CORPORATIONS, DEMOCRACY AND THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION: TOWARDS A PLURALISTIC ANALYSIS OF CONSTITUTIONAL LAW

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[In this paper, the author outlines a legal pluralist analysis of the High Court of Australia's jurisprudence on the implied freedom of political communication. The focus is on the Court's attitude to corporate power in constitutional law as revealed in cases involving corporate litigants such as Australian Capital Television Pty Ltd v Commonwealth *and* Nationwide News Pty Ltd v Wills, *but also the recent decisions of* Lange v Australian Broadcasting Corporation *and* Levy v Victoria *The discussion centres on the issues of democratic accountability raised by these developments in the context of the shifting of power from states to the private institutions of the market. The vision of the corporation as a constitutional actor which underpins the Court's jurisprudence is analysed in detail, and the argument is advanced that, to the extent that this denies corporate normativity, it undermines the democratic control of corporate power.]*

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INTRODUCTION

The globalisation of the economy[1] and the world-wide spread of constitutionalism,[2] two of the most dynamic phenomena of the late twentieth century, both raise crucial issues about the democratic accountability of power for the opening years of the new millennium. The liberalisation of trade has led to concerns about a net loss of control over the economy from the (democratic) institutions of the state to the (for profit) institutions of the market, often at a cost too high in terms of social upheaval.[3] The recent profusion of constitutional charters of rights has also sparked a debate about the democratic legitimacy of judicial review, and whether constitutionalism affects the democratic quality of public policy.[4] In this paper, I explore the potential for scholarship in linking the discourses about these two phenomena which, so far, have generally developed on independent trajectories. In particular, I ask how we should view the institutional and intellectual landscape of constitutionalism, based as it is on the central idea of limiting the state, in a world where state power is being increasingly diffused and disaggregated, often to the aggrandisement of the corporate sector.

Although calls for an indigenous Bill of Rights have so far gone unheeded, Australia has not been unaffected by the global expansion of constitutionalism, which here has been manifested in the High Court of Australia's development of the doctrine of implied constitutional freedoms. This began in the cases of *Australian Capital Television Pty Ltd v Commonwealth*[5] and *Nationwide News Pty Ltd v Wills*,[6] when the High Court ('the Court') declared the existence of a freedom of political communication, implied in the structure of the Commonwealth Constitution, in order to strike down federal legislation. The high water mark of the jurisprudence may have been *Theophanous v Herald & Weekly Times Ltd*,[7] (seen as the Australian version of *Sullivan v The New York Times*),[8] where the implied freedom provided a defence to defamation not available at common law. The recent judgments of *Lange v Australian Broadcasting Corporation*[9] and *Levy v Victoria*[10] may, however, be seen in time as marking the end of an activist period in the Court's history. In these cases, the Court has overruled the reasoning of the majority in *Theophanous*; to the extent that Brennan CJ has succeeded in

1 See generally James Mittelman (ed), *Globalization. Critical Reflections* (1996).

2 See generally Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771.

3 See, eg, Gary Teeple, *Globalization and the Decline of Social Reform* (1995); cf Paul Hirst and Grahame Thompson (eds), *Globalization in Question: The International Economy and the Possibilities of Governance* (1996)

4 See, eg, C N Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (1995); cf David Beatty, 'Law and Politics' (1996) 44 *American Journal of Comparative Law* 131.

5 (1992) 177 CLR 106 ('*ACTV*').

6 (1992) 177 CLR 1 ('*Nationwide News*')

7 (1994) 182 CLR 104 ('*Theophanous*'). See also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ('*Stephens*'); *Cunliffe v Commonwealth* (1994) 182 CLR 272

8 376 US 254 (1964); see Ian Loveland, '*Sullivan v The New York Times* Goes Down Under' [1996] *Public Law* 126.

9 (1997) 145 ALR 96 ('*Lange*').

10 (1997) 146 ALR 248 ('*Levy*').

steering the Court towards more restrained constitutional interpretation, the implied freedoms adventure may have reached its limit for the time being.[11]

This may then be an appropriate juncture to reconsider the significance of these cases. In this paper, I discuss these cases in the globalising context outlined above, and highlight one of their most important, but largely overlooked, aspects — that some of the principal beneficiaries were powerful private corporations. The interface between constitutional law and corporate power raises a number of questions for courts and legal theory alike. In particular, it requires us to consider the implications of global trends which see much real power passing from the nation-state to the internationalised market economy. This raises doubts over many of the assumptions on which much of the legal system and orthodox scholarship is based, not least the traditional constitutional framework that places the sovereign state at the centre of its inquiry. The challenge is whether existing understandings provide an adequate theoretical basis for dealing with the power wielded by powerful corporations when they appear in constitutional litigation. The answer is of crucial importance to how we think about the enterprise of constitutional law in Australia, and also in those jurisdictions contemplating constitutional reform.[12]

The body of this paper is divided into three parts. In Part I, I highlight the relevance of the corporation in constitutional law by juxtaposing the paradigms of legal centrism and legal pluralism and their differing perspectives on state and corporate power. I defend, with reference to the current globalising era, the pluralist insight that the state is not the sole repository of normativity, and argue that this raises potential democratic concerns regarding corporate constitutional freedoms. In Part II, I apply pluralist analysis to the implied freedoms jurisprudence and show how the Court's reasoning largely discounts the possibility of corporate normativity. In Part III, I assess the democratic quality of this doctrine. I contend that the anti-democratic implications are disproportionate to any supposed benefits, and that the most significant lesson is to reveal the limits of constitutional ideology whereby practical and symbolic obstacles are placed in the way of the democratic accountability of corporate power. I conclude by suggesting how constitutional arguments might be recast to address democratic concerns.

I THE CONSTITUTIONAL RELEVANCE OF THE CORPORATION

A *Legal Centrism and Legal Pluralism*

To argue that conferring benefits on corporations in constitutional cases deserves our fuller attention is also to make an argument about how we should theorise about law. What significance we attach to the presence of corporate

[11] For a helpful and extensive survey of the literature on these developments, see George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848, 850 fn 13.

[12] See, eg, United Kingdom, *Rights Brought Home: The Human Rights Bill* (Cmnd 3782, 1997).

parties is largely determined by the fundamental assumptions we have about law's relationship to the state, and the conceptual and normative structures which these in turn sustain. At stake is a choice between the competing paradigms of legal centrism and legal pluralism. The central understanding of legal centrism (or monism) is that only official law promulgated by the state is real law.[13] In other words, 'legislated normativity, the principal form of state normative activity, is the optimal form of legal normativity.'[14] On this account, the state is supreme in terms of its law-making power; any questions of supremacy are thus normative, involving the ranking of various systems of official norms inter se, and are resolved by the operation of a hierarchical official system.[15] The methodology is analytical, establishing the correct answer to a legal problem by the proper application of legal reasoning within the parameters of a largely autonomous body of doctrine.

By contrast, a growing body of literature under the rubric of legal pluralism questions the view that state law is the only source of normativity.[16] In the legal pluralist view of the world, society consists of a number of jurisgenerative[17] institutions, of which the state is an important example, but which also includes institutions such as the family, churches, trade unions, voluntary organisations and corporations.[18] Each of these institutions has its own recognisable normative orders, which exhibit the various indicia traditionally associated with state law, not least the ability to procure the values they embody through subtle, and sometimes not so subtle means, including the ability to coerce.[19] On this account, issues of supremacy are functional in nature, and are settled in terms of competing normative orders' relative capacities to exert organised influence over our lives. The methodology, while not discounting the importance of detailed legal analysis, also has a clear sociological element, concerned with understanding the impact of various normative structures.

