Representation-Reinforcing Review: Arguments about Political Advertising in Australia and the United States

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I propose to speculate about the Australian High Court's willingness to exercise review in dealing with issues of electoral campaign financing and advertising. I am interested in why the Court has recently recognised a responsibility for policing the system of political representation.[1]

The doctrines which most of the judges embrace in finding a free speech right implied by the Constitution are suggested by some of the opinions of the late Justice Lionel Murphy;[2] who, in turn, takes ideas that were forged in the United States by the Supreme Court when it was dominated by liberals. As Murphy J correctly observes, the more innovative judges on the Supreme Court in the United States have not been guided by a plain reading of their Bill of Rights nor have they felt bound by the "original intentions" or values of its Framers; instead, they rely on philosophical and political theories to guide their judgments. Murphy J thinks that liberal philosophical ideals and principles should also guide judges in Australia, regardless of the fact that our founders declined to include a Charter of Rights in the Constitution. According to him, the fact that there is a written document which is designed to facilitate a democratic political system in Australia is enough to warrant a more alert judicial scrutiny than has traditionally been undertaken. Thus he rejects the view, expressed by Mason CJ, that:

> Because the founders accepted, in conformity with prevailing English legal thinking, that the citizen's rights are best left to the protection of the common law and because they were not concerned to protect the individual from oppression by majority will, the constitution contains very little in the way of provisions guaranteeing new rights.[3]

For Murphy J, in contrast, constitutional democracy requires some form of judicial review to secure fundamental civil and political rights. Thus, he tells us, our judges should read the Constitution's text in a creative way, following the

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1 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 66 ALJR 695 and *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658.

2 For a good selection of Murphy J's judgments see Blackshield, A R, Brown, D, Coper, M and Krever R (eds), "Democracy and Fundamental Rights" in *The Judgments of Justice Lionel Murphy*, (1986) at 1–32.

3 "The Role of a Constitutional Court" (1986) 16 *Fed LR* 8.

example of the United States Supreme Court under Chief Justices Warren and Burger. In his view, Australian judges are not bound by the English doctrine of parliamentary supremacy and our judges have a duty to delineate the unenumerated rights implied by the Constitution's structural arrangements.

The fact that a majority of the High Court seems to have been persuaded by Murphy J makes it imperative to critically assess the "representation-reinforcing" approach that he has taken-over from writers in the United States.[4] As I show, the High Court does not adhere to it consistently in its recent free speech rulings. Indeed, it seems to embrace two competing rationales, indicating that the judges are confused — they understand that they must keep the political system open so the government is accountable to the people, but they are not sure which free speech principles this responsibility commits them to. This confusion is also manifest in the United States for the Supreme Court has demonstrated that the judges are not agreed about how to deal with the problem of campaign finance reform. In some rulings they follow the "representation-reinforcing" rationale, in others they seem to abandon it completely.

I shall argue that the fact that the United Supreme Court has been willing to identify unenumerated rights that are somehow "implied" by the United States Constitution is not a good reason why the Australian High Court should do the same when interpreting our Constitution. Our judges have traditionally been far more deferential to legislators and their reluctance to displace politicians in making policy choices has not served us badly. Although we can identify some abuse that could have been avoided by closer judicial scrutiny, our governments have tended to respect liberal concerns when rights are in question and our society has a good record in dealing with controversial civil rights matters.[5] There have been lapses and violations remain, but we should not suppose that we will necessarily solve our problems if the judiciary starts making more policy choices. For these reasons, I argue that we need to be wary of the kind of arguments that the High Court now seems to have taken on board. As I show, the judges may be in danger of extensively rewriting the Constitution by judicial fiat — just at the time that the United States Supreme Court is beginning to have second thoughts about its own record of innovation under Chief Justices Warren and Burger. If we are to have a Charter of Rights in Australia, this should be the result of a national debate and the forging of consensus about the scope of the liberties to be protected. It should not be imposed in advance by an impatient judiciary.

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4 The "representation-reinforcing" argument is a development of the position articulated by Meiklejohn A, *Free Speech and its Relation to Self-Government* (1948) and *Political Freedom. The Political Powers of the People* (1965). See also Ely, J H, *Democracy and Distrust: A Theory of Judicial Review* (1980) and Choper, J, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980).

