

An Alternative Interpretation of Australia’s Implied Freedom of Expression— Through the Lens of Intrinsic and Instrumental Values

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Abstract

As a fundamental human right, freedom of expression is constitutionally protected in many jurisdictions with written constitutions due to its critical role in safeguarding individual dignity and self-realization, supporting representative democracy and the rule of law, and fostering diversity and tolerance. Even in authoritarian states where freedom of expression lacks practical protection, constitutions often still declare citizens’ rights to free speech. This study, utilizing a doctrinal legal research approach and a comparative legal analysis, finds that Australia stands as an “outlier” among Western democracies—Australia’ s federal constitution and its state and territory constitutions rarely recognize freedom of expression. Through examining this phenomenon through the philosophical lenses of intrinsic and instrumental value, this study suggests that the classification of free expression as merely an implied constitutional right in Australia stems from legislators and judges focusing primarily on its instrumental value, specifically its role in supporting representative democracy, rather than its intrinsic value as a natural right essential to self-fulfillment and individual autonomy. This limited perspective has ultimately contributed to the fragility of protections for freedom of expression within Australia’ s legal system.



Full Text Article



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Keywords: Freedom of Expression; Constitutional Rights; Intrinsic and Instrumental Values

Introduction

Written constitutions and bills of rights in democracies always safeguard freedom of expression as one of the fundamental freedoms of individuals or groups from repression or regulation by the state (Barendt, 2005). However, compared to Western democracies such as the United States and the European Union, freedom of expression is barely recognized in Australian law. This study analyses the reasons for this phenomenon from the perspective of the philosophical rationales of freedom of expression, arguing that, at least at the judicial level, Australia's recognition of the instrumental value of freedom of expression in protecting representative democracy only while ignoring its intrinsic value, led to fragile protections of freedom of expression in Australia. Freedom of expression in Australia is an implied constitutional right compared to other Western democracies with explicit constitutional protections. The High Court of Australia (hereafter HCA) relies on fundamental constitutional concepts such as representative government or representative democracy to support freedom of expression. The "implied constitutional right" has resulted in Australian law not recognizing freedom of expression as a "natural human right" but instead as a tool to ensure the effective functioning of representative democracy. Without representative democracy, freedom of expression has no judicial underpinning in Australia. The neglect of the intrinsic value of freedom of expression has resulted in inadequate legal protections and several coercive restrictions. The frequent renewal of judicial decisions and the conflicting opinions of judges have also led to a high degree of uncertainty as to the scope of the implied freedom of political communication. Thus, the underlying cause of freedom of expression is barely recognized in Australian law, and it is not that the law protects freedom of expression too little or restricts it too much. Instead, inadequate legal protection and coercive restrictions on freedom of expression are symptomatic of the fact that Australian legislators and the HCA, which has the role of judicial interpretation, have focused on the instrumental value of expression as a safeguard for democracy, to the detriment of the speech's intrinsic value. This study first uses doctrinal analysis to review the constitutional protections for freedom of expression in various jurisdictions. It then introduces the philosophical rationales for freedom of expression, dividing them into intrinsic and instrumental dimensions. In addition, this study analyzes how freedom of expression is protected in other democracies from a comparative law perspective and examines the unique approach to protecting freedom of expression under the Australian constitution. Finally, the study highlights the dilemma of inadequate legal protection and excessive coercive restrictions resulting from an Australian model of free speech protection that relies too heavily on the instrumental value of speech.

Literature Review

Fundamental Principles of Freedom of Expression and the Current Status of Positive Law from a Comparative Law Perspective

Freedom of expression is a fundamental prerequisite for exercising other rights, including voting, peaceful assembly, and freedom of association, and it plays a crucial role in safeguarding press freedom (Howie, 2018). Historically, the origins of freedom of expression can be traced back to parliamentary privilege, which protected legislators' expressions in parliamentary debates from prosecution. Over time, the abolition of prior censorship in

Britain extended these rights from an elite few to the general public, with the “Letters of Cato” further highlighting the importance of free speech within political processes. Additionally, theories of natural rights, the growth of religious tolerance, and the nature of federalism have also played a foundational role in establishing contemporary freedom of expression (Bogen, 1983). As immunity rules, freedom of expression includes three distinct dimensions: the specified categories of protection, the degree of protection (absolute or conditional), and the types of protected behaviors (Stevens, 1992).