13 Charles Sampford, *The Disorder of Law* (1989) chh 3–5.

14 Roderick Macdonald, 'The New Zealand Bill of Rights: How Far Does It or Should It Stretch' in *Proceedings of the New Zealand Law Conference* (1993) 94, 147. For Macdonald, this leads to the further point that:

> [T]he most liberating legislated norms are those which provide baselines for self-directed conduct by assigning justiciable rights to individuals; thus, adjudicative procedures for determining the scope and meaning of these rights are the most just mechanism for deciding between competing claims.

15 See, eg, H L A Hart, *The Concept of Law* (2nd ed, 1994) 116.

16 See, eg, S E Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869; Massimo Corsale, 'Legal Pluralism and the Corporatist Model in the Welfare State' (1994) 7 *Ratio Juris* 95; Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (1995); Gunther Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law without a State* (1996) 3.

17 Andrew Fraser, 'Populism and Republican Jurisprudence' (1991) 88 *Telos* 95, 103.

18 For an expanded account of the relevance of institutions, see Charles Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 *Federal Law Review* 185.

19 This is a truth long regarded in a number of disciplines of legal scholarship For example, in employment law the notion of 'private ordering' evokes the reality of industrial relations where shop-floor or boardroom practices have as much influence, if not more, on the lives of employers and employees as 'official' law: Harry Arthurs, 'Understanding Labour Law: The Debate over "Industrial Pluralism"' (1985) 38 *Current Legal Problems* 83.

In this paper, I adopt and defend the insight of legal pluralism that normativity, as a matter of fact, extends beyond the realm of official law.[20] This position resonates with the current globalising era where the effective exercise of economic and social (and hence political) authority is no longer (if it ever was) the exclusive preserve of the state.[21] We can measure this in various ways. Susan Strange, for example, argues that the four basic power structures of world society — security, credit, information and production — can no longer be described in terms of the state's territorial limits.[22] For her, the latter half of the twentieth century has witnessed a shift of authority from states to markets, bringing with it the increased power and influence of multinational corporations.[23] Quantitative data are also available: research conducted by the Institute for Policy Studies estimates that 51 of the 100 largest economies on earth are presently constituted by multinational corporations, leading to some startling comparisons, such as Ford being bigger than South Africa and Mitsubishi larger than Indonesia.[24] Such authority brings about compliance, as can be manifested by states modifying or abandoning their attempts to regulate the market when faced with threats by multinational corporations to relocate to jurisdictions they find less onerous.[25] With the official triumph of free trade, such de facto compliance may have reached de jure status through the adoption of formal global mechanisms, such as the General Agreement on Tariffs and Trade ('GATT') and the proposed Multilateral Agreement on Investment ('MAI').[26] My focus in this article is on the consequences of the denial of the possibility of any other serious sources of normativity beyond official law inherent in the legal centrist mindset. My purpose in utilising legal pluralism is to render transparent the assumptions upon which

20 I am less concerned to defend the position that the label of 'law' should be attached to these plural sources of normativity. To the extent that we may think of the normative influence of corporations as being on a par with the institutions of the state, calling this 'law' may have considerable rhetorical significance. However, I do not wish to be distracted from advancing the thesis of this paper by entering debates which may be seen as issues of 'intellectual hygiene' regarding whether we are speaking about legal pluralism or rule (or norm) pluralism. For a strong version of the case against applying the label 'law' see Brian Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20 *Journal of Law and Society* 192. I am happy for those who share Tamanaha's objections to read this paper as an exercise in normative pluralism: this does not materially affect its argument or conclusions.

21 Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996) 1–31.

22 Susan Strange, *The Retreat of the State* (1996) ix.

23 Ibid 44:

> [T]he shift from states to markets has actually made political players of the [transnational corporations] ... they themselves are political institutions, having political relations with civil society. These political relations are even more important than their political involvement with other firms or with specific governments. They are important at every stage of production when firms act as technical or organisational innovators, as consumers of others' goods and services, as producers and sellers, and as employers.

24 Sarah Anderson and John Cavanagh, *The Top 200 The Rise of Global Corporate Power* (1996), cited in 'Forum File: Index on Global Corporate Power', *The Canadian Forum* (Ottawa, Canada), January – February 1997, 48.

25 Harry Arthurs and Robert Kreklewich, 'Law, Legal Institutions and the Legal Profession in the New Economy' (1996) 34 *Osgoode Hall Law Journal* 1, 21.

26 Under negotiation at the time of publication. For official documentation, refer to the MAI home page maintained by the Organisation for Economic Cooperation and Development ('OECD'), <http://www oecd.org/daf/cmis/mai/maindex.htm>.

this denial is based; I believe doing so directs us to a broader (and I would add richer) perspective on the potential democratic problems posed by granting constitutional freedoms to corporations.

B *Competing Visions of Constitutional Law*

Legal centrism and legal pluralism produce radically contrasting outlooks on the relation between the state and corporations, and this impacts on the role of constitutional law and the democratic issues raised by corporate constitutional freedoms. For the legal centrist, the state's relationship with corporations is essentially vertical; the state is superior to the corporation, which, like all non-state legal persons, is subject to regulation according to the hierarchy of state norms (here principally in the form of company law). Combined with the axiomatic understanding of legal centrism that constitutional law, as a positive fact, concerns purely the state, the presence of corporate parties in the implied freedoms cases is thus merely incidental. What is important is the limitation of state power and the normative limits this builds into the state's vertical relationship with its (corporate and other) legal subjects.

In the legal pluralist vision, the corporate litigants are not just a footnote in our comprehension of constitutional law. The state's relationship with corporations is regarded as horizontal; in functional terms, state law has no necessary claim to superiority in the production of normativity over that of corporations, purely by its provenance. While it may be true that constitutional texts speak to government, it is crucial to look also to the effect constitutions have on the abilities of the various institutions to prosecute their own agenda. As legal pluralism posits the production of normativity by both the state and corporations,[27] to the extent that constitutional law exists only as a direct limitation on the former, it may confer relative advantages on the latter, and thus affects the power and influence each may exercise.

Which view we find more convincing determines whether there is a potential democratic problem in the idea of corporate constitutional freedoms. It is important here to note the link legal centrism posits between law and politics: politics is carried on within the processes of state institutions, whose authoritative decisions may then be translated into law. Democracy is therefore defined by reference to the state and is essentially formal: it is most efficacious when state power is exercised within the procedural limitations decreed by the constitution. There is accordingly little threat to democracy when corporations receive the benefit of constitutional freedoms; this in fact may enhance democracy by

[27] One commentator has argued that the web of corporate enterprise now

> touch[es] every minute of our waking lives: health and diet; nutrition, Third World poverty, environmental destruction; animal welfare (conditions of both life and death), human welfare (working conditions, both economic and physical); packaging, waste and advertising .. and last, but by no means least, freedom and the right to free speech.

