

USING FEDERALISM TO PROTECT POLITICAL COMMUNICATION: IMPLICATIONS FROM FEDERAL REPRESENTATIVE GOVERNMENT

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[The recognition of the implied freedom of political communication has been the subject of much controversy. Although a unanimous High Court in Lange v Australian Broadcasting Corporation identified the textual basis for the implication, there continues to be significant uncertainty as to the nature and scope of the freedom. This article seeks to provide an alternative constitutional foundation for protecting political communication, which focuses on the way in which representative government has been accommodated within the federal structure of government. In doing so, it attempts to provide a firmer constitutional foundation for the protection of political communication.]

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I INTRODUCTION

The recognition and development of the implied freedom of political communication has been controversial. There has been uncertainty about the foundation for, and nature and extent of, the limitation. Recognition of the freedom has not always attracted the support of all High Court judges. Until *Lange v Australian Broadcasting Corporation* ('*Lange*'),¹ Dawson J maintained that there was no basis for implying a freedom of political communication.² It was not until the majority decision in *McGinty v Western Australia* ('*McGinty*'),³ followed by the unanimous judgment in *Lange*, that the Court clarified the textual foundation for the implied freedom. Even so, since *Lange*, Callinan J has regularly expressed disapproval of the limitation.⁴

As to the extent of protection provided by the freedom, there has been uncertainty about the test to be applied,⁵ and the degree to which the judiciary should defer to legislative judgements about the regulation of political communication. Some judges have been prepared to defer substantially to the policy balance struck by legislatures,⁶ and most have generally been reluctant to identify with precision the factors to be taken into account when applying tests for validity. Even McHugh J, a strong supporter of a constitutional limitation to protect political communication, went to extraordinary lengths to deny that the Court engages in a policy balancing function when invalidating legislation.⁷ There has also been reluctance by a number of judges to expand the category of protected communication to include, for example, political insults,⁸ satire⁹ or communication about the judiciary.¹⁰ Furthermore, the question of whether the limitation

¹ (1997) 189 CLR 520.

² Although his Honour did recognise a lesser degree of constitutional protection for political communication: see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 186–7 ('*ACTV*').

³ (1996) 186 CLR 140.

⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 338–9 ('*Lenah*'); *Roberts v Bass* (2002) 212 CLR 1, 101–2; *Coleman v Power* (2004) 220 CLR 1, 109 ('*Coleman*'); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 287; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 477 ('*APLA*').

⁵ See below nn 141–7 and accompanying text.

⁶ See below n 145 and accompanying text.

⁷ *Coleman* (2004) 220 CLR 1, 48.

⁸ See, eg, *ibid* 30–1 (Gleeson CJ), 113–14 (Callinan J), 126 (Heydon J), where three judges considered political insults to be beneath or at the margin of constitutional protection.

⁹ *Australian Broadcasting Corporation v Hanson* [1998] QCA 306 (Unreported, de Jersey CJ, McMurdo P and McPherson JA, 28 September 1998). Cf *Brander v Ryan* (2000) 78 SASR 234.

¹⁰ See Zoë Guest, 'The Judiciary and the Freedom of Political Communication: The Protection of Judgment on Australia's Judges' (2006) 17 *Public Law Review* 5.

operates on communication solely about state government or politics remains unclear.¹¹

Despite the unanimous support for the implied freedom in *Lange*, the case law both preceding and following that judgment paints a picture of an unsettled constitutional doctrine. On one view, the uncertainties may be seen as a consequence of the Court incrementally feeling its way forward with a fledgling constitutional doctrine. However, on another view, these uncertainties may in fact reflect a perception by some judges that the judiciary is operating at the margin of, or in fact overreaching, its legitimate constitutional function. Indeed, as will be seen, there are very strong arguments against the implication of a freedom of political communication that are yet to receive a satisfactory response.¹²

This article seeks to provide an alternative constitutional foundation for protecting political communication. Like the *Lange* doctrine, this article relies on the centrality of political communication to the constitutional system of representative government. However, unlike *Lange*, this article will focus on the way in which representative government has been accommodated within the federal structure of government. Under the framework suggested in this article, the constitutional limitations protecting political communication draw from federal doctrines and thus lie at the heart of the judiciary's core constitutional function to maintain the federal compact. The article will argue that, according to this alternative framework, there is a strong case for protecting political communication, at least to the same extent as under the *Lange* doctrine. In doing so, this article is an attempt to provide a firmer constitutional foundation for the protection of political communication in response to the critics of the *Lange* doctrine who are concerned with the overreach of judicial review.

Part II of this article provides an overview of the current basis for the implied freedom and its objections. Part III will then argue that various dimensions of the federal structure protect representative government in Australia and the political communication necessary to give the institutions of representative government life, at least to the same extent as the *Lange* approach. Part IV considers the implications that these federal limitations have for current *Lange* doctrinal uncertainties.

II THE BASIS FOR AND OBJECTIONS TO THE IMPLIED FREEDOM

A Recognising the Implied Limitation

The early development of the implied freedom of political communication as a limitation on legislative and executive power was supported by two different conceptions of the scope of judicial review of legislative action. The less

¹¹ See *Direct Factory Outlets Homebush Pty Ltd v Property Council of Australia Ltd* (2005) 148 FCR 12, 26–30 (Sackville J); Helen Chisholm, “‘The Stuff of Which Political Debate Is Made’”: *Roberts v Bass*’ (2003) 31 *Federal Law Review* 225, 240–1.

¹² See below nn 24–31 and accompanying text.

controversial basis for the limitation was that the High Court's role extends to the reinforcement of the constitutional system of representative and responsible government (put narrowly) or, alternatively, conceptions of representative democracy created by the *Australian Constitution* (put more broadly).¹³ On this view, the reduction of 'representative government' or 'representative democracy' into written form in our constitutional system was seen as sufficient to depart from the orthodox constitutional theory of parliamentary sovereignty over representative government.¹⁴ In other words, the mere existence of a written constitution embodying representative political institutions provided the foothold for the judicial protection of political communication and perhaps other rights.¹⁵

By contrast, some proponents of the freedom of political communication sought to reinterpret the intentions of the framers when establishing the constitutional arrangement. It was said by these proponents that federal legislative powers were not intended to be construed as encroaching upon fundamental rights, and the judiciary was seen as having an important role in identifying and protecting those rights.¹⁶ Underlying the development of these views was the acceptance that legal sovereignty had shifted from the Imperial Parliament to the people of Australia.¹⁷ On this understanding of our constitutional arrangement, it was argued that the federal legislature holds power on trust and it is for the judiciary to police the exercise of that power.¹⁸

¹³ See Leslie Zines, 'Courts Unmaking the Laws' in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy* (1995) 125, 130–4. On the difference in interpretative method between the narrow and broader views: see Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87, 93. For a tripartite approach to interpretive technique: see Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 45–8.

¹⁴ See, eg, Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 184, 200.

¹⁵ This is most explicitly recognised by Brennan J in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 48 ('*Nationwide News*'). See also at 94 (Gaudron J); *ACTV* (1992) 177 CLR 106, 210–12 (Gaudron J); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 298 (Mason CJ), 336 (Deane J) ('*Cunliffe*'); *McGinty* (1996) 186 CLR 140, 198 (Toohey J), 216 (Gaudron J). See the discussion in Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 26–7; Cheryl Saunders, 'Democracy: Representation and Participation' in P D Finn (ed), *Essays on Law and Government: Principles and Values* (1995) vol 1, 51, 68–71.

¹⁶ *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ); Justice John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 169–70. For discussion and critique: see George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 121; Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (1997) 91, 104; Zines, 'Courts Unmaking the Laws', above n 13, 136–7.

¹⁷ *Nationwide News* (1992) 177 CLR 1, 71 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 137–8 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 173 (Deane J) ('*Theophanous*'); *McGinty* (1996) 186 CLR 140, 199 (Toohey J). See George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1.