At the international law level, freedom of expression is enshrined as a fundamental human right in Article 19 of the 1948 *Universal Declaration of Human Rights* (United Nations, 1948). Subsequently, Article 19, Section 2 of the 1966 *International Covenant on Civil and Political Rights* further affirmed the right to freedom of expression (United Nations, 1966). At the regional convention level, Article 13 of the *American Convention on Human Rights* outlines the forms and limitations of freedom of expression and the criteria for censorship and restrictions on such actions (Organization of American States, 1979). Article 10 of the *European Convention on Human Rights* divides the concept of freedom of expression into two dimensions: the freedom to hold opinions and the freedom to receive and impart information and ideas (European Union, 1950). Similarly, Article 9 of the *African Charter on Human and Peoples' Rights* also links the rights to receive, disseminate, and express information when defining freedom of expression (Organization of African Unity, 1981). At the level of specific international conventions, Article 5(d)(viii) of the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* does not explicitly address freedom of expression; however, it encompasses the "right to freely express opinions" within the context of ensuring equality, opposing discriminatory speech based on race, color, and other factors (United Nations, 1965). Additionally, Article 13 of the 1989 *Convention on the Rights of the Child* establishes children's right to freedom of expression (United Nations, 1989).

(Table 1)

Table 1. Key International Treaties Protecting Freedom of Expression

Year	Title	Type
1948	Universal Declaration of Human Rights	The Charter of the United Nations
1966	International Covenant on Civil and Political Rights	International Convention
1969	American Convention on Human Rights	International Convention
1950	European Convention on Human Rights	International Convention
1965	International Convention	International Convention

	on the Elimination of All Forms of Racial Discrimination
1989	Convention on the Rights International Convention of the Child

At the domestic law level, many jurisdictions recognize freedom of expression as a constitutional right. The United States, noted for its robust protection of free expression, explicitly prohibits the legislative deprivation of citizens' rights to free speech and press in the First Amendment to the United States Constitution (United States of America, 1791). Article 5 of the Basic Law for the Federal Republic of Germany guarantees the protection of freedom of expression (Germany, 1949). Section 2(b) of the Canadian Charter of Rights and Freedoms establishes freedom of expression as a fundamental freedom guaranteed to everyone (Canada, 1982). Additionally, the constitutions or constitutional documents of jurisdictions such as Japan (Japan, 1946), India (India, 1949), Brazil (Brazil, 1988), South Africa (South Africa, 1996), France (French, 1958), China (China, 1982), and Russia (Russian, 1993) as well as international organizations like the European Union explicitly provide for the protection of citizens' rights to freedom of expression (Table 2). Although freedom of expression in the UK is regarded as a residual liberty—existing only within the gaps of legal restrictions such as breach of confidence and obscenity—its status has evolved. Influenced by the *European Convention on Human Rights and Fundamental Freedoms* and the *Derbyshire County Council v Times Newspapers Ltd* (1993), freedom of expression can now be viewed as a foundational principle of English law, serving as a criterion that courts must consider when developing common law or interpreting statutes (Barendt, 1993). In contrast, freedom of expression in Australia is not explicitly stated in the Australian Constitution but is regarded as an implied constitutional right. Unlike the United States or Canada, which have a Bill of Rights or Charter of Rights and Freedoms that explicitly outlines this right, the High Court of Australia has affirmed in cases such as *Nationwide News Pty Ltd v Wills* (1992) and *Australian Capital Television Pty Ltd v Commonwealth* (1992) that this right is part of the implied protections within the Constitution.

