Free Speech in Australia: A Comparative Perspective

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I

Now that the Australian High Court in two landmark cases[1] has recognised an implied constitutional right to freedom of expression, at least on matters of political and public affairs, Australian lawyers have an interest in how other jurisdictions have developed this right. In the political advertising case in particular, there are copious references to United States case law on the First Amendment, as well as to some relevant English and Canadian authorities.[2] Indeed, the ruling in that case indicates in some respects an American approach to freedom of expression in that the High Court invalidated legislation which was designed to promote the quality of electoral speech on the most important mass media. For one of the characteristics of the US free speech jurisprudence, explored in Parts 2 and 3 of this article, is a strong distrust of government action regulating speech, even when its intervention was intended to foster speech or to equalise opportunities for its dissemination.

It is perhaps natural for Australian lawyers to turn to the United States of America in this area. There are both negative and positive reasons for such recourse. Let me emphasise the latter. Without doubt the American jurisprudence on free speech is by far the most fertile from which to draw inspiration.[3] Since the 1920s the Supreme Court, and other (mostly) federal courts, have ruled on virtually every free speech issue that can be litigated. In many, perhaps most, respects the right to free speech is more fully protected under the First Amendment than under any comparable freedom of expression clause either in a national or under a supranational convention. In the era of the global village, exporting the First Amendment may well be the most significant contribution the United States makes to international legal culture towards the end of the twentieth century.

Nor are there many alternative sources from which to draw. In England until recently freedom of speech has been regarded as a residual liberty, existing only in the gaps left by the law of libel, breach of confidence, obscenity and

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1 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (hereinafter *Nationwide News*); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (hereinafter *Australian Capital Television*).

2 For example, Mason CJ refers in the *Nationwide News* case to two English cases, one Privy Council decision, five decisions of the European Court of Human Rights, seven rulings of the US Supreme Court and five decisions of the Supreme Court of Canada.

3 "American thinking on freedom of speech is relevant to the rest of the world because our experience in wrestling with free speech conflicts and communications policy is unusually rich. American society may not have the best answers, but it has thought about the problems more", Smolla, R A, *Free Speech in an Open Society* (1992) at 347.

so on. As a political value free speech considerations might have influenced legislative reform, but the freedom was not really part of the law itself. Although the Diceyan account was flawed in many respects,[4] it has remained broadly accurate until the last few years. The picture has now changed quite radically, largely owing to the growing influence of the European Convention on Human Rights and Fundamental Freedoms (ECHR). After the recent decision of the House of Lords in the *Derbyshire* libel case,[5] freedom of speech may be regarded as a principle of English law, that is, as a standard which the courts must take into account when developing the common law or in interpreting statutes.[6] But the English common law has yet to develop a free speech jurisprudence, just as the Australian courts have to work out what their new commitment to the freedom entails. Indeed, English lawyers and judges may also be tempted to import United States jurisprudence; to some extent this happened in the *Derbyshire* libel decision, which relied on two American cases, including the famous *New York Times* ruling requiring public officials to show actual malice if they are to recover libel damages.[7]

Other legal systems offer more, but are less approachable. There is a large body of German constitutional case-law on Article 5 of the Basic Law; I will refer later to some of its prominent features. They differ in significant respects from comparable aspects of United States jurisprudence. Recently, particularly in the context of press and broadcasting regulation, decisions of the French *Conseil constitutionnel* repay some attention. But for reasons of language and culture, continental European jurisprudence is unlikely to exercise much influence in Australia. These arguments do not apply to the same extent to Canada, where some impressive free speech decisions have been handed down both before and subsequent to the enactment of the Charter in 1982. However, some of the post-Charter rulings have themselves been influenced by United States precedents; Australian lawyers might therefore reasonably prefer to have recourse to the latter.

So it is natural for Australian, as it is for English, lawyers to give attention to United States jurisprudence. But they should at the same time ask themselves a number of difficult questions. Do the principal lines of that jurisprudence rest on cultural values, which are particular to American history? Or, to put it in a more modest way, does a commitment to free speech mean that Australian (or English) courts should follow US precedents — on the unexamined assumption that this is the best (or only) way to honour that commitment? Is there sometimes a good argument for examining other approaches, in particular those found in continental Europe?

These are the issues explored in this article. It is not suggested that United States free speech law is wholly misconceived. But it will be argued that, at least

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4 See the article by Boyle, A E, "Freedom of Expression as a Public Interest in English Law" (1982) *Public Law* 574.

5 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 held that a local authority cannot maintain an action in libel, as "such actions would place an undesirable fetter on freedom of speech", per Lord Keith at 549.

6 See Barendt, E, "Libel and Freedom of Speech in English Law" (1993) *Public Law* 449 for development of this argument.

7 376 US 254 (1964).

in some instances, the jurisprudence of other systems might also be considered. One preliminary point should be made at this juncture. There is no uniform approach to free speech issues in the United States itself. Indeed, the position is quite opposite. There is fierce debate on the question, for example, whether it is sometimes lawful under the First Amendment for government to intervene to promote free speech. But the general view on that question, as on many other issues in this area, is clear: that the First Amendment usually precludes such intervention. There is also a division of opinion on the constitutionality of "hate speech" or vilification laws of the kind recently introduced or proposed in Australian states.[8] But again the majority view, recently approved by the Supreme Court itself,[9] is relatively easy to state: such laws are illegitimate because they proscribe a particular type of speech on the basis of its contents.

