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# Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?

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## Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?

JOHN S. SHOCKLEY\*

*The author critically evaluates the judiciary's activist role in striking down legislation directed toward mitigating the deleterious effects of excessive and unaccountable campaign financing of ballot initiatives and referenda. Moreover, the author proffers evidence as well as analytical models to persuade the courts of the need for legislative reform of campaign financing.*

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### I. INTRODUCTION

In response to the dangers posed by excessive and unaccountable campaign financing, states and municipalities throughout the country have enacted legislation to preserve and foster direct de-

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mocracy.<sup>1</sup> Yet, over the last decade, the judiciary has played an activist role in striking down and modifying this legislative initiative. In so doing, the courts have subjected ballot proposition reform to even stricter scrutiny than reform directed at candidate elections. Sadly, as the courts have struck down spending and contribution limitations on ballot propositions, they, in turn, have allowed campaign financing to play a significantly larger role in determining ballot results than states and municipalities have desired.<sup>2</sup>

This judicial activism has troubled many legal scholars and political analysts. This Article will explore certain perceived weaknesses and inconsistencies in these judicial opinions that have limited direct democracy. It will demonstrate, that even if one were to accept the Supreme Court's narrowing of the legitimate goals of campaign finance reform of ballot propositions, the goals that the Court has held justify reform are themselves subject to a variety of interpretations.<sup>3</sup> In addition, the Supreme Court and certain lower courts have exacerbated this ambiguity by failing to use agreed-upon definitions and precision in explaining their political activism.

A main reason for the controversy surrounding judicial activism in campaign finance reform is that many observers believe that the judiciary has undermined the basic *raison d'être* of elections in democratic societies: political equality. An examination of the evidence supporting this assertion will demonstrate that judicial activity has very likely enabled monied interests to alter the results

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1. Direct democracy is defined here as citizens voting directly on issues (ballot propositions) rather than on representatives who then speak for voters. The word encompasses both initiatives (issues placed on the ballot by citizen petition, which is allowed in 23 states) and referenda (issues referred to the voters either by the legislature or by the citizen petition). For more on this practice, see *REFERENDUMS* Chs. 4, 5 (A. Ranney & D. Butler eds. 1978).

Most commentators have criticized the judiciary's response to campaign finance reform. Among the most comprehensive works on the subject are: Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 *Wis. L. REV.* 323; and Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 *SUP. CT. REV.* 1 (1977). For a critique of the Court's philosophy behind its campaign finance reform decisions, see Shockley, *Money in Politics: Judicial Roadblocks to Campaign Finance Reform*, 10 *HASTINGS CONST. L.Q.* 679 (1984).

2. The Court has unquestionably demonstrated its recognition of the legitimacy of direct democracy. See, e.g., *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). Chief Justice Burger, speaking for the majority in support of direct democracy, said "[a] referendum cannot . . . be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." *Id.* at 672.

3. See *infra* p.---

of numerous ballot proposition elections. The analysis will turn to the question of whether enough empirical evidence can be marshalled to convince the Court to uphold campaign finance reform legislation aimed at more stringently regulating funding in ballot proposition elections.

After a discussion of the most recent cases and the quality of arguments and evidence used in these cases, this Article will conclude with a discussion of alternative routes that can be used to limit the impact of monied interests on ballot propositions. In addition, this Article will question the effectiveness of the judiciary's blocking of the legislative reform that most states and municipalities already have taken.

As the frequency of initiatives and referenda in states and municipalities has grown over the last decade,<sup>4</sup> campaign finance reform simultaneously has become a much more prominent issue.<sup>5</sup> Political activity on these matters has occurred at a time of growing political alienation, declining confidence in political institutions, and steadily decreasing voter turnout.<sup>6</sup> The confluence of

4. For a list of the number of propositions voted on by each state from 1968 to 1982, see D. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES*, app. C (1984). Delaware has had the fewest ballot propositions with one; California has had the most with 176. For an examination of the upsurge in the use of the initiative process in the 1970's, see D. Schmidt, *Ballot Initiatives: A Brief History, 1980 Election Analysis, and a Look at Trends*, (1981), at 2-5.

5. As the post-Watergate concern for campaign finance reform affected candidate races, numerous states passed laws that restrict and police campaign spending on ballot propositions. As of 1978, 31 states restricted corporate political activity, and 18 of these states either prohibited or limited corporate contributions on ballot issue campaigns. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 803 (1978) (White, J., dissenting).

6. For a number of years, the Center for Political Studies of the Institute for Social Research at the University of Michigan has been asking citizens the following question: "Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all people?" Gradually, more people have responded that they believe that a few big interests run government. In 1958, only 18% of the respondents agreed with that view, but by 1980, 76% believed that a few big interests run government. *Opinion Roundup*, 4 *PUB. OPINION* 34 (1981).

Among the many sources on steadily decreasing voter turnout is W. CROTTY & G. JACOBSON, *AMERICAN PARTIES IN DECLINE* (1980). The authors note that "in comparisons [sic] with twenty-one other democratic countries, the United States ranks last." *Id.* at 5. They note further that:

American voting turnout over time is decreasing and it has reached unusual lows. . . . Nonvoters are basically inactive on all levels. If people do not vote, the chances are excellent they will not participate in any other form of political process. In effect, they remain outside the political system, unrepresented and ignored.

*Id.* at 6, 13. "The turnaround in indicators of public trust, efficacy, and faith in government in less than two decades has been remarkable." *Id.* at 248.

these forces has emphasized the purpose of direct democracy: to bypass and reform the more stagnant and potentially corrupt governmental processes.<sup>7</sup>

The states' passage of more effective disclosure laws, which revealed that American political interests are spending considerable, and to many observers shocking amounts of money on ballot proposals, has fueled the perceived need for campaign finance reform on ballot propositions.<sup>8</sup> The reason contributors donate so much money is easily understood once one recognizes that they have a significant political interest in the outcome of ballot propositions.<sup>9</sup>

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7. For more on the origins, history, and purpose of direct democracy in America, see *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 310 n.8 (1981) (White, J., dissenting); *Joint Resolution Proposing an Amendment to the Constitution of the United States with Respect to the Proposal and the Enactment of Laws by Popular Vote of the People of the United States, 1977: Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong. 1st Sess. 9-11 (1977) (introduced by Sen. Abourezk); L. BERG, H. HAHN & J. SCHMIDHAUSER, *CORRUPTION IN THE AMERICAN POLITICAL SYSTEM* (1976) [hereinafter cited as L. BERG].