¹⁸ Harley G A Wright, 'Sovereignty of the People — The New Constitutional Grundnorm' (1998) 26 *Federal Law Review* 165, 168. See also Paul Finn, 'A Sovereign People, a Public Trust' in P D Finn (ed), *Essays on Law and Government: Principles and Values* (1995) vol 1, 1; Leighton

B *The Lange Court's Version of the Implied Freedom and Objections to the Implied Freedom*

The High Court in *Lange* adopted the narrow version of the first basis for justifying the freedom and rejected the second. The revisionist view of the framers' intentions about rights protection has not been accepted and, in *Lange*, 'there was no appeal to the ultimate sovereignty of the Australian people' in grounding the freedom.¹⁹ The freedom is to be drawn from the text of the *Australian Constitution*, not from vague theories of representative democracy said to underlie the constitutional system.²⁰

Essentially, there are three steps to the *Lange* implication of a limitation on legislative power that is protective of political communication. First, that the text of the *Australian Constitution* creates a particular system of Commonwealth governmental institutions and processes: representative and responsible government and referenda.²¹ Secondly, that it is an indispensable incident of those institutions and processes that there be a freedom of political communication.²² Thirdly, that there needs to be a judicially enforceable limitation on legislative and executive power to protect communication which is required for those institutions and processes to work.²³ It is the third step in this justification that has been controversial, and there are a number of related reasons for that controversy.

The clearest objection put forward against the implication is that it is not consistent with 'interpretive orthodoxy'.²⁴ Although it may be accepted that the free flow of relevant information is essential to the efficacy of Australian

McDonald, 'The Denizens of Democracy: The High Court and the "Free Speech" Cases' (1994) 5 *Public Law Review* 160; A R Blackshield, 'The Implied Freedom of Communication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 232.

¹⁹ Wright, above n 18, 175. Even if it were accepted that legal sovereignty has passed from the Imperial Parliament to the Australian people, it is not clear why the judiciary should be the preferred means by which the exercise of legislative power in relation to political communication should be policed: at 188; Winterton, 'Constitutionally Entrenched Common Law Rights', above n 16, 135–42; Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the *Australian Constitution*' (1994) 16 *Sydney Law Review* 213, 222–4.

²⁰ *Lange* (1997) 189 CLR 520, 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McGinty* (1996) 186 CLR 140, 168 (Brennan CJ), 182 (Dawson J), 239 (McHugh J), 291 (Gummow J).

²¹ *Lange* (1997) 189 CLR 520, 557–9 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²² Ibid 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²³ Ibid 560–1 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²⁴ Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 106, 147. See generally Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 41–3; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 150; Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249; Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23 *Monash University Law Review* 362. Cf Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133.

constitutional institutions and processes, it has been argued that the policing role need not *necessarily* fall to the judiciary.²⁵ Dawson J initially resisted the recognition of an implied freedom on the basis that it was not an implication that was ‘necessary or obvious having regard to the express provisions of the *Constitution* itself’.²⁶ This argument remains influential for Callinan J, who agreed with Jeffrey Goldsworthy’s description of this objection as ‘[t]he “lion in the path” of any argument that judicial enforcement of freedom of political speech is practically necessary for the effective operation of our representative democracy.’²⁷

Of course, as a matter of political theory, there need not be judicial enforcement of political rights for the political process to work effectively. The question, however, is whether the system of government entrenched in the *Australian Constitution* gives rise to such an implication. For Dawson J in particular, the fundamental objection was that the implication was of something ‘for which the *Constitution* did not provide.’²⁸ In other words, by engaging in judicial review of legislation to protect political communication, the judiciary was said to be going beyond the understandings of the framers as to how the *Australian Constitution* organised the powers of the respective arms of government. In this regard, there are two familiar sticking points: first, that the framers did not contemplate that rights would be protected by judicially enforceable limitations on legislative power; and, secondly, that the distrust of the democratic process commonly attributed to the framers of the *United States Constitution* was absent from the framers of the *Australian Constitution*.²⁹ One consequence of these constitutional understandings was that, for the large part, competing claims of rights were to be resolved through the political process.³⁰ As Dawson J said in *ACTV*:

those responsible for the drafting of the *Constitution* saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in

²⁵ See, eg, Tom Campbell, ‘Democracy, Human Rights, and Positive Law’ (1994) 16 *Sydney Law Review* 195, 204–7; Leslie Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 *Sydney Law Review* 166, 177; Goldsworthy, ‘Implications in Language, Law and the *Australian Constitution*’, above n 24, 180; Aroney, ‘A Seductive Plausibility’, above n 24, 260.

²⁶ *Theophanous* (1994) 182 CLR 104, 194. See also *Cunliffe* (1993) 182 CLR 272, 362 (Dawson J).

²⁷ *Lenah* (2001) 208 CLR 199, 331 fn 603. One senses that Justice Dyson Heydon also does not view the implication favourably: see Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 47(1) *Quadrant* 9, 22.

²⁸ *Cunliffe* (1993) 182 CLR 272, 362.

²⁹ See, eg, Dan Meagher, ‘What Is “Political Communication”? The Rationale and Scope of the Implied Freedom of Political Communication’ (2004) 28 *Melbourne University Law Review* 438, 454; Haig Patapan, ‘Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia’ (1997) 21 *Melbourne University Law Review* 497, 505–8; Stephen Gageler, ‘Foundations of Australian Federalism and the Role of Judicial Review’ (1987) 17 *Federal Law Review* 162, 170–3; Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (1965) 100–3; W Harrison Moore, ‘The Commonwealth of Australia Bill’ (1900) 16 *Law Quarterly Review* 35, 40–2.

³⁰ See, eg, Jeffrey Goldsworthy, ‘The Constitutional Protection of Rights in Australia’ in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (1992) 151, 151–8.

this respect was, not the *United States Constitution*, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.³¹

A second consequence was that the political process was to be the primary mechanism through which representative government was shaped. As Gummow J emphasised in *McGinty*, the *Australian Constitution* does not entrench ‘the whole apparatus of representative government’³² — much of the system of representative government is left to the Parliament.³³

The implied freedom of political communication, which rests on the system of representative government created by the *Australian Constitution*, runs into both of these obstacles: it removes the resolution of competing rights from the political process and entrenches an incident of representative government from legislative alteration. Although the unanimous judgment in *Lange* affirms the existence of the implied freedom and its textual source, the judgment does little to address the apparent incompatibility of the implied freedom with fundamental understandings of the roles of the respective branches of government. The discarded alternative view supporting implied limitations at least posited a challenge to the constitutional settlement reached by the framers based, in part, on shifting theories of sovereignty. By contrast, the majority in *Lange* relies exclusively on the reduction of representative government into written form and the judiciary’s role as interpreter of the *Australian Constitution*. However, the Court does not explain how those justifications overcome the objections identified earlier.

C Consequences of Unaddressed Objections for the Scope and Operation of the Implied Freedom

Despite the *Lange* Court affirming the freedom, the experience with the implied freedom reveals an unenthusiastic application of the limitation by many recent members of the High Court. The experience so far has seen substantial deference by a number of justices to legislative policy-making,³⁴ imprecision in the identification of the test to be applied,³⁵ a reluctance to expand the boundaries of the protection,³⁶ and a reluctance to openly concede the policy role of the Court and to identify factors to be taken into account in determining whether a law contravenes the limitation.³⁷ These hesitations and uncertainties are not

³¹ *ACTV* (1992) 177 CLR 106, 186. See also *Cunliffe* (1993) 182 CLR 272, 361 (Dawson J); *Theophanous* (1994) 182 CLR 104, 193 (Dawson J). In rejecting the freedom, Callinan J has also emphasised in *Lenah* (2001) 208 CLR 199, 331, that the framers deliberately chose not to include a provision like that in the First Amendment to the *United States Constitution*.

³² (1996) 186 CLR 140, 284, quoting *Theophanous* (1994) 182 CLR 104, 203 (McHugh J).

³³ (1996) 186 CLR 140, 280–4. See also *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 24 (Barwick CJ), 46 (Gibbs J), 57 (Stephen J).

³⁴ See below n 145 and accompanying text.

³⁵ See below nn 143–7 and accompanying text.

³⁶ See above nn 8–11 and accompanying text.

³⁷ See above n 7 and accompanying text.

surprising given the opposition to the implication and the different interpretative techniques used to infer the limitation from the *Australian Constitution*.³⁸

This article will attempt to provide an alternative and firmer constitutional foundation for protecting political communication — one that seeks to augment representative government with the federal structures of government. In doing so, the article responds to the critics of the implied freedom.

