BURDENING THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION: METHOD, IDEAS, AND DISAGREEMENT

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This article explores what is driving the many divided decisions reached over recent years by the High Court in implied freedom of political communication cases. Key to that divergence is the remarkable range of approaches taken to the assessment of not only the extent of a particular statutory burden on constitutionally protected political speech but also concerning what types of legislative restriction constitute any such burden in the first place. This article argues that competing ideas on the High Court Bench about the core function of the doctrine are producing starkly different interpretive approaches and outcomes in implied freedom challenges. Further, having first located the doctrine's roots within a framework of Australian constitutional 'legalism' that reflects the primacy of political checks on government power, this article endorses an interpretive model that takes a maximalist view of the impact and importance of strands of political speech on electoral choice.

I INTRODUCTION

> Observing that the Court has divided in opinion about the outcome of particular [implied freedom of political communication] cases shows no more than that the questions at issue call for judgment, and that opinions may differ about the answers that should be given to them in a particular case.
>
> – Justice Michelle Gordon, *McCloy v New South Wales* ('*McCloy*')[1]

The High Court now routinely reaches split decisions in constitutionally implied freedom of political communication ('implied freedom') cases. A key driver of that divergence is the wide range of approaches applied to the assessment of not only the *extent* of a statutory burden on political communication, but also in answering the question of what *types* of legislative restriction placed on electorally relevant speech may constitute a burden in the very first place. I argue in this article that these doctrinal tensions are rooted in competing ideas about the essence of

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1 (2015) 257 CLR 178, 282 [310] ('*McCloy*').

constitutionally protected political communication. Further, I make the case that the legalistic foundations of the implied freedom offer, somewhat paradoxically, legitimation for a more proactive judicial approach in the assessment of statutory burdens on political speech than that which has prevailed in recent years on the High Court.

Analysis of the now ossified doctrinal rift on the High Court Bench over the benefits of proportionality testing as compared to calibrated scrutiny when reviewing the constitutionality of a statutory burden[2] has eclipsed important normative choices that must be made *prior* to the application of either of those two tests. The assessment of the nature of a legal burden on political speech is undertaken separately at a preliminary stage of the now-modified test from *Lange v Australian Broadcasting Corporation* ('*Lange*'),[3] before validity testing is applied. The extent of a statutory burden is critical to the evaluation of whether that impediment is reasonably appropriate and adapted, or proportionate, to achieve a constitutionally legitimate end.[4] It is '[a]nalytically important' at the beginning of the validity testing process 'to be categorical about the nature of the burden … impose[d] on political communication'.[5]

Differing views on the High Court Bench about the core function of the implied freedom are driving starkly divergent interpretive approaches and outcomes in constitutional challenges to legislative power. The implied freedom operates ultimately to protect and foster political modes of accountability over government power.[6] It does so by securing the flow of information critical to the integrity of voter choice.[7] To that end, a constitutionally implied limit is placed on statutory power so that a law cannot unduly burden acts of electorally relevant communication. Significant and recurrent disparities of view on the High Court about the relative *importance* of a particular act of speech in fulfilling that core constitutional function have shaped materially different outcomes in the assessment of the gravity of an impugned law's burden on the implied freedom. This ultimately reflects very different positions on what it takes to *sustain* political communication in a sense that fulfils the constitutional imperatives protected by the implied freedom doctrine.

Put differently, a view of the quality and importance of political speech necessary to sustain Australia's constitutionally prescribed system of government

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2 See, eg, Anne Carter, 'Moving beyond the Common Law Objection to Structured Proportionality' (2021) 49(1) *Federal Law Review* 73 <https://doi.org/10.1177/0067205X20981512>; Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92 <https://doi.org/10.1177/0067205x19890439>; Evelyn Douek, 'All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia' (2019) 47(4) *Federal Law Review* 551 <https://doi.org/10.1177/0067205x19875010>.

3 (1997) 189 CLR 520 ('*Lange*').

4 See, eg, *Tajjour v New South Wales* (2014) 254 CLR 508, 579–80 [147]–[149] (Gageler J) ('*Tajjour*'); *Brown v Tasmania* (2017) 261 CLR 328, 369 [128] (Kiefel CJ, Bell and Keane JJ), 433 [324]–[325], 460 [411] (Gordon J) ('*Brown*'); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 37 [94] (Gageler J) ('*LibertyWorks*').

5 *LibertyWorks* (n 4) 37 [94] (Gageler J).

6 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ) ('*ACTV*').

7 Ibid 139, quoting Archibald Cox, *The Court and the Constitution* (Houghton Mifflin, 1987) 212.

must precede the qualitative assessment of the extent to which communication is burdened by an impugned law. Where a broad construction is taken of the importance and influence of a particular form of speech in shaping public discourse relevant to voter choice, a statutory impediment to that mode of communication will invariably be assessed as more extensive than if a narrower view of its reach was adopted.

Disparities in the High Court's analytical approach to those questions are more evident in the most recent implied freedom judgments than is true at any point in the post-*Lange* jurisprudence. That disparity may also explain why outcomes remained largely the same in decisions taken in, and shortly after, the first application of proportionality testing by a High Court majority in the 2015 judgment in *McCloy*,[8] but significant splits on the question of constitutional validity have developed in decisions handed down over the past six years in *LibertyWorks v Commonwealth* ('*LibertyWorks*')[9] and *Farm Transparency International Ltd v New South Wales* ('*Farm Transparency*'),[10] as well as deep analytical divides in the *Clubb v Edwards* ('*Clubb*') decisions.[11]

This is doctrinal instability that the implied freedom can little afford. The constitutional implication remains, more than three decades after its first enunciation,[12] in a 'defensive position'[13] – despite having evolved into one of the most commonly litigated constitutional matters[14] – with its existence subject to renewed scepticism not only from academia,[15] but, after a lull in demurral, from a sitting High Court justice.[16] Even advocates of the implied freedom lament that the doctrine was 'largely illusory'[17] as a constraining force on government power in a recent case, and that interpretive choices mean that important normative questions remain unanswered.[18] This trajectory has been viewed as signalling a 'deepening division on the Court about the normative status of the implied freedom'.[19] This is

8 *McCloy* (n 1).
9 *LibertyWorks* (n 4).
10 (2022) 277 CLR 537 ('*Farm Transparency*').
11 (2019) 267 CLR 171 ('*Clubb*').
12 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *ACTV* (n 6).
13 Douek (n 2) 553.
14 Geoffrey Nettle, 'Whither the Implied Freedom of Political Communication?' (2021) 47(1) *Monash University Law Review* 1, 1.
15 See, eg, Jeffrey Goldsworthy 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9; Benjamin B Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Hart Publishing, 2023) 193–4.
16 *LibertyWorks* (n 4) 95 [249] (Steward J).
17 Sarah Sorial and Shireen Morris, 'Does It Exist? *LibertyWorks* and Australia's Shrinking Implied Freedom of Political Communication' (2023) 42(1) *University of Queensland Law Journal* 1, 3 <https://doi.org/10.38127/uqlj.v42i1.6479>.
18 Rachel L Li, '*LibertyWorks Inc v Commonwealth*: The Implied Freedom of Political Communication and the Constitutionality of Australia's Foreign Influence Legislation' (2022) 44(3) *Sydney Law Review* 469, 479–82. See also Theunis Roux, 'Reinterpreting "the Mason Court Revolution": An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia' (2015) 43(1) *Federal Law Review* 1, 23–4 <https://doi.org/10.1177/0067205x1504300101>.
19 Murray Wesson, 'The High Court's Opaque Decision in *Farm Transparency International Ltd v State of New South Wales*' (2023) 33(4) *Public Law Review* 294, 299.

but an outline of a torrent of criticism from constitutional lawyers on recent trends in implied freedom doctrine.[20] Disharmony in judicial reasoning can therefore only add to the Court's 'institutional costs' identified by Evelyn Douek a few years ago. Indeed, the 'continued division' surrounding the role of proportionality testing in implied freedom jurisprudence approach was invoked by Steward J two years ago in support of his assertion that the doctrine – more than 25 years after its consolidation in *Lange* – is 'not yet settled law' and could even 'justify a reconsideration of the implication itself.'[21]

On the vexed nature of assessing statutory burdens, in *LibertyWorks* Edelman J identified two issues which complicate the construction of laws impeding political speech. The first such difficulty is that the judicial assessment 'sometimes depends upon reaching conclusions of fact, and the drawing of inferences' without the ability to rely on standard evidentiary rules.[22] The second complication, his Honour said, is the process of sketching the dual aspects of a statutory burden. The dimension of *breadth* requires analysis of the burden's scope concerning 'how much political communication, between how many people, is affected by the law'.[23] A burden's breadth, or, as also labelled by Edelman J in the past, its 'width',[24] depends on the extent to which the law is checked by factors such as 'constraints of time, location, or subject matter'.[25] The dimension of *depth*, by contrast, concerns 'how deeply the burden is felt'.[26] His Honour has also previously stated that a burden will be deemed to be 'deeper' the more that the law targets political communication, disproportionately affects the speech of one side to a debate more than the other, or 'punishes or sanctions the conduct' that it captures.[27]

This article explores the nature and implications of the second challenge identified by Edelman J. Several recent High Court decisions reveal myriad approaches applied to the construction of a statutory burden placed on political communication. Preceding that qualitative analysis is the preliminary and, in some cases, equally divisive question or 'threshold issue',[28] of whether a purported statutory burden is, in fact, *any* kind of tangible impediment to political

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20 See, eg, Sorial and Morris (n 17); Anthony Gray, '"Necessary" Interferences with the Implied Freedom of Political Communication in the *Australian Constitution*: How Proportionality Is Reducing Judicial Review' (2024) 35(1) *Public Law Review* 24; Joachim Dietrich, 'Trespass, Recordings, and Freedom of Speech in Australia: Balancing Private Law, Criminal Law, and Constitutional Freedoms' (2023) 34(3) *Public Law Review* 211.

21 *LibertyWorks* (n 4) 95 [249]. His Honour reemphasised those concerns more recently in *Ravbar v Commonwealth* [2025] HCA 25, [272]–[293]. Indeed, Steward J noted that the implied freedom was 'very wrong' and 'just not sustainable': at [273].

22 *LibertyWorks* (n 4) 81 [209] (Edelman J).

23 Ibid 81 [209]–[210].

24 *Clubb* (n 11) 337 [480].

25 Ibid 338 [480].

26 *LibertyWorks* (n 4) 81 [209]–[210] (Edelman J). See also his Honour's reasons in *Clubb* (n 11) 337 [480] and *Comcare v Banerji* (2019) 267 CLR 373, 452–3 [194] ('*Banerji*').

27 *Clubb* (n 11) 337–8 [480].

28 *Ruddick v Commonwealth* (2022) 275 CLR 333, 391 [155] (Gordon, Edelman and Gleeson JJ) ('*Ruddick*'). It has also been labelled the 'infringement question': Dan Meagher, 'The Protection of Political Communication under the *Australian Constitution*' (2005) 28(1) *University of New South Wales Law Journal* 30, 41.

communication: here, again, the High Court's justices have often adopted sharply divergent interpretive approaches. The threshold question is, I argue, marked by the adoption of conflicting 'positivist' and 'systemic' approaches, with that split attributable to whether one insists that an identifiable legal *right* to engage in a means of political communication is a prerequisite to that mode of speech attracting constitutional protection. Evaluation of the gravity of a statutory burden, by contrast, is shaped by the relative importance attached to a constitutionally protectable mode of speech.

Part II of this article provides an overview of the development of doctrinal principles relevant to the identification and evaluation of a statutory burden on political speech: this includes analysis of the positivist and systemic approaches adopted to the antecedent but vital question of what type of communicative activities may be constitutionally protected by the implied freedom.

In Part III, I consider the diverse ways in which High Court justices have assessed the nature of legislative burdens on political communication in recent cases. I find that stark divergence in interpretive methods reflect a diversity of opinion about the *degree* of protection that must be afforded to a particular form of speech in order to preserve the constitutional imperatives underpinning the implied freedom. I also touch on divergence in the application of the Court's 'prudential' approach to constitutional disputes, which is a further driver of doctrinal instability in implied freedom challenges.

