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(DON'T) READ BETWEEN THE LINES: CONSTITUTIONAL IMPLICATIONS IN *BABET V COMMONWEALTH* (2025) 423 ALR 83

I Introduction

The extent to which the legislative freedom of the Commonwealth Parliament is constrained by implications arising from the text or structure of the *Constitution* has been one of the most frequently litigated issues in recent constitutional jurisprudence.[1] *Babet v Commonwealth* ('*Babet*')[2] constituted the first opportunity for the Gageler Court to show its colours on these questions. In this case, the High Court unanimously dismissed a challenge to the validity of s 135(3) of the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*') for infringing: (1) the requirement of 'direct choice'; (2) the implied freedom of political communication; and (3) a novel implication disallowing discrimination between electoral candidates.[3] In so

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1 See generally: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*'); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ('*Stephens*'); *McGinty v Western Australia* (1996) 186 CLR 140 ('*McGinty*'); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *Levy v Victoria* (1997) 189 CLR 520 ('*Levy*'); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah*'); *Coleman v Power* (2004) 220 CLR 1 ('*Coleman*'); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 ('*Mulholland*'); *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*'); *Monis v The Queen* (2013) 249 CLR 92 ('*Monis*'); *Unions NSW v New South Wales (No 1)* (2013) 252 CLR 520; *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *Murphy v Electoral Commissioner* (2016) 261 CLR 28 ('*Murphy*'); *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*'); *Unions NSW v New South Wales [No 2]* (2019) 264 CLR 595 ('*Unions NSW [No 2]*'); *Comcare v Banerji* (2019) 267 CLR 373 ('*Comcare*'); *LibertyWorks Inc v* Commonwealth (2021) 274 CLR 1 ('*LibertyWorks*'); *Ruddick v Commonwealth* (2022) 399 ALR 476 ('*Ruddick*'); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 ('*Farm Transparency*'); *Unions NSW v New South Wales [No 3]* (2023) 407 ALR 277 ('*Unions NSW [No 3]*'); *Ravbar v Commonwealth* (2025) 99 ALJR 1000 ('*Ravbar*'); *Farmer v Minister for Home Affairs* [2025] HCA 38; *Lees v New South Wales* [2025] NSWSC 1209.

2 (2025) 423 ALR 83 ('*Babet*').

3 Ibid 88 [8] (Gageler CJ and Jagot J).

doing, the Court rejected the existence of the new putative implication.[4] Further, despite the unanimous outcome, comparison of the six separate judgments[5] reveals a notable divergence: a majority of the Court[6] appears to have departed from the tri-stage approach to proportionality testing, termed 'structured proportionality', treated as mandatory by the other two members.[7]

This case note challenges those two developments. Parts II and III contextualise the impugned provision and explain the salient facts underlying the decision in *Babet*. Parts IV–VI detail the constitutional background and reasoning informing the Court's decision on each challenge to s 135(3). Part VII advances two critiques. First, I argue that the Court should continue to employ structured proportionality irrespective of whether the duty of fidelity to precedent demands it. Second, I argue that the Court's rejection of the novel implication is incompatible with its continued recognition of the implied freedom of political communication. Part VIII concludes.

II The *Electoral Act*

Part XI of the *Electoral Act* provides for the voluntary registration[8] of eligible political parties[9] on the public Register of Political Parties established and maintained by the Australian Electoral Commissioner ('AEC').[10] Registration confers three primary benefits: (1) a 'streamlining of the nomination process in so far as nominations of candidates endorsed by a registered political party are permitted to be signed by its registered officer and submitted in bulk';[11] (2) an entitlement to have the registered name and logo printed on ballot papers adjacent to the names of endorsed candidates;[12] and (3) an entitlement to have the registered name and logo appear 'above the line' on Senate ballot papers if the party has endorsed two or more candidates for election to the Senate.[13] Concomitantly, registration triggers annual financial disclosure obligations on the part of both the registered parties themselves and their

4 Ibid 95–6 [41]–[42] (Gageler CJ and Jagot J), 115–17 [121]–[128] (Gordon J), 136 [190] (Edelman J), 139–40 [205] (Steward J), 141–2 [213], [217] (Gleeson J), 149–50 [247]–[250] (Beech-Jones J).