III FEDERALISM AS A BASIS FOR PROTECTING POLITICAL COMMUNICATION

A Federalism as a Judicially Enforceable Limitation on Legislative Power

It is common ground that the framers considered the judiciary to be ‘the keystone to [or of] the federal arch’.³⁹ Despite the absence of a firm textual or structural basis for judicial review in the *Australian Constitution*,⁴⁰ it is widely considered ‘axiomatic’⁴¹ that the federal judiciary was intended to have the power to invalidate legislation so as to maintain the federal compact.⁴² Indeed, Gregory Craven has noted ‘the near obsession of the Founders that the High Court should act as a guardian of federalism and the states’.⁴³

Its continuing acceptance by the High Court as a clear justification for the exercise of ‘counter-majoritarian’⁴⁴ authority is well-illustrated by the recent judgment of Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission* (*‘Forge’*).⁴⁵ In discussing the ‘general considerations which inform Chapter III of the *Constitution*’, their Honours said:

Central among those considerations is the role which the judicature must play in a federal form of government. The ultimate responsibility of deciding upon

³⁸ Stone, ‘Australia’s Constitutional Rights’, above n 24.

³⁹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 950 (Josiah Henry Symon). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10 967 (Alfred Deakin, Attorney-General).

⁴⁰ See James A Thomson, ‘Constitutional Authority for Judicial Review: A Contribution from the Framers of the *Australian Constitution*’ in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (1986) 173, 186–201; James A Thomson, *Judicial Review in Australia: The Courts and the Constitution* (1988) 129–60; P H Lane, *The Australian Federal System* (2nd ed, 1979) 1135–7.

⁴¹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J).

⁴² B Galligan, ‘Judicial Review in the Australian Federal System: Its Origin and Function’ (1979) 10 *Federal Law Review* 367; Thomson, *Judicial Review in Australia*, above n 40; Thomson, ‘Constitutional Authority for Judicial Review’, above n 40, 176–86; Helen Irving, ‘Its First and Highest Function: The Framers’ Vision of the High Court as Interpreter of the *Constitution*’ in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 17.

⁴³ Craven, ‘Heresy as Orthodoxy’, above n 13, 100.

⁴⁴ Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 16.

⁴⁵ (2006) 229 ALR 223.

the limits of the respective powers of the integers of the federation must be the responsibility of the federal judicature.⁴⁶

Although, as a matter of political theory, the role of maintaining the federal compact need not have gone to the judiciary,⁴⁷ and the institutional design of the federal political institutions could have been seen as a sufficient protection for the federal system,⁴⁸ it is clear that the judiciary's place as 'the keystone of the federal arch' was the accepted basis upon which Federation proceeded,⁴⁹ and has continued to figure strongly in the Court's rationale for its function.

The core conception of federalism is the division of legislative power between differently constituted bodies politic, and there is clear support from history and subsequent judicial practice for the judiciary invalidating legislation to that end. Indeed, such a role for the judiciary is perfectly compatible with legal and political theories of parliamentary sovereignty.⁵⁰ That is not to suggest that the courts do not perform a political role by exercising judicial review in relation to these federal questions,⁵¹ but overall legislative sovereignty is not diminished — it is simply divided between multiple levels of government. These limitations not only find expression within the text of the *Australian Constitution* but, even from the very beginning of Federation, were implied from the federal structure.⁵²

However, judicial review in Australia goes beyond that core conception of federalism. The *Australian Constitution* contains other important provisions,

⁴⁶ Ibid 238. See also the judgment of Gaudron, McHugh, Gummow, Hayne and Kirby JJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 514, where when discussing the significance of the jurisdiction conferred by s 75(v) of the *Australian Constitution*, their Honours said:

Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the *Constitution* of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function.

⁴⁷ See Sir W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 357–61; James Bryce, *The American Commonwealth* (1912) vol 1, 259–60.

⁴⁸ See L Zines, *The High Court and the Constitution* (4th ed, 1997) 430. Similar arguments have been advanced in the US: see Herbert Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government' (1954) 54 *Columbia Law Review* 543; Jesse H Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980); Jesse H Choper, 'The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review' (1977) 86 *Yale Law Journal* 1552.

⁴⁹ Galligan, 'Judicial Review in the Australian Federal System', above n 42; Thomson, *Judicial Review in Australia*, above n 40; Irving, above n 42. As Galligan notes at 379 (citations omitted), when describing statements by Edmund Barton during the Convention Debates:

giving the arbitral role to the court would prevent the federal government's being a judge in its own case. Both State and federal parliaments would be bound by the constitutional division of powers and that would be policed by the court. This was something quite novel to the traditional parliamentary system.

⁵⁰ James Allan, 'A Defence of the Status Quo' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights* (2003) 175, 192–3.

⁵¹ Adrienne Stone, 'Judicial Review without Rights' (2008) 28 *Oxford Journal of Legal Studies* (forthcoming).

⁵² For a discussion of the implied immunities doctrine: see Zines, *The High Court and the Constitution*, above n 48, ch 14.

most prominently s 92, that limit the totality of legislative power and create a constitutional space of non-regulation. However, those limitations ‘mandate a national economic space, protecting interstate mobility and a common market’,⁵³ and thus, are integral to the ‘federal compact’. In short, they are ‘federation reinforcing’ limitations on the totality of legislative power. Although probably not envisaged by the framers, more recently, the existence of federal judicial structures has been used as a justification for implying a limitation on the totality of legislative power.⁵⁴

Thus, both express and implied limitations operate to impose judicially enforceable restrictions on the respective powers of the Commonwealth and the states, and the totality of legislative power. These judicially enforceable limitations on legislative power may be justified on federalism grounds. Part III(B) of this article will provide an overview of how federalism and rights have intersected in Australia and other common law countries. The remainder of Part III will build upon these ideas, and seek to justify, on federalism grounds, limitations on legislative power which are protective of political communication.

B *Federalism and Political Communication*

As indicated, the idea that federalism gives rise to limitations on legislative power is not new. Although the details are still subject to some dispute,⁵⁵ and the scope of the limitation has been narrowed considerably since the early years of Federation,⁵⁶ it has been long established that, to some extent, legislative power is impliedly limited by ‘the conception of a central government and a number of State governments separately organized’.⁵⁷ Although the accepted scope of the limitation extends to what the federal and state legislatures may do vis-a-vis the constitutional powers of the other, even within this narrow conception of a federal implication, there is a strong claim that one governmental polity is limited in relation to the extent to which it can undermine the system of government of the other.⁵⁸ In *ACTV*, in separate judgments, Brennan and McHugh JJ invalidated federal legislative provisions banning political communication during state elections on federalism grounds.⁵⁹

Indeed, the idea of a federal implication protecting political communication is not a new idea in Australia nor in other common law federal systems. In the 1912

⁵³ Cheryl Saunders, ‘Constitutional Structure and Australian Federalism’ in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 174, 177 (citations omitted).

⁵⁴ See, eg, the way in which the creation of a federal judicature in Ch III of the *Australian Constitution* imposes limitations on the exercise of state legislative power in relation to state courts exercising federal jurisdiction: *Kable v DPP (NSW)* (1996) 189 CLR 51 (‘*Kable*’).

⁵⁵ See *Austin v Commonwealth* (2003) 215 CLR 185; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte The Defence Housing Authority* (1997) 190 CLR 410.

⁵⁶ See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁵⁷ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

⁵⁸ *ACTV* (1992) 177 CLR 106, 163 (Brennan J), 202 (Dawson J), 243–4 (McHugh J).

⁵⁹ *Ibid* 162–4 (Brennan J), 241–5 (McHugh J).

case of *R v Smithers* ('*Smithers*'),⁶⁰ two members of the High Court invalidated New South Wales legislation prohibiting the influx of out-of-state criminals on the basis that it breached an implied federal limitation. Griffith CJ held that the continuance after Federation of colonial powers to exclude undesirable immigrants 'is inconsistent with the elementary notion of a Commonwealth.'⁶¹ His Honour quoted, with approval, the United States case of *Crandall v Nevada* ('*Crandall*'),⁶² where Miller J said that a citizen has 'the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it; to seek its protection, to share its offices, to engage in administering its functions.'⁶³ Referring to the same case, Barton J said:

The whole of that memorable judgment is instructive upon the rights of the citizens of the federation. The reasoning shows that the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation.⁶⁴

Although relying upon the separate identity of the national body politic, Miller J in *Crandall* also emphasised the federal character of the national body politic:

The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, *from the States and from the people of the States*.⁶⁵

Care must be taken not to rely too much on the US cases. Although *Crandall* was decided by the US Supreme Court before the ratification of the 14th Amendment and thus could not be said to rest upon the provisions in the US Bill of Rights, the decisions are still deeply rooted in republican ideas of national citizenship.⁶⁶ Nevertheless, as will be argued below, *Crandall*, as relied upon by Griffith CJ and Barton J, expresses a federal idea about the extent to which states can intrude upon the constitutional capacities of the federal government. The rights described in the US cases were said to be correlative to the creation of a federal body politic.

