

## Australia: Freedom of speech and insult in the High Court of Australia

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*Implied freedom of political communication—prohibition on the use of “threatening, abusive, or insulting words to any person” in or near a public place—interpretation—scope of implied freedom—deference to legislature—prohibition of incivility or intimidation as a legitimate legislative end*

In 2004, the High Court of Australia quashed the conviction of a demonstrator who had been prosecuted under Queensland state legislation<sup>1</sup> for using “threatening, abusive, or insulting words to any person” in or near a public place.<sup>2</sup> Patrick Coleman, a well-known political activist with a history of complaints against police, had been arrested while distributing pamphlets in a shopping mall in northern Queensland. The pamphlets contained allegations of corruption against several local police officers; when approached by one of those officers, Coleman pushed him<sup>3</sup> and shouted “This is Constable Brendan Power, a corrupt police officer.”

Coleman succeeded in challenging the Queensland law as inconsistent with the constitutional right of “freedom of political communication.” Three justices held that the law was valid, but the freedom at issue was such that the law had to be read so narrowly as not to apply to the facts of Coleman’s case (because he had no intention of provoking an unlawful physical reaction, and no such reaction was likely);<sup>4</sup> a fourth justice held that the law could not be read down<sup>5</sup> in this way and was, therefore,

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<sup>1</sup> Vagrants, Gaming and Other Offences Act, 1931, § 7(1)(d) (Qld.).

<sup>2</sup> *Coleman v. Power* (2004) 220 C.L.R. 1 [hereinafter *Coleman*].

<sup>3</sup> Coleman was also convicted of assaulting two police officers who were acting in the execution of their duties. His appeal against those convictions was dismissed by all members of the High Court except Justice McHugh, either because they regarded § 7(1)(d) as valid and applicable and, therefore, the conduct of the police officers in attempting to serve a notice on Coleman and arrest him for committing an offense under that section was lawful (*Coleman* at paras. 34, 303, 337) or (if § 7(1)(d) was valid but inapplicable) because the conduct of the police officers was reasonable (*id.* at paras. 203–205, 267). Justice McHugh disagreed because he alone regarded § 7(1)(d) as invalid (*id.* at paras. 128–144).

<sup>4</sup> Justices Gummow, Kirby, and Hayne.

<sup>5</sup> I.e., interpreted more narrowly to make it consistent with the Constitution.

invalid.<sup>6</sup> The three dissenting justices held that the law ought not be read narrowly but, nonetheless, validly applied to the facts of Coleman's case.<sup>7</sup>

The case is a rarity in Australian constitutional law. Because the Constitution contains no comprehensive statement of rights, Australian constitutional law is overwhelmingly concerned with the structure of the federal government and the division of powers between the Australian Commonwealth and the states.<sup>8</sup> The few rights recognized by the High Court of Australia have typically been given narrow interpretations.<sup>9</sup> That trend extends to the right of freedom of political communication, a limited kind of free speech right first recognized in 1992 as "implicitly" required by the system of representative and responsible government.<sup>10</sup> Although the early 1990s saw a number of decisions that protected speech in relatively expansive ways,<sup>11</sup> in 1997 the doctrine was revised, in response to criticism and growing doubts<sup>12</sup> about its more adventurous applications within the Court. In *Lange v. Australian Broadcasting Corporation*,<sup>13</sup> the Court affirmed the doctrine but emphasized the limits imposed on it by the Constitution's "text and structure."<sup>14</sup> Following *Lange*, no free speech challenge succeeded in the High Court of Australia until *Coleman v. Power*.

The Court's decision in *Coleman*, therefore, confirms the survival of the freedom of political communication. It also clarifies several aspects of the doctrine. The most significant feature of the case, however, lies in what it reveals about the Court's substantive conception of freedom of political expression. In quashing Coleman's conviction, the majority justices rejected arguments based on the legitimacy of the state's seeking to mandate civility in political communication. Although the majority justices treat their anti-civility stance as self-evident given the nature of Australian political debate or as dictated by earlier precedent, we will suggest that neither of these rationales suffices. On the contrary, we will argue that such a position is best justified by a substantive preference for a public debate that tolerates insult

<sup>6</sup>Justice McHugh.

