

## SILENCING THE SOVEREIGN PEOPLE\*

P A Keane<sup>†</sup>

Colleagues, ladies and gentlemen,

May I say how honoured I am to have been asked to deliver this year's Spigelman Oration.

It was my great good fortune to appear on several occasions on the same side as Jim Spigelman in the High Court when he was a de facto Solicitor-General for New South Wales in the 1990s. Mr Spigelman QC was one of the most compelling advocates of his time. His colleagues from the other States were in awe of him. Honesty compels me to say, however, that I cannot recall that the deployment of his formidable skills as an advocate in the interests of the States ever resulted in our actually winning any cases.

Jim's efforts did, however, inspire the rest of our tatterdemalion little band with a deep and abiding admiration for his intellectual depth and acuity as a lawyer as well as his skills as an advocate.

Later, I came to value, even more highly, the intellectual leadership that he brought as Chief Justice of New South Wales to the resolution of the problems that challenged the administration of criminal justice at around the turn of the century in relation to the revelations of sexual abuse of children in both domestic and institutional settings. His leadership of the Court of Criminal Appeal helped to ensure that the legacies in our criminal law of the inveterate misogyny of the great sages of the common law were not allowed to prevent dark crimes committed in secret against children from being brought to justice.

After Jim's retirement as Chief Justice of New South Wales, he found himself heavily involved, not as a judge, but as a participant, in ongoing controversy over the nature and extent of legitimate governmental restriction upon the communication of matters of political interest to the community. It would have been difficult to be closer to the action than Jim was during his term as Chairman of the ABC, the great public broadcaster at the centre of our life as a people.

It is, I hope, fitting, that my remarks this evening will focus upon the constitutional concept of "the people" and, specifically, on the idea that freedom of speech in Australia is to be understood as an incident of the relationship between the institutions of government established by the *Constitution* and the people of the Commonwealth who sustain those institutions. Obviously, I will not discuss recent judgments of the High Court in any detail, much less comment upon differences of approach among the judges or specific doctrinal issues such as the evolving role of proportionality testing in the Court's jurisprudence. Rather, I propose to track through the cases

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<sup>†</sup> Justice of the High Court of Australia.

some of the attempts by counsel to emulate a conspicuously successful piece of advocacy by Mr Spigelman QC in the landmark case of *Lange v Australian Broadcasting Corporation*<sup>1</sup>.

The success of the advocacy of Spigelman QC in *Lange* provides an instructive example of what Sir Owen Dixon described as "the high technique of the common law". I am speaking particularly of that aspect of the technique whereby the advocate advances his or her case by an appeal to the values that can, at least arguably, be said to stand behind the legal text under discussion, so as to make his or her argument more attractive to the court to whom it is presented. Even though the content, and even the immanence, of those more abstract values may be distinctly contestable, skilful deployment of the technique may render more likely a sympathetic response by the court to the advocate's case. It may also shape the court's answer to the controversy so that the answer is more compelling than might otherwise be the case.

In the discourse about freedom of political communication in Australia, the relevant values are those that may arguably be said to inhere in the concept of "the people". That concept can be presented as a bridge between politics and the law; between the government and the governed; and between the polity and its sovereign authority. It can also be seen as a bridge between generations – of the living, those who have gone before, and those yet to be born. It can also suggest notions of autonomy, unity, fraternity, civility and equality.

### **The people**

Ironically perhaps, the concept of "the people" seems to have been more influential in the jurisprudence of the Australian *Constitution* than it has been in the constitutional jurisprudence of the United States. I speak of irony because, in the *US Constitution*, the concept of "the people" was accorded central prominence by its drafters in contrast to our *Constitution*. One might expect the concept to affect, persuasively and pervasively, the interpretation of the *US Constitution* by American judges. But that expectation would be disappointed.

On the other hand, with less abundant textual material to work with, Australian judges have found the concept of "the people" to be a fertile source of constitutional doctrine. I do not suggest, however, that the work of our judges in this regard has been uncontroversial. Controversy cannot be avoided where judicial decision-making is influenced by values that are said to lie behind the black letter of the constitutional text. Such values are sometimes competing, and even their relevance contestable.

No doubt the differences in American and Australian constitutional case law in this regard reflect the different historical foundations and experience of our two countries, and consequent differences in cultural outlook. Generations of different lived experience have shaped the judges' understanding of their respective nations. Lived experience, and the cultural values it engenders, may tend to be more influential than the black letter of the constitutional text. But we must start with the text.

### **The *US Constitution*: We the People**

In the very first words of the *US Constitution*, "We the People", that people declared to an amazed world their determination to constitute a government for themselves.

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<sup>1</sup> (1997) 189 CLR 520.

As Marshall CJ said in *McCulloch v Maryland*<sup>2</sup>:

"[t]he Government of the Union [is] a Government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised on them, and for their benefit."

The people, as the source of the *US Constitution* itself, are expressly referred to in Article 1, Section 2 and in the First, Second, Fourth, Ninth and Tenth Amendments. The deployment of the concept explicitly rejects all possibility of a superior authority on Earth, including the authority of the existing colonies, or States as they then became: the new government to be constituted was not the creature of those colonies; rather, the States as such, were the creatures of the *US Constitution*, and the *US Constitution* was the creation of "the People". It is noteworthy that the people, who are constituting a new government for themselves, recognise each other as members of a distinct community that is logically and historically anterior to the government to be established by and for that community.