5 Despite the Bill of Rights, the United States enjoys a much less liberal record than most other democracies. Effective measures to combat gross discrimination against minorities and electoral manipulation to exclude them from the franchise only began after 1964. We should not forget that the Court was ineffective in curbing the anti-communist hysteria in Congress during the McCarthy era and that the FBI and CIA both systematically violated rights throughout the Cold War period.

1. *Focus on Procedures: Meiklejohn and Ely*

One problem with the practice of judicial review is that it seems to be undemocratic. Why should judges be able to overrule the considered policy choices of democratically elected governments? Legislators are accountable and can claim to represent sections of the electorate, but judges are not. One answer to the "countermajoritarian issue" relating to judicial review is that it may sometimes be necessary for judges to facilitate fair elections. If a government uses its authority to try and avoid accountability, judges may need to act as umpires of the democratic system to prevent this. The term "representation-reinforcing review" refers to this line of argument. Some theorists claim that the United States Constitution sets out fair rules for representative government — it establishes how choices about competing substantive values may be made democratically. In terms of this reading, the Unites States Constitution aims to ensure that there is an open and informed discussion of political issues and that those who act on behalf of the American people are genuinely representative. Thus, when judges act in the name of the United States Constitution, they cannot be accused of violating democratic values.

One writer who has used the "representation-reinforcing" rationale in an interesting way is Alexander Meiklejohn. In his essay *Free Speech and its Relation to Self-Government*,[6] Meiklejohn claims that the First Amendment to the United States Constitution should be read as a protection for all communications that contribute to rational deliberation on matters of public policy; but other categories of expression are not necessarily protected. This limited view of the First Amendment reflects the Schumpeterian conception of democracy (as competition for the right to govern between rival elites)[7] which many American theorists in the fifties and sixties embraced.

But this conception of the meaning of the free speech protection in the United States Constitution has never been accepted. The First Amendment has always been read as reflecting broader concerns about the importance of freedom in discovering truth or in encouraging artistic expression. Moreover, emotional appeals are far more important in conveying messages than Meiklejohn allows — indeed, the ability to amuse, shock or horrify may be more necessary in conveying a political message than its cognitive content.

Nevertheless, Meiklejohn's analysis has sometimes provided guidance when difficult choices have had to be made (for example, in delineating the power of governments to regulate commercial speech, libellous speech, offensive speech, and obscene speech). In this regard, the Supreme Court has found Meiklejohn's identification of a primary function of the First Amendment (to keep the government from legislating to secure itself in office or to silence critics of its policy agenda) useful. Indeed, many of the Court's doctrines assume a balancing process in which various categories of speech are ranked according to how they contribute, in a reasoned way, to the public discussion of political issues — the less cognitive the mode of communication, the lower

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6 Meiklejohn, above n4.

7 Schumpeter, J A, *Capitalism, Socialism and Democracy* (1970) at 269, claims "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by mean of a competitive struggle for the people's vote".

the ranking; the less relevance to the subject of politics, the lower the ranking. Thus, when speech is of the kind which is of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" the Supreme Court has tended to defer to legislators, recognising traditional limitations on freedom.[8] But the judges do not defer to legislators when the harm in question arises because of the particular message being conveyed; in these circumstances, the Court has recognised that the "hazards of political distortion and judicial acquiescence are at their peak".[9]

Another influential theorist who has used the "representation-reinforcing" rationale is John Hart Ely. Ely's objective is to provide a convincing defense of the work of the Warren Court by describing its role as analogous to that of a referee. In his view, the judges have not often imposed their personal values nor have they attempted to act as surrogate representatives who are authorised to identify the fundamental values of the people, displacing state governments. Rather, the Supreme Court under Chief Justice Earl Warren's leadership, took responsibility for detecting malfunctioning of the system of representation which occurs, according to Ely, when:

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[10]

This judicial role is justified, Ely tells us, for the judiciary needs to "make sure the channels of political participation and communication are kept open"[11], and it must also scrutinise statutes to ensure that those who are unable to use the political process are not subjected to disproportionate burdens or excluded from benefits. In terms of Ely's understanding of the "representation-reinforcing" rationale, then, the judiciary has a duty to protect the politically weak when they are ignored, isolated or oppressed by governments.[12]

One of Ely's reasons for articulating the "representation-reinforcing" rationale is to limit judicial discretion. In his view, judges are equipped by their training to make judgments about procedures — keeping the players to fair rules — but they are not better than others as policy-makers. Thus, he seeks to articulate a theory of judicial review that is concerned primarily with policing the policy-making processes. Far from wishing to empower unelected judges to make policy, he concedes that judicial review presents a serious difficulty precisely because "a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that

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8 Thus it has allowed the restriction of defamatory, obscene, insulting and offensive speech. The quote is from *Chaplinsky v New Hampshire* 315 US 568 (1942) (recognising "fighting words" as falling outside First Amendment protection, see also *Roth v United States* 354 US 476 (1957) (obscenity); *Beauharnais v Illinois* 343 US 250 (1952) (defamation).

