The Lion that Squeaked: Representative Government and The High Court
McGinty & Ors v The State of Western Australia

1. *Introduction*

In the recent case of *McGinty v Western Australia*,[1] the High Court has delivered its first decision exploring the limits of the concept of representative government as a basis for implying rights into the Australian Constitution. In the foundational decisions of *Australian Capital Television Pty Ltd v The Commonwealth*[2] and *Nationwide News v Wills*,[3] a majority of the Court[4] distilled an implied freedom of political communication from the provisions and structure of the Constitution and particularly from the concept of representative government which it enshrines.[5] In a later case, *Theophanous v The Herald & Weekly Times Ltd*,[6] a smaller majority[7] of the Court found that the newly found freedom could override not only Commonwealth laws but also State laws and the common law.[8] There was considerable disagreement in each of these cases, however, about the Constitutional source and scope of the implication. Since *Theophanous* was decided there have been changes in the composition of the Court, with Mason CJ and Deane J being replaced by Gummow J and Kirby J respectively. *McGinty* therefore represented the first test of how the balance of the Court in this area had been changed. The case reveals a new majority in support of what seems to be a narrower approach to the concept of representative government enshrined in the Constitution. In adopting such an approach, the Court has cut off one source from which a range of public rights might have been judicially developed and has tilted the political balance of power away from the Court and back towards Parliament.

2. *The Facts*

Two of the plaintiffs in the case, Mr McGinty and Mr Gallop, were members of the Western Australian Legislative Assembly. The third, Mr Halden, was a member of the State's Legislative Council. They challenged the validity of State laws establishing the electorate distributions for both houses of the State Parliament.[9] For the purposes of electing the Legislative Assembly, the State was divided into a Metropolitan Area and an Area comprising the remainder

1 (1996) 134 ALR 289 ("*McGinty*").
2 (1992) 177 CLR 106 ("*Australian Capital Television*").
3 (1992) 177 CLR 1 ("*Nationwide News*").
4 Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ (Dawson J dissenting).
5 (1994) 182 CLR 104 ("*Theophanous*") at 120-1 per Mason CJ, Toohey and Gaudron JJ.
6 Ibid. See also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ("*Stephens*"); *Cunliffe v The Commonwealth* (1994) 182 CLR 272 ("*Cunliffe*").
7 Mason CJ, Deane, Toohey and Gaudron JJ (Brennan, Dawson and McHugh JJ dissenting).
8 Williams, G, "Engineers is Dead, Long Live the Engineers!" (1994) 17 *Syd LR* 62 at 62.
9 *Acts Amendment (Electoral Reform) Act* 1987 (WA), amending the *Electoral Distribution Act* 1947 (WA).

of the State. The Metropolitan Area was further divided into 34 electoral districts and the remainder of the State into 23 electoral districts.[10] The number of enrolled electors in any district in an Area was not to be more than 15 per cent greater or less than a quotient determined by dividing the total number of electors in the Area by the total number of districts in the Area. Since nearly 75 per cent of the State's population at the time the Act was implemented lived in the Metropolitan Area, this scheme produced some large discrepancies between districts. The largest Metropolitan district, for example, had 26 580 voters while the smallest district outside the Metropolitan Area had just 9 135 voters.[11]

A similar scheme applied to establishing the districts for the Legislative Council.[12] The Metropolitan Area was divided into a North Metropolitan Region, a South Metropolitan Region and an East Metropolitan Region. The remainder of the State was divided into a Mining and Pastoral Region, an Agricultural Region and a South West Region. The North Metropolitan Region and the South West Region were each allocated seven members in the Legislative Council, while the other four Regions were allocated five members each.[13] As might be expected, this scheme produced large discrepancies between Regions. At the 1991 State election, for example, a successful candidate in the North Metropolitan Region required a quotient of 34 161 votes, while a successful candidate from the Mining and Pastoral Region required a quotient of just 9 097 votes.[14]

The plaintiffs challenged the constitutionality of these arrangements on the basis that they were inconsistent with a principle of "representative democracy" enshrined in either the Commonwealth Constitution or the Western Australian State Constitution.[15] In support of their contention, they pointed to sections 7 and 24 of the Commonwealth Constitution, which provide that members of the Senate and the House of Representatives shall be "directly chosen by the people", and to the logically equivalent phrase in section 73(2)(c) of the Western Australian Constitution.[16]

