Political Donations and Free Speech

By Anne Twomey*

To what extent can the making of a political donation amount to speech? It is well accepted that speech need not be verbal. It can be expressed through both visual images and actions. What message is being conveyed by the making of a political donation? Is it that the donor supports the policies of a political party or that the donor wishes to influence government? What about those donors who do not wish their donations to be publicly known? This paper will discuss whether the making of political donations amounts to a form of political communication, whether reducing the number of potential donors amounts to a burden upon political communication and the constitutional ramifications for campaign funding laws.

Introduction

Are political donations speech? At first glance, it appears a rather odd proposition. But in the United States, where naked dancing and silence have both been held to be constitutionally protected forms of speech, the Supreme Court has held that the making of a political donation does amount to the exercise of freedom of speech and freedom of political communication, both of which are protected by the First Amendment.

In 1976 the US Supreme Court held in *Buckley v Valeo* that the making of a political donation 'serves as a general expression of support for the candidate and his views'.[1] It is effectively a form of putting one's money where one's mouth is. It is therefore regarded as a form of 'symbolic speech'. The Court held that putting a cap on donations was acceptable, because the nature of the symbolic expression of support by a candidate is not affected by the amount of the donation – just the fact that it is made. Hence, caps on donations were acceptable because they did not affect the symbolic expression involved, whereas banning donations would not be constitutionally acceptable because it would prevent this form of symbolic expression of political support.

More recently, in April this year, the US Supreme Court relied on the 'donations equal speech' argument in striking down aggregation rules.[2] Since caps on donations were first imposed in the United States, aggregate limits were also imposed on donations. A donor, therefore, could only make capped $1000 donations up to the point that he or she met an aggregate limit of $25,000. This aggregate limit was initially upheld in *Buckley v Valeo,* as a 'modest restraint' aimed at preventing the circumvention of the law. The Court was concerned that otherwise a donor could make a large number of capped donations to different political committees which would then all be funnelled to the same candidate, effectively still permitting donors to make large donations to the one candidate.[3]

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[1] *Buckley v Valeo* 424 US 1 (1976) 21.

[2] *McCutcheon v Federal Election Commission* 572 U.S. __ (2014) (unreported 2 April 2014).

[3] *Buckley v Valeo* 424 US 1 (1976) 38.

In 2014 the aggregate limit, now $48,600 for candidates and $74,600 for party committees and political action committees, was challenged in *McCutcheon v Federal Election Commission.* This time the US Supreme Court struck it down because it denied the donor the capacity to be associated with additional candidates and political action committees, once he or she had reached the aggregate cap. Mr McCutcheon had already made donations to 16 federal candidates in the 2012 election and wanted to contribute to another 12 candidates and some political action committees. The Court held that the aggregate limit was invalid because it denied him the capacity to associate himself with those additional candidates in this way. They rejected the previous view of the Supreme Court in *Buckley* that an aggregate limit was a 'modest restraint'. Chief Justice Roberts said:

> An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a "modest restraint" at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.[4]

Not all Supreme Court Justices, however, have agreed with this approach. Shortly after this judgment was handed down, former Supreme Court Justice John Paul Stevens, told a Senate Committee:

> While money is used to finance speech, money is *not* speech. Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities should not receive precisely the same constitutional protections as speech itself. After all, campaign funds were used to finance the Watergate burglary – actions that clearly were not protected by the First Amendment.[5]

Do political donations really contain a message?

Two questions arise to my mind about whether political donations are speech. The first is whether they can amount to protected speech if that communication is not publicly disclosed. Just as one can ask whether a tree falling in a forest, which nobody hears, makes a noise, one might well ask whether a political donation makes a communication of support for a political party if the donation is kept secret and not disclosed? At the Commonwealth level, the level at which disclosure is required is relatively high – $12,800. Arguably, where the identity of the donor of a political donation is not publicly disclosed, the donation should not receive constitutional protection because it does not amount to a political communication of support for a candidate or party.

Of course it might be argued that the point of the donation is not to make public one's support for a party, but to exercise covert influence over the party's officials and

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[4] *McCutcheon v Federal Election Commission* 572 U.S. __ (2014) 15 (Roberts CJ).
[5] Philip Elliott, 'Former Supreme Court Justice John Paul Stevens: "Money Is Not Speech"', AP, 30 April 2014: http://www.huffingtonpost.com/2014/04/30/john-paul-stevens-campaign-finance_n_5240779.html.

parliamentary representatives by virtue of being known as a secret donor. However, it is precisely that type of influence that laws regulating political donations are intended to prevent.

