REGULATING HATE SPEECH

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In *New York Times v Sullivan*[1] Justice Brennan, who delivered the opinion of the United States Supreme Court, held that the First Amendment of the *Constitution of the United States* embodies a "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials".[2] Justice Kirby would, some three and a half decades later, echo these remarks in *Roberts v Bass*[3] observing that whilst the philosophical ideal may be that "political discourse should be based only upon objective facts, noble ideas and temperate beliefs,[4] in reality, rationality often gives way to "passionate and sometimes irrational and highly charged interchange". Extending the shield of the First Amendment, and, in the Australian context, the implied freedom of political communication, to offensive, subversive and even outrageous speech is a measure as well as a test of our commitment to the cardinal principle that, in an open and democratic society, freedom of speech or political communication should be uninhibited.

Hate speech directed at racial or ethnic groups is a particularly pernicious form of speech, manifestations of which include racial epithets such as "nigger" and "kike". The underlying message of hate speech is that members of particular racial or ethnic groups are inferior. Hate speech causes emotional as well as psychological distress and, in extreme cases, incites violence against members of the racial or ethnic groups at which it is targetted. Many liberal democracies, including Australia, have proscribed hate speech. Racial vilification is unlawful in most of the states and territories of Australia.[5] Critics opposed to the regulation of hate speech adopt the logic of First Amendment jurisprudence, albeit selectively, to argue that the proscription of hate speech is a threat to freedom of speech or, in the Australian context, political communication. In the United States, statutes regulating hate speech have twice been struck down by the Supreme Court.[6] However, the issue of the constitutionality of racial vilification statutes has not yet come before Australia's High Court.

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1 New York Times v Sullivan, 1 376 U.S. 254, 1964, 270 per Brennan J delivering the opinion of the court.

2 (2002) 212 CLR 1.

3 *Roberts v Bass* (2002) 212 CLR 1, 62–63 per Kirby J.

4 Ibid.

5 Refer to the *Anti-Discrimination Act 1977* (NSW), the *Racial Vilification Act 1996* (SA), the *Discrimination Act 1991* (ACT), the *Anti-Discrimination Act 1991* (Qld) and the *Criminal Code* (WA).

6 *R.A.V v City of St. Paul,* 505 U.S. 377, 1992 and *Virginia v Black* 538 U.S. 343, 2003.

In this paper, I consider the case for the regulation of hate speech and racial vilification, terms I use interchangeably to refer to speech, which is intended to, or has the effect of, threatening or intimidating members of racial or ethnic groups. This paper is divided into four parts. In Part I, I explore the debate over the regulation of hate speech ("the free speech/hate speech debate") by reference to First Amendment jurisprudence. The constitutionality of racial vilification statutes in Australia has not been tested in the High Court. Hence, it is necessary to turn to the United States where they have. Also, First Amendment principles are the background against which critics opposed to the regulation of hate speech make their case. In Part II, I turn to the Australian jurisprudence and consider the scope of the implied freedom of political communication enshrined in the *Commonwealth Constitution*. In Part III, I explore how the regulation of hate speech may be reconciled with the implied freedom of political communication, using the *Racial Discrimination Act 1975* (Cth) as a model to consider the constitutionality of Australian racial vilification law. In Part IV, I conclude by expressing the view that regulation of hate speech does not threaten freedom of political communication provided any statute intended to regulate hate speech is drafted in sufficiently narrow terms.

I. Free Speech v Hate Speech

In a democracy, freedom of speech/political communication is sacrosanct. Justice Holmes, in his oft cited dissent in *Abrams v United States*,[7] which has become the orthodoxy of First Amendment jurisprudence in the United States, characterised the *US Constitution* as "an experiment."[8] Justice Holmes regarded knowledge as imperfect and argued that the only means by which to achieve "the ultimate desired good [is] by free trade in ideas."[9] The best test of truth is the "power of the thought to get itself accepted in the competition of the market."[10] The underlying premise is that except by vigorous exchange of ideas, individuals have no means by which to assess the merits of a particular idea or set of ideas. As such, we must "be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."[11] It is only where those opinions "imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[12]

Those who won our independence believed the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the

7 250 U.S. 616, 1920.
8 250 U.S. 616, 1920, 630 per Holmes J (dissenting) (Brandeis J concurring).
9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid.

The paragraph above commencing "Those who won our independence" and concluding "fitting remedy for evil counsels is good ones" is a quotation from *Whitney v California*, 274 U.S. 357, 1927 at 375 per Brandeis J, which has been printed as text. Before publication, the writer asked that the paragraph be deleted. It s publication was an editorial error, which we regret.

secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of nocuous doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

In *Whitney v California* Brandeis J said that the First Amendment guards against "the occasional tyrannies of governing majorities" who have a vested interest in the preservation of the status quo and may seek to fortify their position by silencing the views of those who might challenge them.[13] "Fear of serious injury cannot alone justify suppression of free speech."[14] If those with a vested interest in the preservation of their own power are authorised to regulate speech, the temptation will be for them to stifle opposition in a bid to preserve the status quo. "Power is jealous, and the temptation to stifle legitimate opposition is too great."[15] Once regulation is accepted as a "legitimate way of muzzling social falsehoods," it sets a precedent for "another group that may one day hold the reins of governmental power" to regulate speech.[16] This is the "slippery slope" argument: "Admitting one exception will lead to another, and yet another, until those in power are free to stifle opposition in the name of protecting democratic ideals."[17] Once a particular form of speech is deemed appropriate to regulate, the boundaries of permissible regulation will continue to expand whilst the ambit of free speech/political communication contracts.[18]

Although *Whitney v California*[19] would later be overruled in *Brandenburg v Ohio*,[20] the cogency of Justice Brandeis's reasoning would remain

13 *Whitney v California*, 274 U.S. 357, 1927 at 376 per Brandeis J (Holmes J concurring).
14 Ibid.
15 J M Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" in J M Matsuda, C R Lawrence III, and R Delgado, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993) 17–51, 32. See also M T Zingo, *Sex/Gender Outsiders, Hate Speech, and Freedom of Expression: Can they Say that about Me?* (1998) 24.
16 F Kerr, "The Policy Implications of Enacting Legislation Prohibiting Racial Vilification" (1998) *ALSA Academic Journal* 61–69, 68.
17 Matsuda, above n 16, 33.
18 K Mahoney, "Hate Vilification Legislation and Freedom of Expression: Where is the Balance?" (1994) 1(1) *Australian Journal of Human Rights* 353–69 <http://www.austlii.edu.au/au/journals/AJHR/1994/21.html> accessed 21 March 2005.
19 274 U.S. 357, 1927.
20 315 U.S. 568, 1969, 449 per Curiam.

compelling. Justice Brennan's opinion, on behalf of the court, in *New York Times v Sullivan*,[21] echoed Justice Brandeis's concurring opinion in *Whitney v California*.[22] The First Amendment embodies a "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[23] Free political discussion is essential to ensure that government is "responsive to the will of the people and that changes may be obtained by lawful means."[24] It is as much the citizen's duty to "criticize as it is the official's duty to administer."[25] Speech need not be rational to fall within the protection of the First Amendment. In this way, Justice Brennan's opinion makes *explicit* what was implicit in Justice Brandeis's concurring opinion in *Whitney v California*.[26] Erroneous statements are "inevitable in free debate" and "must be protected if the freedoms of expression and of the press are to have the 'breathing space'" that they "need . . . to survive."[27]

Critics opposed to the regulation of hate speech adopt the powerful rhetoric of Justices Holmes, Brandeis and Brennan in *Abrams v United States*,[28] *Whitney v California*,[29] and *New York Times v Sullivan*,[30] respectively. They contend that it follows from each of these authorities that in order for speech to be free, in a true sense, it must be vigorous and uninhibited. We, the *people*, are entitled to determine for ourselves what constitutes the truth.[31] The autonomy of the people is the essence of freedom in a liberal democracy. The state is not in a position to make principled distinctions between valuable and non-valuable, sound and unsound ideas.[32] This power only resides in the people. The regulation of hate speech would, in the view of its opponents, be contrary to these fundamental principles, which underpin the First Amendment.

