

# AN IMPLIED FREEDOM OF POLITICAL OBSERVATION IN THE *AUSTRALIAN CONSTITUTION*

DANIEL REYNOLDS\*

*The implied freedom of political communication exists to ensure that Australians are able to exercise a free and informed choice as electors. Yet communication is a second-hand means of acquiring information, and it is not the only means. Nor is there any reason arising from the text or structure of the Australian Constitution why communication should receive special status. This paper makes the case for a related implication, an ‘implied freedom of political observation’, designed to ensure that electors can also acquire politically relevant information first-hand. It is argued that such an implication arises by force of the same logic that gave rise to the implied freedom of political communication, yet — unlike the ill-fated ‘implied freedom of political association’ — occupies a unique territory that goes beyond that already recognised freedom.*

## CONTENTS

I	Introduction.....	2
II	Constitutional Implications from Representative Democracy.....	5
III	The Rise and Fall of the Implied Freedom of Association.....	8
	A <i>Kruger v Commonwealth</i> .....	10
	B <i>Mulholland v Australian Electoral Commission</i> .....	14
	C <i>Wainohu v New South Wales</i> .....	16
	D <i>Tajjour v New South Wales</i> .....	17
	E Conclusion on the Freedom of Association .....	19
IV	The Implied Freedom of Political Observation .....	20
	A The Argument.....	20
	B Support in Authority and Commentary .....	24
V	Counterarguments .....	28
	A Artificiality .....	29
	B Expanding the Implied Freedom of Political Communication .....	31
	C A Suitable Vehicle.....	32
VI	Conclusion .....	33

\* LLB (Hons), BInSt (UNSW). I would like to thank Professor Anne Twomey, Professor James Stellios, Jeremy Kirk SC, Shipra Chordia, Alex Lee and the anonymous reviewers for their helpful comments on earlier drafts of this article. All views are my own.

Cite as:

Daniel Reynolds, ‘An Implied Freedom of Political Observation in the *Australian Constitution*’  
(2018) 42(1) *Melbourne University Law Review* (advance)

## I INTRODUCTION

In 1992, the High Court of Australia held that there exists an implied freedom of political communication ('the IFPC') which arises as a necessary incident of the system of representative democracy for which the *Australian Constitution* (the 'Constitution') provides.<sup>1</sup> This was a landmark event that prompted much academic speculation about whether representative democracy might require any other implications, such as freedom of assembly, freedom of movement, freedom of association and the right to vote.<sup>2</sup> In the decades since, the Court has recognised some further implications from representative democracy,<sup>3</sup> and rejected others.<sup>4</sup>

This paper makes the case for a new implication yet to be considered by any court: an implied freedom of political observation. 'Political observation' in this context means any use of the senses (sight, hearing, and so on) to perceive something, by means of which the observer may form a view on government or political matters. Like the IFPC, the rationale for the freedom would be to '[enable] the people to exercise a free and informed choice as electors'.<sup>5</sup>

The need for the new implication arises because the IFPC only protects the formation of views acquired second-hand (whether by communication between electors, between representatives and electors, or via the media). That is, the IFPC is premised upon the involvement of at least two people: the person imparting information, and the person receiving it. What the IFPC does not protect is the formation of views acquired first-hand, that is, through the individual observations of one person acting autonomously, without reference to the views of others.

<sup>1</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('ACTV'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('Nationwide').

<sup>2</sup> See, eg, Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23(1) *Federal Law Review* 37; Adrian Brooks, 'A Paragon of Democratic Virtues?: The Development of the Commonwealth Franchise' (1993) 12(2) *University of Tasmania Law Review* 208; George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20(3) *Melbourne University Law Review* 848; Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28(1) *Federal Law Review* 125.

<sup>3</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('Roach'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('Rowe').

<sup>4</sup> *McGinty v Western Australia* (1996) 186 CLR 140 ('McGinty'); *Tajjour v New South Wales* (2014) 254 CLR 508 ('Tajjour').

<sup>5</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('Lange').

This halfway protection would be justifiable if the *Constitution* impliedly protected communication itself. But it does not: communication is protected *because it is a means* by which electors may inform themselves about government and political matters and thereby exercise a free and informed choice at elections. The text and structure of the *Constitution* supply no reason to conclude that communicative means of acquiring that information should be protected, but non-communicative means should not. One possible explanation for the recognition of the former alone is the influence on Australian courts of American jurisprudence concerning the First Amendment, which expressly protects the freedom of speech. Yet while that jurisprudence is illuminating, its utility in the present constitutional context is attenuated by the circumstance that the relevant protection in Australia arises by way of implication rather than by express guarantee.<sup>6</sup>

Accepting that there is no reason why first-hand information should not be protected in the same way as second-hand information, two questions follow: what sort of conduct would an implied freedom of political observation cover, and what sort of laws would burden it?

As to the first question, experience teaches us that many people make up their minds about political matters, at least in part, not by discussing politics with friends or reading the news, but by going out into the world and arriving at opinions based on what they observe. As will be argued, that is an unexceptional and entirely legitimate way of forming political views. For example, controversies occasionally arise as to whether a particular building should be 'heritage listed' and preserved, or sold to developers and demolished. That is clearly a political issue. It is also clearly an issue on which views can be formed by going to see the building. It is a small further step to appreciate that a law that prevented people from going to see the building would, to that extent, impede their ability to form those views. As is more fully developed below, there are many other examples where political views will readily be formed by electors going to a particular place and observing what is there. Critically, the IFPC can provide no protection from government action that would inhibit the ability of electors to form views in this way, as no communication is involved.

The example just given reveals that the proposed implication has a corollary: freedom of movement, at least of a particular kind. What is necessary is

<sup>6</sup> See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 358 [56] (McHugh J) ('*APLA*'). See also Stephen Gageler and Will Bateman, 'Comparative Constitutional Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 261, 273–4.

the freedom for electors physically to go to public places, or other places of political significance, in order to observe whatever may be there. The implication proposed in this paper would justify a freedom of movement only in this limited sense, rather than at large. Just as the IFPC does not protect non-political communication,<sup>7</sup> so too an implied freedom of political observation would not protect movement that does not conduce to the obtaining of information that could affect a person's choice in federal elections.<sup>8</sup>

As to the second question, a law will therefore burden the implied freedom of political observation if it impedes access to a place where information that could affect a person's choice in federal elections may be acquired. Possible examples of such laws are given in Part IV, but one needs to look only to modern history, where people of particular races or religions have been segregated and excluded from public places (as in South Africa during apartheid, and in Jewish ghettos in Nazi Germany) to see that the question is not purely theoretical.

The approach of this paper is as follows. Part II considers the High Court's jurisprudence on the IFPC to date and draws on it to identify a relevant consideration for the recognition of further implied freedoms arising from the constitutionally prescribed system of representative democracy. Part III analyses the line of authority culminating in the rejection of a free-standing 'implied freedom of political association', which is now understood to exist only as a corollary to the IFPC. The purpose of Part III is to explain the rationale for that line of authority and to extract from it a second criterion for the recognition of new implications from the system of representative democracy<sup>9</sup> and responsible government for which the *Constitution* provides. Part IV contains the argument proper for the implied freedom of political observation, and explains how it might operate in practice. Part V deals with possible counterarguments. Part VI provides a conclusion.

<sup>7</sup> *Lange* (n 5) 560–1 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *APLA* (n 6) 350–1 [27]–[28] (Gleeson CJ and Heydon J), 361 [66]–[67] (McHugh J), 403 [216] (Gummow J), 451 [380]–[381] (Hayne J). 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, 388–90; 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, 459–61.

<sup>8</sup> See *Lange* (n 5) 571 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>9</sup> References in this paper to 'representative democracy' should hereinafter be taken to refer to that constitutional concept, rather than to representative democracy more generally.

## II CONSTITUTIONAL IMPLICATIONS FROM REPRESENTATIVE DEMOCRACY

My purpose in this Part is to do two things. First, I make the basic, and perhaps uncontroversial, point that the rationale for the existence of the IFPC is that it is necessary to enable people to exercise a free and informed choice as electors. Second, I consider the relevance of the question of necessity in deciding whether to accept or reject the existence of further proposed constitutional implications from representative democracy.