There is, it may be said, a prevailing USA approach to many free speech questions, and it is this which is set out in the second part of this article. In the third section I will make some observations concerning the cultural values which seem to me to underlie American free speech jurisprudence. European free speech law on some points contrasts quite sharply with that jurisprudence, largely, it will be suggested, because the two systems are based on distinctive values; these differences are explored in the fourth section. The essay concludes with a short elaboration of these theoretical points in a critique of the Australian political advertising decision, which unlike the companion *Nationwide News* case raises hard free speech issues.

II

It is impossible in the course of a few pages to provide an exhaustive summary of United States free speech law. What can be given is a survey of some of the major characteristics of that jurisprudence as it has evolved over the last 30 years. These are primarily achievements of the liberal Warren Court, and have been largely unaffected by the Burger and Rehnquist courts. Others were more firmly established under Burger CJ, with reservations expressed by the surviving Warren liberals, notably Brennan and Marshall JJ. To some extent this account follows that of Cass Sunstein, a dissenter from the standard perspective of United States commentators; but I do not think his description of the trends, as distinct from his commentary on their wisdom, is particularly controversial.[10]

The first characteristic is the coverage by the First Amendment of types of speech which at one time were regarded as falling outside the principle altogether. (Speech which is "covered" falls within the First Amendment; it does not mean that on the facts of the case it is protected.)[11] In *Chaplinsky v New Hampshire* in 1942 the Court said:[12]

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8 For a brief summary of these laws and proposals for legislation, see Eastman, K, "Racial Vilification: the Australian Experience" in Coliver, S (ed), *Striking the Balance: Hate Speech, Freedom of Expression and Non-discrimination* (1992).

9 *RAV Petitioner v City of St Paul*, 112 S Ct 2538 (1992).

10 Sunstein, C R, "Free Speech Now" in Stone, G R, Epstein, R A and Sunstein, C R (eds), *The Bill of Rights in the Modern State* (1992) 255 at 259–260.

11 See Schauer, F, *Free Speech: A Philosophical Enquiry* (1982) at 89–92 for the coverage-protection distinction.

12 315 US 568 at 571–2 (1942). The unanimous judgment was given by Murphy J, one of the most liberal members of the Court.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Although the case has never been formally overruled, the quoted proposition is now very misleading. Libel is covered by the First Amendment, whether the plaintiff is a public official or figure or even a private individual.[13] (The implications of this point for Australia are clear in light of the recent references to the High Court concerning the impact of the implied free speech right for libel law.) The concept of "obscenity" has been redefined, so that it refers in effect only to hard-core pictorial pornography.[14] Emotive lewd epithets are also immune from legislative restriction.[15] Finally, the "fighting words" category, at issue in *Chaplinsky* itself, has been reduced to vanishing point: only inflammatory speech intended to bring about imminent violence falls wholly outside the First Amendment.

From the mid–1970s commercial speech has usually been treated as covered by the First Amendment, though restrictions on its dissemination are more likely to be upheld than they are in the case of political speech.[16] In other words, it is covered, but a substantial state interest, typically in consumer protection, will often justify a restriction on professional or commercial advertising.[17] The First Amendment has also been interpreted to cover instances of so-called "symbolic speech", for example, the wearing of arm-bands in protest against the Vietnam war[18] or flag-burning.[19] Admittedly, some types of "speech", in the dictionary sense of that word, remain wholly outside the Amendment. Perjury, blackmail and contractual misrepresentations do not raise constitutional arguments, but overall this class is much smaller than it used to be 30 years ago.

A second characteristic, in some ways associated with this development, is that the courts are particularly mistrustful of laws outlawing or restricting speech on the basis of its contents. This principle of content-neutrality explains the tolerance of "hate speech" or racialist propaganda, which is unique to the USA among western democracies. To allow a state or local community to proscribe, say, the marches of Nazi-type political parties is to accept that government may outlaw speech which it strongly dislikes.[20] The principle may also determine whether a "time, place and manner" regulation is acceptable. A

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13 The leading decisions are *New York Times v Sullivan* 376 US 254 (1964) and *Gertz v Robert Welch* 418 US 323 (1974). The latter decision constitutionalised the whole law of libel, even where the plaintiff is a private citizen.

14 See *Roth v United States* 354 US 476 (1957) and *Miller v California* 413 US 15 (1973).

15 See *Cohen v California* 403 US 15 (1971), holding the expression "Fuck the Draft" protected.

16 The leading case extending coverage is *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748 (1976).

17 See, eg, *Zauderer v Office of Disciplinary Counsel* 471 US 626 (1985), upholding disclosure requirements to protect the public.

18 *Tinker v Des Moines School District* 393 US 503 (1974).

19 See *Texas v Johnson* 491 US 397 (1989); *United States v Eichman* 496 US 310 (1990).

20 See the decision of the Court of Appeals for the Seventh Circuit in the famous *Skokie* case, *Collin v Smith* 578 F2d 1197 (1978), where the Court refused to ban a Nazi march through a Jewish suburb.

community is free to ban all hoardings or leafleting on the grounds that they are unsightly or create litter; but it must not allow, say, charities to advertise in this way, while it proscribes political or commercial displays or leafleting.