The critical deficiency with this view is that it assumes freedom of speech is an absolute right. In the United States, there exists a fundamental distinction between speech and conduct. Whilst Congress may legitimately punish conduct, it cannot generally punish speech. However, even in the United States, freedom of speech is not an absolute right. Congress may

21 376 U.S. 254, 1964.
22 Above n 20.
23 *New York Times v Sullivan*, 376 U.S. 254, (1964) 270 per Brennan J delivering the opinion of the court (emphasis added).
24 Ibid, 269.
25 Ibid, 282.
26 Above n 20.
27 Above n 24, 271.
28 250 U.S. 616, 1920.
29 Above n 20.
30 Above n 22.
31 Matsuda, above n 16, 31. See also A Flahvin, "Can Legislation Prohibiting Hate Speech be Justified in Light of Free Speech Principles?" (1995) 18(2) *University of New South Wales Law Journal* 327–40, 330–31.
32 Matsuda, above n 16, 32. See also C R Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" in J M Matsuda, C R Lawrence III, and R Delgado, above n 16, 53–88, 82–83 and Zingo, above n 16, 24.

curtail speech where the words the subject of proscription present a "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[33] Interference with the stability or security of the state is one of the substantive evils, which Congress has a right to prevent. However, advocacy of the use of force or the violation of the law to effect social or political change can only be proscribed, consistent with the First Amendment, if the advocacy is "directed to *inciting* or producing *imminent* lawless action and is *likely* to incite or produce such action."[34] Teaching, in abstract, "the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."[35] It is only in the circumstance where speech incites *imminent* lawlessness that Congress may legitimately legislate. A statute that fails to distinguish between speech which *advocates* violence and speech that *incites* violence is an impermissible abridgement of the First Amendment right to freedom of speech.[36]

Fighting words are another category of speech that falls outside the protection of the First Amendment. Fighting words are those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[37] The fighting words exception implicitly recognises that not all speech is considered to warrant equal protection under the *US Constitution*. Fighting words are considered to form "no essential part of any exposition of ideas".[38] They are deemed to be "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[39] The fighting words doctrine and the clear and present danger test expounded in *Brandenburg v Ohio*[40] are similar in nature. Both lie at the outer limits of the First Amendment.

Fundamentally, the argument that the regulation of hate speech constitutes a threat to freedom of speech is based on a false premise. A rigid speech/conduct dichotomy does not exist in First Amendment jurisprudence. Speech and conduct are better positioned on a continuum. Speech that incites or produces imminent lawlessness as well as fighting words, which inflict injury or incite a breach of the peace, are both categories of speech that may best be characterised as speech that is located on the border between speech and conduct on the speech–conduct continuum. First Amendment jurisprudence clearly creates a strong presumption

33 *Schenck v United States* 249 U.S. 47, 1919, 52 per Holmes J delivering the opinion of the court. See also *Abrams v United States* 250 U.S. 616, 1920, 627 per Holmes J (dissenting) (Brandeis J concurring).
34 *Brandenburg v Ohio,* 315 U.S. 568, 1969 at 447 per Curiam (emphasis added).
35 Ibid, 448 per Curiam (cited authorities omitted).
36 Ibid.
37 *Chaplinsky v New Hampshire,* 315 U.S. 568, 1942 at 572 per Murphy J delivering the opinion of the court.
38 Ibid.
39 Ibid.
40 315 U.S. 568, 1969.

against the constitutional validity of a statute which proscribes particular speech. However, a presumption is, in fact, all it is. There is no doubt that the executive/legislature will need a compelling justification to rebut the presumption but there exists those exceptional categories of speech that are susceptible to regulation.

Racism lies at the heart of hate speech. Proponents of the regulation of hate speech, particularly critical race theorists, argue that racism presents an "idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation . . . that it is properly treated as outside the realm of protected discourse."[41] Hate speech is unambiguous. It communicates a message of racial inferiority. Hate speech is not a category of speech, the truth of which might be legitimately contested. It is interesting to observe that in *Virginia v Black*,[42] the Supreme Court was alive to this. After reciting the history of cross burning, Justice Sandra Day O'Connor, who delivered the opinion of the court, said: "the burning of a cross is a 'symbol of hate.'"[43] She continued: "And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed."[44] The burning of a cross "often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm."[45] The court ultimately found the statute, which prohibited cross burning, unconstitutional because it did not make a distinction between "different types of cross burnings."[46] The statute did not treat "the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers."[47] However, the significance of this case does not lie so much in its outcome but rather, in the dictum of the majority which expressly makes the connection between a form of expressive conduct, which would presumptively fall within the scope of the First Amendment, and violence or fear of bodily harm.

The essence of Justice Holmes's dissent in *Abrams v United States*[48] and Justice Brandeis's concurring opinion in *Whitney v California*[49] is that freedom of speech is indispensable to the discovery of political truth. Critical race theorists contend, however, that if "the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech becomes a possibility."[50] Furthermore, if the rule in *New York Times v Sullivan*[51] protects erroneous speech because

41 Matsuda, above n 16, 35. See also Zingo, above n 16, 30.
42 538 U.S. 343, 2003.
43 *Virginia v Black* 538 U.S. 343, 2003, 357 per O'Connor J delivering the opinion of the Court.
44 Ibid.
45 Ibid.
46 Ibid, 366.
47 Ibid.
48 Above n 8.
49 Above n 20.
50 Matsuda, above n 16, 26.
51 Above n 22.

of an ultimate concern for discovery of truth then its application to hate speech, specifically racial epithets, "must be based on an acceptance of the possible 'truth' of racism."[52] Indeed, not only may the truth value of hate speech be considered marginal, it may properly be characterised as distorting the marketplace of ideas. Critics, who ground their opposition to the regulation of hate speech in the rhetoric of Justices Holmes and Brandeis, fail to reconcile their argument with the principle that the proscription of some speech is justified in light of its marginal social value as a step to truth and the harm caused by its utterance.[53] Hate speech is one such manifestation of speech.

In *Cohen v California*,[54] Justice Harlan, who delivered the opinion of the Court, relied on Justice Brandeis's concurring opinion in *Whitney v California*[55] as authority for the proposition that the First Amendment is "designed and intended to remove governmental restraints from the arena of public discussion."[56] The people are free to determine "what views shall be voiced."[57] This freedom is intended to "ultimately produce a more capable citizenry and more perfect polity in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[58] A consequence of this freedom may "appear to be . . . verbal tumult, discord, and even offensive utterance."[59] However, the fact that "the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength."[60] So long as the means of communication are peaceful, "the communication need not meet standards of acceptability."[61] "One man's vulgarity is another's lyric" and, as such, the state has no role, apart from exceptional cases, to "cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[62]

The state is not in a position to make principled distinctions between what constitutes acceptable and unacceptable, tasteful and distasteful expression.[63] Furthermore, in *Cohen v California*[64] the Court recognised that a linguistic expression, in this case the expression "Fuck the Draft," may serve both an emotive and cognitive function. The expression may not only be chosen to convey a particular idea but also an emotion, which "practically speaking may often be the more important element

52 Lawrence III, above n 43, 75.
53 Above n 48.
54 403 U.S. 15, 1971.
55 Above n 20.
56 *Cohen v California,* 403 U.S. 15, 1971 at 24 per Harlan J delivering the opinion of the court.
57 Ibid.
58 Ibid.
59 Ibid, 24–25.
60 Ibid, 25.
61 Ibid.
62 Ibid.
63 Ibid.
64 Above n 55.

of the overall message sought to be communicated."[65] Hence, true to Justice Brennan's characterisation in *New York Times v Sullivan*,[66] the First Amendment reflects a commitment to the principle that "debate on public issues should be uninhibited, robust, and wide-open."[67]

Hustler Magazine v Falwell[68] affirms the Court's opinion in *Cohen v California*.[69] Citing *Gertz v Robert Welch, Inc.*[70] Chief Justice Rehnquist, who delivered the opinion of the Court, said: "The First Amendment recognizes no such thing as a 'false' idea."[71] Though falsehoods may have little value, "they are nevertheless inevitable in free debate and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value."[72] Chief Justice Rehnquist said: "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[73] Criticism of public figures will not always be reasoned or moderate. Public officials and public figures may be the subject of "vehement, caustic, and sometimes unpleasantly sharp attacks."[74] Indeed, "if it is the speaker's opinion that gives offence, that consequence is a reason for according it constitutional protection."[75] The offensiveness of the speaker's words does not warrant their proscription.

