SOUNDING THE CORE OF REPRESENTATIVE DEMOCRACY: IMPLIED FREEDOMS AND ELECTORAL REFORM

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[In this article the author analyses recent developments in the High Court's approach to deriving implied freedoms from the Australian Constitution. The focus is upon the High Court's 1996 decisions in McGinty v Western Australia, Langer v Commonwealth *and* Muldowney v South Australia. *The decisions are examined in the context of the High Court's development of a concept of representative government (or representative democracy). In light of* McGinty, *the author seeks to determine what further rights or freedoms might be derived from the Constitution by the High Court. The issue is a critical one for both constitutional interpretation generally and for the role of the High Court. It raises fundamental issues relating to the legitimacy of High Court decision-making.]*

INTRODUCTION

The High Court's decisions in *McGinty v Western Australia*[1], *Langer v Commonwealth*[2] and *Muldowney v South Australia*[3] mark a subtle shift in the approach of the Court to deriving implications from the Australian Constitution. *McGinty* is the central case of the three as it provided the High Court with the greatest opportunity to elaborate. Perhaps in response to criticism of earlier decisions[4] or due to changes in the composition of the Court,[5] *McGinty* resulted in a new approach to implied rights and freedoms. This new approach is to be

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1 (1996) 134 ALR 289 ('*McGinty*').

2 (1996) 134 ALR 400 ('*Langer*'). For a case note analysis of the decision in *Langer*, see Kristen Walker and Kristie Dunn, 'Mr Langer is not entitled to be agitator: *Albert Langer v Commonwealth*' (1996) 20 *Melbourne University Law Review* 909.

3 (1996) 136 ALR 18 ('*Muldowney*'). The author appeared in this matter as counsel for the plaintiff.

4 See, eg, Tom Campbell, 'Democracy, Human Rights, and Positive Law' (1994) 16 *Sydney Law Review* 195.

5 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*') and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ('*Stephens*') were heard by a High Court consisting of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. Chief Justice Mason, Deane, Toohey and Gaudron JJ formed the majority in those decisions, the high water mark of the implied freedom of political discussion (see George Williams, '*Engineers* is Dead, Long Live the Engineers!' (1995) 17 *Sydney Law Review* 62). Chief Justice Mason and Deane J subsequently left the Court. In *McGinty*, the majority consisted of Brennan CJ, Dawson, McHugh and Gummow JJ, with Toohey and Gaudron JJ dissenting. Control of the development of implied freedoms was lost to the minority of *Theophanous* and *Stephens* plus Gummow J, a new appointee. The position of the other new appointee, Kirby J, remains unknown (see *John Fairfax Publications Pty Ltd v Doe* (1995) 80 A Crim R 414, 438-42 (Kirby P)).

welcomed. While it narrows the scope for implications and negates the possibility of an implied bill of rights,[6] it does offer the potential for a more certain and enduring set of political freedoms.

The development of implied freedoms is central to the role of the High Court today. In decisions such as *Theophanous v Herald and Weekly Times Ltd*[7] and *McGinty*, battle lines have emerged between members of the High Court on issues of far wider concern such as the process of constitutional interpretation generally and whether the Constitution is to be interpreted as a 'living force'[8] or as a document still shaped by the vision of its drafters. Underlying these and other issues is the extent to which the development of implied rights marks the demise of the watershed decision of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd.*[9]

The question facing the High Court after *McGinty* is — what are the core characteristics of representative government (or, alternatively, representative democracy)?[10] The answer provides the key to the future of implied freedoms because the High Court has recognised, I think correctly, that only the core elements of representative government can be discerned in the text and structure of the Constitution. *McGinty* indicates that the High Court will now adopt a more cautious approach to constitutional implications and will not imply freedoms unless they can be securely grounded in a narrower concept of representative government. This means that it will not be permissible to discover implications in any overarching or underlying concept such as representative democracy without founding, and thereby limiting, such a concept in the text and structure of the Constitution.

In *Attorney-General (Cth); ex rel McKinlay v Commonwealth* Stephen J acknowledged that representative democracy:

> has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether.[11]

Thus, an electoral system might lack some quality, such as a freedom to discuss political matters, so that any representatives elected under the system would not have been 'directly chosen by the people' pursuant to ss 7 and 24 of the Austra-

[6] See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, ('*Australian Capital Television*'), 136 (Mason CJ); Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166.

[7] (1994) 182 CLR 104.

[8] *Theophanous* (1994) 102 CLR 104, 173 (Deane J). Adopted by Toohey J in *McGinty* (1996) 134 ALR 289, 319.

[9] (1920) 28 CLR 129 ('*Engineers*' case'). See Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (Federation Press, forthcoming 1996).

[10] The term 'representative government' has been preferred over 'representative democracy' by Dawson, McHugh and Gummow JJ on the basis that the former is the more narrow and precise concept. Chief Justice Mason, Toohey and Gaudron JJ have tended to use the terms interchangeably. See *Theophanous* (1994) 182 CLR 104, 125 (Mason CJ, Toohey and Gaudron JJ), 189 n 56 (Dawson J), 199-201 (McHugh J); *McGinty* (1996) 134 ALR 289, 306 (Dawson J), 374 (Gummow J).

[11] (1975) 135 CLR 1, 57 ('*McKinlay*').

lian Constitution. The reasoning of the majority in *McGinty*, Brennan CJ, Dawson, McHugh and Gummow JJ, endorsed this approach.[12] However, it was held that equality of voting power (or some concept of 'one vote, one value') was not a legitimate implication as it is not an essential aspect of the system of representative government of Western Australia. One of the central issues to arise out of *McGinty* is the basis upon which the High Court could distinguish between political discussion and equality of voting power, with the former, but not the latter, being constitutionally mandated.

The narrowing approach of the High Court to constitutional implications of rights and freedoms has broad ramifications for the Court's recent development of a freedom of political discussion.[13] That freedom was first recognised by a

[12] Cf minority judgement in *McGinty* (1996) 134 ALR 289, 336 (Gaudron J). Justice Toohey was also in the minority.

