

THE LIMITS OF CONSTITUTIONAL TEXT AND STRUCTURE REVISITED

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In *Lange v Australian Broadcasting Corporation*¹ (*'Lange'*) the High Court insisted that the freedom of political communication was confined by the 'text and structure' of the *Australian Constitution*.² I have argued elsewhere that the idea that text and structure alone determine the application of the freedom of political communication is mistaken.³ That claim is descriptive rather than normative. I argue that, whatever the merits of the idea, it is *impossible* for courts to adhere to this method. Further, because the text and structure method is likely to obscure the true bases of decision, judicial insistence on the method is likely to be counter-productive.⁴ The argument has been the subject of a response from McHugh J in *Coleman v Power*.⁵ His Honour's attention to my ideas is extremely generous but in this article I revisit, and defend, my argument.⁶

I THE TEXT AND STRUCTURE METHOD AND ITS LIMITS

A The Constitutional Text and Structure Method

I will begin by revisiting the decision in *Lange* and restating my critique of it. The text and structure method described in *Lange* requires that we pay close attention to the specific institutions of representative and responsible government identifiable in the text and structure of the *Constitution* – the election of the

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1 (1997) 189 CLR 520.

2 Ibid 566–7.

3 Adrienne Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668.

4 Adrienne Stone and Simon Evans, 'Developments: Freedom of Speech and Insult in the High Court of Australia', *International Journal of Constitutional Law* (forthcoming).

5 (2004) 209 ALR 182.

6 I particularly regret this disagreement since I was privileged to work as his Honour's associate in 1993. However, his Honour encouraged lively discussion with his associates and was extraordinary patient and generous in response. I hope, then, that this disagreement will be understood as faithful to the spirit of his chambers.

Parliament, the function of responsible government and the referendum procedure contemplated by s 128. The freedom of political communication is a necessary implication from, and exists to support, these specific institutions and only these institutions.⁷

The text and structure method appears to provide two kinds of limits. First, it confines our attention to the specific institutions of representative and responsible government identifiable in the text rather than a more general or ‘free standing’ principle of representative government.⁸ Secondly, the text and structure method invokes the concept of ‘necessity’. Judges are not required to consider what would be desirable for the operation of representative and responsible government. The freedom of political communication is a minimum requirement protecting only communications without which representative and responsible government at the federal level would falter. Taking these matters into account, freedom of political communication seems markedly narrower than a general guarantee of freedom of speech or expression and narrower even than a guarantee of freedom of political expression.⁹

The idea that the freedom of political communication is limited by text and structure appeals to certain ideas about the rule of law. First, it ties the freedom of political communication to a legitimate source of law – the constitutional text and its necessary implications. Second, the constraints of text and structure appear to make the meaning of the freedom of political communication more certain and predictable. In short, the appeal of this method lies in its capacity to constrain judges so that the freedom of political communication reflects the commands of the *Constitution* rather than the preferences of judges.¹⁰

This explains the appeal of the method to McHugh J in particular. Justice McHugh’s approach to constitutional interpretation is marked by a strong commitment to this conception of the rule of law and a determination to adhere to the limits that the *Constitution* imposes on judges.¹¹ Though I admire these ideals and Justice McHugh’s commitment to them, I am not convinced that they are served by the text and structure method.

7 *Lange* (1997) 189 CLR 520, 566–7. *Lange* remains the starting point for analyses of freedom of political communication in the High Court: see *APLA Limited v Legal Services Commission (NSW)* [2005] HCA 44 (Unreported, Gleeson CJ, Heydon, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 1 September 2005) [27] (Gleeson CJ and Heydon J), [47] (McHugh J), [213] (Gummow J), [346] (Kirby J), [375] (Hayne J), [446] (Callinan J); for explicit affirmation of the text and structure method in this judgment see [27] (Gleeson CJ and Heydon J), [56]–[57] (McHugh J), [448]–[451] (Callinan J).