Those who advocate against the regulation of hate speech contend that sedate and non-controversial speech "within the confines of traditional convention and morality seldom needs protection."[76] Speech that is outrageous does. Government is susceptible to political pressures, including pressure exerted by particular segments of the community, to "prohibit speech that is unpopular or inconsistent with current social mores."[77]

This would render views which challenge the status quo, views that may be unpalatable or distasteful, susceptible to regulation. However, rhetoric, metaphor as well as imagery, no matter how distasteful, are "powerful instruments for change."[78] This view is strongly aligned with the argument that there is a distinction to be drawn between speech and conduct.[79] No physical harm flows from hate speech. The listener's sensibilities may be

65 Above n 57, 26.
66 Above n 22.
67 Above n 2.
68 485 U.S. 46, 1988.
69 Above n 55.
70 418 U.S. 323, 1974, 339 per Powell J delivering the opinion of the court.
71 *Hustler Magazine and Larry C Flynt v Falwell*, 485 U.S. 46, 1988 at 51 per Rehnquist CJ delivering the opinion of the court.
72 Ibid, 52.
73 Ibid, 50–51.
74 Ibid, 51.
75 Ibid, 55.
76 N Wolfson, *Hate Speech, Sex Speech, Free Speech* (1997) 54–55.
77 D Partlett, "From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech" (1989) 22(3) *Vanderbilt Journal of Transnational Law* 431–90, 465.
78 Wolfson, above n 77, 55.
79 Mahoney, above n 19.

offended but otherwise no harm ensues. The argument concludes: "If the First Amendment is going to turn on relative use of emotion, insult, or injury to sensibilities of the listener . . . judges will be thrust into content and style discrimination, required to weigh the proportion of emotion and derision to the percentage of pure reason."[80] Regulation of hate speech is, in other words, censorship.[81] Hence, hate speech, held out as a paradigm of outrageous speech, should be protected.

However, this argument fails to distinguish between speech that is offensive and speech that is injurious. It fails to distinguish between words that may be "impolite or personally demeaning and the *injury* inflicted by words that remind the world that you are fair game for physical attack."[82] This is an important distinction in light of the doctrinal opening, already adverted to, which was created by the Supreme Court for the regulation of speech that sits on the cusp of speech and conduct on the speech–conduct continuum. Hate speech causes more than offence. It causes injury. It is the verbal equivalent of a "slap in the face."[83] The effect of hate speech is to intimidate its victim, to silence him or her.[84] Critics contend that hate speech is one of a number of stages of racism, which has the potential, unless circumvented, to escalate into violence.[85] Hate speech cannot be divorced from a historical context of "lynchings, beatings and economic reprisals."[86] The effect of hate speech is to "lay the foundation for the mistreatment of members of the victimised group."[87] Hate speech provides the rationale for action. It is not merely offensive.

Furthermore the principles expounded in *Cohen v California*[88] and *Hustler Magazine v Falwell*[89] cannot be divorced from the factual matrixes out of which they arose. The appellant in *Cohen v California*[90] was prosecuted for wearing a jacket emblazoned with the words "Fuck the Draft." In *Hustler Magazine v Falwell*,[91] the respondent was a high profile, public figure, who at first instance was awarded compensation for emotional distress for a parody, published in *Hustler* magazine, which intimated that he had had sexual intercourse with his mother in an outhouse. In both cases, the object of criticism was either a public policy or a public figure. The words "Fuck the Draft" were intended as a criticism of a controversial public policy. Any offence caused was a by-product of the political message communicated. The Court reasoned that if the state had the power to prosecute an

80 Wolfson, above n 77, 55.
81 Wolfson, above n 77, 59.
82 C R Lawrence III, above n 33, 74 (emphasis added). See also Flahvin, above n 32, 334.
83 Ibid, 67–68.
84 Ibid, 79. See also Wolfson, above n 77, 47.
85 Mahoney, above n 19.
86 C R Lawrence III, above n 33, 79.
87 Mahoney, above n 19.
88 Above n 55.
89 Above n 69.
90 Above n 55.
91 Above n 69.

individual under the pretext that his or her conduct was offensive, the state could, in effect, suppress political dissent, as it effectively did in this instance. Political dissent is speech that lies at the heart of the First Amendment. Similarly, if an individual with a public profile, an individual whose own conduct has exposed him or herself to public scrutiny, could sue for emotional distress he or she could effectively employ the threat of civil sanction to silence critics.

By contrast, hate speech is directed at private individuals. Any political message intended to be communicated is peripheral to the core message of racial inferiority intended to be communicated. The veil of constitutional protection extends to offensive and insulting language to prevent agents or instruments of the state from being used to suppress political dissent or criticism of public officials or figures. In the context of hate speech, the machinery of the state would be deployed to protect individuals from harm rather than stifle dissent.

In *R.A.V v City of St. Paul*,[92] the Court held "facially unconstitutional" an ordinance which proscribed fighting words that aroused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[93] The statute was declared invalid because it only proscribed fighting words in connection with a set of specified disfavoured topics—race, colour, creed, religion or gender. The court concluded that "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[94] A tenet of First Amendment jurisprudence is that the state must remain neutral lest it skew the marketplace of ideas, privileging particular ideas and subordinating others. Consistent with the proposition that the state must remain neutral in the marketplace of ideas, a content-based regulation is "*presumptively* invalid,"[95] a presumption that may be overcome in exceptional cases. The rationale of the general prohibition against content-based regulation is that content discrimination "raises the spectre that the Government may effectively drive certain ideas or viewpoints from the marketplace."[96] In addition to prohibiting content-based regulation, regulation which targets a particular message or idea, the First Amendment also restrains government from discriminating between particular viewpoints.[97] The State has no "authority to licence one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[98] In *R.A.V v City of St. Paul*,[99] the statute ran afoul of both the content and viewpoint discrimination rules. Ironically, the statute was struck down because it was too *narrow*

92 505 U.S. 377, 1992.
93 *R.A.V v City of St. Paul,* 505 U.S. 377, 1992, 391 per Scalia J delivering the opinion of the court.
94 Ibid.
95 Ibid, 382.
96 Ibid, 388.
97 Above n 94.
98 Ibid, 392.
99 Above n 93.

in scope. The statute was "under inclusive." If it had proscribed fighting words in general, rather than those expressed in connection with specific topics, it may have been upheld.

