

MONEY POLITICS: JUDICIAL REVIEW OF ELECTORAL COMMUNICATION EXPENDITURE LIMITS IN AUSTRALIA

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Electoral communication expenditure limits, which are becoming a common feature of Australian campaign finance law, present a particularly acute challenge to the tradition of Australian formalism, and thus the democratic legitimacy of judicial review of legislative action. With no constitutional text or context to guide them, judges must refer to their ideological construction of representative government in order to respond. One that presupposes the autonomy of the people in an open marketplace of ideas will lead them to invalidate the limits as unconstitutional. However if the goals of political equality and rational decision-making are preferred, and believes that the legislature has a legitimate interest in regulating political discourse to that end, they will be inclined to uphold expenditure limits. Either way, the legal vision of Australian democracy will be entirely judge-made.

I INTRODUCTION

Increasingly, the expenditure of vast sums of money is becoming a prominent feature of Australian State and Federal election campaigns. Such expenditure in the democratic process is intuitively suspect, as economic influence translates into political influence, political discourse becomes dominated by the opinions of the well-financed, as opposed to the meritorious. It distorts the balanced debate necessary for good decision-making and sound policy development, ultimately at the expense of the public interest - or so the argument runs.

There are a number of avenues available to parliaments wanting to curb the influence of money during elections,¹ but by far the most direct (and controversial) method is limiting the amount of money candidates, political parties and third parties may spend on political communication. What makes this proposition so startling - and interesting from an academic perspective - is that it reverses the logic used to justify freedom of political communication

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¹ Other common methods include limiting the amount of money third parties may contribute to election candidates and political parties, and mandating disclosure of amounts raised and spent by political parties and third parties.

under the Australian Constitution: freedom of speech is transformed from a fundamental precept of democratic governance, to being a corroding force; and government, the natural enemy of liberty, becomes the protector of the democratic process.²

It is no surprise, then, that one's appetite for expenditure limits will naturally align with one's personal preference between two democratic visions: one safeguarding the liberty of the people from government intrusion; the other supporting regulation in pursuance of political equality and rational decision-making. The propensity of expenditure limits to ignite fierce ideological division is demonstrated in spectacular fashion in the current US Supreme Court. The Court's deeply value-driven 5-4 split in *Citizens United v Federal Election Commission*,³ which reverberated across the American political landscape,⁴ was rehashed earlier this year in *McCutcheon v Federal Election Commission*.⁵ The defining distinction between the majority, which invalidated Congressional expenditure limits in both cases, and the minority which upheld them, was their alignment with libertarian or deliberative conceptions of American democracy,⁶ which was inevitably informed by political affiliations.⁷

In Australia, electoral communication expenditure limits have not long featured as a significant part of State campaign finance regulation, and while

² Similar observations were made by Cass Sunstein, 'Free Speech Now' (1992) 59 *U Chicago LJ* 255, 259; Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Allen and Unwin, 1976), 270-271; Owen Fiss, *The Irony of Free Speech* (Harvard University Press, 1996), 18-19.

³ 558 US 50 (2010). The Supreme Court affirmed this opinion this year in *American Tradition Partnership Inc v Steve Bullock, Attorney General of Montana* 567 US (2012) (Breyer, Ginsburg, Sotomayor and Kagan JJ dissenting).

⁴For a cross-section of the critical backlash from *Citizens United*, see: President Barack Obama, *Weekly Address*, Washington DC, 21 August 2010; Ronald Dworkin, 'The Decision that Threatens Democracy' (2010) 57(6) *NYRB* 63; EJ Dionne Jr, 'The Citizens United Catastrophe', *Washington Post* 6 February 2012.

⁵ 572 US ___ (2014).

⁶ Geoffrey Stone, 'Citizens United and Conservative Judicial Activism' (2012) *University of Illinois LJ* 485, 487-488. See also Chapter II, Part E(ii) below. For an especially cynical account of how political affiliation influences decisions regarding campaign finance reform, see Burt Neuborne, 'One Dollar One Vote: A Preface to Debating Campaign Finance Reform' (1997) 37 *Washburn LJ* 1, 1.

⁷ Bearing in mind that caution is required when describing judges with reductive terms such as "liberal" and "conservative" (Kathleen Sullivan, 'Two Concepts of Freedom of Speech' (2011) 124 *Harv LR* 143, 144), all five Justices in the majority in *Citizens United* (Roberts CJ, Stevens, Scalia, Thomas and Alito JJ) were appointed by Republican Presidents, and all but Stevens J (who was appointed by Gerald Ford, but is in any case regarded to be left of centre: Jeff Bleich et al, 'Justice John Paul Stevens: A Maverick, Liberal, Libertarian, Conservative Statesman on the Court' (2007) October *Oregon State Bar Bulletin* 26) of the minority - Ginsburg, Breyer and Sotomayor JJ - were appointed by Democratic Presidents.

they have been recommended,⁸ they are yet to be introduced at Federal level. Until recently, the question of their compatibility with the constitutionally protected freedom of political communication had not been referenced in an Australian court, and the High Court decision in *Unions NSW v State of NSW*⁹ leaves the issue open. The decision, and the High Court's jurisprudence on the freedom of political communication generally, does not (and cannot in its current state) properly address the complex issue of the relationship between electoral communication expenditure limits and representative government.

Normative and empirical assumptions necessarily pre-empt electoral communication expenditure limits, and thus the issue cannot be resolved without a commitment to an ideological position on what democracy means. This presents a problem for our professedly formalist High Court, so loath to develop jurisprudence based upon extra-constitutional values. Thus expenditure limits are important not only from the perspective of how we are to regulate our democratic process - they raise difficult questions regarding the democratic legitimacy of judicial review of legislative action.

II ELECTORAL COMMUNICATION EXPENDITURE LIMITS UNDER AUSTRALIAN LAW

Expenditure limits are designed to protect the integrity and fairness of the electoral process by levelling the playing field between candidates and ensuring a minimum level of quality in the political debate; but limits may equally undermine democracy by unduly inhibiting free speech. Thus, overseas, electoral communication expenditure limits are susceptible to challenge under express free speech clauses.¹⁰ In Australia, where there is no express guarantee, expenditure limits fall for review under the freedom of political communication identified by the High Court in *Australian Capital Television Pty Ltd v Commonwealth*¹¹ (*ACTV*) and *Nationwide News Pty Ltd v Wills*.¹²

Electoral communication expenditure limits have never been addressed by an Australian court, but two High Court decisions – *Unions NSW v State of*

⁸ Australian Government, 'Electoral Reform Green Article: Donations, Funding and Expenditure' (2008), 67; see submissions to Joint Standing Committee on Electoral Matters, 'Funding and Disclosure: Inquiry into Disclosure of Donations to Political Parties and Candidates' (Parliament of the Commonwealth of Australia, February 2006), 31.

⁹ [2013] HCA 58.

¹⁰ See, for instance, in Europe: *Bowman v United Kingdom* (1998) 26 EHRR 1; and Canada: *Harper v Canada* [2004] 1 SCR 827.

¹¹ (1992) 177 CLR 106.

¹² (1992) 177 CLR 1.

NSW and ACTV – have touched on related laws and principles. This article addresses these cases, finding them to be an inadequate basis for an analysis of the complex issues raised by the laws. The analysis shall go on to apply the bifurcated *Lange* test, which was developed to conform with the Court’s supposedly ideologically neutral commitment to the constitutional “text and structure”. However this test obscures rather than eliminates the value judgments inherent in judicial review in this area.

A Money in Australian politics

In Australia, election campaigns mean big business.¹³ During the financial year 2010-2011,¹⁴ which encompassed Commonwealth, Victorian and New South Wales’ elections, the four major political parties spent \$230 million on election-related advertising.¹⁵ Further, spending by third parties is rising,¹⁶ with corporations and industry groups donating large sums to political parties and conducting their own large-scale campaigns on discreet issues.¹⁷

Campaign finance had, until recently, been neglected by Australian legal scholarship,¹⁸ and it has received little judicial attention.¹⁹ However in light of unprecedented²⁰ levels of expenditure by political parties and third parties, it has been recognised as “*the* central issue facing electoral law”,²¹ being the

¹³Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *UNSWLJ* 1, 1.