The *US Constitution* owed a lot to Alexander Hamilton and James Madison, two of the three authors of *The Federalist Papers*; but it also owed much to some of the lesser known of the Founders of the United States. For example, it was John Jay, of New York, the third contributor to *The Federalist Papers*, who had the brilliant insight that, by expressly locating sovereignty in "the People", one could avoid an inevitably divisive and difficult issue as to whether sovereignty resided in the States or in the new federal government<sup>3</sup>.

Another of the lesser-known of the American Founders was Gouverneur Morris. He was charged by the Constitutional Convention with actually drafting the *US Constitution*. He took the preamble of the original draft, which had been: "We the people [with a small 'p'] of the states of New Hampshire, Massachusetts, Rhode Island [etc]" and changed it to: "We the People [with a capital 'P'] of the United States". This has rightly been described as "probably the most consequential editorial act in American history"<sup>4</sup>.

In contrast, the Commonwealth of Australia was created by the *Commonwealth of Australia Constitution Act 1900* (Imp), an enactment of the Imperial Parliament at Westminster. The preamble to the Imperial Act recites the agreement of the people (with a small "p") of New South Wales, Victoria, South Australia, Queensland and Tasmania to "unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland under the *Constitution* hereby established". It was the Act of the Imperial Parliament that did the establishing.

As we will see, ss 7, 27 and 64 of our *Constitution*, along with s 128, provide the textual foundation for the implied freedom which has been invoked to strike down laws made by the parliaments of the States and the Commonwealth. Section 24 provides that the House of Representatives shall be composed of "members directly chosen by the people of the

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<sup>2</sup> (1819) 17 US 316 at 404-405.

<sup>3</sup> Ellis, *The Quartet: Orchestrating the Second American Revolution, 1783-1789*, (2015) at 113.

<sup>4</sup> Ellis, *The Quartet: Orchestrating the Second American Revolution, 1783-1789*, (2015) at 151.

Commonwealth". Section 7 provides that the Senate shall be composed of senators for each State, "directly chosen by the people of the State". Section 128, which provides for the amendment of the *Constitution* by referendum, does not even refer to the people; rather, it refers to "the electors qualified to vote for the election of members of the House of Representatives".

As a matter of practical politics, the idea of "the People" in the United States had an immediate and powerful practical appeal for those who had recently engaged in a long and costly, but ultimately victorious war against a common foe. The colonists had successfully combined in war to win their independence from the most powerful empire in the world. For eight years they maintained in the field an army in which the people of the several colonies were unified in a way that was indispensable to the success of their struggle for independence. Moreover, they had experience of 150 years of clearing a wilderness and building towns, and of holding town hall meetings to decide how their common enterprises should best be conducted. And, most importantly, they all spoke a common language and shared the cultural insights generated by the memory of, and reflection upon, the English civil wars of the seventeenth century.

All that having been said, one may digress to say that there must be a serious question as to the historical accuracy of the assertion by those who propounded the *US Constitution* that all those who had previously been residents of thirteen colonies under the British Crown were truly unified as a "People"<sup>5</sup>. In some respects, it would be difficult to imagine aggregations of people less unified in their commitment to common ideas of justice than the hardy individuals of the Puritan states of New England and the slave-owning aristocracies of the South.

Before the Convention which agreed to propose the *US Constitution* for adoption by the people, George Washington had written<sup>6</sup>: "We are either a United people or we are not. If the former, let us, in all matters of general concern, act as a nation ... If we are not, let us no longer act a farce by pretending to it." His rhetorical urging of the former proposition was wishful thinking. It was a view that the more clear-eyed James Madison did not share. Madison saw the division between the states by reason of "their having or not having slaves"<sup>7</sup> as fundamental. Within 80-odd years, he would, tragically, be proved right. And even today, those divisions continue to have their contemporary manifestations.

Focusing for present purposes though, upon "the People" as a legal rather than political concept, we can see that the values of unity and civility inherent in the concept of "the People" have not flourished in the constitutional jurisprudence of the United States as one might have expected given the central place occupied by "the People" in the *US Constitution*.

I will mention some of the US cases on election funding in due course, but the most powerful modern illustration of the diminished significance of "the People" in the framing by the US judiciary of constitutional disputes is the recent expansion by the US Supreme Court of the scope of the Second Amendment. The Second Amendment says: "A well regulated Militia,

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<sup>5</sup> Some such questions were raised by Barwick CJ in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 22-23.

<sup>6</sup> Quoted in Ellis, *The Quartet: Orchestrating the Second American Revolution, 1783-1789*, (2015) at 109.

<sup>7</sup> Farrand, *The Records of the Federal Convention of 1787*, vol 1 (1937) at 486.

being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

In 2008, in *District of Columbia v Heller*<sup>8</sup>, and in 2010, in *McDonald v Chicago*<sup>9</sup>, the majority of the Supreme Court struck down gun control laws in the District of Columbia and the States on the basis that they infringed the Second Amendment.

The majority view proceeded on the footing that this provision confers a constitutional right upon individuals to possess firearms. It may be noted that this view was contrary to that taken in 1939 in *United States v Miller*<sup>10</sup>. In that case, the Supreme Court emphasised that the right to bear arms was related to their use for general security by a militia. McReynolds J, delivering the opinion of the Supreme Court, said<sup>11</sup>:

"With obvious purpose to assure the continuation and render possible the effectiveness of such forces [that is, 'the well-regulated militia'], the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."