8. In California, proponents and opponents of the state's various ballot propositions spent over \$36 million between 1972 and 1978. D. MAGLEBY, *supra* note 4, at 149 (Table 8.2). By way of comparison, this amount was more money than supporters contributed to either of the major presidential candidates for general election campaigns nationwide in 1976 and 1980. In 1978, tobacco companies spent over \$7 million in California to defeat a "Clean Indoor Air" proposition that would have restricted smoking in enclosed public places. This amount of money exceeded the combined expenditures of *all* gubernatorial candidates in California that same year. Four major tobacco companies and their trade association spent ninety-eight percent of the \$6,411,318 spent in opposition. FAIR POLITICAL PRACTICES COMMISSION, *CAMPAIGN CONTRIBUTION AND SPENDING REPORT, NOVEMBER 7, 1978 GENERAL ELECTION, G-5-7, A-4* (2d printing 1979).

In 1982, campaigners spent a record \$35 million on petition drives and campaigns for and against initiatives in the primary and general elections in California alone—where they set a new national record on a single ballot proposal by spending \$9.9 million on the Handgun Control initiative. Initiative News Report, Apr. 8, 1983, at 6.

Although the magnitude of campaign spending on propositions was perhaps most dramatic in California, this phenomenon has occurred throughout the country. Inflation, however, was partially responsible for this increase in spending. D. MAGLEBY, *supra* note 4, at app. e; Initiative News Report, Apr. 8, 1983 at 6. In 1980, for example, both Montana and Colorado also broke their state records for the total amount of money spent on ballot propositions in a single year. M. Males, *Expenditures on 1980 Montana Ballot Issues*, (1980) (mimeograph on file with the author); 1980 COLORADO CAMPAIGN REFORM ACT SUMMARY OF CONTRIBUTIONS AND EXPENDITURES 32 (Sept. 17, 1981). In the previous year, Consolidated Edison contributed over \$1.2 million to defeat a public power measure in Westchester County, New York, thus setting the all-time spending record on a county-level proposal. S. Lydenberg, *Bankrolling Ballots: Update 1979*, at 2-3 (1980) (Council on Economic Priorities).

9. For example, tobacco companies feared that restrictions on smoking in enclosed public places would lead to reduced smoking. If each American smoker smoked only one less cigarette a day, the tobacco industry would lose an estimated \$450 million a year. St. Louis Post-Dispatch, Oct. 1, 1978, at C3, col. 1. In view of this projected loss, spending over six million dollars to stop California, which contains more than one-tenth of the American pop-

The amount of money spent also has led to the fear that ballot proposition campaigns might be "bought" in much the same manner as seems to be the case with some candidate-centered campaigns. This fear, in turn, has prompted many states and municipalities to include ballot issues in their campaign finance reform legislation. States have made various efforts to prohibit corporations from donating to ballot issue campaigns, to limit ballot campaign expenditures, and to limit the amount of contributions that a campaign could accept from any one individual or corporation.<sup>10</sup> These legislative efforts set the stage for the resulting clash with the Supreme Court.

## II. CORRUPTION, UNDUE INFLUENCE, AND DECLINING VOTER CONFIDENCE

The Supreme Court of the United States has set stringent parameters on campaign finance reform legislation by the manner in which it has chosen to frame the constitutional questions presented by legislative reform. By viewing money as speech, rather than as speech-related conduct,<sup>11</sup> the Court has subjected

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ulace, from adopting an ordinance restricting smoking was economically reasonable. Similarly, in 1980, Standard Oil of California contributed almost one million dollars to defeat a single state initiative that would have increased the company's taxes by perhaps as much as \$75 million a year. *Los Angeles Times*, June 5, 1980, Part I, at 3, col. 6. Again, such spending was a prudent, sensible way to protect livelihood and profits.

Analysts have done only a small amount of work comparing lobbying expenses with ballot proposition financing. Overall, lobbyists have spent an estimated one billion dollars a year lobbying Congress, with another billion spent lobbying elsewhere. 112 *TIME* 14, Aug. 7, 1978. Lowenstein, *Forecast from Lowenstein: Campaign Finance Scandals Ahead*, CAL. J., Mar. 1978, at 103-05, compares lobbying expenses with campaign contributions in California in 1976. Although companies generally spend more money on lobbying than on either candidate elections or ballot propositions, they sometimes exceed their lobbying expenses for the year. See S. Lydenberg, *Bankrolling Ballots: Update 1980*, at 19-22 (1981) (Council on Economic Priorities).

10. California voters adopted, via an initiative, a unique proposal preventing either side from spending more than one-half million dollars above the amount being spent by the other side. CAL. GOV'T CODE § 85303(b) (West 1975) (repealed 1977).

11. The Court in *Buckley* expressed the best overall statement of this view: "it is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'" *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (citation omitted). The Court further noted: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. This view, however, is not unanimously held. See, e.g., Judge Wright's response to being overruled, in Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 *COLUM. L. REV.* 609 (1982); Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001

campaign finance laws to strict scrutiny;<sup>12</sup> in the process, it often has found the legislation an infringement upon free speech. Although it is difficult to identify a coherent, overall rationale in the Court's campaign finance opinions, the Court certainly has ignored and perhaps rejected one of the primary historical reasons for campaign finance reform: greater equality in campaigns.<sup>13</sup>

For example, the majority in *Buckley v. Valeo*<sup>14</sup> held 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 . . . ."<sup>15</sup> By so ruling, the majority overturned much of the District of Columbia Court of Appeals's opinion in *Buckley*. Noting the disparity of wealth, the Court of Appeals sympathized with the goal of equalizing political influence:

It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are unable to give and spend more money, and because the amounts they give and spend cannot be limited.<sup>16</sup>

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(1976).

12. "In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (citation omitted); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (state must show a compelling interest).

13. There has been some disagreement over whether the Court has been actively unsympathetic to the goal of equality in campaign finance—no doubt in part because the justices themselves seem to disagree. Compare L. TRIBE, *AMERICAN CONSTITUTION LAW* § 16-26 (1978) (arguing that the court is basically hostile to the idea of equality in campaign finance reform); Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945 (1980) (arguing same); Shockley, *supra* note 1 (arguing same); Note, *Citizens Against Rent Control v. City of Berkeley: Constitutionality of Limits on Contributions in Ballot Measure Campaigns*, 69 CALIF. L. REV. 1001 (1981) (arguing same) [hereinafter cited as *Limits on Contributions*] with *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 303 (1981) (White, J., dissenting) (arguing that equality, although perhaps demoted as an issue to quid pro quo corruption, has not been excluded as a legitimate governmental objective in the conduct of campaigns); Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 587 n.305, 588-90 (1982) (arguing same); Note, *Equalizing Candidates' Opportunities for Expression*, 51 GEO. WASH. L. REV. 113, 114-15 (1982) (arguing same) [hereinafter cited as *Equalizing Candidates' Opportunities*]. One writer noted that, "the government can constitutionally promote equality only by multiplying and improving opportunities for disadvantaged candidates to express their views." *Equalizing Candidates' Opportunities*, *supra* note 13, at 115.

14. 424 U.S. 1 (1976).

15. *Id.* at 48-49.