⁶⁰ (1912) 16 CLR 99.

⁶¹ *Ibid* 108.

⁶² 73 US (6 Wall) 35 (1867). These comments were endorsed by the US Supreme Court in *Butchers' Benevolent Association of New Orleans v Crescent City Live-Stock Landing and Slaughter-House Co*, 83 US (16 Wall) 36, 79 (Miller J) (1872).

⁶³ *Smithers* (1912) 16 CLR 99, 108. Some further support for this implied federal limitation can be found in *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 549–50 (Dixon CJ), 560 (Taylor J), 566 (Menzies J), although the Court did not take *Crandall* further.

⁶⁴ *Smithers* (1912) 16 CLR 99, 109–10.

⁶⁵ *Crandall*, 73 US (6 Wall) 35, 43 (1867) (emphasis added).

⁶⁶ See especially the concurring judgment of Kennedy J in *US Term Limits Inc v Thornton*, 514 US 779 (1995).

That federalism might create limitations on power to protect political communication outside a republican model of government is evidenced by the protection of political communication by the Supreme Court of Canada prior to the adoption of the Canadian Bill of Rights. In *Re Alberta Legislation*, three judges of a six-member court recognised that federalism offered protection for political communication.⁶⁷ That case involved Alberta legislation regulating the way in which newspapers published in that province reported the policies or activities of the Alberta government. The joint judgment of Duff CJ and Davis J (delivered by the Chief Justice) considered that the regulation of public discussion of public affairs was a matter beyond the power of provincial legislatures:

Any attempt to abrogate the right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the Legislatures of the provinces ... as repugnant to the provisions of the [*British North America Act, 1867*], by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions.⁶⁸

Cannon J also saw federalism as imposing a limitation on provincial legislative power to curtail political communication, again on the basis that the right to political communication transcended the provincial level and was somehow attached to Canadian citizenship.⁶⁹ To this extent, much of the reasoning in the judgments of both Duff CJ and Cannon J can be attributed to the characterisation exercise undertaken in Canada to identify a subject matter as within *either* federal *or* provincial power.⁷⁰ However, for Cannon J, federalism also had a horizontal effect on provincial authority:

Moreover, citizens outside the province of Alberta have a vital interest in having full information and comment, favourable and unfavourable, regarding the policy of the Alberta Government and concerning events in that province which would, in the ordinary course, be the subject of Alberta newspapers' news items and articles.⁷¹

As to whether the dominion Parliament could curtail political communication, Cannon J was of the view that it could,⁷² whereas Duff CJ's judgment is more elusive. Peter Hogg has expressed the view that 'Duff CJ's opinion could be read as suggesting that the *Constitution Act, 1867* impliedly forbade both the Legisla-

⁶⁷ The judgments in *Re Alberta Legislation* [1938] SCR 100 provided inspiration for a number of judges in the early Australian political communication cases: see *Nationwide News* (1992) 177 CLR 1, 49–50 (Brennan J); *Theophanous* (1994) 182 CLR 104, 125 (Mason CJ, Toohey and Gaudron JJ), 180–1 (Deane J).

⁶⁸ *Re Alberta Legislation* [1938] SCR 100, 134.

⁶⁹ *Ibid* 145–6.

⁷⁰ For a discussion of that characterisation process: see Zines, *The High Court and the Constitution*, above n 48, 5–6, 24.

⁷¹ *Re Alberta Legislation* [1938] SCR 100, 146.

⁷² *Ibid*.

tures and the Parliament from curtailing political speech',⁷³ and subsequent judgments left that possibility open.⁷⁴ In this respect, the rationale for the limitation seems to go beyond federalism, instead relying on the mere establishment of parliamentary institutions in written form.⁷⁵

C *Constitutional Protection for Political Communication from the Australian Federal Compact*

As discussed earlier, the maintenance of the federal compact, on any theory of constitutional interpretation, has been seen as the clearest justification for the High Court's counter-majoritarian function of judicial review. It is a fairly modest claim to suggest that judicial review extends to encompass the structural features of federalism. The brief discussion in Part III(B) identifies at least four structural features of federalism from which the protection of political communication may be derived. First, that federalism is premised upon the continued existence of the states as separately organised governments. Secondly, that federalism creates a national body politic with a separate constituency that transcends those of the state bodies politic and their separate constituencies. Thirdly, that the Commonwealth body politic is a federal one and federal constituencies, drawn along state lines, share in the exercise of federal power. Fourthly, that a federal compact can create a horizontal connection among states and their separate constituencies in a way that limits how state Parliaments can regulate political communication about state government.

The remainder of this Part will explore these federal structural ideas further in their respective application to four categories of laws: (1) federal laws that regulate political communication relevant to state governmental institutions and processes; (2) state laws that regulate political communication relevant to federal governmental institutions and processes; (3) federal laws that regulate political communication relevant to federal governmental institutions and processes; and (4) state laws that regulate political communication relevant to state governmental institutions and processes. It will be seen that there is a strong argument for drawing limitations based on the federal structure in relation to category (1) and (2) laws. There is also support for a federal limitation in relation to category (3). Of the four categories, there is the least support for a limitation in relation to category (4) laws.

It is important to emphasise in advance that, although federalism provides the justification for the judiciary's role, the constitutional protection for political communication derives from the system of representative government that operates within and across the federal system. Thus, like the *Lange* approach, political communication is derived from representative government. However, unlike *Lange*, it is not representative government alone, but the *federal struc-*

⁷³ Peter Hogg, *Constitutional Law of Canada* (4th ed, 1997) 589.

⁷⁴ *Ibid* 589–90.

⁷⁵ *Ibid* 590.

tures of representative government, that provide the foundation for the constitutional protection of political communication.

1 *Federal Laws That Regulate Political Communication Relevant to State Governmental Institutions and Processes*

As indicated earlier, under the *Lange* approach to the freedom of political communication, there is some uncertainty as to whether constitutional protection is given to political communication solely about state government.⁷⁶ That uncertainty does not arise in the case of *federal* regulation of that type of communication if the constitutional protection for that communication is seen as flowing from federal principles which confer state immunity from Commonwealth laws.

It is now well-accepted that the Commonwealth Parliament is limited in the way in which it may affect the constitutional powers of the states and/or their capacities to function as separately organised bodies politic.⁷⁷ In *ACTV*, Brennan J said that

[t]he functions of a State include both the machinery which leads to the exercise of the State's powers and privileges and the machinery by which those powers and privileges are exercised. Some functions are performed by electors, some by officials of the State. Among the functions of the State I would include the discussion of political matters by electors, the formation of political judgments and the casting of votes for the election of a parliament or local authority. Laws which affect the freedom of political discussion in matters relating to the government of a State, whether by enhancement or restriction of the freedom, are laws which burden the functioning of the political branches of the government of the State with statutory constraints and restrictions.⁷⁸

Brennan J considered that the provisions regulating the advertising of political matter in a state or local government election sufficiently burdened the functioning of the political branches of state government.⁷⁹ McHugh J similarly concluded that those provisions constituted 'an unacceptable interference with the functions and responsibilities of the people and officials of the States under their Constitutions'.⁸⁰ As his Honour said:

It is for the people of the State, and not for the people of the Commonwealth, to determine what modifications, if any, should be made to the Constitution of the State and to the electoral processes which determine what government the State is to have.⁸¹

In essence, the state systems of representative government are central to the constitutional integrity of the states and their capacities to function as separately

⁷⁶ See above n 11 and accompanying text.

⁷⁷ *Austin v Commonwealth* (2003) 215 CLR 185; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595.

⁷⁸ *ACTV* (1992) 177 CLR 106, 163–4.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* 243.

⁸¹ *Ibid* 242.

existing bodies politic.⁸² As Cheryl Saunders has said when reflecting upon the state immunity doctrine:

the concept of functioning ‘as a government’ draws on constitutional principles broadly in the British common law tradition. It assumes a legislature, executive and judiciary, in a symbiotic relationship with each other, delivering accountable, representative government and a rule of law.⁸³

Commonwealth laws that unduly burden those constitutional capacities to function will infringe the federal limitation. As demonstrated by the judgments of Brennan and McHugh JJ in *ACTV*, the regulation of political communication in relation to state elections can constitute a sufficient impairment.

Thus, the very existence of federalism, and the premise that there will continue to be states as separately organised governments, provide a strong foundation for a limitation on the Commonwealth Parliament’s power to regulate political communication about state governments.