5 Ibid 87–99 [1]–[58] (Gageler CJ and Jagot J), 99–117 [59]–[128] (Gordon J), 117–39 [129]–[204] (Edelman J), 139–41 [205]–[212] (Steward J), 141–46 [213]–[235] (Gleeson J), 146–53 [236]–[261] (Beech-Jones J).

6 Ibid 97 [49] (Gageler CJ and Jagot J), 102 [72] (Gordon J), 148 [242] (Beech-Jones J), 144–5 [225]–[229] (Gleeson J).

7 Ibid 144–5 [225]–[229] (Gleeson J), 131 [176] (Edelman J).

8 *Commonwealth Electoral Act 1918* (Cth) s 126 ('*Electoral Act*').

9 Ibid ss 123(1) (def 'eligible political party'), 124.

10 Ibid ss 125(1)–(1A), 133(1)(a).

11 *Babet* (n 2) 89 [15] (Gageler CJ and Jagot J), citing *Electoral Act* (n 8) ss 166(1)(b)(ii), 167(3).

12 *Electoral Act* (n 8) ss 169(1), 214(1), 214A(1)–(2).

13 Ibid ss 169(4), 210A, 214(2), 214A(2)

'associated entities'.[14] Those financial disclosures are then required to be published by the AEC on the public Transparency Register.[15]

A political party may be voluntarily deregistered on application to the AEC by an entitled person.[16] The benefits and obligations of registration cease to apply upon deregistration. The 'inexorable consequence'[17] of voluntary deregistration is the triggering of s 135(3), which provides that

> [w]here a political party is deregistered under subsection (1), that party … is *ineligible for registration under this Part until after the general election next following the deregistration*.[18]

III Facts

After the 2022 general election, the United Australia Party ('UAP') applied for deregistration and was subsequently deregistered pursuant to s 135(1).[19] On 29 November 2024, and importantly ahead of the 2025 general election, Ralph Babet — a UAP Senator — applied to have the Party re-registered.[20] The AEC refused Senator Babet's application in accordance with s 135(3).[21] Following the AEC's refusal, Senator Babet and Neil Favager, National Director of the UAP, commenced proceedings in the High Court's original jurisdiction, challenging the validity of s 135(3).[22] Clive Palmer, as owner of the registered trademarks in the UAP's name, abbreviation, and logo, separately commenced similar proceedings.[23] The defendant in each proceeding was the Commonwealth of Australia.[24]

The parties did not dispute that s 135(3) is properly characterised as a law 'relating to elections' within the scope of ss 10 and 31 of the *Constitution* so as to fall within the power reposed in the Commonwealth Parliament.[25] Rather, the plaintiffs submitted that the impugned provision is invalid for infringing three distinct constitutional limitations. Hence, by special cases, the parties in both proceedings agreed to state five identical questions of law:

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14 Ibid ss 314AB, 314AEA.

15 Ibid s 320.

16 Ibid s 135(1).

17 *Babet* (n 2) 92 [26] (Gageler CJ and Jagot J).

18 *Electoral Act* (n 8) s 135(3) (emphasis added).

19 *Babet* (n 2) 87 [4] (Gageler CJ and Jagot J).

20 Ibid 87–8 [5].

21 Ibid 87–8 [5].

22 Ibid 87–8 [5].

23 Ibid 88 [6].

24 Ibid 88 [6].

25 *Australian Constitution* ss 10, 31, 51(xxxvi); *Babet* (n 2) 94 [35] (Gageler CJ and Jagot J).