The court's majority opinion in *R.A.V v City of St. Paul*[100] was criticised by Justice White with whom Justices Blackmun and O'Connor concurred. Although Justice White concurred with the outcome of the majority's opinion, he was critical of its reformulation of the fighting words exception to the First Amendment. He reasoned that under the majority's view, "a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech."[101] Traditionally, the Court subjects statutes which seek to proscribe speech, on the basis of a recognised exception such as the fighting words doctrine, to "strict scrutiny review."[102] The Court scrutinises a statute, applying the "overbreadth doctrine," to ensure that it does not extend to protected expression.[103] The majority's opinion in *R.A.V. v City of St. Paul* appears to have introduced an "underbreadth doctrine" so that if only a subclass as opposed to an entire class of fighting words is proscribed by the impugned statute, the law will fail. This is indeed aberrant logic. Applying the "overbreadth doctrine," however, Justice White found the statute unconstitutional because it also criminalised expressive conduct that "causes only hurt feelings, offense, or resentment," speech which is protected by the First Amendment.[104] This is consistent with the Court's decisions in *Cohen v California*[105] and *Hustler Magazine v Falwell*.[106]

The basis on which Justice White held the City of St. Paul ordinance unconstitutional seemingly supports the argument that "*any* prohibition broad enough to prevent racist speech would catch in the same net forms of speech that are central to a democratic society."[107] This argument proceeds on the basis that it is too difficult to draft a regulation which distinguishes between speech that it is permissible to regulate and speech deemed to be "central to a democratic society."[108] However, there is an important conceptual shift in the debate at this juncture. Critics opposed to the regulation of hate speech tacitly concede that the regulation of hate speech is at least possible—albeit difficult. This argument does not preclude the possibility of a hate speech statute, which is drafted in sufficiently narrow terms, from passing constitutional muster. Rather, it proceeds on the basis that, in light of the strict scrutiny to which such statutes are subjected, it is difficult to envisage an ordinance that could effectively reconcile the dual

100 Above n 93.
101 Above n 94, 404 per White J (Blackmun and O'Connor JJ concurring) (Steven J concurring except as to Part 1–A) (emphasis added).
102 Ibid.
103 Ibid, 402.
104 Ibid, 414.
105 Above n 55.
106 Above n 69.
107 Lawrence III, C.R., above n 33, 71 (emphasis added).
108 Ibid.

aims of protecting individuals of particular racial or ethnic groups from hate speech whilst not encroaching on speech that is protected under the First Amendment. Nevertheless, the door to regulation is left ajar.

In the United States, opponents of the regulation of hate speech contend, in essence, that if speech is to be free, in a true sense, it must extend to the most unpalatable, even extreme, forms of political communication of which hate speech is a manifestation. Regulation of any speech is a threat to all speech. The proposition is either/or: the choice is *either* the preservation of freedom of speech/political communication *or* the regulation of hate speech.[109] However, the structure of the free speech/hate speech debate, which ostensibly adopts the logic of First Amendment jurisprudence, is tenuous. The First Amendment is not absolute. It envisages a continuum of speech/conduct. Hate speech, properly characterised as injurious rather than merely offensive, is located on the border of speech and conduct. If Justice White's opinion in *R.A.V v City of St. Paul*[110] is adopted, the Congress is competent to legislate provided it does so in sufficiently narrow terms. Fundamentally, the free speech/hate speech dichotomy is false. It presupposes that it is necessary to elect between freedom of speech and the regulation of hate speech. It assumes that regulation of hate speech is inconsistent with the preservation of freedom of speech. However, once it is accepted that free speech is not absolute and that it is preferable to conceptualise speech as existing on a continuum, the dichotomy collapses and the conceptual barriers against the regulation of hate speech do not appear as insurmountable.

II. Freedom of Political Communication Under the Commonwealth Constitution

Sections 7, 24 and 64 of the Australian *Constitution* establish a representative and responsible system of government. Section 128 prescribes a mechanism by which the people of the Commonwealth may alter the terms of the *Constitution*. Together they comprise the constitutionally prescribed system of government an indispensable incident of which is freedom of political communication ("the implied freedom").[111] The implied freedom has been described in various ways. In *Nationwide News Pty Ltd v Wills*,[112] Brennan J described the implied freedom as a "freedom of public discussion of

109 Mahoney, above n 19.
110 Above n 93.
111 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 47–48 per Brennan J and 72–73 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 138–39 per Mason CJ, and 174 per Deane and Toohey JJ; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 163 and 180 per Deane J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; *Levy v State of Victoria* (1997) 189 CLR 579, 617 per Gaudron J, and 622 per McHugh J; *Roberts v Bass* (2002) 212 CLR 1, 26 per Gaudron, McHugh and Gummow JJ; *Coleman v Power* (2004) 209 ALR 182, 181 per McHugh J, and 229 per Gummow and Hayne JJ and 264 per Heydon J.
112 (1991) 177 CLR 1.

political and economic matters."[113] In *Australian Capital Television Pty Ltd v Commonwealth (No 2),*[114] Mason CJ described the implied freedom as freedom of communication "*at least* in relation to public affairs and political discussion."[115] In the same case, Gaudron J and McHugh J described the implied freedom as a "freedom of political discourse"[116] and a freedom of "communication in relation to federal elections," respectively.[117] Toohey J aptly described the effect of these varying statements in *Cunliffe v Commonwealth*[118] noting:

> at their lowest, [they] assert an implied freedom on the part of the people of the Commonwealth to communicate information, opinions and ideas relating to the system of representative government [and], at their highest, they recognize a freedom to communicate in relation to public affairs and political matters generally.[119]

The scope of the implied freedom is not fixed. However, following over a decade of judicial consideration, its content has become relatively clear.

The *Constitution* provides that both the Senate and the House of Representatives shall be "directly chosen by the people,"[120] This must be a "true choice," a choice made with all "available alternatives or, at least, with an opportunity to gain an appreciation of the available alternatives."[121] To fulfil their Constitutional functions, conferred specifically by sections 7 and 24 of the Constitution, the people of the Commonwealth must be able to communicate freely in order to be able to form political judgments, and make political decisions.[122] To "cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election."[123] The implied freedom applies to all "those steps

113 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 47 per Brennan J. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 149 per Brennan J.
114 (1992) 177 CLR 106.
115 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106 at 138 per Mason CJ (emphasis added).
116 Ibid, 212 per Gaudron J.
117 Ibid, 227 per McHugh J.
118 (1994) 182 CLR 272.
119 *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 379 per Toohey J.
120 Sections 7 and 24 of the Constitution.
121 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 186–87 per Dawson J. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 360 per Dawson J and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, *Levy v State of Victoria* (1997) 189 CLR 579, 607 per Dawson J and *Coleman v Power* (2004) 209 ALR 182, 268 per Heydon J.
122 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 72 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 138–39 per Mason CJ and 231 per McHugh J; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 150 per Brennan J.
123 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 72 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 231 per McHugh J and *Langer v The Commonwealth* (1995) 186 CLR 302, 350 per Gummow J and *Levy v State of Victoria* (1997) 189 CLR 579, 606 per Dawson J and *Coleman v Power*

which are directed to the people electing their representatives—nominating, campaigning, advertising, debating, criticizing and voting."[124]

However, the implied freedom not only extends to political communication during an election. The relationship between elected representatives, sitting in both chambers of the Parliament, and electors is ongoing and "presupposes an ability of represented and representatives to communicate information, needs, views, explanations and advice."[125] As such, the implied freedom subsists beyond the period of an election.[126] Criticism of the "views, performance and capacity of a member of Parliament and of the member's fitness for public office"[127] is protected by the implied freedom as is the "discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office."[128] "Public discussion" includes discussion of "the political views and public conduct of persons who are engaged in activities that have become the subject of political debate."[129] The implied freedom extends to criticism of Commonwealth instrumentalities and institutions including the executive, legislative and judicial branches of government.[130] It also extends to criticism and scrutiny of "government decisions and actions"[131]—that is, the "business of government".[132] It is a freedom to "seek to bring about change" and "influence . . . elected representatives".[133]

It is at least "strongly arguable that the Constitution's implication of freedom of communication about matters relating to the government of the Commonwealth operates also to confine the scope of Territory, State as well as local legislative powers."[134] This is due to the integrated nature of the federal system.

The implied freedom is also both vertical and horizontal. It extends

(2004) 209 ALR 182, 268 per Heydon J.

124 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 231–32 per McHugh J. See also *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 204 per McHugh J.

125 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 72 per Deane and Toohey JJ.

126 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ and *Coleman v Power* (2004) 209 ALR 182, 264 per Heydon J.

127 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 123 per Mason CJ, Toohey and Gaudron JJ and 180–81 per Deane J.

128 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 124 per Mason CJ, Toohey and Gaudron JJ.

129 Ibid.

130 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 73–74 per Deane and Toohey JJ. See also *Coleman v Power* (2004) 209 ALR 182, 268 per Heydon J.

131 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 138–39 per Mason CJ.

132 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 231 per McHugh J.

133 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 138–39 per Mason CJ.

