

The High Court and implied constitutional rights: exploring freedom of communication

By Alison Hughes*

Introduction

Among the most significant and controversial statements the High Court has made of late are those probing the boundaries of freedom of communication. Central to the Court's recent decisions is the concept of implied rights - i.e. rights that are logically derived from express constitutional guarantees but which are not found in the text of the document. In *Australian Capital Television Pty Ltd v. Commonwealth*¹, *Nationwide News Pty Ltd v. Wills*², and *Theophanous v. The Herald and Weekly Times Limited*³, the Court introduced freedom of communication, a right implied from the fundamental constitutional principle of representative government. As the Court enters the arena of rights discourse, divisions between the judges have become apparent, both as to the validity and extent of implied rights. Although the decisions fundamentally have altered the way the Constitution is interpreted, they are really just a beginning; as significant as the principles they elucidate are the directions they indicate for future interpretation of the Constitution.

The cases

The first two cases, *Australian Capital Television* and *Nationwide News*, have been described⁴ as landmark constitutional decisions, ranking in the same league as the *The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd*⁵. They recognised implied rights as viable and necessary, and set guidelines for the use of such constitutional

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1 (1992) 177 CLR 106.

2 (1992) 177 CLR 1.

3 Unrept, HC, 12/10/94.

4 Justice M. Kirby, 'Current Topics' (1992) 66 ALJ 775.

5 (1920) 28 CLR 129.

tools⁶. In *Theophanous*, the relevant principles were expanded upon and applied in the private law setting of defamation.

(a) Australian Capital Television

Australian Capital Television arose in the context of election broadcasting and advertising. Commercial television broadcasters challenged the validity of Pt IIID of the *Broadcasting Act 1942* (Cwlth), which was introduced by the *Political Broadcasts and Political Disclosures Act 1991* (Cwlth). The controversial elements of Pt IIID consisted of sweeping prohibitions on political broadcasts and advertisements⁷ during an election period⁸ (subject to exemptions in regard to news broadcasts, current affairs items, and talkback radio programs), and the imposition of obligations on broadcasters to make available 'free time'⁹ for election broadcasts. Ninety per cent of that time was to be allocated by the Australian Broadcasting Tribunal to political parties according to the

- 6 The concept of implied constitutional rights is not new; Murphy J had previously championed such rights in a number of decisions. In *Ansett Transportation Industries (Operations) Pty Ltd v. The Commonwealth* (1977) 139 CLR 54 at 88, he expressed the view that constitutional provisions for the election of members of Parliament require freedom of movement, speech, and other means of communication. See also his opinion in *Miller v. TCN Channel Nine Pty Ltd* (1986) 161 CLR 556.
- 7 The term 'political advertisement' was defined very broadly to include any advertisement containing 'political' or 'prescribed' material, consisting of matter 'intended or likely to affect voting' or material containing an express or implied comment on the election, the issues, or the candidates.
- 8 Subject to qualifications, the Act stated that the election period was to begin on the day that an election was announced or the day on which writs for the election were issued (whichever was first), and to end when the polls closed on polling day. The Act applied to Commonwealth Parliamentary elections or referenda, and to elections to legislatures or local government authorities of a Territory or State.
- 9 In the context of the Act, 'free time' meant advertising slots which were free of charge, but which were subject to stringent requirements as to manner and content. The advertisements were to depict one person speaking directly to the camera for a period of two minutes; no extraneous sound, dramatic enactment, or impersonation was permitted. The preference was clearly for a sober discussion of the issues rather than the campaigning flourish of image and style common to visual political advertising.

proportion of first preference votes obtained in the previous election. The remaining ten per cent of time was to be given, at the Tribunal's discretion, to other parties and independent candidates.

Effectively, the Act mandated that almost all of the free political advertising be awarded to parties already heavily represented in the relevant Parliament or legislature. Individuals, associations, and community groups not standing for election were ineligible for consideration, resulting in their complete exclusion from radio and television broadcasting during elections. Their only chance for input in these media was in the context of current affairs programs and news interviews.