16. 519 F.2d 821, 841 (D.C. Cir. 1975).

By viewing campaign funding as speech and in turn demoting equality as a proper goal in political campaigns, the Supreme Court has affected significantly both issue elections and candidate elections, though in different ways. In its review of legislative reform of campaign funding, the Court has held that it only will allow statutes aimed at securing the goals of "preserving the integrity of the electoral process"<sup>17</sup> and "individual citizen's confidence in government"<sup>18</sup> by preventing both (1) "reality or appearance of corruption"<sup>19</sup> and (2) "undue influence"<sup>20</sup> in the electoral process. Because of this narrow approach, determining precisely what the Supreme Court has meant by these terms is critical. Yet, an examination of the Court's use of these terms reveals narrowness of interpretation and confusion over meaning.

### A. Corruption

In marked contrast to earlier rulings, the modern Court now views the reality and appearance of corruption as solely an individual candidate problem rather than a systemic problem.<sup>21</sup> In *First National Bank of Boston v. Bellotti*,<sup>22</sup> the Court naively explained that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."<sup>23</sup> Although many legal scholars and political analysts

17. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978).

18. *Id.* at 789.

19. *Buckley*, 424 U.S. at 48.

20. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

21. In *Burroughs v. United States*, 290 U.S. 534 (1934), a case that tested the power of Congress to require certain political committees involved in presidential elections to issue financial reports, the court broadly declared: "To say that Congress is without power to pass appropriate legislation to safeguard such an election from *the improper use of money to influence the result* is to deny to the nation in a vital particular the power of self protection." *Id.* at 545 (emphasis added). See generally *United States v. UAW-CIO*, 352 U.S. 567 (1957) (upholding a statute proscribing the expenditure of union dues to pay for campaign advertising); *Buckley v. Valeo*, 519 F.2d 821, 904 app. (1976) (brief history of federal election regulation); H. ALEXANDER, *FINANCING POLITICS*, ch.2 (2d ed. 1980) (reviewing the history of campaign finance reform); Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. ON LEGIS. 359, 363 (1972) (noting that prior to 1932, "'corrupt practices' had long been a phrase of art, not limited to bribery or undue influence—which a dictionary might suggest—but directly applicable to contributions excessive in amount or from a forbidden source").

22. 435 U.S. 765 (1978).

23. *Id.* at 790 (citations and note omitted); see *infra* notes 43-47 and accompanying text. The Court in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1981) (quoting *Let's Help Florida v. McCrary*, 621 F.2d 195, 199 (5th Cir. 1980)) noted: "The sole governmental interest that the Supreme Court recognized as a justification for restricting contributions was the prevention of quid pro quo corruption between a contribu-



forcefully argue that the Court's definition of corruption should include the systemic view that financial power fosters unchecked or unaccountable influence in any electoral setting, a majority on the Supreme Court still adheres to the restrictive definition.<sup>24</sup> Because the Court's view of corruption (sometimes referred to as quid pro quo corruption) does not account for the systemic dangers of financial power, it ignores the dynamics of modern politics.

By contrast, the city of San Francisco, in defending its contribution limitation on ballot propositions, more realistically defined political corruption. Citing Webster's *New International Dictionary*, which defines corruption as "decay, decomposition or putrefaction," the city concluded that "corruption embraces more than the compromising of public officials."<sup>25</sup> The city argued that unrestricted campaign contributions on ballot measures "[create] the conviction in the minds of the electorate that the democratic processes have been perverted, thereby impairing . . . the concept of direct democracy."<sup>26</sup>

The Supreme Court's narrow definition of corruption also belies the views of many political leaders and commentators. For instance, Tom McCall, former governor of Oregon, has charged that on the issue of mandatory deposits, the beverage industry "bought the . . . elections by flooding the mass media with a mess of lies and distortions of the truth."<sup>27</sup> He has argued that "if limits aren't placed on industry's spending, they will continue to buy out minds of voters . . . ."<sup>28</sup> Perhaps the confusion is due to the Court's fail-

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tor and a candidate.'"

24. For an excellent discussion of contrasting views on the meaning of corruption, see L. BERG, *supra* note 7, at 3, 7 (Rather than limiting the definition of political corruption to direct bribes and personal greed, it also must include "fundamental or systemic corrupting influences within existing institutions," and activity that "violates and undermines the norms of the system of public order which is deemed indispensable for the maintenance of political democracy."); see also Nicholson, *supra* note 13, at 989 (blending the notion of corruption with undue influence); Note, *Preventing Corruption in the Electoral Process: The California Supreme Court Expands the Buckley v. Valeo Analysis of Campaign Finance Regulations to Non-Candidate Elections*, 3 WHITTIER L. REV. 431, 449-51 (1981) (noting that the Supreme Court's definition of corruption as only "political debt" by "corrupt politicians" ignores the far broader dictionary definitions and that the judiciary's narrow definition has been examined in adversary proceedings).

25. Amicus Curiae Brief for the City and County of San Francisco, at 15, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

26. *Id.* at 16. San Francisco's evidence for this charge consisted of statements by a variety of citizens, including those who had worked on municipal ballot proposition campaigns and had seen the discouragement and disillusion of supporters when faced with powerful financial opposition.

27. Cahn, *Buying the Voters' Minds*, AUDUBON, Jan. 1980, at 105.

28. *Id.* at 112; see also *Beverage Container Reuse and Recycling Act of 1979; Hearings*

ure to recognizing that *people* vote on ideas; just as false advertising can influence people to buy a particular product, it also can affect voters' electoral decisions.<sup>29</sup> To create a definition of corruption that functionally recognizes its existence in candidate elections and not ballot proposals requires a peculiar view of the term—one that only accounts for improper influence upon officeholders and candidates, but not upon voters.<sup>30</sup>

Even if one accepts the narrow, *quid pro quo* view of corruption that is concerned only with the personal cupidity of corrupt officeholders, ballot propositions, nonetheless, have involved the reality or appearance of bribes, extortion, and personal greed. A number of ballot issues directly affect the political futures of candidates; an obvious example is referenda on whether officeholders can succeed themselves in office. Contributions to a referendum campaign allowing a governor to seek reelection are really no different from contributions to the governor's reelection campaign. Yet, in the first instance, the Court has stated that the risk of corruption "simply is not present," while in the second, it acknowledges that it is.<sup>31</sup>

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on S. 50 Before the Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 2nd Sess. 8-12 (1980); R. Anderson, The Ohio Alliance for Returnables: A Single Issue Group in Action (paper presented at the Midwest Political Science Association Convention, Chicago, April 24-26, 1980) (discussing elections on mandatory deposits in Ohio).