In addition to the judgments of Brennan and McHugh JJ in *ACTV*, the preservation of the integrity of state electoral processes is also at the core of the variously described exceptions to the limitation in s 117 of the *Australian Constitution* set out in *Street v Queensland Bar Association*.⁸⁴ The system of representative government at the state level has such strong constitutional integrity and autonomy that it creates a qualification to the constitutional limitation in s 117 which is designed to enhance national unity.

2 *State Laws That Regulate Political Communication Relevant to Federal Governmental Institutions and Processes*

The question of whether a state law is valid if it regulates political communication relevant to federal governmental institutions has so far been addressed through the conventional *Lange* approach.⁸⁵ However, on a federalism-based conception of judicial review, the enquiry can be seen as a question of Commonwealth immunity from state laws. Without navigating the uncertainties and subtleties that differentiate Commonwealth and state immunities,⁸⁶ it is sufficient for present purposes to say that the states do not have the power to enact laws that affect the capacities or constitutional powers of the Commonwealth government.⁸⁷ By analogy to the way in which state immunity was considered in *ACTV*, there is a strong claim that representative government is at the core of the Commonwealth body politic and thus, ‘the discussion of political matters by

⁸² Although on a different point, Brennan J described representative government in the states as ‘characteristic of their respective Constitutions’: *ibid* 163.

⁸³ Saunders, ‘Constitutional Structure and Australian Federalism’, above n 53, 183.

⁸⁴ (1989) 168 CLR 461, 490–3 (Mason CJ), 513–14 (Brennan J), 528–9 (Deane J), 548 (Dawson J), 559–60 (Toohey J), 572 (Gaudron J), 583–4 (McHugh J).

⁸⁵ *Levy v Victoria* (1997) 189 CLR 579 (‘Levy’); *Coleman* (2004) 220 CLR 1; *APLA* (2005) 224 CLR 322.

⁸⁶ See generally Anne Twomey, ‘Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another’ (2003) 31 *Federal Law Review* 507.

⁸⁷ *Re Residential Tenancies Tribunal (NSW); Ex parte The Defence Housing Authority* (1997) 190 CLR 410, 424–6 (Brennan CJ), 438–43 (Dawson, Toohey and Gaudron JJ), 454 (McHugh J).

electors, the formation of political judgments and the casting of votes for the election of⁸⁸ the federal Parliament is an area beyond state power.⁸⁹ This dimension has also been recognised by A R Blackshield:

if *any* aspect of Commonwealth institutions is to be ‘immune’ from State laws, that immunity must at least extend to Commonwealth political institutions, and especially to the Commonwealth Parliament. And, if democratic freedom of political discussion is entailed in those very institutions, *that freedom* may be within the area which is simply immune from State laws.⁹⁰

This federally-based limitation protecting political communication about federal government and politics can be located in a broader context. As cases like *Smithers* and *Crandall* show, there is a strong argument that the very existence of a federal body politic places a limitation on the way in which the states can prevent access to federal institutions.⁹¹ Other dimensions might include limitations on the way that states can regulate access to federal courts or state courts exercising federal jurisdiction.⁹²

The limitations described above in relation to laws in categories (1) and (2) have a strong doctrinal foundation. Additionally, they are perfectly consistent with the assumed predominance of parliamentary supremacy and responsible government in the Australian constitutional system of government. The state systems of representative governments are matters for the respective states, and the federal system of representative government is a matter for the federal body politic. As Saunders has said:

The ‘conception of a central government and State governments separately organised’ to which Owen Dixon referred, presupposes and protects a fundamental organising principle of representative government in Australia, that governments are responsible to their respective Parliaments and, through them, to the Australian people, organised nationally or in States or territories ...⁹³

If these federal limitations are accepted on their own (that is, independently of the further federal implications discussed below), it is a question of *which* legislature has the authority to regulate questions of political communication: the suggested limitations do not result in a lacuna in the totality of legislative power. However, as I will discuss below, there are other federal structural features which may take federally-based limitations further.

⁸⁸ To adopt Brennan J’s words in *ACTV* (1992) 177 CLR 106, 164.

⁸⁹ Dawson J also suggested this point in *Theophanous* (1994) 182 CLR 104, 190.

⁹⁰ Blackshield, above n 18, 265 (emphasis in original).

⁹¹ Indeed, *Smithers* was referred to with approval in: *Nationwide News* (1992) 177 CLR 1, 60 (Brennan J), 73 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 213–14 (Gaudron J), 232 (McHugh J).

⁹² Constitutional protection on federalism grounds was accepted, at least to some extent, by a majority of judges in *APLA* (2005) 224 CLR 322, 367 (McHugh J), 406 (Gummow J), 446 (Kirby J), 455 (Hayne J).

⁹³ Saunders, ‘Constitutional Structure and Australian Federalism’, above n 53, 188, citing *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

3 *Federal Laws That Regulate Political Communication Relevant to Federal Governmental Institutions and Processes*

The judicial review of category (3) type laws cannot be justified on the federal principles discussed in relation to category (1) and (2) laws: some further structural feature of the federal compact must be identified. The High Court in *Lange* turned to the text of the *Australian Constitution* to find a national system of responsible and representative government as the basis for the freedom. As outlined earlier, the mere reliance upon *national* representative government in written form runs into significant constitutional hurdles.

What is missing from this textual analysis is an understanding that the *Australian Constitution* gives rise to a *federal*, not just a *national*, system of representative government, and that the system of government at the Commonwealth level must be seen in its federal context. In this respect, the judgment of Gummow J in *McGinty* is significant. In addressing the question of whether the *Australian Constitution* or the constitutions of the states require equality of voting strength within electorates, his Honour gave a detailed account of the adoption of representative government in Australia. What is particularly important is Gummow J's emphasis on the adaptation of the principles of representative government 'to the central government of the federation'.⁹⁴ While the framers of the Australian Federation contemplated that national government would be representative government, 'it was necessary to adapt notions of representative government to the requirements of federalism as hammered out in forming the federal compact'.⁹⁵ In addressing the arguments in *McGinty*, Gummow J noted that the elements of representative government that were constitutionally entrenched by the framers 'concerned issues of federalism'.⁹⁶

The obvious reflection of federalism is in the establishment and composition of the Senate.⁹⁷ However, Gummow J's judgment highlights that even provisions relating to the House of Representatives display an endeavour to adapt representative government to a federal system. For example, s 24 of the *Australian Constitution* contains a number of entrenched elements that were essential to the federal structure.⁹⁸ In particular,

[t]he requirement in s 24 that the number of members chosen for each State shall be in proportion to the respective number of its people is evidence of a concern for equality of voting power, but only in the limited sense of interstate equality. ... The concern was one of equality of voting power among States, not among people.⁹⁹

Gummow J's observations emphasise that, while s 24 prescribes that the House of Representatives be 'composed of members directly chosen *by the people of*

⁹⁴ *McGinty* (1996) 186 CLR 140, 271.

⁹⁵ *Ibid* 270 (Gummow J).

⁹⁶ *Ibid* 277.

⁹⁷ Acknowledged by Gummow J: *ibid* 270.

⁹⁸ *Ibid* 275-6 (Gummow J).

⁹⁹ *Ibid* 277. See also *ibid* 240 (McHugh J).

the Commonwealth', their arrangement into state political communities retains a strong constitutional significance.¹⁰⁰ This finds particular reflection in s 128 which, amongst other things, requires majority support within a state before that state's proportionate representation in the House of Representatives is diminished.

Other provisions within Chapter I also reflect the federal dimensions to structures and processes of the House of Representatives: each original state is to have at least five members;¹⁰¹ electoral divisions are not to be formed out of parts of different states;¹⁰² electors are to vote only once (contrary to the position in Tasmania, Queensland and Western Australia in 1900);¹⁰³ and persons entitled to vote in state elections in 1900 were entitled to vote in federal elections.¹⁰⁴

It may be accepted, as Gummow J said in *McGinty*, that the core requirement of representative government is the 'ultimate control by the people, exercised by representatives who are elected periodically.'¹⁰⁵ However, in relation to federal Parliament, 'the people' are, to a significant extent at least, identified by their state of residency, and 'the representatives' are, as emphasised in relation to the US Congress in *Crandall*, to a significant extent at least, 'from the people of the States.'¹⁰⁶ This understanding of the federal structures of both the Senate and the House of Representatives accords with the prevailing view of the framers and their understanding of federalism. As Nicholas Aroney has shown, the Convention Debates 'over sections 7 and 24 demonstrat[e] the degree to which "federal", as opposed to "individual-democratic", considerations dominated the thinking of a decisive majority of the framers.'¹⁰⁷ Representative government, on this account, is as much (or perhaps more) about representation of state communities than the democratic representation of the individual.¹⁰⁸

¹⁰⁰ *Australian Constitution* s 24 (emphasis added). See also *Western Australia v Commonwealth* (1975) 134 CLR 201, discussed in Zines, 'Courts Unmaking the Laws', above n 13, 129–30.