In Part IV, I ask what the doctrine's origins tell us about its apposite range of operation. Locating the implied freedom's basis within a framework of Australian 'legalistic' constitutional orthodoxy that reflects the primacy of political checks on government power, I sketch and endorse an interpretive model that takes a maximalist view of the impact and importance of strands of political speech on electoral choice. Such a model was crystallised, I argue, in the High Court's unanimous reasoning in the foundational *Lange* decision: there, a model of governance was traced necessitating a richer view than has been evident on the apex court in recent years of the significance of speech bearing on electoral choice. Further instructive in this regard, and explored in this section, is recent approaches taken by state courts and the Federal Court in implied freedom challenges: the decisions explored offer useful direction for how statutory burdens can be evaluated by the apex court in a manner that more closely aligns with the doctrinal foundations laid in *Lange*.

II WHAT IS A BURDEN ON THE IMPLIED FREEDOM?

A Guiding Principles

The High Court's unanimous decision in *Lange* established that any effective statutory burden placed on political communication must be justified by the government responsible for its enactment.[29] A legal burden on political speech

29 *Lange* (n 3) 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

'lies in its incremental effect' on the capacity of an elector 'to make or to receive communications capable of bearing on electoral choice'.[30] That is, a statutory impediment arises only to the extent it goes beyond an existent, valid prohibition on political communication under the general law.[31] The implied freedom is a qualified, rather than absolute, constraint on statutory power that exists to protect a free and informed vote. Political speech can be lawfully burdened, and the High Court has elaborated and continues to refine a test to ensure that, consistent with the historical pre-eminence of Australian political constitutionalism, parliaments retain significant legislative power.

The first step in the *Lange* analysis, which was modified and refined in more recent cases, is a review of whether a statutory provision effectively burdens political speech in its terms, practical operation, or legal effect.[32] This reflects the 'high purpose and substantive nature of the protected freedom'.[33] To 'effectively burden', Hayne J wrote in *Monis v The Queen* ('*Monis*'), 'means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications'.[34]

The central analytical question, as Keane J later expressed it in *Unions NSW v New South Wales* ('*Unions NSW [No 1]*'), is evaluation of the 'effect of [statutory] proscriptions upon the free flow of political communication within the federation'.[35] Close construal of the relevant statutory text is vital[36] as the operational effect of a burden informs the ultimate question of constitutional validity tested at the second and third stages of the modified *Lange* analysis.[37] Specifically, where a statutory burden on political communication is identified, the impugned law must then be found to be 'reasonably appropriate and adapted' to advance a constitutionally legitimate purpose.[38]

The modified *Lange* test reflects the implied freedom's function as a check on legislative burdens that unduly weaken structural constitutional imperatives rather than as 'a constitutional claim *right*'.[39] The test also reflects the *Australian Constitution*'s drafters' view that government power must be primarily moderated

30 *Banerji* (n 26) 420 [89] (Gageler J).
31 *Farm Transparency* (n 10) 607 [223] (Edelman J).
32 *Lange* (n 3) 561–2, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). The test has undergone several revisions subsequent to *Lange* (n 3): *Coleman v Power* (2004) 220 CLR 1, 50 [92]–[93], 51 [95]–[96] (McHugh J), 77–8 [196] (Gummow and Hayne JJ) ('*Coleman*'); *McCloy* (n 1) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (n 4) 363–4 [104] (Kiefel CJ, Bell and Keane JJ). See also *Farm Transparency* (n 10) 551 [27] (Kiefel CJ and Keane J).
33 *Tajjour* (n 4) 578–9 [146] (Gageler J). See also *Unions NSW v New South Wales* (2019) 264 CLR 595, 654–5 [163] (Edelman J) ('*Unions NSW [No 2]*').
34 (2013) 249 CLR 92, 142 [108] ('*Monis*'). See also *Unions NSW v New South Wales* (2013) 252 CLR 530, 574 [119] (Keane J) ('*Unions NSW [No 1]*'); *McCloy* (n 1) 230–1 [126] (Gageler J).
35 *Unions NSW [No 1]* (n 34) 574 [119].
36 *Monis* (n 34) 154 [147] (Hayne J). See also *Brown* (n 4) 353 [61] (Kiefel CJ, Bell and Keane JJ), 480 [487] (Edelman J); *Banerji* (n 26) 434 [136] (Gordon J).
37 See, eg, *Unions NSW [No 1]* (n 34) 553–4 [35]–[36], 555 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown* (n 4) 360 [90] (Kiefel CJ, Bell and Keane JJ).
38 *McCloy* (n 1) 200–1 [23] (French CJ, Kiefel, Bell and Keane JJ).
39 *Farm Transparency* (n 10) 607 [223] (Edelman J) (emphasis added).

by political means.[40] The implied freedom operates, then, in a restricted sense as a judicial backstop to systemic risks arising from legislation to the Australian people's performance of their supervisory role over government power: a function that is principally effected through the act of voting. The assessment of a law's constitutional validity is centrally informed by the formalistic interpretive framework established in the unanimous reasons in *Lange* as shaped by the answer to the question: 'What do the terms and structure of the *Constitution* prohibit, authorise or require?'[41] I explore that framework much further in Part IV of this article.

The depth of justification required at the final stage of *Lange* testing generally corresponds with the intensity of the burden placed on political communication.[42] And because the implied freedom is tied to the structural constitutional imperatives of responsible and representative government, rather than operating as a *personal* right or freedom,[43] any purported burden must be assessed by considering the law's universal operation rather than by reference to its discrete application in particular cases.[44] There is, in that sense, a 'high level of generality' to the evaluation that must be performed.[45] Specific instances of an impugned law's operation may, however, usefully illustrate the law's practical effect for the purposes of that analysis.[46]

Further, the High Court has forcefully rejected the idea that a burden's magnitude has a bearing on whether the implied freedom is engaged in the very first place.[47] '[A]n argument that only particular degrees of burden warrant justification is inconsistent with *Lange*', Kiefel CJ and Bell and Keane JJ wrote in *Brown v Tasmania* ('*Brown*')[48] – a point that has been reiterated by the Court many

40 *Lange* (n 3) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *ACTV* (n 6) 137–8 (Mason CJ).

41 *Lange* (n 3) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

42 *Monis* (n 34) 146 [124] (Hayne J); *Tajjour* (n 4) 579 [147] (Gageler J); *McCloy* (n 1) 238–9 [150]–[152] (Gageler J), 259 [222], 267–70 [251]–[255] (Nettle J). See also *Brown* (n 4) 367 [118] (Kiefel CJ, Bell and Keane JJ), citing Gageler J in *Tajjour* (n 4) 580 [151], who, in turn, drew on *ACTV* (n 6) 143 (Mason CJ), 169 (Deane and Toohey JJ). See also *Brown* (n 4) 378–9 [164]–[165], 389–90 [200]–[202] (Gageler J), 460 [411], 477–8 [478] (Gordon J); *LibertyWorks* (n 4) 28 [63] (Kiefel CJ, Keane and Gleeson JJ), 53–4 [136] (Gordon J); *Ruddick* (n 28) 348 [19] (Kiefel CJ and Keane J), 369–70 [83]–[84] (Gageler J).

43 See, eg, *ACTV* (n 6) 150 (Brennan J); *Lange* (n 3) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 245 [180] (Gummow and Hayne JJ) ('*Mulholland*'); *Monis* (n 34) 189 [266], 192 [273], 206–7 [324] (Crennan, Kiefel and Bell JJ); *Unions NSW [No 1]* (n 34) 551 [30], 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour* (n 4) 569 [104], 593 [198] (Crennan, Kiefel and Bell JJ); *McCloy* (n 1) 202–3 [30] (French CJ, Kiefel, Bell and Keane JJ).

44 See, eg, *Wotton v Queensland* (2012) 246 CLR 1, 31 [80] (Kiefel J); *Unions NSW [No 1]* (n 34) 553–4 [35]–[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

45 *Kvelde v New South Wales* [2023] NSWSC 1560, [256] (Walton J) ('*Kvelde*').

46 *Farm Transparency* (n 10) 587 [154] (Gordon J), citing *Brown* (n 4) 360 [90] (Kiefel CJ, Bell and Keane JJ).

47 See especially Crennan, Kiefel and Bell JJ's correction of the defendant's submissions made in *Tajjour* (n 4) 569 [106] concerning a misreading of their Honours' joint judgment in *Monis* (n 34) the previous year: '[I]t [is] only an effect which would not be regarded as a real effect that would not qualify as a burden. It was not suggested that a qualitative assessment of the degree of the restriction effected by a legislative provision was appropriate at the stage of the first limb [of the *Lange* test]'. See also *Clubb* (n 11) 199 [65] (Kiefel CJ, Bell and Keane JJ), citing *McCloy* (n 1) 213 [68] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (n 4) 369 [127] (Kiefel CJ, Bell and Keane JJ).

48 *Brown* (n 4) 369 [128]. See also *Monis* (n 34) 212–13 [343] (Crennan, Kiefel and Bell JJ).

times since.[49] It is a strictly *qualitative* assessment.[50] If, then, a material burden of *any* degree is placed on political speech, the constitutional imperatives anchoring the implied freedom are engaged and trigger the judicial supervisory role so that the impediment must be supported by adequate justification. To approach the task any differently – that is, by construing a purported burden in a 'volumetric'[51] or 'quantitative'[52] sense – would be to expose the implied freedom to subordination by 'small and creeping legislative intrusions', so that, ultimately, a point is reached where 'there are so few avenues of communication left that the last and incremental burden is no longer to be called a "little" burden'.[53] That approach has also been deemed necessary to ensure that minority voices are not made particularly vulnerable to the risk of disenfranchisement.[54]

B Incremental Burdens

It is, as noted above, established that the implied freedom does not create a *positive* personal right or freedom to engage in political communication. It is, rather, 'a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other' on matters relating to the constitutionally prescribed system of government.[55] As such, the doctrine is not engaged, and cannot invalidate statutory regulation of conduct that is unlawful due to a separate, constitutionally valid law.[56] It is necessary to 'approach the burden which a statute has on the freedom by reference to what [persons] could do were it not for the statute'.[57] There exists a 'constitutionally valid baseline' of law against which any purported burden must be evaluated.[58] As such, the implied freedom can provide legislative immunity only from constitutionally unjustifiable burdens placed on *lawful* communication relating to political and governmental matters. That doctrinal axiom again accords with the implied freedom's constitutional basis: it acts as a direct constraint on legislative power at the systemic, and not the personal, level. The High Court, Edelman J wrote in *Farm Transparency*, has

> consistently denied that the freedom implied in the *Constitution*, as a limit on legislative power, prevents a Parliament from regulating communications that

49 See, eg, *Unions NSW [No 1]* (n 34) 555 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 574 [119] (Keane J); *Tajjour* (n 4) 569–70 [105]–[107] (Crennan, Kiefel and Bell JJ); *Clubb* (n 11) 259 [255], 275–6 [293] (Nettle J).

50 See, eg, *Brown* (n 4) 382 [180] (Gageler J).

51 *Tajjour* (n 4) 578 [145] (Gageler J).

52 See, eg, *Monis* (n 34) 145–6 [118]–[122], 160–1 [173]–[174] (Hayne J).

53 Ibid 145 [120].

54 See, eg, *Levy v Victoria* (1997) 189 CLR 579, 625 (McHugh J) ('*Levy*'); *Tajjour* (n 4) 578 [145] (Gageler J). See also *McCloy* (n 1) 265 [244] (Nettle J); *LibertyWorks* (n 4) 70 [181] (Gordon J), quoting *ACTV* (n 6) 175 (Deane and Toohey JJ).

55 *Levy* (n 54) 622 (McHugh J) (emphasis in original).

