FREE SPEECH CONSEQUENTIALISM: AN AUSTRALIAN ACCOUNT

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'A person may say and write what he pleases except insofar as he may not.'

French J in Brown v Classification Review Board[1]

This work addresses the extent to which jurisprudence on the implied freedom of political communication can be seen as a kind of free speech consequentialism. Building on the work of Goldberg in the American context it is argued that specific features of the implied freedom can be characterised as consequentialist. Both in its justification and application the implied freedom operates according to consequentialist norms — protecting speech only insofar as it goes to facilitating representative government and restricting as much when it conflicts with a sufficiently pressing interest. Because of this, jurisprudence on the implied freedom illustrates a type of consequentialist reasoning that emphasises ends rather than rights — with significant results for the protection of free speech in this country.

I INTRODUCTION

It has been said before that the Australian story is, in essence, a consequentialist one.[2] Consider, for example, the fact that while almost all western liberal democracies mandate that their governments respect a certain set of basic rights,

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1 (1998) 82 FCR 225, 234.

2 See, eg, Collins who suggests that '[t]he central features of the Australian political system … exhibit a utilitarian character' and that '[i]ndeed, so completely has this philosophy captured Australia's public mind that the sporadic appearance of different political ideas, whether of the left or of the right, is better understood as a reaction against this hegemony than as the motion of independent forces': Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114(1) *Daedalus* 147, 152. See also Goldsworthy who adds that 'Australia has been described as a paradigmatically utilitarian society': Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2007) 106, 109.

Australia's *Constitution* generally eschews any reference to such protections.[3] Perhaps this emphasis on outcomes rather than rights could be characterised as a political and legal commitment to 'the fair go' — the idea that all people, even legislators, should be given an opportunity to put forward their ideas in a public forum rather than have them presumptively denied.[4] As Hirst notes, 'no-one will argue against "fair go" as a principle':

> [F]or a long time [it] was used … to refer to keeping to the rules, treating people equally or giving someone a decent chance. More recently it has come to stand for egalitarianism in society at large. So if Australians believe in the 'fair go' they should be committed, it is said, to a truly egalitarian society.[5]

More formally, Stone has suggested that '[w]hile it is difficult to identify a consistent Australian commitment to "equality", it might be that certain types of distinctions are particularly foreign to the Australian political culture'.[6]

Perhaps, it could be said, that this principle of an egalitarian society obviates the need for rights protections. Less romantically — and more plausibly — rights-scepticism is likely a hangover of an Australian commitment to 'the two institutions which formed the basis of the Constitutions of … the Australian colonies — representative and responsible government'.[7] It has been held that this commitment reduced the need for rights protections — the people's determination of their parliament along with their accountability in the Senate and House of Representatives all that is necessary to prevent over-enthusiastic government.[8] Nevertheless, there is something intriguing about the apparent Australian commitment to consequentialism. Whilst scholars such as Collins have given this question a general treatment — few have devoted their time to considering its relationship to the law.[9] Relying on research by Goldberg, this

3 This obviously excludes the minimal rights protections which it does include such as: freedom of religion (s 116); just terms for the acquisition of property (s 51(xxxi)); freedom of interstate trade and commerce (s 92); etc.

4 See, eg, Jeremy Sammut, 'As Australian As The Fair Go' (2015) 31(1) *Policy* 19 and Joanna Shulman, 'A "Fair Go" for All' (2013) 38(1) *Alternative Law Journal* 2 for the use of this phrase in a legal context.

5 John Hirst, *The Australians: Insiders & Outsiders on the National Character Since 1770* (Black, 1st ed, 2007) 149 ('*The Australians*').

6 Adrienne Stone, '"Insult and Emotion, Calumny and Invective": Twenty Years of Freedom of Political Communication' (2011) 30(1) *University of Queensland Law Journal* 79, 96.

7 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 229 (McHugh J) ('*Australian Capital Television*').

8 See, eg, Australia's longest serving Prime Minister Robert Menzies' remarks that '[r]esponsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition. I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world': Brian Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (Papers on Parliament No 18, Research Section, Department of Senate, December 1992) 56, quoting Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (University Press of Virginia, 1967) 54.

9 See, eg, Collins (n 3).

piece will do just that by addressing the extent to which the implied freedom of political communication represents a kind of free speech consequentialism.[10]

To achieve as much, the work will divide its analysis of consequentialism and the implied freedom into three sections. Part II will be largely descriptive and focus on characterising the features of consequentialism, its 'foil' deontology, and the idea of free speech consequentialism. Part III will then consider how these ethical theories apply to justifications of free speech and in what way they can be seen in the Australian jurisprudence. Finally, Part IV will address proportionality and the extent to which this reflects consequentialist or deontological conceptions of free speech — concluding that the current three step test from *Lange* and *McCloy* (particularly its balancing component) reflects a consequentialist emphasis on outcomes rather than rights.[11]

The merits of consequentialism and the implied freedom have been given regular and insightful critique by others so this work will not be a normative account of either. As put elsewhere, I do not enter into the 'philosophical debates on different theories' merits' nor their suitability when it comes to the implied freedom.[12] Rather, this is a descriptive account which seeks to show how the two are related. What will be evident throughout is that Australian jurisprudence reflects a commitment to the tenets of free speech consequentialism. In contradistinction to American case law — which has frequently rejected the value of consequentialism when handing down decisions on the *First Amendment* — Australian courts have been much more open to the prospect. This can be seen in the very justifications for the implied freedom put forward, which demonstrate an ongoing concern for a particular end, namely furthering representative government. It is also a component of its more doctrinal features, which deploy methods of proportionality and the weighing of interests in order to resolve controversies.[13] However, before these things can be considered in more detail, Part II of this work will provide some — necessarily brief — definitions which are pertinent to the work here.

10 I thank Erica Goldberg for the expression 'free speech consequentialism'. Her work on the topic was particularly useful for the purposes of this piece and though she focuses on the American context — where such an approach is almost never officially endorsed — it has provided the author with many interesting and insightful ideas: Erica Goldberg, 'Free Speech Consequentialism' (2016) 116(3) *Columbia Law Review* 687.

11 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); Metaphysis Research Lab, *Stanford Encyclopedia of Philosophy* (online at 22 March 2019) Deontological Ethics ('Deontological Ethics').

12 'Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role' (2017) 130(5) *Harvard Law Review* 1436, 1437 ('Rights in Flux').

13 See generally *Lange* (n 12); *McCloy* (n 12).

II CONSEQUENTIALISM, DEONTOLOGY AND FREE SPEECH

A *Consequentialism*

At this stage, it is useful to begin with a discussion of consequentialism generally. As Brilmayer notes, consequentialism involves determining a course of action based upon the 'desirability' of its consequences.[14] More generally, '[t]he core component of consequentialism is adjudicating the morality of any [decision] based on its results'[15] — analysing their 'consequences alone'.[16] This stands in contrast to consequentialism's 'foil' — deontology — which categorically prohibits certain acts regardless of their beneficial consequences.[17]

An often cited example of consequentialism is utilitarianism, which in its original form encouraged choices that maximised pleasure — however defined.[18] Although utilitarianism has seen many revisions since its rise to prominence in the 19th century, this theory remains the most well-known version of consequentialism.[19] Utilitarianism is a helpful illustration of one kind of consequentialism but it is not the focus of this work. At issue here is consequentialism more generally, a philosophy which involves making decisions by focusing on ends — whatever those ends may be. Pleasure might be one, but any other objective can plausibly fit within a consequentialist framework, including: truth, social cohesion or, even, democracy.[20] As Paulo notes: 'Consequentialism is the generic term for those moral theories that judge the moral quality of an act by the consequences of this act alone. Utilitarianism is a kind of consequentialism that focuses on certain consequences [ie pleasure].'[21]

Having provided some content to the question of what consequentialism is, I now consider its duty-based counterpart deontology.

14 Lea Brilmayer, 'Rights, Fairness, and Choice of Law' (1989) 98(7) *Yale Law Journal* 1277, 1285; Goldberg (n 11).

15 Carlo Dellora, 'Testing the Waters: The Limits of Consequentialist Logic in Australia's Asylum Seeker Debate' (2019) 54(1) *Australian Journal of Political Science* 150, 151.

16 Rights in Flux (n 13) 1436, 1438, citing Metaphysics Research Lab, *The Stanford Encyclopedia of Philosophy* (online at 22 October 2015) Consequentialism.