> Question 1: Is s 135(3) of the Act invalid … on the ground that it impairs the direct choice by the people of Senators and Members of the House of Representatives, contrary to ss 7 and 24 of the *Constitution*?
>
> Question 2: Is s 135(3) of the Act invalid … on the ground that it impermissibly discriminates against candidates of:
>
> (i) a political party that has deregistered voluntarily; or
>
> (ii) a Parliamentary party that has deregistered voluntarily?
>
> Question 3: Is s 135(3) of the Act invalid … on the ground that it infringes the implied freedom of political communication?
>
> Question 4: In light of the answers to questions 1 to 3, what relief, if any, should issue?
>
> Question 5: Who should pay the costs of and incidental to these special cases?[26]

On 12 February 2025, the Court made orders answering the first three questions in the negative, thereby upholding the validity of s 135(3).[27] In answer to questions 4 and 5, it followed that no relief should issue and the plaintiffs should pay the costs of and incidental to the special cases.[28] The Court published reasons for giving those answers on 14 May 2025, comprising six separate judgments.[29] The balance of this case note explains and evaluates the Court's reasoning in respect of the first three questions stated.

IV Question 1: Direct Choice

A *Constitutional Background*

Sections 7 and 24 of the *Constitution* expressly require that senators and members of the House of Representatives be 'directly chosen by the people'[30] — a principle described by multiple former High Court judges as 'constitutional bedrock'.[31] The express language of direct choice has been held to give rise to a constitutional limitation: Parliament may not legislate to burden the informed choice of electors unless the law is 'reasonably appropriate and adapted to serve an end which is

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26 *Babet* (n 2) 88 [8].

27 Ibid 88 [7]–[8].

28 Ibid.

29 Ibid 87–99 [1]–[58] (Gleeson CJ and Jagot J), 99–117 [59]–[128] (Gordon J), 117–34 [129]–[204] (Edelman J), 139–41 [205]–[212] (Steward J), 141–6 [213]–[235] (Gleeson J), 146–53 [236]–[261] (Beech-Jones J).

30 *Australian Constitution* ss 7, 24.

31 *Rowe* (n 1) 12 [1] (French CJ), quoting *Roach* (n 1) 198 [82] (Gummow, Kirby and Crennan JJ).

consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[32] Relevantly, in *Ruddick v Commonwealth*,[33] a majority held that the requirement of direct choice constrains Parliament's ability to burden, or impair, 'the quality of information that is intended or likely to affect voting choice in Commonwealth elections'.[34]

B *Decision*

1 *Does s 135(3) Burden Informed Electoral Choice?*

All but one judge held that s 135(3) imposes a burden on informed electoral choice.[35] Borrowing the language of Gageler CJ and Jagot J, that burden arises 'through omission from the ballot paper, a source of information about the party affiliations of some but not all candidates who wish to provide that information', being information relevant to voters' choices between candidates.[36] Justices Gleeson and Beech-Jones expressed similar reasoning.[37] Justices Gordon and Edelman opined that whilst s 135(3) does impose a burden, that burden is slight as assessment of the overall burden must balance the denial of information pertaining to candidates' affiliation against the potential benefit of the information gained from the financial disclosures.[38] Whilst Steward J explicitly agreed with Gordon J, and inferably with Edelman J, that the burden imposed by s 135(3) 'must be considered within the wider scheme of the *Electoral Act*',[39] his Honour held that no burden on informed choice arises because: (1) the constitutional implication of informed choice does not require that all candidates must be treated uniformly 'for the purpose of their identification on a ballot paper; and (2) there is no pre-existing and independent right to such information.[40]

2 *Is s 135(3) Reasonably Appropriated and Adapted?*

The Court unanimously construed the purpose of s 135(3) as promoting financial transparency in the political process, being a purpose that 'affirmatively promotes'[41]

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32 *Ruddick* (n 1) 388–9 [148], quoting *Roach* (n 1) 199 [85]. See also: *Lange* (n 1) 557; *Murphy* (n 1) 113 [262] (Gordon J).

33 *Ruddick* (n 1).

34 *Babet* (n 2) 125 [159] (Edelman J), quoting *Ruddick* (n 1) 390 [151] (Gordon, Edelman and Gleeson JJ), 398 [174] (Steward J).