In *Lange v Australian Broadcasting Corporation* ('*Lange*'),<sup>10</sup> a unanimous High Court explained the rationale for the IFPC in the following terms:

[B]ecause the choice given by ss 7 and 24 must be a true choice with 'an opportunity to gain an appreciation of the available alternatives' ... legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.

That being so, ss 7 and 24 and the related sections of the *Constitution* necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.<sup>11</sup>

It may immediately be noticed that nowhere here, nor elsewhere in *Lange*, is the IFPC justified on the basis that political communication is important for its own sake. Rather, its importance lies in its ability to enable people to make a free and informed choice as electors. The IFPC is necessary to representative democracy because it facilitates the acquisition of relevant information upon which the free and informed choice of electors depends.

The Court in *Lange* affirmed this understanding by adopting McHugh J's statement in *Stephens v West Australian Newspapers Ltd*<sup>12</sup> that 'the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials'.<sup>13</sup> The Court proceeded to declare that 'each member of the Australian community has an interest in disseminating and

<sup>10</sup> *Lange* (n 5).

<sup>11</sup> *Ibid* 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted), quoting *ACTV* (n 1) 187 (Dawson J).

<sup>12</sup> (1994) 182 CLR 211.

<sup>13</sup> *Lange* (n 5) 570 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoting *ibid* 264. See also *Lange* (n 5) 571.

receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.’<sup>14</sup> It can be seen that the acquisition of politically relevant information is the end; communication the means.

This understanding of the rationale of the IFPC is also to be found in the foundational cases of *Australian Capital Television Pty Ltd v Commonwealth* (‘ACTV’)<sup>15</sup> and *Nationwide News Pty Ltd v Wills* (‘*Nationwide*’).<sup>16</sup> In *ACTV*, Mason CJ said that the ‘efficacy of representative government depends’ upon political communication, because ‘individual judgment’ on a variety of ‘issues turns upon free public discussion’ of those issues.<sup>17</sup> His Honour footnoted the following quote from Lord Simon in *Attorney-General v Times Newspapers Ltd*:

People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.<sup>18</sup>

Notice that the public press is here characterised as ‘a’ principal instrument of fact-finding. As will be seen, this is consistent with another theme in the cases to date, which is that the IFPC is only ever characterised as ‘a’ — indeed a *necessary* — condition to the ability of electors to inform themselves, but never as a *sufficient* condition or as the *exclusive* condition.

The informational rationale of the IFPC was also expressed in *Nationwide* by Brennan J, where his Honour considered that the IFPC’s existence was necessary to prevent the substantial impairment of ‘the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions.’<sup>19</sup> Similarly, Deane and Toohey JJ linked the nascent freedom to the ‘ability to acquire information’ which was in turn necessary for the ‘ability to cast a fully informed vote.’<sup>20</sup>

<sup>14</sup> *Lange* (n 5) 571.

<sup>15</sup> *ACTV* (n 1).

<sup>16</sup> *Nationwide* (n 1).

<sup>17</sup> *ACTV* (n 1) 139.

<sup>18</sup> [1974] AC 273, 315, quoted in *ibid* 139 n 6.

<sup>19</sup> *Nationwide* (n 1) 51.

<sup>20</sup> *Ibid* 72.

This is not an exhaustive compilation of such statements, but it is hoped that it is sufficient to make the point that the IFPC exists only to serve the purpose of enabling electors to be fully informed in the exercise of democratic choice.

The cases also establish that the IFPC is a *necessary* implication from the system of representative democracy for which the *Constitution* provides. More than once in *Lange*, the Court held effectively that the *Constitution* ‘necessarily implies’ the existence of the IFPC.<sup>21</sup> Similarly, as Jeremy Kirk notes, in *ACTV* and *Nationwide*, the judges described the IFPC as an “essential”, “necessary”, “indispensable”, “presupposed” or “inherent” element of representative democracy.<sup>22</sup> Indeed, necessity was seen by Mason CJ in *ACTV* as a prerequisite for structural implications generally:

It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the *Constitution* it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.<sup>23</sup>

As Jeremy Kirk wrote, in an article published not long after the judgments in *ACTV* and *Nationwide* were handed down, in those cases ‘the judges applied the test of essentiality to representative democracy in implying the freedom of political communication’.<sup>24</sup>

It does not appear from the subsequent cases, however, that a test of essentiality or necessity has been adhered to as a strict criterion for the recognition of further implications. For example, the majority judgments in *Roach v Electoral Commissioner*<sup>25</sup> and *Rowe v Electoral Commissioner*,<sup>26</sup> which recognised implied constraints on legislative power to enact exclusions to the federal franchise, were not expressed in terms of those implied constraints

<sup>21</sup> *Lange* (n 5) 560, 561, 562.

<sup>22</sup> Kirk (n 2) 40, citing *ACTV* (n 1) 138–40 (Mason CJ), 211–12 (Gaudron J), 230–1 (McHugh J) and *Nationwide* (n 1) 47–50 (Brennan J), 72 (Deane and Toohey JJ).

<sup>23</sup> *ACTV* (n 1) 135.

<sup>24</sup> Kirk (n 2) 44.

<sup>25</sup> *Roach* (n 3).

<sup>26</sup> *Rowe* (n 3).

being ‘necessary’.<sup>27</sup> However, the test has not fallen completely out of use,<sup>28</sup> and indeed three Justices employed it in the High Court’s most recent decision on structural implications in the *Constitution*, *Burns v Corbett*.<sup>29</sup> Perhaps the best way to understand the language of necessity in light of its usage in recent years is that it is legitimating rather than criterial language, designed to show that the implication is securely based rather than to show that a threshold requirement has been satisfied.<sup>30</sup> Understood in this way, necessity remains a relevant factor in, but (ironically) not a necessary condition to, the recognition of new constitutional implications. That understanding would at least suggest that where a proposed implication can fairly be described as necessary for the preservation of the integrity of the structure for which the *Constitution* provides, the likelihood of its recognition will be stronger.

### III THE RISE AND FALL OF THE IMPLIED FREEDOM OF ASSOCIATION

At the conclusion of his article ‘Constitutional Implications from Representative Democracy’,<sup>31</sup> Kirk suggested that a number of further constitutional implications were available by reference to a test of necessity or essentiality to representative democracy. These were: ‘freedom of assembly for political purposes, freedom of association, freedom of movement related to political matters, access to government, and regular, free and fair elections’.<sup>32</sup>

One of these, the implied freedom of association, showed particular promise. It had been endorsed in substance — though not in terms — by Murphy J

<sup>27</sup> *Roach* (n 1) 179–82 [19]–[23] (Gleeson CJ), 198–9 [81]–[85] (Gummow, Kirby and Crennan JJ); *Rowe* (n 1) 18–21 [17]–[25] (French CJ), 46–50 [118]–[126] (Gummow and Bell JJ), 105–17 [324]–[368] (Crennan J).

<sup>28</sup> See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 152, 157 (Gummow J) (*‘Kruger’*); *McGinty* (n 4) 184 (Dawson J), 245 (McHugh J); 285 (Gummow J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 297 (Callinan J) (*‘Mulholland’*). See also *Austin v Commonwealth* (2003) 215 CLR 185, 245 [112]–[113] (Gaudron, Gummow and Hayne JJ); *APLA* (n 6) 409 [242] (Gummow J), 453 [389] (Hayne J); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 613 n 198 (Kirby J).

<sup>29</sup> (2018) 353 ALR 386, 414 [94], [96] (Gageler J), 435 [175], 439 [188] (Gordon J), 442–3 [205] (Edelman J).

<sup>30</sup> See, in a related context, *Mulholland* (n 28) 199–200 [39] (Gleeson CJ).

<sup>31</sup> Kirk (n 2).

