

Justice McHugh, Representative Government and the Elimination of Balancing

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Abstract

This article critically examines Justice McHugh's use of the idea of representative government, an idea that has been crucial to the development of the implied freedom of political communication in the High Court. According to Justice McHugh, the Court ought to limit itself to what he calls the 'constitutionally prescribed system of representative government', a conception ostensibly grounded upon the text and structure of the Constitution. Recently, Justice McHugh has further concluded that limiting the implied freedom in this way requires the Court to avoid 'balancing' the constitutional interest in freedom of political communication against the social value to be achieved by the legislation under examination in any particular case. This article discusses these limits and critically examines both the coherence and sustainability of this inference. It is argued that the qualified and limited nature of Justice McHugh's proposal represents in principle a coherent and sustainable means by which the High Court's reliance upon extra-constitutional value judgments can be minimised, although not entirely eliminated.

1. Introduction

Justice McHugh's interpretation of representative government has the promise to be one of his Honour's most enduring contributions to Australian constitutional law. The significance of McHugh J's interpretation of this idea derives largely from the role that representative government has played in the development of the implied freedom of political communication, as well as other civic freedoms, which the Court first identified in the well-known *Political Communication Cases* of 1992.¹ Justice McHugh's treatment of the idea is important, not only because until his retirement in November he was the only remaining member of the Court of 1992, but because his approach to representative government has arguably been the fulcrum upon which the High Court's free speech jurisprudence has turned.

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

Representative government plays a critical role in the Court's free speech jurisprudence by providing the essential link between the text of the Constitution and the idea that an implied freedom of political communication is somehow justified.² To put the matter shortly, McHugh J's contribution has been to insist that, while the terms of the Constitution must be read in the light of the idea of representative government, it is illegitimate for the Court to rely upon a 'free-standing' conception of representative democracy as a premise from which further implications are derived.³ This idea, first enunciated by McHugh J in *Theophanous* in 1994,⁴ and again soon thereafter in *McGinty* in 1996,⁵ was adopted by a unanimous Court in *Lange* in 1997.⁶

Fundamental to the decision in *Lange* is the idea that constitutional implications must be based strictly upon the text and structure of the Constitution, without reliance upon free-standing, extraneous ideas, theories or doctrines.⁷ Consequently, the High Court in *Lange* devised a test for determining whether the freedom was contravened which turns, ultimately, on the question whether the law in question is 'compatible' with the constitutionally prescribed system of representative government.⁸ However, the decision in *Lange* has subsequently been criticised on the basis that a kind of 'balancing' between legitimate objectives and constitutional requirements is inevitably required, and that such tasks unavoidably require the Court to draw upon value-laden considerations that lie outside the text and structure of the Constitution.⁹ Moreover, in *Lenah Game Meats*, decided in 2001,¹⁰ Justice Callinan, a long-time critic of the implied freedom, drew attention to these criticisms as a reason for questioning the foundational reasoning and conclusions adopted in *Lange*.¹¹ In *Coleman v Power*, decided in 2004,¹² McHugh J accordingly felt compelled to reply to these criticisms at length, explaining and partially reformulating the *Lange* test in an effort to show that it does not require the Court to balance legislative objectives against the constitutional interest in freedom of speech.¹³ The question, he insisted, is one of determining whether the law in question is compatible with the system of representative government that is specifically prescribed by the text and structure of the Constitution. Free-standing conceptions of representative democracy are consequently irrelevant to the analysis.

2 See Nicholas Aroney, *Freedom of Speech in the Constitution* (1998) at 115–117, 153–158.

3 See Nicholas Aroney, 'Representative Democracy Eclipsed? The *Lange*, *Muldowney* and *McGinty* Decisions' (1996) 19 *UQLJ* 75.

4 *Theophanous v The Herald & Weekly Times Limited* (1994) 182 CLR 108 (hereafter *Theophanous*) at 195.

5 *McGinty v Western Australia* (1996) 186 CLR 140 (hereafter *McGinty*) at 232, 234, 236.

6 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (hereafter *Lange*).

7 *Id* at 566–567.

8 *Id* at 561–562, 567–568.

9 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *MULR* 668.

10 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (hereafter *Lenah Game Meats*).

11 *Id* at 337–338.

12 *Coleman v Power* (2004) 220 CLR 1 (hereafter *Coleman*).

13 *Id* at 46–53.

Justice McHugh's reformulation of the *Lange* test in *Coleman* is significant not least because three other members of the Court — Gummow, Kirby and Hayne JJ — have expressed agreement with it.¹⁴ What is at stake in the explanation is the question whether text and structure not only provide a sufficient foundation for the implied freedom, but also whether they provide adequate guidance to the courts when determining whether a particular law unconstitutionally contravenes the implied freedom. For those concerned about the problem of confining the operation of the implied freedom to the text and structure of the Constitution, McHugh J's reformulation is attractive.¹⁵

Whether McHugh J's doctrine of representative government is to fulfil its promise will depend upon how successful he has been in devising a stable, coherent interpretation that will not break down either into the more expansive pattern that characterised a majority of the Court in the immediate aftermath of the decisions of 1992¹⁶ or alternatively into the more restrictive pattern favoured by some more recently appointed members of the Court.¹⁷ It is vital, therefore, that McHugh J's explanation and reformulation in *Coleman* is examined closely and carefully. At issue is the attempt to show that the implied freedom can be maintained and applied without relying upon free-standing conceptions and theories abstracted from the Constitution's text and structure.

In this article, I survey McHugh J's treatment of the idea of representative government in the development of the High Court's free speech jurisprudence in order, first, to explain the nature of the conception, second, to show how it has become a critical feature of the Court's jurisprudence, and third, to discuss the question whether the idea of the 'constitutionally prescribed system of representative government' — a conception grounded upon the text and structure of the Constitution rather than 'free-standing' ideas — provides sufficient guidance to the courts when determining whether a law contravenes the implied freedom. This will require that rather close attention is given to McHugh J's judgments in the five critical judgments to which reference has already been made, namely *ACTV*, *Theophanous*, *McGinty*, *Lange* and *Coleman*, in the context of a number of others. The manner of exposition will be chronological, and will be limited to McHugh J's judgments in particular.

There are two reasons for this approach. The first reason flows from what has already been said. Justice McHugh's conception of representative government is arguably the pivot on which the High Court's free speech jurisprudence has turned.

14 *Id* at 78 (Gummow & Hayne JJ), 82 (Kirby J).

15 See Nicholas Aroney, 'The Structure of Constitutional Revolutions: Are the *Lange*, *Levy* and *Kruger* cases a Return to Normal Science?' (1998) 21 *UNSWLJ* 645.

16 See, in particular, the judgments of Mason CJ, Deane, Toohey & Gaudron JJ in *Theophanous*, above n4 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, and compare *Cunliffe v Commonwealth* (1994) 182 CLR 272.

17 See, for example, the judgments of Gleeson CJ, Callinan, Hayne & Heydon JJ in *APLA Limited v Legal Services Commissioner (NSW)* (2005) 219 ALR 403 (hereafter *APLA*), particularly Callinan J at 519, 524–526. See also Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9.

While each member of the Court joined in the unanimous *Lange* judgment for his or her own reasons, the decision manifests many of McHugh J's characteristic concerns. Moreover, while Gummow, Kirby and Hayne JJ agreed with McHugh J's *Coleman* reformulation, it was McHugh J who felt it necessary to address the question in detail and to articulate the reasons. Focusing on McHugh J's judgments in the line of cases between *ACTV* and *Coleman* enables us to gauge McHugh J's influence, as well as to isolate and assess the cogency of his approach to representative government and his explanation and reformulation of the *Lange* test.

The second reason for adopting this approach is related to the first. Most analytical legal scholarship, for very understandable reasons, concerns itself with the meaning of decided cases as laid down by the entire court or courts concerned. Rarely are the judgments of an individual judge in a line of cases examined successively and in detail. Focusing on only one judge, however, and working chronologically through his or her decisions, makes it possible to identify and evaluate the specific characteristics of that judge's reasoning. Judges have a responsibility to articulate reasons for decision, and it is expected that a judge's reasons will be consistent, not only with existing principles, but also with the judge's own reasoning in previous decisions. Justice McHugh, along with other members of the Court, has been accused of both inconsistency and incoherence in the area of implied rights.¹⁸ Examining his judgments provides an opportunity to assess those criticisms, and it does so in a way that provides an opportunity to shed light on his contribution to Australian law that is liable to be missed in a more general survey of the cases. The occasion of McHugh J's retirement as a justice of the High Court on 1 November 2005 provides a fitting opportunity to make such an assessment.

2. *Representative Government*

Three aspects of McHugh J's treatment of the concept of representative government are particularly noticeable. First, representative government is of central importance to his reasoning, particularly in relation to the implied freedom of political communication. Second, however, McHugh J consistently ties the meaning of representative government to what he later refers to as the text, structure and history of the Constitution, with the consequence, thirdly, that implications should only be based upon the constitutionally prescribed system of representative government, and not any 'free-standing' conception of representative democracy. In this regard, McHugh J's preferred expression is 'representative government', as well as the cognate idea of 'responsible government', both of which are used to designate the system of government required by the Constitution's text and structure, and which are distinguished,

18 See, for example, Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *UNSWLJ* 842; Hoong Phun Lee, 'The "Reasonably Appropriate and Adapted" Test and the Implied Freedom of Political Communication' in Matthew Groves (ed), *Law and Government in Australia* (2005) at 75; Dan Meagher, 'The Protection of Political Communication under the Australian Constitution' (2005) 28 *UNSWLJ* 30, 38.

rather sharply, from the idea of ‘representative democracy’ conceived as a free-standing conception. As will be seen, the nature and scope of the implied freedom of political communication, as well as the test to be applied when determining whether a law contravenes the implied freedom, are developed in a way that seeks to be consistent with this approach to the constitutionally prescribed system of representative and responsible government.