17 Deontological Ethics (n 12) 'Deontological Theories'.

18 See, eg, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford University Press, 1996).

19 See generally Henry Sidgwick, *The Methods of Ethics* (Hackett Publishing, 1981); Peter Singer, *Practical Ethics* (Cambridge University Press, 3rd ed, 2011).1981

20 See generally Kent Greenawalt, 'Free Speech Justifications' (1989) 89(1) *Columbia Law Review* 119.

21 Norbert Paulo, *The Confluence of Philosophy and Law in Applied Ethics* (Springer Nature, 2016) 209 n 1.

B *Deontology*

Deontological ethics emphasises the absolute nature of certain rights as a matter of duty.[22] As noted by Alexander and Moore:

> The most familiar forms of deontology, and also the forms presenting the greatest contrast to consequentialism, hold that some choices cannot be justified by their effects — that no matter how morally good their consequences, some choices are morally forbidden.[23]

Indeed, the idea that a right cannot be 'displaced' by consequentialist concerns 'could be described as the essence of what it means for a right to be absolute' and in essence deontological.[24] Meiklejohn reflects this perspective in his assertion that '[t]he *First Amendment* [i]s an Absolute'.[25] However, this is complicated by the fact that some deontological proponents of rights do see it as plausible to impair as much when they clash with other rights. I will come to this in more detail in Part IV of this work but at this stage it is sufficient to note that, generally, deontology sees certain rights as inviolable. Having broadly defined two sides of this ethical landscape, I move on to the specific features of free speech consequentialism.

C *Free Speech Consequentialism*

Free speech consequentialism might be succinctly characterised as a defence of free speech on the basis of its positive consequences.[26] This is the usage adopted by Goldberg in her comprehensive treatment of the topic.[27] In that work, Goldberg defines free speech consequentialism as having two main components. First, it covers justifications for free speech which emphasise the facilitative or instrumental nature of the right — namely how it might be used in order to achieve higher order ends.[28] Second, Goldberg suggests free speech consequentialism is seen in the way in which the freedom is protected, particularly through the balancing of interests and the use of proportionality testing to resolve controversies.[29] These aspects are interrelated but they will be dealt with separately for ease — Part

22 Deontological Ethics (n 12) 'Deontological Theories'.

23 Ibid.

24 Natasa Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15(4) *Human Rights Law Review* 721, 723–4.

25 Alexander Meiklejohn, 'The First Amendment Is an Absolute' [1961] (1) *Supreme Court Review* 245, 245.

26 Goldberg (n 11).

27 Ibid.

28 Ibid 690. 'Scholars who espouse explicitly consequentialist theories of the *First Amendment* believe that free speech's value lies in advancing particular ends, such as truth or democratic self-government.'

29 Goldberg (n 11) 755. See also *Lange* (n 12) 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy* (n 12) 219 [87] (French CJ, Kiefel, Bell and Keane JJ).

III of this work beginning with justifications for free speech, their relationship to consequentialism and how they are reflected in the Australian jurisprudence.

III FREE SPEECH AND ITS JUSTIFICATIONS

Broadly speaking, justifications for free speech can be broken up into two groups: consequentialist and deontological.[30] As Dworkin notes, most free speech defences

> fall into one or the other of two main groups … The first treats free speech as important *instrumentally,* that is, not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us. … The second kind of justification of free speech supposes that freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society …[31]

The former justification is consequentialist, the latter is deontological. This work will first assess consequentialist rationales for free speech, before moving on to the deontological justifications. From there I will turn my attention to the Australian case law on the topic and the extent to which this reflects one or the other.

A *Consequentialism as Instrumentalism*

Free speech consequentialism suggests that the right's importance stems from its capacity to achieve other ends. This is often characterised as an 'instrumental' defence.[32] As Goldberg notes: '[s]cholars who espouse explicitly consequentialist theories of the *First Amendment* believe that free speech's value lies in advancing particular ends, such as truth or democratic self-government.'[33]

This is reaffirmed by Greenawalt in his perceptive and systematic analysis of free speech justifications.[34] He claims that the following arguments may all be characterised as consequentialist justifications for free speech: 'truth discovery';

30 Non-consequentialist reasons will include deontological justifications but also, perhaps, virtue theory rationales for the freedom. We do not direct our attention to the latter theory here. See Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 377 n 13.

31 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) 199–200 (emphasis in original). This distinction probably reflects the highest level of abstraction with which such arguments can be formulated. A step below are those arguments by Swannie where he distinguishes between 'political arguments, arguments based on dignity and autonomy, and arguments based on the value of inquiry': Bill Swannie, 'Are Racial Vilification Laws Supported by Free Speech Arguments?' (2018) 44(1) *Monash University Law Review* 71, 76.

32 Goldberg (n 11) 696.

33 Ibid 690.

34 Greenawalt (n 21).

tolerance; autonomy;[35] 'interest accommodation'; 'social stability'; the exposure of abuses of authority and the promotion of liberal democracy.[36] Greenawalt goes on to say:

> A practice has value from a consequentialist point of view if it contributes to some desirable state of affairs. Thus, to say that free speech contributes to honest government is to advance a consequentialist reason for free speech. The force of a consequentialist reason is dependent on the factual connection between a practice and the supposed results of the practice.[37]

This emphasis on achieving some or other goal through freedom of speech is consequentialist because it justifies the freedom only as a means to certain ends — ends such as representative government, truth discovery, or the avoidance of an untrustworthy '[e]pistemic [a]rbiter'.[38] Goldberg concurs that the value of free speech can be sourced in this capacity to achieve other objectives, however, some disagree and suggest that free speech justifications are grounded in their inherent value rather than their instrumental content — I call these deontological inherency arguments.[39]

B *Deontological Inherency Arguments*

Deontological justifications for free speech emphasise the value of the right independent of its consequences. Such defences rely on, what I have labelled, inherency arguments — 'according people rights and justice' as goods in and of themselves rather than in order to achieve some other end.[40] Such goods might include autonomy or dignity and can provide a justification for the protection of rights based on the necessary value of the liberty. This approach 'denies that the rightness or wrongness of our conduct is determined *solely* by the goodness or badness of the consequences' but rather emphasises the inherent value of the right itself.[41]

A consequentialist will not make use of inherency arguments for their own sake but only if the consequences are beneficial overall (eg autonomy might be the reason behind protecting a right to free speech but only because the promotion of autonomy is a necessary precondition for the direct election of political

35 This example is controversial and many other scholars would characterise autonomy as a non-consequentialist justification. See, eg, Kai Möller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights' (2009) 29(4) *Oxford Journal of Legal Studies* 757.

36 Greenawalt (n 21) 130.

37 Ibid 128.

38 Brian Leiter, 'The Case against Free Speech' (2016) 38(4) *Sydney Law Review* 407, 419.

39 Goldberg (n 11) 693–4.

40 Greenawalt (n 21) 128. See also what Dworkin calls 'constitutive' arguments: Dworkin (n 32) 205.

41 FM Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Oxford University Press, 2007) 11 (emphasis in original), quoted in Rights in Flux (n 13) 1439; Greenawalt (n 20) 147.

representatives — though it is worth noting that this would not be an inherency argument in the strict sense).[42] Greenawalt has suggested that there is an artificiality in this latter distinction 'requiring, among other things, a somewhat strained breaking down of arguments concerning individual autonomy and of arguments concerning' consequences.[43] Because of this, it can often be difficult to determine where 'the intrinsic nature of the act stops and consequences begin'.[44] However, to avoid 'collapse of one [into] the other',[45] I use free speech consequentialism as directed towards outcomes and inherency arguments to describe those which are focused on the self-regarding features of free speech — such as autonomy. Having sketched out some of the contours of this philosophical landscape I will now turn to the implied freedom and see how it reflects a consequentialist conception of free speech.

C *The Implied Freedom*

It is now perhaps beyond trite to remark that the rationale for the implied freedom of political communication is representative government.[46] Though the freedom has undergone significant and dramatic doctrinal changes over the course of its existence one thing has remained constant: this justification. As much has been expressed in various ways.[47] In *Theophanous v Herald & Weekly Times Ltd* ('*Theophanous*') Mason CJ, Toohey and Gaudron JJ suggested that 'the underlying purpose of the freedom is to ensure the efficacious working of representative democracy'.[48] In the same case Brennan J averred that the implication 'is derived from the system of government prescribed by the *Constitution* which I shall call "representative government"'.[49] Similarly, in *Lange* the High Court spoke unanimously when it suggested that '[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the *Constitution* creates'.[50] As much has been

42 Dworkin (n 32); Similarly, RM Hare (as summarised by Meyerson) argues that there are 'possible utilitarian reasons to inculcate in individuals a disposition to follow rules, even in situations where following a rule might seem to yield the worse outcome from the utilitarian point of view … Hare believes that utilitarian goals are likely to be better served indirectly by following a non-utilitarian strategy of rule-following than by directly attempting to determine the right outcome on a case-by-case basis': Denise Meyerson, 'Why Courts Should Not Balance Rights against the Public Interest' (2007) 31(3) *Melbourne University Law Review* 873, 888–9, citing RM Hare, 'Ethical Theory and Utilitarianism' in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (Cambridge University Press, 1982) 23, 31–6.

43 Greenawalt (n 21) 127.

44 Ibid 129.

45 Ibid.

46 This has sometimes been framed as representative and responsible government, but for simplicity I shall stick with just the former.

47 *Lange* (n 12); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*').

48 *Theophanous* (n 47) 123.