This principle looks benign, but it has sometimes been applied to outlaw what might be regarded as a sensible regulation. For example, a provision in the federal *Public Broadcasting Act* 1967 forbidding public broadcasters from editorialising was held contrary to the First Amendment as a contents-based restriction on their speech.[21] The Supreme Court has also sometimes been reluctant to countenance restrictions on the siting of sex shops, cinemas and comparable premises.[22] It is certainly right for constitutional courts to treat with great suspicion rules enabling government to choose which views may be expressed; it would clearly be wrong, for instance, to permit speech by Liberals or Republicans, but forbid that of members of the Labour or Democrat party. In comparison one might expect courts sometimes to be more tolerant of broad classifications with regard to the types of speech which are permitted or regulated. The US Supreme Court is, however, generally equally hostile to both kinds of rule.

The third principle is more controversial. United States courts are usually hostile to arguments that a commitment to freedom of speech entails recognition of equal rights to, or opportunities for access to, expression. Thus, they have rejected an access right to the broadcasting media,[23] a right to leave unstamped mail in letter-boxes,[24] and a right to put notices on local authority lamp-posts.[25] They are equally unsympathetic to legislative provisions intended to promote the opportunities of (minority) groups for speech, insofar as these rules would limit the freedom of those who currently enjoy such opportunities. This is illustrated first by *Miami Herald v Tornillo*,[26] holding unconstitutional a Florida statutory right of reply, on the ground that it infringed a newspaper editor's free speech and free press rights. Secondly, in *Buckley v Valeo* (cited with approval by Mason CJ and McHugh J in the political advertising case) the Supreme Court invalidated provisions of a federal statute limiting expenditure by and for political candidates, provisions which were designed to bring about greater fairness in the conduct of election campaigns.[27]

All these decisions can be defended with good arguments: the first three cases indicate that the First Amendment does not (usually) institute access or positive rights to free speech, beyond the cases of access to the traditional "public fora" (rights to protest on the streets and in parks) recognised by the courts. Moreover, the regulations in question were content-neutral, a feature which would certainly have disposed the Court in their favour. The explanation for the right of reply and campaign financing cases is that the Supreme Court

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21 *FCC v League of Women Voters of California* 468 US 384 (1984).

22 Thus in *Schad v Mount Ephraim Borough* 452 US 61 (1981) the Court struck down a community's total ban on places of live entertainment which included nude dancing, while it had earlier upheld a zoning ordinance regulating "adult theatres", *Young v American Mini Theatres* 427 US 50 (1976).

23 *CBS v Democratic National Committee* 412 US 94 (1973).

24 *US Postal Service v Council of Greenburgh Civic Association* 453 US 114 (1981).

25 *City Council for Los Angeles v Vincent* 104 S Ct 2118 (1984).

26 418 US 241 (1974).

27 424 US 1 (1976).

is extremely reluctant to uphold legislation promoting speech. Put briefly, the First Amendment is usually interpreted as hostile to government regulation. It is immaterial that the intervention was intended to increase the range of opinions circulating in society, or that its overall effects would probably be to produce a greater variety of available speech. In particular, it is irrelevant that the government acted to limit the effects of what it considers a harmful private concentration of power, for example, in the ownership of the press or broadcasting media. By and large the First Amendment confers a freedom against the government, not against private media oligopolies.[28] One doctrinal manifestation of this is, of course, the "state action" requirement, that is, that freedom of speech (and other freedoms in the Bill of Rights) are only at issue when there is some element of state (or public) action involved in the restriction. The doctrine would seem readily applicable in Australia, where the implied right to free speech is derived from the principles of representative government. (It has yet to be decided whether it can be invoked against state legislation or in areas of law, like libel and contempt of court, governed largely by the common law.)[29]

III

All these observations will be familiar to any student of the First Amendment. What has been less fully explored is how far these developments are explicable in terms of an understanding of free speech principles peculiar to the USA and rooted in its history and traditions. However, these themes have been touched on in recent United States commentary, partly of scholars concerned to defend its distinctive tradition, partly (and more substantially, it seems to me) by scholars uneasy with certain of its features.[30]

One major theme of American writing on free speech is that government cannot be trusted to determine truth or the limits of permissible political and social debate. Indeed, this has been regarded as a vital element in the justification for the free speech principle:

> Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.[31]

To be coherent, this rationale for freedom of speech must surely be linked to Mill's famous truth argument or to those arguments which base freedom of expression on the right of individuals to decide for themselves the good life.[32]

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28 One qualification to this position was approved in the *Red Lion* case (395 US 367 (1969)), upholding a right of reply to personal attacks on the broadcasting media.

29 See the doubts expressed by Brennan J in the *Nationwide News* case, above n1 at 52.

30 Examples of works sympathetic to the principal lines of development sketched in Part II are Powe, L A, *American Broadcasting and the First Amendment* (1987) and *The Fourth Estate and the Constitution* (1991) and Smolla, above n3. For articles critical of the American Tradition, see Fiss, O M, "Free Speech and Social Structure" (1986) 71 *Iowa LR* 1405 and "Why the State?", (1987) 100 *Harv LR* 781 and Sunstein, above n10.

31 Schauer above n11 at 86.

32 See the arguments, eg, of Scanlon, T M, "A Theory of Freedom of Expression" (1972) 1

We need only be particularly suspicious of government (or for that matter private) regulation of speech, if we have first shown that there is something special about speech, in comparison, say, with economic activity.