<sup>32</sup> *Ibid* 75.



in a number of judgments prior to 1992.<sup>33</sup> In *ACTV*, McHugh J held that s 7 and s 24 of the *Constitution* implied the existence of ‘constitutional rights of freedom of participation, association and communication’,<sup>34</sup> repeating this view several times in his judgment.<sup>35</sup> Gaudron J held in the same case that the ‘notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally.’<sup>36</sup> And not least of all, the idea of an implied freedom of association had the merit of being logically implicit in the same considerations that had led to the recognition of the IFPC. As Professor George Williams argued not long after *ACTV* and *Nationwide* were handed down:

It is difficult to see how some version of a freedom to associate could not be implied given the approach of the majority in *McGinty* and the existence of a freedom of political discussion. The ability to associate for political purposes is obviously a cornerstone of representative government in Australia. How could the people ‘directly choose’ their representatives if denied the ability to form political associations and to collectively seek political power?<sup>37</sup>

However, the implied freedom of association has since run aground, at least as a free-standing implication existing in its own right (that is, independently of the IFPC). In *Tajjour v New South Wales* (*‘Tajjour’*),<sup>38</sup> a number of questions were stated for the opinion of the Full Court of the High Court, including the following: ‘Is there implied into the *Commonwealth Constitution* a freedom of association independent of the implied freedom of communication on governmental and political matters?’<sup>39</sup> The answer of the majority of the Court was ‘No.’<sup>40</sup>

<sup>33</sup> See, eg, *Buck v Bavone* (1976) 135 CLR 110, 137; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581–2.

<sup>34</sup> *ACTV* (n 1) 227.

<sup>35</sup> *Ibid* 233, 234.

<sup>36</sup> *Ibid* 212 (citations omitted).

<sup>37</sup> Williams (n 2) 861.

<sup>38</sup> *Tajjour* (n 4).

<sup>39</sup> *Ibid* 534 [5] (French CJ).

<sup>40</sup> The majority answered ‘No’: *ibid* 567 [99] (Hayne J), 575 [134] (Crennan, Kiefel and Bell JJ), 589 [180] (Gageler J), 607 [250] (Keane J), whilst French CJ held that the question was unnecessary to answer: at 556 [53].

To understand why, it is necessary to briefly consider three earlier High Court decisions, on which the Court in *Tajjour* placed significant reliance. These are *Kruger v Commonwealth* ('*Kruger*'),<sup>41</sup> *Mulholland v Australian Electoral Commission* ('*Mulholland*')<sup>42</sup> and *Wainohu v New South Wales* ('*Wainohu*').<sup>43</sup>

The purpose of this Part is to show what it was that the High Court saw as fatal to the recognition of the implied freedom of association. This is in order to subsequently show why the reasons that compelled the rejection of the implied freedom of association do not also compel the rejection of the implied freedom of political observation: that is, why the implied freedom of political observation is different.

### A *Kruger v Commonwealth*

In *Kruger* (also known as the *Stolen Generations case*), a group of Indigenous plaintiffs sought to challenge the validity of the *Aboriginals Ordinance 1918* (NT), pursuant to which they had been removed from their homes, detained, and kept away from their mothers and families. One of the arguments advanced by the plaintiffs was that the relevant provisions of the Ordinance were invalid because they were contrary to an implied constitutional right to, or guarantee of, freedom of movement and association. That argument did not succeed. However, the reasons for rejecting it varied between Justices.

Brennan CJ did not decide whether such an implication existed, as his Honour considered that if it did, it would not avail the plaintiffs on the facts of the case:

No such right has hitherto been held to be implied in the *Constitution* and no textual or structural foundation for the implication has been demonstrated in this case. The freedom contended for is advanced as a corollary of that freedom of communication about government and political matters which is implied in the *Constitution*, especially by reason of ss 7 and 24. But the impugned provisions in this case were not directed to the impeding of protected communications and, if action taken under those provisions could have had that effect, the

<sup>41</sup> *Kruger* (n 28).

<sup>42</sup> *Mulholland* (n 28).

<sup>43</sup> (2011) 243 CLR 181 ('*Wainohu*').

invalidity would strike at the action taken, not at the provision which purported to authorise the action.

...

It follows that, whether or not some such implication ... is to be found in the *Constitution*, its existence would not have invalidated any of the provisions impugned by the plaintiffs.<sup>44</sup>

Dawson J, too, left open the question of whether such an implication existed — though, on balance, his Honour appeared doubtful — on the basis that if it did, it would not in any event apply to laws made under the territories power:

The freedom of communication protected by the *Constitution* relevantly arises from the system of representative government for which the *Constitution* specifically provides. In *Australian Capital Television Pty Ltd v The Commonwealth* McHugh J observed:

There is nothing in s 122 or anywhere else in the *Constitution* which suggests that laws made by the Commonwealth for the government of a Territory are subject to prohibitions or limitations arising from the concepts of representative government, responsible government or freedom of communication.

I respectfully agree with that observation and would extend its application to such other rights to freedom of movement and association as may be suggested as constitutional requirements. ... I also have in mind the suggestion of Gaudron J in *Australian Capital Television Pty Ltd v The Commonwealth* that '[t]he notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association'. In any event, that suggestion appears to be based on the nature of our society, which to my mind cannot legitimately be used as a source of constitutional implications.<sup>45</sup>

Toohy J considered an implied freedom of association to exist as a corollary of the IFPC. His Honour held that the freedom of association

is an essential ingredient of political communication, a freedom which extends not only to communications by political representatives to those whom they represent but also to communications from the represented to the representa-

<sup>44</sup> *Kruger* (n 28) 45.

<sup>45</sup> *Ibid* 69 (citations omitted).

tives and between the represented. Indeed, the freedom necessarily extends to all the people of the Commonwealth.<sup>46</sup>

His Honour went on to express agreement with the reasons of Gaudron J for concluding that the legislative power conferred by s 122 of the *Constitution* is subject to the IFPC, and with it an implied freedom of association.<sup>47</sup> Gaudron J's reasons were as follows:

[T]he position is that the *Constitution* mandates whatever is necessary for the maintenance of the democratic processes for which it provides.

...

It is clear, and it has been so held, that the fundamental elements of the system of government mandated by the *Constitution* require that there be freedom of political communication between citizens and their elected representatives and also between citizen and citizen. However, just as communication would be impossible if 'each person was an island', so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement.<sup>48</sup>

Her Honour concluded that s 122

is confined by the freedom of political communication identified in *Nationwide News* and in *Australian Capital Television* and by the subsidiary freedoms of association and movement to which reference has already been made.<sup>49</sup>

McHugh J also recognised an implied freedom of association, but considered that it did not apply to residents of the territories:

The reasons that led to the drawing of the implication of freedom of communication lead me to the conclusion that the *Constitution* also necessarily implies that 'the people' must be free from laws that prevent them from associating with other persons, and from travelling, inside and outside Australia for the purposes of the constitutionally prescribed system of government and referendum procedure. ...

<sup>46</sup> Ibid 91 (citations omitted).

<sup>47</sup> Ibid 92.

<sup>48</sup> Ibid 114–15 (citations omitted).

<sup>49</sup> Ibid 118.

However, from the time when the 1918 Ordinance was enacted until it was repealed in 1957, the residents of the Northern Territory had no part to play in the constitutionally prescribed system of government or in the procedure for amending the *Constitution*.<sup>50</sup>

Lastly, Gummow J rejected an implied freedom of political association outright:

That the structure established by the *Constitution* has as essential elements a system of responsible government and representative government does not bring with it, as an implication of logical or practical necessity for the preservation of the integrity of that structure, an implied restriction upon federal legislative power, as regards ‘freedom of association’ in any general sense of that expression.<sup>51</sup>

In point of authority, then, *Kruger* was ultimately inconclusive as to whether the *Constitution* contains an implied freedom of association: three Justices held that it does (Toohey J, Gaudron J and McHugh J),<sup>52</sup> one Justice held that it did not (Gummow J),<sup>53</sup> and two Justices left the question open (Brennan CJ and Dawson J).<sup>54</sup> Further, as between the Justices who held that it does, there was some difference in the way their reasons were expressed. McHugh J appeared to hold that an implied freedom of association existed as a free-standing implication arising for the same reasons as, but separately to, the IFPC,<sup>55</sup> while Toohey J and Gaudron J held that it existed as a corollary of, and ‘subsidiary to’, the IFPC.<sup>56</sup> It is worth noting that Toohey J and Gaudron J did not explain why the implied freedom of association was a mere corollary of the IFPC; however, as counsel for the plaintiffs put their case expressly on that basis,<sup>57</sup> one possible explanation is that their Honours simply accepted that argument. That inference is strengthened by the consideration that in

<sup>50</sup> Ibid 142–3 (citations omitted).