Michael Mansfield, 'Power, Corruption and Fries', *The Observer (Review)* (London, UK), 13 April 1997, 15.

defining more clearly the procedural limitations on state power.[28] To the extent that the cases may provoke a debate about overweening corporate power, this is properly redressed through the process of democratic politics and the promulgation of more effective state law.

For legal pluralism, democracy is necessarily a more substantive concept. Here, 'politics is larger than what politicians do'[29] and so also involves the exercise of power by non-state authorities. This leads first, even on formal grounds, to a concern that focusing exclusively on the state as a site of normativity involves only the subjection of a part of political activity to the processes of (state) democracy. Describing democracy is accordingly a normative exercise; the legal centrist account is making a statement about how we should rank our concerns about state and non-state actors. It is therefore appropriate to ask what is legal pluralism's substantive definition of democracy. It is submitted that the goal of rendering transparent all sources of power lends itself to an expanded definition of democracy, namely the 'active participation of people in determining the conditions of their existence and association.'[30] This is given coherence through the principle of equality so that a democratic constitution is 'one which gives the fullest expression to the right of political equality and one which facilitates rather than impedes measures designed to promote either social and economic equality or social and economic equity.'[31]

The democratic concern legal pluralists have with corporate constitutional rights is that creating the conditions for freeing up corporate normative power may be inimical to equality. This rests on a historical understanding of the most likely institutional support for the goal of equality. It is the state, through official law, which has been the vehicle for promoting the general welfare through redistributive intervention designed to ameliorate the excesses of the market.[32] In

[28] For a discussion of how juridified human rights are primarily concerned with procedural values, see John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (1980), Conor Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview' (1993) 52 *Cambridge Law Journal* 89

[29] Strange, above n 22, xiv.

[30] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (1997) 10 For Bakan, existing state institutions provide

> only a thin version of democracy. Most people do not participate in self-government, except in a rudimentary and formalistic fashion: they vote for representatives every few years on the basis of platforms formulated by parties to which they do not belong, and they have little access to the government of the day unless they are part of an organised lobby group The active exercise of rights to form and join political parties, and to lobby representatives and governments, not to mention run for election, requires time, energy, information and resources not available to most people, especially those struggling just to make ends meet. In contrast, powerful economic actors and wealthy individuals have a disproportionate influence on the political process.

[31] K D Ewing, 'Human Rights, Social Democracy and Constitutional Reform' in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights* (1996) 40, 42 An important component of this approach is the idea that this may 'require the imposition of controls on those who exercise great private power, to ensure that that power is not exercised in a manner which is inconsistent with the needs of the community as a whole': ibid 49.

[32] That is not to deny that the state may, as the recent past clearly shows, see its interests in the advancement of law running counter to democratic (ie equality-serving) values; however, to the extent that institutional power has been used in furtherance of equality, it remains the case that this has been through the exercise of state law.

contrast, corporations do not operate, nor are they designed to, with concerns of the general welfare to the fore:[33] they serve a much narrower group of interests (whether shareholders or controllers), where the primary goal is the maximisation of profits, with any social welfare benefits mere adjuncts to questions of transaction costs.[34] Accordingly, we should then direct our attention more closely to the High Court's treatment of the corporate parties in the implied freedoms cases. Two important questions are opened up from a pluralist perspective: first, whether the implied freedoms jurisprudence is premised on a denial of the normativity of corporate power; and second, if this is so, whether this jurisprudence alters the balance between the exercise of state and corporate power as to diminish the potential for official law to serve democratic ends. In Part II, I turn my attention to the first of these questions.

II THE HIGH COURT'S CONSTITUTIONAL VISION OF THE CORPORATION

To the legal pluralist, one of the most striking aspects of the High Court's initial implied freedoms jurisprudence is that the (media) corporate parties invariably won. In *ACTV*, (private) television companies successfully challenged a total ban on political advertising on television or radio during election campaigns, contained in the *Broadcasting Act 1942* (Cth), on the basis that it infringed the implied constitutional freedom of political discussion. In *Nationwide News*, the invocation of the same freedom provided a constitutional defence to another media corporation being prosecuted for bringing the Industrial Relations Commission into disrepute under the *Industrial Relations Act 1988* (Cth). Finally, in *Theophanous* and *Stephens*, news publishing corporations received immunity in actions for defamation on account of the incompatibility of the freedom with the common law right of public figures to sue in protection of their reputation. The recent case of *Lange* appears to buck this trend: here a unanimous Court held, partly overturning the reasoning in *Theophanous* and *Stephens*, that the laws of defamation met the test of being 'reasonably appropriate and adapted to serve a legitimate end'[35] and so were compatible with freedom of political communication.[36] Although no private corporations were directly

[33] Another way of putting it is the extent to which law will be more 'public-' or 'private-regarding'. For a discussion of the various antagonisms which underlie these ideal-types, see Louis Michael Seidman, 'Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law' (1987) 96 *Yale Law Journal* 1006, 1019–28.

[34] Harry Glasbeek, 'The Corporate Social Responsibility Movement — The Latest in Maginot Lines to Save Capitalism' (1988) 11 *Dalhousie Law Journal* 363, 382–93.

[35] *Lange* (1997) 145 ALR 96, 112, 119. As a result, the judgment extended the defence of qualified privilege to the publication of defamatory material relating to all levels of government.

[36] See also *Levy* (1997) 146 ALR 248: the issue here was whether the *Victorian (Game) (Hunting Season) Regulations 1994* (Vic), which prohibited access to permitted hunting areas to non-holders of a valid game licence, were ultra vires the Parliament of Victoria on the grounds that, inter alia, they offended the implied freedom of political discussion. Although this was not directly concerned with the law of defamation, the Court did address arguments that 'favoured the notion of a constitutionally protected freedom of speech which would afford a constitutional deference to actions for defamation in matter published in the course of political discussion': *Levy* (1997) 146 ALR 248, 251. On this point, the *Levy* court concurred with the reasoning

involved,[37] it seems clear that they would have lost their recourse to the *Theophanous* defence in any event. However, *ACTV* and *Nationwide News* were not disturbed,[38] and so in direct doctrinal terms, the democratic implications of corporate constitutional freedoms remain live. It is therefore legitimate to examine the Court's attitude to corporate power.

The difficulty we encounter here is that the Court does not engage directly with these issues; there is, for example, no express discussion of whether corporations have standing to bring such challenges. This difficulty is surmounted by employing the methodology suggested by legal pluralism's scepticism about preoccupation with doctrinal analysis.[39] For the pluralist, disagreements on questions of constitutional interpretation are 'secondary or displacement issues over which jurists puzzle endlessly, but which presuppose an existing (and uncontroversial) framework of analysis.'[40] It is therefore important to look below the surface of doctrine for a unifying framework which reveals the Court's attitude to corporate power.[41] It is submitted that on closer analysis, the implied freedoms reasoning amounts to a denial that corporations exercise significant normative power. This becomes clear when we highlight the three dominant strands of the jurisprudence which made the *ACTV* and *Nationwide News* decisions possible (and which also run through the apparent setbacks of *Lange* and *Levy*). These are: the Court's framework of formal equality; its general conception of constitutional freedoms as negative limits on the state; and its understanding of (political) communication as a transparent medium.