9 Meiklejohn above n4 at 111.

10 Id at 103.

11 Ely, above n4 at 76.

12 This argument is foreshadowed in a footnote in Stone J's opinion for the Court in *United States v Carolene Products Co* 304 US 144 at 152-153 (1938) footnote 4. See Ely, id at 75–7.

they cannot govern as they'd like".[13] In his view, judges have no authority to overrule just because they dislike what the legislators have done.[14] If they exercise review, according to Ely, they should be able to show that this is necessary to preserve the competitive processes that make it possible for the elected representatives to claim their authority to govern in the name of the people.

The conception of democracy which seems to inform Ely's view is also derived from Schumpeter but he offers a slightly more egalitarian vision than Meiklejohn. For example, he thinks it important that all votes be counted equally and that sections of the community are not excluded from the ballot. As his analysis demonstrates, even a narrowly conceived Schumpeterian democracy is not easy to realise or sustain. If the public are unable to distinguish lies or gross exaggerations, if sections of the population who would support one group of elites are excluded from the ballot, if electoral districts are drawn unequally so that competition is unfair, if communications are monopolised or some speakers enjoy an overwhelming advantage in conveying their messages, the point of holding elections may be undermined.

2. *"Representation-Reinforcing" Review in the United States*

The "representation-reinforcing" rationale requires the judiciary to engage in a difficult task for it must balance the public interest in hearing various opinions on matters of legitimate public interest against the important goals which governments may seek to secure when regulating speech. This kind of "balancing", in which the scales are weighted heavily to secure freedom for politically relevant communications, has guided many of the United States Supreme Court's free speech rulings. For example, in *New York Times Co v Sullivan* (protecting the media when they are sued for defamation by public officials) it made the evaluation that the public good requires a fearless, vigorous discussion of both public policy and administration;[15] in *Consolidated Edison Co v Public Service Commission of New York* the Court struck down an order forbidding public utility companies from including political messages in their billing envelopes on the grounds that it was important to encourage people to think about matters of public controversy;[16] in *First National Bank v Bellotti* it ruled that a private corporation enjoys a right to communicate its political views using an advertisement.[17] The underlying rationale in all these cases is that the public has a compelling interest in gaining information about political affairs. If a speaker wishes to inform the public, the Court reasons, he or she should be protected because democracy requires an "uninhibited,

13 Above n4 at 5.

14 Despite his own sympathies for women who do not wish to continue with a pregnancy, Ely questions the controversial abortion decision *Roe v Wade* 410 US 113 (1973) (in which the United States Supreme Court settled a moral dispute on a matter of fundamental importance).

15 376 US 254 (1964) (the First Amendment prohibits a public official from recovering damages against those who have published a defamatory falsehood relating to his or her official conduct unless the statement made was known to be false or made with a reckless disregard as to whether it is false or not).

16 447 US 530 (1980).

17 435 US 765 at 777 (1978) (Powell J, writing for the Court, cites Meiklejohn).

robust, and wide-open" public debate.[18]

But the "representation-reinforcing" rationale has sometimes been rejected.[19] Consider the reasoning in *Miami Herald v Tornillo*.[20] The conflict addressed in this case arose in September 1972 when the *Miami Herald* published a series of editorials highly critical of Pat Tornillo who was, at the time, a candidate standing for the Florida House of Representatives.[21] Despite the privileged position the *Miami Herald* enjoyed as the only daily newspaper and the special circumstances of a political campaign faced by Tornillo, the editor refused to publish his response. Not surprisingly, Tornillo asked the courts to force the *Miami Herald* to carry his reply. The case was appealed to the Supreme Court. Although the Court was persuaded that the newspaper's editorials undoubtedly influenced many voters who needed to hear what Tornillo might say in reply and agreed that Tornillo could not adequately answer the charges without gaining access to the pages of the *Miami Herald*, it declined to interfere with what it claimed was the protected freedom of newspaper editors. Burger CJ, delivering the opinion for a unanimous Court, tells us:

> A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and the treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[22]