Table 2. Key Countries and International Organizations with Constitutional or Constitutional document Protecting Freedom of Expression

Year	Title	Jurisdiction
1791	First Amendment to the United States Constitution	The U.S.
1949	Basic Law for the Federal Republic of Germany	Germany
1982	Canadian Charter of Canada	Canada

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Rights and Freedoms		
1946	The Constitution of Japan	Japan
1949	The Constitution of India	India
1988	Constitution of the Federative Republic of Brazil	Brazil
1996	The Constitution of the Republic of South Africa	South Africa
2000	Charter of Fundamental Rights of the European Union	European Union
1958	Constitution of the Fifth Republic	France
1982	Constitution of the People's Republic of China	China
1993	The Constitution of the Russian Federation	Russia

Philosophical rationales for freedom of expression: Intrinsic and instrumental values

The philosophical underpinnings of freedom of expression have profoundly influenced the legal protection of freedom of expression in various jurisdictions. Martin Redish argues that the rationales for freedom of expression are crucial since they determine the scope and what it protects. Philosophical rationales of freedom of speech provide the basis for determining whether kinds of expression, such as literature, art, science, commercial discourse, and political communications (Redish, 1982). Therefore, before analyzing the appropriateness of protecting freedom of expression under Australian law, it is necessary to explore the philosophical justifications for freedom of expression, i.e., why a country's constitution and laws should safeguard its citizens' freedom of expression. Campbell divided the fundamental theories of freedom of speech into three categories, namely the truth rationale, the democratic rationale, and the self-determination rationale (Campbell & Sadurski, 1994). The three rationales describe the value of freedom of expression in terms of its role in discovering the truth, guaranteeing democratic politics and self-fulfillment for citizens; this section splits the three rationales for freedom of expression into intrinsic and instrumental values and analyses the philosophical justification for each dimension.

The Intrinsic value of freedom of expression: Self-determination and individual autonomy

The Enlightenment opened the prelude to developing the contemporary theory of freedom of expression. The Enlightenment broke the fetish for information provided by traditional authorities, such as religion and kings. Enlightenment thinkers argued that people could use reason to discover knowledge independently; this ideological revolution was seen at the time as “the achievement by the self of its proper autonomy (Campbell & Sadurski, 1994).” Thus, a critical reason speech should be protected is that it enhances the individual’s autonomy. The primary point is that speech is an activity exclusive to humans. It is through the expression of our thoughts that we realize and express our humanity (MacIntyre, 1984). The capacity to connect our thoughts and experiences is asserted to be an inherent part of being human (Roderick et al., 2021). The theory of autonomy rationale emphasizes the intrinsic significance of speech. Freedom of expression is a fundamental human right. Even if the protection of freedom of expression does not further instrumental goals such as liberal democracy, accountable government, or the rule of law, it should nevertheless be protected on the grounds that it is a part of human nature and a fundamental human right.

In *Whitney v California* (1927), Brandeis J held that “those who won our independence believed the ultimate purpose of the United States was to liberate men so they might develop their faculties.” This illustrates that freedom of expression is protected by law in the United States partly because it promotes the free development and self-fulfillment of the human person. Meanwhile, Scanlon argues that if individuals are to be treated as “equal, autonomous, rational actors,” the authority cannot restrict speech only on the grounds that it may induce its audience to develop harmful beliefs or engage in harmful actions (Barendt, 2005). Because humans are rational, it is logical to assume that their statements are also rational; audiences will judge the truthfulness of what they hear based on their rationality and decide whether or not to believe it. Although Scanlon’s views may be too idealistic to deal with the complexities of the current situation where the mass media use their distorted influence to manipulate and control public opinion (Sparks, 2005), this view at least demonstrates that freedom of expression should not be restricted for paternalistic reasons inconsistent with respect for individual autonomy. In short, based on the intrinsic value of speech, any restriction on freedom of expression inhibits self-fulfillment and individual autonomy. Freedom of expression is not only of instrumental value for achieving external ends but also a fundamental human right grounded in the demands for dignity, equality, and respect.

The Instrumental value of freedom of expression: Discovering the truth and safeguarding democracy

The instrumental value of speech is also its external value, which refers to disregarding its intrinsic value, what we anticipate speech to bring us. First, speech is considered to be of great value in discovering truth. Sharon Rodrick contends that freedom of expression should be safeguarded since the truth can only be discovered in all places where ideas circulate freely. If the dissemination of ideas is restricted, falsehood may replace the truth (Roderick et al., 2021); this underlines the significance of an open and free-speech environment for people to discover

the truth. Milton believes that a free press is essential for spreading ideas and that the truth will always prevail regardless of what other views are disseminated (Milton, 1904). In *Abrams v United States* (1919), Holmes J's argument is a vital judicial exposition of the truth rationale for freedom of expression. He held that "the best test of truth is the potential of an idea to gain self-acceptance in a competitive market." Therefore, to defend freedom of expression is to provide a safe and fair environment for the discovery of truth, where no supreme power beyond the average individual monopolizes the right to speak and where every individual can express his or her views equally. Many opinions compete fairly in an environment similar to a market economy, and each individual uses their rationality to accept opinions, which is the process of discovering the truth.