<sup>51</sup> Ibid 157.

<sup>52</sup> See above nn 46–50 and accompanying text.

<sup>53</sup> See above n 51 and accompanying text.

<sup>54</sup> See above nn 44–5 and accompanying text.

<sup>55</sup> See above n 50 and accompanying text.

<sup>56</sup> *Kruger* (n 28) 126 (Gaudron J). See also above nn 46–9 and accompanying text.

<sup>57</sup> The plaintiffs had argued: ‘There is a constitutional right to, and immunity from legislative and executive restrictions on, freedom of movement and association for political, cultural and familial purposes. ... [F]reedoms of movement and association are corollaries of implied constitutional freedom of political communication’: Ibid 10–11 (NHM Forsyth QC) (during argument).

ACTV, where Gaudron J first floated the idea of an implied freedom of association, her Honour appeared to regard the freedom as deriving from representative parliamentary democracy itself, rather than from any other implication in turn deriving from that system of government.<sup>58</sup>

It may be noted in passing that whether the implication is ‘free-standing’ or a ‘corollary’ of another implication is not merely an academic question. The distinction can have practical consequences. It may, for example, have an impact on the application of strict proportionality analysis to determine whether an impugned law impermissibly burdens the implied freedom. This analysis involves a comparison of ‘the positive effect of realising the law’s proper purpose with the negative effect of the limits on constitutional rights or freedoms.’<sup>59</sup> In order to weigh the negative effect or burden, it is necessary to identify precisely what right or freedom is being burdened. And where a law affects both political communication and association at once, but in unequal measure, the selection between them may yield two different answers to the question of the magnitude of the burden. But if one implication is seen as a mere corollary of the other, the result may be that no selection is to be made at all, and that the only issue for the Court is the extent of the burden on the ‘primary’ implied freedom.<sup>60</sup>

## B *Mulholland v Australian Electoral Commission*

The second case in which the Court examined the implied freedom of association was *Mulholland*, a challenge to electoral laws which provided that the name of a political party could not be printed on a ballot paper unless the party had 500 unique members. In that case, Gleeson CJ left open the question of whether the implication existed:

It is unnecessary to deal separately with what were said to be cognate implied freedoms of association and privacy of political association. Since the burden

<sup>58</sup> ACTV (n 1) 212.

<sup>59</sup> *McCloy v New South Wales* (2015) 257 CLR 178, 219 (French CJ, Kiefel, Bell and Keane JJ) (*McCloy*).

<sup>60</sup> See Murray Wesson, ‘*Tajjour v New South Wales*, Freedom of Association, and the High Court’s Uneven Embrace of Proportionality Review’ (2015) 40(1) *University of Western Australia Law Review* 102, 105; Anthony Gray, ‘Freedom of Association in the Australian Constitution and the Crime of Consorting’ (2013) 32(2) *University of Tasmania Law Review* 149, 159–60.

on freedom of political communication has been justified, the same would apply if and to the extent to which such other or different freedoms existed.<sup>61</sup>

McHugh J summarised and affirmed his earlier views (and those of Toohey J and Gaudron J) that the implied freedom of association existed, but held that it had not been breached in the present case.<sup>62</sup> Kirby J also accepted the existence of the implied freedom:

I am also prepared to accept, as the appellant argued, that there is implied in ss 7 and 24 of the *Constitution* a freedom of association and a freedom to participate in federal elections extending to the formation of political parties, community debate about their policies and programmes, the selection of party candidates and the substantially uncontrolled right of association enjoyed by electors to associate with political parties and to communicate about such matters with other electors.

...

In so far as the Full Court expressed doubts about the existence of a freedom of association for such purposes, implied in the text of the *Constitution*, I consider that their Honours were unduly cautious. The logic of this Court's decision upholding freedom of political communication obliges acceptance of protected political association, at least to some extent, so that the constitutional system of representative democracy will be attained as envisaged by Ch I.<sup>63</sup>

Callinan J dismissed the implied freedom on the ground that it was not necessary:

The appellant put a submission that there were other constitutional implications upon which he could rely, of freedom of association in relation to federal elections 'and an associated freedom of political privacy relating thereto'. These too were said to be derivable from ss 7 and 24 of the *Constitution*, or from the implied constitutional freedom of communication itself, in short, again that there should be drawn an implication on and from another implication. The appellant argued that these were necessary precursors to, and inextricably linked with direct choice. Disclosure, it was argued, of the names of members of the party, unreasonably interfered with or burdened these freedoms.

I would reject this submission also. It was not suggested by the appellant that the secret ballot was constitutionally protected, but yet he would have it

<sup>61</sup> *Mulholland* (n 28) 201 [42].

<sup>62</sup> *Ibid* 225 [114]–[115].

<sup>63</sup> *Ibid* 277–8 [284], [286] (citations omitted).

that secrecy of affiliation with a party should be, even in circumstances in which disclosure is only required in order to verify a qualification applicable to all parties ... Implications of the type suggested fall far short of being necessary.<sup>64</sup>

Lastly, Gummow and Hayne JJ, with whom Heydon J relevantly agreed,<sup>65</sup> rejected the notion of a ‘free-standing’ freedom of association:

[T]he same is to be said of the reliance upon a ‘right of association’. There is no such ‘free-standing’ right to be implied from the *Constitution*. A freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation* and considered in subsequent cases. But that gives the principle contended for by the appellant no additional life to that which it may have from a consideration later in these reasons of *Lange* and its application to the present case.<sup>66</sup>

It may be observed that once again, no explanation is given here as to why, if the implied freedom of association did exist, it would only be as a ‘corollary’ of the IFPC. The paragraph ended with a footnote containing pinpoint references to the relevant passages of the judgments of Brennan CJ, Dawson J, McHugh J and Gummow J respectively in *Kruger*.<sup>67</sup> With respect, however, those passages shed little light on why the freedom of association should be understood as giving ‘no additional life’ to the IFPC, because, it will be recalled, those four Justices reached very different — indeed, in the case of McHugh J and Gummow J, diametrically opposed — views.

In any event, a majority in *Mulholland* (Gummow and Hayne JJ, Callinan J and Heydon J) clearly rejected the existence of at least any ‘free-standing’ implied freedom of association.<sup>68</sup>

### C *Wainohu v New South Wales*

In *Wainohu*, a challenge to legislation designed to disrupt and restrict the activities of criminal organisations, the freedom of association question was dealt with more succinctly than in *Kruger* and *Mulholland*. Gummow, Hayne,

<sup>64</sup> Ibid 297 [334]–[335].

<sup>65</sup> Ibid 306 [364].

<sup>66</sup> Ibid 234 [148] (citations omitted).

<sup>67</sup> Ibid 234 n 163.

<sup>68</sup> Ibid 234 [148] (Gummow and Hayne JJ), 297 [335] (Callinan J), 306 [364] (Heydon J).



Crennan and Bell JJ (with whom French CJ and Kiefel J relevantly agreed),<sup>69</sup> affirmed the ‘corollary’ theory in the following terms:

The plaintiff also attacked the validity of the Act for exceeding the constraint upon State legislative power said to be derived from implications in the *Constitution* respecting political communication and freedom of association. Any freedom of association implied by the *Constitution* would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.<sup>70</sup>

That paragraph ended with a footnote referring to one authority: the paragraph of Gummow and Hayne JJ’s reasons in *Mulholland* extracted above.<sup>71</sup> Thus, a clear majority can be seen by this stage to have coalesced in support of the ‘corollary’ theory, though still without an explanation given as to why that theory was correct.

