Thus *the question is not whether a person is limited in the way that he or she can express himself or herself*, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?[124]

As dignity attaches to individuals and the focus of analysis is not on individuals, dignity is not relevant to the analysis of a law's effect on freedom of political communication.

There are two, related problems with this set of responses about the use of dignity in adjudication. The first problem is that using dignity only on one side of the equation creates a partial and distorted conception of dignity. In international and comparative theory and practice, it is well accepted that dignity is relevant to the justifications for both the protection of rights and freedoms and for the imposition of limitations on rights and freedoms.[125] Indeed, the very person that Kiefel CJ, Bell and Keane JJ cite in *Clubb* to elucidate the concept of dignity shares this view. In his book on human dignity, Barak states that dignity is a concept that, first and foremost, justifies the recognition of human rights[126] before going on to acknowledge its relevance as a justification for limitations on rights too.[127] He concludes:

> the general purpose of human dignity in a particular right (e.g. the right to free speech), might oppose the particular purpose in another right (e.g. the right to privacy). Thus, when two independent constitutional rights conflict, *the constitutional value of human dignity might find itself on both sides of the scales*.[128]

To use dignity on only one side of the equation is a particularly distorted use of the concept because it overlooks an essential characteristic of dignity — *all* humans have it. As both listeners and speakers have dignity,[129] it would be particularly misleading to invoke dignity in a manner that only considers the dignity of some natural persons (listeners) and disregards the dignity of other natural persons (speakers).

---

[124] *Unions NSW* (n 11) 554 [36] (emphasis added). For a critique of this understanding of the implied freedom, see Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374.

[125] See the Waldron/Seglow debate above n 119; McCrudden (n 1) 698, 702, 717, 719. For an analogous claim about other values that underpin free speech such as equality, see Adrienne Stone, 'Canadian Constitutional Law and Freedom of Expression' in Richard Albert and David R Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press, 2017) 245, 260–62.

[126] See, especially, Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015) 104–5.

[127] Ibid 112–13.

[128] Ibid 122 (emphasis added).

[129] To avoid any doubt, the claim is not that listeners and speakers necessarily have dignity interests of the same strength or value (eg, the dignity interests of listeners may outweigh the dignity interests of speakers in the context of hate speech). For a discussion of this issue, see Adrienne Stone, 'Viewpoint Discrimination, Hate Speech Laws, and the Double-Sided Nature of Freedom of Speech' (2017) 32(3) *Constitutional Commentary* 687. Instead, the claim is that it is a mistake to ignore the dignity interests of one side in their entirety.

The second problem with this set of responses is that it reverses the principal objective of dignity. Whatever disagreements may exist about the precise role of dignity, there is broad agreement that its principal objective is to assist in the recognition and protection of fundamental rights and freedoms — whether that is as a justification for their existence, as a freestanding right, or as an aid in the interpretation of rights and freedoms.[130] To use dignity only as a justification for the imposition of limitations on political communication risks turning the concept solely into a vehicle for restricting rights and freedoms. It shifts dignity from a concept that is associated with the protection of fundamental rights and freedoms to a concept that is associated with their limitation. In practice, it means that dignity may amount to no more than an additional reason for the executive and legislature to restrict political communication. To avoid any doubt, the argument is not that the protection of dignity is unable to justify restricting political communication — indeed, the facts of *Clubb* illustrate one such instance where the protection of dignity provides a cogent reason for restricting political communication. The protection of dignity will sometimes — and, perhaps, even often — require the imposition of limitations on the rights and freedoms of others. Instead, the argument is that the use of the protection of dignity *solely* as a justification for the imposition of limitations on rights and freedoms flips the principal objective of dignity on its head, which is to recognise and protect them, not limit them. What this means in the Australian constitutional context is that dignity becomes a concept that operates to erode what is already a limited protection for political communication. Edelman J expressly pointed to the implied freedom's confined operation in *Clubb*, stating:

> *a restrained approach* to each stage [of proportionality analysis] is required because the freedom of political communication is *a limited implication* from the *Constitution* that applies only where it is necessary to ensure the existence and effective operation of the scheme of representative and responsible government protected by the terms of the Constitution.[131]

The object of this part of the article is not to put forward a view on the merits of having an expansive or a limited protection for freedom of political communication. Instead, it is to argue that it is highly unusual, and arguably misleading, to use the concept of dignity to help create such a limited protection for political communication. In international and comparative constitutional law and scholarship, dignity is understood, first and foremost, as a justification for the existence of fundamental rights and freedoms, not as a justification for their abrogation.

What the foregoing suggests is that, if dignity is to be used in a broad manner as a legitimate reason for restricting political communication, its relevance to the *protection* of political communication should also be recognised. To do otherwise would be to adopt a partial and distorted conception of dignity that flips its objective on its head. While judicial and other actors regularly re-engineer

---

130 See McCrudden (n 1); Waldron (n 113); Barak (n 126).

131 *Clubb* (n 6) 105 [408] (emphasis added).

constitutional concepts from other jurisdictions,[132] it is arguable that reconceptualising dignity to serve only as a justification for limiting freedom of political communication would make it borderline unrecognisable from a comparative perspective, and therefore call into question the appropriateness of using a well-established transnational and international concept at all.

V Conclusion

While the invocation of dignity in *Clubb* might be seen as another way in which the High Court is increasingly coming to engage with comparative constitutional ideas, it is also apparent that this engagement will acquire a special local flavour — in much the same way as the Court's invocation of structured proportionality analysis.[133] However, the Court should, this article argues, be careful about the ways in which it engages with the concept. The invocation of dignity in a narrow manner — as a distinctive characteristic of natural persons and thus a way of differentiating them from corporations under the implied freedom of political communication — is useful and justifiable. More challenges arise with its invocation in a broad manner — as a means of identifying one possible purpose that a law might pursue that is compatible with the implied freedom. While this latter invocation is what most clearly emerges from the judgment in *Clubb* and may be ultimately defensible, the article demonstrates that it requires engagement with two difficult issues: the meaning of dignity and the use of dignity. Importantly, it argues that there are no straightforward ways of resolving these issues. Questions about dignity's meaning cannot be circumvented by adopting a capacious definition and questions about its use cannot be circumvented by limiting its relevance to identifying a law's legitimate purpose. There is, in short, great complexity lurking underneath what, at first glance, might appear to be a relatively innocuous invocation of the concept.

---

[132] On the concept of constitutional reengineering, see Scott Stephenson, 'Constitutional Reengineering: Dialogue's Migration from Canada to Australia' (2013) 11(4) *International Journal of Constitutional Law* 870, 873–8.

[133] On the Court's engagement with structured proportionality analysis, see Stone (n 19).