49 Ibid 149.

50 *Lange* (n 12) 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

reiterated elsewhere on numerous occasions.[51] Notwithstanding this apparent consensus, however, the above examples belie an early doctrinal disagreement amongst the High Court regarding the source of this justification.

1 *Initial History*

Early on in the implied freedom's history a divide emerged between those justices who characterised representative government as an implication from the *Constitution* generally and those who grounded it in the text.[52] While all agreed that the freedom had a role to play in Australian law, there was no clear consensus around where the implication came from. For a doctrinal majority it was evident that representative government underpinned the *Constitution* and was a fundamental assumption of its operation.[53] Because of this, it would operate to the extent necessary to facilitate the maintenance of representative government — however defined. A doctrinal minority held more narrowly that representative government was not a 'free standing, extra-constitutional principle' but rather a product of the text and structure of the *Constitution*.[54] These minority justices turned their attention to ss 7 and 24 in particular and emphasised the requirement that parliamentarians be directly elected.[55] In the words of Nicholas Aroney, the doctrinal minority 'restricted the implication to the specific language of ss 7 and 24 whereas the majority derived the idea of a freedom of political communication from a conception of representative democracy which was extra-constitutional'.[56]

Ultimately the doctrinal minority won out and in *Lange* it was unanimously held that the implied freedom exists 'only to the extent that the text and structure of the *Constitution* establish it'.[57] This provided a framework for the first question which must be answered in any implied freedom analysis: 'does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?'[58]

Where the relevant speech to which the law is applied does not relate to representative government then *by necessity* the law cannot burden the implied

51 *Lange* (n 12); *Theophanous* (n 48); *Coleman v Power* (2004) 220 CLR 1 ('*Coleman*'); *Monis v The Queen* (2013) 249 CLR 92 ('*Monis*').

52 What I call here the 'doctrinal majority' and 'doctrinal minority'.

53 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 74 (Deane and Toohey JJ) ('*Nationwide News*').

54 Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438, 445.

55 *Nationwide News* (n 53) 74 (Deane and Toohey JJ).

56 Nicholas Aroney, 'The Implied Rights Revolution: Balancing Means and Ends?' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 1st ed, 2009) 183.

57 *Lange* (n 12) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), citing *McGinty v Western Australia* (1996) 186 CLR 140, 168, 182–3, 231, 284–5.

58 *Lange* (n 12) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

freedom — at least not in that instance.[59] This is something I shall turn to in more detail shortly, but the content of the speech in question is therefore a threshold question which must be answered before moving on to the next step from *Lange*.[60] Putting to one side these doctrinal disagreements regarding the source of the freedom, what should be emphasized is that, for either side of the debate, the philosophical rationale was always clear — for both the majority and minority the implied freedom operated only to the extent that representative government requires as much. This was so whether characterised as a *Constitutional* assumption or as a product of the document's text and structure.

As much is important for the purposes of this work. Notwithstanding the original disagreement pre-*Lange* regarding the source of the 'true stream' for the implied freedom, both sides articulated versions of free speech consequentialism in order to justify its existence.[61] The doctrinal majority and minority placed value on the freedom *only insofar* as it helped achieve another end — namely the maintenance of the 'constitutionally prescribed system' of representative government.[62] Here one can see different versions of the same instrumentally grounded conceptions of free speech which share a focus on the ends that the implied freedom might achieve. Importantly, despite different conceptions of what gives rise to that obligation, no justice has ever characterised speech in non-consequentialist terms — as an inherent good in and of itself or essential to the promotion of dignity, self-determination or autonomy. This has had significant implications for the development of the law on the subject.

Particularly early on, courts showed a real willingness to engage with whether the speech in question was relevantly political.[63] This was so across a range of issues involving: incitement to commit crime, defamation and artistic expression.[64] What these instances demonstrated is that there was acceptance of the idea that the court must play a supervisory role in this regard — considering the content of the speech in order to determine whether or not it was constitutionally protected. This in turn meant assessing its worth in terms of whether it bears upon the direct choice which must be made at federal elections. Since then, courts have been much more reluctant to do so and have almost always characterised the speech as broadly directed towards a subject relevant to the direct choice of

59 *Brown v Classification Review Board* (n 1) 258 (Sundberg J).

60 Ibid 258; *Clubb v Edwards* (2019) 366 ALR 1, 10 [4]–[5] (Kiefel CJ, Bell and Keane JJ) ('*Clubb*').

61 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, 'Finding The Streams' True Sources: The Implied Freedom of Political Communication and Executive Power' (2018) 43(2) *University of Western Australia Law Review* 188.

62 *Lange* (n 12) 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

63 *Australian Broadcasting Corporation v Hanson* [1998] QCA 306 ('*Hanson*'); *Brown v Classification Review Board* (n 1); *Hogan v Hinch* (2011) 243 CLR 506.

64 *Hanson* (n 63); *Brown v Classification Review Board* (n 1).

representatives.[65] As much has also been conceded by counsel without argument.[66] I consider two cases below to highlight how the instrumental end to which the implied freedom is directed has had substantial legal consequences for the parties involved — cases from relatively early in the freedom's development and at the lower court level where whether or not the speech is relevantly political is often at issue — before moving on to a broader outline of the contemporary state of the law on the subject.

2 Hanson

In *Australian Broadcasting Corporation v Hanson* ('*Hanson*') an injunction was sought against the Australian Broadcasting Corporation by populist politician Pauline Hanson after the release of a song satirising her entitled 'Back Door Man'.[67] Hanson had stood for the electorate of Oxley on a Liberal/National Party ticket but had been dis-endorsed after a series of controversial comments regarding immigration and indigenous affairs.[68] Despite running as an independent, she ultimately carried the seat and was elected to the House of Representatives in 1996. Whilst there, she formed Pauline Hanson's One Nation Party on a platform of anti-immigration. Hanson's political perspective was perhaps best reflected in her maiden speech to Parliament, where she spoke of a fear that Australia was being 'swamped by Asians'.[69] Hanson also made other controversial remarks, describing the Mardi Gras parade in Sydney as 'promoting something … that is not natural'.[70] With this backdrop, satirical artist and drag queen Pauline Pantsdown released the song 'Back Door Man'. A pop number comprised of a driving techno beat, it featured snippets of Hanson's own words sewn together to resemble the genuine opinions of the member for Oxley. Some examples included:

> I'm very proud that I'm not straight
> I'm very proud that I'm not natural
>
> I'm a backdoor man for the Ku Klux Klan
> With very horrendous plans …[71]

65 An important exception to this has been *Clubb* (n 60) which is discussed in more detail at n 92.

66 See, eg, *Coleman* (n 51).

67 *Hanson* (n 63) 2.

68 Tony Moore, 'The Rise and Fall and Rise of Pauline Hanson', *Brisbane Times* (online, 7 July 2016) <https://www.brisbanetimes.com.au/national/queensland/the-rise-and-fall-and-rise-of-pauline-hanson-20160707-gq13fl.html>.

69 Matt Martino, 'Pauline Hanson's Maiden Speech: Has Australia Been "Swamped by Asians"?', *ABC News* (online, 14 September 2016) <https://www.abc.net.au/news/2016-09-14/pauline-hanson-maiden-speech-asian-immigration/7645578>.

70 'The Hanson Phenomenon', *60 Minutes* (Rewind Clip, Channel 9, 1996) 0:03:39–0:03:42 <https://www.9now.com.au/60-minutes/rewind/clip-cisgujra700110hp4h13jno2f/politics>.

71 Lawrence M Bogad, 'Electoral Guerrilla Theatre in Australia: Pauline Hanson vs Pauline Pantsdown' (2001) 45(2) *Drama Review* 70, 79 (emphasis omitted).

At the trial level the injunction was granted by the Chamber Judge.[72] The respondents sought review of this decision but it was upheld by the Court of Appeal.[73] In the course of submissions, argument was made by counsel for the defendant that the injunction would be an impermissible burden on the implied freedom of political communication. This suggestion was cursorily treated by de Jersey CJ who penned the unanimous judgment of the Court.[74] His Honour held that

> [e]njoining the broadcast of this material could not possibly be said to infringe against the need for 'free and general discussion of public matters' fundamental to our democratic society. These were grossly offensive imputations relating to the sexual orientation and preference of a Member of Parliament and her performance which the appellant in no degree supports as accurate and which were paraded as part of an apparently fairly mindless effort at cheap denigration.[75]

As these words show, the Court was willing to bypass any consideration of the implied freedom on the basis that the speech itself could not possibly bear upon the direct choice people must exercise at elections. Stone notes that the 'reasons for the dismissal of the *Hanson* case are … unconvincing' and that the song in question clearly contained

> some strongly critical statements — perhaps most pertinently, 'I'm a back door man for the Ku Klux Klan with very horrendous plans' — that were clearly inspired by, and meant to inspire in others, hostility towards her and her politics. The relevance of this kind of comment on a member of Parliament to the federal electoral process need hardly be explained.[76]

Notwithstanding the conclusion of the Court, what this case does illustrate is the effect of the implied freedom's instrumental end. While this may be a controversial instance of its application, it highlights how there will always be certain circumstances where the speech in question does not bear upon the direct choice of electors. Clearly here, the Court felt that such a grossly offensive song could not plausibly do so. Reasonable minds may differ regarding that conclusion but there is no doubting the soundness of the judges' statement of the law — where speech is not relevant to the instrumental end of the freedom, namely the direct choice of representatives, it must go unprotected. Remarkably, this can occur even when the speech in question is clearly *politically motivated*, something demonstrated in the case of *Brown v Classification Review Board*.[77]

72 *Hanson* (n 64) 2.