¹⁰¹ *Australian Constitution* s 24.

¹⁰² *Australian Constitution* s 29.

¹⁰³ *Australian Constitution* s 30. See the discussion of Gummow J in *McGinty* (1996) 186 CLR 140, 281–2.

¹⁰⁴ *Australian Constitution* s 41.

¹⁰⁵ *McGinty* (1996) 186 CLR 140, 285.

¹⁰⁶ Bradley Selway and John M Williams, 'The High Court and Australian Federalism' (2005) 35 *Publius* 467, 470 (emphasis added) (citations omitted), note that '[t]he people of each state are represented in both the Senate and the House of Representatives.' The point is also made in Saunders, 'Constitutional Structure and Australian Federalism', above n 53, 176 (emphasis added) (citations omitted):

the States (or, more accurately, their peoples) are represented in central institutions, following a pattern now familiar in federal design. Thus *the people grouped in States* are represented in the upper House of the federal Parliament (the Senate), recognised in the composition of the House of Representatives and given a distinct voice in the process of constitutional alteration.

¹⁰⁷ Nicholas Aroney, 'Federal Representation and the Framers of the *Australian Constitution*' in Gabriël A Moens (ed), *Constitutional and International Law Perspectives* (2000) 13, 44.

¹⁰⁸ *Ibid* 13, 15, 17, 40. See also Nicholas Aroney, 'Representative Democracy Eclipsed? The *Langer*, *Muldowney* and *McGinty* Decisions' (1996) 19 *University of Queensland Law Journal* 75, 100–1; Nicholas Aroney, "'A Commonwealth of Commonwealths": Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890–1901' (2002) 23 *Journal of Legal History* 253, 266, 273; Nicholas Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890–1901' (2002) 30 *Federal Law Review* 265.

Of course, Gummow J was emphasising the limited scope for imposing constitutional constraints on the way in which representative government at the Commonwealth and state levels could be altered by the respective legislatures. As his Honour said, the entrenched dimensions of representative government ‘concerned issues of federalism’.¹⁰⁹ Nevertheless, his Honour’s analysis highlights the *federal* structure of representative government at the Commonwealth level.¹¹⁰ Put simply, representative government is *federal* representative government. Seen in this way, the Commonwealth system of representative government is the backbone of the federal compact: the way in which the people, organised according to state communities, *exercise* and *control* federal power. While, as the *Lange* Court said, the free flow of information is necessary for the effective operation of representative government, at the federal level, it is the federal structure of that institution which locates in the judiciary the function of policing that structure. If the system of representative government created by the *Australian Constitution* is the backbone of the federal compact (that is, a way in which federal power is exercised and controlled), there is a strong case for allowing the judiciary, as the guardian of the federal compact, to invalidate legislation that undermines that system of government.

While the judiciary need not have that power as a matter of political theory, once it is accepted that the judiciary is to have the power of controlling the reach of federal legislative power, it seems a modest extension to allow the courts to police the federal mode through which that legislative power is exercised. As Robert Garran recognised in *The Coming Commonwealth*, ‘the mode in which federal powers are exercised’ is as central to the federal design as the distribution of power.¹¹¹

In summary, there is a solid foundation to support judicial review of category (3) laws. By policing federal regulation of federal representative government, the judiciary safeguards the federal compact. This is also a basis which may provide additional justification for (and perhaps even overshadow) the judicial review of category (2) type laws, as state legislatures could no more undermine the constitutional system of government than Commonwealth laws.

4 *State Laws That Regulate Political Communication Relevant to State Governmental Institutions and Processes*

As indicated above, under the *Lange* approach, there is some uncertainty as to whether political communication solely about state governments has any constitutional protection from state legislation. There may be a stronger case for that protection if one relies upon limitations based on federalism.

State–state relations within the federal system is an underdeveloped area in Australian constitutional law. Nevertheless, there is little doubt that the federal

¹⁰⁹ *McGinty* (1996) 186 CLR 140, 277.

¹¹⁰ Indeed, Gummow J dealt with the implied freedom against this background: *ibid* 286.

¹¹¹ Robert Randolph Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (1897) 27. See also Moore, *The Constitution of the Commonwealth of Australia*, above n 47, 67–8.

compact has horizontal dimensions. Most obviously, provisions like ss 92 and 117 of the *Australian Constitution* largely operate horizontally. Furthermore, in the choice of law context, the High Court has acknowledged that the nature of the federal compact is one where sovereignty is shared among the states.¹¹² Similarly, the Court has acknowledged that inconsistencies between state laws may need to be resolved by federal implications.¹¹³ The states are not sovereign legal entities and, to some extent, their separate constitutional existence is qualified by Federation.¹¹⁴

The application of the principles of state immunity as between states has not yet been addressed by a majority of the Court. However, there would be a strong claim that Federation has prevented a state from interfering with the governmental institutions of other state legislatures.¹¹⁵ This may not be a significant limitation in practice, although in theory, hypothetical examples can be envisaged where a state legislature might hamper the capacities of non-residents present in the state from voting in the elections of their state of residence. To take a fanciful example, the NSW Parliament might pass a law banning political advertisements in NSW in relation to Queensland elections. This may significantly impact upon endeavours to target Queensland residents temporarily in NSW. Such a law may well undermine the system of government in Queensland and, arguably, might fall foul of federal implications.¹¹⁶

The more problematic question is whether federal implications might limit the extent to which a state legislature undermines its own system of government. It will be recalled that in *Re Alberta Legislation*, Cannon J took the view that the citizens of one province in Canada have a vital interest in having access to information regarding the policy of a sister province.¹¹⁷ The question is whether that vague horizontal limitation to protect political communication finds any firm reflection in the text and structure of the Australian federal compact.

The argument might be constructed along similar lines to that accepted in *Kable*, where it was considered that '[t]he *Constitution* is premised upon the proposition ... that, of every State ... there will be "courts" and "judges"'.¹¹⁸ There were three pillars to the argument that state courts cannot be abolished,

¹¹² *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534, 536 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), 551 (Kirby J).

¹¹³ See, eg, *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 34 (Gaudron, Gummow and Hayne JJ), 50 (Kirby J) ('*Mobil*').

¹¹⁴ See James Stellios, 'Choice of Law and the *Australian Constitution*: Locating the Debate' (2005) 33 *Federal Law Review* 7.

¹¹⁵ For some recognition of a horizontal application of these federal principles: see *Mobil* (2002) 211 CLR 1, 25–6 (Gleeson CJ); *Re Residential Tenancies Tribunal (NSW)*; *Ex parte The Defence Housing Authority* (1997) 190 CLR 410, 451 (McHugh J).

¹¹⁶ See the example given by Kirby J in *Mobil* (2002) 211 CLR 1, 63–4 (citations omitted) of 'a law of one State that purport[s] to regulate beyond that State's borders the exercise of the jurisdiction and powers of an organ of government of another State.' Although Kirby J was discussing a related question of the federal limitations on the territorial reach of state laws, the example might be seen through a state immunity framework. See also *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 468–9, where Hayne J suggests that federal implications may limit the exercise of state judicial power within the boundaries of another state.

¹¹⁷ See above n 71 and accompanying text.

¹¹⁸ (1996) 189 CLR 51, 140 (Gummow J). See also at 108 (McHugh J).

although it is not clear to what extent each pillar was sufficient on its own to establish the constitutional protection for state courts, or whether they worked in combination. First, there are textual references to state courts in provisions like covering cl 5, ss 51(xxiv), 51(xxv), 73, 77(iii), 79 and 118.¹¹⁹ Secondly, there is the expedient within s 77(iii) for the investiture of federal jurisdiction in state courts.¹²⁰ That expedient 'would be frustrated if there were no system of state courts to provide these substitute tribunals as repositories of the judicial power of the Commonwealth.'¹²¹ Thirdly, there is the appellate path in s 73 from state courts, in particular, the state supreme courts.