29. The Supreme Court has accorded greater constitutional protection for free speech to political advertising than to commercial advertising: "[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). Yet, many voters seem to assume that because "commercial advertising is subject to some requirements of truthfulness the same must be true of political advertising." Lowenstein, *supra* note 13, at 563 n.226. For an attempt at protecting voters from falsehoods in ballot proposition campaigns, see *infra*, Part V.

30. Professor Daniel Lowenstein has argued that even if one acknowledges the Court's definition of corruption and concedes that such corruption cannot occur in ballot proposition campaigns, indirect *quid pro quo* corruption nonetheless occurs. He has said, "The initiative is intended to reduce corrupt influence in the legislature by creating an alternative means of passing laws. If the initiative works well it will force special interests to settle for less in the legislature, lest they be trumpeted by the voters. If the special interests have an effective veto over initiatives, then this restraining influence in the legislature is removed. In this sense, large contributions in ballot measure elections do pose a danger. . . . The danger is indirect but it fits within the narrow sense of *quid pro quo* corruption, which is given freer reign in the legislature." Letter from Professor Daniel Lowenstein to Professor John S. Shockey (discussing corrupt influences on the initiative process).

31. As merely one example, in the 1981 vote on whether to allow the governor of Kentucky to seek reelection, statewide proponents of the then-current governor's position outspent foes by a fourteen-to-one margin, and eleven large corporations, some of whom were headed by close personal friends of the governor, contributed over \$10,000 each to the effort. *Louisville Courier-Journal*, Dec. 8, 1981, at 1. Allegations of threats to enforce the fund-

Similarly, candidates can ride into office on the coattails of ballot proposition issues.<sup>32</sup> One way to gain favor with a political candidate may be to contribute heavily to a proposition that he actively supports or even upon which he may be staking his career. In other words, ballot proposition campaigns *can* create political debts.<sup>33</sup> It is not unknown for a politician to campaign actively in support of a ballot proposition favored by a powerful financial interest with whom he later accepts employment.<sup>34</sup> Are political debts being rewarded? Is a politician being "bought?"

In *Schwarz v. Romnes*,<sup>35</sup> the first modern court case to address these issues,<sup>36</sup> the majority and dissent differed on the possibility

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raising effort also surfaced. Louisville Courier-Journal, Feb. 7, 1982, at D1. Whether such allegations were true or not in this particular instance is beside the central point being made here—that ballot propositions undoubtedly *can* involve the reality and the appearance of corruption—even under the Court's narrow definition of the term.

32. Amicus Curiae Brief for the City of Santa Monica at 3, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981).

33. Some might argue that this situation is sufficiently infrequent to allow for limiting contributions on all ballot proposition campaigns. But we do not know how often this occurs, and the Court has said that it is interested not only in eliminating corruption but the appearance of corruption as well. Defenders of Court policy might also argue that this distinction is too complex for the Court to handle. *But see infra* note 42 (concerning CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).

34. Confidential Interview with a government official in the State of Michigan (Spring, 1984). Also, how is one to understand the following political event:

The Los Angeles Times reported on 11/13/82 that California State Assembly Speaker Willie Brown offered to include a "No" endorsement of the Handgun Control Initiative in a slate mailing to the state's Democrats, if opponents of the initiative paid \$75,000. After the offer was rejected, party leaders made an endorsement overture to proponents. "Yes on 15" [sic] spokesperson Victor Palmieri said he discussed a cost of between \$35,000 and \$40,000 for the endorsement, but declined because "We just didn't have the money." Opponents of the Water Resources and Beverage Container Deposit Initiatives . . . paid \$30,000 each for a "Vote No" position in the mailing to 1.5 million of the state's Democrats.

The mailing took no position on the Gun Initiative, and Brown denied any knowledge of offers to either side in that campaign. But prominent Democrats have criticized Brown and State Democratic Chairwoman Nancy Pelosi for accepting a total of \$75,000 from ballot measure committees promoting positions not approved by the state party's central committee.

Initiative News Report, Dec. 1, 1982, at 1.

35. 495 F.2d 844 (2nd Cir. 1974); see Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns*, 13 U.S.F.L. REV. 145, 167-68; Note, *supra* note 24, at 442-44.

36. Earlier court cases from the Progressive Era addressed this question. See, e.g., *People v. Gansley*, 191 Mich. 357, 158 N.W. 195 (1916) (upholding the conviction of a director of a corporation for contributing corporate funds to a ballot proposition committee in violation of a state statute regulating and limiting election expenses). This emphasizes the point that the Burger Court's views on campaign finance have not been in keeping with the tradition of American law on the subject. See *supra* note 21.

of questionable motivations underlying contributions to ballot propositions. A two-man majority on the United States Court of Appeals for the Second Circuit argued that “[w]hatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum.”<sup>37</sup> The dissent by Judge Mulligan, however, raised disturbing issues:

While the appellants urged that their contribution was motivated by their interest in good highways which are essential to the operation of their business, the position of the appellees seems to be that the motivation . . . was to curry favor with the Governor, who was totally devoted to the passage of the proposition and whose Appointments Secretary resigned to head up [the bond issue campaign]. They find it sinister that the three identified public utility donors were in the same year seeking rate increases from the Public Service Commission whose members are appointed by the Governor.<sup>38</sup>

Although Mulligan did not assess the accuracy of these charges, he emphasized: “It is the opportunity for abuse created by the contribution which the [New York State] statute seeks to avoid.”<sup>39</sup>

Perhaps the Supreme Court of the United States chose to adopt the narrow quid pro quo definition of corruption because a broader definition would force the Court to abandon its candidate/issue dichotomy and, in turn, compel the Court to discontinue its approval of the actions of monied interests in ballot proposition campaigns.<sup>40</sup> The knowledge that the prevention of corruption (a goal that the Court recognizes as constitutionally permissible) and the equalizing of access to all citizens (a goal for which the Court has expressed considerable distaste) are distinguished from each other primarily by degree may have further troubled the Court: “Both seek to remedy the danger of an elected official or policy that represents the will of a few large contributors rather than the will of a majority of the electorate.”<sup>41</sup> Any definition broader than

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37. *Schwarz*, 495 F.2d at 852-53 (footnote omitted).

38. *Id.* at 857 n.3.

39. *Id.* Judge Mulligan also noted that although the majority recognized that public disclosure of funding minimized the risk that the public would “‘be misled as to the source or inspiration of corporate-financed views,’ it [was] significant that [the proponents’ committee had] not reported or disclosed the sources of its income and [had] successfully resisted legal action seeking to obtain this information.” *Id.*

40. See *infra* note 124 and accompanying text.

41. *Limits on Contributions*, *supra* note 13, at 1016. Of course it is true that many laws

the Court's quid pro quo view of corruption might have led the Court down a slippery slope. Thus, by ignoring these similarities, the Court often has erected what is an artificial distinction between ballot propositions and candidate elections.