The decision in *Miller* stood as a statement of the law in the United States for seventy years. During that time, in the aftermath of the assassinations of Martin Luther King and Robert Kennedy, Congress enacted the *Gun Control Act* in 1968. This legislation established a system of licensing and prohibited certain classes of people from buying or owning firearms. The decisions in *Heller* and *McDonald* relegated the claims of precedent and the text of the *US Constitution* in favour of a very strong view of individual rights.

It seems distinctly odd that the Second Amendment expressly contemplates that the militia may be well-regulated – for example, the militia may be ordered to stack their arms by their officers acting within the chain of command – yet individuals may not be required to give up their arms.

But the most remarkable feature of the recent cases is the reading out of the express recognition in the Second Amendment itself, that it is the right of "the people", which is not to be infringed. The people was not some kind of shorthand for a collection of social atoms. Rather, the people were a community, organised and capable of acting as such. It was the organised people who had thrown off the tyrannous British yoke. It was they who established and sustained their militia. This is not an idea that is difficult to grasp. The notion that a people is not merely an assemblage of individuals bound by the passing exigencies of self-defence or commercial interactions, but rather a commonwealth bound together by a dedication to doing justice to each other, is an idea as old as Cicero's *De Re Publica*<sup>12</sup>.

This reading out of "the people" is baffling. Even if one subscribes to the originalist approach to constitutional interpretation adopted by the majority of the US Supreme Court in the Second

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<sup>8</sup> (2008) 554 US 570.

<sup>9</sup> (2010) 561 US 742.

<sup>10</sup> (1939) 307 US 174.

<sup>11</sup> (1939) 307 US 174 at 178.

<sup>12</sup> Cicero, *De Re Publica* (1928), bk 3, XXXI-XXXV Loeb Classical Library (1928) at 218-226.

Amendment cases, we can be entirely confident that the framers of the *US Constitution*, slave-owners and free-soilers alike, did not intend that the right to keep and bear arms should be guaranteed to any one of the millions of African-Americans in the United States at the time who might happen to win his or her freedom.

As we will see, the seeming indifference to the concept of the people extends in the recent case law of the US Supreme Court to cases about election funding. It stands in marked contrast to the Australian jurisprudence in relation to the same issue. Here, with much less textual encouragement, our jurisprudence has warmly embraced the idea of the people as a source of constitutional law.

### **The Australian experience**

In recent times in Australia, the powerful cultural influence of the United States has made it common for litigants and their lawyers instinctively to frame issues of public law as a contest for the vindication of individual rights without regard for the historical development of our institutions of government and of their responsibilities *inter se*<sup>13</sup>. The zeitgeist<sup>14</sup> is so thoroughly entranced, if not obsessed, by the notion that the operation of our legal system is to be understood in terms of the enforcement of individual rights, that fundamental propositions about our institutions of government – and their roles in the apparatus of creating and enforcing the law – can be lost from view.

The fascination of the zeitgeist with rights analysis, as the universal solvent of legal issues attending the exercise of public power, tends to exalt judicial power as the source of rights over the political branches of government. This exaltation of the judiciary as the principal, if not the exclusive, champion of individual rights may tend to distort the role of the judiciary as understood in the Anglophone tradition, and, indeed, in our *Constitution*. The traditional view was explained by Brennan J in *Attorney-General (NSW) v Quin*<sup>15</sup> by reference to the institutional responsibility peculiar to the judicial branch of government to declare what the law is: "[T]he scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise."

Consistently with that traditional view, the Australian cases concerning freedom of speech came to frame the problems to be addressed as an aspect of the development of our institutions of government and of their relationship to the governed, the people, rather than the vindication of individual rights<sup>16</sup>.

From the rather sparse textual basis of ss 7, 24 and 128 of the *Constitution*, the implied freedom of political communication emerged in *Australian Capital Television Pty Ltd v The Commonwealth*<sup>17</sup> as a means to protect the "[e]quality of opportunity to participate in the exercise of political sovereignty [which] is an aspect of the representative democracy guaranteed

<sup>13</sup> Cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 101-102 per Dixon J.

<sup>14</sup> The expression "zeitgeist", "the spirit of the age", was coined in the early nineteenth century by Georg F W Hegel in *The Philosophy of History*, German ed (1899).

<sup>15</sup> (1990) 170 CLR 1 at 36.

<sup>16</sup> *Russell v Russell* (1976) 134 CLR 495 at 507, 520-521, 532 citing *Scott v Scott* [1913] AC 417 at 441.

<sup>17</sup> *ACTV* (1992) 177 CLR 106.

by our *Constitution*"<sup>18</sup>. As the ties of Empire became more and more tenuous, and especially after the passage of the Australian Acts in 1986, an expansive reading of ss 7, 24 and 128 of the *Constitution* met the felt need to relocate Australian sovereignty. As Mason CJ observed in *ACTV*, the Australian Acts "marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people"<sup>19</sup>.

Within a couple of years of the decision in *ACTV*, the High Court decided *Theophanous v Herald & Weekly Times Ltd*<sup>20</sup> and *Stephens v West Australian Newspapers Ltd*<sup>21</sup>. These cases were concerned with the intersection between the laws of defamation and the implied freedom recognised in *ACTV*. These cases were remarkable for the variety of the articulations of the principle that had emerged in *ACTV*.

In 1997, in another defamation case, *Lange v Australian Broadcasting Commission*<sup>22</sup>, the High Court had occasion to revisit *Theophanous* and *Stephens*. In *Lange*, it was argued on behalf of the Attorney-General for Victoria that those cases were wrongly decided, the point being made that even the justices in the majority were divided in their views<sup>23</sup>.

