Financing Political Party Broadcasting

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I: INTRODUCTION

Overseas jurisprudence reveals that the regulation of political campaign finance involves balancing the competing interests of liberty (freedom of speech) and political equality. While the concept of freedom of speech is widely understood, what political equality means is less clear. In the context of this article, a workable definition is that the principle of political equality seeks to ensure that political parties (and candidates) contest elections on equal terms, and to eliminate, as far as possible, the disproportionate influence that those with financial resources might have on those who exercise political power.

The purpose of this article is to analyse the relevant New Zealand legislation from the point of view of this tension between freedom of speech and political equality, and to ascertain whether our current restrictions on political broadcasting can be justified from either perspective. In order to do this, I briefly set out the regimes and key concerns of four overseas jurisdictions. This provides a foundation on which to examine Part VI of the Broadcasting Act 1989 ("the Act") and its application at the 1990, 1993, and 1996 New Zealand general elections. Following this, there is a discussion of the extent to which restrictions are permissible from the freedom of speech perspective. This section illustrates how legal principles can provide a framework which clearly sets out the issues that need

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to be resolved and the choices that need to be made. The tests thus identified are then applied to the New Zealand legislation. Finally, a possible regime for New Zealand is advanced which purports to achieve an appropriate balance between freedom of speech and political equality in the current New Zealand context.

In New Zealand, election broadcasting by political parties is governed by a statutory regime. Under this regime, money and free air time are allocated to political parties. The allocation process is hotly contested, because the funds that each party receives in the state carve-up is all they are permitted to spend to buy air time. The people responsible for allocating the funds have found their task difficult and complex and have felt constrained by inadequate legislation. Both the public and political parties have criticised the allocations which have been made.

The current regime, supposedly necessitated by the increasing number of political parties contesting general elections, was put in place for the 1990 general election. It replaced the "informal" party structure that the National and Labour parties had operated under to allocate time and funds to themselves and the odd minor party. With an independent body consequently being required to make the allocations, the task fell first to the Broadcasting Standards Authority ("the Authority"). The Authority was thus entrusted with the responsibility of deciding which political parties were eligible for taxpayer-funded political advertising and accordingly allocating the funds appropriated by Parliament. The Authority quickly found, however, that the legislation did not adequately provide for the realities which arose.

The apparent gaps in the statutory framework, the Authority's long and continued opposition to its task, and the likely increased complexity of the allocation process under a Mixed Member Proportional ("MMP") system, as more parties jostle for a share of the funding pie, prompted a review of the legislation which began in late 1995. This review, completed in mid-1996, led to the enactment of the Broadcasting Amendment Bill with the Electoral Commission assuming responsibility for allocating the funds. The Electoral Commission though, in its decision on the funding allocations for the 1996 election, "attacked the funding criteria as deficient and urged a rewrite of the law".[1]

When the legislation was first introduced in 1989, it was alleged that the Labour Government originally had wanted to introduce public funding of political parties, but discarded the idea because the public would not have accepted it. Instead, it elected to have a system of free political broadcasting. This led to the charge that the Labour Party had no funds and was desperate to sell itself and that the legislation was a back door way for the Government to fund its television and radio election advertising.[2]

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1 *The New Zealand Herald*, 21 August 1996, section 1, 5. See also the report of the Electoral Commission, "1996 General Election: Provisional Decisions of the Electoral Commission on Allocations of Time and Money to Political Parties for Broadcasting of Election Programmes" (August 1996) 1.

2 505 NZPD 453 (7 March 1990).

The essence of the current New Zealand regime is that if a party does not receive an allocation of time and money from the state, the law prohibits that party from advertising on television and radio. Further, parties which receive an allocation cannot buy more time with their own money. Therefore, our present regime raises not only issues of political equality, but also important questions about freedom of speech. It is of concern that in New Zealand we have so easily overlooked questioning the legitimacy of our system from such a fundamental viewpoint as the basic liberty of freedom of speech. The fact that we have allowed such a restrictive regime to operate in this country without addressing these issues illustrates how easily New Zealanders have accepted limitations on freedom of speech.

II: CAMPAIGN FINANCE LAWS

The New Zealand legislation dealing with political party broadcasting is one aspect of what are more broadly known as campaign finance laws. The campaign finance laws of the United States and Canada are much more comprehensive regimes than that of New Zealand. The New Zealand legislation has been said to have been "guided in part by the Canadian experience".[3] However, the relevant Canadian legislation and subsequent case law have been heavily influenced by American scandal, legislation, and jurisprudence. In the United States, Watergate raised public awareness of the dangers of campaign funding from private donors and motivated reform. While Watergate had nothing to do with Canada, "it did not leave Ottawa untouched and appeared to contribute markedly to the alleged public demands for legislation in Canada."[4]

New Zealand, Britain, Canada, Australia, and the United States all have different systems of campaign finance. Given the aim of this paper, a point of great interest is that the United States, Canada, and Australia have all found their written constitutional documents to be one of the biggest obstacles to campaign finance reforms. "This is because there is a potentially irreconcilable conflict between the goal of equality pursued by election expenditure controls and the protection of liberty expressed in constitutional documents."[5]

When the New Zealand system is compared with that of the United States, Australia, the United Kingdom, and Canada, it quickly becomes apparent that in terms of political broadcasting, only the British and Canadian systems are comparable. Therefore, I will begin with an outline of these two regimes. I will then briefly explain the United States' system of campaign finance and finally, I

3 Ewing, *Money, Politics and Law* (1992) 230.
4 Ibid, 60.
5 Ibid, viii.

will look at the Australian system. The United States Supreme Court decision in *Buckley v Valeo*[6] has had a major impact on campaign finance reforms in both the United States and Canada. It is touched on here, but a more substantial discussion occurs below.[7]

1. The United Kingdom

In Britain, parties do not receive state funding, but are subsidised at elections by receiving (inter alia) free broadcasting time. Like New Zealand, paid political broadcasting at elections is prohibited.[8]

Once the broadcasting authorities have announced the amount of time that is available, the parties have to agree on how to allocate the time amongst themselves. The allocations are based on party strength at the time that the election is announced.[9] Past elections have shown that without the subsidies, the Conservative Party has a significant financial advantage over its political opponents. Minor parties with not less than fifty candidates are entitled to additional time, less than the amount allocated to the main parties.[10]

In Britain the issue of free political broadcasting time is discussed in the wider context of state funding for political parties. The view that parties must support themselves has been declared "redundant" by one writer since "it is clear that Britons ... do not favour joining political parties".[11] Fisher contends that despite the dilemma of whether the state should support voluntary organisations with public funds, there must be sufficient financial support for political parties because of the essential role they play in modern politics. However, he notes that sensible debate on the issue could only exist against a backdrop of increased public funds.[12]

2. Canada

Canada partially reimburses the election expenses of political parties.[13] In addition, political broadcasting is regulated by the Election Expenses Act CS 1973-1974 and the Canada Elections Act RS 1985. Broadcasting authorities must

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6 424 US 1 (1976).

7 See text, infra at Part IV.

8 In Britain, party political broadcasts are not regulated by statute, but rather by the Report of the Committee on Broadcasting 1960 (Cmnd. 1753) and the Aide-Memoire of 1947. See 45 *Halsbury's Laws of England* (4th ed) paras 575-576.

9 *Halsbury's Laws of England*, ibid, para 576, n 15.

10 Ibid, para 576.

11 Fisher, "The Institutional Funding of British Political Parties" in Broughton, Farrell, Denver, and Rallings (eds), *British Elections and Parties Yearbook 1994* (1995) 194.

12 Ibid, 195.

13 Political parties that spend more than ten percent of their election expenses limit are reimbursed nearly twenty-three percent of those expenses. Elections Canada, "Providing a Level Playing Field" (February 1996) 2.

set aside six and a half hours of prime broadcasting time. While parties are required to pay for this time, they cannot be charged more than the normal commercial rate. If the parties cannot agree on how to allocate the time, the Broadcasting Arbitrator is required to allocate the time, having regard to the number of seats which any party has and that party's share of the popular vote at the previous general election. New political parties are guaranteed a provision of broadcasting time, being the lesser amount of either six minutes or the lowest allocation to an established party. In addition to this paid advertising, free time is also allocated to the parties. Every broadcaster carrying on as a network operation must make free broadcasting time available and the amount must not be less than that made available at the previous election. At least two minutes of free time must be made available to any party which does not want any allocation of paid time. The rest of the free time is then in proportion to the paid time.[14]

Since the introduction of the Canadian Charter of Rights and Freedoms in 1982, the "tension between equality and liberty has become an important issue in Canadian public law".[15] The view has been expressed that there is a danger that liberty will prevail "simply because those who operate the Charter have the last word on political questions."[16]

In 1995 the Alberta Court of Appeal ruled that certain provisions of the Canada Elections Act violated the constitutionally guaranteed right to freedom of speech and thereby struck down a federal law prohibiting individuals or interest groups from spending more than $1000 during an election campaign on advertising to directly promote or oppose a candidate or political party. The Chretien Government has decided not to appeal to the Supreme Court. The Justice Minister denied that the government's decision not to appeal had nothing to do with the outrage which had been expressed by senior Liberal MPs at Quebec's similiar "gag" laws, however:[17]

> [S]enior Liberals privately conceded the government would have looked ridiculous defending its own gag law and denouncing Quebec's when both are aimed at the same objective: creating a level playing field by preventing the wealthy from unduly influencing the outcome of votes.