¹⁴ At the time of writing, the Australian Electoral Commission's Funding and Disclosure Election Report was not yet available for the 2013 Federal election, although it was reported that the Liberal Party's spending was A\$6.75 million, and the Australian Labor Party's was A\$4.04 million: David Waller, 'Election 2013 Advertising Wars: the Winners and Grinners' (2013) *The Conversation*, 11 September 2013.

¹⁵ Graeme Orr and Brian Costar, 'Old Figures, New Money' (2012) *Inside Story* <<http://inside.org.au/old-figures-on-new-money/>> (accessed 20 August 2012). Orr's article relies on statistics released by the Australian Electoral Commission on 1 February 2012 under Part XX of the *Commonwealth Electoral Act 1918* (Cth).

¹⁶Government, 'Electoral Reform Green Paper: Donations, Funding and Expenditure' (2008), 1; Joo-Cheung Tham, *Money and Politics: The Democracy we can't Afford* (UNSW Publisher, 2010), 183-185.

¹⁷For a break-down of the amount of money spent by third parties on political advertising according to ideological affiliation between 2006 and 2010, see Andrew Norton, 'Democracy and Money: The Dangers of Campaign Finance Reform' (The Centre for Independent Studies, 2011), 19.

¹⁸Orr, 'The Currency of Democracy', 3. Deborah Z Cass and Sonia Burrows, 'Commonwealth Regulation of Campaign Finance - Public Funding, Disclosure and Expenditure Limits' (2000) 22 *SYDLR* 477, 478.

¹⁹ Orr, 'The Currency of Democracy', 3; Graeme Orr, *The Law of Politics* (Federation Press, 2010), 207.

²⁰Government, 'Electoral Reform Green Paper: Donations, Funding and Expenditure' (2008), 10-12; 'Research Brief: Political Advertising in Australia' (Parliament of Australia, 29 November 2004), 1.

²¹Orr, 'The Currency of Democracy' 1, 1; Graeme Orr, Bryan Mercurio and George Williams, 'Australian Electoral Law: A Stocktake' (2003) 2 *Election LJ* 383, 397.

subject of State and Commonwealth Parliamentary inquiries,²² scholarly interest²³ and significant reform at Commonwealth level and in each of the States and Territories.²⁴ In New South Wales²⁵ and Queensland,²⁶ reforms include limits on campaign expenditure by candidates, political parties and third parties.

This article addresses the validity of proposed Federal electoral communication expenditure limits under the Commonwealth Constitution, rather than State limits which raise additional questions regarding the respective State constitutions, and the degree to which the Commonwealth Constitution properly extends to political communication on State affairs. Although, with the High Court content to accept a loose nexus between State and Federal affairs,²⁷ it seems likely that much of the constitutional analysis applicable to Federal limits will apply equally to State limits.

B *Electoral communication expenditure limits, equality and quality decision-making*

The exorbitant costs associated with campaign advertising preclude all but the largest political parties and corporate interests from accessing broadcast and

²² Joint Standing Committee on Electoral Matters, 'Funding and Disclosure: Inquiry into Disclosure of Donations to Political Parties and Candidates' (Parliament of the Commonwealth of Australia, February 2006); Select Committee on Electoral and Political Party Funding, 'Electoral and Political Party Funding in New South Wales, ' (NSW Legislative Council, 2008); Electoral Matters Committee, 'Inquiry into Political Donations and Disclosure' (Parliament of Victoria, 2009); Standing Committee on Justice and Community Safety, 'Inquiry into Campaign Finance Reform' (Legislative Assembly for the ACT, 2011).

²³ See Cass and Burrows, 'Commonwealth Regulation of Campaign Finance - Public Funding, Disclosure and Expenditure Limits' (2000) 22 *SYDLR* 477; K D Ewing, 'The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study' (1992) 22 *UWALR* 239.

²⁴ For a detailed account of campaign finance reforms in each State and Territory, see Brenton Holmes, 'Political Financing: Regimes and Reforms in Australian States and Territories' (Parliament of Australia, 2012).

²⁵ The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) was amended in 2008, 2010, and 2012, each time making the restrictions on electoral communication expenditures tighter (see the current s. 95F(10)).

²⁶ The Queensland Parliament inserted Division 9, Part 9A into the *Electoral Act 1992* (Qld) via the *Electoral Reform and Accountability Amendment Bill 2011* (Qld), which applies a cap of \$10,000 on third parties (adjusted by the Consumer Price Index): ss. 274 and 280. Tasmania has imposed expenditure limits on elections for the Legislative Council since the enactment of the *Electoral Act 1985* (Tas) (now repealed, see *Electoral Act 2004*(Tas)).

²⁷ *Unions NSW v New South Wales* [2013] HCA 58 at [20] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, citing *Hogan v Hinch* (2011) 243 CLR 506 at [48] per French CJ.

print media,²⁸ the most influential mediums in electoral campaigns.²⁹ The concern is that well-financed groups will monopolise the airwaves and "distort" political discourse to reflect their interests disproportionate to others, and by introducing limits on the amount that political candidates and third parties may spend during an election, the legislature hopes to "level the playing field"³⁰ between candidates.³¹ This is desirable to maintain a minimum level of quality of political debate by permitting a diversity of viewpoints to be expressed,³² as well as the fairness of elections.³³

There are two ways of conceptualising a "level playing field", or fairness, in an election.³⁴ First, electoral campaigns may be regarded as fair when each person has roughly equal opportunity to present his or her opinions to the public.³⁵ The argument extends equal rights to participate in the democratic process, which also supports universal adult suffrage and equal vote distribution among electorates, to speech: a type of "one person, one dollar, one vote" egalitarian ideal.³⁶ In pursuance of this goal, laws limiting electoral

²⁸ This was one basis for the legislation struck down by the High Court in *ACTV: Minister for Transport and Communications*, House of Representatives, Parliamentary Debates (*Hansard*), 9 May 1991, p. 3479.

²⁹ During the 2010 Federal election campaign, 36% of the public followed "a good deal" of the election on television, 20% via the major newspapers, 17% on the radio and 10% through the internet: Ian McAllister and Juliet Pietsch, 'Trends in Australian Political Opinion: Results from the Australian Election Study, 1987-2010' (Australian National Institute for Public Policy, 2011), 69-72.

³⁰ Providing "a more level playing field for candidates seeking election" was a predominant reason for the introduction of expenditure limits in NSW and campaign advertising regulation at Commonwealth level: Kristina Keneally, Premier, Second Reading Speech to Election Funding and Disclosures Amendment Bill 2010, Legislative Assembly of New South Wales Parliament, *Hansard*, 28 October 2010, 27168; Kim Beazley, Minister for Transport and Communications, Second Reading Speech to *Political Broadcasts and Political Disclosures Bill 1991*, House of Representatives of Commonwealth Parliament, *Hansard*, 9 May 1991, 3480. See also Twomey, *Freedom of Political Communication and Its Constitutional Limits on Electoral Laws* 203.

³¹ There are other justifications for electoral communication expenditure limits that are not addressed by this article, such as reducing the risk of, or appearance of, corruption and alleviating the burden on candidates to dedicate significant time to fundraising in order to compete in a successful campaign: see Ewing, 'The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study' (1992) 22 *UWALR* 239, 242-246.

³² Julian N Eule, 'Promoting Speaker Diversity: Austin and Metro Broadcasting' (1990) *Sup. CtR* 105; Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1993), 94.

³³ Sunstein, 'Political Equality and Unintended Consequences' (1994) 94 *Colum. LJ* 1390, 1390; Tham, *Money and Politics*, 9; *FEC v Massachusetts Citizens for Life*, 479 US 238 (1986) per Brennan J.

³⁴ Daniel Lowenstein, 'Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment' (1981) 29 *UCLR* 505, 515.

³⁵ This conception of fairness is derived from a much broader philosophical argument for equality of opportunity: see John Rawls, *A Theory of Justice* (Harvard University Press, 1971); John Roemer, *Equality of Opportunity* (Harvard University Press, 1998).