The State of Queensland supported Victoria's position, arguing that the text and structure of the *Constitution* did not support "[a]n implied licence to publish defamatory matter"<sup>24</sup>. The States of South Australia and Western Australia put similar arguments<sup>25</sup>. New South Wales supported the decisions in *Theophanous* and *Stephens*<sup>26</sup>. On behalf of the Attorney-General for the Commonwealth, it was argued that while the practical result in each case was correct, "the majority in each case reached the result by an inappropriate method"<sup>27</sup>. It was argued on behalf of the plaintiff in *Lange* that there was "no ratio to the two cases"<sup>28</sup>.

Spigelman QC, who appeared as leading counsel for the defendant, argued that *Theophanous* and *Stephens* were correctly decided. He argued for a wide view of the requirements of the system of representative democracy that cannot be confined to communications during an election campaign or in relation to matters of purely Commonwealth concern<sup>29</sup>. Responding to the argument that recognising the implied freedom is inconsistent with the *Engineers' Case*<sup>30</sup>, Mr Spigelman argued that<sup>31</sup>:

"The majority judgment in the *Engineers' Case* is partly based on the notion that the political system established by the Constitution provides the primary

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<sup>18</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 207.

<sup>19</sup> (1992) 177 CLR 106 at 138 (citation omitted).

<sup>20</sup> (1994) 182 CLR 104.

<sup>21</sup> (1994) 182 CLR 211.

<sup>22</sup> *Lange* (1997) 189 CLR 520.

<sup>23</sup> (1997) 189 CLR 520 at 523.

<sup>24</sup> *Lange* (1997) 189 CLR 520 at 533.

<sup>25</sup> *Lange* (1997) 189 CLR 520 at 534-535.

<sup>26</sup> *Lange* (1997) 189 CLR 520 at 537-538.

<sup>27</sup> *Lange* (1997) 189 CLR 520 at 529.

<sup>28</sup> (1997) 189 CLR 520 at 525.

<sup>29</sup> *Lange* (1997) 189 CLR 520 at 538-539.

<sup>30</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

<sup>31</sup> *Lange* (1997) 189 CLR 520 at 541.

mechanism for constraining the exercise of government power. By protecting the operation of the political system, the implication of freedom of political communication reinforces that constraint."

This argument appealed to the institutional values associated with the people, rather than to an individual right to freedom of speech. It struck a chord with all the members of the Court.

It would not be much of an exaggeration to say that the unanimous judgment of the Court that emerged in *Lange* may well have saved the implied freedom from the waste-paper basket of constitutional history. In that case, the very existence of the implied freedom had been assailed on almost all sides, and the Court had been confronted by the most powerful criticism of judge-made law: that it is incapable of clear articulation by the judges who seek to propound it. If the judges who lay down a rule cannot agree upon its terms, how can the rule claim the obedience of those who must obey it? A multiplicity of judicial articulations of a rule, or of the basis for a rule, may fascinate academics and provide grist to their mill, but it cannot be expected to inspire public confidence in the work of the Court.

The decision in *Lange* served to establish a relatively stable protection against legislative, executive or judicial action by a State or the Commonwealth so as to afford an irreducible minimum of assurance that political sovereignty in this country is exercised by the people of the Commonwealth<sup>32</sup>.

Two broad points can be made here. First, time would vindicate Spigelman's submission that the interaction between the different levels of government in Australia and the communication between the people about them is so significant that, although the source of the implied freedom is the *Commonwealth Constitution*, political communication at a State, or even local level, may readily be seen in practice to have a federal dimension<sup>33</sup>.

More important for present purposes, was the proposition in Spigelman's argument that the power of the Parliament is constrained by the need to recognise and protect the constitutional role of the sovereign people. An approach couched in terms of necessary limitations upon legislative power was no doubt calculated to appeal to the scepticism of judges about politicians that informed the landmark decision in *ACTV*. In *ACTV*, Mason CJ had said that "the Court should scrutinize very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process"<sup>34</sup>. That sceptical mindset as to the ability and willingness of politicians to exercise their powers as the people's representatives in a disinterested and competent way, was fertile ground for an argument couched in terms of the need to constrain the power of the political branches of government vis-a-vis the people.

That said, the point of abiding importance which *Lange* settled is that the freedom of political communication was not formulated as a personal right of the kind guaranteed by the First Amendment against any exercise of legislative power that might adversely affect that right.

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<sup>32</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530 at 583-584 [158].

<sup>33</sup> *Hogan v Hinch* (2011) 243 CLR 506 at 543 [48]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 549-551 [20]-[26]; 582-584 [150]-[159].

<sup>34</sup> (1992) 177 CLR 106 at 145.



Rather, it was described as a limitation on the power of elected representatives of the people over the people themselves as the ultimate political sovereign.

It is particularly interesting to note that in the report of Mr Spigelman's argument in Vol 189 of the Commonwealth Law Reports<sup>35</sup>, there is no reference to the American free speech jurisprudence, and no appeal to the values of individual rights or even to the notion of the marketplace of ideas associated with that jurisprudence. The implied freedom was advanced as a proposition about the institutions of government and their relationship to the people<sup>36</sup>.

In due course I will suggest that, in later cases, the emphasis of the advocates who have sought to deploy the same technique in free speech cases in the High Court has shifted from a negative focus upon the legislature as the natural enemy of "the people", to the successful deployment of the argument that there is, in the values inherent in the concept of the people, scope for a positive role for legislatures in the protection and enhancement of popular sovereignty and so of the implied freedom. With this shift in emphasis, the democratic values of civility and equal dignity arguably inherent in popular sovereignty were invoked to provide positive support for laws that burden the ability of some of the people to engage in political speech.