3. The United States

In the United States, the presidential and congressional elections operate under different systems of campaign finance. Presidential candidates almost universally

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14 See ss 307-316 of the Canada Elections Act RS 1985, c E-2; and Ewing, supra at note 3.

15 Ewing, ibid, viii.

16 Ibid, 164.

17 *The Citizen*, 9 October 1996, A5.

accept public funding and accompanying expenditure restrictions.[18]

The Federal Election Campaign Act 1971 ("FECA") was the first comprehensive revision of federal campaign legislation since the Corrupt Practices Act 1925 The FECA was amended in 1974 to include new contribution and spending limits. The amendments also set up a complex system for financing presidential elections.[19] The main aim of this system was to limit the potential influence of private money in presidential elections, and consequently, every presidential election since 1976 has been financed with public funds.

The Supreme Court decision in *Buckley v Valeo*, however, "gutted" vital portions of the 1974 reforms.[20] The Court accepted public financing of presidential elections, and held that Congress could attach conditions to the acceptance of those funds, including spending limits. It also agreed that ceilings on campaign contributions were justified by the need to prevent corruption and the appearance of corruption. Yet it "unequivocally struck down [FECA's] limits on overall campaign spending by a candidate who does not receive public financing, restrictions on independent expenditures in support of or against a candidate, and ceilings on candidate spending from personal or family funds."[21] Although *Buckley* has been "universally condemned in a quite unprecedented fashion",[22] it is still the leading case on campaign finance reform in the United States.

The spending limits inherent in public funding have resulted in the candidates channelling the bulk of their resources into television, which is the most effective way to communicate with the electorate when there is a limited supply of dollars. The proportion of general election spending devoted to the electronic media has increased steadily since 1960: "It has been estimated that nominees in 1976, 1980, 1984, and 1988 spent about half of their public subsidy on advertising, mainly through television". [23]

The 1974 reforms were criticised as not going far enough, because they did not provide for the public funding of congressional elections. Unlike the presidential campaigns, there is no system of public funding for House and Senate elections, and consequently there are no expenditure limits. The result has been that congressional candidates have increasingly turned to political action committees

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18 In 1992 Ross Perot became only the second major candidate to have declined public funds. He stated he would not accept any federal financing, and therefore avoided limitations on the amount he could spend from his personal wealth. He vowed to spend as much money as it took to win the election, causing some to fear that the publicly funded candidates would not be able to compete because of their spending limits. In the end these fears were unfounded, Perot spent less than either major party ticket.

19 For a summary of these see Pace, "Public Funding of Presidential Campaigns and Elections: Is There a Viable Future?" (1994) 24 Pres Stud Q 139, 142-146.

20 Wright, "Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?" (1982) 82 CLR 609, 611.

21 Ibid.

22 Supra at note 3, at 221.

23 Asher, *Presidential Elections and American Politics* (1992) 210.

("PACs") and wealthy individuals to finance campaigns, as this is the most efficient way of raising money. Since PACs overwhelmingly favour those already in office, the current system "has played a central role in shaping an electoral landscape that is grossly unfair to challengers."[24] The present regime has acted as an incumbent protection measure – as statistics show, congressional incumbents rarely lose. This has led to numerous calls for reform.[25]

A USA Today–CNN Gallup poll conducted in 1996 revealed that eighty-three percent of Americans wanted campaign finance reform; only balancing the Federal budget and reforming welfare had more support.[26]

4. Australia

In 1984 Australia amended its electoral legislation to introduce public funding for national elections. Since then, all candidates, registered parties, and groups gaining at least four percent of the first preference votes in the relevant electorate can claim reimbursement from the fund.[27]

The system is of major benefit to all parties and candidates, but especially to minor parties whose access to funds from members and donors is very limited."[28] However, as the funding is proportional to support, the major parties are the major beneficiaries.

To be eligible to receive funding a party must be registered, and in order to be registered a party must have one representative in Parliament or at least 500 members. Tied to public funding is the obligation to publicly disclose donations. Prior to the introduction of public funding parties were permitted to raise unlimited funds from whatever source without disclosure being required. Now the Commonwealth Electoral Amendment Act 1995 requires all parties and candidates to furnish a public return showing the amount and details of all donations and gifts (of $1000 or more to political parties and of $200 or more to a candidate), including the names and addresses of donors.[29]

In Australia, as elsewhere, the increasing role played by expensive television advertisements in election campaigns led to concern that politics was becoming the domain of the wealthy. Amid the increasing reliance on television for political advertising and rising advertising costs, fears arose that dependence on corporate donations to finance political campaigns could lead to undue influence. In response, the Australian Labour Government introduced, in 1991, the Political

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24 Wertheimer and Manes, "Campaign Finance Reform: A Key to Restoring the Health of our Democracy" (1994) 94 CLR 1126, 1127.

25 See, for example, ibid; and Raskin and Bonifax, "The Constitutional Imperative and Practical Superiority of Democratically Financed Elections" (1994) 94 CLR 1160.

26 141 Cong Rec S 12831.

27 Jaensch, *Election! How and why Australia votes* (1995) 48.

28 Ibid, 48-49.

29 Sections 305B-313.

Broadcasts and Political Disclosures Bill which completely prohibited all paid political advertising on the electronic media:[30]

> The proposal was the widest possible, covering political parties and pressure groups, and encompassing any explicit or implicit reference to, or comment on elections; past or present state or federal governments or oppositions; any past or present politician; any political party or candidate; and any issue concerning an election. It was a complete "blanket ban".

Labour's justification for the ban was that the costs of political advertising, especially on television, had reached a level beyond any reasonable fund-raising efforts by political parties. It claimed that this placed too much pressure on political parties and candidates to raise large sums of money, and rendered them vulnerable to corruption and undue influence. While the Australian Democrats supported the Bill in principle, it was opposed by the Liberal and National parties who described the proposal as an outrage, and saw it as an attack on the freedom of speech. Finally, the High Court of Australia ended the debate by declaring the Act to be unconstitutional. In *Australian Capital Television Pty Ltd v The Commonwealth [No 2]*[31] the Court accepted that undue influence and corruption was a concern, but held that the freedom of discussion on public and political affairs and the freedom to criticise federal institutions was so important that, despite the concerns, paid political advertising should be permitted.

III: NEW ZEALAND'S POLITICAL PARTY BROADCASTING REGIME

1. The 1990 General Election

For a political party to be eligible for time or money, it had to conduct its affairs throughout New Zealand, have a national organisation, and have consistently expressed philosophies or policies on a range of issues over the period of twelve months immediately preceding the issue of the writ for the election; and have candidates for at least ten seats in the House of Representatives. The Broadcasting Act also required the Authority to have regard to the number of votes that a party received at the last general election, the number of votes a party's candidate of that party had received at any by-election since the last general election, the number of members of Parliament that political party had immediately preceding the expiration or dissolution of Parliament, and other indications of public support for that party such as the results of public opinion polls and the number of members

30 Supra at note 27, at 59.
31 (1992) 177 CLR 106.

belonging to that political party.[32]

Essentially, Part VI provided that only political parties which satisfied the above criteria could broadcast election programmes.[33] Political parties which did not meet the criteria for funding set out in s 75 of the Act were prevented from advertising on television or radio.[34] Further, political parties which did meet the criteria in the Act, could not use their own funds to purchase more air time, although they could spend their own money on production costs. In short, there was a complete prohibition on paid election advertising.[35]

The Act required the Authority to ascertain which parties were the "major political parties". The Authority unanimously resolved that the Labour and National parties be classified as major political parties for the purposes of Part VI of the Act. This meant that these two parties were eligible for the maximum allocation of time and money. Most parties did not dispute this decision, which was based on the parties' percentage of votes in the last election, representation in the House, current polls, and public interest in them.

The issue that divided the parties and the Authority was how to allocate the time and money, and what principles should govern the allocations. The minor parties argued that since National and Labour received substantially more media exposure than they did, the allocations should be made to help address the media bias.[36] In other words, they were asking the Authority to use the allocation process to help create a "level playing field".

The Authority debated at length the various methods of allocating the time and money. In the end it was resolved that National and Labour would each receive thirty-five percent of the funds allocated for radio and television election programmes, and the remaining thirty percent would be allocated among the six remaining political parties in the following proportions: Democrats 7 percent, New Labour 7 percent, Social Credit 4.5 percent, the Greens 4.5 percent, Christian Heritage 3.5 percent and the New Zealand Party 3.5 percent. The money for production costs was allocated in the same way. The free air time offered by Television New Zealand and TV3 for the opening and closing addresses was allocated in a three way split between Labour, National, and the minor parties.[37]

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32 Sections 74-75.

33 Section 69 defined an election programme as a programme that is used, or appears to be used, to promote or procure the election of any person at an election, or advocates support for a candidate or a political party, or notifies meetings to be held in connection with an election.

34 The Act does not restrict the broadcasting of news, comments, or current affairs programmes, and since their content is at the discretion of the broadcaster, they may include political parties which have not met the Act's criteria for time and money.

35 Section 70.

36 The Democratic Party, noting that the two major parties already had an advantage in terms of media coverage, by way of the news, talkbacks and current affairs programmes, to get their policy messages across to the public, asked the Authority to have regard to that when determining the allocation of time and money to the parties. Ibid, 9.