73 Ibid 8–9 (de Jersey CJ, McMurdo P and McPherson JA).

74 Ibid 2–8.

75 Ibid 8.

76 Stone (n 31) 382–3.

77 *Brown v Classification Review Board* (n 1).

3 Brown v Classification Review Board

Like *Hanson* the facts in *Brown v Classification Review Board* once more involve the more extreme side of politics — namely the publication of an article called 'The Art of Shoplifting' in the La Trobe student magazine. The piece essentially lived up to its name 'contain[ing] a brief introductory critique on the deficiencies of capitalism followed by what was described in its text as "a step by step guide to shoplifting"'.[78] After the La Trobe Student Representative Council tried to publish the work, the Review Classification Board (the 'Board') stepped in and refused to give it a classification — effectively prohibiting its distribution. The Representative Council appealed this decision to the full bench of the Federal Court who agreed with the Board that the work contained instructions on how to commit a crime and should therefore be denied classification. Though implied freedom arguments were made, these were dismissed by at least two of the justices on the grounds that

> the article does not concern 'political or government matters'. The author is not advocating the repeal of the law of theft, either generally or in respect of theft from shops owned by large corporations. The article says nothing, expressly or by implication, about the conduct of holders of elected or appointed public office or the policies which should be followed by them. The article is not addressed to readers in their capacity as fellow-citizens and voters. The article does not even advocate breaking one law as a means of securing the repeal of another law perceived as bad, as with draft card burning in protest against conscription for Vietnam.[79]

Accordingly, the piece was deemed not to engage the implied freedom and the article was left unprotected. Again, this can be criticised on the grounds discussed above, that clearly the incitement of criminal activity on such a topic goes to larger political questions regarding the state — something which could have significant implications for the electoral process, including who one might vote for or, if in fact whether one should vote at all.[80] Nevertheless, like *Hanson*, despite disagreement regarding what can reasonably be described as necessary for exercising a direct choice by electors for the purposes of the implied freedom, French J correctly identified that

> [u]nless the article is prima facie within that freedom, one does not get to the stage of considering whether the relevant statute is enacted for a legitimate end, compatible with representative and responsible government and reasonably

78 Ibid 227 (French J).

79 Ibid 246 (Heerey J).

80 Consider the case of *Langer v Commonwealth* (1996) 186 CLR 302 ('*Langer*') or scenarios involving political radicals (as alluded to by the High Court) who might have advocated for criminal activity to support their cause.

> appropriate and adapted to achieving that end. The statute simply operates according to its terms as properly construed, like any other statute.[81]

Like *Hanson*, *Brown v Classification Review Board* shows the highly instrumental nature of the implied freedom — precluding certain claims before any other steps from *Lange* are to be considered because they do not further the ends which the freedom is designed to protect. This would seemingly remove a significant number of otherwise important issues from the ambit of the freedom. Indeed, these cases seem to support Dworkin's suggestion that:

> If the point of freedom of speech is only to ensure that democracy works well — that people have the information they need in order to vote properly, or to protect democracy from usurping officials, or to ensure that government is not corrupt or incompetent — then free speech is much less important in matters of art or social or personal decisions.[82]

Recognising that Australia does not have a right to free speech per se, it would seem that the above quote nevertheless reflects the scope of the implied freedom, which only protects speech which bears upon the direct choice of electors at federal elections and by extension only speech bearing on as much. Despite this, since *Hanson* and *Brown v Classification Review Board* — up until recently — the trend has been in the opposite direction, with the court increasingly less willing to engage in assessing the nature of the speech in question — accepting that the speech bears upon the choice of representatives.

4 *Contemporary Trends*

Since both *Hanson* and *Brown v Classification Review Board*, one can see a gradual move towards broadly characterising the speech at issue as being relevantly political. As Stone and Morris note:

> [D]evelopments in the subsequent case law have made it apparent that the concept of 'political communication' is rather broad. Early suggestions by some judges that the freedom may not encompass discussion of state political matters have been conclusively set aside. It has been accepted that political communication includes expressive conduct, speech that causes offence, hatred, disgust or outrage, and could also include invective or abuse.[83]

81 *Brown v Classification Review Board* (n 1) 242 (Heerey J).

82 Freedom's Law (n 32) 201.

83 Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards; Preston v Avery*' (2018) 40(3) *Sydney Law Review* 395, 399, citing *Levy v Victoria* (1997) 189 CLR 579, 595–6 (Brennan CJ), *Unions NSW v New South Wales* (2013) 252 CLR 530, 549–51 (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW*'), and *Monis* (n 52) 131 (French CJ), 136, 171–4 (Hayne J).

Other laws which have restricted: the third-party financing of electoral campaigns at the state level;[84] the movement of people protesting in environmental heritage sites;[85] and the expression of religious beliefs[86] have all been found to burden the implied freedom. On one level '[t]he trajectory of the case law is not surprising'.[87] The features of the implied freedom and the test put forward in *Lange* perhaps lend themselves towards resisting the questions which might arise when determining what kind of speech can reasonably bear upon people's direct choice of representatives. As much might be seen to involve a degree of political inquiry that the court is not properly adapted to perform.[88] Political scientists have, for instance, long pondered over what kind of speech may influence direct choices at elections.[89] Perhaps recognising this, focus is today directed towards whether the law is legitimate, namely, 'compatible with the maintenance of the constitutionally prescribed system of government' and 'appropriate and adapted to advanc[ing] that purpose in a manner compatible with the … constitutionally prescribed system of government'?[90] In changing focus, the question of whether the speech itself can be characterised as necessary for the exercise of a direct choice by electors in federal elections has been often put to one side.

One important exception to this trend has been *Clubb v Edwards* ('*Clubb*') in which the plurality suggested that the implied freedom was not engaged in that case since '[a] discussion between individuals of … moral or ethical choices … is not to be equated with discussion of the political choices to be made by the people of the Commonwealth'.[91] This is a significant development. Despite previous case law consistently expanding the scope of what is defined as relevantly political, *Clubb* has now apparently narrowed this enquiry — remarkably holding that certain ethical or moral questions are not relevant to the choice made by electors of their federal representatives. This is a striking conclusion given the sheer number of political issues that can be framed as moral or ethical ones.[92] Given this unexpected reversal by at least some members of the High Court in terms of what speech is considered political it is worth asking how these developments bear upon the consequentialist rationale of the freedom. Certainly early case law when it was discussed as the lower level involved a more explicit commitment to that principle — the idea being that where speech does not contribute to the

84 *Unions NSW* (n 84).

85 *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*').

86 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1 ('*A-G (SA) v Adelaide City Corporation*').

87 Morris and Stone (n 83) 399.

88 See, eg, Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9, 10.

89 See, eg, Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) *American Political Science Review* 417.

90 *Brown* (n 86) 376 (Gageler J).

91 *Clubb* (n 61) 14 [29] (Kiefel CJ, Bell and Keane JJ).

92 See, eg, Stone's critique of *Hanson* above: Stone (n 31); Dellora (n 17).

instrumental end at issue it will go unprotected. But since then the High Court has generally been comfortable with characterising speech as broadly relating to the direct choice of electors. Indeed, up until *Clubb* this trend had all been in one direction. At this stage it is too early to say whether that case marks a genuine resurrection of a more narrow conception of when the implied freedom will operate or is *sui generis*.

From a consequentialist perspective characterising the kind of speech protected by the implied freedom expansively — as had previously been the case — might seem to alleviate the court's discomfort in dealing with *what kind* of speech is relevantly political, however, this merely transfers that burden elsewhere. As much reflects what Letsas has called 'rights inflation' — the gradual expansion of rights such that it becomes 'difficult to find a case where the reviewing court concluded that the policy at stake did not interfere with *a* right'.[93] The result is 'that most if not all of the analytical work takes place at the second stage where the test is proportionality'.[94] However, by concluding that most types of speech bear upon the direct choice by electors the High Court has simply shifted the difficulty that might be obviated by that threshold question to the subsequent steps from *Lange* and *McCloy*. Indeed, even in *Clubb* — despite the fact that the speech in question was held not to bear on the choice made by electors — the High Court could not resist analysing as much.[95] This has meant that what the law is directed at and its proportionality components have been given much more work to do. The latter step in particular requires a delicate balancing act regarding speech which now might plausibly be on almost *anything*. These subsequent steps are variously described as assessing whether the law in question is 'appropriate', 'adapted', 'suitable', 'adequate', 'necessary', or 'proportionate' to its ends.[96] I now turn to the extent that this process itself can be seen as an articulation of free speech consequentialism. The next part of the work begins with the way in which consequentialist and deontological conceptions of freedom of speech differ in their application before moving on to whether this is seen in the doctrinal development of the implied freedom.