[13] For analysis and comment on the development of the implied freedom of political discussion, see generally: Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249; Peter Bailey, '"Righting" the Constitution Without a Bill of Rights' (1995) 23 *Federal Law Review* 1; Eric Barendt, 'Election Broadcasts in Australia' (1993) 109 *Law Quarterly Review* 168; A Blackshield, 'The Implied Freedom of Communication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232; A Blackshield, 'Reinterpreting the Constitution' in Judith Brett, James Gillespie and Murray Goot (eds), *Developments in Australian Politics* (1994) 23; David Bogen, 'Comparing Implied and Express Constitutional Freedoms' (1995) 2 *James Cook University Law Review* 190; Gerard Carney, 'The Implied Freedom of Political Discussion - Its Impact on State Constitutions' (1995) 23 *Federal Law Review* 180; Deborah Cass, 'Through the Looking Glass: The High Court and the Right to Speech' (1993) 4 *Public Law Review* 229; Anthony Cassimatis, 'Defamation – The Constitutional Public Officer Defence' (1996) 4 *Tort Law Review* 27; Peter Creighton, 'The Implied Guarantee of Free Political Communication' (1993) 23 *University of Western Australia Law Review* 163; Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133; Neil Douglas, 'Freedom of Expression under the Australian Constitution' (1993) 16 *University of New South Wales Law Journal* 315; K Ewing, 'New Constitutional Constraints in Australia' (1993) *Public Law* 256; K Ewing, 'The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study' (1992) 22 *University of Western Australia Law Review* 239; Arthur Glass, '*Australian Capital Television* and the Application of Constitutional Rights' (1995) 17 *Sydney Law Review* 29; Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 150; Jeffrey Goldsworthy, 'The High Court, Implied Rights and Constitutional Change' (March 1995) *Quadrant* 46; Alison Hughes, 'The High Court and Implied Constitutional Rights: Exploring Freedom of Communication' (1994) 1 *Deakin Law Review* 173; Geoffrey Kennett, 'Individual Rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581; Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37; H Lee, 'The Australian High Court and Implied Fundamental Guarantees' (1993) *Public Law* 606; Ian Lovelard, '*Sullivan v The New York Times* Goes Down Under' [1996] *Public Law* 126; Leighton McDonald, 'The Denizens of Democracy: The High Court and the "Free Speech" Cases' (1994) 5 *Public Law Review* 160; Damien O'Brien, 'Parliamentary Privilege and the Implied Freedom of Speech' (1995) 25 *Queensland Law Society Journal* 569; Stephen O'Meara, '*Theophanous* and *Stephens*: The Constitutional Freedom of Communication and Defamation Law' (1995) 3 *Torts Law Journal* 105; Steven Rares, 'Free Speech and the Law' (1995) 13 *Australian Bar Review* 209; G Santow, 'Aspects of Judicial Restraint' (1995) 13 *Australian Bar Review* 116; Donald Speagle, '*Australian Capital Television Pty Ltd v Commonwealth*' (1992) 18 *Melbourne University Law Review* 938; 'Symposium: Constitutional Rights for Australia?' (1994) 16 *Sydney Law Review* 145; James Thomson, 'Slouching Towards Tenterfield: The Constitutionalization of Tort Law in Australia' (1995) 3 *Tort Law Review* 81; Anne Twomey, '*Theophanous v Herald & Weekly Times Ltd; Stephens v West Australian Newspapers Ltd*' (1994) 19 *Melbourne University Law Review* 1104; Sally Walker, 'The Impact of the High Court's Free Speech Cases on Defamation Law' (1995) 17 *Sydney Law Review* 43; George Williams, above n 5; George Williams, 'Civil Liberties and the Constitution - A Question of Interpretation' (1994) 5 *Public Law Review* 82; George Williams, 'A Republican Tradition for Australia?' (1995) 23 *Federal Law Review* 133.

majority of the High Court in *Australian Capital Television.*[14] It was subsequently developed in *Theophanous,*[15] *Stephens*[16] and *Cunliffe v Commonwealth.*[17] *McGinty* simultaneously strengthened the central aspects of the implied freedom of political discussion, as developed in *Australian Capital Television*, while weakening some of its far reaching aspects, such as its application to the common law in the defamation case of *Theophanous.*

McGinty, *Langer* and *Muldowney* have great practical significance. Each case involved a challenge to an aspect of the electoral systems of Western Australia, the Commonwealth and South Australia respectively. In each instance the Court indicated that constitutional implications will have little role to play in the process of electoral reform and hence the electoral systems of the Commonwealth and the States will be largely left to the respective Parliament. In its inquiries into push polling and the redistribution provisions of the Electoral Act 1918 (Cth), the Joint Standing Committee on Electoral Matters of the Commonwealth Parliament kept a keen eye on the extent of the High Court's recognition of implied freedoms.[18] The resolution in *McGinty*, *Langer* and *Muldowney* of certain ambiguities in the High Court's approach affects whether the Parliament could, for example, proscribe push polling or mandate 'truth in political advertising'. These decisions mean that the Parliament can implement the Committee's recommendation that the Electoral Act 1918 (Cth) be amended 'to extend the variation from average divisional enrolment allowed three-and-a-half years after a redistribution from two to 3.5 percent'.[19] The High Court has indicated that the Parliament has considerable latitude in amending the Electoral Act 1918 (Cth) to further depart from the concept of 'one vote, one value'.

THE QUESTION OF ELECTORAL EQUALITY REVISITED: *McGINTY*

In Western Australia, the number of voters per electoral district differs markedly between districts. The system does not bear out the principle that voters should have equality of voting power in choosing a representative in the Western Australian Parliament. The Legislative Assembly in Western Australia consists of 57 members each representing one electoral district. The electoral districts are divided between the Metropolitan Area, containing 34 electoral districts, and the

[14] The implied freedom of political discussion was also applied by members of the High Court in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'), a decision handed down on the same day. In a series of dissenting judgments, Murphy J had also recognised a similar freedom. See *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88 ('freedom of movement, speech and other communication'); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581 ('freedom of speech and other communications and freedom of movement').

[15] (1994) 182 CLR 104.

[16] (1994) 182 CLR 211.

[17] (1994) 182 CLR 272.

[18] Joint Standing Committee on Electoral Matters, *Report on the Effectiveness and Appropriateness of the Redistribution Provisions of Parts III and IV of the Commonwealth Electoral Act 1918* (December 1995) 44.

[19] Ibid 31.

remainder of the State, containing 23 electoral districts. At the 1993 Western Australian election, the most populous electorate in the Metropolitan Area was Wanneroo which had 26,580 enrolled voters, while the least populous electorate outside the Metropolitan Area was Ashburton which had only 9,135 enrolled voters. The number of Wanneroo voters was 291% of the number of voters in Ashburton. The voting system for the Legislative Council involved similar differences. The greatest disparity between the quotient for regions for the Council was that between the number of voters required in the North Metropolitan Region and in the Mining and Pastoral Region. The former had 376% of the number of voters in the latter's quotient.

The plaintiffs, including James McGinty who is the Labor Opposition Leader of Western Australia, challenged the legislation giving rise to these differences in voting power.[20] It was argued that a system of representative democracy was created by both the Commonwealth Constitution and the Constitution Act 1889 (WA) and that either or both of these requires that, in voting for the Western Australian Parliament:

(i) every legally capable adult have the vote, and

(ii) every person's vote be of equal value to the vote of every other person.[21]

A central impediment to the plaintiffs' argument was the High Court's earlier decision in *McKinlay*. In that case, a majority, with Murphy J dissenting, held that s 24 of the Commonwealth Constitution does not imply a constitutional requirement of as near as practicable equal numbers of people per electoral division for the House of Representatives. However, the majority did not totally reject the notion that s 24 requires some form of equality. *Obiter dicta* in *McKinlay* suggest it is possible that, in some situations, there might be such a degree of malapportionment between electoral divisions as to bring into question whether the Parliament had been 'directly chosen by the people'. For example, Mason J stated that:

> It is perhaps conceivable that variations in the numbers of electors or people in single member electorates could become so grossly disproportionate as to raise a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people of the Commonwealth.[22]

[20] The distribution of voters to electorates for the Legislative Assembly and the Legislative Council of Western Australia is achieved by the Constitution Acts Amendment Act 1899 (WA) and the Electoral Districts Act 1947 (WA), as amended by the Acts Amendment (Electoral Reform) Act 1987 (WA).

[21] Peter Creighton, 'Apportioning Electoral Districts in a Representative Democracy' (1994) 24 *University of Western Australia Law Review* 78, argued that 'a system of representative democracy does require a degree of equality between electoral districts, but not equality in an absolute sense'. See David Wiseman, 'Defectively Representing Representative Democracy' (1995) 25 *University of Western Australia Law Review* 77; Peter Creighton, 'Defectively Representing Representative Democracy - A Reply' (1995) 25 *University of Western Australia Law Review* 85.