On the assumption that freedom of speech is worthy of special (constitutional) protection, it is important to ask whether restrictions on speech imposed by the state differ fundamentally from those imposed by private people and institutions. Charles Fried argues that they do, because the state controls or in some sense is the law; private restrictions in contrast are imposed by the private person's own exercise of liberty, a right to privacy or a property right.[33] On the other hand, the effects of private restrictions on speech may be just as significant as those imposed by the state. Consider, for example, the impact on political debate, if all newspapers and broadcasting companies were controlled by one or two magnates, sympathetic to right-wing political parties. Also imagine that this happened in a society which had no public broadcasting system and which, moreover, imposed no positive programme requirements on broadcasters, let alone the press, because they were regarded as content-based restrictions.

Another important aspect of the "distrust of government" perspective is the famous slippery slope argument. If government is allowed to outlaw an admittedly dangerous type of speech or something on the margins of "speech", for example, explicit pornography, then inevitably it will slide down the slope and start to ban some types of harmless speech. This argument has exercised an enormous influence on US free speech jurisprudence, dictating, for example, the narrow definition of "obscenity" which allows for the unhindered publication of much indecent and pretty revolting material. It also constitutes one of the most important arguments for the unique US tolerance of "hate speech": if legislatures or universities were allowed to ban racialist insults, they would next start to police the quality of political debate.

What is odd about this argument is that it reveals doubts about the capacity of the courts themselves to draw the right lines, as well as a mistrust of the legislature. Let us suppose that the Supreme Court upheld as constitutional a tightly-drawn vilification ordinance, criminalising insulting remarks or literature disseminated directly to members of the insulted group. That would only lead to a slide down the notorious slippery-slope, if first, a state legislature were to enact broader prohibitions and secondly, state courts failed to distinguish the constitutionality of this later legislation from that of the earlier narrowly drawn ordinance. Of course, until the correct decision (invalidating the second statute) was reached, some speech which ought to be permitted might be the subject of criminal proceedings and other prospective publishers might be deterred from speaking. Surely these temporary effects, however unattractive, do not provide a decisive argument against the drawing of lines between permissible and impermissible speech?

The American suspicion of government assumes more paranoid proportions when it is directed against legislative measures (actual or potential) designed to

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Phil & Public Affs 204, and of Fried, C, "The New First Amendment Jurisprudence: A Threat to Liberty", in Stone et al, above n10 at 232–3.

33 Fried, id at 236–7.

promote or enhance speech. Access rights to the media and political financing rules, for example, are suspect because government might police them in a discriminatory way. A government arbiter determining access to a public forum could not, it is claimed, be content-neutral.[34] There may be some warrant for this scepticism in recent United States history. Members of administrative agencies, such as the Federal Communications Commission, are appointed exclusively by the President, and have generally been chosen to implement his political ideology. There has been great controversy about the award of funds by the National Endowment for the Arts to support "indecent" art exhibitions; inevitably the allocation of limited resources in this context will create administrative and perhaps constitutional problems.[35]

But regulatory authorities for the press and broadcasting media, for the oversight of elections and for the allocation of government funds, should be independent of government. Indeed, the balanced composition of the bodies regulating public and private broadcasting is regarded in Germany as one of the principal attributes of the broadcasting freedom guaranteed in the Basic Law.[36] Positive rules to promote speech can be administered in a neutral manner and in a way which increases the range of opinions discussed in a particular society, with minimal risk of government control. There is in short a distinction between state control of speech, which is bad, and its regulation in some contexts by an independent public authority, which may be beneficial.

Another idea running through United States free speech theory is that truth should be determined in the "market-place". The idea goes back to Holmes J's famous judgment in *Abrams*: "the best test of truth is the power of the thought to get itself accepted in the competition of the market".[37] This remark really amounts to a denial of the notion of objective truth. The success of an idea in the market-place does not necessarily show its truth, but perhaps only its attractiveness. Notwithstanding its incoherence, this theory has exercised a significant influence on the development of free speech law, reinforcing the distrust of government, which, as already emphasised, is another peculiar feature of the US approach to freedom of speech. It has played a part in the extension of the First Amendment to cover much commercial speech, in the de-regulation of programme standards and the removal of broadcast advertising limits (even for a time for children's programmes), and in justifying the absence of restraints on the spending of political parties. In all these situations it is argued that individual choice in the free market provides the best control. For example, if advertisements flatter the services and products they promote or unregulated television offers poor quality programmes, a self-correcting market mechanism will operate.

To be fair, there are many critics of this ideology in the United States itself.[38] Equally it has some adherents in Europe, particularly in the United Kingdom. But I doubt whether it has exercised any great influence on free speech law outside the USA. Certainly Australian lawyers considering the import,

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34 Id at 251.

35 For a discussion of the controversy arising from the funding of exhibitions of Mapplethorpe's work, see Fiss, O M, "State Activism and State Censorship" (1991) 100 *Yale LJ* 2087.

36 See Barendt, E, *Broadcasting Law* (1993) at 41, 60–3.

37 250 US 616 at 630–1 (1919).