What is startling about this statement is its incompatibility with an earlier case in which the Court reviewed the Federal Communication Commission's right-to-reply rule (imposed on licensees managing radio and television stations).[23] In this case, the broadcasters were treated as mere conduits for news, comment and advertising and the "representation-reinforcing" rationale was used to show that the government had a legitimate interest in telling them what to broadcast. Thus, Burger CJ is simply wrong when he tells us that the consistency of government controls over editorial judgment with First Amendment guarantees had never been demonstrated.[24]

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

19 See Dworkin, R, "Is the Press Losing the First Amendment?" for a good explanation of why the judges have sometimes departed from the "representation-reinforcing" rationale, in *New York Review of Books*, 27 No 19 (4 December 1980) at 49–57.

20 418 US 241 (1973).

21 The possibility of this kind of abuse of monopoly power was anticipated by Florida's legislators who had enacted a right-to-reply law requiring "that if a candidate for nomination in election is assailed regarding his personal character or official record by any newspaper, the candidate has a right to demand that the newspaper print ... any reply that the candidate may make to the newspaper's charges". Florida Statute 104.38 (1973).

22 Above n20 at 258.

23 *Red Lion Broadcasting Co v FCC* 395 US 367 (1969).

24 Interestingly, the Supreme Court seems to apply different standards in dealing with broadcast media. Thus, in the recent case *Metro Broadcasting v FCC* 497 US 547 (1990), the assumption that Congress has a legitimate interest in ensuring programme diversity is not even contested.

A. Dealing with Political Advertising in the United States

The Supreme Court's on-again off-again flirtation with the "representation-reinforcing" rationale has resulted in confusion in dealing with the problems of campaign funding and political advertising. In some circumstances it has attempted to facilitate fairness; more often, it has countenanced the advantages afforded to wealthy speakers.

Perhaps the most significant occasion on which the Supreme Court rejected the "representation-reinforcing" rationale is in the 1976 case *Buckley v Valeo*[25] in which the Court examined Congress' efforts to reform federal political campaigns by (1) imposing disclosure requirements, (2) placing limits on campaign expenditures, (3) placing limits on political expenditures, and (4) the public financing of presidential elections.[26]

In reviewing the rules relating to campaign financing that the Congress had enacted, the Court accepted the need for disclosure requirements (so long as they were not applied to intimidate unpopular or dissident groups) and also accepted that public financing for presidential election campaigns enlarged and facilitated public discussion. But it did not agree that Congress could impose spending constraints for this seemed a violation of freedom of speech. In its view, the First Amendment prevents the government from curbing the speech of the rich just because they happen to be too influential or dominant. It may be undesirable that, for example, the voice of Ross Perot should be amplified during the 1992 presidential election merely because he was prepared to spend a considerable part of his vast fortune to secure this (estimated at around $50 million!); but, the Court ruled, the government may not silence rich candidates like him, just because wealth secures advantages. According to the Court in *Buckley v Valeo*, then, the "representation-reinforcing" understanding of the First Amendment (in terms of which the government may legitimately act as a neutral moderator ensuring that all points of view are afforded a fair hearing) is unacceptably restrictive. In its view, the First Amendment forbids the government from determining which voices are to be heard by the electorate and it cannot limit the amount of money any person may spend to secure political office or to communicate a message.

Having established the free speech principle it felt obliged to apply, the Court considered Congress' motives for restricting the amount of money that individuals may donate directly to a politician. Here it embraced a distinction between expenditures on speech (for example, Ross Perot funding his own advertising) and contributions to political candidates or campaign funds (corporations giving money to Clinton or Bush to use for their advertising). The Court upheld limits on the campaign contribution anyone could make to a candidate because any direct financial relationship between a contributor and politician poses the special problem of potential corruption.[27]

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25 424 US 1 (1976).

26 *Federal Electoral Campaign Act* of 1971, 86 Stat 3 as amended by the *Federal Electoral Campaign Act* amendments of 1974, 88 Stat 1263.