It necessarily followed, it was thought, 'that the *Constitution* has withdrawn from each state the power to abolish its Supreme Courts or to leave its people without the protection of a judicial system'.¹²² In addition to preserving the existence of a system of state courts, the second and third pillars of federal–state constitutional integration were seen as preventing state legislatures from empowering state courts to act in a way that is incompatible with the exercise of Commonwealth judicial power, that is, in a way that would compromise their institutional integrity.¹²³ In *Forge*, the Court tried to tie this analysis back to the word 'court' in Chapter III and a search for its 'defining characteristics'.¹²⁴ Thus, a law that failed the *Kable* test would undermine the state court's essential characteristics of independence and impartiality to such a degree that it would cease to be a 'court' described in Chapter III.¹²⁵ Nevertheless, the transcendental place of state courts in the federal judicature remains the justification for the Chapter III limitations on state legislatures.¹²⁶ Consequently, although the constitution and organisation of state courts are matters for the states, the *Australian Constitution* imposes some limitations on state legislatures.¹²⁷

In relation to state legislatures and executives, there are textual references in the *Australian Constitution* to state 'Parliaments',¹²⁸ to state 'Executive Governments',¹²⁹ and to state 'Governors'.¹³⁰ As a starting proposition it can be said that, subject to constitutional requirements, the structure and nature of state political bodies are matters for state legislatures, and that state legislatures are not tied to the structure and nature that characterised those institutions at

¹¹⁹ Ibid 140 (Gummow J).

¹²⁰ Ibid.

¹²¹ Ibid. See also at 102 (Gaudron J), 111 (McHugh J).

¹²² Ibid 111 (McHugh J). See also at 106 (Gaudron J), 141 (Gummow J).

¹²³ Ibid 98 (Toohey J), 104 (Gaudron J), 116, 118 (McHugh J), 137 (Gummow J). This principle was affirmed by the Court in *Fardon v A-G (Qld)* (2004) 223 CLR 575, 591 (Gleeson CJ), 598–9 (McHugh J), 617 (Gummow J), 627 (Kirby J), 652–3 (Callinan and Heydon JJ).

¹²⁴ *Forge* (2006) 229 ALR 223, 241 (Gummow, Hayne and Crennan JJ). See also at 234 (Gleeson CJ), 279 (Kirby J).

¹²⁵ Ibid 240 (Gummow, Hayne and Crennan JJ).

¹²⁶ See, eg, ibid 244–5 (Gummow, Hayne and Crennan JJ).

¹²⁷ See ibid 240–1.

¹²⁸ See, eg, *Australian Constitution* ss 7, 9–10, 15, 29, 123–4, 128.

¹²⁹ See, eg, *Australian Constitution* s 119.

¹³⁰ See, eg, *Australian Constitution* ss 12, 15, 110.

Federation. State legislatures are free, for example, to abolish upper houses.¹³¹ However, it can equally be said that the references to state ‘Parliaments’, ‘Executive Governments’ and ‘Governors’ are terms of constitutional content. Those textual references are probably sufficient to confer constitutional protection for the continued existence of those political institutions at the state level, otherwise the federal mechanisms contained within the relevant provisions would be frustrated. However, recognising the continued existence of those political bodies says little about the essential characteristics that are protected from alteration.

For present purposes, the question is whether representative government, and the political communication that is required to make it work, are so characteristic of the constitutional concepts of state Parliaments, and their place in the federal architecture, that they are protected from abrogation by their express inclusion in the federal scheme.¹³² Gummow J in *McGinty* certainly appears to have adopted this position. Following discussion about Chapter III that mirrors the rationale later set out by his Honour in *Kable*, and having referred to the textual references to state legislative and executive machinery in the *Australian Constitution*,¹³³ his Honour said:

it may fairly be said that the framers of the *Constitution* accepted the structure of the governments of the colonies as they stood at federation and, in so far as the doctrines of representative government and responsible government were then understood, they were treated as operating within the new States.¹³⁴

Similar comments have been made by other judges.¹³⁵ However, to find the strongest support from the *Kable* reasoning, those characteristics of state Parliaments must somehow be significant to the federal scheme. To imply a constitutional requirement of institutional integrity for state courts, even when exercising state judicial power, the Court in *Kable* relied upon the transcendental role of state courts exercising Commonwealth judicial power under Chapter III of the *Australian Constitution*.¹³⁶ The essential characteristic of institutional integrity (or, in the language used in *Forge*, independence and impartiality) was

¹³¹ *Clayton v Heffron* (1960) 105 CLR 214.

¹³² The search for essential characteristics is also the approach that the High Court has taken to the governmental institution of trial by jury in s 80 of the *Australian Constitution*: see James Stellos, ‘The Constitutional Jury — “A Bulwark of Liberty”?’ (2005) 27 *Sydney Law Review* 113, 120–5.

¹³³ Gummow J relied in particular on s 15, which permits state Parliaments to choose a person to fill a Senate vacancy, s 51(xxxvii)–(xxxviii), which grants the Commonwealth power to legislate upon reference, at the request of, or with the concurrence of state Parliaments, and s 123, which grants the Commonwealth power, with the consent of a state’s Parliament, and the approval of the majority of its electors, to alter the limits of the state: *McGinty* (1996) 186 CLR 140, 293.

¹³⁴ *Ibid.* See also Selway and Williams, above n 106, 470.

¹³⁵ *Nationwide News* (1992) 177 CLR 1, 75 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 168 (Deane and Toohey JJ), 216 (Gaudron J); *McGinty* (1996) 186 CLR 140, 216 (Gaudron J); Zines, *The High Court and the Constitution*, above n 48, 389–91.

¹³⁶ Although some of the judgments in *Forge* (2006) 229 ALR 223, have sought to ground this analysis in the meaning of state ‘courts’, the judgments continue to rely on the place of state courts in the federal judicature as the justification for limitations on state power to affect the independence and impartiality of those courts: see above nn 124–7.

derived from the effect that the exercise of state judicial power had on the integrity of the integrated Australian legal system and the exercise of Commonwealth judicial power. By analogy, any constitutional requirement of representativeness for state Parliaments would require a transcendental impact on the role and place of those Parliaments in the federal scheme. However, many of the provisions which refer to state Parliaments were transitional,¹³⁷ and others may not have a sufficient impact on representative government at the federal level to constitutionalise those characteristics at the state level.¹³⁸ Thus, reliance on *Kable* to preserve representative and responsible government at the state level, and the political communication necessary for them to work, has some difficulties. This is particularly the case since some judges view *Kable* as ‘drawing ... a very long bow’,¹³⁹ and even McHugh J, who was a member of the majority in *Kable*, has rejected the argument.¹⁴⁰

In summary, of the four categories of laws identified earlier, this dimension finds the least support in current doctrine.

IV IMPLICATIONS FOR CURRENT DOCTRINE

There is a range of uncertainties which have accompanied the development of the implied freedom, many of which continue despite the unanimous statement in *Lange*. The first concerns the very existence of the freedom. Anchoring representative government, and consequent necessary implications, in the federal compact provides a stronger justification, on any theory of constitutional interpretation, for the protection of political communication and the role of the Court in exercising judicial review in this context. To deny constitutional protection for political communication derived from the federal structures of representative government would be to treat federalism and rights as mutually exclusive subject areas.

A second uncertainty is the question of what is relevantly political for the purpose of the implied freedom. Adrienne Stone has argued that the Court’s reliance upon ‘text and structure’ in *Lange* provides no guidance in this regard.¹⁴¹ Locating constitutional protection in the federal structures of representative government does little to provide further answers, as the approach in this article merely provides an alternative construct of representative government to support the protection of political communication. It may be that providing greater legitimacy for the constitutional protection of representative government

¹³⁷ See the discussion by Toohey J in *McGinty* (1996) 186 CLR 140, 206.

¹³⁸ As Toohey J said in *McGinty* (1996) 186 CLR 140, 207, ‘[e]ven if the replacement senator was chosen by a State parliament which was not a representative government, the effect on representative government at the Commonwealth level would be minimal’ as its operation is infrequent and of short duration; see also *Vardon v O’Loghlin* (1907) 5 CLR 201, 216 (Isaacs J).

¹³⁹ *APLA* (2005) 224 CLR 322, 469 (Callinan J).

¹⁴⁰ *Theophanous* (1994) 182 CLR 104, 201–2.