One obstacle in the way of the plaintiffs' case was the majority High Court decision in the 1974 case of *Attorney-General (Cth) (Ex rel McKinlay) v The Commonwealth*[17] that the text of section 24 did not require the number of voters in Commonwealth electoral divisions to be equal. The plaintiffs, however, submitted that *McKinlay* had been overtaken by the *Australian Capital Television* line of cases ("the freedom of political communication cases"[18]) which, they argued, held "that the principle of representative democracy is inherent in

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10 *Electoral Distribution Act* 1947 (WA), s6 (as amended).
11 Above n1 at 292.
12 *Constitution Act (Amendment) Act* 1899 (WA), s6, and the *Electoral Distribution Act* 1947 (WA), s9 (as amended).
13 *McGinty*, above n1 at 292.
14 Id at 293.
15 Id at 341, 361.
16 The phrase in s73(2)(c) is "chosen directly by the people".
17 (1975) 135 CLR 1 ("*McKinlay*"): Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ (Murphy J dissenting).
18 That is, *Australian Capital Television*, *Nationwide News*, *Theophanous*, *Stephens* and *Cunliffe*.

the Constitution independently of the terms of any particular provision".[19] The plaintiffs then argued that "representative democracy" required that every legally capable adult have the vote, and that each person's vote be equal to the vote of every other person.[20] If equality of voting power was required under the Commonwealth Constitution, they further claimed that section 106 subjected State Constitutions to the Commonwealth Constitution. Therefore, State Constitutions likewise enshrined a principle of "representative democracy".[21]

3. *The Legal Framework*

Judicial use of the phrase "representative democracy" began in *McKinlay*,[22] where Stephen J used it to mean no more than that the legislators must be chosen by the people.[23] Similarly, several of the judgments in the freedom of political communication cases seem to use the phrase interchangeably with "representative government".[24] This is potentially very confusing. As McHugh J noted in *Theophanous*, representative government merely denotes a political system where the people elect the legislature in free elections.[25] Representative democracy, on the other hand, encapsulates a conception of society which provides for political equality of rights, freedoms and privileges.[26] For the purposes of analysis the remainder of this case note will adopt McHugh J's usage.

Since neither "representative government" nor "representative democracy" appears expressly in the text of the Constitution,[27] the concepts they encapsulate can only be given Constitutional status through the process of drawing implications. After *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[28] "the notion seemed to gain currency that no implications could be made in interpreting the Constitution",[29] but *Engineers* required only that "ordinary principles of statutory construction" be applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning.[30] So it became clear that implications could be drawn where "the very frame of the Constitution" and the efficacy of its system logically demands a restriction on Commonwealth or State legislative power.[31] In accordance with this approach of preserving the integrity of the Constitution's structure,[32] the High Court has drawn implications from the Federal structure of the Constitution

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19 Above n1 at 341.
20 Id at 293.
21 Id at 300.
22 Above n17.
23 Id at 56.
24 *Australian Capital Television*, above n2 at 137 per Mason CJ; *Theophanous*, above n5 at 125, 127 per Mason CJ, Toohey and Gaudron JJ.
25 Above n5 at 200.
26 Id at 199.
27 *McGinty*, above n1 at 295 per Brennan CJ.
28 (1920) 28 CLR 129 (*"Engineers"*).
29 *Australian Capital Television*, above n2 at 133 per Mason CJ.
30 Above n28 at 155.
31 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 83.
32 *McGinty*, above n1 at 345 per McHugh J; *Australian Capital Television*, above n2 at 135 per Mason CJ.

and from the separation of powers between the executive, the legislature and the judiciary. Similarly, the implication from the Constitutional system of representative government found in the freedom of political communication cases was structural, deriving from the need to protect the efficacy of that system.[33]

The precise content and scope of Constitutional representative government were left unresolved after the freedom of political communication cases. At one extreme, Dawson and McHugh JJ in *Theophanous* thought that the content of representative government was limited to the express provisions of a limited number of sections, including sections 7 and 24.[34] There was nothing in the text or structure of the Constitution which made it necessary to imply representative government "independently of the content of those sections".[35] Brennan J did not discuss the content issue expressly, but said that the Court cannot "fill in what might be thought to be lacunae left by the Constitution".[36]