27 This rationale seems to be questionable. It is implausible to suppose that politicians will not offer a *quid pro quo* when individuals assist them in indirect ways, just as they may do when the assistance is more direct. The distinction between "direct" and "indirect" forms of assistance will also be blurred in many cases (for example, a businessman or corporation

What is interesting about *Buckley* is the Court's failure to show any concern about the fairness of the electoral process or to ask questions about the quality of public discussion. As we have seen, this is also the attitude taken in *Miami Herald v Tornillo* — freedom to speak must be protected even when this means that the electorate is not properly informed. In the light of the "representation-reinforcing" rationale, in contrast, it matters whether a category of speech contributes in a reasoned way by providing accurate information and analysis or whether it is misleading and manipulative. But the Court was not persuaded that Congress had a legitimate interest in ensuring that the kind of communications which dominate the media during campaigns were likely to ensure that the electorate was properly informed. Nor did the Court think that Congress should seek to secure equal opportunities for rich and poor speakers. Indeed, it seemed to endorse the view that it was quite appropriate for the rich to have a greater voice than the poor and for the electorate to be misled by those who are skilled at manipulating their emotions.

B. *Inconsistency in the United States*

It does seem to be the case that some wealthy individuals and corporations exercise too much influence in elections in the United States and it is not surprising that the "representation-reinforcing" rationale has been resurrected despite *Buckley v Valeo*. One concern has been with spending by corporations and trade unions. It is thought unfair for these agencies to enter directly into the political arena because they will not necessarily represent the opinions of their members or shareholders. Suppose a union articulates political views which many of its members disagree with; or suppose a corporation enters into the political arena to support a candidate that many of its shareholders dislike. In these circumstances, the organisation makes use of resources that are provided by these individuals without their consent. Thus, Congress (and various state governments) have imposed regulations which require corporations and unions to establish separate funds for political purposes (federal law allows a corporation to solicit contributions to such a fund from persons associated with it, but forbids it from using its resources to solicit contributions from the wider public).[28]

The Supreme Court has ruled that there is a compelling interest that justifies imposing these restraints on corporations.[29] It has accepted that it is necessary to protect shareholders and union members who are vulnerable; and it has also conceded that legislators may need to ensure that state-created advantages (such as limited liability) that allow corporations to play a dominant role in the economy do not also allow them to obtain an unfair advantage in the political marketplace.[30] Of course, the restraints that the Court has upheld merely gesture towards a full-blown strategy for establishing circumstances in

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who hires pollsters and then passes the information they gather to a candidate will be making a very useful contribution to the candidate's campaign; so would an individual who invites wealthy friends to meet the candidate at a private barbecue).

28 *Federal Electoral Campaign Act* of 1971, 86 Stat 11, as amended, 2 USC at 431–455.

29 *FEC v Massachusetts Citizens for Life, Inc*, 479 US 238 (1986).

30 *Richard H Austin, Michigan Secretary of State and Frank J Kelly, Michigan Attorney General v Michigan State Chamber of Commerce*, 494 US 652 (1990).

which the strength of a voice reflects the number of people who support the message it conveys. (Ross Perot is still free to spend $50 million dollars in promoting his candidacy and many Political Action Committees raise substantial sums of money that they are free to use to communicate messages). But it is clear that the Court's reasoning is inconsistent — it cannot accept *Buckley v Valeo* and *Miami Herald v Tornillo* as well as the "representation-reinforcing" rationale; yet it has.

3. *Regulating Political Campaigns in Australia*

The Commonwealth Parliament's proposed strategy for dealing with the corrupting influence of money is much more practical than any of the plans embraced by the United States Congress. By removing the reliance of candidates on expensive television and radio advertising, the Parliament hoped to undermine the influence that large donors are exerting.

The parliamentary committees that suggested restraining political advertising thought that they very often trivialised public discussion, making it more difficult for the electors to reach a considered assessment of the various promises and claims made by competing candidates. By offering free time to candidates (so long as they are prepared to speak for themselves for one minute on radio or two minutes on television) and by forbidding paid advertisements, they hoped to improve the quality of debate and to avoid the prevailing tendency to sell candidates as though they are some kind of commodity, using images that deliberately by-pass serious analysis. The legislation they proposed did not prohibit broadcast media or newspapers from disseminating commentary on matters of public interest; editors remained free to present news and programs that discussed major issues. Nor did any of the major contenders for office gain a significant advantage. The proposed changes were designed to ensure that citizens were provided with better information on which to base a judgment about who was fit to govern the country.

A. Political Advertising and the Australian High Court

The reasoning of the judges who claimed that this legislative plan violated an implied constitutional right to freedom of speech is complex. They needed to justify their finding an implied right to free speech in the Constitution; and they needed to articulate a conception of this free speech right.