134 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 76 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 168–69 per Deane and Toohey JJ, at 216 per Gaudron J.

vertically between the electors and the elected as well as horizontally to communication amongst the people.[135]

In *Nationwide News Pty Ltd v Wills*,[136] Deane and Toohey JJ said: "It would be unwise and impracticable to seek to identify in advance the precise categories of prohibition or control which are consistent with the implication."[137] As unsatisfactory as this may be to those who seek certainty, a clear demarcation of permissible and impermissible governmental restraints on freedom of political communication, the nature of political communication is such that it is difficult to establish a fixed or definitive boundary.[138] The definition of "political communication" is elusive. It is difficult to construct a clear conceptual model which distinguishes between classes of speech and that defines what falls within or outside the scope of the implied freedom. However, the High Court has indicated certain speech that may be said to lie at the nucleus or core of the implied freedom. Speech that falls within this class is necessary or essential for the maintenance of our constitutionally prescribed system of government. Speech that is critical of elected representatives, or candidates for election, would fall within this class as would speech that is directed towards each of the arms of government—the legislature, executive and the judiciary.

However, there is also a class of speech that may not be directed specifically at or relevant to an elected representative or candidate for election. Likewise, speech may not be directed specifically at or relevant to an instrument of government. Hence, it is inadequate to describe the implied freedom as a freedom to discuss government institutions. Speech falling within this class may involve the communication of an idea or opinion relating to a particular policy area such as immigration, industrial relations, national security or foreign affairs, which is far from an exhaustive list of broad policy areas. An elected representative's or a political party's position with respect to a particular problem, issue or question falling within one or more of these broad policy areas may affect how individuals may exercise their constitutional right to elect their representatives to the House of Representatives and the Senate. Most speech has at least the potential to become political or to have some bearing on the political judgments the people of the Commonwealth must form to discharge their constitutional functions. As such the definition of political communication must necessarily be broad. With the exception of defamatory statements directed at private citizens with no public profile, as opposed to public

135 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 72 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 139 per Mason CJ, 174 per Deane and Toohey JJ, 212 per Gaudron J and 231 per McHugh J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ and *Coleman v Power* (2004) 209 ALR 182, 264 per Heydon J.

136 (1991) 177 CLR 1.

137 Nationwide News Pty Ltd v Wills (1991) 177 CLR 1, 76–77 per Deane and Toohey JJ.

138 *Levy v State of Victoria* (1997) 189 CLR 579, 646 per Kirby J.

officials and public figures, it is difficult to conceive of other forms of speech that could be definitively characterised as "non-political." Hence, speech that ostensibly appears to have only a tenuous connection to a subject for public consideration may nevertheless be characterised as political communication.

The implied freedom protects "more than . . . rational argument and peaceful conduct that conveys political or government messages."[139] "It also protects false, unreasoned and emotional communications."[140] Political communication will often be "robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest."[141] As already adverted to, the "philosophical ideal" may be that "political discourse should be based only upon objective facts, noble ideas and temperate beliefs."[142] However, the reality is that often rationality gives way to "passionate and sometimes irrational and highly charged interchange."[143] It also extends to "non-verbal conduct," by which an idea may be expressed.[144]

The implied freedom is not absolute.[145] Ultimately, the scope of the implied freedom must be "ascertained from the text and structure of the *Constitution*."[146] The relevant question is: "What do the terms and structure of the *Constitution* prohibit, authorise or require?"[147] The implied freedom "is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*".[148] Deane and Toohey JJ formulated a broader proposition in *Nationwide News Pty Ltd v Wills*:[149] "It is an implication of freedom

139 *Levy v State of Victoria* (1997) 189 CLR 579, 623 per McHugh J.
140 Ibid.
141 *Roberts v Bass* (2002) 212 CLR 1, 62–63 per Kirby J.
142 Ibid.
143 Ibid.
144 *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199, 281 per Kirby J.
145 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 51 per Brennan J and 76 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 142 per Mason CJ, 159 per Brennan J, 169 per Deane and Toohey JJ, and 217 per Gaudron J; *Langer v The Commonwealth* (1995) 186 CLR 302, 333–34 per Toohey and Gaudron JJ; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–62 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; *Levy v State of Victoria* (1997) 189 CLR 579, 624 per McHugh J and 644 per Kirby J; *Coleman v Power* (2004) 209 ALR 182, 229 per Gummow and Hayne JJ and 264 per Heydon J.
146 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 124 per 157 per Brennan J and 197–99 and 202 per McHugh J. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 362 per Dawson J and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557, 560 and 566–67 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.
147 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–67 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. See also *Levy v State of Victoria* (1997) 189 CLR 579, 606 per Dawson J.
148 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–62 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. See also *Levy v State of Victoria* (1997) 189 CLR 579, 624 per McHugh J and *Coleman v Power* (2004) 209 ALR 182, 206 per McHugh J and 264 per Heydon J.
149 (1991) 177 CLR 1.

under the law of an ordered society."[150] Similarly, Brennan J said in the same case: it remains within Parliament's purview to curtail freedom of political communication "to the extent necessary to protect other legitimate interests."[151] In *Cunliffe v Commonwealth*[152] Brennan J said: the implied freedom "does not impair, much less sterilize, the exercise of a power which might become the subject of political debate".[153] In the formative stages of the High Court's freedom of political communication jurisprudence, a number of tests were propounded for reconciling the implied freedom with "other legitimate interests,"[154] which Parliament may promote or pursue.

In *Australian Capital Television Pty Ltd v Commonwealth (No2)*,[155] Brennan J said that Parliament must be afforded a "margin of appreciation."[156] Whether a statutory regime is appropriate to achieve a particular end is an assessment Parliament is entrusted to make. The court's role is to consider whether the assessment "could be reasonably made."[157] In *Theophanous v Herald and Weekly Times Ltd*,[158] Justice Brennan said laws which restrict the "freedom to discuss government, governmental institutions and political matters are invalid unless the restriction is imposed incidentally as part of the means that are appropriate and adapted to achieve a legitimate purpose."[159] However, in *Langer v The Commonwealth*,[160] Brennan J said: "if the impairment of the freedom is *reasonably capable* of being regarded as appropriate and adapted to the achieving of a legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose, the law is within power."[161] Brennan J's comments in *Langer v The Commonwealth*[162] are consistent with his earlier comments in *Australian Capital Television Pty Ltd v Commonwealth (No2)*.[163] In both cases, Brennan J envisaged that Parliament should have a reasonable degree of latitude in determining the means suited to a specific legislative end. Provided the means are reasonably *capable* of being regarded as appropriate and

150 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 76 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 169 per Deane and Toohey JJ.
151 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 51 per Brennan J.
152 (1994) 182 CLR 272.
153 *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 329 per Brennan J.
154 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 51 per Brennan J.
155 (1992) 177 CLR 106.
156 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 159 per Brennan J.
157 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 159–60 per Brennan J (footnotes omitted).
158 (1994) 182 CLR 104.
159 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 150 per Brennan J. See also *Levy v State of Victoria* (1997) 189 CLR 579, 645 per Kirby J.
160 (1995) 186 CLR 302.
161 *Langer v The Commonwealth* (1995) 186 CLR 302, 317–18 per Brennan J (emphasis added).
162 (1995) 186 CLR 302.
163 (1992) 177 CLR 106.

adapted, a policy assessment that Parliament is better equipped to make than the court, the law would be consistent with the implied freedom. The consequence of this test would have been to afford Parliament a significant margin of appreciation in determining what means are appropriate and adapted to achieving other legitimate ends within power.

In *Cunliffe v Commonwealth*,[164] Mason CJ said that a "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."[165] Deane J said: "a court must first identify the relevant character, operation and effect of the impugned law in so far as any curtailment of the freedom of political communication and discussion is concerned."[166] The court must then consider "whether, in the light of the answer to the first question, the identified curtailment of that freedom is inconsistent with the constitutional implication and therefore beyond the relevant head or heads of legislative power conferred by s 51."[167] With respect, neither formulation is particularly helpful.