Mason CJ in *Australian Capital Television* placed himself somewhere in the middle. On the one hand, he held that "the very concept of representative government and representative democracy signified government by the people through their representatives".[37] On the other, he suggested that the failure of the framers of the Constitution to incorporate comprehensive guarantees of individual rights made it structurally "difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms".[38]

Whereas Mason CJ, Brennan, Dawson and McHugh JJ based their reasoning on orthodox methods of interpretation, Deane, Toohey and Gaudron JJ commenced from a quite different position which owes much more to representative democracy than to representative government. Deane and Toohey JJ in *Nationwide News* said that the ultimate power of government control which is reserved to the people by the doctrine of representative government[39] entitled all people to share equally in the exercise of that power.[40] Gaudron J in *Australian Capital Television* thought that the system of representative government protected by the Constitution was "predicated on a free society governed in accordance with the principles of representative parliamentary democracy" which were "a fundamental part of the Constitution".[41] The most expansive views were expressed by Deane J in *Theophanous*. He characterised the Constitution as "a living force" deriving its legitimacy from "the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people".[42] Since the Constitution represented "the will and intentions of all contemporary Australians",[43] the Court was entitled to take "full account of contemporary social and political circumstances

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33 *Australian Capital Television*, above n2 at 139 per Mason CJ.
34 Above n5 at 189 per Dawson J; 196 per McHugh J.
35 Id at 196.
36 Id at 143 per Brennan J.
37 Above n2 at 137.
38 Id at 136.
39 Above n3 at 71.
40 Id at 72.
41 Above n2 at 210.
42 Above n5 at 171.
43 Id at 173.

and perceptions"[44] in deciding whether State defamation laws were consistent with the Constitutional implication of freedom of communication.

The High Court in *McGinty* had to choose between these competing views. In doing so, it effectively had to establish a position on two fundamental, complex and interrelated questions of constitutional theory associated with developing and protecting rights. First, to what extent was the Court entitled to interpret the Constitution in accord with its own view of what representative democracy or representative government required rather than according to orthodox legal analysis of the Constitution's text and structure? Second, where should the political balance of power in the Australian polity lie between the Parliament, the High Court and the people?

4. *The Decision*

The Court in *McGinty* held by a majority of four to two that the State laws were valid. Six judgments were delivered. In the majority, the approach to Constitutional interpretation taken by Brennan CJ, Dawson and McHugh JJ was substantially similar, while Gummow J had a slightly more complex outlook. In the minority, Gaudron J generally agreed with Toohey J,[45] although her judgment also admits of a narrower reading.

A. The Majority — Brennan CJ, Dawson, McHugh and Gummow JJ

Each of the majority justices in *McGinty* rejected the implication that the institutions of representative government or representative democracy were part of the Constitution independent of sections 1, 7, 24, 30 and 41.[46] Brennan CJ emphasised that

> [i]mplications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure ... 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.[47]

Brennan CJ and McHugh J discussed the concept of "representative democracy" in considerable detail. Each described the term as an inexact shorthand description of the form of government prescribed by the Commonwealth Constitution used in order to explain how the freedom to discuss government and political matters is implied.[48] Brennan CJ then stated that the principle of representative government that was implied in the freedom of political

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44 Id at 174.

45 Above n1 at 332.

46 Id at 305 per Dawson J, quoting *Theophanous*, above n5 at 199 per McHugh J.

47 Above n1 at 295–6 per Brennan CJ. Dawson J at 310 stated that "it is fallacious reasoning" to draw an implication of a system of representative government "for which the Constitution does not provide" from an "extrinsic source".

48 Id at 294 per Brennan CJ. See also McHugh J at 346.

communication cases "can be no wider than — for it is synonymous with — what inheres in the text of the Constitution or in its structure".[49] Remaining true to orthodox principles, the Chief Justice agreed with the other members of the majority that "underlying or overarching doctrines", although useful in illuminating the meaning of the text or structure of the Constitution, are not independent sources of constitutional "powers, authorities, immunities and obligations".[50]

McHugh J went further than Brennan CJ. He noted that Mason CJ, Toohey and Gaudron JJ in *Theophanous* had preferred to describe the "freedom" of political communication as an implication of freedom rather than as a guarantee of positive rights.[51] He concluded that the logical consequence of the majority's reasoning was that the Constitution contained a "free-standing principle", "a section 129", that representative democracy was the law of Australia notwithstanding any law to the contrary other than the express provisions of the Constitution.[52] McHugh J declined to follow this analysis of the earlier cases, however, regarding any invocation of an implied principle of representative democracy in the freedom of political communication cases as "fundamentally wrong and as an alteration of the Constitution without the authority of the people under s128".[53] He argued that