³⁶ Smolla, *Free Speech in an Open Society* (Knopf, 1992), 223; Elizabeth Drew, *Regulating Campaign Activity: The New Road to Contradiction* (Macmillan Publishing Co., 1983), 149.

communication expenditure across the board prevent inequality in resources from being realised as an inequality of influence. They also recognise voters' interest in receiving a balanced presentation of a wide range of opinions.³⁷

Critics of this conception of fairness regard strict political equality to be a chimerical goal: among large, diverse populations, achieving equal opportunity to influence political discourse is, quite clearly, impossible.³⁸ Nor is strict equality necessarily desirable in political debate: it seems entirely consistent with democratic government that more popular ideas should receive wider publication. The second conception of fairness accounts for this criticism, referring to the ability of each political opinion to be presented in proportion to the actual public support for the political ideas espoused.³⁹ Legislation limiting electoral communication expenditure directed to this end will account for unequal expenditure insofar as the quantity of funds available to a candidate or special interest group are "a rough barometer of public support" for its views.⁴⁰ Rather than channelling the opinions of those with the greatest economic influence, political discourse will more accurately reflect the interests of the voting public, and ultimately lead to better decision-making.

III ELECTORAL COMMUNICATION EXPENDITURE LIMITS UNDER THE FREEDOM OF POLITICAL COMMUNICATION

A *Case Law to Date*

1 *Unions NSW v State of NSW*

In *Unions NSW v State of NSW*, the High Court was not called upon to assess the constitutional validity of New South Wales' electoral communication expenditure limits generally,⁴¹ but to address two provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (the EFED Act) that assisted in that purpose. Section 96D prohibited donations to political parties,

³⁷Lowenstein, 'Campaign Spending and Ballot Propositions', 516.

³⁸The breakdown of the strict equality principle in large populations is well illustrated in Bertrand de Jouvenel, 'The Chairman's Problem' (1961) 55 *The American Political Science Review* 368.

³⁹*FEC v Massachusetts Citizens for Life*, 479 US 238 (1986) at 258 per Brennan J; *Austin v Michigan Chamber of Commerce* 494 US 652 (1990) at 660 per Marshall CJ; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 US 238 at 252 per Brennan J.

⁴⁰*Federal Election Commission v Massachusetts Citizens for Life* 479 US 238 (US) per Brennan J; Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v Carr to Bush v Gore* (New York University Press, 2003), 111.

⁴¹*Unions NSW v State of NSW* [2013] HCA 58 at [41] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

candidates and third party campaigners by all but individuals who were enrolled to vote. By section 95G(6), the legislation aggregated the electoral communication expenditure of political parties and their affiliates for the purposes of the electoral communication expenditure caps. The High Court was unanimous⁴² in striking down both provisions, holding that they failed to pass the second limb of the *Lange* test.

By introducing the general scheme limiting electoral communication expenditure in 2010, NSW Parliament hoped to improve the diversity of political opinion available by curbing a system "under which those with the most money have the loudest voice and can simply drown out the voices of all others".⁴³ However the provisions under constitutional challenge were introduced later, and while they were designed to support the scheme as a whole, their purpose had a slightly different focus: by removing the ability of electoral candidates to rely on corporate and union donations to fund their campaigns, the laws reduced the influence of interest groups over the political process.⁴⁴ This was the primary focus of the State of NSW's in its submissions as defendant (the argument was phrased as reducing "corruption", or "the appearance of corruption", of the political process)⁴⁵ and as a result, it was the focus also of the High Court.

The Court had little difficulty finding that the provisions did not, in fact, reduce corruption or the appearance of it, and were therefore unconstitutional. The majority held that section 96D had no clear purpose, the State of NSW and its fellow intervening States having failed to explain how, in its incompleteness, a prohibition on political donations from some sources but not electors

⁴² Note that Justice Gageler recused himself after it was revealed that he had provided advice on the laws in his former role as Commonwealth Solicitor General.

⁴³ Kristina Keneally, Premier, Second Reading Speech to the *Election Funding and Disclosures Amendment Bill 2010*, Legislative Assembly of New South Wales Parliament, Hansard, 28 October 2010, 27168.

⁴⁴ Michael Gallacher, Minister for Police and Emergency Services, Second Reading Speech to the *Election Funding and Disclosures Amendment Bill 2011*, Legislative Council of New South Wales Parliament, Hansard, 15 February 2012. There is a very strong case to be made that the real aim of the O'Farrell Government in passing these amendments was to weaken the NSW Australian Labor Party and third party campaigners, as eloquently explained by Anne Twomey's paper on *Unions NSW v State of NSW* at the Gilbert + Tobin Centre for Public Law's Constitutional Law Conference on 14 February 2014, available at http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2014_con_law_conf_papers_anne_twomey_o.pdf.

⁴⁵ See the Defendant's submissions, filed 9 October 2013, at [67] and [96].

achieved its anti-corruption purpose.⁴⁶ In relation to section 95(G)(6), the majority was unable to deduce how, by limiting political donations from affiliated industrial organisations, the section furthered the anti-corruption purpose.⁴⁷

The High Court was not required to address the more troublesome proportionality aspect of the *Lange* test in *Unions NSW v State of NSW*, and the question of the constitutional legitimacy of legislative attempts to level the political playing field by regulating political communication was not raised by the parties.⁴⁸

2 ACTV

The High Court has considered legislative attempts to level the playing field with respect to political communication only once,⁴⁹ and it was before the *Lange* test was developed. In *ACTV*, the Court struck down Part IIID of the *Broadcasting Act 1942* (Cth), which did not address electoral expenditure limits *per se*, but regulated broadcast media during elections to the same end. The offending Part was introduced following “[t]he rising cost of television advertising time... which risks the distortion of our open democratic system”.⁵⁰ The legislation imposed a general prohibition on the broadcasting of political advertisements⁵¹ relating to a Commonwealth,⁵² Territory⁵³ or State⁵⁴

⁴⁶ *Unions NSW v State of NSW* [2013] HCA 58 at [51] - [56] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

⁴⁷ *Unions NSW v State of NSW* [2013] HCA 58 at [64] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

⁴⁸ In his separate opinion, Keane J acknowledged that protecting the electoral process from undue influence was legitimate, but noting that the expenditure limits had not been challenged generally by the Plaintiffs, his acknowledgment in passing that they “may reasonably be seen to enhance the prospects of a level electoral playing field” does not assist our analysis: see [138] and [136] of his Honour’s judgment.

⁴⁹ In *Mulholland* (2004) 220 CLR 181, the High Court considered a “level playing field” argument with respect to equal opportunity for political parties to register their name against their preferred candidate on the ballot, although the Court in its analysis went no further than recognise that carefully-calibrated political equality was not required by the Commonwealth Constitution: at [332] per Callinan J, [63] per McHugh J, and see also [11] per Gleeson CJ.

⁵⁰ Joint Standing Committee on Electoral Matters, ‘Who Pays the Piper Calls the Tune: Minimising the Risks of Funding Political Campaigns’ (No. 4, 1989), iv.

⁵¹ “Political advertisements” were defined broadly under s. 95B *Broadcasting Act 1942* (Cth), to include “matter intended or likely to affect voting in the election or referendum concerned”, which included express or implicit reference to a candidate or group of candidates in that election, an issue before electors in that election, or the government, the opposition or previous government or opposition. The prohibition did not extend to reporting of news or current affairs, or print media.

⁵² Section 95B(1) *Broadcasting Act 1942* (Cth).

⁵³ Section 95C *Broadcasting Act 1942* (Cth).

⁵⁴ Section 95D *Broadcasting Act 1942* (Cth).

Parliamentary election or referendum during the “election period”.⁵⁵

The majority Justices were circumspect in their treatment of the “level playing field” rationale. Chief Justice Mason acknowledged but did not approve of it,⁵⁶ although he went on to express considerable distrust of Parliament.⁵⁷ Justice McHugh was similarly sceptical, holding that “before legislation could be upheld on the “level playing field” theory, it would need to be demonstrated by acceptable evidence, and not merely asserted”.⁵⁸ Justices Deane and Toohey gave the rationale equivocal support,⁵⁹ but added that “a prohibition is no less antagonistic to and inconsistent with the freedom of political communication... simply because the Parliament or those in government genuinely apprehend that some persons or groups may make more, or the more effective, use of the freedom than others involved in political processes”.⁶⁰ Only Justice Brennan definitively supported the “reduction of an untoward advantage of wealth in the formation of political opinion” as a legitimate legislative objective. A majority of five Justices struck down the provisions for being incompatible with the freedom of political communication.⁶¹

The freedom of political communication doctrine has moved on significantly since the *ACTV* decision, which ultimately did not yield any principled method of addressing “the level playing field” rationale for electoral communication expenditure limits. Nowhere in their judgments did the High Court Justices indicate a textual basis for their conclusions: they simply accepted or rejected the rationale according to their personal preference. Unfortunately, the introduction of the *Lange* test has not provided the Court with a more principled, text-supported basis upon which to analyse the issue.