37 *Minutes of the Eighth Meeting of the Extended Broadcasting Standards Authority* (29 August 1990) 3-5.

The minutes of the Authority record that its members were disappointed that the new legislation precluded an allocation of time or money to Mana Motuhake. With the party only contesting four seats, the four Maori electorates, it did not satisfy the criteria in s 75(1)(c) which required candidates in at least ten seats. Discussion about whether the Authority could use its discretion and allocate Mana Motuhake time and money for expenditure in the four Maori seats, was ended when it was observed that the issue of Mana Motuhake's eligibility was clearly recognised when the new Bill was passed.[38]

The Authority was forced to reconsider the original allocations when the New Zealand Party failed to field ten candidates. With no provision in the Act to deal with this situation, the Authority sought a legal opinion. It was advised that the power of expediency in s 24 of the Act empowered the Authority to reallocate the time and money.[39]

Using the formula applied to the original allocations of time, the New Zealand Party's seven minutes of free time would only have meant an additional one minute thirty-nine seconds for Labour and National, and eleven seconds for each of the minor parties. Accordingly, the Authority decided that there was little to be gained from reallocating the time as most of the parties' programmes would already have been made.

Allocating the funds under the original formula meant approximately an additional $15,000 for Labour and National, $3,000 for the Democrats and New Labour, $2,000 for the Greens and Social Credit, and $1,500 for Christian Heritage. Consequently, the Authority unanimously resolved to reallocate the money following the original proportions (35:35:30), but that it would not vary the time allocations already made to the remaining parties.

Following this resolution the Electoral Office confirmed that the number of candidates standing for some of the minor parties was less than the number originally indicated to the Authority. Nevertheless, the Authority decided that, other than for the New Zealand Party, the difference did not warrant revisiting the original allocations.[40]

Despite the Authority's previous unanimous resolution to reallocate the money amongst all the remaining parties, the Authority's members discussed a recommended motion which proposed that only the remaining minor parties should receive the New Zealand Party's share. The two political appointees firmly disagreed with the motion. They were convinced that the "only equitable distribution" was to allocate the funds amongst all the parties.

Mr Falck, the Government nominee, reminded the Authority that in the original

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38 *Minutes of the Seventh Meeting of the Extended Broadcasting Standards Authority* (22 August 1990) 2.

39 *Minutes of the Eleventh Meeting of the Extended Broadcasting Standards Authority* (1 October 1990) 1.

40 *Minutes of the Twelfth Meeting of the Extended Broadcasting Standards Authority* (12 October 1990) 1.

discussions on the ratios, he had recommended a 40:40:20 split. He stated that when he agreed to the 35:35:30 ratio, it was on the assumption that there would be six minor parties and that a funding limit of $42,000 would enable the smallest of the third parties to access television. He argued that if there had only been five minor parties from the beginning, he would have sought a different ratio for the original allocation; retaining a minimum threshold of around $42,000, but with a higher proportion for major parties. Mr Falck pointed out that it had been at his instigation that the Authority had approached the Government for an additional $200,000 for television funding, because dividing the original allocation amongst eight parties would not have given the smallest parties an adequate threshold amount.[41]

The nominee of the Leader of the Opposition, Mr Beatson, felt that if the Authority did not reallocate the New Zealand Party's share according to the 35:35:30 ratio, the Authority would be seen as being prejudiced against the two major parties. Mr Beatson believed that this was especially so because the polls indicated little support for the minor parties.[42]

In response, Ms Morris stated that democracy was "not served by denying the small parties access to the media",[43] and she noted that they could not increase their public support without media coverage, which was controlled by the Authority's allocation of time and money. Ms Morris and Ms Hardie argued that the minor parties could not hope to improve their position unless they were allocated proportionally more money. While the Chairperson acknowledged this argument, he questioned the members whether, if two or three of the minor parties had become ineligible for funding, they would still have supported the distribution of the funds previously allocated to all six minor parties amongst the three or four remaining.[44]

After further discussion, involving a review of the criteria contained in s 75(2) of the Act, a majority upheld the previous resolution to reallocate the money to all the parties. The Authority's decision to reallocate the funds in the same proportions as the original allocations was challenged by the New Labour Party, which sought judicial review. Justice Heron upheld the reallocation, rejecting the argument that the reallocation was "irrational and unreasonable in the Wednesbury sense because it did not reallocate the available money amongst the minor parties but included the two major parties all on a proportionate basis."[45]

The Authority's decision to apply a ratio system to the allocation process

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41 Ibid, 2.

42 Ibid. Nearly all the minor parties' poll results showed their percentages to be less than the margin of error.

43 Ibid.

44 Ibid, 3. Mrs Jocelyn Fish, Ms Jan Hardie, and Ms Joanne Morris, had originally proposed a 30:30:40 split. The Chairperson, Mr Iain Gallaway, had proposed a compromise - a 33.3:33.3:33.3 ratio, before the 35:35:30 split was settled upon.

45 *Alton v Broadcasting Standards Authority*, High Court, Wellington, 15 October 1990, CP 89/90, Heron J, 7.

illustrates how arbitrary the regime can be. While any of the ratios which the Authority considered would have met the administrative law test of reasonableness, all the political parties had firm views on how the funds should be allocated to be "fair". The glaring deficiency in the legislation in terms of the 1990 election was the exclusion of the Mana Motuhake party from the funding process, and therefore from political broadcasting altogether.[46] Since there were only four Maori electorates at the 1990 and 1993 elections, there should have been provision for any party that only wanted to contest those seats. The legislation did not attempt to give the Mana Motuhake party a place on the "level playing field" of political party broadcasting, and arguably, was another way of marginalising the party and Maori politics.

2. Statutory Reform

The Authority urged reform of the law and in early 1993 the Broadcasting Amendment Bill (No 2) was introduced into Parliament. It permitted political parties to spend their own money on election broadcasting up to fifty percent above the largest state allocation to any party. This meant political parties which received a state allocation could top up their allocation, and parties which missed out on state funding could spend their own funds and therefore would not be prevented from advertising on television and radio.

The prospect of political parties receiving large donations to fund their advertising campaigns led to concerns being expressed over the possibility of corruption and undue influence. This issue had recently been addressed in Australia in the landmark *Australian Capital Television* case. Labour claimed the proposed changes would have adverse consequences, with money dictating electoral success. It talked of a tendency to Americanise the kinds of election strategies used, with more pressure to raise funds, and parties more geared towards television advertising.[47] The Alliance claimed that the result of enacting the proposed changes would be presidential-style campaigns in which the message conveyed was determined by wealth.[48] National, on the other hand, dismissed the fears of American-style campaigns as an overreaction, saying the amounts of money that would be involved were not huge.[49]

In the end, a number of amendments were passed to tighten up the statutory regime, but the provisions permitting political parties to spend their own money on television and radio advertising were taken out of the Bill before it was passed on Budget night. Mr Warren Kyd, a National MP and chairman of the Commerce Select Committee which considered the Bill, said that the clauses were dropped

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46 See text infra at Pt IV para 2 for a discussion of this issue from a freedom of speech perspective.

47 *The Dominion*, 19 April 1993, 4.

48 Ibid, 1 June 1993, 2.

49 Supra at note 47.

partly because of opposition to them from Labour and the Alliance. Interestingly, it was estimated that "allowing political parties to buy their own air time would have perhaps trebled the amount of political advertising before the election."[50]

Consequently, the essence of the legislation remained the same – only parties which received state funding could run election campaign advertisements on television and radio.

3. The 1993 General Election

At the 1993 general election the criteria in s 75(1) of the Act was again the test for whether an allocation would be made to that party. Six political parties, namely National, Labour, the Alliance, Christian Heritage, the McGillicuddy Serious Party, and the New Zealand Defence Movement, clearly satisfied the section. The Authority accepted the recommendation that two other parties met the criteria of s 75(1), but made this subject to further information being obtained from these parties. The Natural Law Party had to supply further information on their policies on a range of issues prior to October 1992, and the New Zealand United Party ("the United Party") was required to provide further evidence that it would stand at least ten candidates at the election. After supplying this additional information, both parties were held to qualify for allocations of time and money. The Authority provisionally declined the application of Social Credit New Zealand ("Social Credit") because it was not adequately assured that the party would stand at least ten candidates at the election.[51]

Requests by the Authority for further information from the ANZAK Party, the New Zealand Representative Party, and the Private Enterprise Party as to their compliance with the statutory criteria went unanswered. The Authority was therefore unable to assess whether these parties met the criteria and so resolved that these parties would not be allocated time or money.[52] The Aotearoa Partnership was ruled ineligible to receive money or time because it would not have been in existence and have expressed policies as a party for at least twelve months before writ day. The Coalition withdrew its application for an allocation and the New Zealand Party advised the Authority that it had withdrawn from contesting the election.

Rather than deciding on a ratio to divide the money and time, the Authority gave parties a mark according to how well they satisfied the statutory criteria and other criteria such as party organisation, the visibility and consistency of party policy, and whether a party was likely to form a government. Once the points had been worked out, they were translated into percentages, and provisional

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50 Ibid, 16 July 1993, 2.

51 *Minutes of the Twenty-third Meeting of the Extended Broadcasting Standards Authority* (4 August 1993) 5-7. Social Credit later informed the Authority it would not be standing candidates at the election.

52 Ibid.

allocations were made. Again, there was no doubt that National and Labour were the major political parties.