56 *Farm Transparency* (n 10) 554 [37] (Kiefel CJ and Keane J), citing *Levy* (n 54) 625–6 (McHugh J); *Brown* (n 4) 365 [109] (Kiefel CJ, Bell and Keane JJ), 385–6 [188] (Gageler J), 408–9 [259] (Nettle J), 443 [357], 455 [393], 460 [411], 462 [420] (Gordon J), 502–3 [557]–[558] (Edelman J).

57 *Brown* (n 4) 365 [109] (Kiefel CJ, Bell and Keane JJ).

58 Ibid 443 [357] (Gordon J).

> a person is *not* free to make. To recognise otherwise would transmogrify the constitutional protection of a freedom into a constitutional claim right.[59]

It is in this sense, then, that a legal burden must be justified only to the extent that it has an *incremental* effect on political speech that goes beyond a valid, pre-existing restraint on conduct produced by the common law, equity or statute.[60] The way in which an incremental statutory burden is measured is also vitally important: if drawn narrowly, the degree of justification required to justify the impediment on political speech diminishes accordingly. This, as we will see, was the central analytical tension between the differing sets of reasons handed down in the High Court's recent *Farm Transparency* decision.

C Pre-existing Legal Entitlements

Emerging from the rule that the implied freedom does not produce rights is a supplemental, but deeply contested, principle that claimants must be able to point to a *pre-existing* legal privilege to participate in a specific form of burdened political communication before the implied freedom is engageable. The first exposition of that principle is found in McHugh J's reasons in the High Court's 1997 decision in *Levy v Victoria* ('*Levy*'). His Honour explained that because the freedom protected is not one '*to* communicate', the implied freedom, then, 'gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law.'[61]

Heavily influencing resolution of the question about whether such a pre-existing right exists on a particular set of facts are two different views of the significance of the Court's majority decision two decades ago in *Mulholland v Australian Electoral Commission* ('*Mulholland*').[62] The key doctrinal point reaffirmed by the plurality three years ago in *Ruddick v Commonwealth* ('*Ruddick*') is that 'rights', as McHugh J put it in *Mulholland*, of political communication unsupported by a positive legal entitlement cannot be protected by the implied freedom:[63] 'Proof of a burden on the implied constitutional freedom requires proof that the challenged law burdens a freedom that exists independently of that law.'[64] Put another way, his Honour wrote in *Levy* that the implied freedom protects a 'right or privilege to communicate political and governmental matters' which already 'exist[s] under the general law'.[65]

Similarly, Gummow and Hayne JJ in *Mulholland* held that a test antecedent to the first stage of the *Lange* analysis required asking 'the questions "whose

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59 *Farm Transparency* (n 10) 607 [223] (emphasis in original) (citations omitted). See also ibid 502–3 [557] (Edelman J).

60 *Farm Transparency* (n 10) 554 [37] (Kiefel CJ and Keane J).

61 *Levy* (n 54) 622 (emphasis in original).

62 *Mulholland* (n 43). This approach, in turn, was heavily influenced by remarks made several years earlier by McHugh J in *Levy* (n 54).

63 *Mulholland* (n 43) 223 [105], discussed in *Ruddick* (n 28) 396–7 [171]–[172] (Gordon, Edelman and Gleeson JJ).

64 Ibid 223 [107].

65 *Levy* (n 54) 622.

freedom?" and "freedom from what?"',[66] to which satisfactory answers must be rooted in a qualified freedom *from* government power over a claimant's existent lawful ability to communicate.[67]

A schism on the High Court Bench now exists over precisely what *form* such a pre-existing freedom to communicate on governmental matters must take. That tension first materialised in the 5:2 split decision in *Mulholland*, before resurfacing in *Brown* in 2017, and, most starkly, again in the bare majority decision in *Ruddick*.

What I will call the 'positivist' view, which prevailed in *Mulholland* and *Ruddick*, sees the implied freedom as protecting only those forms of political speech that are supported by an identifiable legal privilege that specifically authorises, or enables, a particular mode of communication that is said to be burdened.[68] In other words, the positivist approach requires an explicit, antecedent statutory or common law right to perform the specific form of political communication said to be impeded by a legislative power. Similarly, Edelman J wrote in *Clubb* that 'freedom of political communication requires an anterior liberty to act'.[69]

Application of the positivist approach may significantly constrain the protective reach of the implied freedom. It means that modes of communication shielded by the doctrine from legislative impediment exist entirely at the whim of the legislature given the stipulation that statutory rights to engage in an act of political speech must exist, or those that already exist are not amended or repealed, while common law freedoms operate only insofar as they may coexist with statute. The positivist view also sits uneasily with the constitutional imperatives from which the implied freedom emerged. The implication's basis as a check on acts of public power that may diminish the depth of public discourse relevant to electoral choice necessarily extends operationally beyond modes of political speech that exist either by virtue of positive legal enactment or recognition by, respectively, Parliament or the courts, or, in a 'residual' sense, to the extent that they have not been impeded by prior legislative action.

As noted, the constraining force of the positivist approach was evident very recently in the *Ruddick* decision. The case concerned an implied freedom challenge to legislative items of the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) ('*Amending Act*') that regulate political party affiliation on a ballot paper. If certain conditions are met, a candidate may be prevented from having their party affiliation printed on the ballot beside their name in federal elections.[70] In their joint judgment, Gordon, Edelman and Gleeson JJ found the

66 *Mulholland* (n 43) 246 [183].

67 Ibid 245 [182], quoting *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086, 1090 [28] (Hayne J).

68 *Mulholland* (n 43) 223–4 [105]–[107] (McHugh J), 245–6 [182]–[183], 247 [186], 248–9 [191]–[192] (Gummow and Hayne JJ), 297–8 [336]–[337] (Callinan J), 303–4 [354], 305 [356] (Heydon J); *Ruddick* (n 28) 396–7 [171]–[172] (Gordon, Edelman and Gleeson JJ).

69 *Clubb* (n 11) 327 [454]. See also *Brown* (n 4) 502 [557] (Edelman J).

70 Section 169(1) of the *Commonwealth Electoral Act 1918* (Cth) permits party affiliations to be printed on a ballot only where the party and its representative officer at election are registered. The impugned legislative items in the *Amending Act* added circumstances in which party registration may be denied. See also *Ruddick* (n 28) 395 [165] (Gordon, Edelman and Gleeson JJ).

impugned provisions to be constitutionally valid on the basis that, beyond the *Amending Act*, the claimant could not point to a legal right to have party affiliation appear on the ballot paper.[71] There was, then, no mode of political communication capable of being impeded.

What I label the 'systemic' approach, by contrast, does not require a link between an affected form of political communication and a positively identifiable legal right to engage in that speech. Rather, the impact of an impugned law is assessed according to how it affects the *practical* operation of political communication. This more expansive approach means that it is not only positively identifiable legal privileges to communicate on electorally relevant matters that may be burdened, but *any* lawful communicative activity that, in any respect, bears on the integrity of voting choice. As such, rather than limiting what can be classed as a statutory impediment on political speech to those activities underpinned by categorical legal authority, the ultimate question is how a purported statutory burden 'operates in practice and in effect'.[72]

In *Lange*, the Court held that, under the common law, we must proceed 'upon an assumption of freedom of speech' as 'everybody is free to do anything, subject only to the provisions of the law'.[73] In that light, the systemic approach's focus is not the search for a legal basis to engage in communicative activity protectable by the implied freedom but, rather, the effect of a statutory burden on *lawful* modes of political communication that secure a 'free and informed choice as electors'.[74] It is the burden's impact on legal communicative activity relevant to the integrity of electoral choice that must be constitutionally justifiable.[75] And, as James Stellios writes, '[t]he pre-existing legal norms must themselves be compatible with the constitutional requirement'.[76]

The approach of the dissenting justices in *Ruddick* in holding that the impugned provisions impermissibly burden the implied freedom reflects, albeit in two different forms, a 'systemic' conception of the implied freedom. In their joint judgment, Kiefel CJ and Keane J found that the implied freedom required a 'true [electoral] choice' in the sense that it is free, informed, and 'gives an opportunity to electors to gain an appreciation of the available alternatives'.[77] The impugned provisions, their Honours held, indisputably, and 'to a considerable extent', burdened political communication as they had the capacity to

> prevent an elector from identifying a candidate with all that is associated with the name of a political party with which that candidate is affiliated. In their effect, they are apt to restrict or distort the choice presented to an elector, and so they are not

71 *Ruddick* (n 28) 378 [111]. See also at 398 [174] (Steward J).

72 *Mulholland* (n 43) 277 [283] (Kirby J).

73 *Lange* (n 3) 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoting *A-G (UK) v Guardian Newspapers [No 2]* [1990] 1 AC 109, 283 (Lord Goff). See also *Brown* (n 4) 384 [186] (Gageler J).

74 *Lange* (n 3) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

75 *Brown* (n 4) 384 [186] (Gageler J).

76 James Stellios, *Zines and Stellios's the High Court and the Constitution* (Federation Press, 7th ed, 2022) 640 ('*Zines and Stellios*').

77 *Ruddick* (n 28) 348 [18].

> compatible with the irreducible minimum requirement of the *Constitution* that the choice presented to electors be an informed choice.[78]

That approach, which holds that political communication is burdened even absent a specific legal basis to engage in a particular form of speech, is difficult to square with their Honours' statement that the decision in *Mulholland* remained undisturbed.[79] It seems, rather, to represent a rejection of the technical rigidity first adopted by McHugh in *Levy* and subsequently applied by a majority in *Mulholland*. Similarly, and despite being the most forceful and consistent proponent of the systemic view, Gageler J's dissent in *Ruddick* described the exclusion of party affiliation on a ballot paper as imposing 'a practical impediment to communication of information relevant to electoral choice in the exercise of the liberty of communication which *exists at common law*'.[80] Such a preclusion, his Honour wrote, would make methods of political advertising used to communicate with electors much less effective.[81]

There is a compulsion in Gageler J's reasons in *Ruddick* not to depart from *Mulholland* (the plaintiff did not seek to overturn that decision): we see this in his Honour's identification of a positive legal right capable of engaging the implied freedom. Gageler J had, however, previously defined the relevant statutory burden requiring justification in any given case as arising from the impugned law's 'incremental effect' on 'the *real-world ability* of a person or persons to make or to receive communications which are capable of bearing on electoral choice'.[82] This is an important conceptual distinction as it broadens the kind of political speech capable of being burdened beyond that which a person has a positive, pre-existing right or freedom to engage in. It encompasses, rather, all forms of lawful communication on electorally relevant matters.

D Identifying a Statutory Burden and Constitutional Imperatives

In *Brown*, Gageler J wrote that the implied freedom cannot be confined to protect only those forms of political speech rooted in a legally enforceable authority as to do so would detach the implication from its constitutional function in preserving electoral accountability.[83] Application of what I have labelled the 'systemic' approach allows us to take an expansive view of the political communication necessary to secure a true electoral vote. It means that the 'real-world impact on the making and receipt of communications capable of bearing on electoral choice' must be measured when evaluating the practical burdening effect of an impugned law.[84]

Proponents of the positivist view stress the constitutional imperatives underpinning the implied freedom when they argue that the doctrine can protect only those forms of political speech that a person has an anterior, legally

78 Ibid 349 [21].
79 Ibid 349 [22].
80 Ibid 367 [78] (emphasis added).
81 Ibid 367–8 [78].
82 *Brown* (n 4) 386 [188] (emphasis added), quoted in *Farm Transparency* (n 10) 569 [88] (Gageler J).
83 *Brown* (n 4) 385–6 [188].
84 Ibid 388 [194]–[195] (Gageler J).

enforceable right to perform: to hold otherwise, positivists argue, is to indulge in the constitutional solecism that the implication can *create* adjudicative rights. But, under that approach, the flow of electorally relevant communication is assessed with a degree of abstraction inconsistent with the systemic rationale from which the implication is derived.[85]

This doctrinal impasse is resolvable only if a fresh challenge is taken to the *Mulholland* decision:[86] something that, regrettably, the plaintiff in *Ruddick* did not pursue. If that happens, the positivist approach established in *Mulholland* should be abandoned as it inadequately fulfils the implied freedom's structural rationale. This encompasses the constitutional protectability of all lawful, politically relevant speech not rooted in statutory authority: recognition of that category of protectable speech does not create an enforceable right, but, rather, admits the practical reality and importance of an Australian political discourse that is fluid and diverse. Ultimately, the positivist approach sets an artificial distinction between protectable and non-protectable forms of communication: the focus of the evaluation process should instead be directed to the adequacy of the justification tendered for placing obstacles in the way of any lawful mode of political communication.