### B. *Undue Influence*

Although the Court's concept of corruption appears to be politically naive,<sup>42</sup> the individual candidate quid pro quo definition is at least reasonably clear, even though it fails to acknowledge the varieties of corruption to which both officeholders and voters are subject. The Court's treatment of undue influence, however, is more confused. In *First National Bank of Boston v. Bellotti*, the first case that the Burger Court considered involving the permissible restraints on the financing of ballot issue campaigns,<sup>43</sup> the majority stated that if evidence demonstrated that "corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment inter-

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involve distinctions of degree rather than of kind, with the actual point at which the division is made often somewhat arbitrary.

For another approach to this combination of similarity and difference in candidate and ballot proposition corruption, see Note, *All the Free Speech That Money Can Buy: Monopolization of Issue Perception in Referendum Campaigns*, 35 U. MIAMI L. REV. 157 (1980). The author adopts the Court's narrow definition but argues that large expenditures of money may mean corruption in candidate campaigns and may mean control of issue perception in ballot proposition campaigns.

[T]he potential to control issue perception does not as clearly threaten our democratic ideals as does corruption in office. . . . Just as the political quid pro quo can threaten the independence of the elected decisionmaker, so can the control of issue perception through monopoly or saturation of the media potentially threaten the independence of the voter decisionmaker.

*Id.* at 161-62. For a related example of the control of issue perception, see *infra* note 71.

42. The Court is not naive about the impact of money in other cases. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 123 (1973) (where Chief Justice Burger expressed concern over media access "so heavily weighted in favor of the financially affluent, or those with access to wealth"); see also Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 275 n.104 (finding considerable irony in the Supreme Court's choice of language); Wright, *supra* note 11, at 630-31 (same).

43. In *Bellotti*, two national banking associations and three business corporations challenged the constitutionality of a Massachusetts statute that prohibited them from contributing to ballot issue campaigns not materially affecting property, business, or assets of the corporation. 435 U.S. at 767-68. For a discussion of the case and much of the commentary, see Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending*, 67 KY. L.J. 75 (1978-79); Kiley, *PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear after First National Bank v. Bellotti*, 22 ARIZ. L. REV. 427 (1980); Shockley, *supra* note 1, at 700-06.

ests, these arguments would merit our consideration."<sup>44</sup> The majority further explained, however, that the State of Massachusetts had failed to show that "the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government."<sup>45</sup>

Such statements seem to indicate that evidence that big money is "overwhelming" or "significant" in ballot proposition campaigns would critically affect the Court's decision. In the next paragraph of the opinion, however, the Court receded from that interpretation: "[C]orporate advertising may influence the outcome of the vote. That would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . ." <sup>46</sup> The Court thus engaged in an apparent contradiction over whether evidence on the influence of money in ballot proposition campaigns would be compelling in its determination.<sup>47</sup>

Neither the judiciary in general nor the Supreme Court in particular has distinguished between what is undue influence and what is effective persuasion.<sup>48</sup> Even if the Court were to recognize that big spending plays a critical role in the success or defeat of a number of ballot measures, the Court's analysis suggests that it merely would deem this "effective persuasion" by those who care enough to spend money to educate voters about their own sincerely held point of view.

The Court's distinction between domination and legitimate persuasion probably hinges on *perception*. In other words, only if voters perceive big money as dominating the process, thereby

44. *Bellotti*, 435 U.S. at 789.

45. *Id.* at 789-90.

46. *Id.* at 790.

47. For a further discussion on this issue, see Nicholson, *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 *ECOLOGY L.Q.* 683, 703-05 (1980-81); Nicholson, *supra* note 13, at 995-96; *Limits on Contributions*, *supra* note 13, at 1005, 1016-17.

48. Professor Easley states that, "from the point of view of government, there can really be no such thing as 'undue' persuasion . . ." Easley, *Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns*, 17 *GA. L. REV.* 675, 738-39 (1983). He further comments that, "[f]or government to detect undue persuasion, it would have to decide that someone was succeeding more than he should. That in turn, though, requires that government be permitted to determine that someone else should be winning instead. That prospect is totally inconsistent with the 'free market' conception of the first amendment." *Id.* at 739 n.328. But is campaign finance reform any more inconsistent with the free market than the Sherman Antitrust Act? Professor Easley, however, detects the ideological undercurrents that are causing the swirling confusion and inconsistencies in the Court's opinions.

alienating citizens, reducing voter turnout, and undermining the democratic process, should campaign finance reform curb such influence.<sup>49</sup> Requiring a public perception of domination adds a second stage to the process, complicating the matter considerably. If the public were to recognize the overwhelming impact of campaign funds on direct democracy, would money simultaneously become less influential, as in a self-negating prophecy? What if the public does not perceive money as being dominant, but it is? Or, less likely, what if the public perceives money as being dominant, but the public is wrong?<sup>50</sup> On this question of perception, is it not relevant that so many states and municipalities—often through direct voter approval of the specific laws—have tried to limit money in ballot proposition campaigns?<sup>51</sup> Is this an indication that the public already perceives and understands the power of money to dominate the electoral process? For what other purposes would these states enact such laws?<sup>52</sup> Unfortunately, the Court has chosen not to answer these questions.

The Supreme Court's curious narrowing of the concept of corruption and leaving unclear the meaning or even the possibility of undue influence has been crucial to the Court's decisions. In addition, by downgrading the goal of equality in the campaign process and viewing money as a form of speech (entitled to constitutional protection), the Supreme Court has deleteriously affected the promotion of direct democracy through campaign finance reform.

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49. In his partial dissent in *Buckley*, Justice Thurgood Marshall stated that "the perception that personal wealth wins elections may not only discourage potential candidates without significant personal wealth from entering the political arena, but also undermines public confidence in the integrity of the electoral process." *Buckley v. Valeo*, 424 U.S. 1, 288 (1975) (Marshall, J., concurring in part and dissenting in part).

50. See Nicholson, *supra* note 47, at 708-10. The question of public perception forces one to look at the sociological area of reputational power analysis. If the public attributes power to certain people or forces, these people or forces are likely to become more powerful from being perceived as powerful: "thinking may make it so."

51. That so many campaign finance reform measures become enacted via the initiative process is an indication that people are concerned about the corrupt influence of money in politics. Elected representatives often tend to be more accommodating to special interests.

52. See *infra* notes 90-91 and accompanying text (discussing the Mervin Field poll of California voters on their perception of the influence of money spent on ballot issue campaigns). Another example of this theory is reflected in a study of restrictions in Connecticut on corporate spending in ballot proposition campaigns. Maloney, *From Marketplace to Ballot Box: The Corporate Assertion of Political Power*, 12 CONN. L. REV. 14, 56 n.146 (1979-80). Maloney concluded that "it is clear that the fear of such potential influence was the motivating force behind the enactment of the legislation." *Id.* Maloney notes that there was no debate on the point, and the bill "passed without significant questions being raised." *Id.* (citing 20 Conn. H.R. Proc., pt. 4, 1977 Sess. 1447-52 (Apr. 14, 1977)).