The provisional allocations led to much criticism of the statutory regime. It was widely regarded as a "glaring anomaly" that fringe political groups such as the Natural Law and McGillicuddy Serious parties qualified for funds, yet New Zealand First, the party polling fourth, and whose leader was leading polls as the most preferred prime minister,[53] was ineligible for public funding because it was formed within the last twelve months and thus did not meet the s 75(1)(b) criteria for funding. While the New Zealand First Party was not eligible to receive funds or time, and therefore was completely prevented from advertising on television or radio, the McGillicuddy Serious Party had been allocated almost $77,000 of taxpayer money. The Authority received a number of letters criticising the allocation to the McGillicuddy Serious Party, but as the Authority stressed, it had no "discretion to base its decisions on the merit of a party's philosophies and there would be (or should be) concern if a statutory body started judging parties. Voters make that judgment."[54] While Winston Peters, leader of the New Zealand First Party, claimed that his party had not applied for funding because he disagreed with the principle of taxpayers' money going to political parties (so, even if the party had been offered money it would not have been accepted), he made much of the fact that his party was prevented from spending its own funds on television and radio advertising.[55] In protest at New Zealand First's ineligibility to receive funds or time, the United Party returned the allocations that the Authority had made to it.

The Authority considered whether the time and money set aside for the United Party should be reallocated. Given the impracticalities of trying to redistribute the time, it was unanimously agreed that only the money would be redistributed. Since the McGillicuddy Serious and Natural Law parties were fielding significantly less candidates than they had originally indicated, the Authority decided that these two parties were ineligible for additional funding.[56]

The next question was whether the funds should be allocated amongst all the remaining eligible parties or only amongst the minor parties. Mr John Wright, Chairman of the Alliance Council, wrote to the Authority urging the latter. He argued that of the minor parties which had collectively received a third-share of the funding, only the Alliance and Christian Heritage had "consistently worked on a nationwide basis, using resources other than those provided by the Authority, to promote consistent philosophy and policies in an ongoing manner."[57] He asked the Authority to have regard to that when considering the possible redistribution of the funds.

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53 *The Evening Post*, 6 September 1993, 4.

54 Letter from the Extended Broadcasting Standards Authority to Mrs N McKay, 28 October 1993.

55 See, for example, *Otago Daily Times*, 30 September 1993, 4.

56 *Minutes of the Twenty-sixth Meeting of the Extended Broadcasting Standards Authority* (15 October 1993) 2-3.

57 Letter from the Chairman of the Alliance Council to the Extended Broadcasting Standards Authority, 13 September 1993.

Following discussion in which the members recalled New Labour's unsuccessful challenge to its reallocation of funding at the 1990 election, the two political appointees together moved and seconded a motion that the money should be reallocated to the Alliance, Christian Heritage, Labour, National, and Defence Movement parties according to the ratios used in the original provisional allocations. This was carried by a majority. Accordingly, the Authority reallocated the funds to both major and minor parties, just as it had done in 1990.

The exclusion of the New Zealand First party from the allocation process clearly illustrated a major problem with the statutory criteria. When applying the system meant that a high polling party was completely excluded from using television and radio advertising to communicate its policies to the voters, something was obviously wrong. The inability of the party to purchase its own air time raised important freedom of speech questions.[58] Equally importantly, however, it plainly demonstrated that prohibiting paid political broadcasting could create real political inequality because parties could be excluded from using important means of communication to convey their messages to the voters.

4. Further Statutory Reform

Following the election the Authority sent a report to the Minister of Communications and the Ministry of Commerce. In its covering letter, it stressed the view of the "core" members of the Authority (ie excluding the political representatives) that the administration of Part VI of the Act should not be its responsibility. "It does not lie comfortably with the other functions of the Authority ... [and] has interfered severely with its main role",[59] it stated. The Authority suggested that the Electoral Commission ("the Commission") might be an appropriate body to take over the election responsibilities. Then, drawing the Minister's attention to areas in the Act which would require consideration in light of MMP, the Authority advised that the task of deciding "major political parties" would be a serious burden given the possibilities of shifting alliances among parties and the possible lack of any one or two "major" ones. It suggested that that the major political party status be removed from the Act.[60]

The Broadcasting Amendment Bill was introduced and referred to the Finance and Expenditure Committee ("the Committee") on 19 October 1995, nineteen months after the Authority had urged that discussion of any proposed changes should begin.[61] According to the Committee's report on the Bill, its main purposes

58 See text infra at Pt IV para 2 for a discussion of this issue.

59 Letter from the Chairperson of the Broadcasting Standards Authority to the Minister of Communications, 3 March 1994.

60 McLean, "Broadcasting Standards Authority: 1993 General Election – Consultant's Report on Application of Part VI of the Broadcasting Act" (January 1994) 7.

61 Finance and Expenditure Committee, "Broadcasting Amendment Bill – Commentary" (June 1996) i.

were "to strengthen the broadcasting standards regime and to make the necessary changes to the election broadcasting regime arising from the change to MMP."[62] The Committee received twenty-six submissions from the television and radio industry, the Authority, the Electoral Commission, political parties, and groups and individuals "concerned about broadcasting and community standards."[63]

To address the problem highlighted by the New Zealand First debacle, the eligibility of parties for state funding was brought in line with the criteria in the Electoral Act 1993. Thus, the twelve month test became a requirement to be registered three months before Parliament was dissolved. "Alternatively, if a party does not intend to field list candidates, eligibility is gained by the party notifying of its intention to field at least five constituency candidates" (at least three months before the dissolution of Parliament).[64] This change was intended to enable small or newly formed parties to promote their policies. The other statutory criteria remained unchanged.

The Bill also permitted parties to spend their own funds on election broadcasts "up to a global maximum of 25 percent above the largest State allocation to any party".[65] To avoid ambiguity, the Committee recommended that the Bill be amended to clarify that the total amount that parties could spend, including both state allocations and party funds, could not exceed a maximum of twenty-five percent above the largest single amount allocated to any party by the Electoral Commission.[66] However, while the other changes proposed by the Bill were accepted, the amendment to allow parties to spend their own funds was, once again, removed from the Bill before it was passed.

5. The 1996 General Election

Despite more parties qualifying for an allocation of funds, the amount appropriated by Parliament was $1.85 million (excluding GST) – the same amount that had been appropriated for the 1990 and 1993 elections. This meant that of the four largest parties, only the New Zealand First Party was eligible for more money than in 1993 when, of course, it received nothing. National, Labour, and the Alliance all received less money. The Commission[67] based its allocations on the

62 Finance and Expenditure Committee, ibid.

63 Ibid. Less than half the Committee's report looked at the changes to the election broadcasting regime, and it appears likely that the bulk of the submissions addressed the broadcasting standards, rather than the election broadcasting regime.

64 Ibid, viii

65 Ibid, ii.

66 There was also a recommendation that the Bill should be amended to specify that spending on election broadcasting was subject to the total spending limit established in the Electoral Act 1993. This followed the realisation that the proposed limit for spending could potentially exceed the total party spending limit permitted by that Act. Ibid, vii-viii.

67 The Broadcasting Amendment Act transferred the responsibility for administering the regime to the Electoral Commission. This latter change, in addition to being favoured by the Authority,

cost of purchasing television time, but parties were able to spend some or all of their state allocation of funds on purchasing radio time.[68]

The Electoral Commission gave each of the statutory criteria a relative weighting. The Commission reports that the weight to be given to each was difficult to determine. The process was further complicated by the fact that it was the first general election under the MMP system, and therefore criteria relating to the previous election were unlikely to be reliable indications of public support.

Unlike the 1990 and 1993 elections, there was no obvious case of a party being excluded from the "level playing field". Labour, the Alliance, New Zealand First, and United, however, all complained about their allocations. Each of these parties felt that the funding had not been fairly distributed. Labour complained that National received $100,000 more than it did. New Zealand First and the Alliance questioned why, when Labour was polling about the same as they were, it had been allocated considerably more state funds than them. United regarded its allocation as insufficient because it received little more than twice the amount given to a party wanting to legalise cannabis.[69]

Although an increase in the amount appropriated by Parliament would alleviate some of the parties' criticisms, parties will still complain at perceived unfairness so long as the present regime exists. While no system is perfect, a system that takes account of the number of votes that a party actually receives at the election would further address the above criticisms.

While the 1996 allocation process was not without controversy, given the restrictions on political broadcasting, the issue of most concern should be the emergence in New Zealand of a new breed of big political spenders. They are collectively known as lobby groups. At the 1993 electoral referendum the anti-MMP group Campaign for Better Government spent lavishly on television advertising. At the 1996 election the Employers' Federation and the Council of Trade Unions both ran campaigns about the Employment Contracts Act 1991, and an organisation called Voters Organisation for Tactical Education (VOTE), ran television and newspaper advertisements encouraging voters to split their votes. With these groups using their considerable financial resources to push their own political agendas, we need to question whether prohibiting political parties from buying some of their own election broadcasting merely gives lobby groups an advantage in putting issues before the voters. At present, political parties and

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implemented recommendations previously made by the Electoral Law Committee. The Electoral Commission also informed the Committee that it considered that it was appropriate for it to gain this additional function. Ibid, vii.

68 At the 1990 and 1993 elections the Authority had made separate allocations for television, radio, and production costs. However, in making the allocations for the 1996 election, the Commission found that the parties strongly preferred to receive one allocation and divide that themselves as they saw fit. In fact, this was the predominant submission, almost to the exclusion of all others. Report of the Electoral Commission, supra at note 1, at 14.