Finally, in *Lange v Australian Broadcasting Corporation*,[168] the court, in a unanimous judgment, set out an authoritative two stage test ("the Lange test"):

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitution")? If the first question is answered "yes" and the second is answered "no", the law is invalid.[169]

The court continued to refine the Lange test and elucidate its meaning in the decisions that followed *Lange v Australian Broadcasting Corporation*[170]. In *Levy v State of Victoria*,[171] Gaudron J drew a distinction between a law the direct purpose of which is "to restrict political communication" and a law that has "some other purpose, connected with a subject matter within

164 (1994) 182 CLR 272.
165 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300 per Mason CJ.
166 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 338 – 339 per Deane J.
167 Ibid.
168 (1997) 189 CLR 520.
169 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. See also *Levy v State of Victoria* (1997) 189 CLR 579, 608 per Dawson J and 647 per Kirby J; *Roberts v Bass* (2002) 212 CLR 1, 27 per Gaudron, McHugh and Gummow JJ and 59–60 per Kirby J; *Coleman v Power* (2004) 209 ALR 182, 202 per McHugh J, 229 per Gummow and Hayne JJ and 264–65 per Heydon J.
170 (1997) 189 CLR 520.
171 (1997)189 CLR 579.

power and only incidentally restricts political communication."[172] If an impugned law falls within the first category, it is valid only if necessary for the attainment of some overriding public purpose whereas a law in the latter category will be valid if it is reasonably appropriate and adapted to an end within power.[173] Kirby J said that in determining the validity of a law said to burden freedom of political communication, the "purpose of the freedom must be kept in mind."[174] The implied freedom is intended to preserve the constitutionally prescribed system of government and not as a general freedom. The question of the validity of an impugned law must always be answered by reference to whether that impugned law is inconsistent with the constitutionally prescribed system of government.[175]

In *Coleman v Power*,[176] McHugh in effect echoed Kirby J's remarks in *Levy v Victoria*[177] when he said that the question of validity "is not one of weight or balance."[178] Rather, it is a question of whether the impugned law "impairs or tends to impair the effective operation of the constitutional system of representative and responsible government by impermissibly burdening communications on political or governmental matters."[179] A "law will not impermissibly burden those communications unless its object and the manner of achieving it is incompatible with the maintenance of the system of representative and responsible government established by the Constitution."[180] The law must not "conflict impermissibly with the postulated operation of the *Constitution*."[181] If the law is "inconsistent with the intended operation of the system of government created by the *Constitution* . . . the implied constitutional prohibition has effect."[182] In the end, a law "will not be reasonably appropriate and adapted to achieving an end in such a manner whenever the burden is such that communication on political or governmental matters is no longer 'free.'"[183]

Several factors affect the assessment of whether a law is reasonably appropriate and adapted to a legitimate end in a manner that is consistent with the constitutionally prescribed system of government. One factor is "the practicability of protection by a less severe curtailment."[184] Another

172 *Levy v State of Victoria* (1997) 189 CLR 579, 619 per Gaudron J.
173 Ibid.
174 *Levy v State of Victoria* (1997) 189 CLR 579, 644 per Kirby J.
175 *Levy v State of Victoria* (1997) 189 CLR 579, 646 per Kirby J. See also *Coleman v Power* (2004) 209 ALR 182, 208 per McHugh J.
176 (2004) 209 ALR 182.
177 (1997) 189 CLR 579.
178 *Coleman v Power* (2004) 209 ALR 182 at 207 per McHugh J.
179 Ibid.
180 Ibid.
181 *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199, 281 per Kirby J.
182 *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199, 282 per Kirby J.
183 *Coleman v Power* (2004) 209 ALR 182, 208 per McHugh J.
184 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 51 per Brennan J. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 143–44 per Mason CJ, and 150–51 per Brennan J.

factor is the "nature of the interest served and the proportionality of the restriction to the interest served."[185] A law that imposes a "disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication."[186] Another relevant factor is "the extent to which the protection of the other interest itself enhances the ability of the Australian people to enjoy their democratic rights and privileges"[187] including the right to "live peacefully and with dignity."[188] Restrictions on political communication will be "permissible as long as they do no more than promote or protect such communications and those who participate in representative and responsible government from practices and activities which are incompatible with that system of government."[189] In essence, the law's validity will depend on "an assessment of the character (including purpose), operation and effect of the particular law."[190]

An impugned law may fall into one of a number of categories. Firstly, it may fall into the category of a law "whose character is that of a law with respect to the prohibition or control of some or all communications relating to government or governmental instrumentalities."[191] Secondly, it may fall into the category of a law whose restrictions "target ideas or information."[192] Thirdly, it mall fall into the category of a law "whose character is that of a law with respect to some other subject" and whose effect on freedom of communication relating to government or government instrumentalities is indirect, incidental, remote or "unrelated to their nature as communications of that kind."[193] Fourthly, it may fall into the category of a law which restricts "an activity or mode of communication by which ideas or information are transmitted."[194] A law that falls into the first or

185 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 150–51 and 159 per Brennan J. See also *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 179 per Deane J and *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 300 per Mason CJ.

186 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 14–44 per Mason CJ. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 300 per Mason CJ and 388 per Gaudron J; *Levy v State of Victoria* (1997) 189 CLR 579, 645 per Kirby J.

187 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 51 per Brennan J. See also *Langer v The Commonwealth* (1995) 186 CLR 302, 333–34 per Toohey and Gaudron JJ; *Muldowney v South Australia* (1996) 186 CLR 352, 373 per Toohey J and *Coleman v Power* (2004) 209 ALR 182, 208–09 per McHugh J.

188 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 77 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 169 per Deane and Toohey JJ and *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 339–40 per Deane J.

189 *Coleman v Power* (2004) 209 ALR 182, 209 per McHugh J.

190 *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 337 per Deane J.

191 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 76–77 per Deane and Toohey JJ. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 337–39 per Deane J.

192 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 143 per Mason CJ. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 299–300 per Mason CJ and *Levy v State of Victoria* (1997) 189 CLR 579, 618–19 per Gaudron J and 645 per Kirby J.

193 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 76–77 per Deane and Toohey JJ. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 337 per Deane J.

194 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 143

second category will be more difficult to justify than a law that falls into the third or fourth category.[195] In the case of a law which falls into one of the latter categories, the threshold of invalidity is higher: "the court will not strike down a law restricting conduct which may incidentally burden freedom of political speech simply because it can be shown that some more limited restriction could suffice to achieve a legitimate purpose."[196] A law in the first or second category may be saved from invalidity, "putting to one side times of war and civil unrest,"[197] only in exceptional cases.

III. Reconciling the Regulation of Hate Speech with the Implied Freedom of Political Communication

The constitutionality of racial vilification statutes in Australia must be considered by reference to those principles enunciated by the High Court. In Australia, the determination of the validity of an impugned law turns on the extent to which the impugned law affects the ability of an individual to form political judgments *necessary* for the maintenance of the constitutionally prescribed system of government. The question of validity will hinge on the terms, operation or effect of an impugned law and can therefore not be determined in the abstract. I turn to the *Racial Discrimination Act* as a model to reconcile the proscription of hate speech with the implied freedom of political communication.