### **Regulating the electoral process**

In 1990 in *Austin v Michigan Chamber of Commerce*<sup>37</sup>, the US Supreme Court held that, notwithstanding the guarantee of freedom of speech in the First Amendment to the *US Constitution*, the power of money concentrated in corporate hands could distort the electoral process by dominating the flow of political communication and that the threat posed by this power to the democratic political process was sufficient to justify legislation restricting campaign contributions. In 2010, a Supreme Court composed of a different majority of Justices overruled *Austin* in *Citizens United v Federal Election Commission*<sup>38</sup>.

In the United States, money talks, and it talks loud and often. The almost unlimited availability of money in the United States has contributed to the banalisation of political debate and the infantilisation of the electoral process to a degree that would astonish both John Marshall and Thomas Jefferson. It is also apt to corrupt that process whether by actual quid pro quo corruption, by reducing elected representatives to clients of the rich and by allowing the voices of the rich to drown out the speech of the poor. The view that now prevails there appears to be that only quid pro quo corruption is a legitimate target of legislative action. An attempt by the legislature to level the electoral playing field to ensure that all political voices may be heard is, prima facie, illegitimate. In Australia, in contrast, under the prevailing interpretation of our *Constitution*, "[l]egislative regulation of the electoral process directed to the protection of the integrity of the process is ... prima facie, legitimate."<sup>39</sup>

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<sup>35</sup> (1997) 189 CLR 520 at 538-544.

<sup>36</sup> *ACTV* (1992) 177 CLR 106 at 150; *McGinty v Western Australia* (1996) 186 CLR 140 at 169-170, 232-235; *Lange* (1997) 189 CLR 520 at 567; *Monis v the Queen* (2013) 252 CLR 530 at 554 [36], 571-572 [109]-[112]; *McCloy v New South Wales* (2015) 257 CLR 178 at 194.

<sup>37</sup> (1990) 494 US 652 at 660.

<sup>38</sup> (2010) 558 US 310.

<sup>39</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 206 [42].

The most recent example of an attempt directly to transport the individual rights analysis that dominates US jurisprudence into Australian law occurred in *McCloy v New South Wales*<sup>40</sup>. The State law imposed restrictions on donations by property developers, among others, to political parties in connection with State and local elections in New South Wales.

The argument for Mr McCloy was that, by reason of the implied freedom, he was entitled to spend as much as he liked in order to acquire and exercise as much political influence as he could thereby garner. Senior Counsel for Mr McCloy, Mr David Bennett QC, used the American jurisprudence to support the proposition that "the ability to pay money to secure access to a politician is a freedom protected by the Constitution"<sup>41</sup>. That argument had recently been upheld in the United States in *Citizens United*<sup>42</sup>. In *McCloy*, the law's restrictions on donations were said by the State to be justified as being appropriate to prevent the growth of quid pro quo or clientelist corruption in government, and, as well, to ensure that the voices of powerful financial interests were not allowed to dominate the avenues of political communication.

The High Court accepted that argument, and rejected the contention that relied on the US jurisprudence.

***Clubb v Edwards; Preston v Avery***

In *Clubb v Edwards; Preston v Avery*<sup>43</sup>, the High Court considered the validity of Victorian and Tasmanian laws that establish "safe access zones" or "access zones" of 150 metres around premises where abortions are provided.

The Victorian Act, the *Public Health and Wellbeing Act 2008* (Vic), relevantly provided that a person must not engage in prohibited behaviour within a safe access zone. "Prohibited behaviour" was defined to include communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety.

The Tasmanian Act in question, the *Reproductive Health (Access to Terminations) Act 2013* (Tas), was in broadly similar terms

It was urged upon the Court by those defending the laws that the purpose of protecting the safety, privacy and dignity of the targets of political speech was a legitimate purpose compatible with the implied freedom. That argument sought to draw positive support from the consideration that to force a political message on another is inconsistent both with the human dignity of that person, and, indeed, the equal dignity of persons considered members of the people of the Commonwealth<sup>44</sup>. The implied freedom was said to ensure that the people of the Commonwealth may engage in "free communication ... as equal participants in the exercise of political sovereignty"<sup>45</sup>. This approach struck a chord with the plurality who said<sup>46</sup>: "[T]he

<sup>40</sup> (2015) 257 CLR 178.

<sup>41</sup> (2015) 257 CLR 178 at 182.

<sup>42</sup> (2010) 558 US 310.

<sup>43</sup> (2019) 93 ALJR 448; 366 ALR 1.

<sup>44</sup> *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448 at 468-469 [51], [60]; 366 ALR 1 at 17-19 [51], [60].

<sup>45</sup> *Tajjour v New South Wales* (2014) 254 CLR 508 at 593 [197]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578 [135]-[136]; *Harper v Canada Attorney-General* [2004] ISCR 827 at 868 [62], 878 [86].

justification of the prohibition draws support from the very constitutional values that underpin the implied freedom."

The plurality accepted that "a law that prevents interference with the privacy and dignity of members of the people of the Commonwealth through co-optation as part of a political message is consistent with the political sovereignty of the people of the Commonwealth and the implied freedom which supports it"<sup>47</sup>. To make other people part of a political message to which they have not consented is inconsistent with their dignity as members of the sovereign people to choose whether to give or to withhold their support for communications calculated or likely to have a political impact<sup>48</sup>.