69 *The New Zealand Herald*, supra at note 1.

lobby groups are playing the same game but with different rules.[70] Consequently, a level playing field does not exist and therefore neither does political equality.

6. Problems Identified by the Electoral Commission

In the report containing its decision on provisional allocations, the Commission stated that it considered the criteria in the Broadcasting Act to be deficient, and that the election-broadcasting regime should be re-examined as part of the usual post-election review of electoral law and practice conducted by Parliament.

The Commission specified a number of matters which it felt were relevant to a re-examination of the Act. First, the fact that some parties qualify for funding which are not "serious" and have little chance of success. Second, s 75(2)(f) requires the Commission to have regard to the need to provide a fair opportunity for each registered party to convey its policies to the public by the broadcasting of election programmes on television, but the appropriation has not increased since 1990 and now must be spread more thinly. Third, if no allocation is made to a minor party, that party cannot buy its own broadcasting time; and, if the allocations to minor parties absorb part of the funds which would otherwise go to other parties, the latter are disadvantaged because they cannot purchase broadcasting time with their funds.

IV: FREEDOM OF SPEECH

1. Freedom of Speech

Restrictions on broadcasting by political parties during election periods is a freedom of speech issue. This is a fact that the politicians in this country have failed to appreciate, and consequently the legitimacy of the current regime has not been examined from this legal perspective. This is not surprising given that "freedom of expression has never been a matter of much concern to New Zealanders."[71] Four issues are raised when our election broadcasting regime is examined from a freedom of speech perspective.[72] First, whether restrictions on spending money impinges freedom of speech. Second, whether it is legitimate to try and create a "level playing field". Third, whether there are public policy concerns that justify limitations on freedom of speech. Fourth, whether a freedom

70 While this comment is directed to the political equality side of the equation, it equally applies to freedom of speech issues. See text infra at Pt IV para 2 for the freedom of speech discussion.

71 Huscroft, "Defamation, Racial Disharmony, and Freedom of Expression" in Huscroft and Rishworth (eds), *Rights and Freedoms in New Zealand* (1995) 171.

72 This sections draws heavily on American jurisprudence and American academic writing. While this country does not have a written constitution, the First Amendment cases are still highly relevant for New Zealand; see ibid, 171-172.

of speech perspective can clarify the competing issues/values that are at stake.

2. Money as Speech

The concept that spending money is a form of speech arose in American campaign finance cases. The United States Supreme Court first equated political spending with political speech in *Buckley v Valeo*. Justice White was the sole member of the Court to disagree with the Court's holding that expenditure limits violate the First Amendment. He rejected the Court's contention that money is speech, stating: "as it should be unnecessary to point out, money is not always equivalent to or used for speech, even in the context of political campaigns."[73]

Professor Sunstein, on the other hand, asserts that "[i]t should not be controversial to say that an expenditure of money on behalf of a candidate or a cause qualifies as speech for First Amendment purposes."[74] He considers that, "[a]t the very least, an expenditure of money is an important means by which people communicate ideas".[75]

Professor Greenawalt has a similiar view.[76] He considers that while an easy solution would be to regard spending money as different from speaking (which would mean that restrictions on expenditure would only receive minimal review from the courts), the Supreme Court has "rightly rejected that approach".[77] Among the free speech rights of political organisations, he includes the right to spend money to promote ideas, stating that "[t]he right to spend money to disseminate ideas is a significant aspect of free speech."[78]

The views of White J are, however, supported by Professor Blasi: "Money is not speech literally, and although money can buy the production and dissemination of speech, that is not all it buys in political campaigns."[79] Blasi, though, recognises that campaign spending limits raise a First Amendment issue because they undoubtedly influence what candidates are able to communicate to voters and what voters are able to learn about the candidates. Whereas the Court treated the regulation of campaign monies as tantamount to the regulation of political expression, he views campaign spending limits not as regulation of speech per se, but as laws which "predictably and heavily" influence speech and, for that reason, trigger First Amendment inquiry.[80]

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73 Supra at note 6, at 263.

74 Sunstein, *Democracy and the Problem of Free Speech* (1993) 94.

75 Ibid.

76 Greenawalt, *Fighting Words* (1995) 140.

77 Ibid.

78 Ibid, 141.

79 Blasi, "Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All" 94 CLR 1281, 1289.

80 Ibid. Justice Wright is of the same view; see Wright, "Politics and the Constitution: Is Money Speech?" (1976) 85 YLJ 1001, 1005.

Justice Skelly Wright asserts that if prohibiting expenditure is practically inseparable from the speech itself, only the most intensely compelling governmental interests will justify the prohibition. However, if the prohibition on expenditure is still at the speech-related conduct level, restriction is only legitimate if it promotes an important governmental interest which is unrelated to the suppression of speech.[81] Judicial scrutiny is still justified because an apparently neutral restriction on the non-speech element might be, in fact, an attempt to silence a particular viewpoint.[82]

In *Buckley* the appeal court drew an analogy with *United States v O'Brien*,[83] a draft card burning case, to decide that the use of money in political campaigns was nothing more than a vehicle for political expression. As a vehicle, it could only be speech-related conduct, not "pure speech". According to Skelly Wright J, the real question in the case was whether the use of money could be regulated where there was an undoubted incidental effect on speech. In Skelly Wright J's opinion, what the Supreme Court asked was whether "pure speech" could be regulated where there was some incidental effect on money.[84] Naturally, the Supreme Court could only answer its question in the negative.

Whether, in the context of campaign contributions and expenditures, one agrees that money is speech or speech-related conduct, it is clear that any restriction should be scrutinised from a freedom of speech perspective. This has an impact for us in New Zealand. At present we prohibit political parties from spending their own funds on broadcasting. Two issues are involved here: First, there is an expenditure restriction. Second, an important means of communication is involved.

3. Political Equality – Creating a "Level Playing Field"

Perhaps the first point to make is that, by themselves, campaign finance reforms can never create a level playing field for election campaigns. Political party financing depends upon a wide range of factors, not the least of which is the electoral popularity of the party. But the law can help, and in particular it can help to regulate the influence of money. However, the American jurisprudence illustrates just how vulnerable such laws are when they are faced with a constitutional law bias towards political liberty rather than political equality.

In what has been described as the key sentence in *Buckley*, the Supreme Court stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment".[85] As far as the First Amendment is concerned, the state

81 Wright, ibid, 1006.
82 Ibid, 1005-1006.
83 391 US 367 (1968).
84 Ibid, 1007.
85 Supra at note 6, at 48-49.

may not redress disparities in wealth at all. Efforts at equalisation are not within the permissible goals of government. Therefore, laws are constitutionally unacceptable if their purpose is to increase political equality. In other words, any restriction that causes the wealthy to be silenced for the benefit of people with less money is illegitimate.

Some have interpreted the Court's position as undermining democracy because it allows a free market mentality to operate as a bar to serious consideration of the democratic effects of different regulatory systems.[86] Sustein sees the Court's reasoning in *Buckley* as reflecting "status quo neutrality":[87]

> [T]he existing distribution of wealth is seen as given, and failure to act – defined as reliance on markets – is treated as no decision at all. Neutrality *is* inaction, reflected in a refusal to intervene in markets or to alter the existing distribution of wealth.

Later he contends:[88]

> Efforts to redress economic inequalities or to ensure that they are not translated into political inequalities should not be seen as impermissible redistribution or as the introduction of government regulation into a place where it did not exist before. Instead campaign finance laws should be evaluated pragmatically in terms of their consequences for the system of free expression.

The importance of *Buckley* has not escaped Rawls. He finds it dismaying that the Court would appear to have completely rejected the idea that government might try to establish the fair value of political liberties.[89] He considers that even though political speech falls under the basic liberty of freedom of thought, it must be regulated to insure the fair value of political liberties. In his opinion, in a private property democracy, one way of guaranteeing fair value would appear to be to keep political parties independent of large concentrations of private economic and social power, and for society to bear a large part of the cost of organising and effecting the political process, including regulating the conduct of elections.[90]

Rawls asserts that if limits on contributions and the public financing of political campaigns and election expenditures are essential for maintaining the fair value of the political liberties, then restrictions are compatible with the central role of free political speech provided three conditions hold. First, there are no restrictions on

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86 Supra at note 74, at 100.

87 Sustein, *The Partial Constitution* (1993) 85.

88 Ibid, 223-224.

89 Rawls, *Political Liberalism* (1993) 360. Rawls explains that the guarantee of the fair value of political liberties "means that the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions", ibid, 327. For a consideration of the fair value of the political liberties, see ibid, 324-331.

90 Ibid, 328.

the content of speech.[91] Second, no undue burden is imposed by the conceived arrangements on the various political groups in society – all must be affected in an equitable manner.[92] Third, the restrictions are rationally designed to achieve the fair value of the political liberties:[93]

> While it would be too strong to say that they must be the least restrictive regulations required to achieve this end – for who knows what the least restrictive among the equally effective regulations might be – nevertheless, these regulations become unreasonable once considerably less restrictive and equally effective alternatives are both known and available.