38 See especially Sunstein above n10 at 285–9.

whether selective or wholesale, of US free speech jurisprudence should reflect on the coherence of the market-place theory and examine its underlying assumptions. Among these is the belief that existing distributions in the market are broadly just and that it is right to protect them through the law, even to the extent of giving them constitutional guarantees. For example, the guarantee of a newspaper editor's or owner's free speech and press rights against claimed rights of reply and access would seem to rest on that assumption — although it is arguable that recognition of reply and access rights would increase the range of views available for public discussion. Another awkward question for proponents of the theory is whether in practice the self-correcting market mechanism works; for instance, in the absence of programme standards, do advertisers and viewers successfully press for better quality material on television?

Finally, these features of US free speech theory are obviously connected with United States history and politics. Americans have always been distrustful of government, an attitude rooted in the origins of the country, the gaining of its independence from a remote and ineffective British regime, and later the pioneering spirit of the nineteenth century. Equally, socialist and egalitarian political theory has exercised relatively little influence on American thinking about fundamental rights.

As far as freedom of speech and media freedom are concerned, a few points seem particularly striking. One is that the USA was geographically and psychologically far removed from experience of the totalitarian regimes in Europe of the late 1920s and 1930s. That was the time when the Supreme Court first began to take the free speech limb of the First Amendment seriously, applying it to strike down state legislation. It is perhaps not surprising that US politicians and courts have usually shown a greater tolerance of racialist and other extremist speech than their European contemporaries. In contrast, during the First World War and its immediate aftermath, and again during the early years of the Cold War, the courts were more hesitant to strike down restrictions on freedom of speech, particularly when they were incorporated in Acts of Congress. Secondly, in contrast to the position in Europe and Australia there was until recently no public broadcasting in the USA. Even now it plays a very minor role compared to the networks and private cable systems. As a result broadcasting regulation is more lax in the USA than in other countries, where the public service model has influenced to some extent the government of private radio and television. A third point is that the Presidential and gubernatorial system of government has probably contributed to the blurring of political and personal questions, and the constitutionalising of libel and privacy actions to the particular advantage of the institutional press.[39]

IV

Post-war European constitutions cover freedom of speech among the other fundamental rights guaranteed to individuals. One of the most important of

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39 See the article by Schauer, F, "Social Foundations of the Law of Defamation: A Comparative Analysis" (1980) 1 *J Media Law & Practice* 3, which draws a strong contrast between US and UK law in this context.

these constitutions has been the German Basic Law, originally drawn up for West Germany and now governing the united country. (The rich jurisprudence of the German Constitutional Court has recently attracted the attention of Anglo-American scholars.)[40] Article 5(1) provides that everyone has the right to disseminate his or her opinions and the right to receive information from generally accessible sources. Press and broadcasting freedom are guaranteed by the same Article, which also explicitly forbids censorship. These rights may be limited by general laws, by provisions to protect youth and by "the right to inviolability of personal honour".[41] Freedom of expression (*Meinungsfreiheit*) is interpreted by the German Constitutional Court in the context of the other rights guaranteed by the Basic Law. The most important of these is the inviolable dignity of man guaranteed by Article 1. This provision, one of the few which cannot be amended, states that "[t]he German people acknowledge inviolable and inalienable rights as the basis of" the community. What is most striking from the text of the Basic Law itself is its emphasis on freedom of expression and other basic rights as fundamental human rights, a perspective also evidenced by the Universal Declaration of Human Rights and by the European Convention, both legacies of the Second World War. The German Constitutional Court has similarly stressed the importance of free speech to the development of the human personality, as well as its essential contribution to the formation of public opinion on social and political issues.[42] On the other hand, it is hard to find either in the Court's jurisprudence or in academic writing any echo of the arguments frequently made in the United States to justify the free speech guarantee: the market-place of ideas rationale, and the distrust of government and the courts' ability to draw appropriate lines.

This perspective has important consequences. If freedom of speech is regarded as a fundamental human right, it becomes more difficult to justify the coverage of commercial speech and the extension of the principle to corporate speech, as has happened in the United States.[43] The German Constitutional Court has ruled a number of times on party and election financing laws, in particular on the constitutionality of provisions for tax deductions in respect of individual and corporate contributions. In none of these cases was Article 5 seriously put in issue. The Court has similarly been unwilling to extend it to cover commercial advertising. (The European Court of Human Rights has, however, held in a case brought from Germany that the provision of information by a veterinary surgeon is covered by Article 10 of the ECHR,[44] but refused to hold that it protected disparaging advertising of mail-order firms published in a trade magazine.)[45]

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40 In particular, see Kommers, D P, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) and "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany" (1980) 53 *South Calif LR* 657.

41 Article 5(2).

42 See the famous *Lüth* case, (1958) 7 BVerfGE 198 and (1980) 54 BVerfGE 12 at 136–7.

43 See Goerlich, H, "Fundamental Constitutional Rights: Content, Meaning and General Doctrines", in Karpen, U (ed), *The Constitution of the Federal Republic of Germany*, (1988) at 45, 56–7.

44 *Barthold v Germany* [1985] 7 EHRR 38.

45 *Markt Intern and Beerman v Germany* [1990] 12 EHRR 161.

Another feature, particularly evident in libel cases, is the Constitutional Court's insistence on the detailed balancing of relevant constitutional and other interests by the lower civil and administrative courts.[46] What concerns it is that proper consideration has been given to relevant constitutional values. That is a radically different approach from that of the US Supreme Court. In libel and other contexts that Court is more inclined to formulate general rules, which must then be observed by lower federal and state courts. The American commentator Melville Nimmer characterised this difference as that between ad hoc and definitional balancing.[47] In his view the latter had the advantages of greater predictability of decision and a wider scope for free speech. Under definitional balancing a rule is formulated to allow a margin of error in favour of speech: so the famous *New York Times* absolute malice rule allows some inaccurate defamatory allegations to be published, as that is preferable to a case-by-case weighing of speech and reputation interests, which would sometimes lead to liability for (and the chilling of) true speech.