The *Racial Discrimination Act* provides that is unlawful for a person to do an *act*, otherwise than in private, that is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" if the act is done because of the "race, colour, national or ethnic origin of the other person or of some or all of the people in the group."[198] An act encompasses words, sounds, images or writing and is done otherwise than in private if communicated to the public or is done in a public place or is done in the sight or hearing of people in a public place.[199] Public place is defined broadly as "any place [to] which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place." Section 18C does not "render unlawful anything said or done in the performance, exhibition or distribution of an artistic work."[200] Nor does it render unlawful anything said or done in the course of a statement, public discussion or debate held for a "genuine academic, artistic or scientific purpose or any other purpose

per Mason CJ. See also *Levy v State of Victoria* (1997) 189 CLR 579, 618–19 per Gaudron J.
195 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 76–77 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 143–44 per Mason CJ and 169 per Deane and Toohey JJ; *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 337 per Deane J and *Levy v State of Victoria* (1997) 189 CLR 579, 618–19 per Gaudron J.
196 *Coleman v Power* (2004) 209 ALR 182, 192 per Gleeson CJ.
197 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 77 per Deane and Toohey JJ.
198 Section 18C(1) of the *Racial Discrimination Act 1975* (Cth).
199 Section 18C(2) of the *Racial Discrimination Act 1975* (Cth).
200 Section 18D(a) of the *Racial Discrimination Act 1975* (Cth).

in the public interest."[201] Finally, an exemption is provided for making or publishing a "fair and accurate report of any event or matter of public interest" or a "fair comment on any event or matter of public interest" provided the comment is an "expression of a genuine belief held by the person making the comment."[202] A complaint alleging a contravention of section 18C of the *Racial Discrimination Act* may be lodged with the Human Rights and Equal Opportunity Commission ("the Commission").[203]

The provisions of the *Racial Discrimination Act* relevant to racial vilification have the capacity to burden freedom of political communication, defined broadly, where racist invective infects political discourse.

In the United States the potential for the Act to catch protected speech within its net would be sufficient cause for striking down the legislation. However, the *Lange* test provides Parliament with a much more significant margin of appreciation than the standard of judicial review adopted by the Supreme Court. The *Lange* test requires an assessment of whether the law is appropriate and adapted to serve a legitimate end *in a manner* which is compatible with the maintenance of the constitutionally prescribed system of representative government.[204] The High Court has elucidated a number of factors that may be relevant to the determination of this question. These factors are outlined in Part II of this paper. It is in light of these principles, that the constitutionality of the racial vilification provisions of the *Racial Discrimination Act* must be considered.

The *Racial Discrimination Act* does not possess the "character of a law with respect to the prohibition or control of some or all communications relating to government or governmental instrumentalities."[205] The statute does not prohibit or control communication relating to government policy. It does not expressly prohibit or control the expression of a particular communication relating to government. The question whether the law targets ideas or information[206] is arguably more open ended though it is unlikely to be characterised as such a law. It is not the underlying racist message that is the target of the legislation. The legislation targets the effects of racial vilification. It provides that it is unlawful to do an *act* that is likely to offend, insult, humiliate or intimidate another person or a group of people. It is the offence, insult, humiliation and/or intimidation caused by the relevant act that is the object of the racial vilification provisions of the Act.

The *Racial Discrimination Act* is more likely to fall into the category of a law "whose character is that of a law with respect to some other subject" and whose effect on freedom of communication relating to government

201 Section 18D(b) of the *Racial Discrimination Act 1975* (Cth).
202 Section 18D(c) of the *Racial Discrimination Act 1975* (Cth).
203 Section 46P of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
204 *Coleman v Power* (2004) 209 ALR 182, 229 per Gummow and Hayne JJ.
205 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 76–77 per Deane and Toohey JJ. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 337–39 per Deane J.
206 Ibid.

or government instrumentalities is indirect, incidental, remote or "unrelated to their nature as communications of that kind."[207] The High Court has made it clear that a law that falls into this latter category will more readily be held to be consistent with the implied freedom than a law that falls into either of the first two categories.[208] There is no doubt that the Act may have an effect on freedom of political communication, in the sense that it may foreseeably inhibit the expression of a political communication, tinged with racist invective, about immigration policy, indigenous policy or other areas of public policy. Arguably, any such effect would be incidental or indirect in the sense that the law does not target, nor does it foreclose, political discussion that is critical of one or more of those heads of government policy. Consequently, the threshold of constitutional validity would be lower than if the law could properly be characterised as a law that either prohibits or controls communication in relation to government or governmental instrumentalities or a law that targets specific ideas or information.

A law that is disproportionate to the end which it seeks to achieve, in the sense that it extends beyond what is necessary to achieve a legitimate end, will likely be construed as a law that is inconsistent with the implied freedom and therefore invalid.[209] This proposition directs attention to the means by which racial vilification law seeks to achieve its end, which is to guard against the effects of racist behaviour and provide a remedy for victims the target of that behaviour. The *Racial Discrimination Act* provides exemptions from the application of section 18C(1). These exemptions would militate against an inference being drawn that the Act is disproportionate to the legitimate end it seeks to achieve. However, the constitutionality of the Act is perhaps not that clear cut. A critical factor that brings the validity of the racial vilification provisions into question is the scope of s 18C(1) which extends not only to an act that *intimidates* but also an act that causes offence, insult or humiliation.

The implied freedom has been held to extend to "false, unreasoned and emotional communications"[210] in view of the fact that political communication will often be "robust, exaggerated, angry, mixing fact and

207 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 76–77 per Deane and Toohey JJ. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 337 per Deane J.
208 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 76–77 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 143–44 per Mason CJ and 169 per Deane and Toohey JJ; *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 337 per Deane J and *Levy v State of Victoria* (1997) 189 CLR 579, 618–19 per Gaudron J.
209 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 51 per Brennan J. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 143–44 per Mason CJ, and 150–51 per Brennan J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 300 per Mason CJ and 388 per Gaudron J; *Levy v State of Victoria* (1997) 189 CLR 579, 645 per Kirby J.
210 *Levy v State of Victoria* (1997) 189 CLR 579, 623 per McHugh J. See also at *Coleman v Power* (2004) 209 ALR 182, 265–66 per Heydon J.

comment and commonly appealing to prejudice, fear and self-interest."[211] It is at this juncture, that the *Racial Discrimination Act* is most susceptible to constitutional challenge. In a heated political environment, where prejudice may overcome reason, the potential does arguably exist for the *Racial Discrimination Act* to effectively inhibit political communication. The words "offend", "insult" and "humiliate" are not defined in the Act but may be taken, on one reading, to encompass expressions that are "potentially provocative or incompatible with civilised discourse, liable to hurt the personal feelings of individuals or contrary to contemporary standards of public good order."[212] In *Coleman v Power*,[213] Justice McHugh concluded that a law which made it an "offence to utter insulting words in or near a public place . . . in the course of making statements concerning political or governmental matters" was invalid.[214] He held that "An unqualified prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted for preventing breaches of the peace in a manner compatible with the prescribed system."[215] The remaining members of the majority, Gummow, Hayne and Kirby JJ, concurred with the view that the appellant's conviction for using insulting words in a public place should be quashed. However, they arrived at this conclusion by reading down the provision so that it was consistent with the implied freedom rather than by declaring it invalid.[216]

Essentially, in light of *Coleman v Power*,[217] the problem with the *Racial Discrimination Act* is that it overreaches. Rather than confining its reach to speech that intimidates, threatens or incites violence, speech that is properly characterised as injurious, the Act potentially extends to offensive or insulting utterances made in public "in the course of making statements concerning political or governmental matters."[218] In some circumstances, words used to communicate a political message, particularly in the course of a debate about immigration, refugee policy or indigenous policy, in which race will invariably feature as a factor, may be offensive or insulting. They may "hurt the personal feelings of individuals."[219] However, if hurt feelings are a sufficient trigger to enliven the jurisdiction of the Commission to act on a complaint alleging contravention of s 18C of the Act, the threshold for establishing a contravention is too low and the burden on political communication arguably too great. The Act may be construed

211 *Roberts v Bass* (2002) 212 CLR 1, 62–63 per Kirby J.
212 *Coleman v Power* (2004) 209 ALR 182, 188 per Gleeson CJ, 255 per Callinan J and 262 per Heydon J.
213 (2004) 209 ALR 182.
214 *Coleman v Power* (2004) 209 ALR 182, 210 per McHugh J.
215 Ibid.
216 *Coleman v Power* (2004) 209 ALR 182, 231 per Gummow and Hayne JJ and 238 per Kirby J.
217 (2004) 209 ALR 182.
218 *Coleman v Power* (2004) 209 ALR 182, 210 per McHugh J.
219 *Coleman v Power* (2004) 209 ALR 182, 188 per Gleeson CJ, 255 per Callinan J and 262 per Heydon J.

as disproportionate to the end which it seeks to achieve in that it catches within its net speech, however unpalatable, that is protected—speech that is critical of government policy. The Act fails to distinguish between offensiveness and injury. Although section 18D of the Act does provide for specific exemptions from the application of section 18C(1), the fact that it could potentially apply to speech that causes merely hurt feelings, rather than injury, may support the view that it is in fact not reasonably appropriate and adapted to serve a legitimate end in a manner consistent with the constitutionally prescribed system of government.