Professor Ewing, taking a similar approach to Rawls, contends that the case for campaign finance controls starts with the principle of political equality, "the principle which may be said to lie at the heart of the system of government in the liberal democratic tradition."[94] Like Rawls, Ewing examines the right to vote. He notes that in countries which claim to be democratic, formal political equality is regarded as a fundamental requirement, meaning that not only should everyone have the right to vote, but also that their votes should be of equal value:[95]

> But the doctrine of political equality embraces more than the right to vote. It embraces also the right to participate in government on equal terms with one's fellow citizens. This means the right to stand for election equally with others .... But we may go further still and argue that the right to political equality, and the right to participate, mean more than the right to stand for election equally with others. They must mean also the right of equal opportunity to secure election. The problem which arises here, however, is a particularly serious one for governments in market economies. It is simply that the political freedoms which these societies seek to guarantee operate against a backcloth of deep-rooted economic inequality.

Ewing argues that the unregulated use of money in political campaigns violates the goal of political equality for two reasons. First, candidates seeking election are not guaranteed equality of opportunity, and second, people contributing large sums to party funds tend to have disproportionate access to their elected

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91 Rawls sees the restrictions as rather "rules of order for elections ... [necessary] to establish a just political procedure", ibid, 357.

92 He acknowledges that what constitutes an undue burden is a question in itself, and states: "[It] is to be answered by reference to the purpose of achieving the fair value of the political liberties. For example, the prohibition of large contributions from private persons or corporations to political candidates is not an undue burden (in the requisite sense) on wealthy persons and groups. Such a prohibition may be necessary so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class ... On the other hand, regulations that restrict the use of certain public places for political speech might impose an undue burden on relatively poor groups accustomed to this way of conveying their views since they lack the funds for other kinds of political expression."
Ibid, 358.

93 Ibid.

94 Supra at note 3, at 13.

95 Ibid, 14.

representatives.[96] The problem of any reform is that it brings the two pillars of a liberal democracy, equality and liberty, into conflict. One of the essential freedoms is the freedom of speech, and here the key issue is the extent to which this freedom needs to be protected. Ewing states that although "there may be a strong case for respecting freedom of speech, the freedom cannot be unlimited ... [since] absolute freedom would be the antithesis of democratic self-government."[97]

Consequently there has to be a choice made between unrestrained liberty, which would ultimately undermine political equality, and the pursuit of equality, which would necessitate restricting the freedom to some degree. This dilemma is "as acute in Canada as it is in the United States given that the Charter expressly protects freedom of expression".[98] Clearly a balance needs to be struck between the two, but what concerns Ewing is that, in Canada, the striking of this balance is not in the hands of the people or their elected representatives, but rests with courts because the Charter has given the last say on political questions to the judiciary.[99] His concern arises because in the United States the courts "have shown themselves unwilling to surrender liberty to the ideal of political equality."[100] The Canadian campaign finance legislation is designed to promote political equality. The Charter is predisposed towards liberty, therefore, the success of the former will "depend on the extent to which the Canadian judges are prepared to depart from American precedents in their interpretation of the Charter."[101]

In Australia, one of the arguments put forward to support the legislation prohibiting the broadcasting of political advertising was that since only those with money could afford the high costs of such advertising, removing it as an option would place everyone in the community on an equal footing.[102] This argument was rejected by Mason CJ. He found that the legislation did not introduce a "level playing field".[103] Its provisions overwhelmingly favoured the established political parties represented in the legislature immediately before the election, and the candidates of those parties, and discriminated against new and independent candidates. By limiting the latter to a maximum of ten percent of the free time available for allocation, they were denied "meaningful access on a non-discriminatory basis."[104] More than that though, individuals and groups which were not contesting the election, were prevented from participating in the election campaign through political broadcasts.[105]

Chief Justice Mason did not accept that because absolute equality in the

96 Ibid, 26.
97 Ibid, 27.
98 Ibid.
99 Ibid, 32.
100 Ibid.
101 Ibid.
102 Supra at note 31, at 130.
103 Ibid, 146.
104 Ibid.
105 Their only means of participation on television and radio were news, current affairs, or talkback programmes, ibid.

sharing of free time was unattainable, the inequalities inherent in the regime introduced by legislation were justified or legitimate.[106]

From the judgment, it appears that the issue of whether creating a level playing field was a legitimate objective in the first place was never discussed. Unlike *Buckley*, where political equality was considered to be unconstitutional, it was simply assumed that a level playing field was a desirable, and therefore legitimate, goal.[107] When the legislation clearly did not enhance political equality it was invalid. This leads to the question whether, if the legislation had not been so stacked against new and independent candidates, the Court would have been slower to strike it down.

4. Political Equality and the New Zealand Legislation

From the discussion above of the New Zealand legislation and its application, it is obvious that our statutory regime does not create a level playing field. In prohibiting paid political broadcasting, the legislation has sought some sort of degree of political equality by preventing private wealth from dominating elections. However, the present regime and methods used for allocating public funds have not always fulfilled that aim. If political equality is a legitimate goal, we need to reform the present regime. If, however, we adopt the United States Supreme Court approach, political equality is not a legitimate goal and a key rationale for the regime has gone.

5. Compelling Governmental Interests

In the United States the effect of the First Amendment is that political expression can only be curtailed by a compelling state interest. In *Federal Election Commission v National Conservative PAC*,[108] the Supreme Court held that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances". This section, therefore, discusses the anti-corruption and undue influence interests. However, as the previous section shows, there is also increasing consensus that political equality is a compelling interest.

In both *Buckley* and *Australian Capital Television* the key rationale of the relevant legislation was the prevention of corruption and undue influence. The Court in *Buckley* upheld the limits on contributions because they addressed the

106 Ibid.

107 In discussing restrictions on freedom of communication in elections, Mason CJ stated that the First Amendment is broader in scope than the implied guarantee in the Australian Constitution. The American jurisprudence that "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office" still applied. Ibid, 144, n 27.

108 470 US 480 (1985) 496.

problem of corruption, and because large contributions could generate an appearance of corruption, but it struck down the limits on expenditure because the same concerns were not justified. Smolla believes that the Court's distinction between contributions and expenditures is essentially sound.

While it is possible to attack the Court's distinction between contributions and expenditures "by pointing to a certain blurriness at the edges, at the core there is a bona fide difference".[109] This is because:[110]

> One involves a transaction with the candidate, the other does not. This is no triviality for a First Amendment perspective. The distinction in *Buckley* between expenditures and contributions was consistent with the general principle that speech may not be regulated by government merely because of the influence that speech is likely to have on those exposed to it. To justify regulation of speech, government must instead demonstrate that it will lead to some more palpable harm, such as an interference with physical or relational interests. No palpable physical or relational harms are present when there is no transaction.

Smolla makes the point that although an expenditure may influence a candidate, and that such influence may be regarded as unsavoury, it cannot be fairly labelled as "corrupt" because there is no genuine quid pro quo. A campaign contribution however carries the potential for "relational harm" because it may be payment for an illicit favour.[111] Thus, in *Buckley*, preventing corruption and its appearance was compelling enough to support limitations on contributions but not expenditure limits.

Like the United States Supreme Court, the High Court of Australia has required the law to be narrowly tailored to achieve its purposes.[112] In *Australian Capital Television*, various tests were applied. Chief Justice Mason stated: "If the restriction imposes a burden on free communication that is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication."[113]

Justice Brennan relied on a proportionality test:[114]

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109 Smolla, *Free Speech in an Open Society* (1992) 224. For a discussion of the shortcomings in the Court's distinction between contributions and expenditures in the context of corruption see ibid, 223-24.

110 Ibid, 224.

111 Ibid.

112 This is the test required under the First Amendment.

113 Supra at note 31, at 143-144. He would have applied a more stringent test if the legislation had been aimed at restricting communication of ideas or information, rather than restricting an activity or mode of communication by which ideas or information are transmitted. In the former case only a compelling justification would have warranted the imposition of a burden on free communication and the restriction could be no more than reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication. Ibid, 143.

114 Ibid, 157-158.

> To determine the validity of a law which purports to limit political advertising, it is necessary to consider the proportionality between the restriction which a law imposes on the freedom of communication and the legitimate interest which the law is intended to serve. If the prohibition on political advertising ... is not disproportionate to the objects of minimising the risk of political corruption and reducing the untoward advantage of wealth in the formation of political opinion, [it] is a valid law even though it restricts to some extent the freedom of political discussion .... Proportionality is, of course, a matter of degree.

Chief Justice Mason stated that the "balancing of the public interest in freedom of communication and the public interest in the integrity of the political process might well justify some burdens on freedom of communication."[115] He considered the *raison d'être* of freedom of communication to be the enhancement of the political process, and cautioned that "the Court should scrutinise very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process",[116] since enhancement of the political process and the integrity of that process were by no means conflicting interests. He warned that:[117]

> All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of the government. The Court should be astute not to accept at face value claims by the legislature ... that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.

Both *Buckley* and *Australian Capital Television* show that for restrictions to be successful, the legislation must be reasonable and appropriate regulation. In other words, it must be constrained to deal with only the precise issue it was designed to meet. If it goes beyond that purpose, or its reach is too broad, the restriction will be invalid. It is difficult to know where to strike the right balance between allowing political discourse and preventing corruption and undue influence. Further, is it a judgment for the courts or for politicians? While of the opinion that restrictions on political advertising were clearly proportionate to the object of the law if they tangibly minimised the risk of political corruption, Brennan J, in his dissenting judgment in *Australian Capital Television*, considered that whether the legislation did tangibly minimise the risk of corruption was a political assessment. "It was for the Parliament to make that assessment; it is for the Court to say whether the assessment could be reasonably made."[118]

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115 Ibid, 145.
116 Ibid.
117 Ibid.
118 Ibid, 160.