Furthermore, freedom of speech is of great significance in safeguarding a liberal democracy, which is also the most prominent manifestation of the instrumental value of free speech. Historically, freedom of expression has posed a grave threat to the authority of authoritarian regimes; hence, authoritarian leaders tend to suppress freedom of expression. In a sense, the struggle for freedom of expression is a battle between democracy and dictatorship. Thus, protecting freedom of expression has always been a core tenet of democratic politics. The instrumental value of freedom of expression for liberal democracy is manifested on two specific levels: one view is that the content of speech is information, and access to information enables citizens to examine the functioning and outcomes of the democratic process more thoroughly, so improving citizens' capacity for decision-making and enhancing the quality of democracy (Campbell & Sadurski, 1994); another view is that the content of speech is a normative or political opinion and that more speech would offer a broader range of political views and moral options (Roderick et al., 2021). It is worth noting that the democratic rationale for freedom of expression occupies a vitally important place in the Australian Constitution. It is a central doctrinal underpinning for the High Court of Australia's recognition of freedom of expression in Australia as only an implied constitutional right. However, the democratic rationale has also led to the fragility of protecting freedom of expression in Australian law. This view will be discussed in more detail below.

In summary, speech has both intrinsic and instrumental value. The intrinsic value of speech is mainly in helping people to self-determine and achieve individual autonomy. The intrinsic value of speech is closely related to our humanity. The extrinsic value of speech is mainly in its role in discovering truth and safeguarding liberal democratic democracy. Intrinsic and instrumental values are not in conflict and are of equal importance.

Methodology

This study employs a doctrinal legal research approach (Christiani, 2016), emphasizing conceptual legal analysis. This methodology involves a thorough investigation of primary and secondary legal sources. The primary sources include the Constitution, case law from various jurisdictions, and international conventions concerning freedom of expression. The author first retrieved primary legal sources. The Constitutions were obtained from official government websites of selected jurisdictions. International treaties related to freedom of expression mainly come from the official websites of the United Nations and other

international organizations. The judicial precedents mainly come from the Westlaw legal research platform. In addition, the secondary sources encompass peer-reviewed legal journal articles and law reviews, which are mainly obtained from Google Scholar, Web of Science, and ScienceDirect databases. Keywords include “freedom of speech,” “speech freedom,” “freedom of expression,” “freedom of the press,” “fundamental rights,” “constitutional protection,” “intrinsic value,” and “instrumental value.”

A comparative legal analysis of constitutional protection for freedom of expression was conducted to assess the Australian constitutional and legal framework for protecting freedom of expression. This legal research approach aligns well with the field of law and ensures verifiability. Another reason for choosing this method is to enhance the trustworthiness of the research findings. Furthermore, comparative law is widely regarded as the analytical cornerstone of legal science, valued for its meticulous approach to comparing and analyzing legal systems or their components to identify similarities and discrepancies (Orucu, 2007). This study evaluated Constitutions and international conventions focusing on the constitutional framework concerning constitutional protection for freedom of expression. The choice of constitutional texts includes not only common law jurisdictions but also civil law jurisdictions. It includes not only the constitutions of developed countries but also of developing countries. This study attempts to demonstrate the uniqueness of the Australian Constitution in protecting freedom of expression in the world through a comprehensive selection of constitutional texts.

Results and Discussion

The Instrumental Value of Freedom of Expression in the Australian Constitution: The Implicit Freedom of Political Communication

Freedom of expression is one of the most constitutionally protected rights in the world. It is explicitly protected in the Constitutions of various jurisdictions; however, Australia appears to be an exception among Western liberal democracies in that its Constitution does not have explicit provisions to guarantee freedom of expression. The High Court of Australia has confirmed through its jurisprudence that the right to political communication is implicitly guaranteed in the Australian Constitution, which is a manifestation of recognizing the instrumental value of freedom of expression in Australian law. This section of the paper compares the constitutional and legal guarantees of freedom of expression in different jurisdictions. It analyses the underlying reasons for the barely non-recognition of freedom of expression in Australian law, namely the importance of the instrumental value of the freedom of speech and the neglect of its intrinsic value.