The Commonwealth defended the legislation on the ground that the express purpose of Pt IIID was to safeguard the integrity of the electoral system by eliminating the intense financial pressure that political parties face when engaged in television and radio campaigning. Such financial pressures, the Commonwealth argued, render political parties vulnerable to corruption and undue influence by the donors of campaign funds. Additionally, this 'cleansing' of the campaigning process was intended to level the playing field by ensuring that the electoral landscape would not be controlled merely by the party most capable financially of dominating the media¹⁰.

The plaintiffs contended that Pt IIID of the Act was invalid by reason of the contravention of three guarantees found in the Constitution: (i) an implied guarantee of the right of freedom of communication in relation to the political process, (ii) an express guarantee of freedom of intercourse in s. 92, and (iii) an implied guarantee of freedom of communication arising from the common citizenship of the Australian people. Six judges¹¹ of the High Court accepted that the Constitution impliedly guarantees a right of freedom of political communication, and all but Brennan J found that Pt IIID infringed this right.

(i) *The Implied Right to Freedom of Communication*

Mason CJ held that Pt IIID contravened 'an implied guarantee of freedom of communication, at least in relation to public and political discussion'¹². His defence of constitutional implications is no-

10 The Commonwealth also aimed to reduce the 'trivialisation' of election issues by dictating the terms of the free advertising.

11 Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ (Dawson J dissenting).

12 Australian Capital Television, fn 1 at 133.

table; he decried the 'unthinking' approach to constitutional interpretation following the *Engineers' Case*, when judges considered themselves precluded from exploring constitutional implications altogether. He argued that constitutional implications are necessary to illuminate the entire scope and meaning of the Constitution; they inhere in the document and are no less forceful for their lack of express articulation. The Chief Justice illustrated the High Court's previous reliance on implications by noting that implications from the federal structure have been interpreted as prohibiting the Commonwealth from using its powers to impose a special disability upon a State, or to threaten the ability of a State to function as such¹³.

In what was the focal aspect of the case, Mason CJ, Deane and Toohey JJ held that the provisions of the Constitution outlining the general structure of responsible and representative government¹⁴ result in several necessary implications. Indispensable to this system of accountability and representation is a freedom to communicate in relation to public affairs and political matters. This freedom operates on two levels. First, the system clearly mandates freedom of communication between the people and their representatives; citizens must be able to urge their representatives to action on political matters, while representatives have a responsibility to account for their actions and to ascertain the views of their electorate. Absent such a free exchange, no system can claim to be truly representative.

13 *Queensland Electricity Commission v. The Commonwealth* (1985) 159 CLR 192. Brennan J in the case at hand relied on this constitutional implication to hold that s. 95D(3) and (4) of Pt IIID were invalid. As indicated in fn. 6, implied rights (in contrast to other constitutional implications) had not historically enjoyed similar recognition by the Court.

14 Representative government is clearly introduced by ss. 7 and 24 of the Constitution, which provide for Senators to be chosen directly by the people of a State, and for members of the House of Representatives to be chosen directly by the people of the Commonwealth. Sections 61 and 62, vesting executive power in the Governor General on the advice of the Federal Executive Council, are examples of responsible government. Gaudron J considered that representative parliamentary democracy also finds expression in the preamble and in s. 128, the amending provision.

Second, the efficacy of representative government depends on free communication between individuals and groups in society. Such free discussion is a necessary prerequisite to independent political judgement and opinion. By enabling active participation in the political process, the two levels of political communication are integrally related. Notwithstanding the fact that the framers declined to incorporate a bill of rights in the Constitution, Mason CJ insisted that:

[f]reedom of communication in the sense just discussed is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.¹⁵

Mason CJ, Deane and Toohey JJ were all of the opinion that the freedom to communicate regarding public and political affairs was not susceptible of bifurcation along States-Commonwealth lines. Deane and Toohey JJ explained that it would be unrealistic to confine an implication of freedom of communication to Commonwealth government institutions. The implication, by their reasoning, extended to all political matters at all levels of government.