Heydon J rejected the freedom of association outright.<sup>72</sup>

#### D *Tajjour v New South Wales*

In *Tajjour*, the question of the existence of the implied freedom of association was subject to the most sustained argument it had ever received. The Court heard arguments both that there was a free-standing implied freedom of association arising by implication from the same provisions of the *Constitution* as the IFPC,<sup>73</sup> and that it was a mere corollary of the IFPC.<sup>74</sup> The latter view ultimately prevailed.

French CJ left open the question of whether there was a free-standing implied freedom of association, but noted that the Court had recently rejected such a concept, citing the consensus view in *Wainohu*, along with the divergent views in *Mulholland* and *Kruger*.<sup>75</sup> Hayne J also cited the passages from *Mulholland* and *Wainohu* for the proposition that the Court ‘has held, more than once, that no “free-standing” right of association is to be implied from

<sup>69</sup> *Wainohu* (n 43) 220 [72].

<sup>70</sup> *Ibid* 230 [112] (citations omitted).

<sup>71</sup> *Ibid* 230 n 224, citing *Mulholland* (n 28) 234 [148].

<sup>72</sup> *Wainohu* (n 43) 251 [186].

<sup>73</sup> *Tajjour* (n 4) 518 (BW Walker SC) (during argument).

<sup>74</sup> *Ibid* 522 (JG Renwick SC) (during argument).

<sup>75</sup> *Ibid* 553–4 [46], 554 n 239.

the *Constitution*, and added that '[t]hese conclusions should not be revisited'.<sup>76</sup> Crennan, Kiefel and Bell JJ did not consider the question at all.

Gageler J affirmed the consensus view in *Wainohu*, but added that to categorise the implied freedom of association as a corollary of the IFPC is not to diminish its vitality:

Very soon after *Lange*, Gaudron J observed:

[J]ust as communication would be impossible if 'each person was an island', so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others.

Statements in subsequent cases, to the effect that any freedom of association implied by the *Constitution* would exist only as a corollary of the freedom of communication formulated in *Lange*, should be read in light of that observed reality. They should not be read as suggesting that the constitutional protection of freedom of association for governmental or political purposes is in doubt. They should not be read as suggesting that it is secondary or derivative. Association for the purpose of engaging in communication on governmental or political matter is part and parcel of the protected freedom.<sup>77</sup>

Lastly, Keane J affirmed the consensus view in *Wainohu* in the following terms:

Mr Tajor and Mr Hawthorne argued that the freedom of association is an important element of democratic government and is more than a mere extension or 'corollary to the implied freedom of political communication'. To the extent that association may be, and often is, an aspect of political communication, this submission may be accepted. To the extent that it is contended that the *Constitution* guarantees a right of association free from legislative intervention separately from the implication to be derived from ss 7, 24, 64 and 128 of the *Constitution*, that contention is contrary to authority and should be rejected.<sup>78</sup>

His Honour proceeded to cite the relevant passages of *Mulholland* and *Wainohu* that support the consensus view.<sup>79</sup>

<sup>76</sup> Ibid 566–7 [95] (citations omitted), 566 n 277–8.

<sup>77</sup> Ibid 577–8 [142]–[143] (citations omitted).

<sup>78</sup> Ibid 605 [242].

<sup>79</sup> Ibid 605–6 [243]–[244].

The point of this examination of the freedom of association cases has been to demonstrate that, although there is now clearly binding authority to the effect that the implied freedom of association exists only as a corollary to the IFPC, for the most part, that conclusion has simply been declared and not explained.

The reasons of Gageler J and Keane J in *Tajjour* represent the exception, each of them offering the explanation that the result obtains because, as a matter of observed reality, association and political communication frequently overlap, with the freedom to politically communicate depending in large part on the freedom to associate. That would appear to be the strongest possible explanation for the ‘corollary’ theory, and it might be added that observed reality also teaches the converse to be true: that the act of associating with others will almost always involve communication (and, therefore, the potential for political communication). In essence, the explanation is that the implied freedom of association does not need its own implication because the conduct that it would protect is already sufficiently covered by the IFPC. Yet it may be said as an aside that to reason in this way is to unduly confer a pre-eminent status on communication at the expense of other potential fields of constitutionally protected conduct, like association.<sup>80</sup> This can create artificiality where the communication is purely incidental to the real purpose of the association, which is often to gain and wield political power, rather than to disseminate information. It may also be doubted whether it can fairly be concluded that all association is necessarily covered by communication. To the extent that it is not, the reason why it should not be protected remains to be articulated by the Court.

### E *Conclusion on the Freedom of Association*

The benefit of analysing this issue is that it can shed light on the question of whether further implications are likely, at least in the near future, to be treated as free-standing implications in their own right, or as mere corollaries of the IFPC. The cases just canvassed show that if a proposed constitutional implication from the system of representative democracy and responsible government for which the *Constitution* provides is one that would protect conduct which is inextricably communicative, it will likely be held to exist merely as a corollary of the IFPC. This then poses the question of whether there exists any

<sup>80</sup> See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 217–18.

implication that goes beyond what might be covered by the IFPC; that is, whether there exists an implication that rests on the same foundations as the IFPC but which does not involve communication. It is contended in Part IV that that question should be answered ‘Yes’.

#### IV THE IMPLIED FREEDOM OF POLITICAL OBSERVATION

##### A *The Argument*

In Parts II and III of this paper, I argued that the case for further implied freedoms from representative democracy can be made out where, but not exclusively where, the following two conditions are satisfied:

- 1 first, the proposed implication is essential to representative democracy — for example, because it is necessary to enable people to make a free and informed choice as electors; and
- 2 second, the activity covered by the proposed implied freedom falls, at least partially, outside the territory covered by the IFPC — a likelier result where the activity to be protected is non-communicative.

The thesis of this paper is that these two conditions are satisfied by an implied freedom of political observation.

To understand how an implied freedom of political observation would operate, it is necessary to consider in a concrete way how observation occurs. Not all aspects of observation are likely subjects of legislative activity. For instance, in order to observe something, you must have use of your senses: taste, sight, touch, smell, and sound. Yet the enactment of a law depriving you of any of these would be distinctly improbable, not to mention dystopian. This paper is not concerned with such remote possibilities, though an implied freedom of political observation would invalidate them.

However, there is another condition of observation that is a more likely target of legislative activity. That condition is freedom of movement; and in particular, movement to and from places where information that could affect a person’s choice in federal elections may be acquired. Freedom of movement in this sense is a corollary of, and is subsidiary to, the implied freedom of political observation. It is not a freedom deserving of protection in its own right. It is a distinctive conception, and needs to be distinguished from three other possible conceptions:

- 1 First, it is not freedom of movement at large, to go to any place for any purpose. No such freedom has yet been recognised as protected by the *Constitution*.

- 2 Second, it is distinct from the freedom of intercourse among the States guaranteed by s 92 of the *Constitution*, which protects only interstate movement.<sup>81</sup>
- 3 Third, for the reasons explained in Part III, it is distinct from freedom of movement for the purposes of receiving or making political communications. For example, going to a particular location for the purpose of staging an effective and visible protest,<sup>82</sup> visiting a public space for the purposes of disseminating flyers,<sup>83</sup> or going to a place (such as a clubhouse) for the purpose of associating with others<sup>84</sup> would not be forms of movement covered by the implied freedom of political observation, as the movement in such cases is sufficiently closely related to communication as to fall within the protection of the IFPC.

Distinct from these conceptions, movement for the purpose of forming one's own views about society occupies a unique territory that goes beyond the constitutional protections already recognised.