A *Formal Equality*

The first element of the Court's judgments which sheds light on its attitude to corporate power is its framework of formal equality. This flows from the central tenet of the liberal rule of law that '[a]ll are equal before the law.'[42] However, it is important to ascertain the precise meaning of constitutional equality for the Court. An important indication here lies in the mode of reasoning adopted; the more abstract this is the less prominent in its mind will be questions of imbal-

given in *Lange* See also Anne Twomey, 'Dead Ducks and Endangered Political Communication — *Levy v State of Victoria* and *Lange v Australian Broadcasting Corporation*' (1997) 19 *Sydney Law Review* 76

37 It should be noted though that some of the corporate parties to the earlier cases (and other media corporations) were granted (conditional) intervener status: eg The Herald and Weekly Times Ltd and Nationwide News Pty Ltd intervened in both cases.

38 The Court seems to refer with approval to the fact that the case in *Levy* is based on these two cases rather than *Theophanous* and *Stephens*. *Levy* (1997) 146 ALR 248, 250–1 (Brennan CJ), 289 (Kirby J).

39 Macdonald, above n 14, 145. Macdonald (following Robert Samek) characterises this as a fascination for 'meta-issues', ie 'those which cause commentators to concentrate on what a Bill of Rights says in its various provisions, and on the grammar, syntax and vocabulary with which it says what it says'

40 Ibid.

41 Thus although *ACTV* and *Nationwide News* will be important sites of inquiry, *Lange* and *Levy* may be just as important in establishing what ideological continuity there may be in the implied freedoms cases despite the ostensible doctrinal reversal.

42 *Leeth v Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J).

ances of power. A tendency towards abstraction is strongly evident in two important stages of the Court's analysis. First, the constitutional implication itself is formulated at a high level of generality, which few would argue would direct the Court to a particular result.[43] This abstraction continues when the Court discusses possible limitations to the newly found principle.[44]

The principal effect of this abstraction is to displace the case from its concrete, material setting, making the process of adjudication more a philosophical inquiry into the compatibility of the impugned law with generalised concepts such as freedom of political discussion. This removal from time and space has important consequences for how the Court deals with corporate power: parties become formal equals at the door of the courtroom, they are dealt with as ahistorical beings, and the fact that some of them may have acquired massive amounts of economic and social power is irrelevant. This framework creates important advantages for the corporation, and allows it to benefit from the corollary of abstraction, namely universalism. It follows from the treatment of parties as formal equals that there should not be more protection of rights granted to the powerful, just as there should not be less protection granted to the weak; equally, however, there should not be less protection for the powerful.

Thus, in the present context, freedom of communication, which might be thought of as a key protection of relatively powerless (natural) individuals, can be used by corporations to mount a successful challenge against state regulation, in what might be more fittingly regarded as the contest between two powerful normative orders. This personification (or personation) of the corporation makes it easier to persuade courts that it does not offend democratic concerns to grant corporate freedoms against measures regulating that power. In terms of the question of corporations' normative power, formal equality is important in constructing an impression of a binary world, consisting exclusively of the state and individuals with the latter necessarily incapable of exercising normative power on a scale commensurate with the former.

B *The Court's Conception of Constitutional Rights and Freedoms*

The second element of the judgments which clarifies the Court's view of the corporation is its general conception of constitutional rights and freedoms[45]

[43] This is acknowledged, for example, by Brennan J in *Nationwide News*, where he comments that '[t]o say that freedom to discuss governments and political matters is essential to the existence of a representative democracy is not to define with any precision the limitation on legislative power implied in the Constitution': (1992) 177 CLR 1, 50.

[44] 'A law [prohibiting communication] can be justified as consistent with the *prima facie* scope of the implication only if, viewed in the context of the standards of our society, it is justified as being in the public interest for the reason that the prohibitions and restrictions on communication about relevant matters which it imposes are conducive to the overall availability of the effective means of such communication in a democratic society or do not go beyond what is reasonably necessary for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society': ibid 77 (Deane and Toohey JJ).

[45] Although the Court expresses its constitutional protection of political communication in terms of implied freedoms rather than rights, I consider it less important how the cases are characterised than that they amount to a paradigm shift which alters the balance of power between the judici-

which underlies its treatment of the freedom of political discussion. The key here is to see how the surface discussion relates to underlying questions of social theory. The choice is between a society consisting of pre-social individuals who contract with each other to enter civil society, or one where individuals are socially constructed and situated. Central to the pre-social view is that individuals are imbued with fundamental rights and freedoms to protect them from interference with their pre-social preferences.[46] Within this understanding, the threat to freedom comes from the state: this can range from the classical liberal version, where virtually all state regulation is necessarily suspect, to a more modern liberalism, which recognises a legitimate role for the state in redressing inequality and checking the excesses of the market, but where state intervention may still be held to impinge unduly upon individual liberty.

Examination of the cases reveals that the emphasis throughout is on prohibition and limitation.[47] This is expressly acknowledged by Deane and Toohey JJ in *Nationwide News* where they underscore that the essence of the implication is its interdiction of government action:

> The implication is not, of course, that the people of the Commonwealth will have free access to all the means of communication any more than is s 92's express guarantee of freedom of inter-State trade, commerce and intercourse a guarantee of free transportation. It is an implication from legislative prohibition and burdensome interference. Its primary operation is to confine, as a matter of construction, the scope of the legislative powers conferred by s 51 of the Constitution.[48]

ary and other branches of government· Tony Blackshield, 'The Implied Freedom of Communication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232, 235–9. See also Geoffrey Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 1, 33 who discusses the possibility of the cases under discussion opening up the way to 'the development by our judges of an implied Bill of Rights ' As such, I will assume that in substance, the High Court's jurisprudence amounts to the adoption of the discourse of constitutionalism as practised in jurisdictions with express constitutional bills or charters of rights. It operates within the same functional framework of placing supralegal limits upon state action. It would not therefore be inappropriate to refer to the developments under discussion in terms of the discourse of rights constitutionalism.

46 Jeremy Waldron, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987) ch 1

47 This is perhaps seen most clearly in Brennan J's judgment in *Nationwide News*, both in regard to the freedom and its possible qualification, where he states.

> I would state the governing implication in these terms: the Constitution *prohibits* any legislative or executive infringement of the freedom to discuss governments and governmental institutions and political matters except to the extent necessary to protect other legitimate interests and, in any event, not to an extent which substantially impairs the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions.

He then goes on to characterise his formulation as an 'implied *limitation* on legislative power'· (1992) 177 CLR 1, 50–1 (emphases added).

48 Ibid 76 See also *Lange* (1997) 145 ALR 96, 106–7·

> [Sections] 7 and 24 . necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.

The consequence of this liberal understanding of rights and freedoms is that the Court operates within the framework of the public–private divide.[49] This posits two spheres of social existence: individuals and their rights are found in the private sphere, in contrast to the collective action of the state which takes place in the public one. At an analytical level, this means that the exclusive business of constitutional law is the state. However, it also provides a powerful normative justification for this practice. It is only through collective action in the public sphere that rights in the private sphere might be impaired; as only the state exists in the public sphere, ipso facto, it is the only potential oppressor. In terms of the question of corporations' normative power, the characterisation of freedoms as negative limitations on the state further reinforces the picture that only the state exercises normative power on a scale with which we should be concerned.