> to decide cases by reference to what the principles of representative democracy currently require is to give this court a jurisdiction which the Constitution does not contemplate and which the Australian people have never authorised.[54]

Like McHugh J, Brennan CJ, Dawson and Gummow JJ all confined the freedom of political communication cases to ensuring the freedom of communication necessary for "the efficacious working of the system of representative government established for the Commonwealth".[55] Put another way, the implication was concerned with "the protection of the governmental structure of the Constitution".[56] While Brennan CJ expressed his decision purely in terms of principles of interpretation, Dawson, McHugh and Gummow JJ each explicitly considered that, aside from the few limited Constitutional entrenchments,[57] the content of representative democracy was a political question "to be answered by the people and their elected representatives acting within the limits of their powers as prescribed by the Constitution".[58] Having rejected the arguments based on representative democracy, Dawson, McHugh and Gummow JJ each endorsed[59] the decision in *McKinlay*.[60] Dawson and Gummow JJ conceded that there could be extreme cases where

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49 Id at 297.
50 Id at 345 per McHugh J. See also Brennan CJ at 295–6 and Dawson J at 305–6.
51 Above n5 at 125–6 per Mason CJ, Toohey and Gaudron JJ.
52 Above n1 at 347.
53 Id at 348.
54 Ibid.
55 Id at 387 per Gummow J. See also Brennan CJ at 296–7 and Dawson J at 304.
56 Id at 387.
57 Sections 1, 7, 24, 30 and 41.
58 Above n1 at 348 per McHugh J. See also Dawson J at 309 and Gummow J at 386.
59 Id at 311 per Dawson J. See also McHugh J at 363 and Gummow J at 382.
60 Above n17.

the inequality of electoral divisions was such as to deny ultimate popular control, but held that this was not the situation here.[61]

In considering the effect of the Commonwealth Constitution upon the States, Brennan CJ said that there was "no relevant reference in the Commonwealth Constitution to the distribution of franchises in elections for State parliaments".[62] Dawson J agreed, adding that section 106 "does not serve to apply to the States provisions of the Commonwealth Constitution which otherwise have no application to them".[63] McHugh J considered that the logic of the freedom of political communication cases required that the principle of representative democracy generally applied to the States even if its Commonwealth application was limited by specific Constitutional provisions. He thought that this result "provides the strongest ground for overruling those decisions as soon as possible" since it could only "distort the meaning and application of the Constitution".[64] He concluded that since the Commonwealth Constitution, on his view, did not require equal representation for equal divisions at Federal elections, it could not do so at the State level.[65]

While the approach taken by Gummow J broadly corresponded with that of the other majority justices, his approach differed in that he restricted his discussion to the narrower notion of representative government[66] which deals only with the institution of Parliament. He considered that the elements of representative government entrenched in the Constitution were limited to accommodate the central government of the Federation but also to allow further development in the institutions of representative government.[67] Of the majority, he alone thought that the question of what the text and structure of the Constitution requires is ultimately to be determined by "the particular stage which ... has been reached in the evolution of representative government".[68] Since different constituents of the Federation could be at different stages of evolution, he therefore concluded that the Commonwealth Constitution could not bind the States to any one stage.[69] This was so even if the Commonwealth Constitution required that its system of representative government be extended to the States, a point which Gummow J did not find necessary to decide.[70]

B. *The Minority — Toohey and Gaudron JJ*

The minority justices in *McGinty* adhered to the view that the Commonwealth Constitution contains an implication of representative democracy.[71] However,

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61 Above n1 at 311 per Dawson J. See also Gummow J at 388. Brennan CJ, at 300, did not decide whether the provisions of the Commonwealth Constitution impliedly precluded "electoral distributions that would produce disparities of voting power — of whatever magnitude — among those who hold the Commonwealth franchise in a State". McHugh J found it unnecessary to comment.