35 *Babet* (n 2) 96 [44] (Gageler CJ and Jagot J), 108 [91] (Gordon J), 137 [196] (Edelman J), 143 [220]–[221] (Gleeson J), 149 [244] (Beech-Jones J), citing *Ruddick* (n 1).

36 *Babet* (n 2) 96–7 [44]–[46].

37 Ibid 143 [220]–[221] (Gleeson J), 149 [244] (Beech-Jones J).

38 Ibid 108 [91] (Gordon J), 137 [196] (Edelman J).

39 Ibid 140 [207].

40 Ibid 140 [207]–[208].

41 Ibid 98 [52] (Gageler CJ and Jagot J).

the constitutionally prescribed system of representative government.[42] Given his Honour's conclusion that no burden arises, Steward J held it 'unnecessary' to consider whether s 135(3) is justified.[43] Otherwise, all six judges who held that s 135(3) burdens informed choice agreed that the provision is reasonably appropriate and adapted to that purpose.[44] It followed that s 135(3) was not invalid for infringing the 'direct choice' implication.

V Question 2: Impermissible Discrimination

The second question stated in each special case was framed to facilitate consideration of the plaintiffs' submission that the Court should recognise a new constitutional limitation that constrains Parliament's ability to discriminate against candidates.[45] The Court unanimously declined to recognise the new putative limitation, holding that the existing implications of direct choice and freedom of political communication are adequate for the preservation of the integrity of representative democracy.[46] In explaining that conclusion, Gageler CJ and Jagot J (Beech-Jones J agreeing) observed that

> legislated inequality or discrimination between participants in political discourse or in the electoral process has been demonstrated by numerous decisions … to be a dimension of a burden imposed by a law which … warrants close scrutiny to assess its justification.[47]

The correctness of that finding is discussed in Part VII. In any event, it is unlikely that the reverse finding would have altered the overall outcome. As Gordon and Beech-Jones JJ (Steward J agreeing) opined, even if such an implication were recognised, the impugned provision would not infringe it.[48] Section 135(3) does not discriminate between candidates as it 'applies equally to all registered political parties and provides for the same consequences in the event that a registered political party voluntarily deregisters.'[49]

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42 Ibid 98 [52]. See also *Babet* (n 2) 109 [94]–[95] (Gordon J), 138 [198] (Edelman J), 139–40 [205] (Steward J), 144 [225] (Gleeson J), 149 [245] (Beech-Jones J).

43 *Babet* (n 2) 140 [210].

44 Ibid 98 [53] (Gageler CJ and Jagot J), 109 [94]–[95] (Gordon J), 138 [198] (Edelman J), 146 [235] (Gleeson J),

45 Ibid 95 [40]–[41] (Gageler CJ and Jagot J).

46 Ibid 95–6 [41]–[42], 115–17 [121]–[128] (Gordon J), 136 [190] (Edelman J), 139 [205] (Steward J), 141–2 [213], [217] (Gleeson J), 149–50 [247]–[250] (Beech-Jones J).

47 Ibid 95 [42].

48 Ibid 116 [128] (Gordon J), 139 [205] (Steward J), 150 [251] (Beech-Jones J).

49 Ibid 116–17 [128] (Gordon J). See also: 139 [205] (Steward J), 150 [251] (Beech-Jones J).

VI Question 3: Implied Freedom of Political Communication

A *Constitutional Background*

The implied freedom of political communication was first recognised in two cases handed down on the same date: *Australian Capital Television v Commonwealth*[50] and *Nationwide News v Wills*.[51] But judicial disagreement[52] concerning the source of the implication was not resolved until *Lange v Australian Broadcasting Corporation* ('*Lange*').[53]

In *Lange*, the court unanimously held that '[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government' mandated by the aforementioned 'direct choice' language in ss 7 and 24.[54] To determine whether a law infringes that implied freedom, the Court adopted a two-stage inquiry, modified in *Coleman v Power*[55] to comprise three questions:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

2. Are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the constitutionally prescribed system … of representative government?