C *The Meaning of Communication*

The third area indicating the Court's attitude to corporate power is its understanding of the nature of communication, which affects how relevant it regards the particular activities engaged in by corporations in the present cases. In the liberal world of pre-social individuals, expression does not have a role in shaping the social world — it exists prior to the emergence of various forms of communication. Accordingly, communication operates in a linear fashion where the emphasis is on quantity: freedom of expression operates to enable individuals to make more informed choices in the political process, and accordingly to enhance the scope of their individual freedom. This results in an essentially neutral conception of communication, consistent with the liberal conception of rights as the means towards the good society, where the content of communication is unimportant as long as the message is getting through in quantitative terms. The contrast here is with the view that communication has a vital role not only in creating social reality. It follows that communication can never be a neutral means, but can work for domination as much as liberation: it makes a difference what is said, who says it, how it is said, and most important, why some statements are regarded as more authoritative than others.[50] The relation of expression to democracy on this view is therefore more of a qualitative than a quantitative issue.

[49] See generally Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (1988) 277–8.

[50] For an elaboration of this position see Allan Hutchinson, 'Money Talk: Against Constitutionalizing (Commercial) Speech' (1990) 17 *Canadian Business Law Journal* 2, 3–6. Hutchinson places language within a dialogic view of discourse:

> Language is not a transparency through which the world is observed nor a catalogue of labels to be attached to the appropriate contents of the world There is no form of pure communication that merely represents instead of creating ... Language is a social medium. It shapes society and its individuals as they work to reshape it. To acquire and exercise a language is to engage in the most profound of political acts.

Ibid 5

Examination of the jurisprudence reveals that the Court tends more towards the former view. The importance of expression for its own sake is encapsulated by Mason CJ in *ACTV*:

> Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government.[51]

The emphasis on quantity is also evident in the Court's analytical framework — there is an almost automatic assumption that any regulation of speech is hostile to (rather than a potential buttress to) freedom of communication. This leads to a presumption that speech should be permitted except where the state (on whom the onus is now placed) can point to countervailing interests which justify any (putative) limitation. This quantitative approach is also indicated by the short shrift often given to qualitative arguments, such as the contention in *ACTV* that the capacity of individuals to communicate with each other about political matters is trivialised by the type of advertising the legislation sought to prohibit.[52] In terms of the question of corporations' normative power, this linear understanding of communication underpins the conclusion that the particular activities of the corporations under discussion have no normative consequences, unlike the state legislation which regulates that activity.

These aspects of the implied freedoms jurisprudence constitute important denials of the normativity which legal pluralism contends is inherent in corporate power. To the extent that these are the dominant strands of reasoning on which *ACTV* and *Nationwide News* are grounded, and which are not departed from in *Lange* and *Levy*, it is submitted that we can reach the general conclusion that the Court's constitutional conception of the corporation is firmly within the legal centrist mindset. In the concluding part of this article, I consider whether the other theoretical concern of legal pluralism is also made out — does this jurisprudence result in a net loss for democracy?

III THE DEMOCRATIC DEFICIT OF CORPORATE CONSTITUTIONAL FREEDOMS

The foregoing analysis of the High Court's conception of the corporation produces a sharp dissonance with the account of the corporation as a powerful source of political power outlined in the opening section. So what? It may be possible to accept (a) the claim that corporations exude normativity, and (b) that

[51] *ACTV* (1992) 177 CLR 106, 145.

[52] Ibid 130–2 See also Tom Campbell, 'Democracy, Human Rights, and Positive Law' (1994) 16 *Sydney Law Review* 195, 202–3. This lack of taste for qualitative argument equally applies to the Court's summary dismissal that the other aspect of the *Broadcasting Act 1942* (Cth), the provision of free access to the media, might be conducive to the well-being of freedom of communication: ibid 224–6.

the Court discounts this possibility, but resist the conclusion that corporate constitutional freedoms represent an anti-democratic development. This response rests on two grounds. First, that there are benefits within the jurisprudence which represent important democratic advantages — the principal idea being that constitutional limitations on the state are necessary to the health of a democracy. Second, that the above analysis somewhat caricatures constitutional doctrine, and ignores the extent to which the Court does recognise that corporations are powerful institutions whose power may need to be restricted.

These are important objections to the thesis advanced in this article — however, I believe they can be met. The first can be countered by reference to the Court's own standard of proportionality. This argument operates at two levels: first, that the benefits brought by constitutionalism are outweighed by the detriments suffered. Second, it questions the implicit fit between means and ends; that is, it suggests that constitutionalism is not necessary to the enjoyment of these benefits. The response to the second objection is that examination of the supposedly more progressive doctrine is instructive in charting the ideological bounds of constitutional adjudication. This reveals structural limits throughout the jurisprudence which undermine constitutional law's democratic potential. I conclude this part of the paper with some preliminary suggestions as to the forms of argument which might bring issues of democracy more readily to the surface.

A *Assessing the Benefits of Constitutionalism: An Exercise in Proportionality*

The overarching contention of the argument from the benefits of constitutionalism is that limits on governmental power are necessary to democracy; freedom of the media plays a key role in holding governments to account, particularly in a Westminster constitutional system where conventional limitations may be an insufficient check on governmental power between elections.[53] This argument rests on the implicit claim that placing constitutional limits on the state is, in comparison to corporations, proportionate to the greater threat it poses to freedom of communication. This rests though on a deeply partial application of assumptions about the effect of public power on the communicative process which, if equally applied to private power, lead us to question whether the greater cost consists in the absence of restraint on the former.

The foundation of the argument from government restraint becomes clear when we highlight the lack of proportionality in the Court's analysis; the problem is not that it has no appreciation of the social constitution of expression, but rather that its understanding is partial in two important senses. The first of these is the disproportionality in its application of the social consequences of speech, depending on whether we are dealing with public or private actors. When discussing the effect of regulation, the Court holds that government's excessive power can influence how people act in deliberative politics and so distort the marketplace of ideas. However, the recognition that concentrations of power

[53] Eric Barendt, 'Inaugural Lecture — Press and Broadcasting Freedom: Does Anyone Have Any Rights to Free Speech?' (1991) 44 *Current Legal Problems* 63, 66.

result in inequality among speakers disappears when government is not present.[54] Second, the Court's (limited) account of speech as socially situated is itself a caricature. Its reasoning oscillates between the extremes of considering humans as rational strong-willed beings for whom free communication enhances autonomy (when dealing with private speech) or as emptier vessels, subject to manipulation by those controlling the dissemination of information (when dealing with government regulation).[55] We can contrast this with contemporary theories of language and communication, such as the work of the philosopher Charles Taylor, which paint a more complex picture. Here, the provenance of the speaker cannot affect the social effects of communication which itself is seen as a more dialectical process whereby speech both shapes, and is shaped by, social reality.[56]

As Frederick Schauer observes, this partiality can only make sense within the understanding that governmental regulation represents a greater risk of distortion than excessive concentrations of power in the government-free marketplace of ideas.[57] However, whether this is true is in essence an empirical question, which may be highly problematic to answer in the affirmative:

> When government is out of the picture, are those remaining forces of power invariably so ineffective that there is less limitation on communicative ability than would be the case were government to be involved? Or is it possible that at some times and in some places and as to some issues, the risks of governmental intervention are no greater than the risks consequent to the imbalances of power that exist when government steps back? To put it differently and starkly, when the state does not decide what is to be said, who does and on what basis?[58]

In the modern communications age, a large part of the answer is the corporate outlets of the mass media[59] — in other words, once we apply equally to all

[54] As Frederick Schauer puts it, while the state's motives for restricting speech are taken as evidence of a non-ideal world (which requires constitutional supervision), once regulation is removed we shift to an ideal paradigm where all non-state participants are presumed equal in their ability to speak and understand: Frederick Schauer, 'Free Speech in a World of Private Power' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (1994) 1, 7.