If the underlying object of racial vilification law, in particular the *Racial Discrimination Act*, is to protect individuals from the *injury* inflicted by hate speech, then the Act and each of those State or Territory statutes which mirror, or are analogous to, its provisions, should be drafted in narrower terms. One proposal would be to limit the reach of s 18C(1) to the prohibition of "face-to-face vilification and [the protection of] captive audiences from verbal and written harassment."[220] This proposal recognises that the physical proximity of the offender to the victim is a critical factor in instilling in the victim a fear of imminent bodily harm. Another proposal would be to limit the scope of the statute to messages that are "prosecutorial, hateful, and degrading."[221] This proposal envisages the proscription of the content of the message directed towards an individual. It is, however, more problematic in light of the fact that any statute which targets an idea or information will be more difficult to justify as consistent with the constitutionally prescribed system of government than a statute which merely has an incidental effect on the idea or information being communicated.[222] Finally, in keeping with the substance of the former proposal, which stresses the context in which racial vilification occurs, the scope of the Act could be confined to speech that is intended to be or has the effect of intimidating, threatening or inciting imminent violence no matter whether the vilification is face to face or whether it is directed at a captive audience.

Hate speech has potential to silence those individuals who are its targets and thereby diminishes the range of views in the marketplace of ideas. A democratic ideal is to expand the opportunities available to individuals to participate in the democratic process. The ability of individuals who are the target of hate speech to enjoy their "democratic rights and privileges"[223] is adversely affected by hate speech, as is their right to "live

220 Zingo, above n 16, 29.
221 Zingo, above n 16, 30.
222 *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 143 per Mason CJ. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 299–300 per Mason CJ and *Levy v State of Victoria* (1997) 189 CLR 579, 618–19 per Gaudron J and 645 per Kirby J.
223 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 51 per Brennan J. See also *Langer v The Commonwealth* (1995) 186 CLR 302, 333–34 per Toohey and Gaudron JJ; *Muldowney v South Australia* (1996) 186 CLR 352, 373 per Toohey J and *Coleman v Power* (2004) 209 ALR 182, 208–09 per McHugh J.

peacefully and with dignity."[224] A society that fails to provide a means of redress for individuals who not only feel aggrieved but, more importantly, threatened or intimidated, fails to assure the right of *all* its citizens to participate in the democratic process free from harassment. On one view, racial vilification law, in particular the *Racial Discrimination Act,* protects "those who participate in representative and responsible government from practices and activities which are incompatible with that system of government."[225] Arguably, speech which offends, insults, humiliates or intimidates citizens who identify with a particular racial or ethnic group is not only of marginal value it also distorts public discourse. In this way, despite the flaws of the *Racial Discrimination Act*, it may be seen not only as appropriate and adapted to a legitimate end, it may also be seen as enhancing our system of representative and responsible government by removing barriers, practices and activities, which inhibit (or otherwise adversely affect) participation in the democratic process.

Critics opposed to the regulation of hate speech or racial vilification would no doubt argue that the marketplace must be kept level and that the state must remain neutral in the marketplace of ideas. However, there exists in the Australian constitutional law context greater scope than in the American context for government to play a positive role in promoting democratic ideals. Government has a role to play as the "preserver of democratic rights,"[226] an agent of democracy, rather than a "potential tyrant."[227] Furthermore, critics opposed to regulation fail to acknowledge the symbolism of government inaction, which speaks as loudly as governmental action. The protection of vituperative, dehumanising, hateful speech conveys the message that hate speech is "legitimate, acceptable, and supported by the law."[228] The "chilling sight of avowed racists in threatening regalia marching . . . with full police protection is a statement of state authorisation."[229] The state is in effect never neutral.[230] Even if the provisions of the *Racial Discrimination Act* are construed as potentially being too broad, it is nevertheless open to reason that the case for the regulation of hate speech or racial vilification is so compelling that the Act should be held valid.

224 *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1, 77 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No2)* (1992) 177 CLR 106, 169 per Deane and Toohey JJ and *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 339–40 per Deane J.
225 *Coleman v Power* (2004) 209 ALR 182, 209 per McHugh J.
226 D Partlett, above n 78, 469.
227 M A Fullilove, "Giving the Devil Benefit of Law: Free Speech and Hate Speech under the United States and Australian Constitutions" (1994) *ALSA Academic Journal* 47–60, 55.
228 Zingo, above n 16, 27. See also Matsuda, above n 16, 49.
229 Matsuda, above n 16, 48–49.
230 D Knoll, "Anti-Vilification Laws: Some Recent Developments in the United States and their Implications for Proposed Legislation in the Commonwealth of Australia" (1994) 1(1) *Australian Journal of Human Rights* 211–34 <http://www.austlii.edu.au/au/journals/AJHR/1994/14.html> accessed 21 March 2005.

In drafting racial vilification statutes, a model of which is the *Racial Discrimination Act*, the legislature must be alive to the parameters of the free speech/hate speech debate. In Australia, there exists broader scope than in the United States to regulate hate speech. However, by failing to distinguish sufficiently between speech that is offensive and speech that is injurious, the legislature has arguably fallen into a conceptual pitfall, which critics opposed to the regulation of hate speech or racial vilification would seize on to impugn the validity of hate speech or racial vilification statutes. The case for the regulation of hate speech may be so compelling that the availability of alternative, more specific, means to achieve the desired legislative aim would not weigh heavily in the assessment of the law's validity. It would be preferable, however, in keeping with the underlying object of racial vilification law, to restrict the scope of racial vilification statutes to speech that is harmful, speech that intimidates, threatens or instils in its victims a fear of imminent bodily harm.

IV. Conclusion

The law must guard against the impulse of the legislature or executive to proscribe, in the interests of public morality, order or stability, speech that is subversive, offensive and irrational. There is no doubt that in liberal democracies such as Australia and the United States, which consider political communication sacrosanct, there should be a strong presumption against the constitutionality of a statute that curtails freedom of political communication. However, freedom of political communication has never been a transcendental value. It is not absolute. Both the Supreme Court and the High Court have acknowledged that in some, albeit limited, circumstances, Parliament and Congress may curtail freedom of speech or political communication.

There are numerous deficiencies with the case against the regulation of hate speech. Firstly, it presupposes that the regulation of hate speech will compromise or threaten freedom of speech/political communication. Secondly, it fails to characterise hate speech properly as injurious or harmful rather than offensive. Thirdly, critics opposed to the regulation of hate speech, whilst tacitly acknowledging that the regulation of hate speech may be possible, thereby undermining the first two legs of their argument, contend that the regulation of hate speech is simply too difficult.

Hate speech is an extreme form of speech. It is speech often expressed in the public domain though directed towards private citizens of particular racial/ethnic groups. Its central purpose is to convey a message of inferiority. Any political message or criticism of government policy is peripheral to this primary message of racial inferiority, which is intended to be communicated. It is a form of speech that is of marginal value and significant harm—at least from the perspective of its victims and arguably

from a broader societal perspective as well. Not only is it open to Parliament to legislate in this area, the case for regulation is compelling.

The difficulty is reconciling the regulation of hate speech with freedom of political communication. In Australia, the test for validity is more liberal than in the United States. Parliament is afforded a more significant margin of appreciation to regulate speech. Nevertheless, the legislature must be sensitive to the tension that exists between speech, expressed in a political context that is tinged with racist invective and may be interpreted as offensive, and speech that is, by its nature, injurious. The *Racial Discrimination Act* is not as sensitive to that distinction as it could be. The Parliament, though competent to legislate to regulate hate speech, must, in the final analysis, ensure any such enactments are drafted in sufficiently narrow terms to ensure that freedom of speech/political communication continues to be robust and wide open.