A. The Strategic Importance of Representative Government

The idea of representative government is critical to McHugh J’s reasoning in *Australian Capital Television Pty Ltd v Commonwealth*, as it is to the reasoning of other members of the majority in that case.¹⁹ While his Honour is careful to insist that the implied freedom of participation, association and communication to which he refers is drawn from the ‘terms of ss 7 and 24 of the Constitution’,²⁰ the concept of representative government is the crucial link between the text of the Constitution and the freedom to communicate. While McHugh J resists the notion that representative government should be relied upon as a conception that is abstracted from the specific provisions of the Constitution, his Honour at the same time insists that those provisions must be interpreted with the concept of representative government in mind.²¹ The Court has a duty, his Honour says, to ensure that the system of representative government intended by the framers of the Constitution operates effectively,²² and an effective system of representative government requires that electors be free to discuss matters relevant to voting in federal elections.²³

As the crucial link between the text of the Constitution and the implied freedom, the concept of representative government performs two crucial functions. On one hand, it serves to tie McHugh J’s reasoning to the text and structure of the Constitution, but on the other hand it enables him to conclude that an implied freedom of political communication is somehow justified. Justice McHugh’s treatment of the concept of representative government is thus a measure of how carefully the judgment negotiates these two desiderata. The need to link the concept of representative government to the terms of the Constitution is manifest throughout the judgment, and yet representative government also functions as a bridge to the idea of an implied freedom of political communication the scope and application of which is adjudicated by the courts.

19 I refer here to those judges who held in *ACTV* that there is an implied freedom of political communication, namely Mason CJ, Deane, Brennan, Gaudron, Toohey & McHugh JJ.

20 *ACTV*, above n1 at 227. For McHugh J, ss7, 24 are to be read with ss30 and 41, as well as ss61, 62 and 64. Other justices also introduce s128 into the equation: see id at 138 (Mason CJ), 170 (Deane & Toohey JJ), 211, 216 (Gaudron J); *Nationwide News*, above n1 at 47 (Brennan J), 71–72 (Deane & Toohey JJ). Justice McHugh refers to s128 only incidentally, in the context of the question whether the legislation under consideration unconstitutionally interfered with the functioning of the States: *ACTV*, above n1 at 242.

21 *ACTV*, above n1 at 230.

22 Id at 231.

23 Id at 232.

Like the other members of the Court in *ACTV*,²⁴ McHugh J refers not only to ‘representative government’,²⁵ but also to ‘responsible government’ and ‘representative democracy’.²⁶ Tony Blackshield has argued that Mason CJ’s usage of responsible government on one hand, and representative government and representative democracy on the other, implies a great deal. He suggests that for the Chief Justice responsible government is inherently associated with the idea of parliamentary sovereignty, and is thus in principle antithetical to the notion of constitutional rights, whereas the idea of representative government is associated with the much wider notion of popular sovereignty.²⁷ As Mason CJ himself observed:

The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives.²⁸

Can the same be said of McHugh J’s use of these terms in *ACTV*? I do not think so. It is true that his Honour distinguishes between responsible government and representative government, but the ground of the distinction is much more straightforward. For McHugh J, it seems that responsible government concerns, simply, the responsibility of the executive government to Parliament in accordance with the conventions of the Westminster system of government, whereas representative government concerns the control over the composition of the Parliament exercised by voters through the electoral process.²⁹ Indeed, McHugh J often refers to ‘representative and responsible government’ as a kind of compound conception, referable to an entire system in which the government is responsible to the legislature and the legislature consists of members elected by the voters.³⁰ Moreover, while McHugh J uses the expressions representative government and representative democracy almost interchangeably, representative government seems to be his preferred term.³¹

24 See, for example, *id* at 137–138 (Mason CJ), 149–150, 156–157 (Brennan J), 168, 174 (Deane & Toohey JJ), 184–185, 187–188 (Dawson J), 210–211 (Gaudron J). See also *Nationwide News*, above n1 at 47–8 (Brennan J), 70–72 (Deane & Toohey JJ).

25 ‘Representative government’ is the most common phrase. It appears at least eighteen times: *ACTV*, above n1 at 228–236, 241–242, 246. What his Honour calls the ‘conception’ of representative government, together with related ‘conceptions’ such as freedom of participation, association and communication, are central to his reasoning. References to such ‘conceptions’ appear on at least eight occasions: see *id* at 230, 232–233, 235–236.

26 ‘Responsible government’ appears on at least thirteen occasions: *id* at 228–231, 241–242, 246. ‘Representative democracy’ or ‘democracy’ are referred to on at least eight occasions: see *id* at 229, 233, 238, 240.

27 Tony Blackshield, ‘The Implied Freedom of Communication’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) at 240–245. Compare the general discussion in Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) at 37–39.

28 *ACTV*, above n1 at 137–138.

29 *Id* at 229.

30 *Id* at 228–231, 241–242, 246; see, likewise, Brennan J at 150.

31 *Id* at 229, 233, 238, 240. The expression ‘representative democracy’ is generally confined to submissions made by the parties and quotations from other sources.

Unlike Mason CJ, therefore, wider conceptions of representative democracy, as well as the idea of popular sovereignty, have no explicit place in McHugh J's reasoning. Not even section 128 is mentioned in connection with the implied freedom, and this is significant given the way in which Mason CJ and other justices connect section 128 with popular sovereignty.³² Justice McHugh's stance on this point is consistent with the way in which he elsewhere declines to draw upon a 'general doctrine of legal equality' as advanced by Deane and Toohey JJ and later adopted by Gaudron J, bound up as it is with the idea of a sovereign, self-governing community and the notion that the 'conceptual basis' of the Constitution is the 'free agreement' of the Australian people.³³ In deriving the implied freedom from specific provisions in the Constitution, McHugh J endeavours to avoid the use of conceptions of representative democracy or popular sovereignty abstracted from what sections 7 and 24 explicitly require.

For these reasons, while the point is not made explicitly, McHugh J's reasoning in *ACTV* already shows signs of resisting the idea that representative democracy can be treated as a 'free-standing' conception detached from the specific terms and structure of the Constitution. Repeatedly throughout the judgment, sections 7 and 24 of the Constitution are given as the basis of the freedom.³⁴ The central questions in issue in the case, his Honour says, turn on the meaning of the expression 'directly chosen by the people' in sections 7 and 24, and on the extent to which the Commonwealth Parliament can regulate the rights that those provisions confer upon the people of the Commonwealth.³⁵ In this respect, there is as yet no mention in the judgment of constitutional 'structure', but only the 'terms' of the Constitution.³⁶ Justice McHugh maintains that the terms of sections 7 and 24 have to be construed by reference to the idea of representative and responsible government — institutions to which the Constitution is said to 'give effect', but does not 'specifically mention'.³⁷ And, his Honour further insists, a 'full understanding' of these concepts is required, for representative government means more than voting at elections by marking a ballot paper with a number, a cross or a tick.³⁸ It is necessary, he reasons, that the institutions of representative and responsible government operate both effectively and in a manner intended by the framers of the Constitution.³⁹ Such a system, his Honour continues, will involve scrutiny, debate and government accountability, and for this to occur, it is

32 Id at 137–138 (Mason CJ); compare id at 210–211 (Gaudron J), *Nationwide News*, above n1 at 47–48 (Brennan J), 70–71 (Deane & Toohey JJ).

33 See *Leeth v Commonwealth* (1992) 174 CLR 455 at 483–493 (Deane & Toohey JJ), 502–503 (Gaudron J) and compare *Nationwide News*, above n1 at 70–71 (Deane & Toohey JJ); *ACTV*, above n1 at 210–211, 216 (Gaudron J); *Kruger v Commonwealth* (1996–7) 190 CLR 1 (hereafter *Kruger*) at 94–97 (Toohey J), 112–114 (Gaudron J). For a discussion, see Blackshield, above n27 at 247.

34 The two provisions are referred to at least 23 times: *ACTV*, above n1 at 227–235, 240, 246.

35 Id at 228.

36 Id at 227.

37 Id at 229–230.

38 Id at 230. See also id 106 at 227, arguing that ss13, 25, 28 and 30 make clear that members of Parliament are to be chosen by means of votes taken at periodic elections.

39 Id at 231.

necessary that voters have access to relevant information, ideas and arguments.⁴⁰ It follows, then, that electors and candidates must be free to communicate in relation to federal elections.⁴¹ And because the legislative powers of the Commonwealth are conferred ‘subject to’ the Constitution, the freedom is ‘elevated’ to the status of a ‘constitutional right’.⁴²

As I have argued elsewhere,⁴³ these are discrete steps in the reasoning, and the movement from text to conception, and from conception to ‘effective’ or ‘intended’ operation, and thence from effective operation to a judicially-enforced freedom of communication, enables the High Court to devise a constitutional immunity that depends on a number of separate value judgments quite extraneous to the text of the Constitution. However, for most of his Honour’s judgment in *ACTV*, McHugh J is careful to underscore that the nature and scope of the constitutional freedom must always be related back to the words of sections 7 and 24. Thus, noting that those provisions refer to a specific process which commences when an election is called and ends with the declaration of the poll, his Honour says that the freedom of communication extends only to communications which are intended or likely to affect voting in a federal election.⁴⁴ However, McHugh J is also willing at least to entertain the idea that the constitutional freedom might not be so confined to election periods.⁴⁵ And to ground *this* implication (here his Honour for the first time suggests that the freedom is an ‘implication’) it is necessary to refer back to the wider conception of representative government.⁴⁶ The words of sections 7 and 24, it seems, are not enough.