Movement in this sense is necessary to enable people to exercise a free and informed choice as electors. Not everyone forms their views through human interaction, that is, by communicating with others, nor do all people rely solely on communications received from the media or politicians. Some views are reached entirely autonomously. For example, you might form political views while visiting your local swimming pool, or community centre, or train station. In going to those places and wandering around, you might form a view that those public facilities constitute money well spent or money squandered, and accordingly form a view on the performance of your elected representatives. Or you might decide to visit Parliament to observe your local member in action, for example, to see how he or she votes. Or you might form a view by walking past your local member's electoral office on your daily commute, and by observing how often the member can be seen in the office, gain an impression on whether he or she makes time to speak to constituents.

The fact that you might equally be able to form such views by reading the paper or talking to friends is beside the point. When it comes to the formation of political views, there is nothing in the text or structure of the *Constitution* that provides a basis for placing a premium on communication as compared

<sup>81</sup> See generally *ibid* 318–21.

<sup>82</sup> See, eg, *Levy v Victoria* (1997) 189 CLR 579; *Brown v Tasmania* (2017) 349 ALR 398.

<sup>83</sup> See, eg, *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1.

<sup>84</sup> See, eg, *Tajjour* (n 4).

with other means of acquiring information. There is nothing constitutionally special or distinctive about communication. Its only claim to pre-eminence is that it was the first in time to receive curial recognition in the form of an implied freedom. Indeed it is distinctly odd, given the law's historical scepticism of hearsay evidence,<sup>85</sup> that second-hand information should receive better protection than first-hand information. And while misinformation is often propagated via the medium of communication, observation can provide the antidote: it is a way of 'getting at the truth'.

If the first-hand acquisition of information relevant to the exercise of electoral choice is the conduct that this implication would protect, what kind of laws would fall foul of such an implication? There are many possible examples, particularly of laws that restrict access to public places, some of which have precedent in Australia. These might include:

- 1 a law prohibiting access to a 'declared area' of a city without a permit;<sup>86</sup>
- 2 a law creating a 'congestion charge zone' in the CBD, entry into which is conditional upon payment of a fee;<sup>87</sup>
- 3 a law making it an offence for certain people — for instance, suspected terrorists — to be present within a specified distance of any 'crowded place';<sup>88</sup>
- 4 a law or executive policy effecting the relocation of a community of people — for instance, homeless people — away from a public place; or
- 5 a law restricting access to certain government facilities, such as jails or detention centres.

Putting to one side the desirability of having such laws, it is clear that their practical effect would be to diminish the ability of the people to whom the laws apply to personally inform themselves about aspects of public life. Some of those people may be content to gain that information via communication,

<sup>85</sup> See, eg, *Teper v The Queen* [1952] AC 480, 486 (Lord Normand for the Court).

<sup>86</sup> See, eg, *G20 (Safety and Security) Act 2013* (Qld) s 42 (no longer in force).

<sup>87</sup> See, eg, 'Congestion Charge Zone', *Transport for London* (Web Page, 2018) <<https://tfl.gov.uk/modes/driving/congestion-charge/congestion-charge-zone?intcmp=2055>>, archived at <<https://perma.cc/5YPF-HRH2>>.

<sup>88</sup> For an example of this definition having been adopted in Australia, see Australia-New Zealand Counter-Terrorism Committee, *Australia's Strategy for Protecting Crowded Places from Terrorism* (Report, 2017) 4 <<https://www.nationalsecurity.gov.au/Media-and-publications/Publications/Documents/Australias-Strategy-Protecting-Crowded-Places-Terrorism.pdf>>, archived at <<https://perma.cc/G95G-SLMP>>.

for example by reading the news, but others may not be. Inevitably, their choice at the next election will be less ‘free and informed’ than it would have been in the absence of the laws.<sup>89</sup>

If an implied freedom of political observation were to be recognised, it would not be an absolute freedom. Most likely, it would be subject to proportionate incursions in the same way as the IFPC. The reason for applying proportionality analysis to the implied freedom of political observation would be that it is conceptually similar to, and shares a common foundation with, the IFPC. Indeed the two freedoms would be juridically identical in every way except for the conduct which they protect. If proportionality analysis did apply, then restrictions on movement imposed as a bail condition or for security reasons, for instance, would likely be at least *prima facie* proportionate. But conversely, a law imposing a blanket prohibition on a particular group of people going to particular public places may not be.

Proportionality analysis would assist as well in analysing whether a law burdens movement at large or movement for political purposes. In IFPC jurisprudence, laws ‘whose character is that of a law with respect to the prohibition or restriction of [political] communications’<sup>90</sup> have been held to impose a direct and substantial burden on political communication and thus to require a more convincing justification, while laws of general application which incidentally restrict political communication have been held to impose a less direct and substantial burden, and therefore to require less in the way of justification.<sup>91</sup> Translated to the present context, a law which, for example, mandated that all road users hold a drivers’ licence would have only an incidental burden on the kind of freedom of movement necessary for political observation, and would likely be proportionate. But a law preventing access to large public areas by anyone lacking a permit would represent a significant burden on the freedom, and would likely be disproportionate. The burden would arguably be more direct and substantial still if its operation were confined to a single group of people whose views do not accord with those of the present government, as the law in that case would clearly be a law with respect to the prohibition or restriction of political observation.

<sup>89</sup> See *Lange* (n 5) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>90</sup> *ACTV* (n 1) 169 (Deane and Toohey JJ).

<sup>91</sup> *Ibid*; *Mulholland* (n 28) 200 [40] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506, 555–6 [95]–[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *McCloy* (n 59) 214 [70] (French CJ, Kiefel, Bell and Keane JJ). See also *APLA* (n 6) 359–62 [60]–[71] (McHugh J).

### B *Support in Authority and Commentary*

There is no direct authority for the kind of freedom of movement that is necessary to sustain an implied freedom of political observation as described above. However, there is support in authority for the recognition of analogous versions of an implied freedom of movement. Although arising in different contexts and often relying on different rationales, these authorities are nonetheless useful to show the extent to which some forms of freedom of movement have been recognised as implied in the *Constitution*, and to demonstrate the law's acceptance of the importance of such freedom to civic participation. In *R v Smithers; Ex parte Benson* ('*Smithers*'),<sup>92</sup> for instance, in striking down a New South Wales law preventing the influx of criminals from other states, Griffiths CJ adopted the language of Miller J in *Crandall v State of Nevada*,<sup>93</sup> who said of 'the citizen':

He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.<sup>94</sup>

Barton J agreed, and added the following:

The reasoning of the Supreme Court of the United States in the case of *Crandall v State of Nevada*, as expressed by Miller J, [a] portion of which, quoted by my learned brother, has been expressly adopted by the same Court in a later decision, is as cogent in relation to the *Constitution* of this Commonwealth, as it was when applied to the Constitution of the United States. The whole of that memorable judgment is instructive upon the rights of the citizens of a federation. The reasoning shows that the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen *the right of access to the institutions, and of due participation in the activities of the nation*.<sup>95</sup>

<sup>92</sup> (1912) 16 CLR 99 ('*Smithers*').

<sup>93</sup> 73 US (6 Wall) 35 (1868).

<sup>94</sup> *Ibid* 44, quoted in *Smithers* (n 92) 108.

<sup>95</sup> *Smithers* (n 92) 109–10 (emphasis added) (citations omitted).



*Crandall v State of Nevada* is authority for a broader version of the freedom of movement than is contended for here, and its underpinnings differ to those presently advanced. Yet the general proposition that freedom of movement is necessary for civic participation aligns with the proposition that it is necessary also for observation.