[22] *McKinlay* (1975) 135 CLR 1, 61.

Justices McTiernan and Jacobs, in a joint judgment,[23] and Stephen J, in a separate judgment,[24] voiced a similar view. Justice Murphy, dissenting, argued that s 24 required as a 'standard of equality the alternatives of equal numbers of people and equal numbers of electors'.[25]

In *McGinty*, a majority consisting of Brennan CJ, Dawson, McHugh and Gummow JJ rejected the plaintiffs' argument. Toohey and Gaudron JJ dissented. The matter was heard by only six judges; Deane J not sitting, as by this time his appointment as Governor-General of the Commonwealth had been announced.[26]

The Majority

Chief Justice Brennan, Dawson, McHugh and Gummow JJ delivered separate judgments. There are considerable differences in emphasis between these judgments. Significantly, each assumed that some form of freedom of political discussion could be implied from the Commonwealth Constitution. However, each also rejected the attempt to extend the reasoning underlying that freedom to produce an implication of voter equality in Western Australia. Also rejected was the attempt to derive such an implication from the Constitution Act 1889 (WA).

A central theme in the judgments of the majority was an attempt to relocate the source of implied freedoms, including, presumably, the implied freedom of political discussion. The majority argued that such freedoms inhere in the text and structure of the Commonwealth Constitution, rather than in any distinct and nebulous concept of representative democracy. Specifically, the implied freedom of political discussion could be 'drawn from the text and structure of Pts II and III of Ch I of the Constitution and, in particular, from the provisions of ss 7 and 24'.[27]

The approach of Dawson J in *McGinty*, as in earlier cases such as *Theophanous*, highlighted the distinction between legitimate and illegitimate implications. For Dawson J the text of the Commonwealth Constitution and the system of representative government thereby created:

> does not have any necessary characteristics other than an irreducible minimum requirement that the people be 'governed by representatives elected in free elections by those eligible to vote'.[28]

[23] Ibid 36-7.
[24] Ibid 57.
[25] Ibid 70.
[26] If the Court had split 3:3 in the case, the opinion of the Chief Justice would have prevailed pursuant to s 23(2)(b) of the Judiciary Act 1903 (Cth). However, it has been suggested that s 23(2)(b) might itself be invalid. See *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336, 387-8 (Murphy J). A 3:3 result in the High Court might thus have led to either a re-hearing of the matter before seven judges of the High Court or a challenge to s 23(2)(b). An intriguing issue would arise if a Bench of six judges were to split 3:3 on whether s 23(2)(b) were valid. See Michael Coper, *Encounters with the Australian Constitution* (2nd ed, 1988) 131-6.
[27] *McGinty* (1996) 134 ALR 289, 295 (Brennan CJ).
[28] Ibid 306 (Dawson J quoting *Theophanous* (1994) 182 CLR 104, 201 (McHugh J).

The people must be able to make a 'genuine choice'.[29] This approach necessarily limits the implications that may be drawn, and was the basis of Justice Dawson's dissenting judgment in *Australian Capital Television.*

In *McGinty*, other judges adopted a similar approach. Justice McHugh attacked the notion that implications could be drawn from a concept of representative democracy itself implied from the Constitution.[30] According to Brennan CJ:

> 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.[31]

This shift of focus by the majority marked a significant change from the approach of a differently constituted majority in earlier cases, particularly the majority of Mason CJ, Deane, Toohey and Gaudron JJ in *Theophanous.*[32]

The plaintiffs in *McGinty* would have succeeded if they had been able to show that the Western Australian legislature was bound by a guarantee of voter equality implied either from the Commonwealth or the Western Australian Constitutions. Arguing from the decision in *McKinlay*, the majority held that there was no basis in the Commonwealth Constitution for a guarantee of voter equality at the State level. Indeed, it was found that in significant ways the Commonwealth Constitution is inconsistent with any such notion of equality. This is indicated by, for example, s 128 of the Constitution, under which the votes of persons living in one of the less populous States are equivalent to the votes of persons living in one of the more populous States for the purposes of achieving a majority of votes in a majority of States.[33] Also relevant was the equal representation of States, and not people, in the Senate and the fact that each of the original States is guaranteed at least five seats in the House of Representatives under s 24 of the Constitution.[34] As Brennan CJ stated:

> Far from containing an implication affecting State disparities, the text of Pts II and III of Ch I of the Commonwealth Constitution and the structure of the Constitution as a whole are inconsistent with such an implication.[35]

Accordingly, no implication arose from the Commonwealth Constitution that could bind, by virtue of s 106 of the Constitution or otherwise, State legislatures to achieve equality of voting power. This meant that it was not necessary for the majority to examine the further question of whether, under the Commonwealth Constitution and as suggested in *McKinlay*, the electoral districts existing in Western Australia could be unconstitutional due to extreme malapportionment of voters to electoral districts. However, such a question might need to be examined

[29] *McGinty* (1996) 134 ALR 289, 304 (Dawson J).
[30] Ibid 347.
[31] Ibid 295-6.
[32] See above n 5.
[33] *McGinty* (1996) 134 ALR 289, 349 (McHugh J).
[34] Ibid 349-50 (McHugh J).
[35] Ibid 300.

in regard to the Western Australian Constitution if *McKinlay* were to operate with parity of reasoning.[36]

Chief Justice Brennan left open the question of whether, in contradiction to *McKinlay* or otherwise, the Commonwealth Constitution requires a level of equality of voting power at the Commonwealth rather than at the State level. For the purpose of argument, Brennan CJ was prepared to assume:

> without deciding, that the provisions of the Commonwealth Constitution impliedly preclude electoral distributions that would produce disparities of voting power — of whatever magnitude — among those who hold the Commonwealth franchise in a State.[37]

Despite the conclusion of the other majority judges that no such guarantee of equality could be derived, Brennan CJ's assumption meant that there was no majority for such a proposition. However, the reasoning used by Brennan CJ is at least consistent with such a finding.[38]

Alternatively, the plaintiffs might have succeeded if they had obtained a finding that a guarantee of voter equality could be derived from the Constitution Act 1889 (WA). In 1978, s 73(2) was inserted into that Act. Section 73(2) entrenches laws of Western Australia, including the Constitution Act 1889 (WA), that would be affected by Bills of the several kinds specified in the provision.[39] This includes, in s 73(2)(c), a Bill that 'expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people'.

Section 73(2)(c) was applied in *Stephens* to derive a counterpart implication of freedom of political discussion from the Constitution of Western Australia. Thus, in *Stephens*, Brennan CJ stated that s 73(2)(c):

> entrenches in the Constitution Act the requirement that the Legislative Council and the Legislative Assembly be composed of members chosen directly by the people. This requirement is drawn in terms similar to those found in ss 7 and 24 of the Commonwealth Constitution from which the implication that effects a constitutional freedom to discuss government, governmental institutions and political matters is substantially derived. By parity of reasoning, a similar implication can be drawn from the *Constitution Act* with respect to the system of government of Western Australia therein prescribed.[40]

[36] This issue was not addressed explicitly by Brennan CJ, McHugh or Gummow JJ. Justice Dawson briefly examined whether the malapportionment in Western Australia was of sufficient magnitude to give rise to the sort of argument put in *McKinlay*. He found that the 'extreme situations' considered in *McKinlay* were 'markedly different from that which exists under the relevant Western Australian legislation': *McGinty* (1996) 134 ALR 289, 311.