A Comparative Law Perspective: Differences in Constitutional Protection of Freedom of Expression in the US, EU and Australia

The First Amendment of the United States Constitution provides the most absolute and comprehensive constitutional protection for freedom of speech; it provides that “Congress shall make no law...abridging the freedom of speech or the press (United States of America, 1791).” In *Whitney v California* (1927), Brandeis J noted that “order cannot be maintained

just by the threat of punishment for its violation...no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for a full discussion.” In Europe, freedom of expression is protected by various overlapping documents. First, Article 10 of the European Convention on Human Rights expressly provides for the protection of freedom of expression, with the first paragraph setting out the basic scope of the right and the second paragraph setting out the restrictions on freedom of expression (European Union, 1950). In addition, Article 11(2) of the Charter of Fundamental Rights of the European Union (EU Charter) guarantees the plurality of the media, claiming allegiance to the opposite of a media monopoly, which is also a manifestation of the safeguarding of freedom of expression (Longo & Molek, 2014). At the domestic level, many EU member states have also included the protection of freedom of expression in their constitutions or other legal instruments. Even in countries that are not widely regarded as democracies, the protection of freedom is also included in the Constitution. For instance, article 35 of the Constitution of China provides that “citizens of the People’s Republic of China shall enjoy freedom of speech, the press, assembly, association, procession and demonstration (China, 1982).” This circumstance accentuates the awkwardness of the Australian Constitution’s lack of direct provisions for protecting the freedom of expression.

Constitutional freedom of expression in Australia: The implied freedom of political communication

Australia is the only Western democracy that does not explicitly protect freedom of expression in its constitution or an enforceable national human rights instrument. Pullan argues the reason is that the establishment of the Commonwealth of Australia was not a revolutionary shift. The consolidation of democracy in Britain and the United States demonstrated the progress of civilization. The authoritarian forces that suppressed free speech were already powerless, so freedom of speech did not require formal constitutional protection. The protection of freedom can be safely left to the common law and the legislature, which represent the fear of the people and are accountable to them (Roderick et al., 2021).

In contrast to the more than two centuries of evolving legal safeguards for freedom of expression in the United States, the High Court of Australia did not recognize the implicit protection of the right to political communication, also known as “freedom of expression”, in Australia until 1992. Section 24 of the Australian Constitution provides that “the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth (Commonwealth of Australia Constitution Act, 1900, s. 24).” This provision is also the basis of Australia’s representative democracy. In *Nationwide News Pty Ltd v Wills Brennan* (1992), J elaborates further on the Constitution’s purpose concerning guaranteeing representative democracy. He held that “to maintain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discourse on political and economic matters is indispensable.” He also noted that “it would be a mockery of democracy to grant the people the power to elect their parliament while denying them the freedom of public discourse from which they derive their political opinions.” Meanwhile, in Australian

Capital Television v Commonwealth, the majority held that the restrictions imposed by The Political Broadcasts and Political Disclosures Act 1991 (Cth) on the broadcast of political advertising during elections were unconstitutional and invalid because the Act contravened the freedom of political communication implicit in the Australian Constitution.

These two cases are regarded as landmarks in establishing the legal protection of freedom of expression in Australia. The implied constitutional protection of political communication reflects the particular emphasis that the HCA places on the instrumental value, especially the democratic rationale of freedom of expression. As mentioned above, one of the instrumental values of speech, democratic theory, enables voters to freely access and exchange information, enhancing the decision-making capacity and, thus, the quality of democracy. Based on this logic, the judges of the HCA regard the promotion of representative democracy as the premise and sole reason for the Australian people to enjoy the freedom of expression. The freedom of expression enjoyed by the Australian people is limited to political communication, beyond which the Constitution does not protect any other expression of an individual's ideas, such as artistic expression and non-political speech. In short, the implied acknowledgment of the people's right to political communication in the Constitution is developed to enable voters to exercise their right to vote more effectively, thereby safeguarding Australia's representative democracy.