⁵⁵ “Election period” was defined to be, subject to some exceptions, the period starting from when the proposed polling day was publicly announced or the day on which the writs for the election were issued, whichever was first: s. 4(1) of the *Broadcasting Act 1942* (Cth).

⁵⁶ *ACTV* (1992) 177 CLR 106 at 131.

⁵⁷ *Ibid* at 145.

⁵⁸ *Ibid* at 239.

⁵⁹ *Ibid* at 175 per Deane and Toohey JJ, finding some “force in an argument that the high cost of television and radio advertisements is such that the prohibition of political advertisements is necessary to create a “level playing field” or to ensure some balance in the different points of view”.

⁶⁰ *Ibid* at 175.

⁶¹ Chief Justice Mason, and Deane, Toohey, and Gaudron JJ held the Act wholly invalid; McHugh J struck down the law except with respect to Territories; Brennan J upheld the Act for federal elections but not for State elections because it breached an “implication which protects the functioning of the States from the burden of control by Commonwealth law” (at 164). Only Justice Dawson was of the opinion that the Act was wholly valid.

B *The first limb: “the law effectively burdens communication about government and political matters...”*

Reflecting the High Court's position in *ACTV*, that the freedom of political communication only extends as far as is necessary to maintain representative government, the inquiry involves two discrete elements: the law must “effectively burden” communication, and that communication must be of a type that would “inform” the people’s choice at Federal elections.

In *Wotton v Queensland*,⁶² Heydon J made a robust critique of this first limb, drawing attention to the great number of areas of regulation - such as evidence, copyright and criminal law - which remain uncontroversial despite the fact that they frequently burden political communication.⁶³ Crucially, his Honour added that the second limb involves considerations that are capable of being applied by each particular judge in a different way, which tend toward sharp divisions of judicial opinion.⁶⁴

The current members of the High Court have not heeded Heydon J’s warning, and seem happy to leave the detailed constitutional analysis to the nebulous second stage.⁶⁵ According to French CJ and Hayne J’s judgments in *Monis v The Queen*⁶⁶, even a “little” burden is sufficient to satisfy the first limb, so that this first stage is unlikely to ever raise much resistance to a constitutional challenge. In *Unions NSW v State of NSW*, having acknowledged that the legislation inhibited communication on electoral matters by design, the High Court held that the first inquiry was uncontentious, and “simply resolved” in favour of there being a burden.⁶⁷

But in the context of electoral communication expenditure limits, this lackadaisical attitude to the first limb of the *Lange* test is not without significance. If the freedom of political communication is justified only to the extent necessary to maintaining the constitutionally prescribed system of government,⁶⁸ the High Court must not only be satisfied that the burdened

⁶² *Wotton v Queensland* (2012) 246 CLR 1.

⁶³ *Wotton v Queensland* (2012) 246 CLR 1 at [42]-[51].

⁶⁴ *Wotton v Queensland* (2012) 246 CLR 1 at [53].

⁶⁵ Thus, this issue is often conceded by the parties, although not always appropriately: *Coleman v Power* (2004) 220 CLR 1 at [298] per Callinan J; *Wotton v Queensland* (2012) 285 ALR 1 at [41] per Heydon J.

⁶⁶ *Monis v The Queen* (2013) 295 ALR 259.

⁶⁷ *Unions NSW v State of NSW* [2013] HCA 58 at [38], [61] per French CJ, Hayne, Crennan, Kiefel and Bell JJ and see also [120], [161] per Keane J.

⁶⁸ *Lange* (1997) 189 CLR 520 at 561; *Coleman v Power* (2004) 220 CLR 1 at [89] per McHugh J, [299] per Callinan J; *Wotton* (2012) 285 ALR 1 at [54] per Heydon J.

communication falls within the prescribed category, but that the speech is conducive to representative government.⁶⁹ Thus the question under the first limb becomes: does the communication that results from unlimited expenditure tend to enhance or weaken representative government?

By failing to properly analyse the limits under the first limb of *Lange*, the High Court implicitly favoured the libertarian preference for unregulated speech as a foundational principle of the Australian democratic process. Never mind that the NSW Parliament hoped to improve the diversity of opinion and produce a better-informed electorate:⁷⁰ as the laws curb political communication they are *prima facie* unconstitutional, and will only be permissible if the Court nonetheless deems them to be "appropriate and adapted to a legitimate end".

C *The second limb: "... reasonably appropriate and adapted to serve a legitimate end..."*

In *Monis*, Crennan, Kiefel and Bell JJ explained that the second limb involves at least two separate inquiries: whether the law's purpose is compatible with the constitutionally prescribed system of representative government;⁷¹ and whether the means are proportionate to the legislative object, or another, less burdensome alternative is available.⁷²

As recognised by their Honours, it would be a rare case in which the Court would find the legislative purpose of the impugned law to be unconstitutional outright.⁷³ But expenditure limits could conceivably be such a case: reasonable adherents to the liberal conception of democratic governance, such as the majority of the current United States Supreme Court,⁷⁴ believe the governmental objective of levelling the playing field to be outright unacceptable. Whether it does so explicitly or not (and here it is advocated that it should do

⁶⁹ For instance in *Coleman v Power* (2004) 220 CLR 1 at [298], Callinan J dissented on the basis that abusive and insulting words were not protected under *Lange's* first limb, because they were unlikely "to throw light on government or political matters". Likewise in *Langer v Commonwealth* (1996) 186 CLR 302 at 351, Gummow J observed that the freedom "does not facilitate or protect that which is intended to weaken or deplete an essential component of the system of representative government".

⁷⁰ This point was argued by the State at [84] of their submissions dated 9 October 2013.

⁷¹ *Monis v The Queen* (2013) 295 ALR 259 at [281]. For elaboration on this point, see *Wotton v Queensland* (2012) 285 ALR 1 at [81] per Kiefel J; *Mulholland* (2004) 220 CLR 181 at [33] per Gleeson CJ; *Lange* (1997) 189 CLR 520 at 567; Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *MULR* 668.

⁷² *Monis v The Queen* (2013) 295 ALR 259 at [280].

⁷³ *Monis v The Queen* (2013) 295 ALR 259 at [281].

⁷⁴ *McCutcheon v Federal Election Commission*, 572 US ____ (2014) at 18 per Roberts CJ (with whom Scalia, Kennedy and Alito JJ joined).

so explicitly), the High Court would have to reach a conclusion on the complex normative issue of government's role in regulating speech in elections.⁷⁵ The *Lange* test goes no way toward answering this issue for the High Court Justices.

Further, assuming the High Court did find that governmental attempts to level the playing field could be, in principle, constitutionally permissible, it must then assess whether the limits in place are proportionate ("reasonably appropriate and adapted") to that end. The inevitability of extra-constitutional principles informing this balancing process has long been recognised.⁷⁶ Commonly, it is applied to legislative purposes entirely unrelated to free speech which have a propensity to reveal the idiosyncratic nature of the inquiry: whether a judge considers a law banning the distribution of pamphlets in shopping malls to be proportionate to protecting shoppers from being hassled, will largely depend upon the judge's aversion to such a nuisance.⁷⁷ Equally with electoral communication expenditure limits, unless the caps were set so low as to effectively silence certain parties altogether, the willingness of the Court to accept them will depend upon their readiness to accept regulation of speech in principle in line with their libertarian or deliberative conception of representative government.

D Conclusion

Except for a smattering of cursory *obiter* on the propriety the government's purpose in levelling the political playing field, the High Court has not resolved the question of whether electoral communication expenditure limits are compatible with the freedom of political communication; and nor can it given the current analytical framework. In short, the Commonwealth Constitution's text, interpreted in accordance with existing precedent, does not reveal whether the prescribed system of representative government contemplates libertarian democracy or deliberative democracy, but if the High Court is to address this issue in a principled way, it must commit to one.

⁷⁵ The arguments for and against regulating speech are developed further in Chapter II.

⁷⁶ For an early and very influential discussion of the shortcomings of the High Court's balancing approach, see Adrienne Stone's 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *MULR* 668; and her follow-up article 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *UNSWLJ* 842. See also Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *SydLR* 505.