[37] Ibid 300.

[38] Note that Brennan CJ's 'assumption' was by way of explanation only. He concluded by saying: '[i]n my opinion, the Commonwealth Constitution contains no implication affecting disparities of voting power among the holders of the franchise for the election of members of State Parliament': ibid.

[39] Under s 73(2)(f) and (g), such bills must be passed by an absolute majority of both Houses of the Parliament and be approved by the electors of the state at a referendum.

[40] *Stephens* (1994) 182 CLR 211, 236. Quoted in *McGinty* (1996) 134 ALR 289, 301.

However, it was held in *McGinty* that this reasoning could not support an implied guarantee of equality of voting power. Such a guarantee was not seen as a core component of the system of representative government created by s 72(3)(c). The plaintiffs' argument therefore failed.

Relevant to this finding was the fact that, historically, electoral districts in Western Australia have been malapportioned. This was true in 1978 when s 73(2)(c) was inserted into the Western Australian Constitution. Thus:

> it is impossible to suppose that the Parliament of Western Australia intended thereby to override the regime of electoral districts and provinces which were then, and had historically been, the electoral framework of the State.[41]

To find otherwise 'would be to find a legislative intention destructive of the means by which the enacting Parliament was elected'.[42]

Implicit in the finding that s 73(2)(c) gives rise to an implication of freedom of political discussion, but not to an implication of equality of voting power, was a value judgment as to the minimum content of the system of representative government created by the Western Australian Constitution. The value judgment was made in light of evolving notions and perceptions of Australian democracy.[43] A pertinent factor in such a judgment is that while freedoms of speech and association have generally been an integral and accepted part of the process whereby the Australian people choose their representatives, equality of voting power has not enjoyed the same acceptance either in the Australian States or in some other nations.[44] Thus, according to Dawson J, 'the matter of electoral systems, including the size of electoral divisions, and indeed whether to have divisional representation at all, is left to the parliament'.[45]

Justice Gummow was the only judge in *McGinty* not to have participated in earlier High Court decisions on the implied freedom of political discussion. In *McGinty,* he found that the Commonwealth Constitution does give rise to a system of representative government, but that this 'is a dynamic rather than a static institution and one that has developed in the course of this century'.[46] It could not, he argued, be said that an essential feature of the system of representative government created both by the Commonwealth and Western Australian Constitutions was a requirement of equality of voting power.

41 *McGinty* (1996) 134 ALR 289, 302 (Brennan CJ).

42 Ibid 303 (Brennan CJ).

43 See ibid 319-21 (Toohey J), 336-7 (Gaudron J), 388 (Gummow J). Recognition of this point provides some scope for the role of constitutional theory, including republicanism, in the shaping of constitutional doctrine. See Williams, 'A Republican Tradition for Australia?', above n 13; Andrew Fraser, 'In Defence of Republicanism: A Reply to George Williams' (1995) 23 *Federal Law Review* 362; George Williams, 'What Role for Republicanism? A Reply to Andrew Fraser' (1995) 23 *Federal Law Review* 376.

44 See *Dixon v British Columbia (Attorney-General)* (1989) 59 DLR (4d) 247; *Reference re Electoral Boundaries Commission Act* (1991) 81 DLR (4d) 16 where a concept of equality of voting power, similar to that argued for in *McGinty*, was rejected in Canada and the United States position was distinguished (see *Baker v Carr* 369 F 2d 186 (1962); *Wesberry v Sanders* 376 2d 1 (1964); *Reynolds v Sims* 377 F 2d 533 (1964)).

45 *McGinty* (1996) 134 ALR 289, 307.

46 Ibid 383.

Thus, Gummow J said:

> It does not follow from the prescription by the [Commonwealth] Constitution of a system of representative government that a voting system with a particular characteristic or operation is required by the Constitution. What is necessary is the broadly identified requirement of ultimate control by the people, exercised by representatives who are elected periodically. Elements of the system of government which were consistent with, albeit not essential for, representative government might have been constitutionally entrenched or left by the Constitution itself to the legislature to provide and modify from time to time. This is what was done.[47]

This did not mean that Gummow J denied the implication of political discussion established by earlier cases such as *Australian Capital Television*. He simply regarded that case as not standing for the wider proposition submitted by the plaintiffs in *McGinty*. However, he did accept the proposition put forward in *McKinlay* that, in a particular Commonwealth election, there might be such a level of malapportionment as to be inconsistent with 'ultimate control by popular election'.[48]

The Minority

Justices Toohey and Gaudron found that the Western Australian electoral system was inconsistent with the system of representative democracy created by the Constitution of that State. In doing so, they relied upon the same reasoning as to malapportionment put forward in *McKinlay*.

Justice Toohey held that '[e]quality of voting power is an underlying general requirement in the [Commonwealth] Constitution.'[49] In reaching this conclusion he found that in *McKinlay* the High Court had considered only the text of s 24 of the Constitution and had not considered whether a guarantee of equality might instead be derived from the concept of representative democracy underlying the Constitution.[50] *McKinlay* thus did not need to be overruled, only distinguished.[51] However, this guarantee in the Commonwealth Constitution did not extend, under s106 of the Constitution or otherwise, to the State level.[52] This was because, unlike the case of free political discussion, inequality of voting power at the State level does not undermine equality of voting power at the Commonwealth level.[53] Justice Toohey also found that the system of representative democracy created by the Western Australian Constitution gives rise to an implication of equality of voting power. This implication was held to be at odds with the malapportionment in the electoral system of Western Australia.[54]

47 Ibid 387.
48 Ibid 388.
49 Ibid 323.
50 Ibid 324.
51 Ibid.
52 Ibid 327.
53 Ibid 328.
54 Ibid 328-9.

Justice Gaudron adopted a slightly different approach from Toohey J. She recognised that differences in the numbers of voters per electorate might legitimately reflect 'geographic boundaries, community or minority interests' or 'the requirements of the Constitution which necessitate or which may necessitate inequality by reason of population differences between the States'.[55] Subject to these factors, she held that under s 24 of the Commonwealth Constitution 'persons elected under a system involving significant disparity in voting value, could not, in my view, now be described as "chosen by the people"'.[56] This, she argued, could be implied from the text and structure of the Constitution, particularly the words 'chosen by the people' in s 24 as 'determined in the light of developments in democratic standards and not by reference to circumstances as they existed at Federation'.[57] Like Toohey J, Gaudron J held that it was an implication derived by parity of reasoning from the Western Australian Constitution, rather than the Commonwealth Constitution, that was decisive. She found that the level of malapportionment in Western Australia meant that future elections in that State would be inconsistent with the requirement in s 73(2)(c) that representatives be 'chosen directly by the people'.

CAUTIONING FREEDOM OF POLITICAL DISCUSSION: *LANGER* AND *MULDOWNEY*

The plaintiffs in *Langer* and *Muldowney* failed on a different basis from that of the plaintiffs in *McGinty*. Both cases involved a challenge to provisions that made it an offence to encourage voters to fill in or mark their ballot paper other than in accordance with the prescribed method. In *Langer*, the Court, with Dawson J dissenting, found s 329A of the Electoral Act 1918 (Cth) to be valid.[58] The Constitution was interpreted to give the Commonwealth Parliament a broad role in selecting, and protecting, the means by which the members of the federal Parliament are elected. Section 329A was thus held not to infringe the requirement in s 24 of the Constitution that the members of the House of Representatives be 'directly chosen by the people'. The majority dealt briefly with the implied freedom of political discussion and narrowly construed the freedom in finding that it did not invalidate s 329A. However, it was not strictly necessary for the Court to examine the implication as it was not argued by the plaintiff.