93 George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) ch 6 (emphasis added).

94 Kai Möller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12(2) *Law and Ethics of Human Rights* 281, 288.

95 *Clubb* (n 61) 16–28 (Kiefel CJ, Bell and Keane JJ).

96 *Lange* (n 12) 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy* (n 12) 194 (French CJ, Kiefel, Bell and Keane JJ); *Brown* (n 86) 363 (Kiefel CJ, Bell and Keane JJ).

IV THE SCOPE OF FREE SPEECH IN AUSTRALIA AND ABROAD

A *Consequentialism as Balancing Interests*

Free speech consequentialism can often be seen in its application as well as in its justifications. For instance, a common approach to determining free speech controversies can involve the balancing of interests — considering the harms caused by the speech against any benefits it may produce.[97] This Goldberg suggests, is definitionally consequentialism.[98] Like those who advocate the instrumental value of free speech in terms of its rationale, free speech consequentialists when dealing with its application similarly turn to the *sine qua non* of consequentialism — consequences — to ask whether it can be demonstrated that the outcomes of protecting speech in that instance (or in comparable instances) outweighs the harm it might cause. While most justices on the Supreme Court in the United States have consistently disclaimed the value of free speech consequentialism, Goldberg argues that this is in fact how almost all free speech theorists deal with the issue:

> Even scholars who favor what they deem nonconsequentialist theories of free speech … will in some circumstances balance these values against the harms speech causes. This balancing would occur for so-called nonconsequentialists either in defining what constitutes speech, in determining which categories of speech are protected, or in evaluating whether speech that is protected can nonetheless be prohibited because its harms greatly outweigh its virtues.[99]

Thus for Goldberg, free speech consequentialism in both justification and application is 'pervasive and unavoidable'.[100] In her view, unless the right is defined absolutely, any other approach simply leads 'back to free speech

97 Goldberg (n 11); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

98 Goldberg (n 11) 703.

99 Ibid 691.

100 Ibid 693.

consequentialism' *tout court*.[101] This is highly contestable however, as many deontological thinkers believe that balancing can be a valid tool when faced with competing rights rather than mere government interests.

B *A Deontological Balancing Act?*

As noted above, Goldberg argues that any use of proportionality constitutes consequentialism. In her view, the current implied freedom test simply places the Australian approach in the consequentialist camp. However, I am not convinced that the answer is so simple. Deontological scholars have wrestled with the relationship between balancing interests/rights for some time — providing a breadth of opinion on the issue.[102] I consider some iterations below.

1 *No Predicament — Only Principles*

Rights can clash with other rights and they can also conflict with government interests. Meyerson acknowledges as much when she suggests that there are 'two kinds of conflict: conflict between the rights of different individuals, and conflict between the rights of individuals and governmental goals which are not rights-based'.[103]

Some theorists such as Dworkin reject balancing with regards to rights entirely. Rights operate as 'trumps' which government interests cannot displace in any circumstances and where two absolute rights clash then their relationship can be reconciled by recourse to the inherency arguments discussed earlier.[104] In either scenario the right itself is never infringed. For Dworkin, chief amongst these inherency arguments relevant to the latter category is dignity, and he advocates an approach which encourages focus on this singular value in order to determine which right should be curtailed and which should be protected.[105]

101 Ibid 710. See also Mark D Rosen, 'When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts and the Sufficiency Question' (2015) 56(4) *William and Mary Law Review* 1535, 1558 who claims 'there does not appear to be a single liberal democracy that utilizes Rights Absolutism'. But see the *European Convention on Human Rights and Fundamental Freedoms* where limitation clauses operate to qualify all rights except in the case of torture: Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) *Public Law Review* 109. See, eg, Rights in Flux (n 13) 1440 where '[t]he text of the *Constitution* … nearly always sets out rights protections categorically. The *First Amendment* begins with a categorical limit on state power: "Congress shall make no law." The Equal Protection Clause bars states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." These provisions neither limit nor qualify rights on consequentialist grounds, nor do over a dozen other individual rights provisions that use similarly categorical language. Recognizing this feature of the text, Justice Hugo Black famously declared that "'Congress shall make no law' means Congress shall make no law"' (citations omitted).

102 Meyerson (n 43).

103 Ibid 874.

104 Cf ibid 884 who claims that Dworkin's language regarding rights as trumps is a 'misnomer' and that 'it is clear that he does not believe that rights must prevail over collective interests in all circumstances'.

105 See Dworkin (n 32). Cf Jacob Weinrib, 'When Trumps Clash: Dworkin and the Doctrine of Proportionality' (2017) 30(3) *Ratio Juris* 341.

Other scholars suggest that a 'definition-oriented process of ascertaining the meaning' of rights such as freedom of speech can be used to ensure that they do not overlap.[106] Where the act lies within the definition of the right it is absolutely protected, where it does not it can be impaired.[107] As Barak has noted: 'the "protection of the right's core" … views only the right's "core" as absolute. Anything within that "core" according to this alternative, cannot be limited.[108]

Again, in this case the right is not infringed — merely properly defined. Those in this group who suggest rights are absolute and cannot/should not be curtailed where properly defined might agree with Goldberg, balancing is definitionally consequentialism, as there is always a way to ensure the right is protected when sufficient attention is given either to its definition or underlying principle. But other groups, however, approach the issue very differently and argue proportionality *is* relevant to protecting rights but only in a narrow category of cases.

2 *Balancing Rights*

This collection of deontological proponents view the '*enfant terrible* of modern judging'[109] — proportionality — as a perfectly reasonable response to circumstances where absolute rights clash — that is 'Inter-Rights Conflicts'.[110] Importantly, this is only the case for a narrow band of scenarios — applying where protection of one right might infringe upon another. Like the other theorists discussed above, none of these thinkers would see it as an appropriate method to use when dealing with Meyerson's latter category — where governmental interests conflict with rights.[111] In the words of Rosen most deontological theorists 'agree that rights can come into conflict with non-rights interests' in which case the 'rights categorically trump' the interests.[112] As much is similarly reaffirmed by Weinrib, who notes that 'even if it was possible to substantially further the realization of a collective goal by slightly curtailing an individual right, it would not be permissible to do so. A right might be violated by a collective goal, but it cannot be outweighed by one.'[113]

To use proportionality when dealing with rights and non-rights would be to

106 Rosen (n 101) 1542, citing Meiklejohn (n 25) 253.

107 Meiklejohn (n 25) 253.

108 Barak (n 98) 496.

109 Ibid, citing Patrick M McFadden, 'The Balancing Test' (1988) 29(3) *Boston College Law Review* 585, 586.

110 Rosen (n 101) 1555–6. There are some scholars who believe rights cannot clash such as Dworkin but cf Rosen (n 101) 1555–6 who argues otherwise. Rawls seems to advocate a deontological conception of absolute rights which can be limited when they come into conflict with other rights: John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press, rev ed, 2005).

111 This presumes that definitionally the act in question is a right and so the Meiklejohn spheres of coverage approach is not applicable.

112 Rosen (n 102) 1558. See also their suggestion that 'basic liberties categorically trump countervailing interest': Rosen (n 102) 1561, citing John Rawls, *Political Liberalism* (Columbia University Press, 1993) 294–5.

113 Weinrib (n 106) 343.

forgo the definitional component of deontological reasoning established at the start of this piece, which deems rights as absolutes. When this occurs, I would then agree with Goldberg, that such an approach *must* necessarily constitute consequentialism.

3 *Threshold Deontology*

A further iteration of deontology that also warrants attention here is what has variously been described as 'threshold deontology',[114] 'sensible deontolog[y]'[115] or 'moderate deontology'.[116] This is a controversial variant of the duty-based ethic which removes what some consider to be its central axiom — namely absolutism.[117] In its place threshold deontology suggests that obligations to act in a certain way obtain *but only when the alternative is not a repugnant proposition*. An oft-cited example apparently attributable to Joseph Raz is to conceptualise such an approach as like a dam the levee of which prevents one acting against deontological constraints unless the water on the other side is likely to spill over the top.[118] A more concrete example is found in a version of the trolley problem where it is suggested that if a hijacked plane is likely to be used to commit some atrocity then it would be morally permissible to shoot it down if the number of lives that would be saved by doing so is above a certain threshold.[119]

While a comprehensive analysis is not possible here there are deep misgivings amongst some scholars about characterising threshold deontology as a genuine version of that philosophy. Smilansky provides a withering critique, for instance, on the topic and convincingly suggests that in losing the absolute component of deontology such theories forgo the character of deontology and instead become pluralist.[120] A further compelling criticism queries where the threshold in each instance is and importantly why it should be found there. Take the plane example provided above, what is the morally salient difference between a ratio of 50:1 lives and 49:1 lives? If one accepts that the former would justify shooting the airline down while the latter would not, then the threshold deontologist is forced to distinguish between the two. Whilst this debate cannot be resolved here, it is worth acknowledging that this school of deontology would also see balancing as a plausible method but only when the interests at stake are of a sufficiently

114 Alon Harel and Assaf Sharon, '"Necessity Knows No Law": On Extreme Cases and Uncodifiable Necessities' (2011) 61(4) *University of Toronto Law Journal* 845, 847.