8 This view was first expressed in *McGinty v Western Australia* (1996) 186 CLR 140, 171 (Brennan J), 180–3 (Dawson J), 233 (McHugh J), 281–3 (Gummow J), and was confirmed in *Lange* (1997) 189 CLR 520, 566–7.

9 For recent emphasis on the limitation of ‘necessity’, see *APLA Limited v Legal Services Commission (NSW)* [2005] HCA 44 (Unreported, Gleeson CJ, Heydon, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 1 September 2005) [27] (Gleeson CJ and Heydon J), [56] (McHugh J), [393] (Hayne J).

10 I have made this point in more detail in Stone, above n 3, 705–6.

11 See especially *Theophanous v Herald & Weekly Times* (1994) 182 CLR 106, 197.

B The Limits of Constitutional Text and Structure

Put simply, my argument is that the text and structure of the *Constitution* is too bare to provide clear guidance in any given case. Therefore, even accepting the text and structure method, the proper scope of the freedom of political communication is highly uncertain. In almost every case, there will be competing conceptions of political communication all of which could satisfy the text and structure method.

Let me offer an illustration. For simplicity's sake, I will make the argument by reference to only one of the institutions of government that the freedom of political communication is designed to protect: the requirement of ss 7 and 24 that Commonwealth Parliament be 'directly chosen by the people'. Under the text and structure method, the freedom of political communication covers communications necessary for the people to make a 'true choice' in those elections with 'an opportunity to gain an appreciation of the alternatives'.¹²

When I initially made this argument, I illustrated the point by reference to the question of standards of review: that is, the question of how closely the courts should scrutinise laws burdening political communication. The freedom of political communication (like all constitutional rights of freedom of speech or expression) is not absolute.¹³ For that reason, courts must determine which burdens on political communication are permissible and which are not.

As I showed in my earlier article, there are two well-known models for approaching this task. One, found in European and Canadian law, uses a single flexible standard usually described in terms of 'proportionality'. The other, found in the law of the First Amendment, uses a multitude of less flexible, but more precise, rules designed to respond to particular kinds of cases.¹⁴ In my earlier article, I argued that the High Court is faced with a choice between these two broad approaches or with the task of fashioning an approach that combines them in some way. The former proportionality approach will appeal to those who value flexibility over certainty, and the latter rules-based approach has the reverse appeal. Flexible standards are also likely to appeal to those who are confident in the judiciary's supposed capacity to resist political pressure towards censorship, while the rules-based approach appeals to those who are highly suspicious of attempts to regulate speech and somewhat more concerned at the possibility of judicial capitulation in times of political pressure.¹⁵

The choice between the competing merits of these approaches depends on rather large questions of fact and value. Rules will appeal to those who value certainty in the application of judicial rules and who believe that rules created by one court are capable of constraining later and lower courts. Flexible standards will appeal to those who value flexibility and to those who are, in any event,

12 *Lange* (1997) 189 CLR 520, 560, quoting *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 187 (Dawson J).

13 *Nationwide News v Wills* (1992) 177 CLR 1, 51 (Brennan J); *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 142–4 (Mason CJ), 159 (Brennan J), 169 (Deane and Toohey JJ), 217–18 (Gaudron J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 299 (Mason CJ).

14 Stone, above n 3, 677–9.

15 *Ibid* 691.

sceptical about the capacity of legal doctrine to effectively constrain judges. The debate over the comparative merits of rules and standards is a long one and is discussed in a vast and very interesting literature.¹⁶ However this debate is decided, very little guidance, if any, is found in the text and structure of the *Constitution*. Certainly, it cannot be said that only one of these two broad approaches is consistent with the idea that the federal parliament be ‘directly chosen by the people’. That last point is made especially clear by the fact that, under the guise of the text and structure method, the High Court has fluctuated between adopting flexible standards and more rule-like approaches.¹⁷

In summary, then, my point is that the appeal of the interpretive method adopted in *Lange* is superficial. It appears to offer judges the ‘safe harbour’ of constitutional text and structure. However, because the text and structure method *cannot* answer these questions, a more substantive notion of freedom of political communication is required.