In *Muldowney*, the implied freedom of political discussion was fully argued. It did not assist the plaintiff as the Court applied its approach in *Langer* to give the South Australian Parliament broad scope to shape the system of popular election in that State. The Court unanimously held that s 126(1)(b) and (c) of the Electoral Act 1985 (SA) were valid on the basis that it was open to the South Australian legislature to protect 'the prescribed primary method of choosing members to sit

[55] Ibid 337.
[56] Ibid.
[57] Ibid.
[58] See Anne Twomey, 'Free to Choose or Compelled to Lie? - The Rights of Voters After *Langer v The Commonwealth*' (1996) 24 *Federal Law Review* 201.

in the respective Houses of Parliament of South Australia'.[59] In the words of Gaudron J, the implied freedom:

> does not operate to strike down a law which curtails freedom of communication in those limited circumstances where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic processes of the States.[60]

IMPLICATIONS TO BE DRAWN FROM REPRESENTATIVE GOVERNMENT

In *McGinty* the High Court adopted a narrow view of what implications may be derived from the concept of representative government. At the heart of this approach was an emphasis upon implying limitations upon power only from the core characteristics of the concept, rather than from a wider conception of what might be entailed by representative democracy. This approach depended upon the concept of representative government being tied firmly to the text of the Australian Constitution, particularly ss 7 and 24. Hence, implications may be derived where they are essential to a system in which representatives are 'directly chosen by the people'. This would support freedoms based upon the participation of the people in the electoral process to the extent required to enable each person to make a free, genuine and perhaps informed choice.

Although cutting back on the implications that might be drawn from the Australian Constitution, the approach of the majority of the High Court in *McGinty* is likely to bring about a greater degree of certainty and stability. It is now demonstrably clearer what might or might not be derived as an implied freedom from the Constitution. It is a matter of sounding the core of representative democracy. A strength of the High Court's approach in *McGinty* is that it is likely to be more enduring. It will provide a stronger foundation upon which to develop the implied freedom of political discussion and to derive further freedoms relating to the democratic process. It is also likely to shore up the interpretive methods of the High Court against charges that such methods have gone beyond the bounds of what is legitimate and acceptable.[61] After a period of hectic development in the area of implied rights, *McGinty* offers an opportunity for greater depth of analysis without cutting back too far on the gains made in earlier decisions.

Despite this, the approach of the High Court still requires considerable elaboration. The interpretation of the Constitution now centres upon a vision of those characteristics of Australian representative government which are so basic to that system that they cannot be abrogated by Parliament. *McGinty* established that the Court continues to view freedom of political discussion as a core characteristic, but that equality of voting power is not (although a high enough degree of

[59] *Muldowney* (1996) 136 ALR 18, 23 (Brennan CJ).

[60] Ibid 31.

[61] See *McGinty* (1996) 134 ALR 289, 343-9, 360 (McHugh J); Goldsworthy, 'Implications in Language, Law and the Constitution', above n 13; Dennis Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195. In his article, Rose focuses upon implications drawn from Chapter III of the Constitution, rather than implications drawn from any concept of representative government.

malapportionment might stir the Court into action). While this distinction might be soundly based upon the relative importance of these concepts to Australian democracy (freedom of speech being traditionally well protected while equality of voting power has often been flouted in the States), other distinctions will not be so clear. The Court will need to chart whether freedoms such as those of voting, assembly, association and movement fall within or without its, as yet, undisclosed conception of the basic characteristics of representative government in Australia.[62] The challenge for the Court will be to assess these freedoms in a way that promotes a higher degree of transparency while avoiding arbitrary distinctions.

The attainment of greater certainty and a more enduring interpretative approach will not remove the policy choices that are embedded in any decision-making in the field of constitutional law. Implications such as the freedom of political discussion will still require value judgments as to what is 'political' and as to matters of degree, such as whether the Parliament has adopted an 'appropriate and adapted'[63] means of derogating from the freedom. This was alluded to by Gummow J in *McGinty* when he stated that:

> To adopt as a norm of constitutional law the conclusion that a constitution embodies a principle or a doctrine of representative democracy or representative government (a more precise and accurate term) is to adopt a category of indeterminate reference. This will allow from time to time a wide range of variable judgment in interpretation and application.[64]

A question still before the High Court is whether the ambit of 'political discussion' can be pared back to less than a general freedom of speech without resorting to arbitrary distinctions. The greater certainty and narrower approach afforded by *McGinty* will provide little assistance in determining the line that separates 'political' from 'non-political' discussion.

THE SCOPE FOR FURTHER IMPLICATIONS

McGinty marks a turning point in the High Court's approach to implied freedoms. It provides a more solid foundation for certain central freedoms derived from the concept of representative government, such as the freedom of political discussion. Fundamental to this was the majority's recognition that the concept of representative government is a shorthand label given to the system created by the structure[65] and text of the Australian Constitution, particularly ss 7 and 24. The concept is thus defined by the Constitution and does not have a separate existence informed by political theory or other extrinsic material.

The reasoning in *McGinty* is sufficiently wide to encompass further implied freedoms consistent with a system of deliberative democracy. Whether or not it

62 See Kirk, above n 13.

63 *Muldowney* (1996) 136 ALR 18, 31 (Gaudron J).

64 *McGinty* (1996) 134 ALR 289, 374-5. See Julius Stone, *Legal System and Lawyers' Reasonings* (1964) 263-7.

65 Cf *McGinty* (1996) 134 ALR 289, 307-8 (Dawson J).

will do so will depend upon the Court's vision of the essential characteristics of representative democracy in Australia. According to McHugh J in *Australian Capital Television* (at a more robust stage in the Court's development of implied freedoms):

> When the Constitution is read as a whole and in the light of the history of constitutional government in Great Britain and the Australian colonies before federation, the proper conclusion to be drawn from the terms of ss 7 and 24 of the Constitution is that the people of Australia have constitutional rights of freedom of participation, association and communication in relation to federal elections.[66]

To give an example, the words 'directly chosen by the people' would clearly be inconsistent with any law that provided that there could only be one candidate per electorate or that each candidate for election must belong to a particular political organisation. Neither example would provide the people with a genuine 'choice'.

Further freedoms might include a freedom of association and a right to vote. It is difficult to see how some version of a freedom to associate could not be implied given the approach of the majority in *McGinty* and the existence of a freedom of political discussion. The ability to associate for political purposes is obviously a cornerstone of representative government in Australia. How could the people 'directly choose' their representatives if denied the ability to form political associations and to collectively seek political power? The ability to choose must entail the ability to be chosen and to seek power. A freedom to associate for political purposes is likely to be a basic element of the system of representative government established by the Constitution, such that any law abrogating that freedom would be inconsistent with the text and structure of the Constitution.

The Communist Party Dissolution Act 1950 (Cth) is an example of legislation that might breach a freedom of association.[67] The Australian Communist Party was a participant in the federal electoral process and stood candidates for election to the Commonwealth Parliament. Section 4 of the Dissolution Act declared the Australian Communist Party to be an unlawful association, provided for its dissolution and enabled the appointment of a receiver to manage its property. Section 7(1) provided that a person would be liable to imprisonment for five years if he or she knowingly committed acts that included continuing to operate as a member or officer of the Party or carrying or displaying anything indicating that he or she was in any way associated with the Party.