### III. EVIDENCE OF THE IMPACT OF MONEY ON BALLOT PROPOSITION CAMPAIGNS

The judiciary's activism on campaign finance reform has forced legislators and scholars to adapt or respond to the courts by giving more weight to their concerns and less to those arguments the judiciary does not consider persuasive. Although some states and municipalities have made persistent attempts to implement reform, complaints about the influence of big money have continued.<sup>53</sup>

Ultimately, one must consider whether money is important in ballot proposition campaigns.<sup>54</sup> If money is unimportant or only marginally important, then the Court's rulings may not have had much impact upon the process of direct democracy. If money is decisive, then direct democracy is severely weakened in its justification as a means whereby ordinary citizens can write and approve their own laws, thereby bypassing the normal political process where entrenched special interests and corruption may have accrued.

#### A. *The Best Currently Available Evidence*

Amassing evidence on the role of money in ballot proposition campaigns has been a fairly recent phenomenon. The task is made

53. Boston tried to respond to private wealth by using municipal funds, but the Supreme Judicial Court of Massachusetts denied the city that right. *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979). States that have fought judicial battles over trying to restrict the use of money in ballot proposition campaigns include: CALIFORNIA: *Citizens for Jobs & Energy v. Fair Political Practices Comm'n*, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976); MONTANA: *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978); FLORIDA: *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980); MASSACHUSETTS: *First Nat'l Bank of Boston v. Bellotti*, 455 U.S. 765 (1978). All of these states have lost. Other states have had to change their laws in response to these decisions. Michigan appears to be the only state left that is actively trying to enforce its campaign finance reform laws on ballot propositions. *See infra* text accompanying notes 135-41.

54. Of course, those individuals, corporations, unions, professional associations, and various other interests would not spend so much money on ballot proposition campaigns if they did not think it likely to be effective, nor, it can be surmised, would monied interests so vigorously challenge state and municipal campaign finance laws. A certain irony exists in monied interests challenging laws regulating the expenditure of money in campaigns when simultaneously they argue that the expenditure of money is not all that important to a campaign. *See Mueller & Parrinello, The Constitutionality of Limits on Ballot Measure Contributions*, 57 N.D.L. Rev. 391 (1981). When the government has spent sums on ballot propositions, opponents, even if wealthy, have been known suddenly to argue that the government expenditure will cause them "irreparable injury." *See, e.g., Mountain States Legal Found. v. Denver School Dist.*, 459 F. Supp. 357 (D. Colo. 1978).



more difficult, both because most states have had inadequate or nonexistent disclosure statutes until fairly recently,<sup>55</sup> and because, as in candidate campaigns, money is only one potential factor in the success or defeat of proposals.<sup>56</sup> What political commentator Alexander Heard said over twenty years ago regarding campaign money in elections is still true:

[There is] no neat correlation . . . between campaign expenditures and campaign results. Even if superiority in expenditures and success at the polls always ran together, the flow of funds . . . might simply reflect . . . prior popular appeal rather than create it. Our understanding of voting behavior is not so precise that all the financial and non-financial factors that contribute to success can be sorted out with confidence. Yet it is clear that under some conditions the use of funds can be decisive. And under others, no amount of money spent . . . could alter the outcome . . . .<sup>57</sup>

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55. Several states still have no disclosure statutes; these states include Arkansas, Nevada, North Dakota, and Utah. Draft Petition before the SEC, filed on behalf of the Council on Economic Priorities, petition for an Amendment of Rule 14a-3 to Provide for Disclosure of Corporate Expenditures in Ballot Question Campaigns (June 15, 1982) (on file with the author). Arizona only recently required disclosure on contributions and expenditures on ballot measures. Initiative News Report, Aug. 23, 1982, at 8.

56. A related but distinct question concerns the impact of mass media advertising on ballot proposition campaigns. Because nearly all heavily funded campaigns make extensive use of the media, the questions of the impact of money and media advertising often merge. Recently, however, several expensive campaigns have avoided use of mass media advertising, probably to avoid granting opponents the right to reply under the fairness doctrine. See *infra* Part V.

As one would expect, judging the impact of mass media on campaigns raises many of the same problems as measuring the impact of money on campaigns. For a good summary of the complexity of the issues involved and the difficulty of measuring its impact, see Nimmo, *Mass Communications and Politics*, in 4 HANDBOOK OF POLITICAL BEHAVIOR 241 (S. Long ed. 1981). He argues that scholars should move away from the either/or mentality of media influence to a consideration of the possible varieties of impact. Scholars, he continues, should neither study communicators or audiences in isolation nor limit the study of impact to individuals but should instead examine the impact upon institutions and political opinion leaders as well. This requires devising better instruments for measuring "media susceptibility" and "media impact." Nimmo concludes that "the role of mass communication in influencing individual political behavior, so readily dismissed as minimal in early studies, is now being taken very seriously." *Id.* at 280.

57. A. HEARD, *THE COSTS OF DEMOCRACY* 16 (1960). With renewed emphasis on campaign finance reform in the last decade, analysts have placed more emphasis on the role of campaign financing in candidate elections and have made some fairly sophisticated attempts to isolate its impact on campaigns. For example, in trying to isolate the influence of partisanship, incumbency, and money on congressional campaigns, one commentator found that the expenditure of money makes a difference, although it was far more helpful to challengers than incumbents. G. JACOBSEN, *MONEY IN CONGRESSIONAL ELECTIONS* (1980) For a critique of the model that Jacobsen uses to measure the influence of money, see Welch, *Money and Votes: A Simultaneous Equation Model*, in 36 *PUB. CHOICE* 209 (1981). Although con-

Nevertheless, certain general tendencies have been found. Across different times and locations, money has been much more successful in defeating ballot proposals than in insuring their success. Numerous scholars have found that it is easier to use money to cast doubts on ballot measures than to get citizens to vote affirmatively. Using money to try to convince voters to support a particular proposition may be more easily portrayed as benefiting a particular special interest.<sup>58</sup> As an example of these general tendencies, in the twenty-eight year period from 1954 to 1982 in California, only one initiative has been able to withstand overwhelming monied opposition.<sup>59</sup> Yet, of the twenty-two ballot propositions where the affirmative campaigners spent considerably more money than the negative, only eight were successful.<sup>60</sup> Through examining polling results for the 1954 to 1978 period, David Magleby has found that significant shifts in voter opinion were three times as likely to occur with ballot proposals (46% of the time) as with candidate elections (15% of the time).<sup>61</sup> These results tend to substantiate the claims of others that money is all the more influential on ballot proposals because voters do not have the orienting devices of party labels or name familiarity when they vote.<sup>62</sup> In addition, be-

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siderable debate exists over how to measure money's impact on political campaigns, no one has suggested that money is not extremely important in determining who wins and who loses.