II THE COLEMAN V POWER RESPONSE

In *Coleman v Power*, McHugh J restated my argument, and the arguments of another critic,¹⁸ and responded as follows:

The above criticisms overlook two matters concerning the ‘reasonably appropriate and adapted’ test formulated in *Lange*. Those matters show that freedom of communication under the Commonwealth Constitution is different from freedom of speech provisions in other Constitutions and that ideas relating to or arising out of other Constitutions have little relevance to the freedom of communication under the Commonwealth Constitution.¹⁹

The first of these ‘two matters’ is a restatement of the importance of text and structure:

First, freedom of political communication under the Constitution arises only by necessary implication ... As the Court pointed out in *Lange*, ‘[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be “directly chosen by the people” of the Commonwealth and the States, respectively’.²⁰

Having reasserted the importance of text and structure, McHugh J reiterates that these limitations constrain the exercise of legislative power:

the powers of the Commonwealth, the States and Territories must be read subject to the Constitution’s implication of freedom of communication on matters of government and politics. The constitutional immunity is the leading provision; the

16 See *ibid* 687–91 for a review of the literature.

17 See *ibid* 675–81 for a discussion of the cases.

18 Elisa Arcioni, ‘Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*’ (2003) 25 *Sydney Law Review* 379.

19 (2004) 209 ALR 182, 206.

20 *Ibid*.

sections conferring powers on the federal, State and Territory legislatures are subordinate provisions that must give way to the constitutional immunity.²¹

So far, the judgment serves to confirm the essence of the *Lange* text and structure method: the confined nature of the institutions it supports and the requirement of necessity. Justice McHugh then goes on to reject the suggestion that the text and structure method leaves the question of a standard of review undecided:

In determining whether a law is invalid because it is inconsistent with freedom of political communication, it is not a question of giving special weight in particular circumstances to that freedom. Nor is it a question of balancing a legislative or executive end or purpose against that freedom. Freedom of communication always trumps federal, State and Territorial powers when they conflict with the freedom. The question is not one of weight or balance but whether the federal, State or Territorial power is so framed that it impairs or tends to impair the effective operation of the constitutional system of representative and responsible government by impermissibly burdening communications on political or governmental matters.²²

One way to read this passage is as a denial of the idea that a standard of review – a balancing test or a set of categorical rules – is required at all. Instead, the question is *only* whether the challenged law is compatible with the constitutional system of government. I do not think that this can be the intended meaning of the passage. Apart from anything else, McHugh J then goes on to restate and reformulate the standard of review established in *Lange*.²³

Another way to read this passage is as a reaffirmation that the choice of a standard of review is determined by the text and structure of the *Constitution*. For that reason, McHugh J emphasises that the confined nature of the institutions that the freedom is designed to support.²⁴ If that is the case, *Coleman v Power* serves to reiterate the point I criticised but gives no further guidance as to how the text and structure method resolves specific cases.

Justice McHugh does give an illustration. He explains that ‘a law that sought to ban all political communications in the interest of national security would be invalid unless it could be demonstrated that at the time such a prohibition was the only way that the system of representative government could be protected’.²⁵ The answer given here serves only to restate the question. To say that a law will only be valid if ‘it was the only way that the system of representative government could be protected’ leaves open the question we are trying to answer: ‘what kind of communications (and how much freedom in relation to them) are necessary for the constitutionally prescribed system of government?’ As I think is now obvious, I have all along accepted that the freedom of political communication exists to support only the particular institutions of representative and responsible government identified in the text and structure of the *Constitution*. *Coleman* thus

21 Ibid.

22 Ibid 207.

23 Ibid 207–8. As I argue in Stone, above n 3, 676–8, this test is close to the proportionality tests used in other jurisdictions.

24 *Coleman v Power* (2004) 209 ALR 182, 206.