[55] For a discussion of the pathologies in judicial reasoning created by this dichotomy in a more developed system of constitutional jurisprudence on expression, see Richard Moon, 'The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication' (1995) 45 *University of Toronto Law Journal* 419.

[56] Charles Taylor, *Human Agency and Language: Philosophical Papers I* (1985) 231–2:

> Language is not an assemblage of separable instruments, which lie as it were transparently to hand, and which can be used to marshal ideas, this use being something we can fully control and oversee. Rather it is something in the nature of a web, and to complicate the image, is present as a whole in any one of its parts. To speak is to touch a bit of the web, and this is to make the whole resonate ... But because we cannot oversee it, let alone shape it all, our activity in speaking is never entirely under our conscious control. Conscious speech is like the tip of an iceberg. Much of what is going on in shaping our activity is not in our purview. Our deployment of language reposes on much that is preconscious and unconscious.

[57] Schauer, above n 54, 9.

[58] Ibid 9–10.

[59] Mark Tushnet, 'Corporations and Free Speech' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (1990) 237 See also Strange, above n 22, 100, who observes that '[a] classic, extreme example of one process by which authority has massively shifted away from the governments of states to the corporate management of firms is to be found in telecommunications.'

sources of power the more complex understanding of communication outlined above, it is no longer credible to assume the 'truth' simply emerges once the danger of state regulation is removed.[60] In terms of the basis on which the corporate media will influence communication, the least that can be claimed (although stronger arguments can be presented)[61] is that the sectional interests which corporations are designed to serve — here the views of the proprietors as to what is important — will necessarily be less well disposed towards democratic concerns than a legislature amenable through a more public process to the influence of a broader constituency.[62]

Does the empirical evidence confirm that there is good reason to doubt that in practice the state will be the greater threat to free communication? It is submitted that we need look no further for this confirmation than *ACTV* where the decision of the Court to strike down the restrictions on political advertising opened up the possibility of those with the private wherewithal having access to the airwaves and using that influence to persuade those without what is in their best interests.[63] To assert that the subsequent choices taken by electors will be freer exercises of individual autonomy in the absence of the *Broadcasting Act 1942* (Cth) is a fiction; the question is how the unfettered influence of private control over the flow of information will affect the perception of electors. As Tom Campbell has argued,[64] it is more probable that freedom of communication, the ostensible rationale for the decision, will be impaired by allowing power and wealth to dominate political advertising.[65]

Even if it is accepted that the case from government restraint cannot stand, we still need to consider that there may be other benefits within the implied freedoms doctrine. Thus it may be argued that the public–private divide cannot easily be done away with as the idea of the private sphere is an important source for the

[60] Richard Abel, 'Public Freedom, Private Constraint' (1994) 21 *Journal of Law and Society* 374, 375–6.

[61] There is no shortage of literature questioning the democratic credentials of the media in Australia: see, eg, Alex Carey, *Taking the Risk out of Democracy* (1995), Padraic McGuinness, *The Media Crisis in Australia: Ownership of the Media and Democracy* (1990); Paul Chadwick, *Media Mates: Carving up Australia's Media* (1989); Alex Carey, 'The Ideological Management Industry' in Ted Wheelwright and Ken Buckley (eds), *Communications and the Media in Australia* (1987) 156.

[62] My argument is not to dismiss completely those elements of public choice theory that suggest it is possible for the legislative process to be 'captured' on occasion by interest groups; my point is simply that to the extent broader democratic concerns can be served at all, this is much more likely to be achieved through legislative politics.

[63] K D Ewing, 'The Legal Regulation of Electoral Financing in Australia: A Preliminary Study' (1992) 22 *University of Western Australia Law Review* 239.

[64] Campbell, above n 52, 202: 'The fact that wealth and property dominate modern communications may be seen as a corruption of the political process precisely because it diminishes the sort of freedom of communication that "truly" representative government requires '

[65] A related concern is that the very process of constitutionalism is incapable of demonstrating the validity of its own basis. The Court's method is principally normative, not empirical; it is not its concern to establish the veracity of the greater threat from governmental regulation. The ensuing gap between the Court's normativity and what Taylor suggests is a more complex reality means that we cannot be satisfied, from examination of the judgments in *ACTV* and *Nationwide News*, that the assumption of the greater threat from public power is well-founded. We have to take it on faith that this is so.

legal protection of privacy and autonomy.[66] Also, it could be said that formal equality has been an important emancipatory ideal for those denied basic political freedoms, and remains a crucial bulwark against discrimination.[67] However, it is not clear that this argument will not also fall foul of the cost–benefit test. We may accept the historical liberating importance of formal equality, as demonstrated, for example, by its use by the United States civil rights movement in the dismantling of official apartheid in education.[68] However, particularly when we are concerned with private barriers to equality, we may juxtapose this with its present use as a shield against affirmative action programmes designed to redress more structural discrimination.[69] It is also possible to accept that there is value in the idea of privacy, while maintaining that the public–private divide protects illegitimate power differentials — this argument has featured in feminist scholarship.[70] These remarks place the collateral advantages of constitutionalist doctrine in the same category as the argument from government restraint — a plausible case that the costs outweigh the benefits installs a presumption against the democratic necessity of constitutionalism, in the absence of compelling contrary evidence. However, they also point to another potential disproportionate element in the jurisprudence — this questions the fit between means and ends by raising the possibility of separating what we may find valuable in the objectives of constitutional doctrine from the practice of constitutionalism itself.

I propose to address this possibility by considering the consequences had either *ACTV* or *Nationwide News* gone the other way. Schauer characterises *ACTV* as a typical use of the free speech principle as a second order reason to block the state doing something for which it would otherwise have good first order reasons.[71] This is, therefore, not the act of an evil government stifling political opposition; what we are dealing with are micro questions about the best arrangements for fair electoral laws, about which reasonable people may disagree. In other words, if the legislation had stood (and I would apply the same conclusion to *Nationwide News*),[72] there would not have been a material diminution, at the macro-level, of

66 For a discussion of this point by an author who is aware of the political shortcomings of the public–private divide, see Andrew Clapham, *Human Rights in the Private Sphere* (1993) 134–5.

67 See, eg, David Beatty, 'The Canadian Conception of Equality' (1996) 46 *University of Toronto Law Journal* 349.

68 This is true of scholars generally critical of the progressive potential of constitutional rights: see, eg, Louis Michael Seidman and Mark Tushnet, *Remnants of Belief* (1996) 4.

69 See, eg, *Adarand Constructors, Inc v Pena*, 515 US 200 (1995). See also Carlos Nan, 'Adding Salt to the Wound: Affirmative Action and Critical Race Theory' (1994) 12 *Law and Inequality* 553.

70 Nicola Lacey, 'Theory into Practice? Pornography and the Public/Private Dichotomy' (1993) 20 *Journal of Law and Society* 93, 100.