### **Shifting targets**

The First Amendment is expressly directed at the Congress as its target; it can now be clearly seen that the implied freedom is not necessarily so targeted. Scepticism about the motives and competence of politicians does not warrant the conclusion that legislatures have no legitimate role at all in the protection, preservation and even promotion of the implied freedom. Legislation may be necessary to ensure the health and integrity of the streams of political communication. The germ of this view was already present in *ACTV* where Mason CJ had said<sup>49</sup>:

"[t]he need to raise substantial funds in order to conduct a campaign for election to political office does generate a risk of corruption and undue influence, that in such a campaign the rich have an advantage over the poor and that brief political advertisements may 'trivialize' political debate ...

The enhancement of the political process and the integrity of that process are by no means opposing or conflicting interests."

A brief survey of some of the cases that followed *ACTV* helps to illustrate the growing strength of the perceptions that popular sovereignty and equality among the sovereign people stand behind the implied freedom and can actually be enhanced by legislative action. We can, I suggest, perceive a shift in the focus of argument from constraint upon the exercise of governmental power, as a threat to popular sovereignty, to an appreciation that legislation may be necessary to protect values associated with the concept of the people from threats from non-governmental sources.

Gradually, counsel charged with advocating the legitimacy of restrictions upon some forms of speech came to appreciate that it could be argued that the more seriously one takes the notion that it is the sovereignty of the people as expressed in ss 7, 24, 64 and 128 of the *Constitution* that animates the implied freedom, the more attractive become arguments supportive of laws directed to the maintenance of civility, and equality, in political debate and in the public square more generally.

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<sup>46</sup> *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448 at 475 [102]; 366 ALR 1 at 28 [102].

<sup>47</sup> (2019) 93 ALJR 448 at 469 [60]; 366 ALR 1 at 19 [60].

<sup>48</sup> (2019) 93 ALJR 448 at 472 [82]; 366 ALR 1 at 23 [82].

<sup>49</sup> (1992) 177 CLR 106 at 144-145. See also at 154-156 per Brennan J, and *Morris v The Queen* (2013) 249 CLR 92 at 153 [143].

One can illustrate this development by locating chronologically, on a spectrum, the High Court's decisions in *Coleman v Power*<sup>50</sup>, *Monis v The Queen*<sup>51</sup>, *McCloy v New South Wales*<sup>52</sup> and *Clubb v Edwards; Preston v Avery*<sup>53</sup>.

In *Coleman v Power*<sup>54</sup>, the High Court by majority, with Gleeson CJ, Callinan and Heydon JJ dissenting, had set aside a conviction under s 7(1)(d) of Queensland's then *Vagrants, Gaming and Other Offences Act 1931* (Qld) which provided relevantly that any person who, in a public place used any threatening, abusive, or insulting words to any person committed an offence. Mr Coleman was distributing in the Townsville Mall pamphlets containing charges of corruption against several police officers when he was approached by a police officer who demanded a pamphlet. Mr Coleman refused saying loudly: "This is Constable X, a corrupt police officer."

Of the majority, Gummow, Hayne and Kirby JJ set aside the conviction on the basis that s 7(1)(d) had to be read down by requiring that the insulting words be likely to have a personal effect on the person or persons who heard them or were intended or likely to provoke physical retaliation by the person to whom they were uttered or by a person who heard them. Absent such a reading down, the provision would have been invalid as an infringement of the implied freedom<sup>55</sup>. The other member of the majority, McHugh J, did not read the provision down, and held that it was invalid as contravening the implied freedom<sup>56</sup>.

The wretched barrister who appeared to defend Queensland's law failed to impress the majority of the Court with an argument that a law apt to promote good behaviour in public places and to prevent breaches of the peace was compatible with the implied freedom<sup>57</sup>. But Gleeson CJ, who dissented, in a virtuoso display of the high technique of the common law, gave the following example that would inspire advocates in subsequent cases<sup>58</sup>:

"A mother who takes her children to play in a park might encounter threats, abuse or insults from some rowdy group. She may be quite unlikely to respond, physically or at all. She may be more likely simply to leave the park."

We can hear this appeal to notions of civility and equal dignity resonating strongly in the plurality judgment in *Clubb*. The example captures the concern that values of equality, free discussion, and the state of civility in which they can flourish, are at risk from intimidation and bullying by other citizens, as well as from governmental regulation.

As we move across the spectrum, we pass from the narrow loss suffered by the claims of civility and equal dignity in *Coleman v Power* to the three-all decision in *Monis* to the six-one majority

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<sup>50</sup> (2004) 220 CLR 1.

<sup>51</sup> (2013) 249 CLR 92.

<sup>52</sup> (2015) 257 CLR 178.

<sup>53</sup> (2019) 93 ALJR 448; 366 ALR 1.

<sup>54</sup> (2004) 220 CLR 1.

<sup>55</sup> (2004) 220 CLR 1 at 79 [200]-[201], 98-99 [254]-[256].

<sup>56</sup> (2004) 220 CLR 1 at 45-46 [81]-[82].

<sup>57</sup> (2004) 220 CLR 1 at 11.

<sup>58</sup> (2004) 220 CLR 1 at 24 [9].

in *McCloy*. In the latter case, those defending the validity of the law were able confidently to claim to justify the law as necessary to suppress any of the identified kinds of political corruption – quid pro quo, clientelist or war chest corruption, whereas in the United States jurisprudence only actual "quid pro quo" corruption is regarded as justifying a restriction on speech. And finally on our spectrum we come to the successful advocacy in *Clubb* and *Preston* of the validity of laws directed to ensuring that members of the sovereign people are not co-opted as pawns in the political campaigns of others.