In this connection, McHugh J says that one of the characteristics of a properly operating system of representative government is that members of Parliament have an ‘obligation’ to listen to and ascertain the views of their constituents during the life of the Parliament.⁴⁷ As McHugh J notes, the Commonwealth submitted in *ACTV* that the system of representative government required by sections 7 and 24 encompasses a wide spectrum of political institutions and processes, and that all that is necessary is Parliament legislating in a manner that answers to that generic conception.⁴⁸ In *ACTV*, McHugh J’s uncomplicated answer to this challenge is to assert that the system of representative government embodied in the Constitution simply ‘involves’ a conception of freedom of communication in relation to federal elections.⁴⁹ However, in later cases, as will be seen, McHugh J disclaims the idea

40 Ibid.

41 Id at 231–232.

42 Id at 233.

43 Nicholas Aroney, ‘A Seductive Plausibility: Freedom of Speech in the Constitution’ (1995) 18 *UQLJ* 249 at 264–268. For a convenient summary of the argument, see Nicholas Aroney, ‘Implied Constitutional Rights: Implications and Inferences’ in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001).

44 *ACTV*, above n1 at 231–232.

45 Id at 232.

46 Id at 232–233.

47 Ibid. His Honour says that it is not necessary for the purposes of the case to determine whether such a ‘general’ right exists.

48 Id at 233.

49 Ibid.

of a generalised freedom of political communication⁵⁰ and endorses the idea that the system of representative government required by sections 7 and 24 is compatible with a wide range of political systems.⁵¹

B. Against 'Free-Standing' Conceptions of Representative Democracy

In two subsequent cases, *Theophanous v The Herald & Weekly Times Limited*⁵² and *McGinty v Western Australia*,⁵³ the relatively subtle difference between McHugh J and the other majority justices in *ACTV* became much more manifest. Representative government remained central, but McHugh J repeatedly insisted in these two cases that constitutional implications must be limited to what can strictly be derived from the text, structure or history of the Constitution.⁵⁴ In particular, this means that it is illegitimate for the Court to draw inferences from a 'free-standing' concept of representative government that is independent of the text and structure of the Constitution.⁵⁵ Justice McHugh continued to maintain that the Constitution gives effect to certain key elements in a system of representative government,⁵⁶ and that it is legitimate to interpret the provisions of the Constitution in the light of that concept.⁵⁷ He also accepted the proposition that since the passage of the *Australia Act 1986* (UK),⁵⁸ 'political and legal sovereignty' now resides in the people of Australia.⁵⁹ However, his Honour insisted that the concept of representative government relevant to judicial interpretation must be limited to that which can be drawn from the text or from implications properly derived from the text and structure of the Constitution.⁶⁰ This, in turn, entailed a rejection of the view that the institution of representative government is somehow implied by the Constitution to an extent that goes beyond or is independent of sections 1, 7, 24, 30 and 41 and related provisions of the Constitution.⁶¹ Representative government should only be used, it seems, as a 'tool' that helps the Court to interpret the 'full meaning' of these provisions.⁶²

50 *Theophanous*, above n4 at 206.

51 *McGinty*, above n5 at 247–248, citing *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 57 (Stephen J) (hereafter *McKinlay*).

52 *Theophanous*, above n4.

53 *McGinty*, above n5.

54 *Theophanous*, above n4 at 195–198, 205; *McGinty*, above n5 at 229–232, 251.

55 *Theophanous*, above n4 at 195; *McGinty*, above n5 at 232, 234, 236. For similar views, see *McGinty*, above n5 at 171 (Brennan J), 180–183 (Dawson J), 281–283 (Gummow J). Justice McHugh parodies the majority position adopted by Mason CJ, Deane, Toohey & Gaudron JJ in *Theophanous*, as if the Constitution contained a new Chapter IX with a s129 that read: 'Subject to this *Constitution*, representative democracy is the law of Australia, notwithstanding any law to the contrary.' See *McGinty*, above n5 at 234.

56 Namely, a system of periodic elections. See *Theophanous*, above n4 at 195–196, 203.

57 *Theophanous*, above n4 at 196, 204.

58 Later cases, however, rely on the *Australia Act 1986* (Cth). See, for example, *Sue v Hill* (1999) 199 CLR 462.

59 *McGinty*, above n5 at 230.

60 *Theophanous*, above n4 at 196–198.

61 *Id* at 199, 202–204; see *McGinty*, above n5 at 229–230, 234.

62 *Theophanous*, above n4 at 204.

Furthermore, McHugh J in *Theophanous* explicitly distinguishes between representative government and representative democracy.⁶³ Representative democracy, he says, is a wider concept, often taken to be descriptive of a society in which there is an equality of rights and privileges.⁶⁴ By contrast, representative government is a much narrower concept, referable to the notion that the people in free elections choose representatives who exercise governmental power on their behalf.⁶⁵ And it is representative government, he insists, not wider conceptions of representative democracy, that the makers of the Constitution probably had in mind when enacting sections 1, 7, 24, 30 and 41.⁶⁶ Indeed, it was for this reason, McHugh J says, that the framers deliberately chose not to entrench within the terms of the Constitution a general Bill of Rights, or a guarantee of universal suffrage or political equality.⁶⁷ Sections 7 and 24 in particular only give effect to particular aspects of a system of representative government; they do not imply an 'entire apparatus' of representative government, let alone a complete theory of representative democracy.⁶⁸

The consequences of this are important. Justice McHugh accepts that 'underlying' or 'overarching' doctrines may possibly 'explain or illuminate' the meaning of the text and structure, but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution.⁶⁹ It is therefore illegitimate, he says, to treat the concept of representative democracy as a putatively free-standing premise from which additional implications are then drawn.⁷⁰ For, when this occurs, the text and structure of the Constitution recede into the background and it is the concept of representative democracy that governs the case.⁷¹ Moreover, the concept of representative democracy will have to be given content, and it is the judges who

63 Contrast the view of Toohey J in *McGinty*, above n5 at 198, who states: 'Recent decisions of the Court have held that the Australian Constitution prescribes a system of representative democracy or representative government. The terms have been used somewhat interchangeably.' See, likewise, Gaudron J in *Kruger*, above n33 at 114, who states: 'It is settled constitutional doctrine that the Constitution provides for a system of government which entails representative government and representative democracy'.

64 *Theophanous*, above n4 at 199–200.

65 *Id* at 200–201.

66 *Id* at 201.

67 *Ibid*.

68 *Id* at 203. However, compare *Langer v Commonwealth* (1995–6) 186 CLR 302 (hereafter *Langer*) at 342, where McHugh J discusses the reference in s24 of the Constitution to the 'vague but emotionally powerful abstraction known as "the people"'. The purpose of this expression, he says, is to 'ensure representative government by insisting that the Parliament be truly chosen in a democratic election'. Noting that the term 'the people' is an idea whose content changes from time to time, McHugh J says that the extension of the franchise through the course of the twentieth century means that women cannot be excluded from voting in federal elections and property qualifications cannot be imposed. However, contrast McHugh J's discussion of the evolving nature of representative government, and his rejection of the proposition that equal voting power is required, in *McGinty*, above n5 at 234–235, 244–250.

69 *McGinty*, above n5 at 231–232. Compare *ACTV*, above n1 at 168 (Deane & Toohey JJ): 'the implication is drawn from an underlying doctrine of the Constitution rather than from any express term'. Compare *McGinty*, above n5 at 227.

70 *McGinty*, above n5 at 234. See also *Langer*, above n68 at 340.

71 *McGinty*, above n5 at 234.

will have to determine what the concept means and requires. To do so, however, is for the Court to undertake a task which the Constitution does not contemplate and which the people have never authorised.⁷² Therefore, while McHugh J had in *ACTV* left the question open, in *Theophanous* he rejects the conclusion that the Constitution implies a general freedom of political communication.⁷³ Sections 7 and 24, his Honour points out, refer to elections, not general political rights, and the only legitimate freedoms that are implied by these provisions concern communications made during the course of, or are of relevance to, federal elections.⁷⁴ In this way, McHugh J's approach looks increasingly similar to (although certainly not identical to) the dissenting position adopted by Dawson J in *ACTV*, who restricted his judgment to the conclusion that the Constitution requires that the people when voting in federal elections must be in a position to exercise a 'true choice', and that knowledge of the available alternative candidates and their platforms was necessary for this to be the case.⁷⁵

C. *Implications Derived from the Constitution's Text and Structure*

The decision of the High Court in *Lange v Australian Broadcasting Corporation*⁷⁶ is significant for its unanimity, and is for this reason regularly cited as the leading case in the area.⁷⁷ The decision is also notable, however, for the extent to which the reasoning follows the arguments and methods laid down by McHugh J in *ACTV*, *Theophanous* and *McGinty*.⁷⁸ This is seen principally in the fact that the *Lange* settlement insists that the foundation of the implied freedom is the text and structure of the Constitution,⁷⁹ and not, it would seem, from some free-standing concept of representative democracy derived from extraneous political principles or theories. Accordingly, the question as formulated by the Court is not one of identifying the requirements of representative and responsible government, but of identifying the requirements of the terms and structure of the Constitution.⁸⁰ Close attention is given, therefore, to the specific terms of sections 7 and 24 and

72 Id at 236. To determine the meaning and requirements of representative democracy is, McHugh J says, 'a political question' which 'should be left to be answered by the people and their elected representatives acting within the limits of their powers as prescribed by the Constitution': *McGinty*, above n5 at 236.

73 *Theophanous*, above n4 at 206.

74 Id at 203, 206–207.

75 *ACTV*, above n1 at 187.

76 *Lange*, above n6.

77 See, for example, *Lenah Game Meats*, above n10 at 280–282 (Kirby J); *Roberts v Bass* (2002) 212 CLR 1 at 26–28 (Gaudron, McHugh & Gummow JJ) (hereafter *Roberts*), 58–60 (Kirby J), 76–79 (Hayne J); *Coleman*, above n12 at 30, 32 (Gleeson CJ), 43 (McHugh J), 68, 77–78 (Gummow & Hayne JJ), 81–83 (Kirby J), 109–110 (Callinan J), 120–121 (Heydon J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (hereafter *Mulholland*) at 195 (Gleeson CJ), 217–218 (McHugh J); *McClure v Australian Electoral Commission* (1999) 163 ALR 734 at 741–742 (Hayne J); *APLA*, above n17 at 412–413 (Gleeson CJ & Heydon J), 419–420 (McHugh J), 456 (Gummow J), 487–488 (Kirby J).