Another example of the difference between the two jurisdictions is shown by their distinctive approaches to hate speech. Not surprisingly Germany has strict group libel and racial hatred laws. These limit freedom of expression; if challenged under Article 5, they would certainly be upheld as general laws which properly limit *Meinungsfreiheit* or as laws protecting personal honour. One crucial factor would be that any balancing of free speech against the general laws or against reputation rights would have to take account of the dignity of persons guaranteed by Article 1 of the Basic Law.[48] That is a more fundamental right even than freedom of speech, giving the balancing process a dimension entirely absent from United States argument in this context. It should be added that France, Britain and other European countries all have laws on their statute-book proscribing incitement to racial, and in some cases religious, hatred.[49] In contrast United States law, as already mentioned, uniquely sets its face against hate speech laws, largely because if they were countenanced there would (it is feared) be a slide down the slippery slope to the suppression of acceptable political speech. In this respect, Australian law probably has more in common with the European approach than that adopted in the USA.

A further characteristic of the continental European approach, again connected with the human rights perspective in German and ECHR law, is the doctrine of abuse of rights. In Germany this may lead to forfeiture of certain basic constitutional rights, including freedom of speech and freedom of the press, though only after a decision of the Constitutional Court.[50] Again, there is no equivalent provision in the US Constitution.

But of more interest than these differences, partly explicable in terms of the constitutional texts, the German Court (and some other continental jurisdictions) are much more willing than the United States Supreme Court to countenance

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46 For a brief discussion, see Barendt, E, *Freedom of Speech* (1987) at 150, 171–2, 184–7.

47 "The Right to Speak from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy", (1968) 56 *Calif LR* 935.

48 See the *Mephisto* case, (1971) 30 BVerfGE 173.

49 For a vigorous defence of the strong French laws in this area, see Errera, R, "In Defence of Civility: Racial Incitement and Group Libel in French Law", in Coliver, above n8 at 144.

50 Article 18 of the Basic Law, and see Art 17 of the ECHR.

legislation promoting freedom of speech. In other words, at least in some contexts, freedom of speech is not solely a negative freedom, guaranteed merely against interference by government. In its early decisions the Court took the view that the rights set out in the first Part of the Basic Law were primarily instituted to protect the citizen against the state. Later it formulated the doctrine that the provisions "establish a value order that represents a fundamental constitutional decision in all areas of law."[51] In the case from which this statement is taken the Court required state legislatures to reformulate their university admissions rules in the light of the constitutional right to choose an occupation, profession and place of training, and of the basic right of equality, guaranteed by Articles 1, 2 and 3 respectively.

The general principle formulated in the university admission case has had two consequences for freedom of speech law in Germany. One is that there is little difficulty in applying the freedom to purely private disputes; the law of libel and privacy, for example, must be developed in light of the freedom of expression guaranteed by Article 5, though account must also be taken by the ordinary civil courts of Article 2 (right to the development of the personality) and Article 1 (human dignity). Secondly, the Court requires the legislature to promote the values of freedom of speech in the way, for example, it frames broadcasting legislation. In that context freedom of expression is not merely a negative or defensive right. Thus, the Court requires both public and private broadcasting legislation to provide for supervisory authorities representative of all significant interest groups, and to lay down minimum programme standards in the interests of listeners and viewers.[52] In short, the law not only may, but must, promote freedom of expression. The Court tries to meet anxiety about the dangers of regulation and of administrative discretion by its insistence that the most important rules are set out in primary legislation.

This approach is shared in the broadcasting and press context by the French Constitutional Council and by the Italian Constitutional Court. The former has developed the constitutional principle of pluralism of voices in the media as an attribute of the freedom of speech guaranteed by Article 11 of the Declaration of the Rights of Man. Thus, press legislation should effectively prevent the development of concentrations of press power, though the Council probably weakened this principle when it invalidated retrospective application of the market share ceilings.[53] The principle was applied to broadcasting legislation in 1986, when the Council struck down the competition provisions of the Chirac Bill as inadequate to limit, for example, the growth of multi-media oligopolies.[54] So in France and other countries freedom of speech is not regarded purely as a limit on what government may do, but as a value which may require it to act to break up concentrations and to promote pluralism of voices.

The protection of freedom of speech in Britain is at the moment too rudimentary to give a clear indication of how far it shares the continental European

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51 *Numerus Clausus* case, (1972) 33 BVerfGE 303 at 330.

52 There have been six major decisions of the Court on broadcasting legislation: perhaps the most important rulings are the *First Television* case, (1961) 12 BVerfGE 205 and the *Fourth Television* case, (1986) 76 BVerfGE 118.