⁷⁷ This example is taken from *Attorney General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197.

IV ELECTORAL COMMUNICATION EXPENDITURE LIMITS AND VALUE JUDGMENTS

The juxtaposition could not be starker between the Australian High Court's professed ideological neutrality⁷⁸ and the US Supreme Court's approach to the First Amendment's guarantee of free speech. However, because of the "genetic" relationship between the Australian and US Constitutions⁷⁹ by virtue of the influence of American constitutional precedent on the framers of the Commonwealth Constitution.⁸⁰ Also, as a practical matter, the High Court has made frequent reference to US First Amendment law and analysis in its freedom of political communication judgments.⁸¹ These references have been superficial however, and the instructive value of US jurisprudence too-readily overlooked (including by the current High Court in *NSW Unions v State of NSW*).⁸² This section attempts to rectify this by explaining the utility of the American normative approach to judicial review of expenditure limits, and subverting common assumptions that are thought to preclude the High Court from following suit.

A *The Australian Formalist Tradition and the Denial of Top-down Legal Reasoning*

Sir Owen Dixon's "strict and complete legalism",⁸³ or formalism,⁸⁴ affirmed

⁷⁸Hutley, "The Legal Traditions of Australia as Contrasted with those of the United States" (1981) 55 ALJ 63, 65.

⁷⁹Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 UQLJ 317, 321 ft 18; Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' (1993) 14 *Cardozo LJ* 533, 536-538.

⁸⁰Dixon, 'Sir Owen Dixon, 'The Two Constitutions Compared' in Cazimir Woinarski (ed), *Jesting Pilate* (The Law Book Co., 2nd ed, 1997) 100, 101; James A Thomson, 'Australian and American Constitutions: Continuing Adventures in Comparative Constitutional Law' (1996-1997) 30 *Marshall LR* 627, 638-639.

⁸¹For an account of the number of times American precedent was cited by the majority Justices in *ACTV* (1992) 177 CLR 106, see Gerald N Rosenberg and John M Williams, 'Do Not Go Gently into that Good Right: The First Amendment in the High Court of Australia' (1997) 11 *Supreme Court Review* 439, 447-452.

⁸²*Unions NSW v State of NSW* [2013] HCA 58 at [19] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, and at [102] per Keane J.

⁸³Sir Owen Dixon, 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia' (1952) 85 *Commonwealth Law Reports* xi, xiv.

⁸⁴A variety of synonyms for "formalism" exist, including "interpretivism" and "legalism". In this article, "formalism" is preferred as it is consistent with international usage: Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *FLR* 1, 7.

that judges genuinely declare rather than make the law,⁸⁵ and has been cited *ad nauseum* in relation to judicial review of legislative acts under the Commonwealth Constitution. There are, of course many exceptions - the “activist” Mason period comes immediately to mind⁸⁶ - and Dixon's pronouncement as an accurate descriptor of the High Court has been successfully undermined.⁸⁷ Nonetheless, the popularity of Dixon's fantasy persists⁸⁸ to a level not indulged in the United States,⁸⁹ and open reliance upon “political principles or theories not anchored in the text of the [Commonwealth] Constitution or are not necessary implications from its structure” remains highly controversial.⁹⁰

In the US, the introduction of legal realism in the 1920s, which embraces the fact that judges create as well as apply the law, opened an avenue for the Supreme Court to embark upon “top-down legal reasoning”. Legal realism, as described by Judge Richard Posner is:⁹¹

[t]op-down reasoning, [where] the judge... adopts a theory about an area of law... and uses it to organise, criticise, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory.

Problems can arise with top-down legal reasoning when there is disunity among the court's members as to the correct theory to be applied. First

⁸⁵ Dixon, 'The Two Constitutions Compared', 155-157. That is not to say Dixon disregarded development of the common law, although he believed this was to be done conservatively (see 158). See also Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *MULR* 543, 544-545.

⁸⁶ Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *FLR* 1, 7; Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *FLR* 1, 5.

⁸⁷ Chief Justice Murray Gleeson, 'The Rule of Law and the Constitution' (Article presented at the Boyer Lecture Series, Sydney, 24 December 2000), 85; Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 224, 224.

⁸⁸ On Dixon's influence in the High Court, see Dawson and Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *MULR* 543; Justice James Spigelman, 'High Court Centenary: Sir Owen Dixon' (2003) 77 *ALJ* 682.

⁸⁹ Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *FLR* 1, 7; Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *PLR* 234, 239; David Tucker, 'Textualism: An Australian Evaluation of the Debate between Professor Ronald Dworkin and Justice Antonin Scalia' (1999) 21 *SydLR* 567, 569.

⁹⁰ *McGinty* (1996) 186 CLR 140, at 231 per McHugh J. See also Latham CJ in *South Australia v Commonwealth* (1942) 65 CLR 373, at 409, absolving the courts of policy considerations.

⁹¹ Richard Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago LJ* 433, 433.

Amendment case law has suffered from a lack of consensus on the theoretical premises of free speech,⁹² and inconsistent decisions and frequent overruling (by a bare majority) have impeded the development of campaign finance law.⁹³ Nonetheless, if the Supreme Court were to adhere to a single principle allowed by top-down legal reasoning, it would benefit from the internal consistency of one principle, leading to the coherent development and predictable application of legal principle.⁹⁴

Accordingly, even though top-down legal reasoning in Australian courts is widely regarded as a term of abuse,⁹⁵ it is here suggested that if the High Court were to commit to a coherent, normative democratic theory in reviewing legislation under representative government, it could at least develop a coherent and principled body of law.⁹⁶

1 *Distinctions with the First Amendment Dispelled*

The First Amendment's free speech guarantee is a deeply contested domain of US constitutional law,⁹⁷ involving a great number of philosophical premises competing for primacy. The three "classic"⁹⁸ justifications are self-realisation, the search for "truth" and the facilitation of democratic governance. Most relevant to Australia,⁹⁹ is the argument from democratic governance, which is associated with Professor Meiklejohn's argument that freedom of speech "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage".¹⁰⁰

⁹² Lillian BeVier, 'The First Amendment and Political Speech: an Inquiry Into the Substance and Limits of Principle' (1977-1978) 30 *Stan LJ* 299, 299.

⁹³ See Part E(ii), below.

⁹⁴ Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *U Chic LR* 433, 435-436; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982), 3-5. Cf. *Roxborough v Rothmans of Paul Masil Australia Ltd* (2001) 208 CLR 516 at 545 per Gummow J.

⁹⁵ Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) Winter *NSW Bar News* 10, 10. See, for instance, McHugh J's denunciation of the interpretive method in *McGinty* (1996) 186 CLR 140 at 344-345.

⁹⁶ Glenn Patmore, 'Making Sense of Representative Democracy and the Implied Freedom of Political Communication in the High Court of Australia' (1998) 7 *Griffith LR* 97, 121.

⁹⁷ Fiss, *The Irony of Free Speech*, 1; Ken Kersch, *Freedom of Speech: Rights and Freedoms under the Law* (Library of Congress, 2003) 103, 3.

⁹⁸ Tom D Campbell, 'Rationales for Freedom of Communication' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994) 17, 17; Smolla, *Free Speech*, Chapter I. There are other justifications, such as the encouragement of a tolerant society, and a suspicion of government: Barendt, *Freedom of Speech*, Chapter I.

⁹⁹ Meagher, "What is Political Communication?", 449; Buss, "Alexander Meiklejohn, American Constitutional Law and Australia's Implied Freedom of Political Communication" (2006) 34 *FLR* 421.

¹⁰⁰ Meiklejohn, *Free Speech and its Relation to Self-Government* (New York, Harper & Bros, 1948), 26-27.

By reason of its derivation from the system of responsible and representative government identifiable in the constitutional text and structure, the Australian freedom is described as an institutional freedom,¹⁰¹ as distinct from the general “personal right” established by the express terms of the First Amendment.¹⁰² But does the express nature of the American freedom genuinely account for the normative theories developed from it, and preclude a similar approach in Australia?