25 Ibid 209.

restates this aspect of the text and structure method but does little to address its limitations.²⁶

Finally, it may be that these passages are designed to emphasise the second aspect of the text and structure method: the requirement of necessity.²⁷ The necessity requirement seems to require an especially tight connection between the communication protected and the constitutionally prescribed system of government. Necessity excludes what is merely desirable and focuses only on the communication essential to the functioning of the constitutionally prescribed system of representative and responsible government.

I should be clear, then, that in my view the requirement of necessity provides no greater certainty than any other aspect of the text and structure method. Even when we confine ourselves to considering what is *necessary* for the protection of a true choice in federal elections, much remains unclear. To make that point, let me now provide two further illustrations.

III CONTINUING UNCERTAINTY

A What is Political Communication?

Consider first the concept of ‘political communication’ or, to adhere precisely to the text and structure method, ‘communication necessary to ensure the exercise of a true choice in federal elections as required by sections 7 and 24 of the *Constitution*’. Elsewhere I have shown the very considerable difficulty in limiting this category of political communication, even accepting the limits of constitutional text and structure.²⁸

At first sight, it seems that the text and structure method tightly constrains the category of communication that can count as ‘political’. It is not enough that a communication is on a matter of general public interest or that it can be described in some vague way as political. Protected communications must be necessary to ensure that the people can exercise a true electoral choice. For that reason, it might seem that the category of political communication extends only to explicit discussion of actual and proposed policies of government and opposition (at the

26 Dan Meagher, ‘What is Political Communication? The Rationale and Scope of the Implied Freedom of Political Communication’ (2004) 28 *Melbourne University Law Review* 438; Hoong Phun Lee, ‘The “Reasonably Appropriate and Adapted Test” and the Implied Freedom of Political Communication’ in Matthew Groves (ed), *Law and Governance in Australia* (2005) 59, 75.

27 On the requirement of necessity, see also *APLA Limited v Legal Services Commission (NSW)* [2005] HCA 44 (Unreported, Gleeson CJ, Heydon, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 1 September 2005) [27] (Gleeson CJ and Heydon J), [56] (McHugh J), [393] (Hayne J).

28 Adrienne Stone, ‘Rights, Personal Rights and Freedoms’ (2001) 25 *Melbourne University Law Review* 374, 378–89.

federal level), the public conduct of members of the federal Parliament and of candidates for that Parliament.²⁹

However, it requires only a little thought to see that much else is relevant to the formation of political opinions and hence the exercise of electoral choice. Public issues not currently on the legislative agenda are obviously relevant since the *failure* to adopt a policy may be just as revealing as a decision to act. Added to these are communications on many matters that are not themselves explicitly political. A brief glance at the issues raised federal politics in recent years – the detention of asylum seekers, same sex marriage, the availability of IVF, the legitimacy of war and torture, the appropriate response to terrorism – demonstrates the point. Voters' understanding of, and attitudes towards, questions like these, and ultimately their vote at a federal election, might depend upon their capacity to communicate about religion,³⁰ moral philosophy, history, medical science and sociology at least as much as they depend on explicitly political communication. It has also proved difficult to draw a distinction between state and federal political matters, given the integration of these levels of government.³¹

The necessity element of the text and structure method also fails to provide much in the way of limitations. In this regard, it is helpful to consider the conception of political speech developed by Alexander Meiklejohn, one of the most prominent free speech theorists of the last century. The category of 'political speech' on which he ultimately settled was extraordinarily broad, encompassing education, science, philosophy, art and literature.³²

At first sight, Meiklejohn's category of 'political speech' appears to include precisely the kind of communication that the text and structure method excludes – speech that might be desirable in a democratic system but is hardly necessary to ensure the functioning of particular institutions. But Meiklejohn is not focused on

29 The existing case law under the freedom of political communication seems to adopt this view: see *ibid* 378–80. Consistent with this conclusion, six members of the High Court recently held that the advertising of lawyers' services for personal injury cases does not amount to political communication: *APLA Limited v Legal Services Commission (NSW)* [2005] HCA 44 (Unreported, Gleeson CJ, Heydon, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 1 September 2005) [28] (Gleeson CJ and Heydon J), [66]–[67] (McHugh J), [216]–[217] (Gummow J), 379 (Hayne J), [456]–[457] (Callinan J).