Secondly, if political donations are speech, what is the message that they convey? Is it *really* that the donor supports the relevant candidate and wishes to be affiliated with him or her? If so, what do we say about the many persons and corporations that give to two or more opposing political parties?[6] That they are schizophrenic or confused? The more likely answer is that their political message is that they want to be on the side of whoever wins, in order to gain influence and access, regardless of which party that might be. While some political donors may genuinely want the candidates and parties to which they donate to succeed in elections, it is likely that just as many, or perhaps more, are donating to secure their own advantage, or at least to ensure that they are not put at a disadvantage if their competitors have donated to the winning side.[7] Again, however, it is this influence-peddling that limits on political donations seek to prevent.

Finally, even if the making of a donation does amount to a political communication, how important is it to protect this form of communication? As Justice Keane noted in the recent *Unions NSW* case, there are many other ways by which a person can express support for a candidate or a political party.[8] Given the ambiguity involved in the message being sent by making a donation, if a political donor really does want to make a political communication concerning support for a party or candidate, he or she might find other far more effective ways of doing so.

The High Court and political donations

The High Court, unlike the US Supreme Court, has not reached a conclusion about whether political donations are a form of political communication. It has, however, taken two steps towards that conclusion. First, in 1992, the High Court held that the provisions in the Constitution that require that the Houses of Parliament be 'directly chosen by the people' imply that this choice must be free and therefore capable of being an informed choice. As free political communication is necessary for voters to be able to make an informed vote in elections and referenda, then the Court held that there is a constitutional implication of freedom of political communication that acts as a limit on Commonwealth and State legislative power.[9]

Secondly, the High Court has accepted that political communication may involve non-verbal symbolic acts, such as displaying the bodies of dead birds.[10] Hence it is

[6] Note the 1995-8 study which showed that of the top 10 donors, all but one donated to both the Coalition and the ALP: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 203-4.
[7] See: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 181; J Fisher, 'Why Do Companies Make Donations to Political Parties?' (1994) 42 *Political Studies* 690; and G Gallop, 'From Government in Business to Business in Government' (1997) 83 *Canberra Bulletin of Public Affairs* 81.
[8] *Unions NSW v New South Wales* [2013] HCA 58, [112] (Keane J).
[9] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
[10] *Levy v Victoria* (1997) 189 CLR 579.

theoretically possible that the payment of money, in the right circumstances, could be regarded as a form of political communication.

The issue was raised, but ducked by the High Court, in the case of *Unions NSW v New South Wales*. The case concerned NSW legislation that banned the making of political donations except by people on the electoral roll. The effect was to ban corporations, unions, partnerships, unincorporated bodies, permanent residents and those under 18 from making political donations.

In *Unions NSW,* the question was whether a ban on some people and bodies from making political donations amounted to a breach of the implied freedom of political communication. In other words, do political donations amount to a form of political communication that has been invalidly burdened? The Court noted the argument that donations are a form of political expression, but raised a concern that approaching the question from this direction might blur the distinction that the High Court has long maintained between the implied freedom as a limit on legislative power as opposed to a personal right.[11] As Keane J pointed out in a separate judgment what is constitutionally protected in Australia is the interest of the people of the Commonwealth in the free flow of political communication that aids them in performing their duties as voters. Australia is therefore different from the United States where the First Amendment protects the right of an individual to make a form of political communication by way of a political donation.[12]

The Court, therefore, did not need to decide whether political donations amount to political communications, and did not do so. Instead it focused upon the effect of the law upon political communication, finding that the ban on political donations by some categories of potential donors had the effect of restricting 'the funds available to political parties and candidates to meet the costs of political communication by restricting the sources of those funds.'[13] Keane J added that banning some kinds of donations is 'apt to distort the flow of political communication within the federation by disfavouring some sources of political communication and thus necessarily favouring others.'[14]

Personally, I don't find this argument particularly convincing. There are still 15 million voters from whom donations can be raised. There are also expenditure limits that parties must comply with. Parties are also reimbursed approximately 75% of their campaign expenses through the public purse. So they only have to fund one quarter of their costs up to the expenditure limit from political donations – at a maximum that is $2.3 million to raise over 4 years or around 460 donations of $5000 each.

It is more than conceivable that even with the ban on donations from unions, corporations and others, political parties could still have validly raised such amounts, with no consequential effect on their capacity to spend on political advertising and other forms of

[11] *Unions NSW v New South Wales* [2013] HCA 58, [37] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[12] *Unions NSW v New South Wales* [2013] HCA 58, [112] (Keane J).
[13] *Unions NSW v New South Wales* [2013] HCA 58, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); and [120] (Keane J).
[14] *Unions NSW v New South Wales* [2013] HCA 58, [140] (Keane J).

political communication. As the US Supreme Court said in *Buckley,* political parties and candidates would simply have to raise funds from a wider field of people and could still raise large amounts if they had sufficiently broad support.[15] It seems to me that limiting the potential number of donors does not necessarily result in a reduction on the donations that can be raised or indeed the quantity or quality of political communications that can be made by parties and candidates at election time.