62 Id at 298.

63 Id at 311.

64 Id at 360.

65 Ibid.

66 Id at 374.

67 Id at 375.

68 Id at 388.

69 Id at 393.

70 Id at 392–3.

71 Id at 319.

both considered that the Western Australian Constitution was decisive in the present case,[72] since there was no necessary inter-relationship between the electoral laws of the Commonwealth and the States.[73] Toohey J used the phrase "directly chosen by the people" in the Western Australian Constitution to extend the implication to the State level.[74] He distinguished *McKinlay* on the basis that it did not address implications from representative democracy,[75] and considered that both Constitutions embodied the current perception of what was required to give expression to that principle.[76] He then concluded that the legislative means used under the Western Australian Acts to give effect to political factors were not proportional to the legitimate aim of "facilitating the representation of those who live in the thinly populated and remote areas of the State".[77]

While professing to agree with Toohey J, Gaudron J based her reasoning on the text of the relevant Constitutional sections[78] but concluded that contemporary democratic standards meant that the malapportionment in the State legislation was too great.[79] She also thought that section 106 of the Commonwealth Constitution required that the States remain "essentially democratic".[80]

5. *Sources of Rights*

The decision of the majority in *McGinty* stands as a reaffirmation of orthodox principles of Constitutional interpretation and as a rejection of the broader views of Constitutional representative democracy espoused by Deane, Toohey and Gaudron JJ in the freedom of political communication cases. Moreover, it severely curtails the scope for a future High Court to use the principle of representative government to develop implied rights other than those necessary for preserving the representative character of the legislature.

Although the reasoning in *McGinty* is orthodox, the merits of the decision depend on whether such orthodoxy is sustainable in a late 20th century Australia where the discourse of individual rights and freedoms is widespread. As Professor Lane has written, the legitimacy of pursuing rights depends on what the rights and their contents actually are, which in turn depends on "the body that declares and develops the rights, and its sources".[81] The three possible political sources of rights are the Parliament, the people and the High Court, but the Constitution itself provides a fourth — legal — source. In assessing the *McGinty* decision, therefore, it is necessary to analyse the ways in which the authority of each source is curbed by the other three.

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72 Id at 328 per Toohey J. See also Gaudron J at 332.
73 Id at 324.
74 Id at 328.
75 Id at 324.
76 Id at 320, 328.
77 Id at 331.
78 Id at 333.
79 Id at 335.
80 Id at 333.
81 Lane, P H, "The Changing Role of the High Court" (1996) 70 *ALJ* 246 at 247.

A. Rights Emasculated — The People

The starting point for any argument in favour of popular authority in the sphere of rights and freedoms is that "sovereign power ... resides in the people".[82] This position, however, would not have been widely accepted when the Constitution was adopted in 1900. Although the agreement to form the Federal Commonwealth was in large measure approved by the people at referenda, the Constitution was legally binding in 1900 "because of the status accorded to British statutes as an original source of law in Australia and also because of the supremacy accorded to such statutes".[83] In this interpretation, which was accepted by Sir Owen Dixon, Australia's organs of government are simply "institutions established by law" and their powers are "authorities belonging to them by law".[84]

The passing of the *Australia Act* 1986 (UK) leaves no doubt that the people, and not the British or Australian Parliament, are now sovereign in Australia in the sense that they alone have power to alter the Constitution.[85] This does not mean, however, that the legal authority of the Constitution has been rejected by the people. Constitutional legitimacy has been maintained by the people's acquiescence in and acceptance of its provisions.[86] While it is true that the last 10 years have seen the emergence of widespread debate about issues such as whether Australia should become a republic and whether an express Bill of Rights should be included in the Constitution, and while it is therefore arguable that popular acceptance of the current Constitution is more artificial than real, there have been no substantial changes wrought to the practice of government in Australia. It is therefore inappropriate to interpret the Constitution as an expression of Australia's contemporary nationhood untrammelled by the existence of long established political institutions and power balances. This position can be contrasted with that in the United States, where there is judicial authority[87] that the phrase "directly chosen by the people" requires that one person's vote should be, as nearly as practicable, equal in value to another person's. The American decisions, which all six judges in *McGinty* rejected as inapplicable in the Australian context, rewrote the history surrounding the formation of the United States Constitution.[88] They were the product of a massive and sudden overhaul of American political institutions in the 1810s and 1820s[89] which meant that "at least in theory the ideals of equality" were "embraced from the outset in an absolute fashion".[90] Such a revolution has not (yet) been paralleled here.

The status of the Constitution as fundamental law accepted by the Australian people is also supported by the Constitutional amendment process provided for

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82 *Australian Capital Television*, above n2 at 137 per Mason CJ.