III EVALUATING A BURDEN: INTRICACY AND DISAGREEMENT IN RECENT HIGH COURT DECISIONS

A Different Starting Points

In *Brown*, Gageler J wrote that the effect of a law on political communication is

> gauged by nothing more complicated than comparing: the practical ability of a person or persons to engage in political communication *with* the law; and the practical ability of that same person or those same persons to engage in political communication *without* the law.[87]

Despite the avowed simplicity of the interpretive task, there is no settled methodology for testing the gravity of a legislative burden on the implied freedom and it may be that no such standard or design is possible. But it is clear from High Court jurisprudence that, when gauging the extent of a statutory burden, the judicial task extends beyond a comparative analysis outlined by Gageler J in *Brown* and encompasses the relative importance of the impeded mode of political communication. It is also the case that recent variance across the High Court Bench in the assessment of statutory burdens is having a material impact on the evolution of implied freedom doctrine. Where a statutory burden is deemed insubstantial, the corresponding depth of justification required for its enactment is necessarily reduced compared to a legal burden on political speech assessed as significant. And with a restrictive view of the nature of protectable communication prevailing on the High Court Bench in recent years – an outlook rooted in the assessment of

85 See also Patrick Graham, 'What is a Burden on Political Communication? Method and Disagreement in *Ruddick v Commonwealth*' (2022) 33(3) *Public Law Review* 177, 184–5.

86 See also *Ruddick* (n 28) 349 [22] (Kiefel CJ and Keane J), 367 [76] (Gageler J).

87 *Brown* (n 4) 383 [181] (emphasis added).

the importance of a particular form of political speech – the implied freedom's capacity to check legislative power has weakened.

This section looks at what is driving the remarkable disparity in the assessment of burdens on the implied freedom in recent years. It does so by focusing closely on several decisions of the Kiefel High Court (2017–23). The discussion is lengthy not only because of the Bench's practice in that period of issuing multiple reasons in individual cases, but also due to the subtleties and diversity of methodological approach evident across those individual judgments.

I find that the key driver behind the remarkable variation in assessments of individual statutory burdens is the range of views on the High Court over what is necessary to *sustain* political communication to the extent required by the constitutional imperatives underpinning the implied freedom. Those imperatives centre on the preservation of informed electoral choice as a check on government power. It is important to be clear that the question of what degree of constitutional protection must be given to particular forms of speech in order to maintain the integrity of electoral choice is conceptually distinct from the question 'what is political communication?': the latter being primarily a categorial analysis and one the High Court has consistently, though not always emphatically,[88] answered in broad terms.[89] By contrast, evaluation of the nature of a legal burden requires a constructional choice about the impact and significance of the relevant strand of constitutionally protected political communication in shaping discourse bearing on electoral choice. The analysis of a statutory burden's character is thereby attuned so that the importance of a form of communication over voter behaviour dictates the gravity of that legal impediment placed on political speech.

The significance of a particular mode of political communication depends on application of the same principles used to assess the meaning of 'political' in implied freedom doctrine: that is, those communications 'necessary for the effective operation of the system of representative and responsible government'.[90] The constructional choice concerns the extent to which a specific form of protected speech is viewed as informing discourse bearing on the formation of voting attitudes.

I must also note that clarity of doctrinal evolution in this area is blurred by inconsistency in the High Court's application of its 'prudential' approach to constitutional disputes.[91] That method means that judges assess constitutional validity only insofar as it is necessary to determine the rights or liabilities of one or more parties to the dispute and where those issues requiring resolution arise from

88 See, eg, *Clubb* (n 11) 191 [31] (Kiefel CJ, Bell and Keane JJ).

89 *Lange* (n 3) 560–1, 570–1 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 378–90; Thomas Wood, 'The "Threshold Question" in *Clubb v Edwards*: Political Communication, Severance and Practice' (2020) 31(2) *Public Law Review* 155, 157–60 <https://doi.org/10.2139/ssrn.3651982>.

90 *Unions NSW [No 2]* (n 33) 654 [163] (Edelman J).

91 For a critical look at the impact of the High Court's recent approach, see Tristan Taylor, 'The High Court's Prudential Approach to Constitutional Adjudication: When Is It Necessary to Resolve a Constitutional Question?' (2024) 47(1) *University of New South Wales Law Journal* 211 <https://doi.org/10.53637/ejcn5510>.

the facts of the particular case.[92] The prudential approach disavows '[a]cademic abstraction' and a 'declarat[ory]' approach to the development of doctrine absent pertinent legal questions arising from the particular circumstances at hand.[93] The evaluative process when testing for constitutional validity in implied freedom cases now often proceeds from different starting points given variance in the application of prudential factors. This, in turn, has significantly influenced construal of the *operation* of specific impugned statutory burdens.

B *Clubb*

In the *Clubb* appeal judgment, Edelman J began his reasons with a call for '[c]larity and principle' in implied freedom reasoning. His Honour's focus was on the perceived danger that the doctrine may become 'an unlicensed vehicle' for the judiciary to undermine the democratic process.[94] '[W]ithout a reasoning process requiring precision of thought and expression', Edelman J warned (while drawing on the poetry of Alfred Tennyson) of the emergence of a 'codeless myriad of precedent, [t]hat wilderness of single instances'.[95]

While his Honour's warning concerned the perceived advantages of structured proportionality testing as an analytical device in implied freedom cases,[96] the most pressing limitations and systemic risks of inconsistent interpretive approaches may lie elsewhere. First, there is scant evidence that the resolve of Gageler CJ and Gordon J not to adopt structured proportionality testing at the justificatory stage of implied freedom challenges has catalysed different outcomes on the question of validity in individual cases.[97] Rather, it is in the assessment of the nature of a statutory burden that the High Court is not only often profoundly divided over, but has also yet to establish a clear and settled methodological approach to steer that process.

Secondly, but closely related, given the limited review capacity afforded to the courts by the implied freedom limitation, the more pressing danger to the democratic process is less likely to be judicial overreach in the assessment of the constitutional validity of a statutory provision, but, instead, the inadequate appreciation of the extent of a particular legal burden placed on political communication. If the recognition of the influence of specific forms of speech on electoral choice is understated, then a statutory burden cannot be subject to sufficiently robust validity testing, thus increasing the risk that modes of political accountability are unduly impeded by government action.

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92 *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ for the Court), quoted in *Knight v Victoria* (2017) 261 CLR 306, 324 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Knight*'); *Farm Transparency* (n 10) 576 [114] (Gordon J).

93 *Clubb* (n 11) 216–17 [136]–[137] (Gageler J). See also at 192–3 [32]–[36] (Kiefel CJ, Bell and Keane JJ).

94 Ibid 310 [407].

95 Ibid, quoting Alfred Tennyson, *Aylmer's Field: With Introduction and Notes by WT Webb* (Macmillan, 1891) 14.

96 *Clubb* (n 11) 311 [408].

97 See also Stellios, *Zines and Stellios* (n 76) 652.

It was in *Clubb* that interpretive tensions surfaced on the High Court concerning the nature of statutory burdens on political speech. The divide in the *Brown* decision two years prior turned instead on a complex array of interpretive approaches to the statutory scheme at issue in addition to, as discussed in Part II, the threshold question about whether *any* form of burden existed. The nature of the burdens imposed by the impugned laws in *Unions NSW v New South Wales* (‘*Unions NSW [No 2]*’)[98] and *Comcare v Banerji*[99] – decisions reached the same year as *Clubb* – were uncontroversial. The *Clubb* decision, by contrast, contains a multiplicity of complex reasons arising from interpretive choices separate to the much-discussed question about the aptness of structured proportionality testing in implied freedom cases. *Clubb* also reveals a prototype of the two broad frameworks to assessment of the extent of statutory burdens that were later evident, and more fully formed, in *LibertyWorks* and *Farm Transparency*.

Clubb concerned communication restrictions enacted by two state parliaments placed on individuals in the proximity of abortion clinics.[100] The two impugned laws create designated areas covering a 150-metre radius measured from any Victorian or Tasmanian abortion provider and, within which, inter alia, communication on matters relevant to abortion is prohibited. Concerning the impugned law in the *Clubb* appeal, in their separate reasons Gageler J,[101] Gordon J[102] and Edelman J[103] declined on prudential grounds to assess the Victorian law’s validity as, first, the appellant was deemed not to be engaged in political communication at the point in time relevant to the litigation, and, secondly, the law was ruled operationally severable (or capable of a ‘distributive operation’)[104] beyond speech protected by the implied freedom.

Though also accepting that the applicant, through her relevant acts, did not engage in political communication,[105] the plurality judgment of Kiefel CJ, Bell and Keane JJ in *Clubb* held that the practice of not considering constitutional validity where, on the facts, the parties’ rights or liabilities do not require a determination is ‘not a rigid rule’:[106] rather, there may be, as was true of this set of facts, ‘unusual

98 *Unions NSW [No 2]* (n 33).

99 *Banerji* (n 26). The majority decision of Kiefel CJ, Bell, Keane and Nettle JJ did not directly address the nature of the burden, but simply noted that it had a ‘material effect on the totality of political communication’: at 399 [29]. Gageler J and Edelman J, in their separate reasons, both found the burden to be substantial: at 421 [95] (Gageler J), 453–4 [195]–[196], 457–8 [206] (Edelman J). Gordon J downplayed the gravity of the burden: at 434–5 [137]–[141].

100 Termed a ‘safe access zone’ under section 185D of the *Public Health and Wellbeing Act 2008* (Vic) and an ‘access zone’ under section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas).

101 *Clubb* (n 11) 215–16 [131]–[133], 221–2 [149].

102 Ibid 287–8 [332], 289 [336], 290–2 [341]–[345].

103 Ibid 311 [410], 312–13 [413]–[414], 324 [441]. Though, importantly, Edelman J stated that ‘severance’ was an ‘inapt’ term to describe the process, and, instead, characterised it as one involving the *disapplication* ‘from certain facts or circumstances to which’ the ‘essential meaning’ of a statutory provision ‘would otherwise apply’: at 311 [410].

104 Ibid 221 [148] (Gageler J).

105 Ibid 191 [31].

106 Ibid 193 [36], quoting *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333, 350–1 (Higgins J).

features' which warrant a departure from the Court's 'usual practice'.[107] Nettle J doubted that the impugned law was severable to the extent that it impinges the implied freedom[108] and identified 'pragmatic reasons' as to why the statutory burden on political communication should be assessed for its constitutional validity.[109]

The plurality assessed the burden to be 'viewpoint neutral',[110] 'slight in respect of both its subject matter and its geographical extent',[111] and, ultimately, 'justified by the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom'.[112] And while the impugned Tasmanian law was held to be slightly different as it specifically included the word 'protest', thus giving the provision more of a 'political' hue,[113] Kiefel CJ, Bell and Keane JJ assessed the relevant statutory burden at issue in *Preston v Avery* ('*Preston*') to be materially the same as that produced by the Victorian legislation.[114]

Further, Nettle J thought that 'there might be something to be said for the view' that the impugned law in *Clubb* imposes *no* effective burden on political communication,[115] but ultimately precedent precluded his Honour from drawing that conclusion. The burden was '[q]ualitatively … significant, even if it is quantitatively insignificant'[116] and 'relatively limited',[117] Nettle J wrote. His Honour held that because 'what is already so low as to be imperceptible cannot perceptibly be reduced by further reduction', the necessity test was met.[118] Nettle J reached the same view of the quality and extent of the statutory burden in *Preston*.[119]

As was true of their Honours' later judgments in *LibertyWorks* and *Farm Transparency*, Gageler J and Edelman J assessed the statutory burden in *Preston* to be much more potent than the other members of the court. Gordon J, however, aligned closer to the reasons of the plurality and Nettle J in her Honour's evaluation that the impediment placed on political communication is modest.