In providing arguments to meet the first challenge, the Australian judges are concerned with what Ely identified as the central problem of judicial review — the fact that judges are not accountable to the people, yet presume to overrule legislators who are.[31] In Australia, the task of legitimating this state of affairs is difficult for there is no equivalent of the United States Bill of Rights in the Australian Constitution. The idea that judges should be able to rely on an unenumerated right is also in conflict with the notion that the Framers of the Australian Constitution deliberately subordinated the judiciary to parliament.[32] Ely's reasoning offers a way around these difficulties. By claiming

31 Above n4 at 5.
32 Above n3.

that the High Court is the only neutral umpire able to ensure that Parliament is actually accountable to the people, the judges reconcile their intervention with what they take to be the democratic theory assumed by the framers.

The argument is articulated most forcefully in *Nationwide News v Wills* (hereinafter *Nationwide News*) which is a straightforward free speech case in that the Commonwealth government tried to secure an important political institution from public scrutiny by intimidating the press through unreasonable changes to the law of contempt. If there is a free speech right implied in the Australian Constitution, it must surely require the High Court to invalidate this kind of restraint on the press.

In *Australian Capital Television v The Commonwealth* (hereinafter *Australian Capital Television*) the High Court faced a more difficult problem. This is because, as we have seen, the Commonwealth Parliament was motivated by the "representation-reinforcing" rationale when framing the law in question. The parliamentarians accepted the view that political advertisements tend to trivialise debate, distort the truth, and distract the attention of the electorate. They also recognised how the high costs of advertising advantages the wealthy in that they can purchase more speech than other groups in the community; and they were worried by the fact that the need to make use of advertising placed politicians in a corrupting dependence on those who can provide the large sums of money to purchase it.[33] Against this background, the High Court needed to explain why the Commonwealth Parliament's understanding of what "free speech" requires should not be deferred to. Alternatively the judges needed to show why they are entitled to substitute a different conception of free speech. If they abandon the "representation-reinforcing" rationale in substituting the judgment of the Court for that of the Parliament, they also needed to show why they think this new conception of free speech is implied by the Constitution.

Interestingly, Brennan J who joined the majority opinion in *Nationwide News* and accepts the "representation-reinforcing" rationale embraced by the Court in identifying a free speech right, refused to join the majority decision in *Australian Capital Television.* According to Brennan J the Commonwealth Parliament is free to restrict speech in pursuing a legitimate interest (such as preventing corruption) provided "the restrictions imposed by the law are proportionate to the interest which the law is calculated to serve" and do not "impair unduly the freedom of informed political discussion".[34] Brennan J is convinced that the restrictions imposed on political advertising in the amended *Broadcasting Act* do not represent a serious threat to processes which are "essential to the maintenance of a system of representative government". Indeed, he agrees with the parliamentary committees that the new rules will facilitate informed discussion. In any event, he tells us, Parliament's assessment that these restraints are necessary to protect the integrity of the system must be accepted as reasonable; according to Brennan J, it is not appropriate for the High Court to substitute its own judgment about how best

33 See, *Who Pays the Piper Calls the Tune: Minimising the Risks of Funding Political Campaigns: Inquiry into the conduct of the 1987 federal election and 1988 referendums* Report No 4 of the Joint Standing Committee on Electoral Matters (1989).

34 *Australian Capital Television* above n1 at 708.

to restrain the costs of political campaigns.

Brennan J's analysis is convincing. So long as the Court chooses to rely on the "representation-reinforcing" rationale as a guide in delineating "free speech" it must defer to legislative judgments about "the requirements which best facilitate democracy" when these are made in good faith.

Of course, as other members of the High Court point out, the arrangements contemplated by Parliament are not without problems. Certain anomalies remain. Some voices (the potential Ross Perots of Australia) and powerful lobby groups (such as the logging industry) would no longer be free to put forward their opinions using advertisements. But the experience in the United States of independent voices shows that they often confuse the debate during elections by focussing on single issues. More significantly, experience in the United States demonstrates how "unauthorised" advertisers are more prepared than the main-stream party leaders to cross the boundary between fair and foul comment.[35] Although the Australian legislators wished to prevent independents from using television advertising as a means for conveying their messages during campaigns, they did not silence these voices. They were left free to communicate in other ways during the campaign period and they could resort to advertising once the election was over. In any event, it is difficult to maintain that the proposed changes would have made the system of electoral competition more unfair than it is now.