78 This is not to suggest that the reasoning in *Lange* does not in these respects reflect the influence of other justices. See *Lange*, above n6 at 567, note 270, citing *McGinty*, above n5 at 168 (Brennan CJ), 182–183 (Dawson J), 231 (McHugh J), 284–285 (Gummow J).

79 *Lange*, above n6 at 566–567.

80 Id at 567.

associated provisions of the Constitution.⁸¹ Representative and responsible government are discussed in the judgment, but not representative democracy,⁸² and the Court maintains that representative and responsible government are legitimately invoked only to the extent to which these ideas are given effect to or provided for by the text and structure of the Constitution.⁸³

To a significant extent, then, the *Lange* settlement is founded upon McHugh J's conception of the proper relationship between representative government and the text and structure of the Constitution. Yet there is one important point at which the *Lange* decision appears to go beyond McHugh J's previous judgments. Seemingly contrary to what McHugh J had suggested in *ACTV* and firmly concluded in *Theophanous*, the unanimous judgment in *Lange* affirms that the freedom extends to political communication generally and is not limited to election periods.⁸⁴ But how significant is this apparent concession by McHugh J? Not very momentous at all, and certainly no great departure from his previous reasoning. This is because the argument advanced in the judgment for a generally applicable freedom of political communication draws upon the same basic considerations McHugh J himself had advanced for restricting the scope of the freedom in the previous cases. Thus, the Court begins in *Lange* by tying the implied freedom to what is necessary to enable the people to exercise a free and informed choice as electors — which is precisely the touchstone that McHugh J had advanced in *ACTV* and *Theophanous*.⁸⁵ However, it is noted in the *Lange* judgment that much of the information needed for this will in fact be disseminated during the period between the holding of one election and the calling of the next — a fact that McHugh J's previous judgments had not considered.⁸⁶ And yet, once this last proposition is accepted, it follows from the premises that the freedom cannot be limited to election periods. In this way, the *Lange* judgment, while going beyond McHugh J's earlier conclusions, appeals to his Honour's own formulation of the question, an approach that is evidently traced to the text of the Constitution, in particular the mandate in sections 7, 24 and 25 that members of Parliament are to be chosen by the people, voting in elections. The availability of information relevant to federal electoral choices is a touchstone that is peculiar to McHugh J's (and Dawson J's) distinct approach. And thus, noting that *Lange's* case involved allegedly defamatory statements made about the Prime Minister of New Zealand, the Court also holds that it will be necessary in the trial of the matter to demonstrate how a discussion of the conduct of a New Zealand politician was relevant to Australian government and politics.⁸⁷

81 Id at 557–559.

82 Id at 557–561, 566–567.

83 Id at 557, 559, 566–567. The judgment particularly bears the marks of McHugh J's influence when it says at 557 that it is the *effective* operation of the constitutionally prescribed system that is critical, that what is meant by the constitutional requirement that members of Parliament are chosen by the people can only be *understood* by reference to the system of representative and responsible government to which ss7 and 24 give effect, and that the *intention* of the framers of the Constitution to provide for such a system is very relevant.

84 Id at 559–561. See *ACTV*, above n1 at 231–233; *Theophanous*, above n4 at 206.

85 *Lange*, above n6 at 560.

86 Id at 561.

87 Id at 576.

D. The Constitutionally Prescribed System of Representative Government

Justice McHugh's understanding of the significance of *Lange* was immediately apparent. In *Levy v Victoria*⁸⁸ and *Kruger v Commonwealth*,⁸⁹ both decided in the same year, McHugh J clearly treats *Lange* as the authority that places the freedom of political communication beyond doubt, but which also ties that freedom to the system of representative and responsible government specifically provided for by the Constitution, based on sections 7, 24, 64 and 128 among others.⁹⁰ Indeed, the rationale for the freedom is said in *Levy* to be the necessity for voters to be informed about matters relevant to choosing their representatives,⁹¹ and the freedom is said to be limited to what is necessary for the effective working of the Constitution's system of representative and responsible government.⁹² Text and structure, and not a free-standing conception of representative government, thus lies at the foundation of the freedom.⁹³

The significance of the constitutionally prescribed system of representative government is particularly evident in McHugh J's judgment in *Kruger*. On one hand, McHugh J affirms the view that there is a parallel freedom of association and travel for the purposes of the constitutionally prescribed system of representative government.⁹⁴ On the other hand, he denies that the implied freedom limits the power of the Commonwealth to legislate for the Territories under section 122 of the Constitution. In *ACTV*, he had observed:

There is nothing in s122 or anywhere else in the Constitution which suggests that laws made by the Commonwealth for the government of a territory are subject to prohibitions or limitations arising from the concepts of representative government, responsible government or freedom of communication.⁹⁵

In *Kruger*, McHugh J adheres to that view. The implied freedom, he says, exists to protect the freedom of the people of the several States and the people of the Commonwealth to choose those who will be members of the Senate and the House of Representatives pursuant to sections 7 and 24 of the Constitution. The question, therefore, is whether at the relevant time the people of the Northern Territory were constitutionally entitled to vote in federal elections or vote in federal referenda. Because the people of the territories do not form part of the people of the States or the Commonwealth for the purposes of sections 7 and 24 and because the right of territory residents to vote in referenda was not inserted into the Constitution until after the relevant time, McHugh J concludes that none of the implied freedoms

88 *Levy v Victoria* (1997) 189 CLR 579 (hereafter *Levy*).

89 *Kruger*, above n33.

90 *Levy*, above n88 at 622; *Kruger*, above n33 at 142.

91 *Levy*, above n88 at 622.

92 *Id* at 624. Noting that the underlying political matter at stake in *Levy* primarily concerned the policies of the State Government of Victoria, McHugh J regards it as necessary to show that the subject matter is in fact relevant to the specifically federal electoral choices that voters are required to make pursuant to the Constitution. See *id* at 626.

93 *Id* at 626.

94 *Kruger*, above n33 at 142.

95 *ACTV*, above n1 at 246.

(communication, association or travel) are applicable.⁹⁶ The foundation of the implied freedoms in the text and the structure of the Constitution remains in this way paramount. It is unnecessary for his Honour to take the matter any further.

In more recent cases, such as *Roberts v Bass*,⁹⁷ *Coleman v Power, Mulholland v Australian Electoral Commission*,⁹⁸ and *APLA Limited v Legal Services Commissioner (NSW)*,⁹⁹ the same themes continue to shape McHugh J's judgments.¹⁰⁰ In the first place, in these cases his Honour refers consistently to representative government and responsible government, rather than representative democracy, as foundational.¹⁰¹ These institutions, he says, are grounded in the specific terms of the Constitution (again, principally, sections 7 and 24), so that what is again relevant is the constitutionally prescribed system.¹⁰² The 'seminal' decision in *Lange* is cited for the proposition that the source of the implied freedom of political communication is the text and structure of the Constitution, rather than any 'general notion' of representative democracy or the 'value' of freedom of expression.¹⁰³ *McGinty* is likewise cited for the proposition that the Constitution prescribes only the 'irreducible minimum requirements for representative government', leaving the Parliament free to determine the details,¹⁰⁴ so long as it remains the case that members of Parliament are 'directly chosen by the people' pursuant to sections 7 and 24.¹⁰⁵ At the same time, representative and responsible government are described as the 'pillars' upon which the implied freedom is based.¹⁰⁶ The Constitution, McHugh J also says, leaves room for the institution of representative government to develop, and the evolution of the system over time can itself give rise to implied rights, such as those associated with universal suffrage and the publication of an electoral candidate's party affiliation.¹⁰⁷ Likewise, the set of possible implications to be derived from the constitutionally prescribed system is not closed. An implied right to freedom of association, as recognised by McHugh J in *ACTV* and *Kruger*,¹⁰⁸ is affirmed in *Mulholland* —

96 *Kruger*, above n33 at 142–144.

97 *Roberts v Bass*, above n77.

98 *Mulholland*, above n77.

99 *APLA*, above n17.

100 See, for example, *Roberts v Bass*, above n77 at 26 (Gaudron, McHugh & Gummow JJ).

101 *Mulholland*, above n77 at 205–206, 213–214, 217, 219. Notably, the only references in the judgment to democracy or 'democratic principles' are quotations from the judgment of Gibbs CJ in *McKenzie v Commonwealth* (1984) 57 ALR 747 at 749 and the judgment of Stephen J in *McKinlay*, above n51 at 57–58.

102 *Mulholland*, above n77 at 205–206.

103 *APLA*, above n17 at 419–420; *Mulholland*, above n77 at 609. See also McHugh J's rejection at 607 of any free-standing constitutional principle of non-discrimination.

104 *Mulholland*, above n77 at 206.

105 *Id* at 206, 211–212, 217.

106 *Id* at 219.

107 *Id* at 213–214. Justice McHugh suggests that the role of political parties and their influence on voters' choices may have developed to such an extent that the system requires that candidates have a right to have their party endorsement indicated on the ballot paper. Compare *Langer*, above n68 at 342, where McHugh J likewise suggested that the system had evolved to the point where a right to universal franchise might also be required.