Gageler J underlined the practical operation, or 'real-world effect',[120] of the prohibition which, in his Honour's view, meant that it applied in a 'time-specific'[121] way and particularly affected anti-abortion activists:[122] it served to undermine 'tolerance of dissenting minority opinion', a value that reflected the implied

107 *Clubb* (n 11) 193 [36].
108 Ibid 250–2 [235]–[237].
109 Ibid 252–3 [238]–[242].
110 Ibid 197 [55] (Kiefel CJ, Bell and Keane JJ). See also at 202 [76].
111 Ibid 209 [100].
112 Ibid 204 [82].
113 Ibid 212–13 [118]–[119].
114 Ibid 215 [127].
115 Ibid 258 [254].
116 Ibid 259 [255]. Nettle J also described the burden as 'quantitatively imperceptible': at 275 [290].
117 Ibid 275 [293].
118 Ibid 275 [290].
119 Ibid 279–80 [303]–[305]. See especially at 279 [303], where his Honour stated: 'In practical reality, however, the two provisions have much the same effect.'
120 Ibid 227 [170].
121 Ibid 227 [169].
122 Ibid 227–8 [170]–[171].

freedom's 'structural purpose'.[123] The burden was deemed to be 'direct, substantial and discriminatory'[124] with the appropriate assessment of its constitutional validity, which it ultimately withstood, calibrated accordingly to a more intense form of review: specifically, 'close scrutiny' requiring both 'a compelling governmental purpose' and the impediment confirmed as 'no greater than is reasonably necessary to achieve that purpose'.[125]

Similarly, Edelman J deemed the impugned Tasmanian law's burdening effect to be 'deep' as it targeted a peculiarly *political* form of communication, while also underpinned by criminal sanctions, and, although 'facially neutral', it placed a heavier impediment on the 'anti-termination' side of the abortion debate.[126] His Honour also assessed the burden to be 'wide' given the geographic area across which it operated,[127] but concluded that there is no obvious and compelling legislative alternative to achieving the purpose behind the Tasmanian legislation.[128]

By contrast, Gordon J found the burden to be 'insubstantial',[129] 'indirect',[130] non-discriminatory in both its legal effect and operation,[131] and 'content and viewpoint neutral'.[132] Her Honour calibrated scrutiny of the law accordingly and found that the burden was not undue. The slight nature of the burden on political communication meant the impugned Tasmanian law's constitutionally valid required only a rational connection to the legitimate aim that it pursues.[133]

C *LibertyWorks*

LibertyWorks was a failed challenge to the constitutional validity of a core part of the *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*') on the basis that it unduly burdened the implied freedom. The case reveals similar analytical dynamics to those explored in the next section on *Farm Transparency*: that is, five separate judgments; prudential concerns that lead to restraint over the *assessable* operation of the impugned law; and, even across the majority judgments, profoundly different evaluations of the burden's nature. Ultimately, the Court split 5:2 in deciding that the implied freedom was not unduly burdened.

The impugned provision in item 3 of the table in section 21(1) of the *FITS Act* covers a 'communications activity' which is 'registerable'.[134] Underpinned by criminal penalties, it imposes stringent and ongoing registration and reporting obligations on those engaged in communications 'on behalf of' a 'foreign principal'

123 Ibid 229–30 [177].
124 Ibid 229 [174] (Gageler J).
125 Ibid 232 [183]–[185].
126 Ibid 338 [481].
127 Ibid 338 [482].
128 Ibid 340 [486].
129 Ibid 300 [371]. See also at 294 [355].
130 Ibid 302 [377].
131 Ibid 300 [372]–[373].
132 Ibid 301 [375].
133 Ibid 304 [389] (Gordon J).
134 Item 3 of the table in section 21(1) of the *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*') engages sections 16 and 18 of the same Act, which concern registration requirements and those liable to register respectively.

aimed at political or governmental influence in Australia.[135] Those responsibilities include recordkeeping (extending for three years after registration has ended), disclosure obligations, periodic information review processes, annual renewal of registration and disbursement reporting.[136] The registration requirement[137] was said to embody the core pillar – 'sunlight'[138] – of the legislative scheme, which is to protect the integrity of the electoral process by uncovering attempts made by foreign bodies to influence political discourse through local actors.[139] The term 'on behalf of' is defined broadly under section 11(1) of the *FITS Act* to mean inter alia an activity undertaken while under an arrangement with a foreign principal.

The Court divided into two camps over the severity of the statutory burden placed on political communication by the impugned law. For the plurality of Kiefel CJ, Keane and Gleeson JJ, the burden was deemed modest, and not particularly wide, as it affects only 'a small subset of political communication' – the registration requirements would deter only a small proportion of a limited category of persons from engaging in political speech.[140] Crucially, their Honours felt that political communication was not directly regulated by the *FITS Act*, but, rather, the impugned provisions concerned only the public identification of the *source* of political speech where the propagator is a foreign actor.[141] The constitutional challenge failed, then, as the burden's modesty easily withstood proportionality testing.[142]

In stark contrast, across four separate judgments the remaining justices assessed the impugned law's burden to be much more severe. While finding the law to be constitutionally justified, Edelman J deemed the burden 'substantial' because its breadth extends well beyond those 'genuine agents' of foreign principals,[143] and touches 'almost every sense of political communication by almost every means'.[144] Concerning the burden's depth, his Honour also identified a 'substantial'[145] and 'significant'[146] deterrent effect on political communication. The registration obligations, underpinned by 'substantial sanctions',[147] targeted not only political speech but its communicators, and acted as a 'constraint prior to communication, at the time of communication, and after communication'.[148] Similarly, while also finding the law did not unduly burden the implied freedom, Steward J felt that the

135 Several exemptions from registration apply: ibid pt 2 div 4.
136 Ibid pt 3 divs 2–3.
137 Ibid ss 16(1), 18(1).
138 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13148 (Malcolm Turnbull, Prime Minister). The other pillars are enforcement, deterrence and capability.
139 *LibertyWorks* (n 4) 26 [57] (Kiefel CJ, Keane and Gleeson JJ). See also at 41 [104] (Gageler J).
140 Ibid 31 [74].
141 Ibid 24 [49]–[50].
142 Ibid 34 [84] (Kiefel CJ, Keane and Gleeson JJ). Most tellingly, the plurality deemed a mooted compelling alternative to the impugned law – the *FITS Act*'s (n 134) disclosure requirements codified in section 38 applying to foreign principals engaged in a communications activity – to be inadequate as a means of realising the statute's constitutionally legitimate core object.
143 Ibid 75 [195].
144 Ibid 84 [218].
145 Ibid 85 [219].
146 Ibid 86 [222].
147 Ibid 87 [224] (Edelman J).
148 Ibid 75 [195].

deterrent effect of the registration requirements on political speech may have been more significant than that recognised in the plurality judgment, thereby producing a significant statutory burden.[149]

In dissent, Gageler J felt that the impugned law functions as a 'prior restraint' on political speech as the registration requirements, attached to criminal penalties, are 'a precondition to being permitted to engage in a category of political communication at all'.[150] The deterrent force of the law is its capacity to '[freeze]'[151] political speech and bring it to the government's attention before a word is publicly uttered.[152] It is the *FITS Act*'s creation of a register containing private information administered by the Attorney-General's Department,[153] and which exists separate from a government-run website's publication of a narrower range of information on registrants,[154] that Gageler J felt lack a compelling justification.[155] Further, the broad discretion afforded to the Australian Government to request that information is provided by registrants for the 'secret register', all of which could be shared between public authorities across Australia, represented a burden far greater than that required to achieve the statute's constitutionally legitimate aim.[156]

In also finding the registration obligation to be undue, and, therefore, a constitutionally impermissible burden, Gordon J assessed the burden placed on the implied freedom to be 'significant'[157], 'substantial'[158] and 'severe'.[159] Indeed, her Honour wrote that the impugned law, although content neutral, imposed a *direct* burden in its regulation of political speech 'of the broadest kind',[160] with its 'overreach' most clearly revealed by the 'gap between the two repositories' holding registrants' information:[161] the private register represents 'darkness, not sunlight'.[162] '[T]here is burden upon burden', her Honour wrote, with 'significant deterrent effects' likely to result upon political discussion[163] *and* as a prior restraint given '"the spectre of a government agent [looking] over the shoulder" of those who register under the scheme'.[164] For Gordon J, too, the possibility of the sharing of registrants' information between public agencies could have particularly restrictive effects on political speech.[165]

149 Ibid 107 [288], 110–11 [295]–[296].
150 Ibid 37 [94].
151 Ibid 37 [95] (Gageler J), citing *Nebraska Press Association v Stuart* 427 US 539, 559 (Burger CJ) (1976).
152 *LibertyWorks* (n 4) 37 [95] (Gageler J).
153 *FITS Act* (n 134) s 42.
154 Ibid s 43.
155 *LibertyWorks* (n 4) 42–3 [107]–[108].
156 Ibid 46 [117]–[118] (Gageler J).
157 Ibid 50 [126].
158 Ibid 68 [175], 71 [182].
159 Ibid 69 [179].
160 Ibid 50 [126]. See also at 68 [176]–[177].
161 Ibid 51 [129].
162 Ibid 51 [130].
163 Ibid 68–9 [178].
164 Ibid 70 [179], quoting *United States v Rumely* 345 US 41, 57 (Douglas J) (1953).
165 *LibertyWorks* (n 4) 68–9 [178].

For stated prudential reasons, the plurality did not address the constitutional significance of the government's discretionary power to require information from registrants for retention in the private register.[166] Therefore a full comparison across the full Bench of assessments made of the burden's scope is not possible. But, as we have seen, significant points of difference on the High Court Bench are stark even within that somewhat narrowed framing.

The plurality judgment understates, in my view, the deterrent effect of the registration obligations on political speech. Further, the issue of whether those requirements may act as an inhibitor of political speech was not directly addressed.[167] Rather, '[i]t would be distinctly jejune', their Honours wrote, 'to insist that participation in the public affairs of the nation must not involve a cost to one's privacy or other individual interests'.[168] That argument was never made. It may be cruder, in fact, to divorce the law from its real-world operation and not engage with the profound restraining effects on electorally relevant speech that the registration requirements are likely to place on at least some of those minded to engage in perfectly legitimate arrangements with foreign actors.

A preferrable view to that of the plurality, and that adopted by the remaining High Court justices in the case, is that the law does, in fact, directly regulate political speech given its registration preconditions, underpinned by criminal sanction, which not only explicitly, but *exclusively*, target communication on politically relevant matters. To sustain political communication in a sense that maintains Australia's constitutionally prescribed system of government requires that any viable statutory deterrent placed on the making of political speech is treated as a peculiarly encumbering burden. The impugned law in *LibertyWorks* poses the very real danger of removing an indeterminate amount of electorally relevant information of varying degrees of importance from public discourse.[169] This is not to say that a burden of such magnitude is necessarily constitutionally invalid, but it is to say that a burden of that nature must be calibrated with a sufficient justification capable of withstanding either structured proportionality or calibrated scrutiny testing.

All of which once again points to the central importance of an assessment that I have argued must be made about the nature, and relative importance, of political communication required to protect and sustain constitutional government across Australia. While Gageler J and Gordon J disagreed with Edelman J on the ultimate question of validity, that divergence arose not from a material difference over the constitutional relevance of the political speech burdened by the impugned requirements in the *FITS Act*. Rather, it arose from the distinctive interpretive approaches taken to the statutory powers that govern information that

166 Ibid 35–6 [89]–[90] (Kiefel CJ, Keane and Gleeson JJ). For a critical look at the plurality's decision not to consider the issue, see Li (n 18) 479–80; Taylor (n 91) 235–6.