Instrumental value orientation leads to manifestations of the fragility of freedom of expression in Australia: Inadequate legal protections and coercive restrictions on freedom of expression

As mentioned previously, the Australian Constitution does not explicitly guarantee freedom of expression, and the implied right is confined to political communication. This phenomenon is rooted in the fact that Australian law prioritizes the instrumental value of speech and ignores its inherent value. In Australia, the purpose of freedom of expression is viewed as a mere guarantee of representative democracy, and its independent inherent value is not recognized, resulting in inadequate legal protection and several mandatory limits on freedom of expression. Therefore, rather than asserting that the legal dilemma of freedom of speech in Australia is the result of inadequate legal protection and coercive restrictions on freedom of speech, it is more accurate to say that these phenomena are the result of Australian laws underestimating the intrinsic value of freedom of speech while valuing its instrumental value. This section of the article explores the outcomes of Australia's emphasis on the instrumental value of speech and neglect of its intrinsic value from the perspectives of inadequate legal protection and coercive restrictions on freedom of expression, respectively.

Implied constitutional rights based on instrumental values of speech lead to inadequate protections for the freedom of expression

In Australia, not only is freedom of expression not explicitly protected by the Constitution, but federal and state laws rarely protect it. Only the Australian Capital Territory and Victoria have established human rights laws that safeguard freedom of expression. These Acts are only in force in their respective jurisdictions and have no effect on freedom of expression at the

federal level; hence, the primary protection for the freedom of speech in Australia continues to derive from the Constitution's implied right to political communication. This phenomenon contradicts Pullan's anticipation that, even if the Constitution did not protect free speech, a parliament elected by representative democracy would do so by federal and state legislation (Roderick et al., 2021). In Australia, freedom of expression directed by instrumental values is inadequately safeguarded by law for two primary reasons.

First, the HCA's instrumental value-oriented interpretation of the Australian Constitution has restricted the scope of freedom of expression. This has caused individuals to believe that the sole purpose of free speech is to protect representative democracy. For a healthy society, instrumental values such as safeguarding liberal democracy, holding government accountable to the people, and promoting transparency and the rule of law are crucial; however, these are not the total values of freedom of expression. The High Court of Australia's constitutional interpretation of freedom of expression restricts the possibility of Australian law to seek support for other philosophical dimensions of freedom of expression rationales. In *Theophanous v Herald & Weekly Times* (1994), Dawson J, as the only dissent, showed his opposition to HCA's interpretation of constitutional provisions based on the instrumental value of speech, thereby obtaining the implicit freedom of speech. He held that "the safeguarding of fundamental freedoms in this country is not a constitutional mandate but rather the capacity of a democratic community to maintain its own common values." As a fundamental human right, freedom of expression should be defined not just by constitutional laws and interpretations but also by the community's consensus in a democratic society.

Second, while the HCA's interpretation of the Constitution provides Australians with limited freedom of political communication, this interpretation restricts the ability of federal and state legislation to redefine the content and expand the scope of freedom of expression. Based on the HCA's restriction of freedom of expression to the realm of political communication in freedom of expression cases, the federal and state parliaments may be concerned that expanding the scope of freedom of expression through legislation is contrary to the constitutional guarantee of the scope of freedom of expression, so abandon the adoption of legislation guaranteeing freedom of expression.

Overall, the instrumental value of freedom of expression has led to a homogeneous approach to protecting freedom of expression in Australia. The implied constitutional right to political communication limits the possibility of the Federal and State Parliaments using their legislative powers to extend freedom of expression, ultimately resulting in a lack of adequate legal protection for freedom of expression in Australia.

Implied constitutional rights based on instrumental values restrict freedom of expression

The instrumental value orientation towards freedom of expression has not only resulted in inadequate legal protections, but also led to coercive constraints in Australia. The most significant restriction on freedom of expression in Australia is that the Constitution solely protects political communication. In the *Rabelais* case, the contested issue was apparently whether the law had the authority to prohibit publications that instructed on crime (*libertus*,

1999). However, the actual question was, what kind of speech can be regarded as implied political communication under the Constitution? In this case, a university student newspaper published a critical commentary on capitalism and poverty, followed by “a step-by-step guide to shoplifting”. The censors refused to classify the publication, thus restricting its publication. In *Brown v Members* (1998), The Full Court of the Federal Court held that the main problem, in this case, was that the “step by step guide to shoplifting” was not a political discussion and therefore did not receive protection from the implied constitutional right of political communication.