McGinty and *Langer* also strengthen the case for recognition of certain voting rights or at least for a strengthening of the federal franchise. The election of the people's representatives under ss 7 and 24 of the Constitution requires that the people are not denied the capacity to vote for, or 'directly choose', their repre-

[66] *Australian Capital Television* (1992) 177 CLR 106, 227; see also 212 (Gaudron J), 232-3 (McHugh J).

[67] The Communist Party Dissolution Act 1950 (Cth) was held invalid by the High Court in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. See George Winterton, 'The Significance of the *Communist Party* case' (1992) 18 *Melbourne University Law Review* 630.

sentatives. An unresolved issue is how far this freedom would extend.[68] *Obiter dicta* in *McGinty* suggests that the federal franchise could not now be narrowed back to the scope of decades past. Justice Toohey, for example, stated that 'according to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy'.[69] In *McGinty*, Gaudron[70] and Gummow JJ[71] supported the notion that universal adult suffrage is now entrenched in the Australian Constitution, with only Dawson J rejecting this.[72] In *Langer*, a fourth judge, McHugh J, supported entrenchment of the franchise by stating that:

> it would not now be possible to find that the members of the House of Representatives were 'chosen by the people' if women were excluded from voting or if electors had to have property qualifications before they could vote.[73]

The current interpretation is likely to match the view of McTiernan and Jacobs JJ in *McKinlay* that:

> the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s 30, anything less than this could now be described as a choice by the people.[74]

Accordingly, the right of Australian women and indigenous peoples to vote could not now be abrogated, nor could the right to vote be made subject to a property qualification. This would be inconsistent with the requirement that the members of the federal Parliament are to be 'directly chosen by the *people*'.

The universal adult franchise entrenched in the Constitution by ss 7 and 24 and recognised by four members of the High Court may make the question of a separate implied right to vote obsolete.[75] Whether a personal right to vote (or at least an immunity from legislative and executive interference with that right) can be implied from the terms or structure of the Constitution, such as ss 7 and 24, and, to a lesser extent, s 41,[76] may be irrelevant when the Commonwealth lacks the power to legislate other than for universal adult suffrage.

A more pertinent question is whether the High Court will construct a right to vote that goes beyond a mere lack of power on the part of the Commonwealth to narrow the franchise. A positive right might, for example, impose a duty upon the Commonwealth to provide the facilities needed by indigenous peoples in remote areas to cast an effective vote. The Court's current approach to implied freedoms

68 See Adrian Brooks, 'A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise' (1993) 12 *University of Tasmania Law Review* 208; Kim Rubenstein, 'Citizenship in Australia: Unscrambling its Meaning' (1995) 20 *Melbourne University Law Review* 503.

69 *McGinty* (1996) 134 ALR 289, 320.

70 Ibid 337.

71 Ibid 388.

72 Ibid 306.

73 *Langer* (1996) 134 ALR 400, 425. Cf *McGinty* (1996) 134 ALR 289, 354 (McHugh J).

74 *McKinlay* (1975) 135 CLR 1, 36. *Contra Australian Capital Television* (1992) 177 CLR 106, 185 (Dawson J).

75 See Tony Blackshield, George Williams and Brian Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials* (1996) 710.

76 See *King v Jones* (1972) 128 CLR 221; *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.

suggests that it is unlikely to take this step. Even though justices of the High Court occasionally refer to implications as a right (for example, 'general right of freedom of communication in respect of the business of government of the Commonwealth' and 'right of the people to participate in the federal election process'),[77] the implications are more correctly known as freedoms. The basis of this distinction lies in Brennan J's description of the freedom of political discussion as 'an immunity consequent on a limitation of legislative power'.[78] However, the question of whether the implied freedom 'could also conceivably constitute a source of positive rights' was left open by Mason CJ, Toohey and Gaudron JJ in *Theophanous*.[79]

While new freedoms at the core of representative government may be discovered by the High Court following *McGinty*, the decision otherwise limits the scope for recognising a wider range of implied freedoms. The approach of the High Court would not enable the implication of freedoms that might be regarded as essential to a Bill of Rights, such as a guarantee of trial by jury or freedoms from torture or racial discrimination.[80] This bears out the observation of Mason CJ in *Australian Capital Television* that:

> it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.[81]

THE STATUS OF *THEOPHANOUS* AND *STEPHENS*

The implied freedom of political discussion is clearly here to stay. However, in *McGinty* doubt was cast upon the earlier decisions of *Theophanous* and *Stephens*, in which the implied freedom was applied to constitutionalise and reshape certain aspects of the common law of defamation. The majority in those cases consisted of Mason CJ, Deane, Toohey and Gaudron JJ. Chief Justice Mason and Deane J have since left the High Court. In *McGinty*, two members of the majority, McHugh and Gummow JJ, cast doubt upon whether *Theophanous* and *Stephens* should be followed.

Justice McHugh vehemently attacked the reasoning employed in earlier decisions of the High Court:

[77] *Australian Capital Television* (1992) 177 CLR 106, 233 (McHugh J).

[78] Ibid 150. See Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923); N Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (1986) 129-40.

[79] *Theophanous* (1994) 182 CLR 104, 125. See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50-1, 76. See Stephen Gageler, 'Implied Rights' in Michael Coper and George Williams (eds), *The Cauldron of Constitutional Change*, (Centre for International and Public Law, ANU, forthcoming 1996).

[80] Cf *Leeth v Commonwealth* (1992) 174 CLR 455.

[81] *Australian Capital Television* (1992) 177 CLR 106, 136.

> I regard the reasoning in *Nationwide News*, *Australian Capital Television*, *Theophanous* and *Stephens* in so far as it invokes an implied principle of representative democracy as fundamentally wrong and as an alteration of the Constitution without the authority of the people under s 128 of the Constitution.[82]

As in *Theophanous*,[83] McHugh J argued that the reasoning of earlier cases involved a rejection of the interpretative methods laid down in the *Engineers'* case.[84] Moreover, he suggested that this reasoning was illegitimate in that it relied upon representative democracy as if it were a:

> free-standing principle, just as if the Constitution contained a Ch IX with a s129 which read: 'Subject to this Constitution, representative democracy is the law of Australia, notwithstanding any law to the contrary'.[85]

This charge was reminiscent of the response to Murphy J's attempt in *Miller v TCN Channel Nine Pty Ltd*[86] to imply:

> guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the Territories but in and between every part of the Commonwealth.[87]

In that case, Mason J stated that: 'It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution.'[88] Justice McHugh's charge against the majority judges of the earlier decisions, including Mason CJ, is thus somewhat ironic.

McGinty indicated that Dawson J and McHugh J have crossed paths. Of the members of the High Court, McHugh J has now adopted the position furthest from that of the majority in the prior cases. Underlying McHugh J's scathing attack upon *Theophanous* and *Stephens* was his view that a system of representative democracy implied from the Constitution had itself 'become a premise from which other implications are drawn'.[89] Indeed, McHugh J suggested that the

> logic of the reasoning in *Theophanous* and *Stephens* would seem to imply that the principle of representative democracy applies generally throughout the Constitution and could require equality of electorate divisions for State elections even though other provisions of the Constitution demonstrate that such equality is not required in federal elections ... if the logic of *Theophanous* and *Stephens* requires this result, it provides the strongest ground for overruling those decisions as soon as possible.[90]

Given that the 'logic of the reasoning in *Theophanous* and *Stephens*' was neither applied nor overruled in *McGinty*, McHugh J's basis for seeking a reassessment of the decisions must logically not arise. In other words, following *McGinty*,

82 *McGinty* (1996) 134 ALR 289, 348.
83 (1994) 182 CLR 104, 202 (McHugh J); 193-4 (Dawson J).
84 *McGinty* (1996) 134 ALR 289, 345. See Williams, above n 5.
85 *McGinty* (1996) 134 ALR 289, 347.
86 (1986) 161 CLR 556.
87 Ibid 581-2.
88 Ibid 579.
89 *McGinty* (1996) 134 ALR 289, 347.
90 Ibid 360.