167 Emphasis was instead placed on assessing the extent to which the registration process may be said to be onerous: *LibertyWorks* (n 4) 30–1 [71]–[72] (Kiefel CJ, Keane and Gleeson JJ).

168 Ibid 31 [75].

169 The statutory scheme as a whole 'focuses specifically upon communication for the purpose of political or governmental influence' and 'operates as a constraint prior to communication, at the time of communication, and after communication': ibid 75 [195] (Edelman J).

can be requested for the private departmental register. The plurality judgment, by contrast, understated the influence of the burdened modes of communication with its emphasis on the ostensibly limited application of the registration obligations.

D *Farm Transparency*

The High Court's recent implied freedom decision, *Farm Transparency*, neatly reflects the implied freedom's doctrinal trajectory under the Kiefel High Court. Coinciding with a remarkably stable court membership,[170] this has entailed an array of reasons underpinned by intricate and varied analytical approaches to the assessment of legislative burdens on constitutionally protected political speech.

The case concerned a challenge by animal welfare activists to the validity of state legislation aimed at deterring trespass on private agricultural property. Section 8 of the *Surveillance Devices Act 2007* (NSW) prohibits the use of surveillance devices in situations where trespass occurs in the installation, use or maintenance of that device. Sections 11 and 12 ('the impugned provisions') proscribe the publication and possession of a record of activity where a person knows that the material was obtained in breach of section 8.

Across six judgments in *Farm Transparency*, the Court agreed that at issue was the validity of the impugned provisions when read with section 8: that is, the publication and possession of material obtained through a trespassory act. All semblance of doctrinal harmony on the Bench ended there. Kiefel CJ and Keane J writing jointly, with Edelman J and Steward J handing down separate judgments, made up a bare majority holding that the impugned provisions, when engaged by section 8, impose a constitutionally permissible burden on freedom of political communication. Writing individual judgments in dissent, Gageler J, Gordon J and Gleeson J held that the statutory burden on the implied freedom was unjustified. But any 'outline of the decision obscures considerable complexity and divergence on the Court'.[171] In fact, the nature of the impugned legislative burden in *Farm Transparency* was interpreted in four radically different senses across the High Court Bench.

Turning first to the scope of the impugned law, Edelman J took the narrowest view of the statutory operation requiring review. His Honour assessed the impugned provisions only insofar as they function to affect those complicit in a section 8 contravention in circumstances where the obtained material does not reveal lawbreaking.[172] His Honour did so, he wrote, to give effect to 'the factual substratum of th[e] case'[173] and thereby avoid questions not argued by the parties

170 In the six years between the *Brown* (n 4) and *Farm Transparency* (n 10) decisions, only two justices (Nettle J and Bell J) left the Court: they were replaced by Steward and Gleeson JJ. Steward J replaced Nettle J in late 2020, followed just a few months later when Gleeson J replaced Bell J. Therefore, both Steward and Gleeson JJ decided the *LibertyWorks* (n 4), *Ruddick* (n 28) and *Farm Transparency* (n 10) cases.

171 Wesson (n 19) 294.

172 *Farm Transparency* (n 10) 602 [207], 603–4 [210].

173 Ibid 599 [196].

to the special case.[174] Steward J agreed with that approach.[175] Ultimately Edelman J felt that the burden on the implied freedom was insubstantial – 'an incremental extension of the general law of confidentiality'[176] that was 'neither deep nor wide'[177] – and justifiable as a proportionate means to serve a constitutionally compliant purpose.

The Court's prudential approach to constitutional issues[178] leaves a wide range of statutory operations open for review – thereby necessitating a choice over what Edelman J described as the 'identification of the appropriate level of generality' requiring constitutional review[179] – is clear from the other five justices' starkly different assessments of the facts presented in the special case. Kiefel CJ and Keane J, Gageler J, Gordon J and Gleeson J assessed the impugned provisions' application (as engaged by section 8) in a much broader sense to extend to *third party* possession and publication of material, including records of *lawful* activity, where the recipient is aware of the trespass involved in its obtention.

That divergence, as was true of *LibertyWorks*, somewhat limits a comparison of the Justices' views on the incremental burden placed on political speech so that it can include only the joint judgment and those of the three dissentients. However, the methodological differences are clear across those four sets of reasons and, yet again, are of real significance. Kiefel CJ and Keane J found that the statutory burden 'cannot be said to be great'[180] given the 'significant limitations'[181] arising from the dual requirement that the material is gathered not only by trespass but that any would-be third party publisher or possessor must also have been aware of such means of obtention.[182] The incremental burden is very much limited, then, to 'the communication of information obtained through specified unlawful means'.[183] This relatively modest burden, in turn, meant that the justification required at the 'suitability' and 'adequacy of balance' (or 'strict proportionality'[184]) stages of proportionality testing that their Honours applied was correspondingly lowered.[185]

Gageler J, however, with whom Gleeson J agreed, found the burden's 'qualitative extent' on political communication to be much greater.[186] His Honour emphasised the 'blanket'[187] and 'blunt'[188] nature of the prohibitions when he wrote that the impugned laws 'indiscriminately' prohibit the supply of 'a source of peculiarly communicative true factual information' that may concern political

174 Ibid 604–5 [213].
175 Ibid 623 [269].
176 Ibid 614 [244].
177 Ibid 618 [255].
178 *Knight* (n 92) 324–5 [33] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
179 *Farm Transparency* (n 10) 603 [209].
180 Ibid 560 [56].
181 Ibid 557 [45].
182 Ibid 557 [45], 559 [50].
183 Ibid 557 [45] (Kiefel CJ and Keane J).
184 *McCloy* (n 1) 219 [87] (Gageler J).
185 See, eg, ibid 218 [84]; *LibertyWorks* (n 4) 28 [63] (Kiefel CJ, Keane and Gleeson JJ).
186 *Farm Transparency* (n 10) 567 [83].
187 Ibid 566 [81].
188 Ibid 567 [82].

matters.[189] Gageler J then found that the legislative burden was too great to be justified as 'appropriate and adapted to the protection of the privacy of activities on private property'.[190]

Gordon J's nuanced judgment further complicates analysis of *Farm Transparency* but reveals again the wide range of interpretive options available when assessing the nature of a statutory burden. Her Honour found that the impugned provisions impose a materially different, and constitutionally significant, type of incremental burden on political speech in their application to those in breach of section 8, on the one hand, compared to, on the other hand, those 'innocent' third party recipients of the obtained material.[191]

For those involved in trespass, Gordon J found that the impugned laws impose an 'indirect and not insubstantial' incremental burden on the publication of material revealing unlawful conduct.[192] But that burden, her Honour wrote, is constitutionally permissible on rule of law grounds as, echoing the joint judgment, its operational restriction to those engaged in illegality meant that the degree of justification required was lowered accordingly.[193] For those third parties, however, the incremental burden on political communication was deemed to be 'indirect but significant'.[194] Gordon J held that the burden is felt more sharply than that faced by trespassers because the impugned laws' prohibitions extend beyond the general law to encompass 'any aspect' of political speech including a report '*about* the "substance" of an activity' even if the unlawfully obtained material is not shown[195] and where the matter concerns illegality.[196] That burden is constitutionally impermissible, Gordon J concluded, because the higher degree of justification required for the impugned laws' more restrictive operation – as 'blunt instruments' that even extend to 'communicating *about* footage' that shows lawbreaking – on third parties was not met.[197]

The wide divergence of opinion across the four sets of judgments (the joint judgment; the decisions of Gageler J and Gleeson J; Gordon J's nuanced reasons; and the much narrower approach taken by Edelman J and Steward J) has two primary causes: the most discernible of which is the varied application of the Court's 'prudentialism' in constitutional disputes. The second such driver is, again, disagreement over the importance and impact of communication deemed necessary to realise the constitutional imperatives that form, ground and shape the implied freedom. In their joint judgment, Kiefel CJ and Keane J once again in effect downplayed the electoral significance on the legal prohibition of a particular form of political information entering public discourse. The statutory burden was also assessed as modest as it concerned only a small range of political

189 Ibid 566 [81]. See also at 569 [88].
190 Ibid 567 [82].
191 Ibid 579 [124], 588 [158], 591–2 [166]–[168].
192 Ibid 591 [167].
193 Ibid 593–4 [174]–[175].
194 Ibid 597 [186] (Gordon J).
195 Ibid (emphasis altered).
196 Ibid 597 [189].
197 Ibid (emphasis in original).

communication. On that reading, then, the statutory burden is quite small because it concerns the transmission of speech peripheral to the shaping of voting preferences. The significance of that categorisation is seen most clearly in the final stage of proportionality testing – adequacy of balance (or 'strict proportionality') – where Kiefel CJ and Keane J held that the policy goal underpinning the impugned provisions was not manifestly outweighed by a burden of such insignificance.[198]

The impact on voting behaviour of the speech burdened by the impugned provisions was understood in a much more expansive sense in the dissenting judgments.[199] As Gageler J wrote, at issue was the removal of a 'factual [and] peculiarly communicative' form of visual imagery with real potential to 'bear on matters of political and governmental concern',[200] while for Gordon J, concerning third-party innocent recipients of the unlawfully obtained material, the impugned provisions constitute a 'blanket prohibition on possessing and communicating any information or material about governmental or political matters'.[201]

IV A 'CODELESS MYRIAD OF PRECEDENT'? IN SEARCH OF METHODOLOGIAL CONSISTENCY

I turn now to developing the basis of an interpretive framework derived from the implied freedom's legalistic foundations – established in *Lange* – which, in my view, shows that the narrower interpretive path predominating in the cases explored in Part III when assessing the extent of a statutory burden may not fully reflect the tenets of Australian constitutional orthodoxy that, in my view, necessitate the doctrine as a limitation on legislative power. Moreover, recent decisions beyond the High Court indicate how such a richer conception of constitutionally protectable speech can operate.

A Engineering *Lange*

After a period of doctrinal instability in the mid-1990s following the initial judicial recognition of the implied freedom, the imperatives identified in *Lange* as compelling a degree of constitutional protection over political communication fastened the implication in the constitutional order. In *Lange*, the High Court definitively rejected the idea that principles extraneous to the constitutional text and structure – primarily those articulated through a contested vision of Australian popular sovereignty prevailing after passage of the Australia Acts of 1986[202] – could act as the doctrine's legitimating basis.[203]

198 Ibid 560 [56].
199 Ibid 569 [88] (Gageler J).
200 Ibid 566 [80]. See also at 624–5 [273] (Gleeson J).
201 Ibid 597 [187].
202 Brendan Lim, *Australia's Constitution after Whitlam* (Cambridge University Press, 2017) 151–3 <https://doi.org/10.1017/9781316401927>.
203 *Lange* (n 3) 560–1, 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *McGinty v Western Australia* (1996) 186 CLR 140, 231–2 (McHugh J) ('*McGinty*').

The foundation for the implied freedom repudiated in *Lange* had been proffered by a majority of the High Court in the formative 1992 cases establishing the doctrine.[204] In *Lange*, by contrast, the apex court held that the judicial supervision of legislative impediments to political speech arises as 'an indispensable incident'[205] of the framework of Australian constitutional government, and, accordingly, implied freedom doctrine must be 'limited to what is necessary for the effective operation' of that system.[206] This reflects an interpretive turn attuned to the prevailing 'legalistic', or formalistic, foundations of Australian constitutionalism.[207] The constitutional system secures 'free elections' in which a 'true choice' is exercised by voters.[208] It follows that as '[c]ommunications concerning political or government matters' between the Australian people is 'central' to the system of government established at Federation – and codified in key provisions such as sections 7 and 24 of the *Constitution* – electoral integrity cannot withstand 'an absolute denial of access by the people to relevant information about the functioning of government in Australia' and that which concerns those vying for political power.[209] This is the textual and structural premise upon which *Lange* legitimated judicial scrutiny of governmental restraints placed on the transfer of electorally relevant information within the Commonwealth.