30 See *APLA Limited v Legal Services Commission (NSW)* [2005] HCA 44 (Unreported, Gleeson CJ, Heydon, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 1 September 2005), [450] (Callinan J).

31 At one time it seemed as if the discussion of state political matters might sometimes be excluded from the coverage of the freedom of political communication: see *Levy v Victoria* (1997) 189 CLR 579, 596 (Brennan CJ), 636 (McHugh J). It now seems likely that a connection between the discussion of state and federal matters will readily be found, bringing the discussion of most state political matters within the scope of the implied freedom: *Roberts v Bass* (2002) 212 CLR 1, 26, 29 (Gaudron, McHugh and Gummow JJ) 62 (Kirby J); see also Helen Chisholm, 'The Stuff of which Political Debate is Made: *Roberts v Bass*' (2003) 31 *Federal Law Review* 225, 240–1. It should also be noted that the communication at issue in *Coleman v Power* concerned the conduct of a *state* police officer and none of the majority judges advanced this as reason for excluding the communication from the protection of the freedom.

32 Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245, 257. For his earlier, more restrictive views, see Alexander Meiklejohn, *Freedom of Speech and its Relation to Self-Government* (1948) 22–7.

a general idea of an enriched, critical citizenry³³ or on a very broad conception of democratic government. Rather, he is concerned with what is necessary to carry out one's duty as a voter. Freedom of speech helps the voter 'acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express'.³⁴ In short, he argued, 'the people do *need* novels and dramas and paintings and poems, *because they will be called upon to vote*'.³⁵ Thus the method underlying Meiklejohn's argument is strikingly similar to the one required by the text and structure method. It is only a very short step from his argument to the argument that a true choice in a federal election requires the protection of a similarly broad range of communication. Without the opportunity to acquire 'intelligence, sensitivity and generous devotion to the public welfare' citizens cannot really gain a full appreciation of the alternatives before them.

Of course, one may wish to reject Meiklejohn's arguments.³⁶ Apart from anything else, it seems to enlarge the category of political communication to the point that it is almost meaningless. But the text and structure method itself provides no principled limits on the category of political communication and little guidance for the resolution of particular cases.

B Limiting Insulting Language

Further difficulties are presented by *Coleman v Power* itself. In that case, the main focus was not on identifying the category of political communication, but on the question of permissible limits.³⁷ The High Court divided sharply on the question of whether insulting language (having political content) could be limited consistently with the freedom of political communication. The majority found that such insulting words could only be limited in circumstances where it was likely that they would cause an imminent lawless response.³⁸ These judgments – especially those of McHugh and Kirby JJ – appealed to a vision of robust, even caustic, political debate, which their Honours took to be the Australian tradition.³⁹ The minority judges – especially Gleeson CJ and Heydon J – were more ready to allow limitations on the use of insulting words, and appealed to a notion of a civil public debate free from intimidation.⁴⁰

33 For this reason I disagree with Dan Meagher's argument that the text and structure method allows for the exclusion of this category of expression: see Meagher, above n 26, 450–1.

34 Meiklejohn, above n 32, 255.

35 Ibid 263 (emphasis added, internal quotation marks omitted).

36 For one such attempt, see Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1.

37 The case thus focused on the second of the two-stage test for the application of the freedom, which asks whether a law burdening political communication is 'reasonably appropriate and adapted to serve a legitimate end ... in a manner ... which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government': see *Coleman v Power* (2004) 209 ALR 182, 207 (McHugh J), 229 (Gummow and Hayne JJ), 240 (Kirby J).

38 Ibid 210 (McHugh J), 229–30 (Gummow and Hayne JJ), 246–7 (Kirby J).

39 Ibid 241 (Kirby J).

40 (2004) 209 ALR 182, 186, 192 (Gleeson CJ), 265 (Heydon J).