108 *ACTV*, above n1 at 227; *Kruger*, above n33 at 142.

although McHugh J is careful to say that this is only in so far that it is required by the constitutionally prescribed system identifiable in sections 7 and 24 of the Constitution.¹⁰⁹ Justice McHugh's insistence on constitutional text and structure thus requires that the implied freedom always be tied back to the *constitutionally prescribed* system of representative and responsible government. In *APLA*, this means that the implied freedom of political communication cannot extend to advertising by legal practitioners. However, McHugh J is in that case curiously prepared to find that Chapter III of the Constitution provides a separate foundation for a corresponding implied freedom of legal communication.¹¹⁰

3. *The Elimination of Balancing*

An integral part of the High Court's free speech jurisprudence has been the proposition that the implied freedom of political communication is not absolute, but may be regulated by laws that are reasonably appropriate and adapted to achieving a legitimate objective. As a consequence, it has been necessary for the Court to formulate a test to be applied in cases where it is alleged that a law is unconstitutional because it is contrary to the implied freedom of political communication. In the cases leading up to *Lange*, widely different formulas were proposed by individual justices. The settlement in *Lange* of an agreed formula — or, at least, an agreed form of words — is one of the reasons, accordingly, that the decision in *Lange* is so significant. How the formula is to be interpreted and applied, however, has been a source of continuing disagreement.¹¹¹

Justice McHugh's treatment of this question is shaped extensively by his approach to the idea of representative government and, in particular, by his insistence that what is relevant is the constitutionally prescribed system of representative and responsible government, grounded in the text, structure and history of the Constitution, and not some free-standing conception of representative democracy. As was argued in the previous section, McHugh J's approach to representative government has to a significant extent been the fulcrum on which the High Court's free speech jurisprudence has turned. This influence has extended, as will now be seen, to the test laid down in *Lange*.

It has been a commonplace observation that when applying the *Lange* test, the Court is compelled to undertake a kind of 'balancing' judgment between the constitutional interest in free political communication on one hand, and the competing objective which the law seeks to achieve on the other. And, as noted, it has been argued that such judgments require the Court to have resort to extra-constitutional standards and theories in order to make such judgments, contrary to McHugh J's insistence that the nature and scope of the implied freedom must be

¹⁰⁹ *Mulholland*, above n77 at 225.

¹¹⁰ For a critical discussion, see Nicholas Aroney, 'Lost in Translation: From Political Communication to Legal Communication?' (2005) 28 *UNSWLJ* 833.

¹¹¹ See Aroney, above n15; Nicholas Aroney, 'The Freedom of Political Communication Since *Lange*: Commentary' in Adrienne Stone & George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) at 27–32.

limited to that which the text and structure of the Constitution requires. However, in *Coleman McHugh J* responds to these criticisms by arguing that the *Lange* test, properly understood, does not require the Court to engage in balancing judgments but simply to assess whether the law is compatible with the constitutionally prescribed system of representative government.

How coherent is this explanation? And is it consistent with the way in which McHugh J has approached the implied freedom in the line of cases beginning with *ACTV*?

A. Competing Objectives and Compelling Justification

Justice McHugh's treatment of this question in *ACTV* is susceptible to two interpretations. On the one hand, there are passages that tie the test to be applied to the text and structure of the Constitution in a way that seems to avoid the need to balance the constitutional interest in freedom of political communication against other, disparate social objectives. However, there are other passages that suggest that the weighing of alternative, indeed 'competing', social objectives is warranted and, indeed, necessary.

Justice McHugh affirms in *ACTV* that the rights identifiable in sections 7 and 24 are not absolute, but may be regulated by laws that seek to achieve an honest and fair election process.¹¹² And, later, he entertains the argument that restrictions on political advertising may be justified as a means of preventing corruption and undue influence in the political process.¹¹³ Notably, the question in both instances is framed in terms of laws that are (ostensibly) aimed at the regulation of the electoral process, so that the end or objective of the law is one that is intimately associated with the constitutionally prescribed electoral system itself. Thus, while in *ACTV* McHugh J does not find the specific interferences with freedom of speech to be justified, his Honour acknowledges that the prevention of the corruption of the electoral system is a potentially justifying end, so long as the means adopted are effective or suitable, as well as narrowly tailored.¹¹⁴ Disparate ends that are less closely associated with the system of representative government prescribed by the Constitution are not directly in view. Moreover, towards the end of the analysis in *ACTV*, his Honour says that the implied freedom is not like the guarantees of freedom of expression found in other countries where the freedom is general in scope but is subject to the power of the legislature to pass laws for various specified purposes.¹¹⁵ Rather, the Australian freedom is paramount: the legislative power of the Commonwealth is subject to the freedom, as in the United States.¹¹⁶

¹¹² *ACTV*, above n1 at 234.

¹¹³ *Id* at 238.

¹¹⁴ *Id* at 238–239. On the concepts of suitability and narrow-tailoring, see Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *MULR* 1.

¹¹⁵ *ACTV*, above n1 at 240.

¹¹⁶ *Id* at 240. Compare, for example, Alexander Meiklejohn, 'The First Amendment is an Absolute' [1961] *Sup Ct Rev* 245.

These observations are significant because they are generally consistent with McHugh J's later insistence in *Coleman* that, because the implied freedom is derived strictly from the text and structure of the Constitution alone, there is no scope for a judicial weighing or balancing of one social objective against another.¹¹⁷ In the case of laws that seek to prevent the corruption of the political process, the objective of the law, it might be said, is nothing more than an effectively operating system of representative government. Accordingly, there is no question of balancing a competing social interest with the constitutional interest in an effectively operating representative system of government. However, what if the objective of the law in any particular case is unrelated in any direct sense to the constitutionally prescribed system of government? There are other remarks made by McHugh J in *ACTV* that are not so easily meshed with his Honour's subsequent strictures.

Justice McHugh says in *ACTV* that in considering the Commonwealth's regulatory power over elections, it is necessary to distinguish between laws that prohibit or regulate the content of communication and laws that only incidentally limit the freedom by regulating the time, place or manner of communication.¹¹⁸ The former kinds of laws can only be upheld, he says, on the basis of some 'compelling justification', and his Honour offers laws against defamation, sedition and treason as examples.¹¹⁹ But why, it may be asked, are these objectives sufficient to justify an interference with a *constitutionally mandated* freedom? What is it in the Constitution which suggests that such objectives, if proportionately pursued, might somehow override the freedom of political communication that is said to be *necessary* for the effective operation of the system of representative government mandated by sections 7 and 24?

Admittedly, McHugh J's remarks are framed in the context of a discussion of what his Honour calls the Commonwealth's regulatory power over elections. And perhaps it could be said that prohibitions concerning defamation, sedition and treason have a relationship to the system required by the Constitution. As McHugh J would later explain,¹²⁰ defamation laws may be construed as an attempt to protect the reputation of those engaged in the governmental activities and political debate that is anticipated by the Constitution. Likewise, there is a general sense in which sedition and treason laws are concerned with more or less direct attacks on the governing institutions established by and under the Constitution.

However, it is very difficult to maintain that there is a sufficient connection to the Constitution in view when his Honour next says that laws which only incidentally interfere with the freedom are 'not inconsistent with the conception of representative government if they are designed to protect some competing aspect of the public interest'.¹²¹ What *is* a 'competing aspect of the public interest'? What are the relevant criteria? And how are these standards referable to the text and

117 *Coleman*, above n12 at 46–53.

118 *ACTV*, above n1 at 234–235.

119 *Id* at 235–236. See, likewise, *Levy*, above n88 at 647 (Kirby J).

120 *Coleman*, above n12 at 52.

121 *ACTV*, above n1 at 235.

structure of the Constitution? The idea of the public interest in view here might conceivably be limited to the governmental institutions and activities envisaged by the Constitution, but the way in which the idea is explained seems to go beyond this. After all, the interest invoked is one that *competes* with the implied freedom. Moreover, in order to validate a law that regulates the content of political communications, the competing interest must provide a *compelling* justification. This suggests that the constitutional interest in freedom of political communication will have to be balanced against competing public interests, some of which are so weighty (compelling) that they can even justify a law which goes so far as to regulate the content of political communications.

Notably, McHugh J concludes in *ACTV* that the restrictions on political broadcast advertising at stake in that case are unconstitutional because they prefer one form of communication over another — these being matters of private, not public interest, and consequently ‘outside the zone of governmental control’.¹²² The (contested) line between public and private is of course well-known to political philosophy, but is it a distinction that is referable to the system of representative government established by the Constitution? It appears, on this analysis, impossible to apply McHugh J’s test without balancing the implied freedom against competing interests, and it seems impossible to undertake this task without adverting to standards and theories extraneous to the text and structure of the Constitution.

B. Compatibility with the Constitutionally Prescribed System

While a number of the legitimating objectives discussed by McHugh J in *ACTV* are relatable to the constitutionally prescribed system of representative government, McHugh J’s reference to competing interests and compelling justification appears to make unavoidable a balancing judgment that relies on free-standing theories and standards. Yet, as has been noted, in *Theophanous* and *McGinty*, McHugh J insists that the meaning and scope of the implied freedom must be referable to the text and structure of the Constitution, an emphasis that is closely followed in the Court’s unanimous decision in *Lange*. *Lange* is also famous, however, for establishing a new test for determining whether a law contravenes the implied freedom, one which requires that a law must be compatible with the constitutionally prescribed system of representative government. By tying the test to what is prescribed by the text and structure of the Constitution, can the Court avoid the value-laden task of balancing the constitutional interest in free speech against some competing public interest?

In *Lange*, the Court certainly reaffirms the standard proposition, established in the earlier cases, that the implied freedom is not absolute. However, what is immediately noticeable about the *Lange* formula is that the reason given for this is that the implied freedom is limited to that which is necessary to protect the system specifically provided for by the Constitution.¹²³ Putting it this way suggests that the reason why the freedom is limited — and therefore why laws that regulate

¹²² *Id* at 236.

¹²³ *Lange*, above n6 at 559–561, 567.

political communications might still be constitutional — has to do with the foundation of the freedom in the text and structure of the Constitution. It is not so much the compelling nature of some competing public interest that defines the limits of the freedom, but rather the restriction of the scope of the freedom to what is necessary in order to protect the constitutionally prescribed system. It is no surprise, then, that the *Lange* test is reformulated in a way that is tied to that system.¹²⁴

As to the test, there are two formulations. In a preliminary way, the Court initially states that:

The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.¹²⁵

Later, the Court says that there are two questions to be asked:

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 s128 for submitting a proposed amendment of the Constitution to the informed decision of the people...?¹²⁶

Clearly, there are two inquiries, the first directed to whether there is a *burden* on the freedom of political communication, the second directed to whether the burden is *compatible* with the constitutionally prescribed system. This second step in turn appears to consist of two parts, the first concerning whether the *objective* of the law is constitutionally compatible, the second concerning whether the *means* adopted in the law are reasonably appropriate and adapted to achieving that objective.