The short answer, is “no”. The nature of the First Amendment’s free speech guarantee is not exposed by its startlingly simple language and sweeping prohibition:¹⁰³ “Congress shall pass no law... abridging the freedom of speech”. Justice Black’s literalist approach¹⁰⁴ (“no law abridging’ means *no law abridging*”¹⁰⁵) was widely regarded to be undesirable and ultimately was not adhered to even by him¹⁰⁶

Nor does an originalist inquiry into the meaning of the First Amendment support its current conception as “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”.¹⁰⁷ The falsity of the long-accepted historical account that the framers intended to ensure an unrestricted right of free speech on public affairs, making “prosecutions for criticism of the government... forever impossible in the United States of America”¹⁰⁸ was exposed by Leonard Levy, who found that the constitutional debates of the House of Representatives and the Senate provide little indication as to the intended meaning of the clause.¹⁰⁹ Levy’s more reliable

¹⁰¹ *Theophanous* (1994) 182 CLR 104 at 149 per Brennan CJ; Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *MULR* 374, 376-377.

¹⁰² *Unions NSW v State of NSW* at [30] per French CJ, Hayne, Crennan, Kiefel and Bell; *Mulholland* (2004) 220 CLR 181 at [107] per McHugh J, [184] per Gummow and Hayne JJ.

¹⁰³ Fiss, *The Irony of Free Speech*, 1; Kersch, *Freedom of Speech*, 3; Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1993), xii.

¹⁰⁴ His Honour relied on the “plain words, easily understood”: Hugo Black, ‘The Bill of Rights’ (1960) 35 *New York University LJ* 865, 874.

¹⁰⁵ Cahn, ‘Justice Black and First Amendment “Absolutes”’ (1962) 37 *NYULR* 549, 553. See also Douglas J in *Gillette v United States* 401 US 437 (1971), and the description of his position in Powe, ‘Evolution to Absolutism: Justice Douglas and the First Amendment’ (1974) 74 *Colum LR* 372.

¹⁰⁶ Barendt, *Freedom of Speech*, 49; William Brennan, ‘The Supreme Court and the Meiklejohn Interpretation of the First Amendment’ (1965) 79 *Harv LR* 1, 5.

¹⁰⁷ *New York Times Co v Sullivan*, 376 US 254 (1964) at 270.

¹⁰⁸ Zechariah Chafee, ‘Freedom of Speech in War Time’ (1919) 32 *Harv LR* 932, 947; Henry Schofield, ‘Freedom of the Press in the United States’ in *Essays on Constitutional Law and Equity* (Chipman Law Publishing Company, 1914) 521, 535.

¹⁰⁹ Constitution, *First Amendment: Freedom of Expression - Speech and Press* (Cornell University Law School, 2000) [Error! Bookmark not defined.](#), 1020; Smolla, *Free Speech*, 38; Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1993), xii.

historical account¹¹⁰ describes a very limited conception of free speech extending protection no further than under English common law prohibiting prior restraints upon publications but retaining punishment for libel.¹¹¹

Thus neither the First Amendment's text nor the historical context of its enactment account for the guarantee of free speech presently understood: the content has been left almost entirely to judicial choice.¹¹² If the scant words of the First Amendment could lead to a complex and normative free speech guarantee, there is no reason in principle why the High Court cannot also refer to extra-constitutional theories to provide content to the similarly ambiguous constitutional mandate that members of Parliament be "directly chosen by the people". Indeed, as shown, such reference in this area is unavoidable.

2 *An Institutional Freedom and Representation Reinforcing Review*

If its status as an implied, as opposed to express, freedom does not preclude reference to substantive theory, could it be argued that the freedom of political communication's institutional nature does? Judicial review of representative government in Australia bears significant resemblance to Professor John Hart Ely's "representation reinforcing review", whereby courts determine a "malfunction [in] the process" by which representative government is realised.¹¹³ The theory denies a role for courts in determining fundamental values,¹¹⁴ entrusting these to the democratic mandate of the legislature.¹¹⁵ Ely describes the courts as neutral referees, intervening "only when one team is gaining unfair advantage, not because the "wrong" team has scored".¹¹⁶

This aspect¹¹⁷ of Ely's theory was echoed by Gummow and Hayne JJ in *Mulholland v Australian Electoral Commission*,¹¹⁸ quoting Professor Laurence

¹¹⁰ See Levy's ground-breaking account: Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Harvard University Press, 1960), revised in *Emergence of a Free Press* (Oxford University Press, 1985).

¹¹¹ William Blackstone, *Commentaries on The Laws of England* (Clarendon Press, 1769), 150-153.

¹¹² For over a century, the Supreme Court chose not to engage with the freedom at all; it was not until Holmes and Brandeis JJ's much celebrated dissenting judgments in the years following the Great War that serious speculation as to the meaning of the freedom, and its latently libertarian character, emerged: see *Abrams v United States* 250 U.S. 616 (1919) per Holmes J; *Whitney v California* 274 US 357 (1927) per Brandeis J; and generally David Rabban, 'The Emergence of Modern First Amendment Doctrine' (1983) 50 *University of Chicago LJ* 1205.

¹¹³ Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), 73 ff.

¹¹⁴ *Ibid*, 88.

¹¹⁵ *Ibid*, 103.

¹¹⁶ *Ibid*, 103.

¹¹⁷ There is a second aspect of Ely's theory which is not easily reconciled with the Australian constitution, which proposes that the Supreme Court should "concern itself with what majorities do to minorities", at 76, referring to footnote 4 of *United States v Carolene Products Co.* 304 US 144 (1938).

¹¹⁸ (2004) 220 CLR 181.

Tribe in extolling “[f]ew prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership”.¹¹⁹ Similarly, Stephen Gageler SC (as he then was) advocated “judicial vigilance where political accountability is inherently weak or endangered”.¹²⁰ Given that representatives have a vested interest in passing legislation that will favour their re-election, a reasonable degree of judicial scrutiny will be justified in relation to them.¹²¹

Of course, Ely’s theory has been the subject of steady scholarly criticism in the US,¹²² the best known being Tribe’s disputation of Ely’s central premise that it is possible to delineate between process and substance.¹²³ In order to protect representative government, the High Court must first define what it means. Reference to US free speech case law and jurisprudence reveals how difficult this task can be.

3 *Town Halls, Marketplaces and Representative Government*

Alexander Meiklejohn conceived of representative democracy as the traditional town meeting writ large, where “the talking must be regulated and abridged as the doing of the business under actual conditions may require”.¹²⁴ In this version of democracy, the government acted as chair of the meeting and facilitated productive public discussion by arbitrating who may speak, when they may speak and in what manner, and by enforcing adherence to the agenda of the meeting.¹²⁵ Crucially, government regulation did not extend to the content of what was said, so long as it conformed with the agreed agenda.¹²⁶

¹¹⁹Mulholland (2004) 220 CLR 181 at [157], quoting Laurence H Tribe, *American Constitutional Law* (Foundation Press, 2nd ed, 1988), 13-18.

¹²⁰Stephen Gageler, ‘Beyond the Text: A Vision of the Structure and Function of the Constitution’ (2009) *Australian Bar Review* 138, 152.

¹²¹Ely, *Democracy and Distrust*; Leslie Zines and Geoffrey Lindell (eds), *Sawyer’s Australian Constitutional Cases* (Law Book Co., 4th ed, 1982), 722; and Mason CJ’s position in *ACTV* (1992) 177 CLR 106 expresses a similar sentiment at 145. Cf Kirk, ‘Constitutional Implications (II): Doctrines of Equality and Democracy’ (2001) 25 *MULR* 24, 55; Meagher, ‘The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference’ (2011) 30 *UQLJ* 119.

¹²²Joseph Grano, ‘Ely’s Theory of Judicial Review: Preserving the Significance of the Political Process’ (1981) 42 *Ohio State LJ* 167, 169.

¹²³Laurence H Tribe, *Constitutional Choices* (Harvard University Press, 1985), 9.

¹²⁴Alexander Meiklejohn, *Political Freedom: The Constitutional Power of the People* (Galaxy, 1965), 24.

¹²⁵Owen M Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Westview Press, 1996), 101-103: “the state must act as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard”.

¹²⁶Robert Post, ‘Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse’ (1993) 64 *U Col LR* 1109, 1114. Notable American advocates of electoral communication expenditure limits who favour this conception of democracy include Professors Owen Fiss (*The Irony of Free Speech*, 16) and Cass Sunstein (*Democracy and the Problem of Free Speech* (The Free Press, 1993)).