115 Martha C Nussbaum, 'Comment' in Judith Jarvis Thomson, *Goodness and Advice*, ed Amy Gutmann (Princeton University Press, 2009) 97, 101.

116 Saul Smilansky, 'Can Deontologists Be Moderate?' (2003) 15(1) *Utilitas* 71, 75.

117 Smilansky (n 117) 72–4.

118 Michael Moore, *Placing Blame: A General Theory of Criminal Law* (Oxford University Press, 2010) 723, discussed in Tyler Cook, 'Deontologists Can Be Moderate' (2018) 52(2) *Journal of Value Inquiry* 199, 204.

119 Harel and Sharon (n 117) 848–50.

120 Smilansky (n 117) 72.

high level that some threshold is met,[121] a level which generally resists overall characterisation but is placed at the extreme end of the spectrum.

So, although there is a range of deontological opinions on the relationship between rights and proportionality, one can discern some common principles. Namely, that proportionality is only a valid approach to rights for some versions of deontology and only when rights are seen to clash with other rights or when the alternative is truly repugnant. The reason this point has been emphasised is because — as we shall see — the current method of applying the implied freedom does not turn its attention to the clashing of rights. Indeed, the High Court has consistently rejected the idea that the implied freedom is a right at all — suggesting that it will not resolve controversies in any of the deontological ways mentioned above.[122] Rather the High Court has reaffirmed that laws which promote a government interest (provided they are proportionate and do not infringe impermissibly upon representative government) will be able to impair the implied freedom — demonstrating how the High Court will often give priority to governmental interests over the implied freedom in a quintessentially consequentialist manner.

C *Scope of the Implied Freedom*

This subsection will begin with a brief overview of the doctrinal development of the implied freedom in *Lange* and minor reformation in *Coleman v Power* ('*Coleman*') then move on to the significant shift seen in *McCloy* and *Brown v Tasmania* ('*Brown*') — aligning the implied freedom with existing proportionality tests from Europe.[123] From there, I will demonstrate how these tests combine to advance a consequentialist approach to the implied freedom — involving the weighing and balancing of interests against rights. While there are certain restrictions (see the curious outlier of *Clubb*) which determine when this can take place, it is clear that most of the case law now revolves around this process. These constraints on legislating in certain ways do little to ameliorate the highly subjective considerations which dictate whether a law that burdens the implied freedom is constitutional.

1 *Lange*

The scope of the implied freedom was first authoritatively set out in *Lange*. There it was held that notwithstanding the fact that '[d]ifferent formulae have been used by members of [the] Court' to determine the breadth of the freedom, the

121 Michael Moore (n 119) 723, discussed in Cook (n 119) 204; Harel and Sharon (n 117) 848–50.

122 *Lange* (n 12) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy* (n 12) 215 [73] (French CJ, Kiefel, Bell and Keane JJ).

123 Anne Twomey, 'Proportionality and the Constitution' (Speech, National Freedoms Symposium, 8 October 2015).

extent to which a law can burden as much turns on whether 'the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government … [and if it] … is reasonably appropriate and adapted to achieving that legitimate object or end.[124]

This was reformulated in *Coleman* where it was held that the law must operate 'in a manner that is compatible with the system of representative government'.[125] In brief, after *Lange* and *Coleman* both the ends to which a law is directed and the law itself must be compatible with representative government — further, the law in question must also be appropriate and adapted to achieving those ends. This was given substantial revision in the cases of *McCloy* and *Brown* where four justices provided a more detailed description of what exactly was required in order for a law to be directed towards a legitimate end and appropriate and adapted to achieving that end.[126]

2 *Legitimacy and Compatibility*

As noted above, the first steps for determining the scope of the implied freedom outlined in *Lange* require a consideration of the law's compatibility and legitimacy with representative government. This criterion underwent a number of reformulations prior to the case of *McCloy* in 2014. As Murray notes: 'It is difficult to say with any confidence what test for compatibility and legitimacy the law actually required before the *McCloy* decision.'[127] Since then, things have been clarified by the High Court. In *McCloy* it was held by a bare majority — that '[a] legitimate purpose is one which is compatible with the system of representative government provided for by the *Constitution*'.[128] More clearly it was established that 'an end will be legitimate (in that it is compatible with representative government) where the end is not directed to "adversely impinging upon" or "impeding" the functioning of the system of representative government'.[129] Once it is established that the law has a legitimate end compatible with representative government it must then be shown that the means used to achieve that end are proportionate.

124 *Lange* (n 12) 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

125 *Coleman* (n 52) 51 [97] (McHugh J).

126 See *McCloy* (n 12); *Brown* (n 86).

127 Samuel J Murray, 'The Public Interest, Representative Government and the "Legitimate Ends" of Restricting Political Speech' (2017) 43(1) *Monash University Law Review* 1, 12.

128 *McCloy* (n 12) 203 [31] (French CJ, Kiefel, Bell and Keane JJ), citing *Lange* (n 12) 561–2, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). It is also worth acknowledging here, that this second step in regards to the implied freedom echoes the terms of the first. Only those communicative acts which further representative government will be protected and only those laws which are compatible with that end can validly impair the implied freedom.

129 Murray (n 128) 16; *McCloy* (n 12) 194 (French CJ, Kiefel, Bell and Keane JJ).

3 *Proportionality*

While it had been clear for many years that the appropriate and adapted test from *Lange* reflected the features of proportionality, what exactly this meant was apparently uncertain.[130] Kirby J once famously described these words as 'a ritual incantation, devoid of clear meaning'.[131] In the face of such criticisms, French CJ, Kiefel, Bell and Keane JJ refined the test from *Lange* — giving it greater content and character. Their Honours confirmed, that for a law to be appropriate and adapted meant that it needed to be proportionate, which in turn required the use of a three step test — identical to that used in certain European legal systems — such as Germany's.[132] This involved assessing whether the impugned law could be considered

> *suitable* — as having a rational connection to the purpose of the provision;
>
> *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; [and]
>
> *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[133]

Where the law failed on any of these steps, it would be unconstitutional. Known as 'structured proportionality' this test has a rich history in the civil law tradition and some have argued its popularity is growing in common law jurisdictions.[134] Three justices saw differently to the majority and expressed their own view of how the law in this area would function — two refusing to deviate from the existing approach from *Lange* and Gageler J refining an alternative his Honour had previously developed in *Tajjour*.[135]

After *McCloy* once it has been determined that a law burdens the implied freedom the following things will need to be asked — is the law:

130 Murray (n 128) 12; *Coleman* (n 52) 30 [26] (Gleeson CJ), 32 [33], 44 [78] (McHugh J).

131 *Coleman* (n 52) 90 [234].

132 Twomey (n 124).

133 *McCloy* (n 12) 195 [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

134 See, eg, Barak (n 98) 343 along with Adrienne Stone in Peter A Gerangelos et al (eds), *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Thomson Reuters, 4th ed, 2017) where it is suggested that proportionality's importation to the common law came from *R v Oakes* [1986] 1 SCR 103, 135–40.

135 *Tajjour v New South Wales* (2014) 254 CLR 508, 580 [150]–[151] (Gageler J). See also the varying judgments of Nettle and Gordon JJ in *McCloy* (n 12).

1. Directed towards a legitimate end compatible with representative government; and

2. Proportionate in the means that it adopts to achieve those ends, namely:

    a. necessary

    b. suitable; and

    c. adequate in its balance.[136]

While 'most of the bench declined to deploy [the above test] in the next case concerning the system of representative and responsible government, *Murphy v Electoral Commissioner*' it gained renewed support with *Brown* and a plurality of justices again reaffirmed their commitment to the above steps.[137] Similarly, four justices recently applied the structured proportionality approach in *Clubb* while a further two acknowledged its validity — leaving an apparently insurmountable six members of the High Court now in favour of the method.[138] Having established the features of the implied freedom's other steps I now turn to an assessment of how this instantiates consequentialism in Australian jurisprudence — holding that two cases in particular illustrate how the legitimacy of ends and proportionality components of the implied freedom interact to provide consequentialist outcomes. These are *Monis v The Queen* ('*Monis*') and *Wotton v Queensland* ('*Wotton*').