Deane and Toohey JJ, in a joint judgment, pointed to the fact that the grants of legislative power in s. 51 are expressly made 'subject to' the Constitution. This proviso specifically directs obedience to the implications in the Constitution. In the absence of a legislative intention to derogate from the implication of freedom of political communication, the legislation will be interpreted as subject to the implication.

In contrast, Dawson J resisted what he perceived as a slide into uncontrolled judicial law-making. He dissented on the issue of the presence of an implied freedom of communication inherent in the Constitution, and relied on the deliberate choice of the framers to forgo a bill of rights:

[I]n this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic so-

15 Australian Capital Television, fn 1 at 140.

ciety to preserve for itself its own shared values...there is no warrant in the Constitution for the implication of any guarantee of freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth.¹⁶

In his view, the only valid implications to be made are those drawn from other Constitutional provisions, or from the Constitution as a whole; implications that have their source in extrinsic origins are illegitimate. Dawson J considers that the real issue in this case was much narrower than that framed by the majority: it was simply whether Pt IIID was incompatible with the sections of the Constitution providing for the direct choice of Parliamentary representatives.

(ii) *Restrictions on the Right*

All members of the majority agreed that the right to freedom of communication is not absolute. They differed, however, in their characterisation of the limits on the right. Mason CJ drew a distinction between restrictions on discussion which target ideas or information and those which fetter their mode of communication. In regards to the former, restrictions must be warranted by 'compelling justifications' and must be 'no more than is reasonably necessary' to protect the competing public interest invoked¹⁷. Restrictions placed on the mode of communication or transmittal of discussion, rather than on the content of the discussion itself, are more easily justified. Again, however, the applicable test must balance the right and the competing public interest. A disproportionate burden on free communication in this context indicates that the purpose and effect of a restriction is in fact to impair freedom of communication.

Deane and Toohey JJ stated that a law will be more difficult to justify if it directly infringes freedom of political communication than if its restrictive nature is unrelated to the political nature of communication. Moreover, they, too, endorsed a notion of reasonable limits on the freedom of communication in light of the public interest in an ordered and democratic society.

16 Id at 183-184.

17 Id at 143.

Brennan J articulated a test based on a broad doctrine of proportionality. In each case, it is necessary to determine the extent of the restriction, the nature of the interest served, and the proportionality of the restriction to the interest served. In assessing proportionality, he adopted the practice of the European Court of Human Rights which gives a legislative body a 'margin of appreciation'¹⁸. He emphatically deferred to Parliament's assessment that Pt IIID would substantially minimise the risk of political corruption in the electoral process:

It was open to Parliament to make a low assessment of the contribution made by electronic advertising to the formation of political judgments. It was open to the Parliament to conclude, as the experience of the majority of liberal democracies has demonstrated, that representative government can survive and flourish without paid political advertising on the electronic media during election periods. The restrictions imposed by s. 95B are comfortably proportionate to the important objects which it seeks to obtain. The obtaining of those objects would go far to ensuring an open and equal democracy The restrictions on advertising do little to inhibit the democratic process.¹⁹

(iii) *The Characterisation of Pt IIID*

According to Mason CJ, the restrictions imposed by Pt IIID affected the mode of communication or transmittal of information under the right to freedom of political communication. Accepting that some of the Commonwealth's arguments regarding corruption of the political process were valid, the Chief Justice agreed that some restrictions on the broadcasting of political advertisements may be justified. However, Mason CJ, Deane and Toohey JJ stated that Pt IIID went beyond acceptable limits in two main ways. First, it discriminated between participants in the political process by allocating free time only to political parties. Electors, individuals, and groups were denied access to this effective mode of communication. Second, it further discriminated in the time allocated to po-

18 Specifically, he referred to *The Observer and the Guardian v. United Kingdom* (1991) 14 EHRR 153 at 178.

19 Australian Capital Television, fn 1 at 161.

litical parties; established political parties were favoured over new and independent candidates.