Professor Robert Post challenges this characterisation of democracy, proposing instead the view that democracy presupposes autonomy of the people. First, Post rightly points out that no agreed agenda exists between the disparate groups and interests that are represented in a nation.¹²⁷ Further, the state “lacks ‘moderators’ who can be trusted to know when ‘everything worth saying’ has been said, and the legislature lacks the capacity to write laws that will tell a moderator when to make such a ruling”.¹²⁸ Meiklejohn’s town meeting is juxtaposed with a chaotic, but ultimately preferable, “arena within which citizens are free continuously to reconcile their differences and to (re)construct a distinctive and ever-changing national identity”.¹²⁹

These competing visions have had a profound effect on the development of electoral communication expenditure limits in the United States and the position as to the constitutional validity of expenditure limits has changed frequently according to the preferred vision of the Court of the day.¹³⁰ Most recently in *Citizens United* and *McCutcheon*, the Supreme Court invalidated federal bans on corporate funded electioneering communication by a 5-4 majority. In *Citizens United*, Kennedy J delivered a judgment for the plurality that utilised a conception of democracy which, like Post, pre-empted the autonomy of the people¹³¹ and thus concluded that the ban was undemocratic.¹³² By contrast, the dissenting Justices upheld the ban on the basis that there was a “compelling governmental interest ... [in] sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government”.¹³³

In Australia, too, the High Court Justices have favoured different conceptions of democracy. For instance, despite criticism that the majority in *ACTV* inappropriately adopted a “free-market” approach to free speech,¹³⁴ their

¹²⁷Post, ‘Meiklejohn’s Mistake’, 1118; see also Smolla, *Free Speech*, 16.

¹²⁸Kenneth Karst, ‘Equality as a Central Principle of the First Amendment’ (1975) 43 *University of Chicago LJ* 20, 40 (although note that Karst recognised an equality principle in the First Amendment).

¹²⁹Post, ‘Meiklejohn’s Mistake’, 1116.

¹³⁰Compare *Buckley v Valeo* 424 US 1 (1976) at 57; *FEC v Massachusetts Citizens for Life*, 479 US 238 (1986) at 257; *Austin v Michigan Chamber of Commerce* 494 US 652 (1990) at 660; and finally *Citizens United*, 130 S Ct 876 (2010) at 899.

¹³¹*Ibid* at [16] per Kennedy J (for the majority), *Davis v Federal Election Commission*, 554 US 724 (2008). See also his Honour’s reference to Douglas J’s dissent in *United States v Automobile Workers*, 352 US 567 (1957) at 593 (joined by Warren CJ and Black J).

¹³² *Ibid* at 23.

¹³³*Citizens United*, 130 S Ct 876 (2010) at 957 per Stevens J (in dissent, joined by Ginsburg, Breyer and Sotomayor JJ), citing *McConnell*, 540 US 93 (2003).

¹³⁴Williams, ‘Do Not Go Gently’, 452; David Tucker, ‘Representation-Reinforcing Review: Arguments about Political Advertising in Australia and the United States’ (1994) 16 *SydLR* 274, 286.

Honours described the freedom of political communication's central premise not in terms of preserving the electorate's autonomy, but to ensure electors' capacity to make informed choices.¹³⁵ Like in Meiklejohn's town hall, freedom of political communication "may be regulated in ways that enhance or protect the communication of those matters".¹³⁶

In *Coleman v Power*,¹³⁷ the High Court was to determine whether or not "threatening, abusive or insulting words"¹³⁸ were conducive to representative government and thereby protected. In so doing, Kirby J presented a vision of a robust and caustic Australian democracy which echoed Post.¹³⁹ By contrast, Heydon J aligned with a deliberative version of democracy, describing Australian representative government in terms of the common convenience and welfare of citizens, ensured by a civilised standard of behaviour.¹⁴⁰

In each of these cases, the Justices were engaged with a form of Ely's norm-denying, representation reinforcing review concerning the process of democratic governance. However their Honours' decisions conflicted as a result of the different versions of representative government being protected, and in the absence of textual guidance, they simply intuited the best version of representative government. Thus, even in Australia, top-down reasoning is inevitable.

B *The Danger of Empirical Assumptions*

Determining the constitutional validity of legislation by reference to abstract principles leads to bad decisions,¹⁴¹ and in this incredibly complicated area of law, empirical assumptions have the potential to be equally problematic.¹⁴²

¹³⁵ *ACTV* (1992) 177 CLR 106 at 239 per McHugh J, 139 per Mason CJ, 187 per Dawson J. see also *Langer v Commonwealth* (1996) 186 CLR 302 at 410 per Dawson J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Coleman v Power* (2004) 220 CLR 1, at 125 per Heydon J; Aroney, "Justice McHugh, Representative Government and Elimination of Balancing" (2006) 28 *SydLR* 505, 515.

¹³⁶ *Coleman v Power* (2004) 220 CLR 1 at 90 per McHugh J.

¹³⁷ (2004) 220 CLR 1.

¹³⁸ Section 7(1)(d) of the *Vagrant's Gaming and Other Offences Act 1931* (Qld).

¹³⁹ *Coleman v Power* (2004) 220 CLR 1 at [239]. See also Gummow and Hayne JJ at [331]-[332].

¹⁴⁰ *Ibid* at [331]. For a very good critique of this decision, see Adrienne Stone, 'Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication' (2011) 30 *UQLJ* 79.

¹⁴¹ Owen M Fiss, 'Free Speech and Social Structure' (1986) 71 *Iowa LJ* 1405, 1421; Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1993), 98-99.

¹⁴² The High Court's approach to constitutional facts is beyond the scope of this paper, but see JD Holmes, 'Evidence in Constitutional Cases' (1949) 23 *ALJ* 235; Cappelletti, 'The Law-Making Power of the Judge and Its Limits: A Comparative Analysis' (1982) 8 *Monash LR* 15.

1 *An Australian example*

Just as the Supreme Court Justices in *Citizens United* struck down electoral expenditure limits by reference to their preferred theory of democratic government rather than evidence of their success,¹⁴³ in *ACTV* the High Court reverted to unspoken ideological preference. The legislation there considered¹⁴⁴ compelled broadcasters to allot a set amount of time for “election broadcasts” for free: 90% to be used by political parties with representatives in Commonwealth Parliament and political parties that had a prescribed minimum number of election candidates,¹⁴⁵ with the remaining 10% distributed among minority political parties (members of the general public and special interest organisations were excluded altogether).¹⁴⁶ The majority Justices emphasised the importance of empirical evidence in reviewing the legislation.¹⁴⁷ However their Honours proceeded to invalidate the relevant provisions for disadvantaging minority parties and excluding third parties, on the unfounded assumption that access to electronic broadcast media was otherwise available to them. In fact, as publicly available data indicates, in the Commonwealth elections leading up to the *ACTV* decision, the four biggest political parties accounted for between 92% and 96.5% of electronic advertising,¹⁴⁸ and individuals and special interest groups were virtually excluded altogether. Thus the majority justified their decision by reference to an open marketplace of political ideas, but by virtue of their reliance on assumptions rather than evidence, they in fact perpetuated discrimination in favour of major political parties and protected a political system in which only a limited range of views could be published. Their Honours’ conclusion was particularly startling given that the regulatory scheme was introduced on the recommendation of the Senate Select Committee on Political Broadcasts and Political Disclosures, with public consultation and after significant debate and compromise in Commonwealth Parliament.¹⁴⁹

¹⁴³ Michael Kang, 'The End of Campaign Finance Law' (2012) 98 *Virginia LJ* 1, 61. The failure to adequately consider empirical evidence put to it was the subject of an unsuccessful appeal in *American Tradition Partnership Inc v Steve Bullock, Attorney General of Montana* 567 US (2012)..

¹⁴⁴ Section 95Q *Broadcasting Act 1942* (Cth).

¹⁴⁵ Section 95H(2) *Broadcasting Act 1942* (Cth).

¹⁴⁶ Sections 5L(1)(a) and 95M(2) *Broadcasting Act 1942* (Cth); *ACTV* (1992) 177 CLR 106 at 132 per Mason CJ; 173 per Deane and Toohey JJ.

¹⁴⁷ *Ibid* at 145 per Mason CJ, 158 per Brennan J, 208 per Gaudron J, 239 per McHugh J,

¹⁴⁸ Williams, 'Do Not Go Gently', 482.

¹⁴⁹ See Matters, 'Who Pays the Piper'; Zines, 'Courts, Unmaking the Laws' in Administration (ed), *Courts in a Representative Democracy* (1995) 125, 132.