In light of these considerations, it is difficult to hold that the Australian High Court shares the "representation-reinforcing" conception of free of speech embraced by the Commonwealth Parliament. It is possible that they are using the rationale in a different way.[36] For example, the judges may agree on a conception of democracy that is extremely undemanding. They may hold that representation can be adequate so long as a liberty to speak is protected, without regard to any notion that the capacity of various agents to assert influence through speech may be very different and without considering what the electorate needs to learn if it is to be properly informed. In terms of this conception, it would not matter if individuals are able to use the liberty to distort the system in unfair ways (for example, an Australian corporation, following the example of Ross Perot, may decide to commit significant resources to influence electoral outcomes).

But there is no evidence that the Australian judges have embraced any special conception of democracy. It is much more likely that they (apart from Brennan and Dawson JJ, each of whom writes a dissenting opinion) embrace a different conception of freedom of speech. Indeed, their ruling in *Australian Capital Television* reflects sentiments that have much in common with those expressed by the United States Supreme Court in *Buckley v Valeo* and in *Miami Herald v Tornillo*. The judges are concerned with the restraints placed on wealthy independent speakers. According to the majority, the central difficulty

35 For example, George Bush gained momentum in 1988 because the "Willie Horton" advertisement grossly distorted Governor Dukakis's record and appealed to racist sentiments. Yet Bush had not authorised this advertisement.

36 This point was made by Wojciech Sadurski, in a comment made at a conference entitled Freedom of Communication in Australia, held 6–8 August 1993, Research School of Social Sciences, Australian National University.

with Part IIID of the amended *Broadcasting Act* (that restricts campaign advertising in the broadcast media) is the exclusion of speakers who are not candidates from the advertising forum. Thus, Mason CJ tells us, any person should have a right to participate — not just candidates for office. Nor is it sufficient, in his view, for the public to rely on journalists to canvass opinions in news, current affairs and talkback programs. According to him, those who are excluded or overlooked by editors may feel damaged or outraged by something asserted during these discussions and, if so, they will need access to advertising time to reply.[37] Gaudron J offers a different argument for disallowing the advertising ban. In her view the implied free speech protection is not absolute but may be limited so long as the government acts within its constitutional power and the law it enacts is "reasonably and appropriately adapted" to achieve some end within the limits of that power.[38] Unfortunately, in her view, the Commonwealth has no constitutional power to ban advertising by independent individuals and organisations; nor are such restrictions "of a kind that has traditionally been permitted" (as, for example, "laws with respect to defamation, sedition, blasphemy, obscenity and offensive language"). Even if the Parliament is acting within its power in searching for a way to protect the integrity of the political process, she concludes that its ban on advertising must be held to be an unreasonable restriction because such a ban has not "traditionally been permitted".[39]

Gaudron J's argument is unconvincing. Political advertising has only recently presented a serious threat to the integrity of the political process. In earlier times, the influence of advertising in the broadcast media was not so overwhelming as it is today. Nor is there any obvious alternative, apart from restraining advertising, for effectively limiting the pervasive and destructive influence of money in contemporary political life. Thus, it makes little sense to rule that Parliament may only regulate speech in ways that have "traditionally been permitted" — political advertising is a serious problem today, especially during elections.

Mason CJ's argument is also implausible. The independent individuals and organisations whose freedom he wishes to protect actually contribute very little that is constructive to our public discussions during election campaigns ($1.7 million out of total of more than $15 million in 1990).[40] When they do communicate their messages through advertising, independent speakers usually distract electors from the actual choices they need to make between the competing parties. Nor is it fair that $1.1 million was spent by the logging industry in 1990 and just over $25,000 by the Australian Conservation Foundation.

This is not to say that there are no problems with the *Political Broadcasts and Political Disclosures Act* 1991 (Cth). The High Court is on strong ground when it claims that the free time rules that were proposed unfairly advantage established parties and sitting candidates.[41] But it is one thing to argue that

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37 *Australian Capital Television* above n1 at 706.

38 *Davis v the Commonwealth* (1988) 166 CLR 79 at 100.

39 *Australian Capital Television* above n1 at 737.