Nonetheless, the High Court did make some interesting statements about the implied freedom of political communication and its consequences in relation to elections. First, it made the point that the political communication that is protected by the Constitution involves communication between 'all interested persons',[16] not just between voters. This includes 'all persons and groups in the community'[17] The majority noted that there are 'many in the community who are not electors but who are governed and are affected by decisions of government'.[18] While stressing again that no one has a 'personal right' to make political communications, their Honours accepted that non-voters 'have a legitimate interest in government action and may seek to influence elections either directly or indirectly through the support of a party or candidate, through donations or otherwise.[19] This includes corporations, unions, other entities and non-citizens.[20]

The Court held that while the capping of political donations may take place in order to achieve the legitimate end of reducing the risk or appearance of corruption,[21] there was no legitimate government interest in banning donations from corporations, unions, other bodies and individuals not on the electoral roll. As caps already limited the donation that anyone could make to $5000 to parties and $2000 to candidates, the risk of corruption had already been dealt with. A corporation's $5000 is worth just as much as a union's $5000 and a voter's $5000. Nothing gives one any greater influence than the other.

The Court was not convinced by the State's argument that despite the $5000 cap on donations, corporations were still more likely to corrupt the electoral system than voters on the electoral roll. It noted that the impugned provision was not directed at corporations in particular – but to any entity or person who was not on the electoral roll. The majority observed that:

> General concerns about corporate activities, as distinct from specific concerns about the activities of any entity (or individual) who is prepared to exert influence corruptly in pursuit of self-interest, cannot explain the purpose of s 96D.[22]

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[15] *Buckley v Valeo* 424 US 1 (1976) 22.
[16] *Unions NSW v New South Wales* [2013] HCA 58, [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[17] *Unions NSW v New South Wales* [2013] HCA 58, [28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[18] *Unions NSW v New South Wales* [2013] HCA 58, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[19] *Unions NSW v New South Wales* [2013] HCA 58, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [144] (Keane J).
[20] *Unions NSW v New South Wales* [2013] HCA 58, [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[21] *Unions NSW v New South Wales* [2013] HCA 58, [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [138] (Keane J).
[22] *Unions NSW v New South Wales* [2013] HCA 58, [55] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [142].

Justice Keane added that the implied freedom of political communication 'is not an adjunct of an individual's right to vote, but an assurance that the people of the Commonwealth are to be denied no information which might bear on the political choices required of them'.[23]

The Court left open, however, the possibility that the prohibition of specific classes of donors might be acceptable where they have 'interests of a kind which requires them to be the subject of an express prohibition'. In NSW property developers and tobacco, liquor and gambling industry business entities, including their directors, officers and their spouses, are also prohibited from making political donations. The High Court, while holding invalid the general ban on donations by corporations, unions and other non-voters, noted that the provisions banning specific bodies and persons from donating were not challenged, and appeared to leave open the possibility that they might be able to be justified if evidence were provided that donations by these specific groups give rise to a greater risk of corruption.[24]

Where does this leave suggestions that there should be a complete ban upon all political donations, replaced by a system of full public funding? The Court, again, left open the possibility that such a ban could be justified, but it would be a difficult task. The majority said:

> A complete prohibition might be understood to further, and therefore to share, the anti-corruption purposes of the… Act. On the other hand, if challenged, it would be necessary for the defendant to defend a prohibition of all donations as a proportionate response to the fact that there have been or may be some instances of corruption, regardless of source.[25]

It is doubtful that the fact that some people in political parties and their supporters seem unwilling to obey the laws and comply with the caps is sufficient to justify banning all donations. If people are prepared to break laws that limit donations, then they will break laws that ban donations too.

Conclusion

Are donations speech? In strict legal terms, the jury is still out on this question. In practical terms, it doesn't matter because the High Court has held that even if the donations themselves are not speech, they facilitate political communication and that banning or limiting them therefore raises the prospect of breaching the implied freedom of political communication. It is therefore a legislative area in which all governments should tread carefully and *only* for the purposes of achieving anti-corruption outcomes, *not* other forms of political advantage.

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[23] *Unions NSW v New South Wales* [2013] HCA 58, [144] (Keane J).
[24] *Unions NSW v New South Wales* [2013] HCA 58, [57]-[58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[25] *Unions NSW v New South Wales* [2013] HCA 58, [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).