<sup>7</sup>Chief Justice Gleeson and Justices Callinan and Heydon.

<sup>8</sup>See, e.g., Simon Evans, *Australia: Mandatory Administrative Detention*, 4 INT'L J. CONST. L. (I-CON) 517 (2006).

<sup>9</sup>See Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement* 27 SYD. L. REV. 29 (2005).

<sup>10</sup>*Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 C.L.R. 106.

<sup>11</sup>See, in particular, *Theophanous v. Herald & Weekly Times Ltd* (1994) 182 C.L.R. 104.

<sup>12</sup>*McGinty v. Western Australia* (1996) 186 C.L.R. 140, 232–235 (McHugh J.); 291 (Gummow J).

<sup>13</sup>(1997) 189 C.L.R. 520.

<sup>14</sup>For a critique, see Adrienne Stone, *The Limits of Constitutional Text and Structure*, 23 MELB. U. L. REV. 668 (1999).

(and perhaps other uncivil forms of expression). The need for such a justification, lying outside the text and structure of the Constitution, exposes the fragility of the consensus regarding the legitimacy of the implied freedom established in *Lange*.

## 1. Freedom of political communication in *Coleman*

The Court in *Coleman* divided four to three. For the majority, joint reasons were given by Justices William Gummow and Kenneth Hayne, while Justices Michael McHugh and Michael Kirby each wrote separately.<sup>15</sup> Chief Justice Murray Gleeson and Justices Ian Callinan and Dyson Heydon each delivering separate opinions.

The central conclusion in each of the majority judgments is that a law creating an offense for the use of insulting words in public must be limited to circumstances in which a violent response is either the intended or reasonably likely result.<sup>16</sup> That conclusion involved the rejection of three arguments, each represented by one of the dissenting justices.

### 1.1. Standards of review and levels of deference

The first point of disagreement, most clearly revealed in a comparison of Justice McHugh's majority judgment and Justice Callinan's dissenting judgment, relates to the level of deference accorded Parliament. Justice McHugh found the Queensland law invalid because it was not "reasonably appropriate and adapted for preventing breaches of the peace."<sup>17</sup> By contrast, Justice Callinan concluded that this law was a reasonable measure aimed at the prevention of a breach of the peace even without a requirement that violence be likely or intended. Justice Callinan was prepared to defer to Parliament's assessment that *all* uses of insulting words risk causing a violent response and, therefore, he did not require that such a risk be an element of an insulting-words offense.<sup>18</sup>

The nature of the disagreement between Justices McHugh and Callinan reveals much about the nature of the standard of review employed in

<sup>15</sup> Opinions are delivered seriatim in the High Court and decisions are commonly reached by plurality.

<sup>16</sup> *Coleman* at paras. 195–199, 254–256, 260. The case was complicated by a disagreement among the majority justices as to whether, as a matter of statutory construction, the law in question applied only where unlawful physical retaliation was either intended or reasonably likely. See Elisa Arcioni, *Developments In Free Speech Law In Australia: Coleman and Mulholland*, 33 FED. L. REV. 333 (2005). The disagreement can be put to one side, here, because all majority justices agreed that the freedom of political communication requires that a law prohibiting insult must be limited to such circumstances.

<sup>17</sup> *Coleman* at para. 102. See also *id.* at para. 237 (Kirby J.).