Theophanous and *Stephens* should not be seen as standing for the proposition put forward by McHugh J.

Justice Gummow agreed that:

> the process of constitutional interpretation by which [the implied freedom of political discussion] was derived ... and the nature of the implication ... departed from previously accepted methods of constitutional interpretation.[91]

He also stated, going no further in deciding upon the correctness of the earlier decisions, that '[i]f it now were sought to apply the principle then the need for further examination of it would arise.'[92]

It appears that McHugh J, and perhaps Gummow J, might support a reassessment or even an overruling of some aspects of the earlier decisions upon the implied freedom of political discussion. Particularly at risk would be the extension in *Theophanous* and *Stephens* of the implied freedom to the common law. Given that there is considerable scope after these decisions for the implication to impact upon a diverse range of areas of the common law, McHugh and Gummow JJ might soon get their chance to directly attack the decision. However, it would seem unlikely that McHugh and Gummow JJ would be able to gather a majority to the view that *Theophanous* and *Stephens* should be overruled. Neither Brennan CJ nor Dawson J in *McGinty* gave any indication that they would be prepared to follow this course. Justice Dawson, in particular, would seem an unlikely candidate so soon after *Theophanous* had been handed down.[93] Indeed, Dawson J was the only judge to dissent in the decision in *Langer*. In doing so, he adopted a more robust view of the implied freedom than even that of Toohey and Gaudron JJ.[94]

The *dictum* of Gibbs J in *Queensland v Commonwealth*[95] is analogous here. In that case Gibbs J refused to overrule the earlier decision of *Western Australia v Commonwealth*[96] in which he had dissented and which he persisted in regarding as 'erroneous'[97] and 'wrongly decided'[98]. He said:

> the decision in *Western Australia v The Commonwealth* recently given by a narrow majority. It has not been followed in any other case. It involves a question of grave constitutional importance. But when it is asked what has occurred to justify the reconsideration of a judgment given not two years ago, the only pos-

[91] Ibid 391.

[92] Ibid.

[93] See the decisions of Dawson J in *Richardson v Forestry Commission* (1988) 164 CLR 261 and *Queensland v Commonwealth* (1989) 167 CLR 232 (*'Tropical Rainforests* case') in which he followed the majority decision in *Commonwealth v Tasmania* (1983) 158 CLR 1 (*'Tasmanian Dam* case') despite himself dissenting in that case. See also Sir Daryl Dawson, 'The Constitution - Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353.

[94] In disagreeing with the majority, Dawson J stated that the 'exhortation or encouragement of electors to adopt a particular course in an election is of the very essence of political discussion and it would seem to me that upon the view adopted by the majority in the earlier cases, s 329A must infringe the guarantee which they discern': *Langer* (1996) 134 ALR 400, 412.

[95] (1977) 139 CLR 585 (*'Second Territory Senators'* case').

[96] (1975) 134 CLR 201 (*'First Territory Senators'* case').

[97] *Second Territory Senators'* case (1977) 139 CLR 585, 597.

[98] Ibid 600.

> sible answer is that one member of the Court has retired, and another has succeeded him. It cannot be suggested that the majority in *Western Australia v The Commonwealth* failed to advert to any relevant consideration, or overlooked any apposite decision or principle. The arguments presented in the present case were in their essence the same as those presented in the earlier case. No later decision has been given that conflicts with *Western Australia v The Commonwealth*. Moreover, the decision has been acted on.[99]

Similarly, in *R v Commonwealth Court of Conciliation and Arbitration; ex parte Brisbane Tramways Co Ltd [No 1]*, Barton J stated that '[c]hanges in the number of appointed Justices can ... never of themselves furnish a reason for review' of a previous decision.[100]

Instead of overruling *Theophanous*, it would seem more likely that the Court will seek to evade the wider consequences of the extension of the implication to the common law. In areas other than the implied freedom of political discussion, the decision might be distinguished, although it is difficult to see why the principles espoused in *Theophanous* and *Stephens* would not apply more widely. More generally, the decisions should be, to the extent possible, integrated into the approach of the High Court in *McGinty*. This would be an appropriate way of dealing with *Theophanous* and *Stephens* as the decisions still require considerable working out in order for it to fit comfortably into the scheme of constitutional interpretation.

THE STATES — THE NEW BATTLEGROUND?

The Constitutions of the Australian states have the potential to be a fertile source of further implied constitutional freedoms. *McGinty* shows that the High Court will not be keen to follow this path. However, if this potential is borne out and the decision in *Stephens* is applied to other states, the effect upon a diverse range of State laws and the common law may be dramatic. This would be fuelled by the greater degree of diversity in the laws of the six states than at the federal level and in some cases by a lesser commitment at the state level to the protection of human rights.

Stephens opened the door for counterpart implications at the state level. *McGinty* did not close that door, but merely left it ajar. Both decisions centred upon s 72(3)(c) of the Western Australian Constitution. *Muldowney* might have given a better indication of whether the High Court will be able to resist such implications in other States. That case raised the issue of whether an implied freedom of political discussion could be derived from the Constitution Act 1934 (SA). However, the High Court was able to avoid the issue as the Solicitor-General for South Australia conceded in argument that the South Australian Constitution contains a constitutionally entrenched limitation upon state legisla-

[99] Ibid 599-600. See also ibid 603-4 (Stephen J); *Re Tyler; ex parte Foley* (1994) 181 CLR 18, 39-40 (McHugh J). *Contra Stevens v Head* (1993) 176 CLR 433, 461-2 (Deane J), 464-5 (Gaudron J); *Re Tyler; ex parte Foley* (1994) 181 CLR 18, 35 (Gaudron J); *McGinty* (1996) 134 ALR 289, 347-9 (McHugh J).

[100] (1914) 18 CLR 54, 69 ('*Tramways [No 1]* case').

tive power that 'precluded interference by an ordinary law with freedom of discussion about political affairs'.[101]

Muldowney demonstrates that if the States are to be the new battleground of implied rights, manner and form requirements will be a central weapon in the armoury of both sides.[102] Unless a State Constitution contains a manner and form requirement that entrenches provisions giving rise to a system of representative government, that system might be overridden by an ordinary Act of Parliament.[103] Any implication arising from the state constitution might thus be impliedly amended by a subsequent inconsistent Act of Parliament.[104] An inability to make out the necessary manner and form requirements may be the greatest impediment to large scale implications of rights and freedoms in State Constitutions. For example, the lack of appropriate manner and form requirements in the Constitution Act 1934 (Tas) is likely to mean that implied freedoms will be unable to take hold in that State.[105]

WHAT VISION OF THE CONSTITUTION?