More than four decades after *Smithers* was decided, similar views were expressed by the High Court in *Pioneer Express Pty Ltd v Hotchkiss*.<sup>96</sup> The case was an appeal brought by a motor coach company and one of its drivers against a conviction under s 28(1) of the *State Transport (Co-ordination) Act 1931–1956* (NSW) for driving a public motor vehicle without a licence. Since the journey was an interstate one (from Sydney to Melbourne, via Canberra), a majority of the Court held that s 92 afforded the driver a complete defence to the charge.<sup>97</sup> However, they also considered an argument that the relevant provisions of the law were invalid because they were in contravention of a constitutionally implicit right of free movement of all persons to and from the seat of government, that being the Australian Capital Territory.<sup>98</sup>

While any consideration of the ‘access to seat of government’ argument was obiter given their Honours’ conclusion on s 92, it is worth noting that Dixon CJ and Taylor J were favourably disposed to it, while Menzies J took a neutral stance,<sup>99</sup> and McTiernan J rejected it.<sup>100</sup> Dixon CJ’s view was as follows:

A claim resting on a much more solid foundation was made for a constitutional implication protecting the citizens of Australia, or if one prefers to put it from the corresponding opposite point of view, protecting the Capital Territory, from attempts on the part of State legislatures to prevent or control access to the Capital Territory and communications and intercourse with it on the part of persons within the States, and to hamper or restrain the full use of the federal capital for the purposes for which it was called into existence. No one would wish to deny that the constitutional place of the Capital Territory in the federal system of government and the provision in the *Constitution* relating to it necessarily imply the most complete immunity from State interference with all that is

<sup>96</sup> (1958) 101 CLR 536.

<sup>97</sup> *Ibid* 550 (Dixon CJ), 551 (McTiernan J), 559 (Taylor J), 563 (Menzies J).

<sup>98</sup> *Ibid* 540 (CI Menhennitt QC) (during argument); see also at 541–2 (E Else-Mitchell QC) (during argument).

<sup>99</sup> *Ibid* 566.

<sup>100</sup> On the basis that ‘[i]t may be presumed that the *Constitution* does not intend to create by implication a guarantee similar to s 92 applying between the States on the one hand and the Territories on the other hand’: *ibid* 552.

involved in its existence as the centre of national government, and certainly that means an absence of State legislative power to forbid restrain or impede access to it.<sup>101</sup>

Similarly, Taylor J said that he had ‘no doubt that some such implication is clearly justifiable’.<sup>102</sup> Again, this authority shows the indispensable role that movement plays in civic participation: here, that participation consists of making ‘use of the federal capital’,<sup>103</sup> which would conceivably entail not only positive acts (such as interacting with the federal government) but also the making of observations.

Nor should the High Court’s general stance in relation to implications that have rights-protecting consequences stand in the way of the recognition of an implied freedom of political observation. That stance has in broad terms been characterised as opposed to the idea that there exists an implied bill of rights in the *Constitution*.<sup>104</sup> Put that way, such opposition is textually sound and historically mandated. As Mason CJ explained in *ACTV*:

The adoption by the framers of the *Constitution* of the principle of responsible government was perhaps the major reason for their disinclination to incorporate in the *Constitution* comprehensive guarantees of individual rights. They refused to adopt a counterpart to the Fourteenth Amendment to the Constitution of the United States. Sir Owen Dixon said:

[they] were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to control of the legislature itself.

...

In the light of this well recognized background, it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of

<sup>101</sup> Ibid 549–50.

<sup>102</sup> Ibid 560.

<sup>103</sup> Ibid 550 (Dixon CJ).

<sup>104</sup> See Hilary Charlesworth, ‘The Australian Reluctance about Rights’ (1993) 31(1) *Osgoode Law Journal* 195, 197–201.

citizens. That sentiment was one of the unexpressed assumptions on which the *Constitution* was drafted.<sup>105</sup>

However, as is evident from the result of *ACTV*, such reluctance does not mean that implications, even implications with rights-protecting consequences, will never be recognised judicially. Indeed, two pages earlier in his judgment in *ACTV*, Mason CJ cited another judgment of Dixon J for the proposition that '[w]e should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications.'<sup>106</sup>

How then are we to predict which implications will receive judicial favour? One indication is that implications will only be made if they are 'based on the actual terms of the *Constitution*, or on its structure.'<sup>107</sup> Another is that the 'only implications which may be drawn from the express terms of the *Constitution* are those which are necessary or obvious.'<sup>108</sup> A third (and with respect, compelling) indication was proposed by Stephen Gageler in his 2009 Sir Maurice Byers Address, 'Beyond the Text: A Vision of the Structure and Function of the Constitution'. In that address, Gageler proposed the following 'coherent conceptual explanation for the broad sweep of constitutional doctrine'<sup>109</sup> since the *Engineers Case*:<sup>110</sup>

You start with the notion that the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power. You see the judicial power as an extraordinary constitutional constraint operating within that system, not outside it. You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see

<sup>105</sup> *ACTV* (n 1) 135–6 (citations omitted).

<sup>106</sup> *Ibid* 134, citing *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85.

<sup>107</sup> *McGinty* (n 4) 168 (Brennan CJ).

<sup>108</sup> *Cunliffe v Commonwealth* (1994) 182 CLR 272, 362 (Dawson J).

<sup>109</sup> Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' in Nye Perram and Rachel Pepper (eds), *The Byers Lectures: 2000–2012* (Federation Press, 2012) 195, 211.

<sup>110</sup> *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers Case*').

judicial vigilance as appropriate where political accountability is either inherently weak or endangered.<sup>111</sup>

On this understanding, implications will more readily be accepted in contexts where political accountability is ill-suited to prevent abuses of power, and conversely, implications will more likely be eschewed where political accountability is effective. This is an approach that takes seriously the idea of popular sovereignty, a corollary of the system of responsible government provided for by the *Constitution*. It also echoes the central thesis of the 2016 Lucinda Lecture given by Justice Patrick Keane, ‘The People and the *Constitution*’, in which his Honour observed:

How the people of the Commonwealth and states should go about making their choice of Members of the House of Representatives and Senate respecting this was left to the Parliament to determine; but the seemingly modest provisions of ss 7 and 24 have been held by our judges to establish that the people of the Commonwealth are the sovereign power within the Commonwealth because of their enfranchisement by the *Constitution*.<sup>112</sup>

An implied freedom of political observation holds up in light of these broader considerations. It is ‘based on the actual terms of the *Constitution*, or on its structure,’<sup>113</sup> as it arises from precisely the same constitutional indicia as the IFPC. It is ‘necessary’ in the sense that without it, governments will have the ability to place any chosen group of electors in the dark on political issues simply by restricting where they can go and what they can see. And it is the kind of implication that calls for ‘judicial vigilance’, as political accountability can hardly be effective to remedy legislative or executive action that, of its nature, reduces that very political accountability.

## V COUNTERARGUMENTS

In Part IV, I offered a response to the potential objection that an implied freedom of political observation would be an unwarranted step towards an implied bill of rights, in defiance of the ‘studied absence’<sup>114</sup> of an express bill of rights in the *Constitution*. This Part offers a response to three further

<sup>111</sup> Ibid. See also *McCloy* (n 59) 227 [114]–[115] (Gageler J).

<sup>112</sup> Justice Patrick Keane, ‘The People and the *Constitution*’ (2016) 42(3) *Monash University Law Review* 529, 538.

<sup>113</sup> *McGinty* (n 4) 168 (Brennan CJ).

<sup>114</sup> See *McCloy* (n 59) 226 [110] (Gageler J).

potential counterarguments. The first is that it is artificial to suppose that people roam around the Commonwealth for the purposes of political observation. The second is that the IFPC is capable of expanding to include the kind of conduct proposed to be covered by the implied freedom of political observation. The third is that, as a matter of practical reality, it is difficult to conceive of a case where a challenge could be brought to a law on the basis of the implied freedom of political observation but not on the basis of the IFPC.

### *A Artificiality*

As to the first — the charge of artificiality — there can be no denying that the kind of political observation described above has a touch of romanticism to it. Many people will not identify with the hypothetical character that I posited earlier, a kind of political flâneur who wanders the city streets, musing on the times and the fate of our nation. There are three points to be made in response to this. The first point is that that character is a type, embodying in an idealised way the habits of inquiry and appraisal which I argue are peculiarly vulnerable to abrogation by government action. While few people will resemble the character in every possible respect, I suggest that a large number of people will at least partly do so. For instance, although it is of course common to form political views through the medium of communication, it cannot be denied that many of us will also form some kind of political view when we first walk over an impressive new bridge, or when we observe an increased number of police officers patrolling a formerly unsafe neighbourhood, or when there is an endemic shortage of parking at our local shops because no new lots have been constructed in years. Informing ourselves about politically relevant matters is something we do so often that we may sometimes not even be conscious that we are doing it.