<sup>18</sup> *Id.* at paras. 296, 299. See also *id.* at para. 9 (Gleeson C.J.) and *cf.* para. 332 (Heydon J.).

applying the freedom of political communication, a matter with which the High Court has struggled since the inception of the doctrine.<sup>19</sup> In this case, Justice McHugh employed a slightly revised version of the standard of review established in the Court's unanimous opinion in *Lange*. In *Lange*, the Court held that a law burdening freedom of political communication must be "reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government."<sup>20</sup> In *Coleman*, the majority justices reformulated the test to make it clear that both the means used as well as the end pursued by the challenged law must be compatible with the system of government prescribed by the Constitution. The test is now:

[I]s the law reasonably appropriate and adapted<sup>21</sup> to serve a legitimate end . . . in a manner . . . which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?<sup>22</sup>

This reformulation was intended as response to the criticism that the *Lange* standard of review gave insufficient guidance to judges.<sup>23</sup> However, as the contrasting conclusions of Justices McHugh and Callinan demonstrate, the reformulation does little to address the problem. It was never seriously disputed that the earlier formulation contained a test of means as well as ends. The earlier criticism was concerned with the requirement that the freedom of political communication be compatible with "the constitutionally prescribed system of representative and responsible system of government"; it was asserted that this provided little guidance, since the concept of "representative and responsible government" was itself susceptible of multiple understandings.<sup>24</sup> To apply that concept to the means employed as well as the ends pursued results in a standard of review that remains flexible and open-ended. It has the advantages of

<sup>19</sup> See generally Stone, *supra* note 14.

<sup>20</sup> *Supra* note 13, at 567.

<sup>21</sup> Justice Kirby would prefer to use a test of "proportionality" because he regards the "appropriate and adapted" formula as "involv[ing] a ritual incantation, devoid of clear meaning": *Coleman* at paras. 234–236. In this context, however, "proportionality" appears to be functionally equivalent to "reasonably appropriate and adapted to": see *Lange*, *supra* note 13, at 567; *Mulholland v. AEC* (2004) 220 C.L.R. 181 at paras. 32–39.

<sup>22</sup> *Coleman* at para. 93 (McHugh J.); para. 196 (Gummow & Hayne JJ.); and paras. 234, 237 (Kirby J.).

<sup>23</sup> Justice McHugh frames this portion of his judgment (particularly *Coleman*, at paras. 83–85) as a response to Stone, *supra* note 14.

<sup>24</sup> See Stone, *supra* note 9.

flexibility but leaves much room for disagreement in its application to particular cases.

### 1.2. The place of civility in public discourse

The second point of disagreement, which is of principal interest, turns on the role of civility in public discourse. The majority found that a law restricting political communication that is aimed at promoting civility is not compatible with the constitutionally prescribed system of representative and responsible government and is thus precluded by the freedom of political communication. The dissents provide two variants of the contrary argument.

### 1.3. The prevention of intimidation

One form of the argument is found in the judgment of Chief Justice Gleeson. The chief justice upheld the law as a legitimate measure meant to prevent the intimidation or humiliation of the victims of insulting language. His concern was that insulting behavior might “seriously disturb public order, and affront community standards of tolerable behaviour” but, for reasons specific to the object of such behavior, be unlikely to produce a violent response.<sup>25</sup> He gives this example:

A mother who takes her children to play in a park might encounter threats, abuse or insults from some rowdy group. She may be quite unlikely to respond, physically or at all. She may be more likely simply to leave the park.<sup>26</sup>

Strikingly, the majority judgments come close to ignoring this argument entirely. Only Justice McHugh gives the matter any consideration, but he gives it such short shrift it is difficult to ascertain the source of his disagreement. While he accepts that the prevention of intimidation would be a legitimate end, he states, without further explanation, that an unqualified prohibition on the use of insulting words is not compatible with the implied freedom.<sup>27</sup>

### 1.4. The political value of civilized discourse

Although they ignore the chief justice’s argument, the majority justices deal with Justice Heydon’s dissent in some detail, and this exchange provides a much clearer indication of the majority’s position. Justice Heydon takes the statute as meant to promote civility. He regards that as a legitimate legislative goal, one that is compatible with maintaining the constitutionally

<sup>25</sup> *Coleman* at para. 9.