Several judges indicated that there were less intrusive means by which to address the problem of corruption and its links with political advertising in the electronic media. Deane and Toohey JJ, for example, suggested that some form of controlling spending or regulation of the use of electronic media could have been equally effective.

Brennan and Dawson JJ found the bulk of Pt IIID to be a proportionate response to Parliament's intention to eradicate corruption in the electoral process²⁰. Similarly, by virtue of his much narrower test, Dawson J found that the prohibition of political advertising in Pt IIID was compatible with the constitutional requirement that electors be able to make informed choices. He stated that the object of the legislation was to 'enhance rather than impair the democratic process'²¹, and held that it was for Parliament to decide how far it should go to achieve that aim.

(b) *Nationwide News Pty Ltd v. Wills*

Although the issue in *Nationwide News* was somewhat narrower than that involved in *Australian Capital Television*, the High Court articulated a similar vision of constitutional rights theory. As many of the judges cross-referenced their opinions to *Australian Capital Television*, their conclusions can be stated briefly.

The case arose in the context of s. 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cwlth) which made it an offence to write or speak words which were calculated to bring a member of the Industrial Relations Commission (or the Commission itself) into disrepute. The section was absolute - it made no provision for defences such as justification or fair comment, which are available for contempt or defamation. Not surprisingly, 'Advance Australia Fascist', a newspaper article which likened the Commission to a corrupt and hopelessly inefficient Soviet-style labour court, fell foul of this section. *Nationwide News Pty Ltd*, the proprietor and publisher of *The Australian*, published the

20 Brennan J held two subsections (s. 95D(3) and (4)) invalid as infringing the implied limitation on Commonwealth legislative power which precludes laws which burden the functioning of the States.

21 *Australian Capital Television*, fn 1 at 189.

attack on the integrity and independence of the Commission, and was charged.

The case predictably focused on the constitutional validity of s. 299(1)(d)(ii). The respondent pointed to the section's valid enactment under s. 51(xxxv) (the conciliation and arbitration power) and s. 51 (xxxix) (the incidental power) of the Constitution, while Nationwide submitted that the Constitution as a whole contained an implied guarantee of freedom of communication on matters of public interest, a guarantee drawn from the overarching principle of representative government.

The Court unanimously rejected the section as unconstitutional. However, only four judges chose to frame their reasons in terms of implied rights. Consistent with his approach in *Australian Capital Television*, Dawson J discussed the case solely in terms of express constitutional terms and the powers incidental to these. Mason CJ and Brennan J chose to discuss the case on grounds other than implied rights. McHugh, Deane, Toohey and Gaudron JJ discussed rights implied by the Constitution.

Mason CJ confined his comments to the question of whether the Constitution's incidental power was used in a reasonably proportionate manner. He stated that a law should be scrutinised strictly where it has an adverse impact on freedom of expression, particularly when it impairs that freedom 'in relation to public affairs and freedom to criticise public institutions'²². It is this notion of proportionality which led Mason CJ to conclude that the section went too far, shielding even criticism on comment which is fair and facts which are true. McHugh J picked up on this theme, and emphasised that by s. 299(1)(d)(ii), the Commission was protected to a greater degree than are the courts.

Dawson J, obviously uncomfortable with this whole business of implied rights, argued that the case was not one about proportionality, but about connection. The powers in s. 51 of the Constitution are plenary and extend to matters that are incidental to their exercise. The primary question, then, is whether there is a sufficient connection between the subject matter of an enumerated power, and the relevant law. Without considering further arguments, Dawson J concluded that s. 299(1)(d)(ii) of the Industrial Relations Act lacked a sufficient connection with

22 Nationwide News, fn 2 at 34.

conciliation and arbitration, and went beyond what is incidental to that power.