The second point to make in response is that, in any proceeding brought in reliance on the implied freedom, the question of whether a plaintiff in fact intended to engage in political observation would ordinarily be a matter not for hypothetical speculation, but for evidence. In the ordinary course, the plaintiff will need to establish that his or her conduct was in fact carried out, at least in part, for the purpose of political observation. The requisite intention will need to be proved on the balance of probabilities, ordinarily by way of affidavit evidence and at risk of cross-examination. If the connection between a person's movement and the act of political observation is non-existent or only colourable, the result would ordinarily be that that person would lack standing to challenge the law restricting that movement. That requirement keeps the proposed implied freedom within modest bounds. The

freedom would not prima facie invalidate all laws having any effect whatsoever on movement of people or access to public places. Rather, it would only come to the fore where a person who in fact sought to inform themselves about politically relevant matters in a public place was denied that opportunity because of the operation of a law (or an executive or judicial act).

The third point is that the IFPC jurisprudence shows that even if the burden on the freedom in a particular case is only very slight, this has nonetheless been held to warrant judicial intervention. In *Monis v The Queen*,<sup>115</sup> for instance, Hayne J explained why the submission that some laws place such a 'little' or 'slight' burden on the IFPC as to not 'effectively burden' it at all should be rejected. His Honour explained:

By these submissions the first respondent and the interveners sought to reset the boundaries to some quantitative measure. By this means the constitutional freedom would be subordinated to small and creeping legislative intrusions until some point where it could be said that there are so few avenues of communication left that the last and incremental burden is no longer to be called a 'little' burden. This is not and cannot be right.

...

... Adoption of some quantitative test inevitably leads to reference to the 'mainstream' of political discourse. This in turn rapidly merges into, and becomes indistinguishable from, the identification of what is an 'orthodox' view held by the 'right-thinking' members of society. And if the quantity or even permitted nature of political discourse is identified by reference to what most, or most 'right-thinking' members of society would consider appropriate, the voice of the minority will soon be stilled. This is not and cannot be right.<sup>116</sup>

By parity of reasoning, the fact that, for many people, the kind of political observation described above may be an uncommon way to form political views, perhaps even an exceptional one, is no reason to reject the need to protect it. And in any event, it cannot be assumed that there is anything uncommon or exceptional about forming views in the way described in this paper.

<sup>115</sup> (2013) 249 CLR 92.

<sup>116</sup> *Ibid* 145–6 [120], [122].

### B *Expanding the Implied Freedom of Political Communication*

A second potential counterargument is that an implied freedom of political observation is unnecessary because the IFPC can simply expand to accommodate the kind of activity sought to be protected by it. However, to expand the IFPC in this way would be to distort the constitutional notion of ‘communication’ beyond recognition. It is true that the IFPC has been held to cover non-verbal kinds of communication. It has been said that it would be apt to protect the activities of those who burn political effigies,<sup>117</sup> raise a hand against advancing tanks,<sup>118</sup> wear symbols of dissent,<sup>119</sup> participate in a silent vigil,<sup>120</sup> turn away from a speaker,<sup>121</sup> boycott a big public event,<sup>122</sup> or make donations to political actors who will in turn communicate a message.<sup>123</sup>

Yet even the most tangential of these conceptions of communication involve, without fail, the impartation of some message or information. To stretch the concept of ‘communication’ further so that it embraces solitary inquiry would be to rob it of actual meaning. When you sit on a public bench and silently observe the world around you, you are neither communicating nor being communicated to. And in any event, there is no good reason to expand the IFPC to cover such observation: if it were thought that the kind of activity covered by an implied freedom of political observation were worthy of protection by way of constitutional implication, then regardless of whether that protection is achieved by folding the new freedom into the IFPC, or by recognising the implied freedom of political observation in its own right, either way the scope of activity protected by the *Constitution* will be enlarged. It might as well be enlarged in a way that promotes, rather than dilutes, the terminological coherence that presently exists in the decided cases.

It must be accepted that there is an alternative way of conceptualising the interaction between the two freedoms. The IFPC and implied freedom of political observation could be understood as particular instances of a broader freedom (some ‘implied freedom of political information’), since the existence of each serves the purposes of preventing disproportionate burdens on the ability of electors to make a free and informed choice and preventing frustra-

<sup>117</sup> *Levy v Victoria* (1997) 189 CLR 579, 595 (Brennan CJ).

<sup>118</sup> *Ibid* 638 (Kirby J).

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530; *McCloy* (n 59).

tion of the constitutionally prescribed system of representative and responsible government. While it is unnecessary to go this far for the purposes of the present argument, the possibility should not go unnoticed.

### C A Suitable Vehicle

The third potential counterargument concerns the way in which, practically speaking, a case raising the implied freedom of political observation might in fact come before the High Court. The essence of the counterargument is that where a law restricts movement to a place, it will invariably not only burden the implied freedom of political observation, but will also burden the IFPC, such that it is difficult to conceive of a case where a Court would need to have resort to, and therefore to recognise, the former freedom. For instance, suppose a law were passed blocking all public access to a national forest, pending construction of a controversial dam within the forest. That law would burden observation, as members of the public would be unable to enter the forest and observe the construction of the dam. However, it would also burden communication, as other members of the public — such as journalists — would equally be unable to enter the forest for communicative purposes, such as to obtain information about the construction of the dam in order to subsequently publish that information. In essence, the counterargument is that for any law that might be challenged by a hypothetical observer, there will typically also exist a hypothetical communicator who could bring a similar challenge, with the result that an implied freedom of political observation is, in practice, unnecessary.

However, merely because a law may burden both freedoms at once is not sufficient to make the freedom proposed in this paper unnecessary. That is because the law may burden the two freedoms in unequal measure. In the forest example, the Court might consider that the law burdens *observation* to a significant extent, because, for instance, the law prevents observation directly and, within its field of operation, absolutely. But it might consider that the law burdens *communication* only to a slight extent, because the law only affects communication indirectly, and because in any event, people would remain free to communicate about the dam generally, albeit without the aid of the first-hand account that would have been published by journalists had they been permitted entry. The significance of the possibility that the Court may hold that a law burdens the two freedoms in unequal measure lies in the circumstance that the extent of the burden is an important factor in strict proportionality analysis. As was explained by the majority in *McCloy*, ‘the greater the restriction on the freedom, the more important the public interest



purpose of the legislation must be for the law to be proportionate.<sup>124</sup> The result is that it is readily conceivable that where a law is simultaneously challenged on the basis of both freedoms, one challenge might succeed and one challenge might fail, by reason of the different answers given to the question of the extent of the burden.

## VI CONCLUSION

Parts II and III of this paper identified criteria for the recognition of further constitutional implications arising from representative democracy. It was argued that the cases suggest that new implications may still be endorsed where they are necessary for representative democracy, yet do not fall within the area of activity already protected by the IFPC. Part IV set out the version of the implied freedom of political observation that I argue representative democracy necessarily requires: a freedom to move to and from, and to access, public places where information that could affect a person's choice in federal elections may be acquired. It was argued that the implication is textually sound, democratically necessary, and apt to constrain legislative activity that is calculated to reduce political accountability. Lastly, Part V dealt with three potential counterarguments, suggesting, first, that although the type of activity sought to be protected here may seem rarefied, it is nonetheless a kind of activity that ordinary electors do commonly engage in; second, that to treat the implied freedom of political observation as a mere corollary of the IFPC would be to distort the concept of 'communication' beyond recognition; and third, that a suitable vehicle for the recognition of the implied freedom of political observation may be found where a law burdens communication and observation in unequal measure.

<sup>124</sup> *McCloy* (n 59) 219 (French CJ, Kiefel, Bell and Keane JJ).