<sup>26</sup> *Coleman* at paras. 9, 32. *Cf. id.* at para. 296 (Callinan J.).

<sup>27</sup> *Id.* at paras. 104–105.

prescribed system of government because it will improve the quality of, and participation in, public debate:

In promoting civilised standards, [this law] not only improves the quality of communication on government and political matters . . . but it also increases the chance that those who might otherwise have been insulted, and those who might otherwise have heard the insults, will respond to the communications they have heard in a like manner and thereby enhance the quantity and quality of debate.<sup>28</sup>

The majority justices strongly disagreed. Justices McHugh and Kirby charged that Justice Heydon has misunderstood the nature of Australian political debate. As Justice Kirby put it:

[Justice Heydon's] chronicle appears more like a description of an intellectual salon where civility always (or usually) prevails. . . . Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion . . . the Constitution addresses the nation's representative government as it is practised.<sup>29</sup>

The other members of the majority, Justices Gummow and Hayne, held that the decision in *Lange*, which extended common law defenses to defamation to allow greater freedom to criticize public officials,<sup>30</sup> was determinative:

The very basis of the decision in *Lange* would require the conclusion that an end identified [as ensuring civility] could not satisfy the second of the tests articulated in *Lange*.<sup>31</sup>

## 2. The High Court's anticivility stance

In our view, the majority Justices were too quick to dismiss the intimidation and civility arguments put forth by Chief Justice Gleeson and Justice Heydon.

### 2.1 The intimidation justification

Given the brevity of the majority's treatment of Chief Justice Gleeson's intimidation argument, it is hardly necessary to demonstrate its inadequacy. It may be, however, that the majority justices intend their response to Justice Heydon also to provide an answer to the chief justice. If so, they have misunderstood Justice Heydon's position. He is concerned with the effect of

<sup>28</sup> *Id.* at para. 324. *See also id.* at para. 299 (Callinan J.).

<sup>29</sup> *Id.* at paras. 238–239. Some passages in Justice Kirby's judgment suggests that he regards civility as an end of little weight rather than one that is illegitimate: *see id.* at para. 237 (where he characterizes the legislation as "intolerably over-wide") and at para. 256; *cf.* para. 105 (McHugh J.)

<sup>30</sup> *Lange*, *supra* note 13, at 571–572.

<sup>31</sup> *Coleman* at para. 199.

insults on the quality of public debate and on participation in the debate. His position is founded on a belief that insults themselves degrade the quality public debate and that, further, they may incur the additional cost of discouraging participation.

Chief Justice Gleeson, on the other hand, is troubled, at least in part, by the effects of insult unrelated to public debate. His concern with a woman who feels compelled to leave a public place in response to insulting behavior is not framed as a harm to the quality of public debate or to the chances that such a woman (or anyone else) will be a participant in public debate. In focusing on the harm created by intimidation, the argument draws some strength from the insight of critical legal scholars who have identified the power of racist epithets (and other "hate speech") to intimidate in circumstances where there is no likelihood of a violent response. (Such scholars argue that, given the marginalized status of the victim, the very strength of the insult may be what makes a response less likely.)

Since hate-speech regulation is immensely controversial,<sup>32</sup> it would be possible for the majority to reject the chief justice's argument. They might, as an empirical matter, reject his characterization of the effect of insult. Alternatively, if they were to accept that an insult caused harm of this kind, they nonetheless might deny that it outweighs the interest in free political communication either generally, or in circumstances where the insult is not aimed at a group that, by reason of some shared characteristic, is particularly vulnerable to its pernicious effects.<sup>33</sup> The majority judgments, however, give no clues as to which of these positions they have taken.