6. New Zealand and the Anti-Corruption Justification

The reality of New Zealand politics is such that the anti-corruption and undue influence rationale is unlikely to be a sufficiently compelling justification for restrictions on political party election broadcasting. In a survey undertaken in 1995 by Transparency International of forty-four countries,[119] New Zealand ranked as the least corrupt country in business and politics:[120]

> [B]y any standards [sic], New Zealand has an enviable record of honest government. There has not been a single serious case of proven corruption by a Government minister within the living memory of the great majority of New Zealanders .... We know from daily experience that bribes and backhanders are not the way most New Zealanders operate. We do not have a culture of corruption in this country. Our experience is in sharp contrast to many other Western democracies – to say nothing of Third World countries.

7. Weighing the Different Issues

The purpose of this section is to take the preceding three sections and try to establish whether the New Zealand legislation is able to withstand a freedom of speech analysis. There are two different ways of conducting this analysis. The first, based on Justice Wright's comments in *Buckley*, takes two routes depending on whether money is speech or speech-related conduct. The second is Rawls' three part test.

(a) The "Skelly Wright Test"

The New Zealand legislation prohibits paid political advertising. If money is speech, then this prohibition can only be justified by the most intensely compelling governmental interests. According to American jurisprudence, the only interest that appears to satisfy this criteria is the interest of protecting the integrity of the political system.[121] Given that the New Zealand political system is one of the least corrupt in the world, it is difficult to see how the prohibition on paid political advertising can be justified. Even assuming that political equality is an intensely compelling interest, it is arguable that the legislation is not narrowly tailored to achieve its purposes of political equality or the prevention of corruption and undue influence. This is especially so in light of Rawls' comment that regulations become unreasonable once considerably less restrictive and equally effective alternatives are both known and available. In terms of the anti-corruption and undue influence rationale, the suggestion by the High Court of Australia in *Australian Capital Television* that special offences could be created seems appropriate.

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119 *The New Zealand Herald*, 28 August 1996, A15.

120 Ibid.

121 See text supra at note 106 and accompanying text.

On the other hand, if the restrictions are speech-related conduct, then they can be justified if they promote an important government interest which is unrelated to the suppression of speech. Two primary interests have been identified. First, to prevent political parties with corporate money from dominating the election process. Second, to ensure minor parties have access to broadcasting.

Generally, reforms fall within three categories: "anti-corruption reforms", "levelling reforms", and "content-quality reforms". Anti-corruption reforms, of course, seek to eliminate the reality and appearance of illicit political activity. Levelling reforms seek to diminish the influence, not necessarily a corrupt influence, of the wealthy and special interest groups. Content-quality reforms encompass a range of reforms that deal with the actual content of political discourse, either by candidates, citizens, interest groups, or the media.

Viewed in this light, the interests promoted by our present regime clearly fall within the second category. In other words, the rationale behind the present regime is political equality. But is political equality an important government interest unrelated to the suppression of speech? This is a two part test. First, it must be an important government interest. Second, it must be unrelated to the suppression of speech.

If political equality is a legitimate government interest, no doubt it would be considered an important interest. However, there is much controversy about whether political equality is a permissible government interest.[122] If it is not a permissible interest then our legislation fails under this test.

If political equality is a permissible interest, is it unrelated to the suppression of speech? Before this question can be resolved, we need to examine what "unrelated to the suppression of speech" might mean. Smolla considers that we can view the political process in either of two ways: as a "marketplace of ideas", or as a "town meeting".[123] If we take the former view, we will be reluctant to impose much regulation. If we prefer the latter view, "we will be inclined to permit significantly more regulation, for if the government is seen as the "moderator" of this "town meeting", it follows that the government may exert greater control over such matters as who make speak, for how long, and on what subjects."[124]

The essential point is that, even if restrictions on speech occur incidentally as a result of enforcing the interest, so long as the interest is not aimed at restricting speech, those restrictions are permissible. In other words, as long as restricting speech is not the motivation for political equality, political equality can still be "unrelated to the suppression of speech" even if restrictions on speech occur incidentally in the course of promoting political equality. If one accepts that our statutory regime is based on political equality (level playing field) arguments, it seems also fair to accept that the restrictions it imposes on speech are incidental and not its aim. However, for this conclusion to be appropriate we need to adopt

122 See text, supra at Part IV, para 3.
123 Supra at note 109, at 221.
124 Ibid.

the "town meeting" analogy. Under the "marketplace of ideas" analogy our statutory regime would not be permissible.

While the analysis under the "Skelly Wright test" is helpful in demonstrating the choices that must be made along the way, in the end, we are left without an answer as to whether the restrictions on speech in our legislation are permissible. This is because there are too many questions that have yet to be resolved in the New Zealand context. For example, is the "town meeting" analogy appropriate? Would our courts view money as speech or speech-related conduct? Would the New Zealand courts consider that they could decide whether political equality is a permissible and important government interest, or would they say that the question is non-justiciable and leave it for our elected representatives to decide?

(b) The "Rawls Test"

A test that is easier to apply in the New Zealand context is Rawls' three part test.[125] If the restrictions meet the three criteria, they are compatible with the central role of free political speech, since the fair value of political liberties is maintained. Applying this test, we see that the first condition is satisfied since there are no restrictions on the content of speech. The second condition is harder to satisfy – there must be no undue burden imposed on the various political groups in society. Arguably, the legislation imposes an undue burden on parties which do not meet the statutory criteria, by prohibiting them from advertising on television and radio. Parties qualifying for small allocations of time and money may also claim that it is an undue burden to have to try and compete with the larger allocations – certainly parties which have financial backing find their hands are tied. However, there is no need to dwell on this second condition, because the legislation clearly does not meet the third element of the test. It requires restrictions to be rationally designed to achieve the fair value of the political liberties. This means that "once considerably less restrictive and equally effective alternatives are both known and available" the restrictions become unreasonable.[126]

One obvious "less restrictive and equally effective alternative" is to maintain the limited public funding but also to allow political parties, whether they qualify for state funds or not, to spend their own funds. Parties could be permitted to spend up to a specified limit; meaning that the larger a party's state allocation, the less that party could spend of its own money. This specified limit could be set at a certain percentage, for example twenty-five or fifty percent, above the largest state allocation.[127] This system would still maintain the interests behind the current system of preventing corporate money from dominating the election process and

125 See supra at notes 91 to 93 and accompanying text.

126 See supra at note 93 and accompanying text.

127 Alternatively, the limit could be the largest state allocation.

ensuring that minor parties have access to broadcasting. By having a maximum spending limit tied to the largest state allocation, the extra money that would be involved would not be sufficient for corporate money to dominate, especially since under the current system there is no spending limit on print advertising.[128]

The Rawls' test clearly demonstrates that the current New Zealand regime is far from satisfactory when it is analysed from a freedom of speech perspective. The test highlights the fact that we need to consider what other "less restrictive and equally effective" alternatives might be available to us. The proposals considered in past reviews of the Act are one option. The following part of this paper offers a further alternative.

V: "HEADING TOWARDS BALANCE"

The statutory amendments that have been considered in the past would have allowed parties to spend a limited amount of their own funds on political broadcasting. No party would have been permitted to spend, party and state funds combined, more than a certain percentage above the largest state allocation. After the 1990 election the percentage proposed was fifty percent; after the 1993 election it was twenty-five percent. Ironically, since state funding has been kept at the 1990 level and now must be shared among a greater number of parties, even a fifty percent limit would not have allowed parties to spend as much money in 1996 as in 1993.

The limited form of paid political advertising which has been proposed still promotes the political equality goals of our current regime. These are to prevent corporate wealth from dominating elections and to ensure that minor parties have some access to broadcasting. Further, the major criticism from the freedom of speech perspective, the expenditure restrictions on broadcasting, is partly addressed because parties have the option of spending a limited amount of their own funds on broadcasting. Therefore, the past proposals are a step in the right direction. Nevertheless, I consider that a focus of any new regime should also be to redress some of the concerns about political equality that have been raised in this paper.

1. "Heading Towards Balance" – A New Model for New Zealand?

First, there must be an increase in the amount of funding that Parliament allocates for political broadcasting. To ensure that minor parties eligible have some access to broadcasting, and that major parties are adequately funded to run a

128 One might even find that money ordinarily spent on print advertising would be shifted into the broadcasting arena, so that in reality very little extra money is spent in total.

television advertising campaign without necessarily having to spend their own funds, I consider that the amount appropriated by parliament must be increased to at least $3 million.[129] Accordingly, the model that I propose, "Heading Towards Balance", is based on that $3 million figure.

Like the proposals put forward in recent years, "Heading Towards Balance" allows parties to spend their own funds while maintaining a system of state funding. Where "Heading Towards Balance" differs is in the allocation of the state funds. These are allocated in a two step process, with one allocation occurring before the election and the second allocation taking place after polling day. The first or provisional allocation would be made according to the present allocation timetable and would involve two-thirds of the amount appropriated, that is $2 million. This would be allocated using the present statutory criteria,[130] following the same process as the Electoral Commission followed for the 1996 election. The statutory criteria would be weighted and each party would be given a mark for their compliance with each criterion.[131] Once the parties' marks have been totalled they would be converted into a percentage. While the amount appropriated[132] would be roughly divided according to those percentages, the Commission would be required to ensure that a party qualifying under s 75(1)(a)(i) had sufficient state funding to pay for one thirty second commercial television spot in prime time over four weeks.[133] The other proviso would be that the largest state allocation could not exceed fifty percent of the amount available to be allocated after the election.[134] Whether parties received state funding or not, they would be permitted to spend their own party funds up to the amount of the largest allocation made at this first stage.