2 *The problems with empirical assumptions regarding campaign expenditure generally*

One argument for reform in favour of electoral expenditure limits is to ensure that the exposure of an idea correlates with popular support behind it, rather than the bank-balance of those who support it (the “distorting” effect). This argument rests upon several assumptions, the first being that financial wealth is the only, or at least the most pernicious, politically influential resource to be unequally distributed among candidates. As Professor Sanford Levinson recognised, however, celebrity, disposable time, volunteer assistance and charisma are also influential in a political campaign, yet unfairly distributed.¹⁵⁰ If electoral communication expenditure limits are permitted as a form of affirmative action for speech by the poor,¹⁵¹ there is no reason in principle why Commonwealth Parliament might not also limit the contribution of white males.¹⁵² Inequality of political influence is an inherent part of the political process¹⁵³ and to justify expenditure limits on this ground, some particularly dangerous feature of money’s influence must be identified.¹⁵⁴

Second, not only may electoral expenditure limits not adequately address all causes of political inequality, they may assist in entrenching incumbents who, by virtue of having a profile with electors through media coverage of their office and prior elections, do not need to spend money to have their name recognised, or inform voters of their policies.¹⁵⁵

Third, limits will inevitably reduce the total quantity of political communication¹⁵⁶ without guaranteeing an improvement in quality. Reformers argue that limits will primarily affect political advertisements,¹⁵⁷ which are

¹⁵⁰ Sanford Levinson, 'Regulating Campaign Activity: The New Road to Corruption' (1985) 83 *Michigan LJ* 939, 948-949; Eule, 'Promoting Speaker Diversity: Austin and Metro Broadcasting' (1990) *Supreme CtR* 105, 126; John Samples, *The Fallacy of Campaign Finance Reform* (University of Chicago Press, 2008), 133.

¹⁵¹ Sullivan, 'Two Concepts', 151.

¹⁵² Levinson, 'The New Road to Corruption', 953; Eule, 'Promoting Speaker Diversity: Austin and Metro Broadcasting' (1990) *Sup CtR* 105, 126.

¹⁵³ Ronald Dworkin, 'What is Equality? Part 4: Political Equality' (1987-1988) 22 *University of San Francisco LJ* 1, 13-17.

¹⁵⁴ For a similar point, see John Rawls, 'The Basic Liberties and Their Priority' (1982) 3 *The Tanner Lectures on Human Values* 3, 70.

¹⁵⁵ This precise scenario was recognised by Gummow and Hayne JJ as that which must be guarded against, as mentioned in Chapter II, in *Mulholland* (2004) 220 CLR 181 at [157].

¹⁵⁶ Samuel Issacharoff, 'On Political Corruption' (2011) 124 *Harv LR* 118; Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton University Press, 2001), 42.

¹⁵⁷ Cox, 'Constitutional Issues', 416; James Skelly Wright, 'Politics and the Constitution: Is Money Speech?' (1976) 85 *Yale LJ* 1001, 1019.

considered to be an inferior source of information and not conducive to deliberative, informed decision-making.¹⁵⁸ However empirical studies in the US indicate that electoral expenditure limits may in fact lead to an increase in advertising, as candidates' likely strategic response to "artificially low ceilings on the financial resources of political campaigns" would be to "place a strategic premium on campaign tactics that have the most favourable effects on the outcome of an election for the least cost".¹⁵⁹ Psychology and marketing research indicates that repetitious advertising has a powerful positive impact on consumer choice,¹⁶⁰ and thus a rational campaign with finite resources has incentives to deploy repetitive, emotive mass advertising.¹⁶¹

Finally, the claim that expenditure limits prevent wealth-backed candidates from "drowning out"¹⁶² under-funded ones by a bombardment of repetitious and simplistic messaging¹⁶³ inaccurately represents the electorate as a homogenous and ill-informed group readily influenced by political advertisements. A more realistic account of the electorate depicts two different types of voter:¹⁶⁴ the politically-engaged voter who seeks out considered opinions on political matters from a variety of sources that offer detailed information and serious political analysis; and the disengaged voter.¹⁶⁵ Political advertising, with its limited informative value and emotive appeal, is unlikely to have a significant impact upon politically-engaged voters.¹⁶⁶ For the disengaged

¹⁵⁸Issacharoff and Karlan, 'The Hydraulics of Campaign Finance Reform' (1998) 77 *Texas LR* 1705, 1709.

¹⁵⁹Sheff, 'The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate' (2010) 75 *Missouri LJ* 143, 166.

¹⁶⁰ Charles Atkin and Gary Herald, 'Effects of Political Advertising' (1976) 40 *Public Opinion Quarterly* 216; Chingching Chang, 'The Impacts of Emotion Elicited by Print Political Advertising on Candidate Evaluation' (2001) 3 *Media Psychology* 91.

¹⁶¹Sheff, 'The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate' (2010) 75 *Missouri LR* 143, 167.

¹⁶²Wright, 'Politics and the Constitution: Is Money Speech?' (1976) 85 *Yale LJ* 1001, 637; Eule, 'Promoting Speaker Diversity: Austin and Metro Broadcasting' (1990) *Supreme Court Review* 105, 115; Fiss, 'Free Speech and Social Structure', 1421.

¹⁶³Cox, 'Constitutional Issues', 417; Ingber, 'Marketplace of Ideas: A Legitimizing Myth' (1984) *Duke LJ* 1, 69.

¹⁶⁴Ortiz, 'The Democratic Paradox of Campaign Finance Reform' (1997) 50 *Stan LJ* 893, 901-902. Ortiz' model is borne out in Australia where empirical evidence suggests a difference between the quality and quantity of political journalism among free-to-air television stations, and a correlating difference in the level of political engagement of their audiences: see Bean Clive, 'How the Political Audiences of Australian Public and Commercial Television Channels Differ' (2005) 32 *Australian Journal of Communication* 41, 44.

¹⁶⁵Ortiz, 'The Democratic Paradox', 901-902.

¹⁶⁶Paul Freedman, Michael Franz and Kenneth Goldstein, 'Campaign Advertising and Democratic Citizenship' (2004) 48 *American J Pol Sci* 723.

voter who is not otherwise exposed to political broadcasting, political advertising may indeed prove to be very influential,¹⁶⁷ but if electoral communication expenditure limits achieve their goal by limiting political advertising, they will deprive the uninformed voters of their only source of information,¹⁶⁸ which empirical evidence suggests goes at least some way to close the gap between the informed and ill-informed.¹⁶⁹ Thus political advertising does not “drown out” quality analysis: it merely ensures that well-financed interests do not disproportionately influence the election outcome by keeping disengaged voters equally ignorant of both wealthy and under-funded candidates.

Ultimately, whether these points will sustain a successful counterargument to electoral communication expenditure limits depends upon whether there is empirical evidence available to support them. Suffice to observe from these examples, however, that the inquiry is far more complex than the initial value judgments suggest.

V CONCLUSION

Electoral communication expenditure limits entail complex philosophical and empirical questions and significant political controversy. Unfortunately for the High Court, these issues are not left at the door of the courtroom and the existing framework for determining the constitutional validity of legislation by reference to the scant constitutional text and structure alone will not excuse High Court Justices from making the necessary value judgments. This article proposes that the Court accept the inevitable departure from its traditional formalist approach to constitutional interpretation and openly embrace abstract democratic theories reflecting the Justice’s preferences between liberty and equality. Only in then can they hope to develop a cohesive constitutional freedom that will withstand future challenges to the Australian democratic process.

¹⁶⁷Ortiz, 'The Democratic Paradox', 902; Freedman, Franz and Goldstein, 'Campaign Advertising and Democratic Citizenship' (2004) 48 *Am J Pol Sci* 723; Daniel R Ortiz, 'The Engaged and the Inert: Theorizing Political Personality Under the First Amendment' (1995) 81 *Virginia LR* 1.

¹⁶⁸“Civic slackers” reportedly make up a substantial minority of the Australian electorate: McAllister and Pietsch, 'Trends in Australian Political Opinion: Results from the Australian Election Study, 1987-2010' (Australian National Institute for Public Policy, 2011), 21.2% of Australian voters “did not care very much which party won” the federal election in 2010.

¹⁶⁹ Thomas Holbrook, 'Presidential Campaigns and the Knowledge Gap' (2002) 19 *Political Communication* 437.