In *Levy*, however, McHugh J restates the *Lange* formula in two different ways. First, his Honour says that the implied freedom is ‘limited to what is necessary to the effective working of the Constitution’s system of representative and responsible government’, so that a law that is ‘reasonably appropriate and adapted to serving an end that is compatible with the maintenance of the constitutionally prescribed system of government’ will not infringe the implied freedom.¹²⁷ However, he later says that the law must be reasonably appropriate and adapted to a ‘legitimate end’ that is ‘compatible with the freedom of communication’ concerning the ‘system of representative and responsible government provided for in the Constitution’.¹²⁸ The reference in *Lange* to the *fulfilment* of the end or

124 Id at 561–562, 567–568.

125 Id at 561–562.

126 Id at 567–568.

127 *Levy*, above n88 at 624.

128 Id at 626.

objective is here omitted, and the thing with which the law must be compatible is identified as *freedom of political communication*, rather than the maintenance of the constitutionally prescribed system of representative and responsible government.¹²⁹ Two questions accordingly arise. First, does this mean that the end alone must be compatible, or must the means adopted to achieve that end also be tested for compatibility? The second formulation in *Levy* suggests the former, leaving open the idea that the means chosen are to be assessed, not for their compatibility but rather for their proportionality. Second, must the societal interest that the law purports to secure be balanced against the constitutional interest in freedom of political communication? Justice McHugh's application of the *Lange* test to the facts in *Levy* suggests that this is the case.

Thus, in *Levy* his Honour begins by assessing whether the objectives of Victorian Regulations which made it an offence to enter a hunting area without a licence are compatible with the constitutionally prescribed freedom of communication, and his Honour concludes that they are.¹³⁰ Those ends, importantly, included the maintenance of 'public safety' and the prevention of 'injury to life and limb' in relation to hunting areas.¹³¹ Noting that it was Victorian State legislation that was in question, it is very difficult to see how these objectives are referable to the constitutionally prescribed system of representative government. They appear, rather, to be *competing* aspects of the public interest no more referable to the terms of the Constitution than the very general idea of 'an ordered and democratic society', 'organised under and controlled by law', relied upon by Mason CJ, Brennan, Deane and Toohey JJ in *ACTV*.¹³² In determining whether the law in *Levy* is justified, can McHugh J avoid balancing the social interest in public safety against the constitutional interest in freedom of political communication?

The next question to be resolved in *Levy* was whether the means adopted by the law were reasonably appropriate and adapted to achieving such ends. One of the Regulations, McHugh J says, effectively achieves its objectives, and is therefore appropriate and adapted.¹³³ In the case of another of the Regulations, however, the matter was not so clear, and it was argued that the Victorian Government could have relied upon other means that achieved the objective but left open a much

129 See *Lange*, above n6 at 561–562. Similar omissions are made in the joint judgment of Gaudron, McHugh & Gummow JJ in *Roberts v Bass*, above n77 at 27, 40. However, when it comes to applying the test to the question in issue, Gaudron, McHugh & Gummow JJ reason as if the *law itself* must not be 'incompatible with the constitutional freedom of communication'. This suggests that the law as whole — the means and the end — must be compatible. In *Mulholland*, above n77 at 218, McHugh J's reference to the *Lange* test does not reformulate it so as to state, clearly, that both the end and the means must be compatible with the constitutionally prescribed system. Indeed, *Coleman* is not even cited in McHugh J's judgment.

130 *Levy*, above n88 at 627.

131 *Ibid.*

132 *ACTV*, above n1 at 142–144 (Mason CJ), 150–151 (Brennan J), 169 (Deane & Toohey JJ); *Nationwide News*, above n1 at 50–51 (Brennan J), 76–77 (Deane & Toohey JJ).

133 *Levy*, above n88 at 627. Regulation 6 of the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic) prohibited a person from approaching within a distance of five metres any person who holds a hunting licence and is hunting in a hunting area.

wider scope for unregulated political communication.¹³⁴ Notably, while McHugh J rejects this submission, his reason for doing so is not that the means actually adopted were compatible with the prescribed system of representative and responsible government, or even with the implied freedom of political communication, but that no other means to achieve the objective was identified and that, given the relevant factors to be taken into consideration (for example, the practical circumstances in which the Regulations were to operate, the tendencies of human nature, etc) it was open to the Government to conclude that no reasonable alternative measure was available to achieve the objective.¹³⁵

The implication of McHugh J's reasoning here is that if another means was available that could achieve the objective without burdening political communication then the Regulation might have been struck down. As applied by McHugh J to the facts in *Levy*, therefore, the *Lange* formula appears to involve much more than simply determining whether the law is compatible with the constitutionally prescribed system of representative government. While McHugh J allows a certain margin of appreciation to the legislative and governmental judgment involved, it is nonetheless apparently relevant to consider the importance of the objective (in this case, to secure public safety),¹³⁶ as well as the factors that are relevant to an assessment of what is necessary to achieve that objective, including the availability of alternative, less intrusive means.

C. *The Inevitability of Balancing?*

Analyses of the process by which courts determine questions such as these suggest that a kind of balancing between legitimate objectives and constitutional requirements is *inevitably* required.¹³⁷ Notwithstanding the way in which the *Lange* formula seeks to tie the inquiry to the constitutionally prescribed system, Adrienne Stone has argued that when applying the *Lange* test judges cannot avoid drawing upon considerations that lie outside the text and structure of the Constitution.¹³⁸ This is because, she says, the Constitution's terms provide no specific guidance for the concrete questions that are raised in any particular case.¹³⁹ There are different ways in which the courts can approach such questions, ranging from single standard, flexible tests of proportionality to more rigid categorical approaches.¹⁴⁰ Each of these approaches, albeit in different respects,

134 Regulation 5 of the Wildlife (Game) (Hunting Season) Regulations prohibited entry into a wildlife hunting area during hunting times without a hunting licence.

135 *Levy*, above n88 at 627–628.

136 *Id* at 627.

137 See, for example, Kirk, above n114; Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *PLR* 212; Hoong Phun Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994).

138 Stone, above n9. See also Meagher, above n18; Elisa Arcioni, 'Politics, Police and Proportionality — An Opportunity to Explore the *Lange* test: *Coleman v Power*' (2003) 25 *Syd LR* 379.

139 Stone, above n18 at 844–845.

140 See Stone, above n9 at 676–679. Indeed, the concept of balancing possibly incommensurable interests is itself problematic. See Aroney, 'Freedom of Political Communication', above n111.

involves a significant degree of judicial discretion, as does the decision as to which approach to adopt in the first place.¹⁴¹ The text and structure of the Constitution provide no guidance on these points, and in fact the Court's decisions have oscillated between both approaches.¹⁴²

In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,¹⁴³ a case in which McHugh J did not sit, Callinan J likewise argues that the Constitution provides no explicit guidance to the Court when it comes to the task of applying the implied freedom to particular cases.¹⁴⁴ Drawing upon Stone's critique,¹⁴⁵ Callinan J argues that the *Lange* method is unsustainable: the Court cannot avoid a value-laden, extra-constitutional assessment of precisely how much and what kind of protection of political communication is required. Inevitably, the Court finds itself having to weigh up or balance the constitutional interest in freedom of political communication against some (competing) social interest that the law aims to secure, and in so doing, the Court cannot avoid drawing upon extra-constitutional ideas and theories. Text and structure alone are not sufficient.

In *Coleman v Power*, decided in 2004,¹⁴⁶ McHugh J squarely addresses the question whether the *Lange* test unavoidably involves the Court in the value-laden task of balancing the interest in freedom of political communication against the legitimate end sought to be achieved by the law in question.¹⁴⁷ The fact that it should be McHugh J who defends the *Lange* test — even though *Lange* was a unanimous judgment — underscores the close relationship between his Honour's characteristic reasoning and the *Lange* test. Justice McHugh's answer is to maintain that the test is indeed derived from the text and structure of the Constitution and that this touchstone does provide sufficient guidance to the Court in resolving specific cases — that is, 'without resort to political or other theories external to the Constitution'.¹⁴⁸

Because McHugh J's response has been widely criticised,¹⁴⁹ it is important to attend to his reasoning closely.

At the heart of the argument are two propositions. First, McHugh J insists that the implied freedom 'arises only by necessary implication from the system of

141 See Stone, above n9 at 687–691.

142 *Id* at 675–681.

143 *Lenah Game Meats*, above n10.

144 *Id* at 337–338.

145 Stone, above n9 at 707–708, discussed by Callinan J in *Lenah Game Meats*, above n10 at 338.

146 *Coleman*, above n12. This case involved s7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld), which made it an offence to use threatening, abusive or insulting words in a public place. Mr Patrick Coleman was convicted by a magistrate under this and another section of the Act in respect of statements made about Constable Brendan Power, whom Coleman alleged to be a corrupt police officer.

147 *Coleman*, above n12 at 46–53. It was conceded that the law in question imposed a burden on the implied freedom of political communication; at issue was the second limb of the *Lange* test: whether the law was reasonably appropriate and adapted to achieving an end, the fulfilment of which is compatible with the system of representative and responsible government prescribed by the Constitution. See *id* at 43, 46 (McHugh J).

148 *Id* at 48.