53 See Decision 84–181 of 11 October 1984 and Decision 86–210 of 29 July 1986.

54 Decision 86–217 of 18 September 1986.

perspective or whether it will have more in common with the US free market approach. Admittedly freedom of expression is sometimes recognised as a positive value; the Monopolies and Mergers Commission is, for example, required to consider the impact of a press merger on "the need for accurate presentation of news and free expression of opinion" when reporting whether it would operate against the public interest.[55] Further, the history of broadcasting regulation in the United Kingdom has much more in common with that in other European countries than it has with USA law. For obvious reasons Britain is generally as vulnerable as Australia to the wholesale import of American legal ideas; on the other hand its participation in the European Human Rights Convention makes it more probable that it will adopt a predominantly European approach to human rights law, including freedom of speech questions.

V

What might be the implications of this brief comparative survey for the Australian High Court's developing free speech jurisprudence? It should be emphasised that the very nature of the Australian implied right, derived from the Constitution's adherence to the principles of representative government, makes comparisons with United States or German free speech law difficult, perhaps even artificial. In the USA and Germany (and many other jurisdictions) freedom of speech is regarded as worthy of constitutional protection, because it contributes to the development of the human personality, as well as because it plays a significant role in safeguarding an effective democratic system of government.[56] A consequence of this broad underpinning is that in these jurisdictions the right may easily be extended to cover artistic and moral discourse, literature (including sexually explicit material), and at least in the United States commercial speech, including advertising.

At first glance, the Australian implied right seems apt only to cover that speech which is obviously pertinent to election campaigns or to the conduct of government. Thus, in the *Nationwide News* case, Brennan J, in the Court's most comprehensive judgment, refers to the "freedom of public discussion of political and economic matters", and to "the freedom to discuss governments and governmental institutions and political matters".[57] These formulations were clearly wide enough to cover the speech at issue in that case (a stinging attack on the integrity of the Australian Industrial Relations Commission) and in the companion political advertising case, advertisements on radio and television held to be wrongly proscribed by the political broadcasting legislation. It is far from clear, on the other hand, from Brennan J's definitions of its scope that the freedom would cover, say, commercial advertisements, pornography, the distribution of information about contraceptive and abortion assistance or many other types of speech which fall under the First Amendment.

The High Court will inevitably be called on to determine the scope of the implied right to free speech in the next few years. The first question to resolve,

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55 *Fair Trading Act* 1973, s59(3).
56 Above n46 at 31–4.
57 Above n1 at at 47, 51.

as already mentioned, will be how far, if at all, it covers defamatory attacks on politicians and public officials — an issue which the Supreme Court did not really confront until some 40 years or more after it first gave the First Amendment teeth at the end of the First World War. In my view it would be wrong for the Court not to extend the implied right to cover at least some types of libel and many of the other categories of expression which would certainly be regarded as covered in the USA or Germany: speech about religious and moral issues, artistic expression, including literature, drama and (some) sexually explicit material, and much information about, say, the availability and price of medical goods and services.

The experience of other countries shows that such developments are likely, albeit not inevitable. It is very difficult for courts to draw a bright line and to exclude altogether broad categories of what the dictionary terms "speech" from constitutional coverage — as the Supreme Court tried to do in the *Chaplinsky* ruling.[58] There are good reasons why attempts to draw such a line cannot be sustained. Arguments about the wisdom of proscribing, say, the dissemination of advice about abortion facilities or of blasphemous speech can easily become political, as they have recently been in Ireland[59] and in England respectively.[60] It would be hard for the electorate to make up its mind about the wisdom of such proscriptions, if it were denied access to the "offending" material in the first place. At all events, the US courts now refuse to draw a line at the points suggested in the *Chaplinsky* decision and (still) advocated by constitutional conservatives such as Robert Bork.[61] A sharp distinction cannot easily be drawn between, say, speech advocating the tolerance of obscenity and publication of the obscenity itself: both should be permitted, provided at any rate that the latter makes a minimal attempt to appeal to the intellect or aesthetic senses, rather than solely an appeal to prurient instincts. Advocacy of law reform in this area cannot be made properly without some dissemination of the material in question.

These practical points are reinforced in American jurisprudence by the hostility to contents-based distinctions referred to in Part II of this article. While some of its applications may be hard to support, the basic principle is sound. Constitutional courts should not allow Parliament (in effect the government) to discriminate between permitted respectable political discourse on the one hand, and forbidden types of communication — even indecent or pornographic speech — on the other. Arguably, the High Court of Australia has already implicitly rejected a distinction of this type in the political advertising case. While Brennan J in dissent was prepared to uphold the outlawing of paid political advertisements on the ground inter alia that they trivialise the democratic process,[62]

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58 See Part II of this article.

59 See the controversy and Referendum Campaign concerning abortion advice, discussed in *Open Door Counselling and Dublin Well Woman v Ireland* (1993) 15 EHRR 244.

60 The publication of *Satanic Verses* has not become a major national political issue, but the resulting unrest in the Muslim community has been an element in some local election campaigns and has led to the institution of a Muslim "Parliament".

61 See his classic article, "Neutral Principles and Some First Amendment Problems" (1971) 47 *Indiana LJ* 1.

62 (1992) 177 CLR 106 at 160.

the Court majority was presumably unimpressed by this argument. Only Mason CJ paid much explicit attention to it, arguing that

> [T]he Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the electoral process.[63]

Moreover, Deane and Toohey JJ pointed out in their joint majority judgment that commercial advertisements on radio and television were permitted. The political broadcasting legislation, therefore, imposed an atypical discriminatory ban on political election advertisements. The ban was very unusual in that political speech is usually more fully protected than commercial speech, in particular advertisements.[64] In these two respects, therefore, the political advertising shows a hostility to contents-based bans on speech, which would be familiar to any student of USA jurisprudence and which is surely right in principle.