The extent of the implied freedom's protective reach when operating upon those foundations revised by *Lange* went unelaborated. More specifically, the High Court did not identify the breadth of communication protected by the implied limitation on legislation, nor did it establish the degree to which a statutory burden placed on political speech should be scrutinised. Those questions were explored closely by constitutional scholars after the *Lange* judgment,[210] with aspects of that discourse prompting a sharp rebuke from McHugh J in *Coleman v Power*.[211] The debate centred on the viability of *Lange*'s affirmation that principles outside the text and structure of the *Constitution* do not shape the implied freedom's function.[212]

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204 *Nationwide News* (n 12) 72 (Deane and Toohey JJ); *ACTV* (n 6) 138–40 (Mason CJ), 211–12 (Gaudron J). Though it should be noted that the rejection of non-textual factors as a basis for, and shaping the operation of, constitutional doctrine is evident in the 1992 *ACTV* (n 6) and *Nationwide News* (n 12) cases, and in cases prior to *Lange* (n 3): see, eg, *ACTV* (n 6) 227–35 (McHugh J); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 255–6 (Brennan J) ('*Stephens*'); *McGinty* (n 203) 171 (Brennan CJ), 180–3 (Dawson J), 281–3 (Gummow J); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 149 (Brennan J) ('*Theophanous*').

205 *Lange* (n 3) 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

206 Ibid 561.

207 See, eg, Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 429.

208 *Lange* (n 3) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

209 Ibid.

210 See, eg, Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668 ('Limits of Constitutional Text and Structure'); Dan Meagher, 'What Is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438 ('What Is "Political Communication"?')

211 *Coleman* (n 32) 48–53 [88]–[100].

212 Central to that debate was Adrienne Stone's argument that the depth of constitutional protection afforded to political communication must depend on the incorporation of extra-constitutional values

It is true that, beyond recognition of the primacy of the sanctity of voter choice as a constitutional check of government power, *Lange* does not offer explicit guidance as to what is necessary to protect the democratic structure established by the *Constitution*. But the doctrine's operational ambit is visible when the decision in *Lange* is placed within the trajectory of Australian constitutional doctrine set by the High Court's majority judgment over a century ago in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers*').[213] The reasoning in *Lange* is attuned to the *Engineers* decision's emphasis on, first, the centrality (but not exclusivity) of textualism in constitutional reasoning[214] and secondly, the ascendancy in Australia of political means of regulating government power. *Lange* also mirrors *Engineers* in that, as foundational cases on constitutional method, both decisions reflect significant compromise on the High Court Bench which, in turn, produced a degree of doctrinal tension that leaves open some interpretive questions. The contradictions and, in passages, latent political ambition[215] of the majority decision in *Engineers* are well-known.[216] But the decision can be assessed on the basis of what it *did* as opposed to exclusive focus on the 'chameleon-like quality of what the case *said*'.[217] A few years before he joined the High Court, Stephen Gageler remarked as Solicitor-General of Australia that the implied freedom is 'in a very real sense the critical underpinning of the political accountability', which, as a constitutional value, underpinned the decision in the *Engineers*.[218] Understood in that light, we do not have to look too far beyond the *Constitution*'s text, and certainly not beyond its structure, to find what *is* necessary for the protection of the constitutionally prescribed system of government. What *Engineers* 'did' was to establish the primacy of political modes of accountability over the exercise of

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and ideas as, at root, the limitation on power requires a balancing of competing interests: Stone, 'Limits of Constitutional Text and Structure' (n 210) 671–2, 702–5. See also Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *University of New South Wales Law Journal* 842 by way of response to McHugh J's criticism in *Coleman* (n 32).

213 (1920) 28 CLR 129 ('*Engineers*').

214 The dissenting reasons of Dawson J and McHugh J in *Theophanous* (n 204) on the correct place of *Engineers* (n 213) in guiding implied freedom doctrine can be viewed as a prelude to the unanimous decision (which their Honours joined in) almost four years later in *Lange* (n 3): *Theophanous* (n 204) 193–4 (Dawson J), 198, 202 (McHugh J).

215 See, eg, RTE Latham, 'The Law and the Commonwealth' in WK Hancock (ed), *Survey of British Commonwealth Affairs* (Oxford University Press, 1937) vol 1, 510, 563; LF Crisp, *The Unrelenting Penance of Federalist Isaac Isaacs: 1897–1947* (1981) 97.

216 See, eg, Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1967) 150.

217 Rosalind Dixon and Brendan Lim, 'The Continued Legacy of the *Engineers* Case: A Dynamic Approach to Federal Power' (2020) 94(11) *Australian Law Journal* 841, 842 (emphasis in original).

218 Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the *Constitution*' (2009) 32(2) *Australian Bar Review* 138, 154. See also Rosalind Dixon and Amelia Loughland, 'Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia' (2021) 19(2) *International Journal of Constitutional Law* 455, 463. John Hart Ely's influential work on 'representation-reinforcement', which charted a path for strong judicial review of government interference on participatory rights in the democratic process, has also been identified as reflected in the development of implied freedom doctrine: see, eg, Stephen Gageler, 'Implied Rights' in Michael Coper and George Williams (eds), *The Cauldron of Constitutional Change* (Centre for International and Public Law, 1997) 83; Lim (n 202) 185–6. Gageler CJ, too, has acknowledged the influence of Ely's work in shaping his views on constitutional adjudication and the implied freedom: see Dixon and Loughland (n 218) 463.

government power. This necessitates democratic institutions that function in a way that facilitates and reflects the will of the Australian 'constituencies'.[219] In the act of federating, 'the people of Australia … took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers'.[220] That governing framework requires, as Sir Maurice Byers submitted to the High Court in *Australian Capital Television Pty Ltd v Commonwealth*, some degree of judicial protection from an encumbrance on the Australian people's capacity to 'make informed judgments on matters of political significance'.[221] That safeguard reflects the 'fundamental premise of the structure of the *Constitution*'.[222]

Going even back further than *Engineers*, in 1902 William Harrison Moore, one of first academic authorities on the *Constitution*, wrote that the document's 'great underlying principle' is that rights protections in Australia rest on 'ensuring, as far as possible, to each a share, and an equal share, in political power'.[223] Further still, '[t]he predominant feature' of the *Constitution*, Moore wrote, 'is the prevalence of the democratic principle, in its most modern guise'.[224]

The importance of those insights is that constitutionally protectable political speech equates to that conduct which, broadly understood, bears on the electoral choice that facilitates the Australian people's core constitutional role as ultimate guardians of the exercise of government power. Accordingly, a measure of justification must be provided when a statutory imposition weighs on that function. And it is the courts' institutional role to supervise that process.[225] Electoral politics, being the key mode through which political accountability is realised, is shaped by an exceptionally broad range of communication and conduct. Again, that insight on the breadth of constitutionally relevant speech does not require consideration of contextual factors much beyond the text and structure of the *Constitution*. It is inherent in, and revealed by, voting behaviour and the electoral function. It also reflects the distinctive nature of Australia's framework of political constitutionalism which, as William Partlett writes, 'the people' play a uniquely direct and constitutionally guaranteed role in shaping government power.[226]

The High Court stated in *Lange* that, when 'read in context', the constitutional provisions that establish the composition of members of the federal Parliament '[embrace] all that is necessary to effectuate' free and periodic elections by the

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219 *Engineers* (n 213) 151 (Knox CJ, Isaacs, Rich and Starke JJ).

220 Ibid.

221 *ACTV* (n 6) 110.

222 Ibid.

223 Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329. This was distinct from the United States where a 'spirit of distrust' in government power so abounded that rights were codified in rights instruments: at 328–9.

224 Ibid 327.

225 As the implication is not an absolute limitation, calibrating the *degree* of protection afforded to a burdened form of communication is also vital, but is a complex question outside the scope of this article.

226 William Partlett, 'Australian Popular Political Constitutionalism' (2024) 52(2) *Federal Law Review* 156, 163–4 <https://doi.org/10.1177/0067205x241255146>. See also William Partlett, 'Remembering Australian Constitutional Democracy' (2024) 52(3) *Federal Law Review* 264, 280–1 <https://doi.org/10.1177/0067205x241274844>.

people.[227] The dissemination and receipt of electorally relevant information is of such grave importance, the Court held, that it advances the 'welfare of Australian society'.[228] The Court also drew on McHugh J's reasons in *Stephens v Western Australian Newspapers Ltd* where his Honour identified the sharing of information on government powers, functions and performance to be 'of vital concern to the community' and, with the 'increasing integration' of Australian 'social, economic and political life', it was important *not* to adopt a 'narrow view' on matters that shape public discourse.[229]

Lange tells us that implied freedom doctrine must be calibrated to protect not only the multiplicity of forms of politically relevant speech that make a free and informed voting choice possible, but also that we must recognise in the broadest sense the constitutional significance, and manifold influencing effects, of those forms of communication. The importance of those modes in cultivating the free and informed electoral choice that ultimately makes political accountability possible must influence the measurement of the extent of a burden placed on electorally relevant communication.

I note, however, that the broad conception of the constitutional significance of forms of protected speech advocated here did not enjoy majority support of the High Court Bench during the Kiefel Court. Too often, as I explored in Part III, the relative significance of a particular form of speech in shaping electoral choice was understated, resulting in a diminishment of the gravity of an impugned law as a burden on political communication. But this enhanced view of what it means to burden political speech can be seen consistently reflected in Gageler J's judgments during that period, as well as in Gordon J's reasons in *LibertyWorks* and *Farm Transparency*, and Edelman J's reasons in *Preston* and *LibertyWorks*. It can also be seen in application beyond the High Court in some recent cases, which I now turn to.

B A Return to *Lange* Fundamentals?

The foundational point made in *Lange* is that the boundaries of political communication required to sustain a true electoral choice – in addition to the integrity of the amendment process under section 128 of the *Constitution* – emerge only from a close grasp of the democratic system devised by the *Constitution*.[230] This extends to political communication on state and territory political matters.[231] However, and as I have noted above, even within the concept of protectable communication defined by *Lange* fundamentals there remains a wide range of interpretive options.

The High Court's decision in 2005 in *APLA Ltd v Legal Services Commissioner (NSW)* ('*APLA*')[232] is instructive as it reveals a particularly narrow approach to

227 *Lange* (n 3) 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
228 Ibid 571.
229 Ibid 570–1, quoting *Stephens* (n 204) 264 (McHugh J). See also *Clubb* (n 11) 256–7 [249] (Nettle J).
230 *Lange* (n 3) 559–62 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
231 *Coleman* (n 32) 49 [90] (McHugh J).
232 (2005) 224 CLR 322 ('*APLA*').

defining that category of speech. One of several constitutional challenges in *APLA* concerned compatibility with the implied freedom of state legislation prohibiting the marketing of legal services referencing personal injuries. In their joint reasons, Gleeson CJ and Heydon J acknowledged that the central term 'freedom of communication about government or political matters' used in *Lange* is 'imprecise', but that its content must be 'governed by the necessity which requires it'.[233] Ultimately, their Honours held that the implied freedom was not burdened because the impugned law did not apply to political communication.[234] McHugh J,[235] Gummow J[236] and Hayne J adopted a similar approach in reaching the same conclusion on validity across separate judgments.[237] Callinan J also looked to *Lange* to give content to the expression 'government or political matter', a term which lacked 'any contextual anchor in it' as it is not found in the *Constitution*.[238] '[P]rotected communications', then, had to have 'a real and practical capacity to interfere with politicians, their free election, and the exercise of their constitutional rights and powers'.[239] Only Kirby J, dissenting on the question of validity, found that *Lange* required that comment on the judicial process constitutes protectable speech under the implied freedom and that to argue otherwise would risk a 'bits and pieces approach' to constitutional doctrine.[240]

It is not clear that the same decision on the same facts in *APLA* would be reached today. Even with the narrow approach to the recognition of protectable communications that prevailed during the Kiefel High Court, forms of speech deemed constitutionally relevant were still viewed in a more expansive sense than is true of the *APLA* majority's approach.