149 Stone, above n18; Lee, above n18 at 75; Meagher, above n18 at 38.

representative and responsible government set up by the Constitution'.¹⁵⁰ The scope of the implied freedom is thus limited to what is necessary in order to ensure the effective operation of the constitutionally mandated system of representative and responsible government. Since the implication arises by necessity, it has effect only to the extent that it is necessary to maintain the effectiveness of the system: no more, no less. Second, McHugh J points out that the legislative and executive powers of the Commonwealth, the States and the Territories are 'subject to' the Constitution and therefore 'subject to the implied freedom'.¹⁵¹ This means that the constitutional immunity is 'the leading provision', whereas legislative enactments and executive actions are 'subordinate'. Justice McHugh's meaning is clear, but he repeats the point in various ways in order to underscore it. Any exercise of legislative or executive power that interferes with the effective operation of the representative system of government 'must give way', he says. Any interference with the constitutionally prescribed system is simply 'invalid'; freedom of political communication 'always trumps' laws which conflict with the freedom. As a consequence, there is no question of balancing the constitutional interest in freedom of political communication against some other competing social goal and determining which is to give way in a particular case.¹⁵²

What does this mean for the second limb of the *Lange* test? Justice McHugh points out that while the first limb concerns the question whether a law 'burdens' the freedom of political communication, the question raised by the second limb is whether a law 'impermissibly burdens' it; and the impermissibility of the burden, he explains, turns on whether the law 'impairs or tends to impair the effective operation of the constitutional system'.¹⁵³ In other words, a law will not impermissibly burden the freedom unless the objectives of the law and the manner of achieving those objectives are 'incompatible with the maintenance of the system of representative and responsible government established by the Constitution'.¹⁵⁴ Thus, the second limb, properly understood, was always directed to both the end that law seeks to achieve and the means used to achieve that end.¹⁵⁵ Both the means and the end must be compatible with the constitutionally prescribed system of representative and responsible government. There is no question, therefore, of balancing; rather, it is a question of compatibility.

The significance of this explanation of the *Lange* test — noting that Gummow, Hayne and Kirby JJ express agreement with the reformulation (if not necessarily the explanation)¹⁵⁶ — is that it seeks to tie the entire process of determining reasonable proportionality to the constitutionally prescribed system of representative government. The question is simply whether the objective that a law

150 *Coleman*, above n12 at 48.

151 *Id* at 49.

152 *Ibid*.

153 *Ibid*.

154 *Id* at 49–50.

155 *Id* at 50. Justice McHugh here concedes that the meaning would have been clearer if the Court in *Lange* had said that the law must be reasonably appropriate and adapted to serve a legitimate end 'in a manner' (rather than 'the fulfilment of') which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

156 *Id* at 78 (Gummow & Hayne JJ), 82 (Kirby J).

seeks to achieve, as well as the means adopted by the law to secure that objective, is compatible with the system of representative and responsible government prescribed by the Constitution.¹⁵⁷ The second limb is thus grounded, it would seem, in the text and structure of the Constitution, and nothing more. In short, the freedom extends only to that which is necessary for the effective operation of the constitutionally prescribed system of representative government. Any law that impairs the effective operation of this system — which is to say, any law that is incompatible with the system — will impose an impermissible burden on the freedom and therefore be invalid. There is no question of balancing competing social interests against the constitutional interest in freedom of political communication; and so there is no need to advert to extra-constitutional values, ideas or theories in order to apply the constitutional freedom to particular cases.

As was said at the outset of this article, for those concerned about the problem of confining the operation of the implied freedom to the text and structure of the Constitution, this argument is highly attractive. But is it intellectually coherent, practically sustainable and normatively appropriate?

4. *Minimising Leeway for Judgment*

Is it possible to construct and apply a test — such as the *Lange* test — for determining whether a law contravenes the implied freedom of political communication without adverting to a theory of the role of political communication within a properly functioning representative democracy? And is it possible to undertake such a task in a way that relies solely upon the text and structure of the Constitution, without adverting to constitutionally extraneous, free-standing ideas?

In order to address these questions, it is first necessary, I submit, to assess the reasoning process that led to the implied freedom in the first place and then to evaluate McHugh J's reformulation in that light.

A. *Origins of the Implied Freedom*

The text of the Constitution has nothing explicit to say about communication or speech. The idea that there is an implied freedom of political communication itself depends on a normative interpretation of the Constitution: a succession of inferences each of which introduces normative elements.¹⁵⁸ The text establishes a system in which legislative power is vested in a Parliament consisting of a House of Representatives and a Senate, the members of which are chosen by the people of the Commonwealth, voting in elections (ss7 and 24). The framers of the Constitution no doubt generally shared a reasonably definite theory of representative government, the constitutionally necessary elements of which they sought by these provisions to establish. There can be little doubt, moreover, that the framers, and the voters of the colonies who agreed to federate on these terms,

¹⁵⁷ Id 49–50.

¹⁵⁸ See Aroney, 'A Seductive Plausibility', above n43.

had more specific ideas about how a fully-functioning system of representative government ought to operate. But the question of how the constitutionally prescribed system ought to operate was not dictated by the framers; much was left to be determined by the Parliament, albeit a Parliament elected in the manner prescribed by the Constitution. Moreover, the Constitution does not spell out a normative theory of representative government; any such theory must inevitably draw upon on ideas that are not explicitly established by the terms of the Constitution. These ideas may be distinguished as alternatively ‘practical’ and ‘normative’, although the line between these two categories will not always be an easy one to draw. Institutions and processes of the kind prescribed, for example, by the *Commonwealth Electoral Act 1918* (Cth), are practically necessary for the particular requirements of sections 7 and 24 to be fulfilled. However, the particular institutions and processes established under the *Commonwealth Electoral Act* reflect at the same time particular normative judgments about how the constitutionally prescribed system ought to operate.

As formulated by the majority in *ACTV*, a fully functioning system of representative government — including a range of specific normative judgments of the kind contained within the *Commonwealth Electoral Act* — is an essential link in the reasoning between the text (and structure) of the Constitution and the idea of freedom of political communication. Injected into the idea of representative government is the additional normative judgment that there ought to be communication about governmental and political matters occurring between holders of political office and the voters, as well as among voters themselves. This notion that political communication is normatively desirable is a complex one. The bare fact that communication occurs is one thing. The nature and degree of communication — its quantity, quality and the ways in which it takes place — is another. A further inference, moreover, is the idea that such communication should occur freely: that is, without (undue) governmental or legislative interference. This is itself a normative judgment: that what is desirable is a system of representative government in which governmental power is constrained as far as political communication is concerned: that is, a negative, rather than a positive, conception of the freedom. And this is not all. The framers deliberately chose not to insert into the text of the Constitution an explicit provision guaranteeing freedom of communication. Arguably, the reason for this was that they believed that decisions about legal restraints on all forms of speech, including political speech, should be left to the common law, as adjusted by the federal and state parliaments within the scope of their constitutional powers. This is itself a normative judgment. However, by concluding that political communication is not only desirable, but constitutionally guaranteed, the Court in *ACTV* asserted that the Court itself has the power to determine the validity of laws regulating political communication. And this, also, is a normative judgment. It is true that such a conclusion is referable, in part, to the provision within the Constitution that the legislative powers of the Commonwealth and the States are ‘subject to’ the Constitution (ss51, 52, 106). But the other necessary premise is the general doctrine of judicial review, itself an institution that is not explicitly referred to in Ch III, but is rather an implication,

supported by a normative judgment about the desirability of judicial review. In this context, there is a significance about the conclusion that there is a judicially enforced freedom of political communication that is difficult to extricate from the normative judgment that this ought to be the case. But that is not all. The Court has all along said that the implied freedom is not absolute, but can be limited by laws which seek to achieve some legitimate objective by proportionate means. The test or tests to be applied, and the application of such tests to particular cases, obviously involves a degree of normative judgment that cannot be referred to anything specific that is said in the Constitution's text. The text and structure of the Constitution provide no concrete guidance.

This last fact is the problem of *Lange*, the problem that McHugh J sought to address in *Coleman*. An appreciation of the successive normative judgments that feed into the final conclusion should make it clear that the Constitution's text and structure are not going to provide any specific guidance on the issue. Those successive normative judgments themselves draw upon (various and contested) theories about representative government, representative democracy, freedom of speech, constitutional rights and judicial review. It is inevitable that the application of a test that derives from a process of this kind of reasoning will have to involve significant normative judgments which will be referable to (various and contested) theories about the proper scope of free speech within a democratic society, and the proper role of the legislature and the courts in framing the law that regulates speech within such a society.

The return to text and structure in *Lange* is an attempt to avoid or, at least, minimise normative judgments of this kind. But in affirming the existence of the implied freedom and formulating a test that is to be applied by the courts, *Lange* makes normative judgment unavoidable. In this sense, McHugh J's position, as well as the *Lange* judgment, is a half way settlement, and McHugh J's explanation and reformulation in *Coleman* is an attempt to defend that settlement. That *Lange* goes only half way is apparent when the reasoning of Dawson J in *ACTV* is compared with the reasoning of the majority. Justice Dawson was prepared to hold that the dictate, in sections 7 and 24, that members of Parliament are to be chosen by the people, requires a 'true' choice (and not merely a formality), and that a choice requires an appreciation of alternatives. Justice Dawson was also prepared to conjoin this constitutional mandate with the institution of judicial review, so that a law that contravened this mandate would be held invalid. Clearly, a (contestable) normative judgment is involved, but the normative judgment is limited to the attribution of a specific meaning to the words 'chosen by the people'. There is room, therefore, for difference of opinion as to the meaning of this phrase, but the task is limited to one of attributing meaning to the text of the Constitution. There is no talk of a right to free speech; not even a reference to representative government. Whether a law actually interferes with this constitutional mandate is thus a question of normative judgment. But the virtue of the approach is that it is a judgment that is constitutionally required: admit a general doctrine of judicial review, and the courts have a responsibility to ensure that federal and state laws enacted 'subject to' the Constitution are not inconsistent with the constitutional requirement that members of Parliament are indeed chosen by the people.