58. Lowenstein, *supra* note 13, at 563-70, has explored this phenomenon the most carefully.

59. Opponents have defeated thirteen of fourteen initiatives. Both Lowenstein, *supra* note 13, and D. MAGLEBY, *supra* note 4, at 147-48, have examined many of these campaigns. For the 1982 results, see Initiative News Report, Nov. 12, 1982, at 1-8. The Coastal Zone Initiative, Proposition 20 in 1972, was the only recent initiative to survive heavy opposition spending. Commentators Lutrin and Settle examined the success of this proposition in the face of financial opposition. Lutrin & Settle, *The Public and Ecology: The Role of Initiatives in California's Environmental Politics*, 28 W. POL. Q. 352 (1975). Professor Lowenstein advances a convincing and disturbing reason for its success. See Lowenstein, *supra* note 13, at 532. From examining polling data and expenditures during the campaign, Lowenstein ironically argues that, among other reasons, Proposition 20 passed because opponents did not spend enough money to defeat it.

60. A success rate of 36% (8 of 22) is actually higher than the overall initiative success rate of 31% for this period. The criteria for heavy, one-sided spending is at least double the amount of the opponent's expenditures, with total campaign expenditures of at least \$100,000 in 1958 (almost \$400,000 in 1982). For the raw data, see D. MAGLEBY, *supra* note 4, app. E.

61. D. MAGLEBY, *supra* note 4, at 298.

62. See J. Shockley, *The Initiative Process in Colorado Politics: An Assessment* (1980) (Bureau of Governmental Research and Service, University of Colorado, Boulder). For another study that focuses upon media impact in three of the same initiative campaigns Shockley discusses, see Mastro, Costlow, & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What To Do About It*, 32

cause some issues present problems of great complexity, or because some issues (especially those seeking repeal of a law) can require one to vote against the proposition in order to retain the law,<sup>63</sup> the possibility of confusion increases the use of deception.<sup>64</sup> Such a phenomenon leads to an irony in judicial policy. Big money contributions can be prohibited in candidate elections, where they may have less influence on the voters, but cannot be prohibited on ballot propositions, where they appear to be more influential.<sup>65</sup>

Steven Lydenberg's studies of ballot proposals around the country in 1978, 1979, and 1980 indicate that where the corporate side spent considerably more money to defeat ballot measures than the proponents had spent, the corporate side was successful eighty-one percent of the time, or twenty-five out of thirty-two times.<sup>66</sup> His evidence also shows that the side spending the most money—whether pro or con and from whatever source—won twenty-nine of the thirty-nine contests in this three-year period from 1978 through 1980.<sup>67</sup>

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FED. COMM. L.J. 315 (1980).

63. For example, on a measure to repeal a state's equal rights amendment, a vote against the effort is a vote to support the ERA. Magleby discusses voter confusion on the tax measure that resulted in the *Bellotti* case, noting that lower income and less educated voters were more likely to vote against their stated preferences. D. MAGLEBY, *supra* note 4, Ch. 5. In their study of the 1976 nuclear safety initiative in California, D. Hensler and C. Hensler have also examined and found some voter confusion over whether a vote in favor of a nuclear safety proposal meant supporting greater or less use of nuclear energy. D. HENSLE & C. HENSLE, *EVALUATING NUCLEAR POWER: VOTER CHOICE ON THE NUCLEAR ENERGY INITIATIVE*, Section V (1979).

64. Lowenstein, *supra* note 13, at 519-26, 563 describes some blatantly deceptive campaign tactics, a strategy that he labels "reversal tactics."

65. The disparity in ballot proposition spending also tends to be much greater than in candidate races; in part, this is one of the results of the *Bellotti* decision. Lowenstein, *supra* note 13, at 589.

66. Lydenberg, *supra* note 9; Lydenberg, *supra* note 8; S. Lydenberg, *Bankrolling Ballots: The Role of Business in Financing State Ballot Question Campaigns* (1979) (Council on Economic Priorities). In these works Lydenberg also details the campaigns, providing valuable information on the strategies, arguments, and the sources of funds in the campaigns.

67. In his most recent work, Lydenberg found the same phenomena:

The 1982 election reconfirmed the powerful role corporate funds can play in initiative and referenda campaigns. An examination of eighteen ballot question campaigns around the country which pitted business interests against citizens or grassroots groups shows that business spending dominated sixteen of the eighteen campaigns—and that the side with business backing won in thirteen of these sixteen campaigns. In both cases where the business-backed side did not outspend its opponents, it lost.

Lydenberg, *Business Big Spenders Hit the Referenda Votes*, 47 *Bus. Soc'y Rev.* 53-55 (Fall 1983). Analysts for the Initiative News Report found in studying all initiatives in 1980 and 1981 that on all measures where significant one-sided spending occurred, "the bigger spenders won 15 of 25, or 60%," and on issues where the significant one-sided spending was on

In many of these campaigns, the impact of money seems to have been crucial to the outcome of the vote. Either polls showed the measures far ahead until enormous opposition spending hit, as in the California separate smoking sections proposals in 1978 and 1980, or polls showed the measures locked in close battle until one side suddenly had much more money to spend, as in the Massachusetts property tax classification measure.<sup>68</sup> There were many instances in California of initiatives being brought down by money. Some were particularly painful for campaign finance reform advocates because, in 1974, the state's voters had approved by an overwhelming margin limitation of expenditures in ballot proposition campaigns. The Supreme Court of California declared the limitation unconstitutional two years later.<sup>69</sup>

Thus, when the amount of money spent against ballot measures is compared with polling data, support for propositions almost always declines as opposition money increases. From these

the negative side, "the better funded side won 13 of 16, or 81%." Where initiatives faced negligible spending, 5 of 7 (71%) were approved, and where roughly equal spending occurred, 3 of 5 (60%) were approved. Initiative News Report, Apr. 19, 1982, at 6 (noting as a comparison that in the U.S. Senate races of 1980 where one candidate had a significant spending advantage over the opponent, the monied candidate won 81% of the time). In the 1976-81 period:

[I]nitiatives characterized by one-sided pro-spending, combined with those without one-sided spending, had a 50% success rate. Those with one-sided anti-initiative spending, by contrast, had only a 22% success rate. This clearly suggests that spending is an important factor in an initiative's defeat, but fails to prove it is the most important factor in all, or even most cases of one-sided anti-initiative spending.

Initiative News Report, May 17, 1982, at 8.