Brennan J was clearly in a quandary. He found the complete insulation of the Commission offensive to broad democratic principles, but was wary of the Court denying the validity of an express legislative power merely on the ground that the law abrogated human rights and fundamental freedoms²³. To achieve a balance, he rooted his decision firmly in the 'constitutional imperatives' of representative democracy and responsible government: 'it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments'²⁴. The constitutional entrenchment of representative democracy must import the means to maintain it. The freedom of public criticism of government institutions, being a part of the larger concept of freedom of discussion, is such a necessary component.

Brennan J conceded that while the Constitution prohibits infringement of the freedom to discuss broadly political matters, this freedom itself can be limited by competing interests having similar status²⁵. In any event, he concluded that the limitation must not be such as to impair substantially the ability of the people to make judgments on political matters.

Deane, Toohey and Gaudron JJ directly addressed implied constitutional rights. Their decisions are based on a straightforward premise: because the express powers in s. 51 of the Constitution are made 'subject to' the Constitution as a whole, they must be read in the context of the fundamental implications which form part of the fabric of the document. Of the general doctrines of government which underlie the Constitution, the doctrine of representative government was determinative in this case. From this doctrine they distilled a 'freedom of communication of information and opinions about matters relating to the

23 Id at 43. He believed that only courts in countries having bills of rights can validly perform this kind of function.

24 Id at 47.

25 Such other interests include the interests of justice, personal reputation, and the community's sense of decency. The extent to which such interests can be curtailed are affected by matters of national defence or security.

government of the Commonwealth²⁶, which can be limited, but not abrogated.

Deane and Toohey JJ emphatically rejected the argument that protecting the Commission from disrepute by such stringent measures as s. 299(1)(d)(ii) was in the public interest. On the contrary, they argued that in a representative democracy, if criticism of the Commission is well-founded, it is in the public interest that it be published, rather than suppressed.

[P]utting to one side times of war and civil unrest, the public interest is never, on balance, served by the suppression of well-founded and relevant criticism of the legislative, executive or judicial organs of government or of the official conduct or fitness for office of those who constitute or staff them. Suppression of such criticism of government and government officials removes an important safeguard of the legitimate claims of individuals to live peacefully and with dignity in an ordered and democratic society.²⁷

(c) *Theophanous v. The Herald and Weekly Times Limited*

In *Australian Capital Television* and *Nationwide News*, the Court found that the freedom of political communication limits legislative and executive powers. In *Theophanous*, a bare majority characterised that freedom as a constitutional ‘implication’ rather than a positive right. The extension of the scope of the implied right of political communication to a private law setting proved contentious, however, with several of the judges issuing strongly worded dissents.

On its facts, *Theophanous* is relatively standard defamation fare: a public figure is criticised in a newspaper, and sues both the writer and the paper. A letter to the editor in *The Sunday Herald Sun* attacked the performance, conduct and views of Dr. Andrew Theophanous, a member of the House of Representatives and chairperson of the Parliamentary Standing Committee on Migration Regulations and the Labour Party’s Federal Caucus Immigration Committee. The letter, entitled ‘Give Theophanous the Shove’, was written by Mr. Bruce Ruxton, President of the Victorian Returned & Services League. He alleged that Theophanous was biased toward Greeks as migrants, and criticised his ‘idiotic antics’ in reportedly advocating the dilution of the

26 *Nationwide News*, fn 2 at 73.

27 *Id* at 79.

'British base' of Australian society. Dr. Theophanous commenced defamation proceedings against both Mr. Ruxton and the newspaper.

The principal question reserved in the case was whether the Constitution impliedly guarantees a freedom to publish material discussing government and political matters, the performance or duties of members of Parliament, and the suitability of people as members of Parliament. If affirmatively answered, a second question would arise: is the publication of such material actionable under defamation law if it is done without malice, was reasonable in the circumstances, was made in the honest belief that the material was true, and did not exhibit reckless disregard for the truth or untruth of the material? Four²⁸ of seven judges answered that there was such an implied freedom.