83 Lindell, G, "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Fed LR* 29 at 32.

84 Dixon, O, "The Law and the Constitution" (1935) 51 *LQR* 590 at 597.

85 *McGinty*, above n1 at 349 per McHugh J.

86 *Theophanous*, above n5 at 171. See also *Bistricic v Rokov* (1976) 135 CLR 552 at 566 per Murphy J.

87 Most notably *Wesberry v Sanders* 376 US 1 (1964).

88 Above n1 at 309 per Dawson J.

89 *Bistricic v Rokov*, above n86 at 24.

90 *McGinty*, above n1 at 373 per Gummow J, quoting *Dixon v British Columbia (Attorney-General)* (1989) 59 DLR (4th) 247 at 263 per McLachlin CJ (Supreme Court of British Columbia).

under section 128, a process which no one has explicitly suggested should be, could be or has been abandoned. While none of the majority justices in *McGinty* expressly dealt with the question of Constitutional authority, McHugh and Gummow JJ thought that ultimate sovereignty resided in "the authority or body which, according to the constitution, may amend the constitution".[91] That body, according to section 128, is a combination of the majority of all the electors and a majority of electors in a majority of States. A Constitutional referendum passed by the people may replace Constitutional law decisions of the High Court or may expand the Court's authority to strike down Parliament's legislation.

Although section 128 gives the people ultimate power to alter the Constitution, it has not yet been used to create Constitutional rights. The consequence of giving primacy to section 128, which some commentators have suggested is itself in need of reform,[92] is that the power to initiate and draft proposed alterations remains with the Commonwealth government and not with the people.[93] The Australian people have shown consistent reluctance to accept referendum proposals, including the 1988 proposal for a partial Bill of Rights. The reasons for this can only be highly speculative, but it is possible that lack of bipartisan support for most proposals has fuelled popular suspicion of the government's motives in framing the questions. On the other hand, the fact remains that the Australian people have not incorporated a Bill of Rights into the Constitution, and the question of how to fill any perceived lacunae by other means must therefore be addressed.

B. Rights Endorsed — The Parliament

Without High Court intervention, the only other way for the people to protect their rights is through electing to Parliament those whom they think will best represent them. In a nation the size of Australia, the Federal Parliament offers the best means of ensuring that all the Australian people are represented in the institutions of government without requiring everybody to be involved in every decision on every issue. Parliament is accountable for its legislation at the ballot box, and even in a two party political system each side must listen to the people in order to garner support.

In these circumstances, the reasoning of the majority justices in *McGinty* derives considerable cogency from its recognition that the exact content of representative government, over and above the Constitutional minimums, has always been a matter for the political process.[94] Dawson, Gummow and McHugh JJ each recognised that representative government could cover a whole spectrum of political institutions, "each differing in countless respects yet answering to that generic description".[95] Dawson J said that "there are

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91 Above n1 at 378 per Gummow J, quoting Bryce, *Studies in History and Jurisprudence* (vol 2, 1901) at 53. See also McHugh J, above n1 at 349.

92 For example, Blackshield, A R, "The Implied Freedom of Communication" in Lindell, G (ed), *Future Directions in Australian Constitutional Law* (1994) at 232.

93 Fraser, A, "False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 *Syd LR* 213 at 217.

94 Above n1 at 306 per Dawson J.

95 Id at 358 per McHugh J, quoting *McKinlay*, above n17 at 57 per Stephen J. See also above n1 at 307 per Dawson J and at 377 per Gummow J.

hundreds of electoral systems in existence today by which a form of representative government might be achieved. Their merits must be judged by a number of different criteria which are likely to be incompatible with one another."[96] Fair and responsible representation, for example, may conflict with the risk of encouraging too many splinter groups which could weaken the effectiveness of government. On the other hand, however, "it would be foolish to pursue strong government so single-mindedly as to prevent the natural diversity of opinion among the electorate from being reflected in the legislature".[97] Similar considerations apply to determining "whether differences in voting power can be justified by distinctions based on political opinion, minority interests or geographical residence".[98] Dawson J concluded that the Federal Parliament may adopt the principle of one vote, one value if it considers it desirable, and that it had done so in accordance with its view of the practicalities in the *Commonwealth Electoral Act* 1918 (Cth).[99] The question of exactly what representative government should entail ultimately does not admit of any definitive a priori answer, and it is therefore difficult to determine whether any one distribution or distributive scheme infringes upon ultimate popular control or choice. In these circumstances, it would be politically unwise for the High Court, which does not have Parliament's representative exposure to the conflicting needs of the people, to enshrine the broader notion of representative democracy and thereby impose formal guarantees of fundamental rights which could give rise to substantive inequalities. This objection also applies to any generally worded express Bill of Rights enshrined in the Constitution by referendum, since the High Court would still be responsible for its interpretation.