D *Case Studies*

1 *Monis*

Monis's facts involved the sending of offensive letters to the fathers, wives and relatives of Australian Defence Force members who had been killed while serving in Afghanistan.[139] The letters made political statements about Australia's involvement in the conflict and were '"really" or "seriously" offensive'.[140] Man Haron Monis was charged with using the postal service in an offensive and/

136 *McCloy* (n 12) 194–5 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ).

137 Shipra Chordia, 'The Trajectory of Structured Proportionality in Implied Freedom of Political Communication Cases: Brown v Tasmania', *AUSPUBLAW* (Blog Post, 2 November 2017) <https://auspublaw.org/2017/11/the-trajectory-of-structured-proportionality/>; *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 61 [63]–[64] (Kiefel J), 94 [205] (Keane J), 122 [297] (Gordon J); *Brown* (n 86) 368–70 [123]–[131] (Kiefel CJ, Bell and Keane JJ). This case also altered the approach slightly and the above reflects as much (on means).

138 *Clubb* (n 61) 10 [5]–[6] (Kiefel CJ, Bell and Keane JJ), 53 [215] (Nettle J), 101 [390] (Gordon J), 105 [408] (Edelman J). See also Alex Deagon, 'There and Back Again? The High Court's Decision in Clubb v Edwards; Preston v Avery [2019] HCA 11', *AUSPUBLAW* (Blog Post, 3 May 2019) <https://auspublaw.org/2019/05/there-and-back-again?-the-high-court's-decision-in-clubb-v-edwards-preston-v-avery>.

139 *Monis* (n 52) 106 [4] (French CJ).

140 Ibid 174 [219], [221] (Hayne J).

or harassing way per s 471.12 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') while an accomplice Amirah Droudis was charged with aiding and abetting Monis in committing the offence.[141] After making its way through the lower courts, special leave to appeal was granted.[142] This occurred shortly after the announcement of Gummow J's retirement and as is standard practice, his Honour did not sit to hear the matter. As much resulted in a split decision. Three justices — French CJ, Hayne and Heydon JJ — held that s 417.12 of the *Criminal Code* did not pursue a legitimate end as its only plausible justification was to prevent offence — something incompatible with representative government.[143] A statutory majority of Crennan, Kiefel and Bell JJ held that the law's object was directed towards preventing 'serious' offence and the 'misuse of postal services' to effect as much — a legitimate end.[144] In reaching this conclusion the statutory majority noted that the:

> The protective purpose of s 471.12 is directed to the misuse of postal services to effect an intrusion of seriously offensive material into a person's home or workplace … A purpose of protecting citizens from such intrusion is not incompatible with the maintenance of the constitutionally prescribed system of government or the implied freedom which supports it.[145]

The acknowledgement above is important for the purposes of this work. Laws which impair the implied freedom can only be valid where the ends are directed towards an object compatible with representative government. Here, prevention of offence through the 'integrity of the post' was deemed to do so and thus subject to proportionality testing.[146] In concluding so, the statutory majority raised a mere interest of the government in preventing intrusion which causes offence up to the level of what is considered a right. In this instance, 'integrity of the post' or the prevention of serious offence cannot be found in any rights catalogue nor international instrument and are perhaps better described as government interests regarding citizens' wellbeing or the effective running of a national communication network.[147]

Alternatively, one might be tempted to frame this as a rights conflict — between the right to political communication and the right to privacy. While a right not to suffer intrusion might broadly be characterised as a right to privacy, it seems

141 Ibid 105 [1] (French CJ).

142 Jeremy Gans, 'Man Haron Monis's Poison Letters Split the High Court and Laid Bare a Flaw in the System', *The Conversation* (online, 16 December 2014) <https://theconversation.com/man-haron-moniss-poison-letters-split-the-high-court-and-laid-bare-a-flaw-in-the-system-35557>.

143 These justices would make up a statutory minority due to s 23 of the *Judiciary Act 1903* (Cth).

144 *Monis* (n 52) 211 [338], 214–15 [348]–[349] (Crennan, Kiefel and Bell JJ).

145 Ibid 214–15 [348]–[349] (Crennan, Kiefel and Bell JJ).

146 Ibid 133–4 [73] (French CJ), 206–7 [324], 210 [333]–[335], 214–15 [348]–[349] (Crennan, Kiefel and Bell JJ).

147 Ibid. Noting of course, that should the sending of the letters rise to the level of abuse then there is existing criminal law which covers as much: *Crimes Act 1958* (Vic) s 21A.

improbable that mailing *political,* offensive, non-threatening material could be a breach of privacy. Allowing as much would give the ambit of privacy a radically expanded scope — so great in fact that it would seem to cripple certain election campaigns where both sides might communicate scandalous things (via post, television or social media) about the other. In *Monis*, the High Court was willing to engage with whether these interests in the 'integrity of the post'[148] and preventing insult could 'trump' protections around freedom of political communication — ultimately holding that they can.[149] In doing so, the statutory majority aligned themselves with a consequentialist tradition that assesses the outcomes of such interests without regard to the protected status of rights. A further response to this might be that as much occurred with a 'significant thumb on the scale in favor of' the implied freedom.[150] Indeed the Commonwealth bears the onus of proving that the law in question satisfies the implied freedom requirements of necessity, suitability and proportionality.[151] However, the first two criteria of the implied freedom have their limitations.[152] As much was acknowledged by Gordon J in *Clubb* where her Honour stated: 'some of the steps in structured proportionality analysis are unnecessary; it is hard to imagine how a law would fail the first stage and not also the second, and the third stage to some degree overlaps with the prior analysis of whether the law's purpose is legitimate'.[153]

Take for instance the end to which the law in *Monis* was directed — preventing insult in order to maintain the 'integrity of the post'.[154] It may well be the case that s 471.12 of the *Criminal Code* was necessary to achieve this end (the criterion did not exist at the time of *Monis*' deciding) as no other response would adequately (and practically) prevent people from sending such letters. Thus satisfying the necessary requirement. It is also clearly suitable as the law criminalises acts that would by the High Court's definition damage the 'integrity of the post' through 'insult and invective'.[155] This, ultimately, leaves the majority of the work to be done by the final *stricto sensu* component of the test which is a subjective balancing

148 *Monis* (n 52) 133–4 [73] (French CJ), 206–7 [324], 210 [333]–[335], 214–15 [348]–[349] (Crennan, Kiefel and Bell JJ).

149 Ibid 215–16 [351]–[353] (Crennan, Kiefel and Bell JJ).

150 Rights in Flux (n 13) 1443; Goldberg (n 11) 693.

151 *McCloy* (n 12) 217 [79], 218 [84] (French CJ, Kiefel, Bell and Keane JJ).

152 Ibid 217 [79]–[81], 218 [83] (French CJ, Kiefel, Bell and Keane JJ).

153 *Clubb* (n 61) 103 [400], citing Ariel L Bendor and Tal Sela, 'How Proportional is Proportionality?' (2015) 13(2) *International Journal of Constitutional Law* 530, 538 and Sujit Choudry, 'Proportionality: Comparative Perspectives on Israeli Debates' in Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart Publishing, 2013) 255, 256–7. Similarly on the topic of suitability Edelman J noted in the same case that '[t]he suitability stage of proportionality testing, which asks whether the operation of a law has a rational connection with its purpose, is almost always satisfied since the construct of legislative purpose is based upon a legislature that is assumed to act rationally': *Clubb* (n 60) 124 [472], citing *Unions NSW* (n 84) 666 [158] (Edelman J).

154 *Monis* (n 52) 133–4 [73] (French CJ), 206–7 [324], 210 [333]–[335], 214–15 [348]–[349] (Crennan, Kiefel and Bell JJ).

155 Ibid 110, 133–4 [73] (French CJ), 206–7 [324], 210 [333]–[335], 214–15 [348]–[349] (Crennan, Kiefel and Bell JJ).

test — in this case involving — a government interest and a fundamental right.

While the necessary and suitable criteria might constrain the scenarios in which the implied freedom can be abridged, any approach which is willing to take a right and curtail it for a government interest cannot be characterised as deontological — even if this occurs in only a limited set of circumstances. As Barak notes:

> The balancing, which is performed as part of proportionality *stricto sensu*, reflects the importance that each legal system ascribes to the marginal social benefits gained by fulfillment of the proper purpose and the marginal social importance of preventing the harm caused to the constitutional right in question.[156]

Although different societies may give these things different weight, it is the mere comparison of rights against governmental interests at all which stands in contrast to a deontological framework and cannot plausibly mean respecting rights as 'trumps' or absolutes.[157] This is so whether from the perspective of threshold deontology or an inter-rights approach. At least implicitly the statutory majority made use of consequentialist reasoning to reach the conclusion that the acts in question were not constitutionally protected. But *Monis* is no aberration, this method was also used in *Wotton* where a similar approach led to the conclusion that the implied freedom did not apply — again, despite the law only advancing a government interest.