The majority accepted that the case fell within the parameters set out for political communication in *Australian Capital Television* and *Nationwide*. They expanded on their reasoning in the previous two cases, and discussed the acceptable limits to the constitutionally protected freedom of communication. Because the underlying purpose of freedom of communication is representative democracy, the content of the phrase 'political discussion' was central to their discussion. It includes:

discussion of the conduct, policies, or fitness for office of government, political parties, public bodies, public officers and those seeking public office... discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, e.g. trade union leaders, Aboriginal political leaders, political and economic commentators... the concept is not exhausted by political publications and addresses which are calculated to influence choices.²⁹

The majority threw the net even wider when they recognised that what ordinarily is commercial or private speech in certain circumstances may have political significance.

The second main point raised by the majority was the 'chilling effect' of defamation laws on the exercise of freedom of communication.

28 Mason CJ, Toohey, Gaudron, and Deane JJ. Deane J wrote a separate judgment, in which he differed from the other three on the terms of when a potentially defamatory publication should be actionable.

29 Theophanous, fn 3 at 8.

Though the common law had attempted to balance free speech and the protection of reputation, insufficient attention had been paid to the effect on the implied freedom of communication. After weighing up the potential defences to an action in defamation, the majority concluded that the common law had tilted the balance too far in favour of the protection of individual reputation, and as a result, freedom of communication had atrophied.

Insisting (and assuming) that existing defamation laws seriously inhibit freedom of communication on political matters, the majority looked to other options to right the balance. They determined that an effective balance is struck under the following test: if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish the matter recklessly, and that the publication was reasonable in the circumstances.³⁰

Deane J differed from the other majority justices on this point. He did not accept that freedom of communication should be conditioned on the ability of the defendant to satisfy such a test of reasonableness or lack of recklessness. Rather, he considered that the freedom precludes completely the application of defamation laws (on either individuals or the media) to impose liability for essentially political discussion. Deane J clearly moved farther than the rest of the majority to tilt the balance toward freedom of communication; it remains unclear, however, whether he conceived of any limits on the freedom whatsoever.

Of the majority justices, only Deane J addressed the broader question of the role of the judiciary in implying rights in the Constitution. He rejected the idea that constitutional interpretation should be restricted by the 'dead hands of those who framed it'³¹; such an approach would desiccate what was meant to be a vital and living instrument. Rather, it is the duty of the Court to give effect not only to the express terms of the instrument, but also to the rights, privileges and immunities which are implied from its terms and from the fundamental doctrines which are its foundation.

Brennan J squarely addressed these arguments. He distinguished between judicial development of the common law and the Constitution; in the former, judicial policy has a role to play while in the latter it does

30 *Id* at 20.

31 *Id* at 55.

not. In his view, when interpreting the Constitution, judges are restricted to applying the text and uncovering textual implications. They cannot fill in the gaps. Accordingly, he stated that the answers to the questions in the present case 'in no way depend on what the Court perceives to be desirable policy'³². He concluded that the law of defamation is not an unnecessary restriction on political discussion, and that it is not limited by the constitutional implication of freedom of communication.

Dawson J disagreed with the majority's fundamental premise - that the Constitution implies a freedom of communication. In his opinion, freedom of communication is relevant only in the very limited sections in which the Constitution recognises representative government. Merely because a form of defamation law is *desirable* in the interests of representative government cannot make it sufficient. Such an interpretation would rely on a general doctrine of representative government extrinsic to the text of the Constitution itself. Dawson J warned of the dangers of this kind of interpretation:

To draw an implication from extrinsic sources... would be to take a gigantic leap away from the *Engineers' Case*, guided only by personal preconceptions of what the Constitution should, rather than does, contain. It would be wrong to make that leap.³³

McHugh J agreed. He also denied that the institution of representative government forms a part of the Constitution; rather, it is imported into the Constitution only to the extent that the text and implications embody it³⁴. He noted that the sections of the Constitution giving effect to representative government address elections, not political rights in general. It therefore is impermissible for the Court to assume that the entire doctrine finds a place in the Constitution, merely because a few aspects of the doctrine have been incorporated.