3. Is the law reasonably appropriate and adapted to advance that legitimate object?[56]

In *Mulholland v Australian Electoral Commission* ('*Mulholland*'),[57] five judges held that a law which restricted the circumstances under which a political party could have its name included on the ballot paper did not burden the implied freedom because it did not diminish any independently existing entitlement.[58] That ratio was endorsed in *Ruddick v Commonwealth* ('*Ruddick*')[59] to find that provisions of the

50 *ACTV* (n 1).

51 *Nationwide News* (n 1).

52 See e.g.: *Theophanous* (n 1); *Stephens* (n 1).

53 *Lange* (n 1). Cf *Lenah* (n 1) 330–9 (Callinan J); *Monis* (n 1) 181 [249]–[251] (Heydon J); *LibertyWorks* (n 1) 95 [249] (Steward J).

54 *Lange* (n 1) 559.

55 *Coleman* (n 1).

56 *McCloy* (n 1) 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ), citing *Coleman* (n 1); *Lange* (n 1) 561–2, 567.

57 *Mulholland* (n 1).

58 Ibid 233 [105] (McHugh J), 246 [184], 247 [186]–[187] (Gummow and Hayne JJ), 298 [337] (Callinan J), 303–5 [354]–[356] (Heydon J), citing *Levy* (n 1) 622 (McHugh J).

59 *Ruddick* (n 1).

Electoral Act requiring a later registered political party to deregister or change its name in certain circumstances similarly imposed no burden.[60]

B *Decision*

The Court accepted the Commonwealth's submission[61] that the reasoning in *Mulholland*, as applied in *Ruddick*, was dispositive of the case in *Babet*.[62] Hence, consistent with the modern requirement,[63] the plaintiffs sought leave to reopen *Mulholland*.[64] Justices Edelman and Gordon (Steward J agreeing) considered the plaintiffs' application to re-open but decided leave should not be granted.[65] Chief Justice Gageler and Beech-Jones, Gleeson and Jagot JJ declined to entertain the plaintiffs' application to re-open *Mulholland* as re-opening could not be dispositive;[66] even if s 135(3) did burden the implied freedom,

> the considerations which demonstrate the justification for the burden on informed electoral choice would equally demonstrate the justification for the putative burden which would be so placed on freedom of political communication.[67]

Accordingly, s 135(3) was not found invalid for infringing the implied freedom of political communication and the third question stated was answered: 'no'.[68]

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60 Ibid 396–7 [171]–[172] (Gordon, Edelman and Gleeson JJ), 398 [174] (Steward J).

61 Commonwealth of Australia, 'Defendant's Submissions', Submission in *Babet v Commonwealth*, B73/2024, 28 January 2025, 16–17 [37]–[40].

62 *Babet* (n 2) 98 [55] (Gageler CJ and Jagot J), 109–10 [97] (Gordon J), 138–9 [202] (Edelman J), 139–40 [205] (Steward J), 151 [255] (Beech-Jones J).

63 See e.g.: *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; *Ravbar* (n 1) 1016 [24] (Gageler CJ), citing *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 150 [17] quoting *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

64 Ralph Babet and Neil Favager, 'Plaintiffs' Submissions', Submission in *Babet v Commonwealth*, B73/2024, 17 January 2025, 15 [56]; Clive Palmer, 'Plaintiffs' Submissions', Submission in *Babet v Commonwealth* B74/2024, 17 January 2025, 2 [2].

65 *Babet* (n 2) 110–11 [98]–[103] (Gordon J), 139 [203] (Edelman J), 139–40 [205] (Steward J).

66 Ibid 98 [56] (Gageler CJ and Jagot J), 146 [235] (Gleeson J), 152 [259] (Beech-Jones J).

67 Ibid 98 [56].

68 Ibid 88 [8].

VII Comment

A *Structured Proportionality: Preferable Irrespective of Precedential Status*

In *McCloy v New South Wales*,[69] the High Court specified a tri-limb approach to proportionality testing, described as 'structured proportionality'.[70] In determining whether a law is 'reasonably appropriate and adapted', structured proportionality prompts courts to determine whether it is: (1) suitable; (2) necessary; and (3) adequate in its balance.[71] Whilst not dispositive, the Court's commentary in *Babet* as to the endurance of structured proportionality warrants examination.