What is important to note here is that all these judges disagree *despite their adherence to the text and structure method, including the concept of necessity*.⁴¹ These disagreements, moreover, run deep. The division seen in the High Court in *Coleman v Power* mirrors the deepest and most fundamental schism in modern free speech theory. Chief Justice Gleeson and Heydon J appear to be aligned with those who place emphasis on the quality of public debate and are sympathetic to government intervention in order to promote a rich and balanced debate.⁴² Justices McHugh and Kirby, on the other hand, appear to be aligned with more traditional free speech theorists who believe that such intervention poses an unacceptable risk of authoritarian censorship.⁴³

Either of these two views could be compatible with the requirements of the text and structure method. That method asks us to consider what is necessary for the maintenance of the constitutionally prescribed system of representative and responsible government. But just what is 'necessary' for the maintenance of that system – even if we confine ourselves just to the exercise of true choice in a federal election – is a complex and deeply disputed question.

At the conclusion of his argument, McHugh J comes close to acknowledging this point. Justice McHugh concludes his analysis with this observation:

the Constitution's tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the availability of other alternatives. The communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means. Whether the burden leaves the communication free is, of course, a matter of judgment. But there is nothing novel about Courts making judgments when they are asked to apply a principle or rule of law. Much of the daily work of courts requires them to make judgments as to whether a particular set of facts or circumstances is or is not within a rule or principle of law.⁴⁴

In the light of that comment, it may be tempting to view my criticism of the text and structure method as reflecting a difference of degree only. However, stating it in this manner downplays the significance of the choice. The element of judgment to which McHugh J refers must be exercised in the face of deep and pervasive controversies. In applying the freedom of political communication, choices must be made between competing visions of the freedom of political communication and those choices require reference to some set of values or other criteria not found in the text and structure of the *Constitution*.

41 Of the *Coleman* court, McHugh, Gummow and Kirby JJ were also members of the *Lange* court and thus party to the unanimous opinion in that case. The text and structure method has frequently been restated. See, for example, *APLA Limited v Legal Services Commission* (NSW) [2005] HCA 44 (Unreported, 1 September 2005, Gleeson CJ, Heydon, McHugh, Gummow, Kirby, Hayne and Callinan JJ) [27] (Gleeson CJ and Heydon J), [56]–[57] McHugh J, [389] (Hayne J), [448]–[451] (Callinan J).

42 The most powerful exponents of this idea are Owen Fiss, *The Irony of Free Speech* (1996) and Cass Sunstein, *Democracy and the Problem of Free Speech* (1993).

43 That view is well represented in the established law of the First Amendment. For an argument defending that position, see Robert Post, 'Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse' (1993) *University of Colorado Law Review* 1109.

44 *Coleman v Power* (2004) 209 ALR 182, 210.

IV CONCLUSION

Despite the initial controversy attending the doctrine, the freedom of political communication is here to stay. There is an urgent need, then, to turn our attention to the kind of public debate that we think is desirable in Australia and to develop an Australian conception of freedom of political communication.⁴⁵ This article should be taken as an argument that the High Court should face this task more squarely. The Court need not, however, immediately adopt a highly developed account of the values that underlie the freedom of political communication. On the contrary, given the difficulty of the task, the Court may wish to proceed cautiously and develop its conception incrementally.⁴⁶ But that cautious incrementalism should be understood as a prudential decision to postpone the development of a fuller conception of freedom of political communication rather than as reliance upon the false promise of constitutional text and structure.

45 For an argument along these lines, see Meagher, above n 26; Dan Meagher, 'How the *Lange* Test for Constitutionality Ought to be Applied ... And Whether the Validity of Australian Racial Vilification Laws is Threatened as a Consequence' (2005) 28 *University of New South Wales Law Journal* 30.

46 See Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219; Adrienne Stone, 'Incomplete Theorizing in the High Court, Review Essay: Cass R Sunstein, *Legal Reasoning and Political Conflict*' (1998) 26 *Federal Law Review* 195.