71 Schauer, above n 54, 2.

72 It is notable that much of the existing 'critical' literature on the implied freedoms jurisprudence focuses almost exclusively on *ACTV* — one might infer from this that *Nationwide News* represents a more difficult target. The implicit distinction with *ACTV* is that here we have truly capricious government behaviour: ibid. However, it would seem to be generally accepted that the state has a valid first-order interest in protecting the administration of justice. If this is the case, then it is difficult to see why the question of whether tribunals are entitled to protection by the equivalent of contempt laws is any less a second-order issue than considering what restrictions on financial influence on broadcasting are necessary to secure the first-order goal of a fair electoral system. It seems counter-intuitive to claim, as any attempt to distinguish the two in support

freedom of political communication. This suggests that something recognisable as political liberty existed in Australia prior to the implied freedoms jurisprudence, and that the benefits attributed to constitutionalism cannot depend on judicial review alone, but require the political will and support of more significant societal players.[73] (The historical record all too clearly shows the insufficiency of constitutional review to defend liberty when such political will is actively prosecuting an illiberal agenda).[74] We could thus abandon constitutionalist forms on the basis of the adverse cost-benefit analysis, but not necessarily suffer the attendant loss of its associated values. This last point indicates that one of the important aspects of our inquiry should be to examine more closely the values which constitutionalism is integral to serving, in terms of how these may constrain constitutional courts in the creation of their jurisprudence. It is to this question that we now turn.

B *Charting the Bounds of Constitutional Ideology*

The second principal objection to depicting the implied freedoms jurisprudence as anti-democratic is that there is evidence within this and other doctrine that the Court does take on board the power wielded by corporations and so does not always (erroneously) treat them as the equivalent of natural persons. The response to this objection goes to perhaps the most fundamental point arising from the analysis of these cases which is that, even in their most progressive guise, they render transparent the ideological limits of constitutional adjudication. The implied freedoms cases confirm the evidence from other jurisdictions[75] that courts undertaking constitutional review generally align themselves with the dominant ideology of society. Here the High Court's reasoning falls squarely within the confines of liberal ideology which limits the democratic potential of constitutional freedoms in significant ways. By constitutional ideology, I refer here simply to the shared understandings and beliefs which structure the judicial

of the proportionate case for constitutionalism is forced to, that if the *Industrial Relations Act 1988* (Cth) had been left untouched, Australia would be on the slippery slope to totalitarianism. I would submit that this is correct, and that it says more about the strength of the culture of political liberty in the absence of constitutional freedoms as it does about the 'capricious' nature of the legislation.

73 Thus, eg, whereas a traditional account of the US Civil Rights movement holds that the seminal decision in *Brown v Board of Education of Topeka*, 347 US 483 (1954) was the key catalyst in ending official segregation, contemporary writers suggest that the decision either symbolically reflected changes in consensus effected by more important forces elsewhere in society, or was at best one among many factors shaping that new consensus: Stuart Scheingold, 'The Constitution and Social Change' in Michael McCann and Gerald Houseman (eds), *Judging the Constitution: Critical Essays on Judicial Lawmaking* (1989) 73–87.

74 For a discussion of the failure of the Weimar Bill of Rights to prevent the rise of Nazism in Germany, see Henry Ehrmann, 'Judicial Activism in a Divided Society: The Rule of Law in the Weimar Republic' in John Schmidhauser (ed), *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis* (1987) 75, 86–8; Ingo Müller, *Hitler's Justice. The Courts of the Third Reich* (1991).

75 See, eg, Bakan above n 30, Michael Mandel, 'Legal Politics Italian Style' in Tate and Vallinder (eds), above n 4, 261; Alec Stone, *The Birth of Judicial Politics in France* (1992) ch 6; Tushnet, *Red, White and Blue*, above n 49.

world view within certain bounds[76] and which constrain the type of argument that we might expect to win out in constitutional cases. The position I will defend is that the social background of judges, their training as lawyers and the backward-looking form of legal argument makes them disposed to upholding the status quo of social and political power.[77] This makes it unlikely that they will question, to any material extent, the prevailing economic system and the central role of private corporations within it. To substantiate this hypothesis, it is necessary to address those ostensibly more democratic aspects of the jurisprudence.

Judicial recognition that corporations are more than private persons can be located in two sources. First, the minority judgments in the implied freedoms cases: for example, in *ACTV*, Brennan J appeared to acknowledge the corrupting effect of private power on communication when he stated that '[i]t can hardly be doubted that reduction in the cost of effective participation in an election campaign reduces one of the chief impediments to political democracy.'[78] Second, dicta such as these may be in point with earlier cases where the Court refused to extend constitutional protection to corporations: eg in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,[79] the High Court refused to extend the privilege against self-incrimination to a corporation principally because the privilege was held to apply only to natural persons, which here excluded corporations.[80]

However, despite appearances, the Court's supposedly more democratic doctrine has much in common with the dominant strain which discounts corporate normativity. It is helpful here to return to legal pluralism's characterisation of doctrinal disputes as 'displacement issues'.[81] Thus, in legal centrism, what is important is whether rights or privileges apply in the instant case (or whether a particular defence is available to an action for defamation). For legal pluralism, what is much more revealing are the shared assumptions underlying the surface opposition which here show significant commonalities. In both strands of doctrine, the Court never seriously questions the essential beneficence of corporations and their positive contribution to the functioning of society; even if they are thought of as more than natural persons, this stops well short of regarding them as exercising normative power on a scale commensurate with (or beyond) that of the state, in a direction potentially antithetical to democratic

[76] For discussion of the use of the term 'ideology' in this way, see J M Balkin, 'Ideology as Constraint' (1991) 43 *Stanford Law Review* 1133.

[77] John Griffith, *The Politics of the Judiciary* (1985) ch 1. Striking down of legislation is therefore not necessarily indicative of the Court's going against prevailing power interests if in doing so it frees up established economic power from state regulation.

[78] *ACTV* (1992) 177 CLR 1, 155.

[79] (1993) 178 CLR 477 ('*Caltex*').

[80] Ibid 500 (Mason CJ and Toohey J):

> In general, a corporation is usually in a stronger position vis-à-vis the state than is an individual. the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater that those possessed and enjoyed by natural persons. The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively.

[81] See above n 40 and accompanying text.

interests.[82] The main distinction within the jurisprudence is that the more progressive doctrine recognises the state's legitimate role in reducing the influence of private power, and so the best case scenario is that it is prepared to countenance a redrawing of the public–private divide which permits more by way of regulation. However, what is important is that adherence to a public–private divide is never abandoned; the state remains the ongoing threat to liberty, and so the necessity of regulation of corporate power is purely an aberration as the occasions where it will operate undemocratically are seen as exceptional. There is no notion that corporations contribute in any way to undemocratic relations of power in liberal political economy: to the extent these exist they are addressed through caressing the market, not by its structural reform.[83]

In practical juridical terms, these ideological constraints limit the possibilities of using constitutionalism offensively for democratic ends. For example, part of Mason CJ's reasoning in striking down the law in *ACTV* rested on the modalities of allocating the alternative 'free time' broadcasts that would replace paid commercials, and in particular the fact that this would favour parties currently represented in Parliament.[84] One might agree that present electoral laws may prevent some minority views being aired in Parliament,[85] but be struck by the curious double standards at work here. The insistence on democracy in the public sphere stands in contrast to the silence on how non-established interests (especially those lacking the financial wherewithal) might fare where publicity depends on buying access to private means of communication. If the Court is committed to promoting representativeness, we might expect to see some positive rights of access to ensure that wealth and power will not drown out those voices which, on its account, popular elections may stifle. That this is hard to imagine speaks volumes for the ideological constraints of constitutionalism.