Four judges in *Babet* considered that the 'express or ritual invocation' of structured proportionality is 'by no means necessary in every case'.[72] Justice Gleeson inferably agreed, emphasising the Court's 'discretion' and observing — in my view correctly — that '[n]o case … has depended for its outcome on the application of the structured proportionality framework'.[73] That observation undercuts the opinion of Edelman[74] and Steward[75] JJ that the Court is obliged to apply structured proportionality as a matter of 'fidelity to precedent' as it has become '*the* doctrinal test for justification'.[76] It is clear that at least four judges view structured proportionality not as comprising a 'test' itself, but rather as an analytical tool which can guide the application of the broader proportionality test. If that premise is accepted, Edelman and Steward JJ's argument holds no water.

But regardless of whether the Court is *bound* to apply structured proportionality, I argue that it should. By 'demanding identification of the factors on the basis of which the balance is struck' and 'necessitating explanation of how they are weighted', structured proportionality ensures that judicial reasoning is 'more fully exposed'.[77] Whilst each judge's ultimate *conclusion* in implied freedom cases may not depend

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69 *McCloy* (n 1).

70 Ibid 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

71 Ibid 194–5 [2].

72 *Babet* (n 2) 97 [49] (Gageler CJ and Jagot J), 102–3 [72] (Gordon J), 148 [242] (Beech-Jones J).

73 Ibid 144–5 [225]–[229].

74 Ibid 131–2 [176].

75 Ibid 140–1 [210].

76 Ibid 131–2 [176] (Edelman J), quoting James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 647. See also: *Brown* (n 1); *Unions NSW [No 2]* (n 1); *Clubb v Edwards* (2019) 267 CLR 171 ('*Clubb v Edwards*'); *Comcare* (n 1); *Spence v Queensland* (2019) 268 CLR 355; *LibertyWorks* (n 1); *Farm Transparency* (n 1); *Unions NSW [No 3]* (n 1).

77 Geoffrey Nettle, 'Whither the Implied Freedom of Political Communication?' (2021) 41 *Monash University Law Review* , 23, citing Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85, 87–8; *Clubb v Edwards* (n 77), 333 [469] (Edelman J).

on the application (or disapplication) of structured proportionality, as Edelman J observes, greater transparency reduces 'the prospect of idiosyncratic judicial policy preferences supplanting the policy of a democratically elected Parliament'.[78] It is no secret that judges 'legislate', but the perceived or actual legitimacy of that task depends, at least in part, on transparency of reasoning.[79]

B *Improper Rejection of the Implication Against Discrimination*

As discussed, the Court unanimously dismissed the existence of the putative implication against discrimination between electoral candidates as legislated inequality in the electoral process 'has been demonstrated … to be a dimension of a burden' warranting scrutiny under the 'adequate' existing implications.[80] At least for Gordon and Steward JJ, it followed that recognition of the new implication was not 'logically or practically necessary'.[81] I advance two critiques of that position.

First, I challenge the test of strict necessity. It has been described as 'well settled' that different tests exist to recognise an implication from the *text* of the *Constitution* as compared to its *structure*.[82] For textual implications, it is 'sufficient that the relevant intention is manifested according to the accepted principles of interpretation'.[83] Conversely, implications sought to be implied from the structure of the *Constitution* must be '*logically or practically necessary* for the preservation of the integrity of that structure' to be recognised.[84] With respect, such a distinction cannot be maintained. As Edelman J aptly observed, 'such statements, if taken literally, would be nonsense' as '[t]he structural concerns of the *Constitution* are all derived … from the meaning of the text and the manner in which that textual meaning is arranged'.[85]

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78 *Babet* (n 2) 132–3 [178]. See also: *ACTV* (n 1) 180–6 (Dawson J); *Theophanous* (n 1) 193–4 (Dawson J); *Langer v Commonwealth* (1996) 186 CLR 302, 324 (Dawson J); *McGinty* (n 1) 234–5 (McHugh J), 291 (Gummow J); *Lenah* (n 1) 330–40 [337]–[348] (Callinan J); *Monis* (n 1) 179–82 [243]–[251] (Heydon J); *LibertyWorks* (n 1) 95 [249], 111–15 [298]–[304] (Steward J); *Ruddick* (n 1) 398 [174] (Steward J); *Farm Transparency* (n 1) 623–4 [270] (Steward J).