The *Rabelais* case raises a concern about the scope of political communication. Although it is widely accepted that the publication guiding the offense, in this case, was not “political communication,” the definition of “political communication” is so broad and ambiguous that it is as philosophically contentious as freedom of expression. This is likewise the dilemma caused by an over-reliance on a democratic rationale for speech based on its instrumental value. The autonomy of speech as a fundamental human right has been replaced by political communication in the service of representative democracy. However, how can we ensure that all authentic “political communication” is considered implicit in the Constitution and properly safeguarded by the courts?

In addition, even though the Australian Constitution restricts freedom of expression to political communication, this freedom of political communication is not absolute. In *Lange v Australian Broadcasting Corporation* (1994), Lange brought a defamation action against the Australian Broadcasting Corporation (ABC), which relied on the “constitutional defense” established in *Theophanous* to assert its constitutional protection of political communication; however, the HCA unanimously rejected ABC’s assertion of implied political freedoms. The majority of the judges held that “although the Constitution protected the freedom of political communication, implied freedom was not a personal or individual right that might confer private rights in common law defamation cases. The protection was, therefore, not absolute.”

The *Lange* case not only further restricted the implied freedom of political communication that had developed from the Constitution. More importantly, it generated a “*Lange* test” in Australia to determine when the implied freedom of political communication would invalidate a law. The test consists of two steps; first, the court needs to examine whether the law effectively burdens free political communication, and if the law does burden that freedom, is it reasonably appropriate and suitable to serve a legitimate purpose consistent with the maintenance of representative and accountable government? In other words, so long as the purpose of the restrictions imposed by law on political communication is consistent with the legitimate purpose of maintaining representative democracy and accountable government, such a law does not violate the implied constitutional protection of political communication, even if it imposes an undue burden on political communication. The *Lange* test further demonstrates the Australian judiciary’s reliance on speech’s instrumental value as protection for liberal democracy. In order to achieve the instrumental purpose of maintaining a representative and accountable government, freedom of expression, both in the broad and narrower sense, can be further restricted by law. The *Lange* test’s applicability has brought considerable confusion. As implied freedom is not absolute, it is questionable how far

political communication's protection extends. Due to divergent interpretations, the scope of freedom has remained ambiguous (Sedgwick, 2003). The test application will likely change with each new judicial appointment. All those cases and situations demonstrate the relative fragility of the right to political communication implied in the Australian Constitution.

In summary, in Australia, freedom of expression, primarily in the form of freedom of political communication, is merely an implication of democracy. It does not reflect speech's intrinsic value in enhancing self-fulfillment and individual autonomy. On the contrary, its value is primarily reflected in the instrumental value of promoting accountable government and safeguarding representative democracy. This has resulted in inadequate protection of freedom of expression in the Australian Constitution and laws and numerous coercive restrictions on freedom of expression.

Conclusion

This study examines the reasons why freedom of expression is barely recognized in Australian law and, through an analysis of the philosophical rationale for speech, concludes that the purpose of freedom of expression implied in the Australian Constitution is not to help people achieve self-fulfillment and individual autonomy, but to protect representative democracy. Australian constitutional and judicial practice reflects an over-reliance on the instrumental value of speech and a disregard for the intrinsic value of freedom of expression, resulting in inadequate protection and excessive restrictions on freedom of expression under Australian law. Both the intrinsic and instrumental value of speech are of great importance, and an accountable democracy should attach equal weight to both. Liberal democracy is not only an end in itself but also a means of safeguarding people's rights from infringement. It is apparently not the best understanding of the philosophical rationale for freedom of expression if, in order to safeguard democracy, freedom of expression is not adequately protected or is even severely restricted. Due to space limitations, this article does not adequately address the approach to change the insufficient legal protection and coercive restrictions on freedom of expression in Australia. There is potential for further research in these areas.

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