Following the election, the remaining $1 million would be allocated. This second or final allocation would take into account the percentage of party votes that parties received at the election. Only parties receiving at least three percent of these votes would be eligible to share in this second allocation ("the eligible parties"). Since it is unlikely that the total of the percentage of votes that each eligible party received would total one hundred,[135] first the voting percentages would need to be converted into funding percentages that totalled one hundred percent. These funding percentages would be used to determine the share of the $3 million[136] that each party was entitled to. Having calculated that party's share ("the figure"), the amount each party had received in the first allocation would be

129 If this figure applied at the 1999 election, it would mean less than a $1 million increase over nine years.

130 Except for the "fair opportunity" requirement in s 75(2)(f) of the Act.

131 Less weight should probably be given to the number of MPs a party had prior to the dissolution of Parliament.

132 Less the amount of the broadcasters' production costs.

133 In 1996 this figure was $22,800 (including GST). Report of the Electoral Commission, supra at note 1, at 20.

134 If $3 million is appropriated, the largest allocation could not exceed $500,000.

135 Parties ineligible for the second allocation also would have received votes.

136 Less the amount allocated to parties ineligible for the second allocation.

deducted from that figure. The variance would be the maximum amount each party could claim in the second allocation. A party would only be able to receive the maximum amount of extra funds if it had spent the equivalent amount itself in party funds. Therefore, if a party was entitled to a further $100,000, but had only spent $80,000 in party funds, it could only receive $80,000 in the second allocation.

In the event that an eligible party had been allocated too much money in the first allocation, it would not be required to pay the extra money back. The second allocation would disregard this party, and the amounts for the remaining parties would be recalculated.

It would be naive to suggest that allowing parties to spend a limited amount of their own funds on broadcasting would open up the way for corporate money to dominate elections. Parties would still have to comply with the maximum spending limits under the Electoral Act 1993[137] and disclose election campaign donations.[138] Although many parties would probably take up the opportunity to spend party funds on broadcasting, they must just channel funds in the direction of broadcasting instead of in some other direction. While the comments of McHugh J in *Australian Capital Television* were directed towards corruption and undue influence, the sentiment expressed there equally applies here. If the political process can be dominated by corporate wealth by allowing parties to spend their own funds (up to $500,000 if $3 million is appropriated by the state), those bent on dominating the process with corporate wealth will not lack opportunities to achieve their ends even if paid political broadcasting remains prohibited.

(a) Assessing the Model

There is no denying that a weakness with the proposed model is that the final allocations of state funding cannot be determined until all the votes have been counted.[139] This weakness does lead to a certain amount of uncertainty. However, the negative side of this can be minimised by political parties erring on the side of caution when estimating the amount of state funding that they are likely to be eligible for. When electoral success is the ultimate criterion, it would be impossible for the Electoral Commission to make final allocations prior to the election. The first allocations must made be made several months in advance of the election. Political parties already find much to be critical of – it would be

137 Section 214B(2)(a) sets the current limit (including GST) at $1 million plus $20,000 for each constituency contested by a candidate for that party, but the current allocations of time and money under the Broadcasting Act are specifically excluded from being counted – s 214B(1)(g). Under "Heading Towards Balance" party expenditure on broadcasting would probably be included, therefore the expenditure limit would need to be increased.

138 See ss 214F-214I of the Electoral Act 1993.

139 However, this also occurs under the Australian regime. See supra at note 27 and accompanying text.

untenable for the Commission to have to make predictions about the percentage of party votes that parties will attract.

"Heading Towards Balance" rightly places the responsibility on the parties themselves and gives them choices. If a party wants to spend its own funds on broadcasting to supplement its state allocation, it is able to do that. If a party does not want to spend its own funds, or does not have sufficient resources to do so, it will still have the opportunity to mount a television advertising campaign. Although it might seem unfair that a minor party could be in the position of being without party funds to supplement its small state allocation and competing with a party which has a broadcasting budget of $1 million, the rights of the other parties in terms of freedom of speech must also be considered and balanced.

The secondary minor parties, the parties which are ineligible to be considered for the second allocation round, are allocated proportionally more state funds than their electoral support would justify. This is important for two reasons. First, it means every registered party is assured of access to television advertising. Second, it recognises the argument that, realistically, minor parties cannot improve their political position unless they are allocated proportionally more state funding. Although it is arguable that allowing a party to spend its own funds on broadcasting renders pointless any advantage in the state funding process, society does not prevent wealthy individuals from spending their own money just because a person on a state benefit cannot afford to buy the same things.

"Heading Towards Balance" still promotes the interests of our current regime. Minor parties will continue to have a minimum level of access to broadcasting and corporate money will not dominate elections merely because a limited amount of paid advertising is introduced. The most one party could spend on broadcasting would be $1 million, this is less than double the amount that National and Labour could spend at the 1990 and 1993 elections, and the amount that National could spend at the 1996 election. This increase is easily justified.

By permitting parties to spend some of their own funds, "Heading Towards Balance" removes some of the advantage that lobby groups currently have, and establishes a degree of political equality between the two groups. However, since all parties are permitted to spend their own funds on broadcasting, no political party is legally excluded from broadcasting at elections. Even if, for some reason, a party did not receive state funding before the election, provided it attracted at least three percent of the party vote, it would be entitled to an allocation recognising its electoral success. Consequently, if this model had operated at the 1993 election, New Zealand First would have been eligible for state funding.

The present regime seeks to promote a level playing field for political parties by preventing them from spending their own funds, in other words, by placing an obstacle in their way. "Heading Towards Balance" promotes a level playing field for political parties by lowering this obstacle. Yet in lowering it, it also promotes freedom of speech. Thus, "Heading Towards Balance" fullfills its goal of finding an appropriate balance between freedom of speech and political equality in the current New Zealand context.

VI: CONCLUSION

Overseas, especially in Canada, the importance of the tension between political equality and freedom of speech in campaign finance reform has been recognised. The United States Supreme Court, however, dealt a severe blow to political equality in its much criticised decision *Buckley v Valeo*. In New Zealand, our political party broadcasting regime is a form of campaign finance regulation. There is no doubt that our legislation restricts freedom of speech, even if it is only "incidentally". However, despite these limitations on liberty, we have not previously critiqued our legislation in light of this tension.

In order to ensure a healthy democracy, we need to challenge restrictions made on our liberties. This is not to say that freedom of speech should outweigh political equality. The constitutional documents in the United States, Canada, and Australia, are predisposed towards liberty and consequently the courts in those jurisdictions find it more difficult to uphold political equality arguments. However, New Zealand does not have a written constitution and this means we are better placed to take political equality arguments into account when deciding on the right balance between equality and liberty.[140]

The New Zealand legislation was introduced to promote a "level playing field". Our statutory regime rests on political equality arguments. However, the practical application of the legislation has not always produced a "level playing field". While the idea of a "level playing field" appears to be inherently fair, its implementation will always require restrictions on liberty, and those restrictions do not always seem so fair. Having focused on putting a "level playing field" in place, we now need to examine whether the restrictions on freedom of speech can be justified.

While other jurisdictions have accepted restrictions to prevent the reality and appearance of corruption, it is questionable just how far such arguments take us in New Zealand, for we are fortunate that our political system is relatively free from undue influence and corruption. This means we are left with political equality arguments to justify any restrictions on freedom of speech.

It is unlikely we would follow the extreme position of the United States Supreme Court and reject equality arguments. In fact, given our constitutional arrangements, we are likely to uphold such arguments and so permit restrictions on freedom of speech. However, if we are aware that there are less restrictive measures available to us which still achieve our aims, the restrictions cannot be justified.

It is the writer's argument that less restrictive measures do exist and are available to us. "Heading Towards Balance", for example, would impose less

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140 Although s 14 New Zealand Bill of Rights Act 1990 protects freedom of expression, this must give way to inconsistent legislation (s 4). In any event, it is suggested that "Heading Towards Balance" is a reasonable limit, and therefore acceptable under s 5 of that Act.

restrictions on freedom of speech and still promote the interests of the current regime, possibly with even greater success. On several occasions in New Zealand we have considered introducing some form of paid political broadcasting, but the political will to introduce such change has been weak. A danger of campaign finance reforms is that, while they have the potential to enhance political equality, there is a tendency to favour incumbents. Perhaps this is not surprising given the political reality that incumbent politicians are unlikely to vote for something that would assist their political opponents.

For too long we have allowed restrictions on political speech to remain unquestioned. We must not blindly accept legislative limitations on freedom of speech. In the end, we may consider that the right balance has already been struck between liberty and equality, but we may also consider that the politicians have struck the wrong balance. As Huscroft writes: "The point is that we have never had that argument; we have never seriously challenged our expectations and the assumptions about freedom of expression, and we are the worse for it. For too long limitations on freedom of expression have been assumed to be legitimate."[141] Let us no longer assume the legitimacy of our current regime.

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141 Supra at note 71.