Finally, it is important to emphasise the symbolic advantages that accrue to corporations from these ideological limitations. Warren Samuels suggests that the corporation is 'both a product of and a contributor to power structure and to belief system.'[86] Portraying the corporation either as a person or a benign, socially useful, institution brings a curious reversal of roles; the corporation is imputed with the beneficent (and public) motive of ensuring laws are compatible with the constitution, whereas the state, the most likely vehicle for democratic law-making, is the institution attributed with acting for selfish gain. Further, to

[82] The reasoning in *Caltex*, for example, in denying the privilege against self-incrimination is not based on the dissonance of extending this 'human right' ((1992) 178 CLR 477, 508 (Mason CJ and Toohey J)) generally intended for the powerless to powerful corporations, but rather on the technical differences between natural and corporate persons whereby the latter is given advantages for engaging in business: '[i]t is an immunity that is irrelevant to a corporation, for a corporation cannot be a witness': ibid 512–3 (Brennan J).

[83] Chris Tollefson, 'Ideologies Clashing: Corporations, Criminal Law and the Regulatory Offence' (1991) 29 *Osgoode Hall Law Journal* 705, 719.

[84] *ACTV* (1992) 177 CLR 106, 146.

[85] Cf *McGinty v Western Australia* (1996) 186 CLR 140.

[86] Warren Samuels, 'The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language' in Warren Samuels and Arthur Miller, *Corporations and Society. Power and Responsibility* (1987) 113, 113–14.

strike down laws inimical to corporations (and also to foreclose the scope of constitutional decision-making) in the name of constitutional rights or freedoms is strong rhetoric, and one all the more potent for emanating from the authoritative source of the High Court.[87] The effect of this is of course difficult to measure, but to the extent it matters (and the efforts and monies expended by the corporate parties throughout the implied freedoms litigation suggest it does) it reinforces thinking that corporate power is not the proper object of democratic politics.

C *Towards a Democratic Typology of Corporate Constitutional Freedoms*

In this paper, I have attempted to show the importance of understanding the limits of constitutional ideology for assessing the impact of the implied freedoms jurisprudence. To the extent that this reveals the advantages for shoring up private power through constitutionalist forms, it is an argument that charters of rights may stymie more than they advance democratic interests. It is also a strong recommendation, where such reform is being contemplated, for diluting judicial review as a mechanism for the protection of rights and freedoms. However, the analysis outlined above can also serve as a ground-clearing exercise for considering how a more democratic version of constitutional adjudication might appear in practice. In this final section, I offer some preliminary thoughts as to the types of constitutional argument which may raise some of the democratic concerns highlighted above to a more central place in judicial consciousness.

I want to propose that the most profitable route lies in emphasising how corporations differ from natural persons as potential bearers of rights and freedoms; if this idea becomes more prominent in constitutional discourse, it would render more explicit the issues relating to corporate normativity kept hidden by the legal centrist methodology. It may also, by bringing the political context in which courts deliberate between different sources of social power into sharper focus, make it more difficult to defend the existing jurisprudence when this has to be done in terms of serving powerful private interests. A helpful starting point can be found in the work of Meir Dan-Cohen who argues that where corporations are present in free speech litigation, this is a relevant factor for the courts to take on board.[88] This is particularly the case where communicative power is excessively concentrated:

> The traffic in communication may call for a certain degree of regulation to avert congestion that would otherwise be detrimental to the listeners' interests. Such congestion can arise due to disproportionate input by large corporations as well as wealthy individuals. Regulation of this communications traffic may pass

[87] As Samuels observes, '[t]o say that someone has a right [or a freedom], therefore, is to say something of the extant normative power structure of society and economy. For a court (or legislature) to say that someone has a right is for it to affect, not merely to discourse about, the normative power structure of society and economy': ibid 117.

[88] Meir Dan-Cohen, 'Freedoms of Collective Speech. A Theory of Protected Communications by Organizations, Communities and the State' (1991) 79 *California Law Review* 1229.

> constitutional muster when it targets corporations even though it would fail if individual speech was the target.[89]

For Dan-Cohen, the relevant question is not whether the corporation's presence is relevant, but how this fact should affect constitutional adjudication. He develops a typology of rights as a guide to sifting out the illegitimate claims of corporations to freedom of expression. He makes a distinction between utilitarian organisations, including commercial enterprises, and expressive and protective organisations, such as campaign and pressure groups. To the extent it is meaningful for both types of organisations to have freedom of expression rights, these are derivative in the sense they are based on the rights of (natural) people other than the organisation. Expressive and protective organisations, themselves engaged in communication, may have active derivative rights, in that their expression is related to the activities of their members.[90] In contrast, utilitarian organisations' goals relate to the production of goods and services, and so they have only passive derivative rights that are based on the autonomy rights of individuals to hear and not the right of corporations to speak.[91]

This typology has a number of attractions in terms of the possibility of developing a more democratic form of constitutional argument. First, by emphasising the derivative nature of media corporations' claims to constitutional protection, we avoid the automatic assumption that they are acting in the public interest on behalf of citizens; their business-related motives thus become a valid focus of inquiry. Second, it directs the Court to consider how the autonomy of listeners will be enhanced in practice by removing restrictions on corporate power; in this way, we necessarily move away from a quantitative approach to communication. Third, and most important, it deals first and foremost with the corporation as a powerful organisation; juxtaposing this social reality with the dominant personifying strands of the jurisprudence makes it more difficult to ignore the democratic concerns which have animated this paper. One should not underestimate the difficulties of injecting such thinking into the prevailing constitutional mindset. Any attempt to do so will have been of value if it yields success in broadening the terms of current debate; if it does not, we will have lost nothing.

CONCLUSION

When we refract the issue of corporate constitutional freedoms through the lens of legal pluralism, we are given a clearer picture of what are the truly important issues on which the health of democracy will depend in the twenty-first century. I have demonstrated how preoccupation with the normative issues of constitutional law perpetuates the traditional fixation with limiting the powers of the state; however, once we get a proper perspective on the relative threats from public and private power, it is not of necessary importance to liberty how these issues are

[89] Ibid 1248.

[90] 'Legal protection that is extended to such organisations is *based on a concern for the individual members' original expressive rights and on the recognition that such organizations aid the exercise of those individual expressive rights*': ibid (emphasis in original).

[91] Ibid 1244–5.

resolved. Such thinking distracts us from the real action, which is that the unimpeded operation of private power in the increasingly diffuse world system constitutes a real danger to the goal of creating a more equitable society. It is the duty of the scholar to make bare how our current constitutional arrangements and thinking contribute to the anti-democratic nature of these developments. Only once this is understood can we begin the task of constructing more progressive constitutional forms; it is my contention that a more pluralistic theory of constitutional law will provide us with the leap of imagination necessary to succeed in this task.