¹⁴¹ Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28 *University of New South Wales Law Journal* 842, 842–51; Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *Melbourne University Law Review* 374, 378–90. Cf Meagher, above n 29.

erodes the reluctance on the part of some judges to take the constitutional limitation seriously. However, even under the federal implications discussed above, whether communication is to be protected depends upon its relevance to the institution of representative government in question. That is a question that necessarily depends upon differing conceptions of how communication informs the political process.

As alluded to above, a third uncertainty remains under the *Lange* doctrine as to whether communication about state government is protected. The strongest claim put forward is one of governmental reality: given the high levels of integration between Commonwealth and state governments, many instances of which find reflection in the text of the *Australian Constitution*, it is unrealistic to create categories according to level of government.¹⁴² This claim of derivative protection is no less relevant for federal structures of representative government. However, focusing on federal implications provides greater scope for direct constitutional protection. Political communication about state government is directly protected from federal and perhaps other state laws on the basis of state immunity principles. It may also be possible, although less likely, that political communication about state government is directly protected from laws of the same state. In any event, in this regard, the idea of derivative protection could be applied with equal force.

A fourth uncertainty concerns the scope of protection provided by the *Lange* doctrine, that is, the standard of review to be applied. The extent to which the judiciary defers to legislative judgements about the regulation of political communication remains unclear. Although *Lange* seemed to identify unanimous support for a test to be applied, differences immediately arose thereafter in *Levy*.¹⁴³ Those differences have continued in the most recent cases of *Coleman* and *APLA*. There is considerable variation in the way in which the test is formulated,¹⁴⁴ and more importantly, in the qualitative enquiry undertaken.¹⁴⁵

¹⁴² *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ); *Nationwide News* (1992) 177 CLR 1, 75–6 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 142 (Mason CJ), 168–9 (Deane and Toohey JJ), 216–17 (Gaudron J); *Theophanous* (1994) 182 CLR 104, 122 (Mason CJ, Toohey and Gaudron JJ).

¹⁴³ (1997) 189 CLR 579. See Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 675–87.

¹⁴⁴ For example, the *Lange* test was slightly modified by the majority in *Coleman* (2004) 220 CLR 1, 50 (McHugh J), 77–8 (Gummow and Hayne JJ), 82 (Kirby J). However, that modification was not applied by the other three judges in the subsequent case of *APLA* (2005) 224 CLR 322. Additionally, some judges seem to prefer a form of words that differs from that adopted in *Lange*: see below n 145 and accompanying text. This lack of commitment to the *Lange* formulation was also displayed in argument during the hearing of *APLA*: see *APLA* [2004] HCATrans 375 (6 October 2004).

¹⁴⁵ See, eg, *Coleman* (2004) 220 CLR 1, 32 (emphasis added) where Gleeson CJ stated that the balance struck by the [legislature] is *not unusual*, and I am *unable to conclude* that the legislation, in its application to this case, is *not suitable* to the end of maintaining public order in a manner consistent with an appropriate balance of all the various rights, freedoms, and interests, which require consideration.

Callinan J stated that a preferable formulation of the requirement that the legislation in question be 'reasonably appropriate and adapted to achieving a legitimate end' was whether it was 'a *reasonable implementation* of a legitimate object': at 110 (emphasis added). Heydon J noted that

Thus, assessing the impact that the ideas in this article would have on that enquiry is very difficult since the point of comparison has not been identified with sufficient precision or consistency.

However, stripped of all the verbiage, it would appear that the fundamental textual or structural constitutional enquiry in *Lange* is whether the law in question is compatible or consistent with the system of government established by the *Australian Constitution*.¹⁴⁶ Ultimately, this is the same constitutional question that would arise under the federal implications identified in this article. Irrespective of the category of law discussed in Part III above, the ultimate enquiry is whether the law in question is incompatible or inconsistent with the relevant system of representative government. Although this article argues that federal principles can provide the justification for the protection of political communication, that protection is still derived from the relevant system of representative government that finds constitutional entrenchment in federal structures. That is, even under a federal justification for judicial review of political judgements about political communication, protection is only provided to the extent that it is necessary for the effective operation of the relevant system of representative government.¹⁴⁷ This, of course, is not a precise standard to be applied. However, it is the same enquiry to be undertaken in relation to the federal structures of representative government.

Four concluding observations can be made about the standard of review to be applied under these federal implications. First, the federal limitations do not necessarily provide further guidance on the way in which judges approach the constitutional enquiry or the way in which they formulate shortcut tests which are used as proxies for that ultimate enquiry. The same variations as to the applicable standard of review which have arisen following *Lange* can equally arise under federal implications. However, and secondly, it may be that the greater legitimacy that federal implications bring to the constitutional protection of political communication might encourage those judges sceptical of the implied freedom to take constitutional protection of political communication more seriously.

Thirdly, in principle, category (3) type laws could be seen as requiring greater deference to legislative judgements about political communication than that

[t]he question is not “Is this provision the best?”, but “Is this provision a *reasonably adequate attempt* at solving the problem?”: at 124 (emphasis added). While purporting to apply the *Lange* test, these formulations of the enquiry exhibit a greater willingness to defer to legislative judgements about the regulation of political communication. See also Adrienne Stone and Simon Evans, ‘Australia: Freedom of Speech and Insult in the High Court of Australia’ (2006) 4 *International Journal of Constitutional Law* 677, 679–80.

¹⁴⁶ *Coleman* (2004) 220 CLR 1, 51 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J), 110 (Callinan J); *APLA* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J). As to whether this test would produce different results from the two-tier *Lange* formulation: see Nicholas Aroney, ‘Commentary’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 21, 26–7, 34.

¹⁴⁷ This is the same justification for the extent of the protection in *Lange* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

applied under the other categories of laws.¹⁴⁸ It is possible that the political process at the federal level could be seen as exercising a principal means for the control of federal power, either because of the federal structures for the exercise of power,¹⁴⁹ or because of the institutional entrenchment of responsible government at the federal level.¹⁵⁰ However, those arguments have not been adopted by the High Court.¹⁵¹ Fourthly, at least the judgments of Dawson and McHugh JJ in *ACTV* illustrate that the same factors taken into account when determining compatibility with the conventional implied freedom of political communication can be considered when determining consistency with the constitutional powers or capacities of the states.¹⁵²

V CONCLUSION

In many ways, the arguments presented in this article are not novel. The seeds for the ideas can be found in the existing cases. It may just be that the compromise in *Lange* that followed the divergent judicial philosophies of the Mason Court judges suffocated any further development of doctrines derived from the federal structure which protect political communication. Those federal implications have not been developed because of the unanimous support in *Lange* for an implied freedom of political communication based, in part, on the constitutional provisions which create Commonwealth representative government. The problem is that reliance upon the reduction into written form of democratic political institutions of government is inconsistent with understandings of the envisaged constitutional scheme that placed faith in democratic government and the political resolution of competing rights claims, and which largely left the system of representative government to parliamentary control.

The strongest justification for judicial review in Australia has been the maintenance of the 'federal compact'. Rather than challenging the constitutional ordering of governmental powers assumed at Federation, this article has suggested that political communication may be protected by federal structures of representative government. There is a strong basis for arguing that federalism in Australia has located with the judiciary the power to exercise judicial review of the regulation of political communication, at least to the same extent as *Lange*.

Why does this matter if *Lange* already protects political communication? It matters because the *Lange* justification for constitutional protection falls short of

¹⁴⁸ It is possible that Brennan J's judgment in *ACTV* (1992) 177 CLR 106 could be rationalised on this basis. Brennan J held that there was no contravention of the implied freedom of political communication, but that Commonwealth provisions regulating political advertising concerning state elections had violated state immunity principles: at 163–4. This is consistent with Brennan J's emphasis on giving Parliament a 'margin of appreciation': at 156, 159; *Theophanous* (1994) 182 CLR 104, 156.

¹⁴⁹ For Wechsler's argument about judicial review in the US: see Wechsler, above n 48.

¹⁵⁰ See Gageler, above n 29, 164–71.

¹⁵¹ See Saunders, 'Constitutional Structure and Australian Federalism', above n 53, 185.

¹⁵² *ACTV* (1992) 177 CLR 106, 202 (Dawson J), 244 (McHugh J). Brennan J, without detailed explanation, held that state immunity principles were breached, but that the implied freedom of political communication was not: at 164.

providing a convincing response to its critics. The continued recognition of constitutional protection for political communication, and a judicial willingness to engage more seriously with the constitutional limitation, depends upon the development of a firmer constitutional foundation.