As one progresses across the spectrum, from *Coleman* to *McCloy* to *Clubb*, one can discern a loosening of the hold on the imagination of advocates and judges of the view of the implied freedom as a bulwark against legislative burdens upon political communication, and a concomitant strengthening of an appreciation that the values of representative government which sustain the implied freedom are social and communitarian rather than personal and individual. That trend can also be illustrated in a recent case specifically concerned with the values of responsible government.

### ***Comcare v Banerji***

In the recent case of *Comcare v Banerji*<sup>59</sup>, the High Court was concerned about the validity of particular provisions in the *Public Service Act 1999* (Cth) that regulated the conduct of Australian Public Service ("APS") employees. Values of responsible government said to stand behind s 64 of the *Constitution* were invoked by those defending the law as providing positive support for restrictions on the speech of civil servants.

In *Re Patterson, Gummow and Hayne JJ* said<sup>60</sup>:

"The central purpose of responsible government is secured by the requirement in s 64 of the Constitution for administration of the departments of State by Ministers who are members of one or other Houses of the Parliament."

Ms Banerji, while an APS employee in the Department of Immigration and Citizenship, used Twitter to broadcast more than 9,000 tweets, many of which were critical of that Department, its other employees, policies and administration, Government and Opposition immigration policies and members of Parliament. Following an investigation, a delegate of the relevant Agency Head determined that Ms Banerji had breached the APS Code of Conduct ("the Code").

The Code included a requirement, as set out in s 13(11) of the *Public Service Act*, that APS employees "must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS". The APS Values relevantly included that the APS is "apolitical, performing its functions in an impartial and professional manner"<sup>61</sup>. An Agency Head could impose sanctions on an APS employee found to have breached the Code, including termination of employment<sup>62</sup>. After Ms Banerji was found to have breached the Code, a delegate of the relevant Agency Head terminated her employment.

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<sup>59</sup> [2019] HCA 23.

<sup>60</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 464 [220].

<sup>61</sup> *Public Service Act* s 10(1).

<sup>62</sup> *Public Service Act* s 15(1).

It should be understood that the case in the High Court did not raise any issue as to whether the Minister's delegate had wrongly found that Ms Banerji's tweeting, about government policies, the administration of these policies and the personal, political and moral deficiencies of both politicians and her fellow public servants, were in breach of the provisions of the *Public Service Act*. Nor did the case raise an issue as to whether her dismissal was unfair or harsh or unconscionable.

In the High Court, Ms Banerji contended that, insofar as the provisions of the *Public Service Act* purported to authorise sanctions against an APS employee for political communications that did not, on their face, disclose her true name, or the fact of her being an APS employee, they imposed an unjustified burden on the implied freedom of political communication and were for that reason invalid. It followed that her termination with the Department was unlawful.

In response, it was argued that the requirement that APS employees behave at all times in a way that upholds the APS Values and the integrity and good reputation of the APS, was justified as a means of maintaining an apolitical and professional public service<sup>63</sup> essential to ensuring responsible government<sup>64</sup>.

Responsible government requires that the Ministry have confidence in the ability of the APS to provide high quality, impartial, professional advice, and that the APS will faithfully and professionally implement accepted government policy, irrespective of APS employees' individual personal political beliefs and predilections<sup>65</sup>.

This system is necessarily dependent on the reliability of the APS, and the maintenance of the confidence of the elected representatives of the people who become Ministers under s 64 in the competence, fidelity and impartiality of the APS. It may not be the case that an apolitical public service is necessarily and always a "defining characteristic" of the system of responsible and representative government<sup>66</sup>; but the contention that the maintenance of an apolitical public service is a legitimate purpose that is compatible with the system of responsible government contemplated by s 64 of the *Constitution* was an argument that resonated with several members of the Court<sup>67</sup>.

One academic commentator has criticised the decision in *Banerji* on the basis that the Court has effectively given Parliament and the executive a blank cheque, holding that the legitimate purpose pursued by the *Public Service Act* justifies sweeping intrusions into the private lives of public servants, whatever the adverse consequences<sup>68</sup>.

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<sup>63</sup> *Comcare v Banerji* [2019] HCA 23 at [34].

<sup>64</sup> Quick & Garran, *Annotated Constitution of the Australian Commonwealth*, (1901) at 703-704.

<sup>65</sup> *Comcare v Banerji* [2019] HCA 23 at [34].

<sup>66</sup> Compare *Comcare v Banerji* [2019] HCA 23 at [111].

<sup>67</sup> Compare *Comcare v Banerji* [2019] HCA 23 at [31], [190].

<sup>68</sup> Pender, "A powerful chill"? *Comcare v Banerji*; [2019] HCA 23 and the political expression of public servants" (on AUSPUBLAW) 28 August 2019, available at <<https://auspublaw.org/2019/08/a-powerful-chill-comcare-v-banerji-2019-hca-23/>>.

As to the suggestion that the Court's decision permitted "sweeping intrusions into the private lives of public servants", it must be remembered that the implied freedom could be said to be engaged at all only because of Ms Banerji's claim to be contributing to a public debate about matters of public interest. That it is difficult to enter the public square while at the same time insisting on one's privacy should not come as a surprise.