## 2.2. Civility and the quality of public debate

The majority treatment of Justice Heydon's civility argument, though somewhat more detailed, is also inadequate. First, consider Justice Gummow and Justice Hayne's reliance on the extension of defenses to the charge of defamation found in *Lange*. The law of defamation can be understood as enforcing rules of civility,<sup>34</sup> and thus *Lange* can be taken to indicate a *circumstance* in which the rules of civility give way to freedom of public discourse. However, *Lange* does not, as Justices Gummow and Hayne seem to

<sup>32</sup> See, e.g., WOJCIECH SADURSKI, *FREEDOM OF SPEECH AND ITS LIMITS* 179–224 (Kluwer Academic Press 2001); MARI J. MATSUDA ET. AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTATIVE SPEECH AND THE FIRST AMENDMENT* (Westview Press 1993); JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* (Westview Press 1999).

<sup>33</sup> It is notable that the chief justice has made an argument about the power of speech to intimidate in a context that is not limited to insults aimed at historically disadvantaged or vulnerable groups.

<sup>34</sup> See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* 74 CAL. L. REV. 691 (1986).

suggest, require that the interest in civility should *always* give way to the interest in political communication.

The *Lange* defense is limited to circumstances where the defendant acted reasonably, a requirement “which goes beyond mere honesty.”<sup>35</sup> In addition, the expression that *Lange* protects is defined both by the damaging nature of its content (defamatory and false) and by the reasonableness of the speaker’s conduct. Insults differ in both respects. On the one hand, they are not necessarily false and may inflict no harm on the reputation of the speaker (though they may inflict other kinds of harm). On the other hand, insults—at least those that are covered by the challenged law—are, by their nature, deliberately offensive,<sup>36</sup> making the conduct of the speaker harder to justify. If *Lange* is to govern the facts at issue here, we need an argument as to why a similar balance between freedom of political communication and civility should be struck when the offending speech is insulting rather than false and defamatory.

### 2.3. Anticivility: “representative government as it is practiced”

The second line of argument made in response to Justice Heydon proceeds from the presumed prevalence of insult in Australian public debate. While it is difficult to deny the truth of their assessment, Justices McHugh and Kirby, who rely on the point, do not explain its significance. To accept that Australian public debate already includes a “fair measure” of insult does not establish that legislatures may not validly seek to “improve” public debate by regulating insult.

To justify their reliance on the nature of Australian public debate, Justices McHugh and Kirby also need to explain why the implied freedom of political communication draws part of its content from existing political and legal practices. Such an argument might be made on institutional and prudential grounds. Given that the implied freedom of political communication was recognized only in 1992 and lacks an explicit textual foundation, it might be argued that deference to existing laws and practices would preserve its legitimacy. Alternatively, a similar argument could be made on the grounds that interpretive principle requires that constitutional concepts be given meaning by reference to established practices. Or existing practices might be given normative weight, perhaps on the basis that the principles that determine the content of the implied freedom derive from uniquely Australian political traditions and practices rather than from overseas practices or from abstract principle or reason.<sup>37</sup>

<sup>35</sup> *Lange*, *supra* note 13, at 572–573.

<sup>36</sup> The formulations used by the various members of the Court varied but an element of deliberate offense appears to be common to all: *Coleman* at paras. 15–17, 64, 183, 226, 286–287, 314.

<sup>37</sup> *Cf.* *Washington v. Glucksberg*, 521 U.S. 702, at 720–721 (1997).

These do not seem to be likely explanations. The arguments assume the need to limit judicial discretion and thus run directly counter to the assertion in *Lange*—to which both justices were a party—that the Constitution's text and structure determine the content of the freedom of political communication. Further, the Burkean flavor of the third argument would be especially problematic for Justice Kirby, who would interpret the Constitution to conform to international human rights principles that derive from inherent human dignity.<sup>38</sup>

The most fundamental problem, however, arises from the nature of established political and legal practices. Arguments from established practice are of little help where laws and practices point in different directions.<sup>39</sup> In this case, the long history of political insult, to which Justices McHugh and Kirby refer, exists alongside a long history of regulation of insulting behavior,<sup>40</sup> making it necessary to explain why one rather than the other had priority in determining the content of the implied freedom.