There are signs, however, in recent cases heard beyond the apex court of a return to *Lange* fundamentals, at least in the sense that I understand implied freedom doctrine to entail. Most recently we can see signs of that approach in the Federal Court's decision in early 2024 in *Deripaska v Minister for Foreign Affairs* ('*Deripaska*').[241] The case concerned a Russian oligarch's challenge to the constitutionality of sanctions regulations. Kennett J's reasons also show that engagement with the richer conception of *Lange* that I have outlined need not necessarily result in a finding of a substantial statutory burden.

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233 Ibid 350 [27]. See also at 361 [66] (McHugh J).

234 Ibid 351 [28]–[29].

235 Ibid 358–9 [56]–[57], 360 [61]–[62], 361–2 [67]–[68].

236 Ibid 403–4 [219]–[220]. It should be noted that in his reasons his Honour specifically drew on Brennan J in *Cunliffe v Commonwealth* (1994) 182 CLR 272, 329 ('*Cunliffe*').

237 *APLA* (n 232) 451 [380], citing *Cunliffe* (n 236) 329 (Brennan J). Further, his Honour stated that the central analytical question is 'what the impugned law does, not how an individual might want to construct a particular communication': *APLA* (n 232) 451 [381]. It remained possible for lawyers to make political points in advertisements so long as that communication does not reference the impugned law's prohibited subjects concerning personal injury matters: at 451 [382] (Hayne J).

238 *APLA* (n 232) 478 [450].

239 Ibid 478 [452] (Callinan J). See also at 480 [457].

240 Ibid 440 [347].

241 (2024) 184 ALD 393. The applicant also failed in his constitutional argument that the laws are inconsistent with Chapter III of the *Constitution*.

The *Autonomous Sanctions Regulations 2011* (Cth) ('*ASR*') restrict asset transfers involving sanctioned individuals, though ministerial permits may be issued in exceptional circumstances. The applicant in *Deripaska* argued that the *ASR* effectively prevented the ability of lawyers to communicate with sanctioned individuals because of controls on remuneration. In *Deripaska*, Kennett J accepted that the implied freedom was engaged but found the relevant *ASR* regulations constituted only an 'indirect' and 'modest' burden on political communication.[242] There were two aspects to that burden, both of which comprised forms of communication that when read with the ministerial permit regime, were made 'contingent on a favourable exercise of discretion by the Minister'.[243]

The first form of burdened speech was identified as arising from a principle applied by the High Court in *Cunliffe v Commonwealth* where a majority held that a discussion between an adviser and client concerning the exercise of executive power constitutes political communication. It followed that the political communication of a sanctioned individual under the *ASR* was burdened as discussions with a legal adviser are permitted at the federal government's discretion. While, as Kennett J noted in his judgment, that authority has not been overturned,[244] it is not clear to me (even on the broad construal that I have argued for) that such speech is in fact a category of political communication when the applicable standard is that the implied freedom protects conduct which may bear, even incidentally, on electoral decision-making.

The second burden, and the most significant for present purposes, concerns political speech categorised after Kennett J had first identified the constitutional imperatives isolated in *Lange*. His Honour reasoned that the implied freedom's singular protection of speech informing electoral choice meant that only a narrow class of communication captured by regulations 14 and 15 is inherently political and subject to constitutional limitations on power.[245] This equated, then, to a burden placed by the impugned law on the acquisition of 'professional services for the purpose of engaging with the Australian public'.[246] To reiterate, services of that nature are lawfully acquirable by a sanctioned individual only with the Commonwealth government's pre-approval.

Lange fundamentals also shaped an exceptionally thorough evaluation of a statutory burden in the New South Wales Supreme Court's decision in late 2023 in *Kvelde v New South Wales* ('*Kvelde*').[247] In respect of the implied freedom, the case concerned a challenge brought by environmental activists, the 'Knitting Nannies', who felt deterred from engaging in protests after the enactment of New South Wales legislation limiting conduct at 'major facilities' (defined as a transportation hub, certain ports and core infrastructure services such as water and energy)[248] in

242 Ibid 420 [111].
243 Ibid 417 [98] (Kennett J).
244 Ibid 417 [96].
245 Ibid 416–17 [95]–[96].
246 Ibid 417 [98].
247 *Kvelde* (n 45) [295] (Walton J).
248 *Crimes Act 1900* (NSW) s 214A(7).

the State. Section 214A(1)(c) of the *Crimes Act 1900* (NSW) prohibited conduct resulting in the closure of such a facility or a part of it, while section 214A(1)(d) made it unlawful to cause a person attempting to use a major facility to be redirected.

In assessing the nature of the impugned provisions' burden on political speech, Walton J stated at the outset that protest on green issues of the nature the applicants in *Kvelde* are committed to and regularly participate in is a type of political communication 'on which the efficacy of electoral accountability for the exercise of legislative and executive power within the constitutionally proscribed [sic] national system of representative and responsible government *depends*'.[249] His Honour noted that one important aspect of the statutory burden is that it fell on a 'prototypical peaceful protest activity'[250] – insofar as it affected assemblies near a major facility – and one that has an intrinsically *political* 'communicative power'.[251]

The incremental burden, Walton J held, was similar to that in *Brown* and had to be assessed according to the 'the real world ability of a person or persons to have others receive communications which are capable of bearing on electoral choice'.[252] The burden on political communication was ultimately found to be 'direct and substantial';[253] 'deep';[254] arising *before* any alleged breach of the impugned law;[255] and, creating a 'substantial deterrent or chilling effect' on political speech[256] in its '*practical* effect'.[257] It followed that section 214A(1)(c) was constitutionally invalid to the extent that it operates on the closure of a major facility, while section 214A(1)(d) imposed an impermissible burden on the implied freedom in its entire operation.

A similar analytical approach is also evident in the New South Wales Court of Appeal's decision two years ago in *Burton v DPP (NSW)* ('*Burton*')[258] where, again, the essence of the *Lange* vision of the implied freedom's protective purpose informed Kirk JA's (with whom Bell CJ and Leeming JA agreed) analysis of the burden placed on political communication. The case concerned an implied freedom challenge to the validity of a state law that prohibits reporting on the name of a child involved in care proceedings.[259]

Kirk JA stated that, from *Lange*, we know that the implied freedom engages speech on 'political *or government* matters which enables the people to exercise

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249 *Kvelde* (n 45) [257] (emphasis added). His Honour drew here on the reasons of Gageler J in *Brown* (n 4) 377–8 [162]. See also *Kvelde* (n 45) [323], [362] (Walton J), citing *Brown* (n 4) [188] (Gageler J); *Kvelde* (n 45) [503] (Walton J), citing *Ruddick* (n 28) [82] (Gageler J).

250 *Kvelde* (n 45) [259].

251 Ibid [262].

252 Ibid [362].

253 Ibid [363] (Walton J).

254 Ibid [478], quoting *Clubb* (n 11) 338 [481] (Edelman J).

255 *Kvelde* (n 45) [401] (Walton J).

256 Ibid [402].

257 Ibid [414] (emphasis added).

258 (2022) 110 NSWLR 145 ('*Burton*'). In April 2023 the High Court dismissed an application to appeal the decision: *Burton v DPP (NSW)* [2023] HCASL 66.

259 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105.

a free and informed choice as electors'.[260] The impugned law in *Burton* was, then, held to burden political communication in that it banned people 'from publicly protesting or discussing the removal of particular children by governmental action'.[261] His Honour assessed the burden to be 'not insignificant, but limited'[262] in that it does not prevent criticism or discussion of government policy and, further, it is possible for children from the age of 16 to consent to publication of their identity in such cases.[263]

In assessing the extent of the burden, it was important, Kirk JA wrote, to construe the impugned law's operation 'in the real world of human action'.[264] While the 'rhetorical force of some arguments' may be reduced by the law's prohibition of the identification of minors, it banned neither reference to specific cases nor 'swingeing criticisms' of government policy or actors.[265] Ultimately the burden in *Burton* was found to be constitutionally justifiable as its modesty meant it clearly met all stages of proportionality testing.

The common approach adopted across these cases reveals a rich view of the weight and influence of constitutionally protectable communication. Commitment to *Lange* fundamentals ensures, ultimately, that the protective reach of the implied freedom is more precisely attuned to the object that the doctrine serves in the protection of strands of political accountability over government power.

V CONCLUSION

The implied freedom of political communication is embedded in the Australian constitutional order. And yet, despite those firm roots, in practice it often operates with a large degree of instability traceable to contested ideas over the very nature of political communication, which, in turn, shape very different assessments of the extent of individual statutory burdens. Gordon J's remarks in *McCloy*, reproduced at the beginning of this article, may seek to allay fears over problems associated with divergent outcomes in implied freedom cases. But, as we have seen, it should be a real point of concern that, since *McCloy*, persistent and fundamental disagreements over the fulfilment of the *Lange* fundamentals underpinning the implied freedom often produce deep splits in the Court's view of the proper constitutional limits of legislative power.

Almost two decades ago, Stellios wrote that a possible explanation for the implied freedom's 'unsettled' nature at that time was the High Court's mission to 'incrementally [feel] its way forward with a fledgling constitutional doctrine'.[266]

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260 *Burton* (n 258) 155 [39] (emphasis in original), quoting *Lange* (n 3) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

261 *Burton* (n 258) 155 [41] (Kirk JA).

262 Ibid 157 [48].

263 Ibid 156–7 [46]. See also at 161–2 [70].

264 Ibid 157 [47].

265 Ibid 162 [70] (Kirk JA).

266 James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31(1) *Melbourne University Law Review* 239, 241 ('Using

Having now been applied for over 30 years, the doctrine may lack the same operational pedigree relative to other core constitutional implications, but its form has, particularly since *Lange*, had plenty of space to coalesce through a broad range of cases heard across the Australian court system.

Many lingering points of doctrinal tension may instead more closely reflect Stellios's second mooted explanation for the doctrine's state of unsettledness. That is, an unease among some justices that, in applying the implied freedom, 'the judiciary is operating at the margin of, or in fact overreaching, its legitimate constitutional function'.[267] This may explain, for example, the continued insistence on positive legal rights before the implied freedom can be applied, as well as the more recent narrowing of the test applied at the 'necessity' step of proportionality testing.

Those questions of legitimacy concerning the supervision of the systemic effect of a legislative burden on electorally relevant speech may abate, I suggest, if we look to the constitutional tenets that create Australia's governmental practices as explored in Part IV and how the exercise of public power is modulated. Understood in that sense, what is equally concerning is the more recent interpretive trend at the first stage of validity testing under the *Lange* framework of understating the importance of forms of communication that concern the electoral process, and not least in the formation of voter choice. The deep significance of *Lange* is that, even as the implied freedom's constitutional basis was narrowed by the High Court, the courts' active supervisory role over risks to the integrity of electoral choice remained not only manifest but substantial. This is the 'structural imperative' from which the implication is derived and which, ultimately, frames the analysis of whether a burden unduly weakens democratic choice.[268] The doctrine's legalistic foundations demand, somewhat paradoxically, proactive judicial protection from systemic threats stemming from legislative enactments. At the more granular level, then, as electoral choice is the keystone of the regulation of government power in the Australian constitutional order, conduct relevant to the performance of the act of voting must be understood as both broad *and* capable of having a multifaceted and decisive bearing on electoral practices. As such, the protective reach of the doctrine can and *should* be calibrated to identify, and require robust justification for, a much broader range of legislative impediments to the richness of Australian political discourse than the High Court has recently been prepared to recognise.

Federalism'). Cf Dan Meagher's argument a few years prior to Stellios that commends incremental doctrinal development for its potential to aid coherence and principle so long as sound theoretical foundations for the implied freedom are more clearly articulated: Meagher, 'What Is "Political Communication"?' (n 210) 440.

267 Stellios, 'Using Federalism' (n 266) 241.

268 *Clubb* (n 11) 239 [207] (Gageler J).