As to the suggestion that the impugned provisions lacked a rational connection to the legislative purpose of establishing an apolitical public service because the provisions applied to capture anonymous communications, the first thing to be said is that anonymity is a fragile thing, especially if the publisher is actively engaged in making his or her views available to the public. Anonymous communications are, by their nature, at risk of ceasing to be anonymous, as actually transpired in the case<sup>69</sup>. It may be noted that departmental and APS guidelines, recognising this reality, caution against unofficial public comment and recorded a "rule of thumb" that anyone posting material online should assume that their identity and employment would be revealed<sup>70</sup>.

More importantly for present purposes, anonymity has long been recognised as a potential threat to the integrity of public discourse. In Australia, as early as 1912, in the High Court in *Smith v Oldham*<sup>71</sup> it was recognised that the anonymity of communications about political matters may have an adverse effect upon the electoral choices required of the people, and that it was within the power of the Commonwealth Parliament to require a communication relating to elections to bear the name of the person by whose authority it is published. Griffith CJ said<sup>72</sup>:

"[T]he freedom of choice of the electors at elections may be influenced by the weight attributed by the electors to printed articles, which weight may be greater or less than would be attributed to those articles if the electors knew the real authors ...

Parliament may, therefore, think that no-one should be allowed by concealing his name to exercise a greater influence than he could command if his personality were known."

To similar effect, Isaacs J said<sup>73</sup>:

"[T]he public injury, so far as political results are concerned, is as great when the opinion of the electorate is warped by reckless, or even careless, misstatements, as when they are knowingly untrue; in each case the result is falsified, and therefore the mischief may equally be provided against if Parliament thinks fit. Even when nothing is conveyed but advice or opinion, the identity of the person proffering it, if not withheld, might for various reasons seriously affect its value".

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<sup>69</sup> *Comcare v Banerji* [2019] HCA 23 at [24]-[25].

<sup>70</sup> *Comcare v Banerji* [2019] HCA 23 at [17].

<sup>71</sup> (1912) 15 CLR 355.

<sup>72</sup> (1912) 15 CLR 355 at 358-359.

<sup>73</sup> (1912) 15 CLR 355 at 362-363.

To say this is not to say that anonymity is always inimical to free and fair political discussion. But the argument that anonymity of the speaker is always compatible with responsible government must come to grips with the concerns articulated in *Smith v Oldham* that anonymity can be one of the natural enemies of responsibility.

### Conclusion

If one takes seriously the notion that what is at stake in determining whether regulation unduly trenches upon freedom of political communication within the Commonwealth is the political sovereignty of the Australian people, one might ask how the organs of government may lawfully place any burden at all on any communication about political matters?

A response to that question may begin with the observation that, unlike the First Amendment, the legislature is not the natural enemy of the guaranteed right of every individual to speak. The First Amendment is expressed in terms designed to keep the Congress out of the way. Under our *Constitution*, the legislature is not identified as the natural enemy of free speech.

The implied freedom meets the need to ensure that existing and potential sources and streams of communication from and to the people are left unimpeded. Such impediments are not always created by governments: sometimes, obstacles and blockages are themselves caused by non-governmental actors. In some cases, money can talk so loudly that other voices are drowned out. And in other cases, debate may be distorted by intimidation or fraud. The interests at stake are the interests of the people, including the civility and equality essential to the achievement and maintenance of popular sovereignty. For us there is no constitutional obstacle to recognising that legislatures have a legitimate role in addressing the threats to popular sovereignty posed by such impediments. The legitimacy of the role of Parliament in that regard was recognised as early as *Smith v Oldham*.

In addition, while ss 7 and 24 of the *Constitution* deny the Parliament the power to impede the people in their choice of representative governments, there is no one ideal form of representative or responsible government against which the measures enacted by Parliament are to be judged<sup>74</sup>. In speaking of the values of representative and responsible government, we are not speaking of rules capable of direct application. As Brennan CJ said in *McGinty v Western Australia*<sup>75</sup>:

"It is logically impermissible to treat 'representative democracy' as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed."

So, we are speaking of the soft lens of values rather than the sharp clarity of bright line rules. What these values require by way of outcome in any particular case may often be contestable. In

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<sup>74</sup> *Attorney-General (Cth); Ex rel McKinley v The Commonwealth* (1975) 135 CLR 1 at 44; *McGinty v Western Australia* (1996) 186 CLR 140 at 169, 244-245; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 86-87 [176]-[178].

<sup>75</sup> (1996) 186 CLR 140 at 169.



talking about civility and equal dignity among a people, we are talking about how the people live their lives together; and that does not occur in courtrooms. The late John Gardner wrote<sup>76</sup>:

"[S]omething is amiss in the public life of a society when constitutional questions often have to be settled in the courtroom. Indeed, one might add, there is something amiss in the public life of a society when questions of any type often have to be settled in the courts."

The sad reality is, however, that in this vale of tears, these questions do have to be settled in the courtroom.

If constraints upon the freedom of political communication by and between members of the sovereign people are justifiable at all, that can only be by keeping a steady focus upon the interests of the people as the source of the freedom. The technique of the common law deployed in the cases we have noted can be seen to maintain that focus so that limitations upon political communication by and among the sovereign people do not go beyond what can be justified in terms of the constitutional right of the people to representative and responsible government and their equal dignity in choosing it.

Thank you for your attention.

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<sup>76</sup> Gardner, "Can There Be a Written Constitution?" (2011) 1 *Oxford Studies in Philosophy of Law* 162 at 172-173.