79 Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24(1) *Adelaide Law Review* 15, 21. See also: Karl Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) *Harvard Law Review* 1222; Brian Leiter, 'Legal Realisms, Old and New' (2013) 47 *Valparaiso University Law Review* 949.

80 *Babet* (n 2) 95–6 [42] (Gageler CJ and Jagot J)

81 Ibid 115 [122] (Gordon J),

82 *Gerner v Victoria* (2020) 270 CLR 412, 422 [14] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

83 *McGinty* (n 1) 169 (Brennan CJ), quoting *ACTV* (n 1) 134 (Mason CJ); *Lange* (n 1) 566–7.

84 *McGinty* (n 1) 169 (Brennan CJ), quoting *ACTV* (n 1) 134 (Mason CJ) (emphasis added).

85 *Babet* (n 2) 126 [162].

Second, even if the test of strict necessity *is* accepted, it follows that the same reasoning deployed in *Babet* to deny the existence of a distinct implication against discrimination between candidates should also operate to deny the implied freedom of political communication. That is because the implied freedom is similarly a corollary of the requirement of direct choice;[86] it arises because direct choice entails 'free, fair and *informed*' voting.[87] To that end, the two recognised implications operate as concentric circles. No decision has held a law to infringe the implied freedom without infringing direct choice where both implications have been raised. It is difficult to imagine such a scenario. The putative implication against discrimination between electors, it was argued,[88] also arises from the direct choice requirement, as such discrimination impedes the capacity of an election to be 'fair'.[89] It is thus manifestly inconsistent to dismiss the existence of a separate implication against discrimination whilst continuing to recognise the implied freedom. If the test is strict necessity, neither the implied freedom nor the implication against discrimination ought to be recognised because the requirement of direct choice subsumes them both.

VIII Conclusion

Babet represented an opportunity for the Gageler Court to present a coherent, unified approach to the constitutional implicatures. Instead, the decision fosters confusion. It is apparent from the High Court's subsequent judgment in *Ravbar v Commonwealth*[90] that the Court's 'sudden' departure from structured proportionality has meant 'there is presently no majority view as to when structured proportionality should be applied'.[91] It is incumbent upon Australia's apex court to clarify the application of structured proportionality and resolve the tension between the simultaneous rejection of the implication against discrimination and recognition of the implied freedom of political communication at the next available opportunity. Unless and until it does, as Edelman J has lamented, the status quo will remain 'the worst of all worlds'.[92]

86 See e.g., *McCloy* (n 1) 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ), citing *Lange* (n 1) 560. See also *Babet* (n 2) 142 [218] (Gleeson J).

87 *Ruddick* (n 1) 348 [18] (Kiefel CJ and Keane J), citing *Lange* (n 1) 560 (emphasis added).

88 Ralph Babet and Neil Favager, 'Plaintiffs' Submissions', Submission in *Babet v Commonwealth*, B73/2024, 17 January 2025, 10–1 [41]–[45]; Clive Palmer, 'Plaintiffs' Submissions', Submission in *Babet v Commonwealth* B74/2024, 17 January 2025, 2 [2].

89 See e.g.: *ACTV* (n 1) 146 (Mason CJ), 227–8 (McHugh J); *Mulholland* (n 1) 217 [86] (McHugh J), 296 [332] (Callinan J); *McCloy* (n 1) 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

90 *Ravbar* (n 1).

91 Ibid 1055 [218] (Edelman J).

92 Ibid [219].