2 Wotton

The facts in *Wotton* began with the death of an indigenous man in police custody.[158] Mulrunji Doomadgee was arrested on Palm Island for public nuisance after swearing at police officers.[159] He was detained at the local police station during which time he collapsed and subsequently died.[160] A riot then ensued.[161] Lex Wotton was convicted of participating in the unrest and sentenced to six years in jail.[162] Wotton was paroled before the conclusion of his sentence but with a number of conditions attached including, per s 200(2) of the *Corrective Services Act 2006* (Qld), that he:

> (t) not attend public meetings on Palm Island without the prior approval of the corrective services officer;

156 Barak (n 98) 490.

157 Freedom's Law (n 32); Weinrib (n 106) 347–9.

158 *Wotton v Queensland* (2012) 246 CLR 1, 8 [4] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Wotton*').

159 Naomi Hart, 'Separating the Inquest from the Trial: The Mulrunji Case' (2009) 7(10) *Indigenous Law Bulletin* 23, 23.

160 Ibid.

161 Sam Thompson, 'Wotton v Queensland (2012) 285 ALR 1' (2012) 31(2) *University of Tasmania Law Review* 168, 168.

162 *Wotton* (n 159) 8 [4] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

> (u) be prohibited from speaking to and having any interaction whatsoever with the media; [and]
>
> (v) receive no direct or indirect payment or benefit to him, or through any members of his family, through any agent, through any spokesperson or through any person or entity negotiating or dealing on his behalf with the media.[163]

Stipulation (u) was ultimately removed when the conditions were challenged, but the other two remained.[164] Also at issue was s 132(1) of the same act which prohibited a person from being able to:

> (a) interview a prisoner, or obtain a written or recorded statement from a prisoner, whether the prisoner is inside or outside a corrective services facility; or
>
> …
>
> (b) photograph or attempt to photograph—
>
> (i) a prisoner inside a corrective services facility; or
>
> (ii) a part of a corrective services facilities.

Wotton challenged these provisions as a breach of the implied freedom. A five judge majority of French CJ, Gummow, Hayne, Crennan and Bell JJ held that s 200(2) had a legitimate end which was 'supplied by the text of the sub-section, namely the imposition of conditions the Parole Board considers reasonably necessary to ensure good conduct and to stop the parolee committing an offence'.[165]

Similarly, the same justices held that the end to which s 132(1) was directed 'is sufficiently identified by the statutory purposes set out in s 3(1). This expresses the need to consider community safety and crime prevention through humane containment, supervision and rehabilitation of offenders'.[166]

Both of these objects were considered wholly compatible with representative government and so valid in the constitutional sense. This was balanced against the imposition on the plaintiff's implied freedom, with the conclusion that it did not do so disproportionately.[167] Again, here one can see a mere government interest balanced against — and ultimately outweigh — a right. While manipulating a parolee's behaviour may be seen to be a legitimate end — and one which can potentially have great utility — it cannot be described as directed towards

163 *Wotton* (n 151) 12 [16] (French CJ, Gummow, Hayne, Crennan and Bell JJ), pursuant to s 200(2) of the *Corrective Services Act 2006* (Qld).

164 Thompson (n 162) 169.

165 *Wotton* (n 151) 16 [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

166 Ibid 16 [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

167 Ibid 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

protecting another right.[168] Accordingly, in *Wotton* the implied freedom was just a 'single variable in a larger equation of interests to be balanced'.[169] This conflicts with deontological conceptions of rights which will only curtail a fundamental freedom — if at all — in the ways discussed above.[170] Indeed this accords with the High Court's language on the subject which has consistently rejected the idea that the implied freedom is a right. Instead it would seem that the implied freedom is another consequentialist concern to be factored into a general assessment of what is preferential in the circumstances.

Deontological theorists would not promote a conception of rights that allows them to be balanced against the government's interest in promoting the integrity of the post or controlling parolee behaviour. However, that is not to say that a government could not use deontological reasoning to limit speech in both scenarios. In either case counterfactuals can be proposed where the rights of others may clash with the implied freedom and potentially justify the balancing act required by structured proportionality. Had Monis's offensive language threatened the individuals in question, this could plausibly have been balanced against his implied freedom of political communication. Similarly, if it was clear that Wotton's parole terms were designed to prevent a new criminal conspiracy transpiring by limiting the rioters communication this too could have been balanced against his political communication.[171] However, what both these cases demonstrate is that the High Court maintains an ongoing commitment to the idea that 'the relationship between human rights … and communal aims can be perceived as commensurate and in competition with one another'.[172] Where a law serves a government end which is compatible with representative government nothing more need be shown in order for it to be weighed against the implied freedom — a consequentialist approach where 'rights [are] made subject to paramount communal interests'.[173]

While some, like Goldberg, may argue that the use of proportionality testing is inherently contrary to deontological conceptions of rights this is not necessarily so as certain deontological defences of balancing can be used when two rights clash — either in an inter-rights sense or threshold manner discussed above. However, any version of deontology which accepts such balancing only does so when rights are in opposition. In Australian law however proportionality has

168 I put to one side the deontological arguments which might be marshalled to justify when the deprivation of rights from certain people such as prisoners and convicted criminals can be justified.

169 Rights in Flux (n 13) 1436.

170 Ibid. Any threshold deontology argument can be even more quickly dispensed with. This approach characterises the threshold as being a remarkably high one and given the alternatives to permitting the speech in question in both *Monis* and *Wotton* were individual interests and not rights this would likely mean that the repugnancy criterion which defines the threshold deontology approach would not be met.

171 Perhaps on the basis that another civil disturbance might infringe others' right to bodily integrity or private property.

172 Başak Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) *Human Rights Quarterly* 251, 254.

173 Ibid 265.

been used for matters which clearly give rise to no more than a governmental interest, such as protecting the 'integrity of the post' or restricting media time for parolees.[174] In the words of Meyerson: '[A] key feature of the balancing model is its exclusive focus on consequences. It takes the view that the way to choose between rights and the public interest is to weigh the consequences of protecting the right against the consequences of restricting it'.[175]

The proportionality testing used by the High Court reflects this approach. Rather than being a means to resolving rights disputes, proportionality when applied in this way is just another method of asking where the limits of particular rights lie when a legitimate governmental interest is at stake.

V CONCLUSION

One possible response to the above analysis might be to remind the reader that the implied freedom is not a right. Rather, as has been consistently reaffirmed by the High Court, it is a fetter on government action.[176] While it is outside of the scope of this piece to resolve this issue it does require some attention. Although the expression 'right' has been used in the work here to describe how the implied freedom operates, this has primarily been as a shorthand to indicate that this is often how these types of freedoms are characterised. Restrictions on government action are generally considered rights protections and indeed the earliest instances of such constraints on executive power constituted the first historical gestures at liberty.[177] While the High Court is not fond of this language, the practical significance of the implied freedom is obvious — it is a protection of a certain sort of speech from governmental intrusion. This may not mean that the implied freedom gives rise to a right, but it often has the same practical consequences. Indeed, the fact that the High Court has so assiduously eschewed the language of rights when discussing the implied freedom only further demonstrates how it does not occupy any place of special significance — it is just one consideration in a consequentialist equation where no interest is in and of itself more valuable than the other. Again, this demonstrates how any deontological conception of as much is unsustainable in Australia. For the High Court in both substance and form the implied freedom is not a right — it is instead a mechanism by which preferable consequentialist outcomes can be determined.[178]

174 *Monis* (n 52) 133 [73] (French CJ). See also *Wotton* (n 159).

175 Meyerson (n 43) 881.

176 *Lange* (n 12) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

177 A number of instances of such limitations on government action could be cited here including the Magna Carta, the Bill of Rights of 1689, the Rights of Man and Citizen and the American Bill of Rights, each of these concern themselves with the limitation of government action.

178 The High Court of course has also acknowledged regularly that the freedom is not absolute. This, however, does not mean that it is necessarily consequentialist in content — see the above analysis on deontological theory and the merits of balancing.

This work has sought to take the concept of free speech consequentialism first developed by Goldberg and apply it to a new context — namely the implied freedom of political communication. What has been shown is that across two broad areas, case law on this topic has consistently deployed consequentialist reasoning. When determining whether speech is protected by the implied freedom justices have emphasised that it must be directed towards maintaining representative government. If speech is not conducive to this instrumental end, then it must go unprotected. Similarly, the High Court has also used a balancing approach to free speech when it has come into conflict with other government interests. No convincing deontological explanation for this can be offered. Certainly, if this was the High Court's approach regarding 'Inter-Rights Conflicts' as much may be defensible on deontological grounds, but given it occurs when government interests are at stake, this too contributes to the conclusion that the current conception of the implied freedom is a consequentialist one.[179]

The above has not been a normative endeavour — seeking to find flaws in the High Court's approach, justifications or implicit values. Rather, it has been wholly descriptive, with the aim of illustrating that when dealing with the implied freedom, an instrumental, and consequentialist, line of reasoning has been used to resolve controversies. The justifications for this approach I leave to one side, with the hope that subsequent work can perhaps reveal the merits (or otherwise) of free speech consequentialism in the context of Australian jurisprudence.

179 Rosen (n 102) 1555.