C. Rights Protected? — The High Court

Aside from implications from representative democracy being politically unwise, the High Court also has no legitimate legal claim to act as an independent creator of Constitutional rights. Although it is now relatively uncontroversial to recognise that the High Court makes rather than simply uncovers the law, the Court is not a free agent. Its proper Constitutional function, entrusted to it by the Constitution itself, is to administer the Constitution, when asked by litigants, to ensure that the Parliament passes only those laws which are consistent with its provisions. In carrying out this function, the Court must recognise that the Constitution is contained in a statute and must therefore determine its content in accordance with established legal principles for interpreting such instruments. Any principle of representative democracy, however, is extrinsic to the text and structure of the Constitution. Its adoption would entail the High Court giving legal status to its own view of what is involved in a society founded on equality, unrestrained by the Constitutional text. As McHugh J noted, the implied principle of representative democracy in the freedom of political communication decisions could have become so widespread in subsequent cases as to be accepted as reflecting the meaning of the Constitution.[100] If the implication

96 Id at 307.
97 Ibid.
98 Id at 294 per Brennan CJ.
99 Id at 311.
100 Id at 348.

were thus elevated to the status of an established interpretative principle, however, the effect may well have been to enshrine a vision not of democracy but of dictatorship.

D. Rights Enshrined — The Constitution

The *McGinty* decision rightly restricts the degree to which parliamentary sovereignty can be restrained by the Courts and the people. It results in a conception of the Australian polity as one in which responsibility for devising and protecting rights and freedoms is essentially left to the legislature. While judicial restraint is clearly proper, justifications for limited intervention arise from the very fact that the High Court is responsible for enforcing Constitutional limits on Parliamentary activity. Michael Coper has written, for example, that the Court

> should be very cautious in overturning the will of the Parliament without a clear and explicit mandate in the Constitution, and should generally defer, on democratic grounds, to the expression of that will, but the case for such deference is weaker as the political and Parliamentary process is less democratic.[101]

The High Court has an important reactive role here in preserving and strengthening the integrity of government institutions, provided that it can do so within the limits of Constitutional interpretation. Although the principle of representative democracy has now been laid to rest, a more limited range of equalities could still be brought about by assigning meaning to the text of specific representative government provisions including the phrase "chosen directly by the people". One example of a right which potentially can be accommodated within the text and structure of the Constitution might be universal adult suffrage. This right, on which Gummow J in *McGinty* sided with Toohey and Gaudron JJ,[102] was only explicitly rejected by Dawson J.[103] Moreover, even Dawson J's position can be seen as merely an incident of his rejection of representative democracy.

As noted above,[104] Gummow J accepted that the content of representative government evolved over time, and he suggested that certain contemporary characteristics of popular election, including universal adult suffrage and a minimum voting age of 18 years, could not be abrogated by a return to different systems operating in some colonies at the time of Federation.[105] One possible objection to this approach is the majority view in *Engineers* that no protection of the Court was necessary or proper in cases where the Parliament validly used its powers to injure a section of the people, since it was within the power of the people to resent and reverse what was done.[106] This argument, however, entails an inflated notion of what the people are able to do within the political process. For example, if Parliament were to pass a law tomorrow

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101 Coper, M, "The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?" (1994) 16 *Syd LR* 185 at 193.

102 Above n1 at 320 per Toohey J; at 388 per Gummow J.

103 Id at 306.

104 Above n67.

105 Above n1 at 388.

106 Above n28 at 151–2. See generally, Williams, above n8 at 85.

that only men were entitled to vote in Federal elections, women would only regain their rights if the predominantly male legislature later relented, or if someone successfully challenged the law in the High Court. In the context of electoral laws, therefore, the voting influence of any one section of the populace, especially one which is disenfranchised, is extremely limited.