### 3. The Missing Argument

A more promising path for the majority—though it is one that they seem unlikely to take at present—would be to present a substantive justification of their anticivility stance.

Such a stance might reflect an assessment that procivility laws are dangerous because they risk government misjudgment or misuse; that it is, therefore, better to allow some insults than to risk the possible distortion caused by procivility regulation.<sup>41</sup> In particular, it might reflect an assessment that procivility regulation risks excluding members of marginalized groups from participating in the democratic system of government required by the Constitution. Civility is an inherently conservative standard. It reflects established social practices. It may, as a result, allow for class-, gender-, and race-based discrimination by in-groups in deciding who could appropriately participate in public life and in what ways.<sup>42</sup> While there may be “almost infinite methods of conveying ideas, information and

<sup>38</sup> *Coleman* at para. 244.

<sup>39</sup> Thus Justice Heydon relies on established practice in dissent to *support* the challenged law. He observes that the law regulating insulting words “operates in an area in which discussion has traditionally been curtailed in the public interest, or as part of the general law”: *Coleman* at para. 327.

<sup>40</sup> Roger Douglas, *The Constitutional Freedom to Insult: The Insignificance of Coleman*, 16 PUB. L. REV. 23 (2005).

<sup>41</sup> WEINSTEIN, *supra* note 32.

<sup>42</sup> *E.g.*, at one time it enabled judgments that certain conduct in the public sphere was “ungentlemanly,” “unladylike,” or “uppity.”

arguments on government and political matters which are not insulting,”<sup>43</sup> those civil methods might not be available to particular speakers, and so to secure their participation in public debate may be sufficient reason to allow uncivil communication.<sup>44</sup> Alternatively, there might be value in the incivility itself. Incivility might be worth tolerating because by tolerating it we promote some desirable quality in the citizenry such as tolerance or “good character.”<sup>45</sup>

This leads us to a somewhat unexpected conclusion: the approach of the majority justices in *Coleman* shows some affinity with the law associated with the First Amendment to the United States Constitution.<sup>46</sup> Each of the arguments that might support their conclusions finds clear expression in First Amendment case law or in prominent justificatory accounts of the First Amendment. That is a surprising conclusion because, when placed in a comparative context, the First Amendment is widely considered to be an exceptional body of law.<sup>47</sup> No other constitutional system of freedom of expression confers so much protection on, or, to be more specific, shares the First Amendment’s commitment to protecting unpleasant, caustic, insulting, and vulgar forms of speech.

It is far too early to conclude that the Australian High Court is developing a body of law that strongly resembles that of the First Amendment. First, accepting that the interest in freedom of communication outweighs an interest in civility in this kind of case (where the law at issue is aimed at insults generally) does not indicate that no procivility arguments will succeed. Arguments from civility might be taken more seriously in circumstances where a stronger case can be made for the harmful effects of the speech.<sup>48</sup>

<sup>43</sup> *Coleman* at para. 330 (Heydon J.).

<sup>44</sup> However members of the High Court appear not to be receptive to arguments about the distribution of speech opportunities and, rather formally, insist that this stance is mandated by the fact that the implication is of a *freedom* from government regulation of speech rather than of a *right* to speak: see *Mulholland v. AEC*, *supra* note 22, at paras. 188–190, 337.

<sup>45</sup> See Lee Bollinger, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (Clarendon Press 1986); Vincent Blasi, *Free Speech and Good Character*, 46 *UCLA L. REV.* 1567 (1999).

<sup>46</sup> The influence of First Amendment thought is especially clear in the judgment of Justices Gummow and Hayne who cite *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), as indicative that certain, narrowly drawn categories of speech are unprotected by a principle of freedom of speech. *Coleman* at paras. 187–188.