A central difference between some of the members of the High Court in *McGinty* was the vision of the Australian Constitution they adopted. Is the Constitution a 'living force', as was suggested by Deane J in *Theophanous*,[106] or is it a more static document somewhat responsive to legal and social change with a text and structure bound to 1900?[107] Or, does the answer lie somewhere in between? The once orthodox basis for judicial restraint in the field of human rights, and coincidentally for a Constitution strictly interpreted according to its text, was encapsulated by Knox CJ, Isaacs, Rich and Starke JJ in the *Engineers'* case:

> If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people

[101] *Muldowney* (1996) 136 ALR 18, 23 (Brennan CJ).

[102] For discussions of 'manner and form restrictions' see Blackshield, Williams and Fitzgerald, above n 75, 298-311; Jeffrey Goldsworthy, 'Manner and Form in the Australian States' (1987) 16 *Melbourne University Law Review* 403. A related, but as yet unresolved issue, is the significance of *Bribery Commissioner v Ranasinghe* [1965] AC 172 for the constitutional source of the effective entrenchment of manner and form provisions in the state constitutions. See *McGinty* (1996) 134 ALR 289, 396 (Gummow J); *Muldowney* (1996) 136 ALR 18, 40 (Gummow J).

[103] See *McGinty* (1996) 134 ALR 289, 329 (Toohey J), 338 (Gaudron J), 363 (McHugh J), 397-9 (Gummow J).

[104] See *McCawley v The King* [1920] AC 691.

[105] Section 41A of the Constitution Act 1934 (Tas) does provide some degree of entrenchment. However, s 41A is not itself entrenched. Thus, while s 41A currently requires that certain amendments be supported by a special majority, s 41A may itself be amended or repealed by an ordinary Act of Parliament and the entrenchment removed.

[106] (1994) 182 CLR 104, 173. This was adopted by Toohey J in *McGinty* (1996) 134 ALR 289, 319.

[107] See *Theophanous* (1994) 182 CLR 104, 193 (Dawson J).

> themselves to resent and reverse what may be done. No protection of this court in such a case is necessary or proper.[108]

Today, popular sovereignty is a key concept in deciding what vision of the Australian Constitution the High Court should adopt. The Court has moved inexorably toward recognising that the sovereignty of the Australian Constitution derives from the Australian people and not from the Imperial Parliament.[109] Chief Justice Mason, for example, stated in *Australian Capital Television* that the Australia Act 1986 (UK) 'marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people'.[110] Or, as McHugh J stated in *McGinty*:

> Since the passing of the *Australia Act* (UK) in 1986, notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia.[111]

Such views are consistent with the notion of an evolving Constitution.

Recognition of popular sovereignty raises the question of what effect the concept will have upon the interpretation of the Australian Constitution. In the hands of Deane J in *Theophanous*, it led to a greater recognition of, and sympathy for, the human rights of the Australian people.[112] Unless it is to be a hollow concept, the challenge for less activist members of the Court (at least in the field of implied freedoms) such as Dawson and McHugh JJ will be to weave popular sovereignty into a different version of constitutional interpretation. Ultimately, the concept might be employed to underpin a return to judicial restraint based upon the people's role in amending the Constitution under s 128.[113] In *McGinty*, this approach may have been foreshadowed by McHugh J in his reference to and use of prior referenda under s 128.[114] A provision in the Constitution guaranteeing 'one vote, one value' had twice been rejected by the Australian people, once on 18 May 1974 and again on 3 September 1988.[115] Justice McHugh used these

108 *Engineers'* case (1920) 28 CLR 129, 151-2. Quoted in *Australian Capital Television* (1992) 177 CLR 106, 182 (Dawson J).

109 See Geoffrey Lindell, 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29; George Williams, 'The High Court and the People' in Hugh Selby (ed), *Tomorrow's Law* (1995) 271; Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *The Constitution and Australian Democracy* (Federation Press, forthcoming 1996). Cf Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

110 (1992) 177 CLR 106, 138. See *University of Wollongong v Metwally* (1984) 158 CLR 447, 476-7 (Deane J); *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ); *Nationwide News* (1992) 177 CLR 1, 70 (Deane and Toohey JJ); *Theophanous* (1994) 182 CLR 104, 171 (Deane J).

111 *McGinty* (1996) 134 ALR 289, 343-9 (McHugh J); 378-9 (Gummow J). In a related finding, Toohey J at 326 found that the present source of the legislative power of the States is s 106 of the Commonwealth Constitution and not the Imperial Parliament.

112 See *University of Wollongong v Metwally* (1984) 158 CLR 447, 476-7.

113 See Michael Coper, 'The People and the Judges: Constitutional Referendums and Judicial Interpretation' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 73.

114 *McGinty* (1996) 134 ALR 289, 356-7, 358.

115 For the results of these referenda see, Blackshield, Williams and Fitzgerald, above n 75, 972, 974. The 1974 proposal was carried only in New South Wales and not nationally, while the 1988

referendum results to resist the implication of a guarantee of equality of voting power.[116]

WHERE TO NOW FOR ELECTORAL REFORM?

If the High Court had taken a more robust approach to voter equality and held that such a concept can be implied from the Australian Constitution, certain provisions of the Electoral Act 1918 (Cth) might have been susceptible to challenge. For example, s 59(2) of the Act may not have met a requirement of relative equality in providing for a redistribution every seven years or where more than one third of electoral districts is malapportioned for more than two months.[117] This was one of the concerns facing the Commonwealth Parliament's Joint Standing Committee on Electoral Matters in its 1995 Inquiry into Electoral Redistributions. Thus, in its Report in December 1995, the Committee recommended:

> that when the High Court's decision in *McGinty v Western Australia* is known, the AEC [Australian Electoral Commission] advise this Committee of the implications for the redistribution provisions of the Electoral Act.[118]

The Joint Standing Committee on Electoral Matters foreshadowed that the Parliament may seek to amend the Commonwealth Electoral Act to reduce the level of equality of voting power in federal elections. If the decision in *McGinty* had recognised a guarantee of equality of voting power above that recognised in *McKinlay*, the Commonwealth might have faced difficulties in making any such change. While the fact that Brennan CJ left open this issue means that the Court could still extend the reach of *McKinlay* at the Federal level, *McGinty* nevertheless gives more than a hint that the Commonwealth is unlikely to face any difficulties in implementing the Committee's Report. This conclusion is reinforced by the decisions of *Langer* and *Muldowney*. The Commonwealth Electoral Act might thus be amended in line with the Committee's Report to 'extend the variation from average divisional enrolment allowed three-and-a-half years after a redistribution from two to 3.5 percent'.[119]

proposal failed in every State and nationally received only 37.10% of the vote. In *McGinty* (1996) 134 ALR 289, 358, McHugh J stated that: '[t]he result of the 1988 referendum shows that most Australians still think that representative democracy does not require equal representation for equal numbers'.

116 See also *McGinty* (1996) 134 ALR 289, 304 fn 68 (Dawson J).

117 The mini-redistribution provisions in s 76 of the Electoral Act 1918 (Cth) might likewise have been susceptible to challenge. See George Williams, 'Submission to the Inquiry into Electoral Redistributions' (2 July 1995) *Submissions*, 57-64; Commonwealth, *Hansard*, Joint Standing Committee on Electoral Matters, 5 September 1995, 51-7; Chris Merritt, 'High Court Ruling Could Alter Electoral Laws', *Australian Financial Review* (Sydney), 20 February 1996; Chris Merritt, 'Number's Up for Equal Votes' *Australian Financial Review* (Sydney), 23 February 1996.

118 Joint Standing Committee on Electoral Matters, above n 18, 44.

119 Ibid 31.