McHugh J's main concern is where all of this may lead. In his view, acceptance of the majority's reasoning would have a far-reaching im-

32 Id at 28.

33 Id at 77.

34 Specifically, McHugh J stated that the terms of ss. 1, 7, 24, 30 and 41 of the Constitution exhaust the textual presence of the doctrine of representative government.

pact on the federal system, including the potential to strike down both federal and State legislation and common law principles³⁵.

Commentary

(a) The Scope of implied rights

In all three cases, the Court carefully stressed that freedom of communication is a much narrower concept than freedom of speech or expression generally. The freedom is characterised specifically in limited terms, such as ‘freedom of communication, at least in relation to public affairs and political discussion’³⁶, ‘freedom of political discourse’³⁷, and ‘freedom...to discuss governments and political matters’³⁸. It appears to be strictly tailored to instances where politics is the topic for discussion.

However, several of the judges recognised that if representative government is the foundation on which the freedom is based, it logically is necessary to align it with other concepts, specifically other civil and political rights such as freedom of association. In *Theophanous*, Deane J stated that in a modern society, freedom of the media is a necessary pre-condition for the freedom of citizens to engage in political communication and discussion³⁹. Similarly, in *Australian Capital Television*, Gaudron J defined the implied right of communication very broadly as ‘freedom of discussion of matters of public importance’, and went farther than the other judges in widening the parameters of the right.

The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally. But, so far as free elections are an indispensable feature of a society of that kind, it necessarily entails, at the very least, freedom of political discourse.⁴⁰

35 *Theophanous*, fn 3 at 88.

36 *Australian Capital Television*, fn 1 at 142, per Mason CJ.

37 *Id* at 214, per Gaudron J.

38 *Nationwide News*, fn 2 at 50, per Brennan J.

39 *Theophanous*, fn 3 at 69.

40 *Australian Capital Territory*, fn 1 at 211-212.

What emerges from the cases is a broad spectrum of judicial opinion on the scope of implied rights. Deane and Gaudron JJ's broad, inclusive approach contrasts sharply with Dawson J's strictly textual analysis, while the other judges cautiously tread a middle ground. The problem is essentially one of boundaries; after having decided to admit implied rights as viable constitutional entities, the judges find themselves in a struggle to define their limits. Successive cases will illuminate the progress they make in this difficult task.

However, one of the basic terms of the definition of freedom of communication deserves special mention. The judges clearly are uncomfortable with characterising the freedom of communication as a personal right. They prefer the terms 'implication' or 'immunity' as more neutral, less politically charged concepts. Whereas a right must be defined to ascertain the area left for legislative regulation, a freedom characterised as an immunity merely limits legislative power. It does not possess the moral authority of a right and does not impose corresponding duties.

This distinction is not merely one of semantics; it points to the fact that the judges are sensitive to criticism that they are introducing a bill of rights through the back door. They clearly have regard to the historical fact that a bill of rights was considered and expressly rejected by the framers of the Constitution, and to the fact that proposals for constitutional reform including guarantees for freedom of expression (both in 1944 and 1988) failed at referenda. As one reviewer states:

The Court's finding to the contrary exposes it to criticism that it is undemocratic in imposing a provision on the electorate and their elected representatives have rejected but cannot now realistically hope to remove.⁴¹

(b) Implications of the cases

Although the wider implications of the cases are beyond the scope of this brief survey, a few observations are in order. Foremost are questions relating to the role of the judiciary, the propriety of judicial law-making, and the impact of constitutional implications on the bill of rights debate.

41 Creighton, P., 'The Implied Guarantee of Free Political Communication' (1993) 23 *University of Western Australia L Rev* 163 at 167.