<sup>47</sup> Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29 (Michael Ignatieff ed., Princeton Univ. Press 2005).

<sup>48</sup> Thus, we are not suggesting that *Coleman* indicates that the High Court of Australia will reject arguments for the regulation of other kinds of uncivil communication such as racist hate speech. On the contrary, the High Court has drawn the concept of political communication

In addition, there are many instances in which the Australian Court been less protective of expression than the First Amendment would require.<sup>49</sup> Nonetheless, in light of the Court's general reluctance to uphold claims based on freedom of political communication,<sup>50</sup> the High Court's intriguing invocation of an anticivility argument in *Coleman* thus suggests that Australian free speech law may yet develop in surprising ways.

*Coleman* also suggests another set of possibilities. The explanation we have advanced for the majority's anticivility stance brings to the surface what *Lange* attempted to suppress—that value judgments are intrinsic to the adjudication of cases involving the implied freedom.<sup>51</sup> It suggests that the Court should now move in one of two directions. Either it should openly embrace the need for those judgments (which would require it to begin the process of identifying and defending a substantive account of the place of freedom in political communication in the Australian polity) or it should retreat from such a freedom in its entirety, acceding to the criticism that the recognition of the implied freedom was, in the first place, an illegitimate invention.<sup>52</sup>

Currently, however, it seems likely that the Court will do neither. Those judges who were concerned about the High Court's early adventurousness<sup>53</sup> seem to have been reassured by the Court's emphasis on "text and structure" in *Lange*. Those who continued to harbor doubts<sup>54</sup> seem

narrowly, so that racial and other forms of vilification may often be excluded from constitutional protection altogether. See Dan Meagher, *What is 'Political Communication'?*, 28 MELB. U. L. REV. 438 (2004).

<sup>49</sup> For example, even before *Lange*, the Court was reluctant fully to embrace *New York Times v. Sullivan*, 376 U.S. 254 (1974), perhaps the canonical United States free speech decision. Even the invocation of the "fighting words" exception in *Chaplinsky*, *supra* note 47, in this case might be taken to demonstrate a greater willingness to uphold restrictions on freedom of speech. Though *Chaplinsky* has not been overruled, the U.S. Supreme Court has never since upheld a "fighting words" conviction. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, 968–969 (Aspen Law & Business 2002).

<sup>50</sup> For a review of some of the more striking cases, see Adrienne Stone, *Rights, Personal Rights and Freedoms* 25 MELB. U. L. REV. 374, 378–383 (2001).

<sup>51</sup> See Stone, *supra* note 14.

<sup>52</sup> *Australian Capital Television v. Commonwealth*, *supra* note 10, at 184 (Dawson J. dissenting); Jeffrey Goldsworthy, *Implications in Language, Law and the Constitution*, in *FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW*, 150–184 (Geoffrey Lindell ed., Federation Press 1994).

<sup>53</sup> See Stone, *supra* note 9.

<sup>54</sup> *Lenah Game Meats v. Australian Broadcasting Corporation* (2001) 208 C.L.R. 199, 337–348 (Callinan J.); Justice John D. Heydon, *Judicial Activism and the Death of the Rule of Law* 23 AUSTR. BAR REV. 110, 123–124 (2003).

grudgingly to have acquiesced to the authority of *Lange*.<sup>55</sup> The result, unfortunately, is that the Court occupies an uncomfortable middle ground. It continues to develop and apply the freedom of political communication while refusing to acknowledge the substantive judgments about freedom of expression on which its decisions depend. The effect of this approach is evident in the majority judgments in *Coleman*. Misplaced confidence in “text and structure” and in the determinative nature of precedent appears to have led the justices to overlook plausible arguments to the contrary and to treat as self-evident positions that are, in fact, contested. For the moment, then, we are left with the worst of both worlds.

<sup>55</sup> *Coleman* at paras. 289, 298, 301; cf. para. 33 (Gleeson C.J.).