Other aspects of the political advertising case show the influence of USA thinking on free speech. The majority of the Court as well as the two dissenters, Brennan and Dawson JJ, were sympathetic to some of the government's objectives in securing the enactment of the political broadcasting legislation: the prevention of corruption and of the undue influence potentially exercisable by richer parties and candidates through their ability to purchase more advertising time. But the majority found that the total ban on political advertisements, with provision for free election broadcasts for established parties and incumbent candidates (and other applicants at the discretion of the Tribunal), was too clumsy a method of achieving these aims. Contrary to the government's contentions, the scheme was poorly suited to bring about "a level playing field". Some of the judges, especially Mason CJ, Deane and Toohey JJ, indicated that more narrowly drawn regulations, perhaps limiting the advertising expenditure of parties and individual candidates, might have been upheld. This approach is in effect similar to the US doctrine that laws regulating speech (or "speech-related conduct")[65] can only be upheld when they are the "least restrictive means" to bring about the compelling or substantial public interest justifying the regulation. To put it another way, restrictions must be narrowly tailored to fit the legitimate end pursued by government; otherwise they will be regarded as disproportionate.

Another objection to the political broadcasting legislation, hinted at by McHugh J,[66] was that while it proscribed political advertising on radio and television, it left press advertising wholly unregulated. If the government had seriously intended to achieve "a level playing field" between rich and less well-off parties and candidates, it should have enacted comprehensive restrictions, limiting election expenditure on advertisements on hoardings and in the press and magazines, as well on the broadcast media. To employ another term familiar in US jurisprudence, the legislation was flawed because it was "under-inclusive";

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63 Id at 145.
64 Above n46 at 55–7, 61–2, 95–7.
65 See *US v O'Brien* 391 US 367 (1968).
66 (1992) 177 CLR 106 at 239.

it discriminated without apparent reason between various means of political advertising.

The most important feature of the legislation at issue in the political advertising case is that it was designed to promote the quality of political speech and debate at election time. Indeed, it is this aspect of the case which made it such a troublesome one to resolve. Although the scheme had imperfections, the Commonwealth Parliament's (and government's) intentions could be regarded as honourable. Moreover, it could be argued in its defence that the legislation did not restrict the content of the communications (the manifestos and messages of political parties), but rather their style and manner of presentation. (The *Political Broadcasts and Political Disclosures Act* 1991 in effect required parties and candidates to communicate by two minute broadcasts rather than by thirty second (or shorter) sound-bites.) A similar point incidentally was accepted by the House of Lords in the notorious broadcasting ban case, when it treated the outlawing of broadcast interviews with Northern Ireland terrorist sympathisers as a restraint on the manner by which their ideas were communicated rather than on their substance.[67]

These arguments were rejected by the Australian High Court. Following the US decision in *Buckley v Valeo*[68] it treated the legislation as tantamount to a ban on political communication, rather than a "manner and place" regulation. Apart from Brennan J in dissent, its members ignored the argument that the legislation was intended to promote electoral debate by ensuring that minority parties and candidates enjoyed some free-time access to radio and television. In its support for broadcast advertising and in its apparent indifference to the risk that rich parties will buy more advertising time, the High Court adopted an approach which seems remarkably similar to the free market perspective of the US Supreme Court.

VI

In a remarkable passage towards the end of his judgment, McHugh J indeed claimed that the USA Constitution provides a more appropriate analogy for Australia than the legal experience in (mainly) continental European countries on which the Commonwealth had relied.[69] It had argued that in these countries restrictions on political advertising have been imposed without successful challenge, despite the existence in their constitutions of clauses guaranteeing freedom of expression. McHugh J found this point unpersuasive because freedom of speech in those constitutions is a general right, subject to some permissible legislative restriction. In contrast, he appears to think that the First Amendment, like the Australian implied right, somehow necessarily curtailed "the legislative power of the central government to control elections".[70]

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67 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 per Lord Bridge at 749.

68 424 US 1 (1976).

69 (1992) 177 CLR 106 at 240–41.

70 Id at 241.

McHugh J's argument is wholly unconvincing. Like Article 5 of the German Basic Law and many other European provisions, the text of the First Amendment creates an explicit and general right to freedom of speech and the press, quite different from the Australian implied right derived, as it is, from principles underlying the Constitution. Admittedly, the First Amendment, unlike the German provision, does not allow for legislative qualifications to the right; but that is immaterial, for the Supreme Court has never regarded the freedom as absolute. In reality the US analogy is only particularly helpful to Australian (or English) lawyers when they choose to draw on it.

Lawyers contemplating the import of US free speech jurisprudence should remember that much of it rests on a distinctive set of controversial principles, in particular, the concept of the "market-place of ideas" and a deep distrust of government intervention, no matter how beneficent it may appear. An uncritical reliance on that jurisprudence would entail, for example, the invalidation of racial vilification laws and much media regulation, both of which would be upheld in most other countries. Moreover, the American "Free Speech Tradition", as it has been termed, is subject to vigorous criticism from within the USA itself.[71] Australian lawyers should always consider what the Supreme Court says about freedom of speech, but it would also be advisable for them to consider other approaches to an understanding of that freedom.

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71 The term was coined by Harry Kalven: see Fiss above n30.