40 See statement by the Minister in House of Representatives, *Parliamentary Debates (Hansard)*, 9 May 1991, 3480.

41 Ninety per cent of the time was to be allocated to political parties already represented in

this limitation is unfair to the individuals or groups excluded and quite another to show it will make future elections less fair than they are at present. Any form of regulation to establish greater fairness will impact on some individuals in a restrictive manner but we need to ask whether, taken as a whole, the proposed changes are reasonably related to a legitimate purpose. Given that some unfairness is inevitable, it is difficult to see why the judgments of legislators should be rejected unless they are blatantly seeking to secure an advantage for one of the major parties in an unfair manner. Rather than asking what the people need to learn in order to make an informed judgement about which of the competing parties should govern, we see that the judges who support the majority in *Australian Capital Television* are more concerned to protect the right of wealthy citizens, corporations and lobby groups to distort the system of communications. This freedom may be important — perhaps it deserves to be protected — but it cannot be derived from the "representation-reinforcing" conception of free speech that the High Court tells us it has embraced.

4. *Conclusion*

As we have seen, the United States Supreme Court embraces two conflicting conceptions of free speech in dealing with the campaign finance problem. The leading case *Buckley v Valeo* seems to be in conflict with some of its subsequent rulings. In *Buckley* the Court is reluctant to consider fairness as an issue and abandons the "representation-reinforcing" concern that no one speaker should enjoy a monopoly or decisive advantage; in recent cases, in contrast, it concedes that it may be necessary to restrain powerful economic groups to preserve the integrity of the political system. The Australian High Court, relying on United States precedents, is inclined to follow this confusing example. In *Nationwide News* it embraces the "representation-reinforcing" rational and applies it consistently; in *Australian Capital Television*, while it pays lip-service to this rationale, a majority of the judges are reluctant to defer to parliamentary judgments that are consistent with it, and they assert views which follow the reasoning of the United State Supreme Court in *Buckley v Valeo*.

The arguments the judges provide to support this evaluation are confused. Although each goes out of his or her way to make statements that suggest a commitment to the "representation-reinforcing" rationale, the "town meeting" model of the democratic process that informs the reflections of writers like Meiklejohn and Ely is abandoned. Each judge who supports the ruling in *Australian Capital Television* supposes that communications during election campaigns are more analogous to competition in an unregulated marketplace, so that it is inappropriate for any speaker to be silenced to ensure that only relevant voices are heard. This is why the High Court reaches the conclusion that it is wrong for the Commonwealth Government to restrain independent speakers until after the election. In their view, the government may not seek to improve the quality of the discussion during election campaigns because this is a

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the Commonwealth or state legislature in proportion to their share of first preference votes in the previous election to the particular parliament; only 10 per cent could be allocated to independent candidates or other parties.

violation of free speech.

Buckley v Valeo is a very controversial ruling in the United States. Indeed, it is an example of difficulties that can arise because of the inclusion of a Bill of Rights in a Constitution. Experience in the United States shows that unless restraints are placed on what speakers can say during campaign periods, it is very difficult to protect the integrity or fairness of the electoral system. Not surprisingly, in his recent State of the Union address to Congress, President Clinton claims that campaign financing in the United States is now completely out-of-hand and proposes reform as an urgent priority. Indeed, he promises a major collaborative effort with Congress to secure more far-reaching controls than those imposed in 1974 (and frustrated by *Buckley v Valeo).* Whether he will propose the kind of changes the Commonwealth Parliament attempted to secure in Australia, through the amendments made to the *Broadcasting Act* that the High Court invalidated in *Australian Capital Television*, is a question that cannot be answered at this stage. But it is difficult to see how the influence of money in the United States will be cut-back if the Supreme Court refuses to overrule *Buckley v Valeo* — just as it is difficult to see how an adequate framework for electoral competition can be put in place in Australia unless the High Court is prepared to retreat from the position it has adopted in *Australian Capital Television.*

The constitutional situation in Australia is different from that in the United States. Whether we approve the outcome of *Buckley* v *Valeo* or not, it has to be conceded that the United States Supreme Court is justified in restraining Congress because the First Amendment in the United States Constitution expressly forbids Congress from making laws that restrain speakers. In Australia, in contrast, our judges must rely on an implied right to free speech. This is why they fall back on the "representation-reinforcing" rationale. But when they do this, they must surely acknowledge that our parliament has a special responsibility conferred by the Framers. As Dawson J notices, the Framers:

> [P]lace their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[42]

Dawson J is not critical of the view that freedom of communication is indispensable to any free society — an implied right — but he does insist that the Commonwealth Parliament has a key responsibility in securing this liberty. In his view, its judgment ought to be deferred to, even when the members of the High Court would prefer a different course. He is surely correct in holding that, so long as Parliament is not intent on imposing an unreasonable restraint on communications, its initiatives ought to be upheld.

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42 *Australian Capital Television* above n1 at 723.