The argument in favour of a Constitutional guarantee of universal adult suffrage also finds support in the fact that the Constitution is broad and general in its terms, "intended to apply to the varying conditions which the development of our community must involve",[107] and "capable of flexible application to changing circumstances".[108] As long as the rights in issue are unquestioned in Australian society and consequently do not raise the spectre of judicial dictatorship, it is quite legitimate that textual implications be used to afford them Constitutional protection. Very few rights, however, currently have such universal status. For example, there may be room for debate about whether "the people" should only include persons aged 18 or over. Judicially entrenching this view in the Constitution could conceivably stifle further extensions since the Parliament could therefore appeal to High Court authority as justification for refusing to act.

6. *Whither Freedoms?*

The decision in *McGinty* effectively confines the structural implication of Constitutional rights based on representative government to ensuring the public communication necessary for the proper operation of Constitutionally recognised government institutions. It therefore also has implications for the Constitutional protection of private rights. First, the decisions of the majority in *Theophanous* and *Stephens*, which found that the freedom of political discussion not only restricted the power of the Parliament but also prevailed over the common law,[109] must now be under threat. The minority in these cases formed the majority (along with Gummow J) in *McGinty*. The arguments of Dawson and McHugh JJ were essentially the same in all three cases, while Brennan CJ's differed in his distinction between "the structures and powers of organs of government" dealt with by the Constitution, and "the rights and liabilities of individuals inter se".[110] Gummow J took the similar view in *McGinty* that the freedom of political communication only exists to ensure that electors were "free of legislative impediment in informing themselves and in receiving information and comment upon matters of political interest".[111] He also expressly observed that an implication which restrained "what otherwise would be the operation of the general law upon private rights and obligations" departed from "previously accepted methods of Constitutional interpretation"[112] and would require further consideration.

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107 *Jumbunna Coal Mine PL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367–8 per O'Connor J.

108 *Australian National Airways v Commonwealth* (1945) 71 CLR 29 at 81.

109 Williams, above n8 at 62.

110 *Theophanous*, above n5 at 153 per Brennan J.

111 Above n1 at 388.

112 Id at 391.

More generally, the text and structure approach to Constitutional implications adopted by the majority seems to preclude the existence of a general underlying notion of Constitutional equality. Some commentators had discerned in a number of other recent High Court decisions[113] a doctrine that all persons subject to law must be treated equally unless there is a rational ground for discriminating between them.[114] Such a principle, however, was explicitly rejected by Gummow J[115] in *McGinty* and is not consistent with the rejection of underlying doctrines as sources of Constitutional rights.

On its facts, the *McGinty* decision merely highlights the fact that elections are one area in which it is impossible to give everybody freedom in equal measure. The nature of elections is such that the extension of one person's rights necessarily requires the erosion of another's. There are other specific kinds of equality, such as universal adult suffrage, freedom of interstate trade[116] and the right to trial by jury for offences on indictment,[117] which can be accorded to one person without another's right to the same entitlement being limited. A common law example would be the right to receive the same compensation for a motor vehicle accident in any Australian jurisdiction no matter where the accident happened.[118] In many other more nebulous cases, however, such as the freedoms of communication, discussion and speech (whether political or otherwise), it will be impossible to determine whether such a condition is satisfied. A general principle of equality would therefore be inappropriate, as would other generally framed rights incorporated by referendum. On the other hand, the current High Court's attitude towards interpreting specific express constitutional provisions or the common law by reference to its own conception of legal equality remains to be seen.

7. *Conclusion*

The decision in *McGinty* signals a return to a more appropriate conception of the Constitution and of the High Court's interpretative role. However attractive the idea of enshrining rights in the Constitution may seem, further judicial development based on implications from the Constitution's structure is not the appropriate mechanism. If the Constitution is to be revised in order to provide protection for rights and freedoms other than those discoverable by textual interpretation, this should be done through express Constitutional amendment by the people. Only this approach can reflect the status of the Constitution as the cornerstone of Australian government.

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113 For a thorough exploration of private freedom under Constitutional law, see Detmold, M, "The New Constitutional Law" (1994) 16 *Syd LR* 228.

114 Id at 232.

115 Above n1 at 387.

116 *Cole v Whitfield* (1988) 165 CLR 360 (Section 92 of the Constitution).

117 *Cheatle v R* (1993) 177 CLR 541 (Section 80 of the Constitution).

118 *McKain v Miller* (1991) 174 CLR 1.

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