The *Lange* judgment attempts to incorporate the virtues of Dawson J's textually-based, minimalist approach with the conclusion of the majority in *ACTV* that there is, indeed, a constitutionally guaranteed freedom of political communication. In the same way, McHugh J's explanation and reformulation of the *Lange* test in *Coleman* is an attempt to shore up and defend that synthesis. The question, however, is whether this intermediate position is coherent and sustainable. To address this question, it is necessary to identify the various normative judgments that are involved when the reformulated *Lange* test is applied in any particular case. Justice McHugh is attempting to defend the *Lange* test by reference to the Constitution's text and structure. This means demonstrating (as far as possible) that the *Lange* test, properly understood, is based on text and structure. This in turn means that each of the various components of the test must be related to the Constitution, and any elements that involve normative judgments based on considerations that involve free-standing theories or standards must, as far as possible, be eliminated. The leeway for judgment is to be minimised. This constellation of closely related objectives explains what McHugh J is trying to do in *Coleman*. To what extent is he successful?

B. Minimising Leeway for Judgment

The *Lange* test requires the courts to answer a number of questions, each of them involving a degree of normative judgment. These questions include:

1. Is there a relevant *communication* at stake in a particular case?¹⁵⁹
2. Is the communication *political* in nature; does it concern *government or political matters*? Alternatively, is the communication relevant to the making of *choices by voters in federal elections*?¹⁶⁰
3. Does the law place a *burden* on the *freedom* of political communication by virtue of its terms, operation or effect?¹⁶¹
4. Are the objectives of the law *legitimate*? Additionally or alternatively, are the objectives and means adopted by the law *compatible* with the *constitutionally prescribed system*?
5. Are the means adopted by the law *reasonably appropriate and adapted* to serving the objective of the law?

Justice McHugh does not deny that these questions require the Court to make difficult value judgments. The two central conclusions at which he is driving, rather, are, first, that in applying the *Lange* test the Court can and ought to avoid 'balancing' and, second, that in doing so it is possible to avoid reliance upon free-standing, external standards and theories. In this concluding section, I aim to defend the first claim and to discuss the limitations of the second.

The cogency of the first claim can usefully be related to Jeremy Kirk's important analysis of the concept of proportionality. Kirk argues that the task cast

¹⁵⁹ See *Mulholland*, above n77.

¹⁶⁰ See *Brown v Classification Review Board* (1998) 154 ALR 67.

¹⁶¹ *APLA*, above n17 at 497–498 (Hayne J).

upon the Court involves three distinct inquiries, which he calls ‘suitability’, ‘necessity’ and ‘balancing’.¹⁶²

The first of these inquiries, that of ‘suitability’, involves the question whether the law is in fact a real means to the claimed end. As such, the courts ask simply whether the law is an ‘effective, appropriate or rational means of achieving the claimed end’.¹⁶³ If a law is simply incapable of achieving a supposed objective, it cannot be legitimated by reference to that objective. Justice McHugh clearly acknowledges the need to make this judgment.

The second of these inquiries, that of ‘necessity’, calls for a closer examination of the relationship between the means and the ends of the law. The test of necessity can be formulated in more or less demanding forms. At one end of the spectrum, a court will ask whether the law does ‘no more than is necessary’ to achieve the objective, that is, whether there are any ‘alternative practicable means available to achieve the same end that are less restrictive of the protected interest’.¹⁶⁴ At the other end of the spectrum, a court may content itself to ask whether the law is ‘reasonably capable’ of being considered appropriate and adapted to achieving the supposed objective, thus leaving the legislature with a significant margin of appreciation. Justice McHugh again clearly acknowledges the need to make a ‘necessity’ judgment of this kind, although he also seems to reject the distinction between the more stringent and the less stringent versions of the test.

The third inquiry is that of ‘balancing’ or, as Kirk puts it, ‘proportionality in the narrow or strict sense’.¹⁶⁵ It is specifically this kind of balancing that, I think, McHugh J is saying is not required by the *Lange* test. Balancing requires a court to weigh the ‘detriments’ of the law against its ‘benefits’. In other words, according to this test a court will have to assess the importance of the constitutional right itself and the degree to which that right is being interfered with, and will weigh that detriment against the importance of the social interest that the law seeks to achieve and the extent to which the law actually achieves that end and thus benefits the community. Such an assessment, when undertaken thoroughly, can be difficult to distinguish from an unrestrained, fully-fledged inquiry into the substantive merits of the legislation in question.¹⁶⁶ Balancing thus involves a significant amount of judicial discretion. It requires a court to make major social and political judgments and it seems impossible to do this in a rationally consistent manner without relying upon some theory or set of standards extraneous to the text and structure of the Constitution. However, Justice McHugh is asserting in *Coleman* that the *Lange* test, properly understood, does not require the Court to undertake a balancing inquiry of this kind.

¹⁶² Kirk, above n114. Compare *R v Oakes* [1986] 1 SCR 103 at 139–140.

¹⁶³ Kirk, above n114 at 6.

¹⁶⁴ *Id* at 7.

¹⁶⁵ *Id* at 8.

¹⁶⁶ See, for example, the inquiry undertaken by the Canadian Supreme Court in *R v Keegstra* [1990] 3 SCR 697. While the law was upheld in that case and thus the decision of the court could be construed as being deferential to the legislative judgment, the reasoning exhibits concurrence with, rather than deference to, that judgment.

First, by insisting that the ultimate question is one of compatibility, McHugh J is arguing that the inquiry should be focused on what is considered necessary for the effective operation of the constitutionally prescribed system. Judgment is unavoidable,¹⁶⁷ but the judgment is limited, as it were, to only one side of the equation: the constitutional interest. The importance of the objective that the law seeks to achieve, in so far as it is unrelated to the constitutional interest, is made irrelevant. This, I submit, is what McHugh J must mean when he says that it is not a question of balancing a legislative or executive end against the freedom, but a question of compatibility.¹⁶⁸ Thus, McHugh J says that laws which ‘promote or protect’ the communication of political and governmental matters, or which ‘protect those who participate in the prescribed system’ will not transgress the implied freedom.¹⁶⁹ This is because such laws are directly defensible as means by which the constitutionally prescribed system is itself enhanced. On the other hand, where a law seeks to achieve an objective that is unrelated to the constitution, the simple question is whether law can be construed in such a way as to be compatible with the constitutionally prescribed system. This is what McHugh J means when he says that a law that seeks to achieve a social objective ‘unrelated to’ the constitutional system will be ‘invalid pro tanto’, unless ‘the objective of the law can be restrictively interpreted in a way that is compatible with the constitutional system’.¹⁷⁰ In these circumstances, in other words, the law must be assimilated into the total system or set of institutions mandated by the Constitution and justified in those terms. The significance or weight to be given to social objectives unrelated to the constitutionally prescribed system is therefore irrelevant to the analysis.

When understood in this way, McHugh J’s proposal to avoid balancing judgments is both coherent and, I think, sustainable. While such an approach does not eliminate value judgments entirely, it does eliminate the need to make specific judgments about the substantive merits of the law in so far as this is required by the process of judicial balancing. As McHugh himself put it, there is no need to make ‘nice judgments as to whether one course is slightly preferable to another’.¹⁷¹ Does this mean that an inevitably ‘value-laden’ decision-making process will tend to be ‘disguised in value-neutral language’?¹⁷² I do not think this is necessarily so. Legal judgment is replete with limiting reasons, which exclude the consideration of factors that would otherwise be brought to bear in a fully-orbed inquiry into the desirability of a particular course of action.¹⁷³ Justice McHugh is proposing a set of such limiting reasons, based on the fact that the implied freedom must be related back to the text and structure of the Constitution.

167 *Coleman*, above n12 at 53.

168 *Id* at 49.

169 *Id* at 52.

170 *Ibid*.

171 *Id* at 53.

172 *Id* at 47.

173 As Adrienne Stone points out, categorical approaches to free speech cases can, compared to *ad hoc* approaches, reduce the degree of flexibility or discretion available to judges: see Stone, above n9 at 686–687, 693–696. The same, I argue, applies to McHugh J’s proposed elimination of balancing.

It is true that individual judges will from time to time take into consideration factors that lie outside these limits, but this does not mean that judges will *inevitably* do so. This will depend upon the self-restraint exercised by each judge. To claim more than this is to elevate the genuine insights of legal realism to the status of unyielding dogma.

One important consequence of this approach is that it gives Australian legislatures a ‘margin of choice’, as McHugh J puts it, ‘as to how a legitimate end may be achieved’.¹⁷⁴ But, says McHugh J, this ‘toleration of the legislative judgment’ ends when a law ‘unreasonably’ burdens freedom of political communication because ‘the burden is unreasonably greater than is achievable by other means’.¹⁷⁵ It is at this point, his Honour admits, that the courts must exercise a degree of ‘judgment’.¹⁷⁶ But the judgment is limited to the question of what Kirk calls the ‘necessity’ of the legislation, and not as to whether it strikes an appropriate ‘balance’ between a particular social objective and the constitutional interest in freedom of political communication.

To this extent — but to this extent only — McHugh J’s reformulation of the *Lange* test does, I think, eliminate the need for the Court to advert to values and theories external to the Constitution itself. To this extent, his proposal is coherent and, in principle, sustainable. In light of the way in which the implied freedom depends upon a whole series of normative judgments that go beyond the text of the Constitution, limiting judicial discretion in this way is also desirable. Whether individual judges will *in fact* follow these strictures in future cases, however, is another question.¹⁷⁷

174 *Id* at 53.

175 *Ibid*.

176 *Ibid*.

177 Not even Dawson J was able or willing to avoid balancing considerations when applying the implied freedom in *Levy*, above n88 at 608. Adrienne Stone has drawn attention to the many times in the past that balancing has *in fact* occurred: Stone, above n9 at 681–684. However, this does not make balancing *unavoidable* or *inevitable*: compare Stone, above n9 at 686–687, 693–696.