Linked to the debate about how far the High Court will go in recognising constitutional implications is the policy question of how far it *should* go. Two positions emerge on this debate. The first argues that in a country with no written bill of rights, allowing judges the power to discover rights implied in the Constitution is equivalent to giving them a constitutional 'blank cheque'; judges are left to 'discover in the Constitution [their] own broad political philosophy'⁴². This approach has engendered intense controversy in the United States. Illustrative are the Supreme Court's decisions in *Griswold v. Connecticut*⁴³ and *Roe v. Wade*⁴⁴, which recognised a right of personal privacy having no basis in the express terms of the Constitution. The High Court has recently faced similar criticism that it has adopted the role of a 'super legislature', intent on determining not only law but also political policy.

Surprisingly, few of the judges in the cases at hand found it necessary to reflect on their role in the process of constitutional interpretation. Deane and Brennan JJ in *Theophanous* are notable for their willingness to question judicial roles, and for their articulation of theories of constitutional interpretation. There is, however, no indication from the cases that the judges have reached a philosophical consensus on this matter.

The counter-argument to the 'blank cheque' approach to constitutional interpretation runs as follows. To recognise the clear democratic, representative underpinnings of the Australian constitutional system without the necessary implications of fundamental rights would be to strip the Constitution of much of its substantive meaning. Limiting constitutional interpretation to the narrow words of the document may do serious violence to the fundamental principles on which the system is based. Calling for a flexible, inclusive approach to constitutional interpretation, this approach was attractive to many of the judges in the cases under consideration. Attractive, at least, in theory; as stated, in

42 Zines, L., 'The Entrenchment of Individual and Democratic Rights' in *Constitutional Change in the Commonwealth* (1991) Cambridge University Press, Cambridge, at 52. Some would argue that even in countries with written bills of rights, often there is, in practice, no democratic check on the judicial interpretation of the outlined rights. In those situations, however, the text of the bill of rights at least provides democratically structured guidelines.

43 381 US 479 (1965).

44 410 US 113 (1973).

practice this approach runs into the problem of defining limits and boundaries.

The decisions have also fuelled the debate on the adoption of a bill of rights. Recognising their significance, Justice Wilcox has stated:

the decisions represent the high-water mark, so far at least, in relation to the implication of constitutional human rights guarantees in Australia. They demonstrate the possibility of human rights being constitutionally protected, even in the absence of express words.⁴⁵

Although heralding the decisions, proponents of a bill of rights have also pointed to the inherent uncertainty in relying on constitutional implications. The messages in the cases are conflicting. The fact that so many of the judges were concerned with limiting the freedom of communication, and avoiding rights terminology altogether, is further cause for concern.

Detractors of a bill of rights point to judicial activism in the area of rights as obviating the need for a formal document listing them expressly. Indeed, compared to the open texture of constitutional interpretation using implications, the idea of a bill of rights may seem unduly constraining. It is at least clear that one argument has been foreclosed on detractors of a bill of rights: the warning that the judiciary will inevitably assume more power and influence (and hence become more 'politicised') under such a scheme appears moot. Even absent a bill of rights, as witnessed by these three cases, the Court has already begun to answer political questions.

Conclusion

In *Australian Capital Television*, *Nationwide News* and *Theophanous*, the High Court has moved decisively into the controversial area of implied rights. The decisions accord with modern conceptions of what is acceptable in a representative, democratic society, but fall far short of creating a right to freedom of expression. The crux of the matter, however, is the process by which the cases were decided. Many questions have been left unanswered, not least of which is the precise scope and extent of such rights. As it stands, the only certainty is that implied

45 Wilcox, M., *A Bill of Rights for Australia?* 1993, The Law Book Company, Sydney, p. 206.

rights will be the subject of much litigation, debate, and discussion. And with the door to implied rights now slightly ajar, the only remaining question is how wide it will swing; almost certainly, there will be no pushing it shut.