68. On the separate smoking sections initiative in California, see Lowenstein, *supra* note 13, at 537-40, 631-32; Lydenberg, *supra* note 9, at 44-49; Lydenberg, *supra* note 66, at 33-34. The Massachusetts case is particularly fascinating because polls showed the measure in a dead heat until the city of Boston was suddenly able to spend \$700,000 just before the election to counter business opposition. The measure then passed by a 64% margin. Lydenberg, *supra* note 66, at 69-75. The judiciary declared unconstitutional Boston's attempt to use municipal funds to counter corporate spending on initiatives. For a discussion of the case and the issues involved, see Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980); *supra* note 53. A discussion of media phases of a utility campaign correlated with daily tracking of voter attitudes toward an Ohio utility reform initiative also provides fascinating evidence of the impact of media and money on the campaign. See Pierce, *The Big Ohio Referendum War: Defeat of an Initially Popular Initiative*, CAMPAIGNS & ELECTIONS, Spring 1983, at 44.

69. *Citizens for Jobs & Energy v. Fair Political Practices Comm'n*, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976).

For more on the law and the judicial response to the Political Reform Act of 1974, see M. NEWQUEST, *THE POLITICAL REFORM ACT OF 1974: A CASE STUDY IN CALIFORNIA'S INITIATIVE PROCESS* (1981).

results, one can infer the significant influence of money.<sup>70</sup> In addition, in their attempt to determine which tactics and arguments are best to use in winning campaigns, numerous media organizations and advertising specialists have found that advertising campaigns strongly influence voter attitudes.<sup>71</sup>

Of course, even in defeating propositions, money is not always determinative, any more than bribery is always committed in a system where there are no laws against it, or any more than bribery is always successful (a person stays bought) when it takes place.<sup>72</sup> Yet, because the Court seems to have placed emphasis on the extent to which money is "significant" or "overwhelming"<sup>73</sup> in ballot proposition elections, the degree and regularity of impact

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70. Lowenstein, *supra* note 13; Lydenberg, *supra* note 9; Lydenberg, *supra* note 8; Lydenberg, *supra* note 66; Mastro, *supra* note 62; Shockley, *supra* note 62; have compared polling results to campaign expenditures over the course of campaigns. Although making no attempt to find a relationship between spending and polling results during the campaign period, Magleby includes appendices on these two factors. D. MAGLEBY, *supra* note 4.

71. Scholars have had difficulty evaluating data on the impact of advertising, because private interests generally retain these polling results. *But see infra* text accompanying notes 135-41. As political consultants and media specialists become more sophisticated, they develop new techniques and more effective ways to measure impact. These include better designs for determining what kinds of arguments would be most useful against particular proposals, such as asking individuals in favor of a measure how much the measure would have to cost the government in implementation before the person would vote against it. Depending upon the answer, the opposition then charges that the measure would cost whatever their polling results say would be a high enough figure to turn people against the measure, even though this is clearly false advertising. Lowenstein, *supra* note 13, at 538-39. Other tactics include waiting until just after an expenditure reporting deadline to pour money into a campaign. D. Lowenstein, Complaint filed before the California Fair Political Practices Commission (Oct. 30, 1980) (on file with the author). For new ways to make corporate campaigns appear to be citizen based, see *infra* note 119. For sophisticated polling techniques to determine the best name for a campaign committee, see *infra* note 151. See also Shockley, *supra* note 62, at 32 (discussing a dramatic example of the impact of sloganeering on the Colorado mandatory bottle deposit initiative where a post-election poll found that forty percent of the people who voted against the initiative recited the advertising slogan against the proposal as their reason for having voted against it). A refreshingly direct article by a leader in a successful negative campaign lays out many of the common procedures by which campaign funding overwhelms popular initiatives: "First, early media must be used to set the parameters of the debate over the issue and define the issue in the public mind"—deflecting original voter "discontent away from its usual focus, the utility industry." Daily polling tracks the effectiveness of the advertising. *Id.*; see Pierce, *supra* note 68, at 40-45.

In those rare instances where opposition money is not successful, extensive post-election research is often undertaken to determine why the money was not successful. See AMERICAN DENTAL ASSOCIATION, BUREAU OF ECONOMIC AND BEHAVIORAL RESEARCH, OREGON INITIATIVE: RESULTS OF POST-ELECTION RESEARCH (1979).

72. It is worth remembering that we do not have bribery laws because we believe all politicians and lobbyists are crooks. We have these laws because we believe that the possibility, or the probability, exists and that when bribery occurs, it corrupts the process.

73. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978).

appears to be crucial to the argument whether campaign finance restrictions will be allowed. Scholars have not made the argument that money is never determinative of ballot proposition outcomes, but occasional studies have attempted to show that money is often not important to the results. Once the distinction between negative and affirmative spending is made, however, these studies lose most or all of their explanatory force.<sup>74</sup>

Scholars of direct democracy have never claimed that money is always determinative of electoral outcomes, and political analysts have noted that other considerations sometimes influence the outcome of ballot propositions. These other factors can be reduced to five points:<sup>75</sup> (1) Was the money effectively spent? Did state, local, or national people participate in the campaign? Were activists sensitive to state or local concerns? Were focus groups, panel studies or other polling techniques used to test the "marketability" of the campaign strategies? How competent were the pollsters and media consultants involved in the campaign? (2) What were the depth and breadth of coalitions for and against a ballot measure (including the reactions of the locality's political establishment and media endorsements)? (3) Were the issues distinctive? For example, straightforward issues (e.g. the death penalty) may be less susceptible to the influence of money and the media than more complex issues<sup>76</sup> (as are those issues that seek to maintain the status

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74. For one study that tries to show that money is *not* very important in ballot proposition campaigns, see Mueller & Parrinello, *supra* note 54, at 415-26. The authors, members of the law firm that represented the appellants in *CARC*, assert that "[m]oney spent on ballot measures may very well influence voter behavior. Nevertheless, historical research reveals that money alone does not dictate or explain the results of ballot measure elections." *Id.* at 417-18. They could make this claim from California initiatives only by lumping affirmative and negative spending together. In this manner, they were able to find that the side spending the most money (even if very little was spent, and even if the difference between sides was minimal) won only 54% of the time. Although their study contains several appendices dealing with money in California ballot proposition campaigns, they avoid the analytical comparison that, according to other scholars, reveals the most significant evidence of the impact of money; thus, they do not confront directly other scholarly works. Professor Easley critiques an earlier work that tried to show that corporations do not dominate ballot proposition campaigns, finding that the four sources utilized in the argument "support a conclusion contrary to the one for which they were cited." Easley, *supra* note 48, at 694 n.108. For the irony of proponents of big spending arguing that money is ineffective, see *supra*, note 54.

75. See Lowenstein, *supra* note 13; Lutrin & Settle, *supra* note 59; Lydenberg, *supra* note 9; Lydenberg, *supra* note 8; Lydenberg, *supra* note 66; D. MAGLEBY, *supra* note 4; M. Males, *Be It Enacted by the People: A Citizens' Guide to Initiatives* (1981) (Northern Rockies Action Group); Shockley, *supra* note 62.

76. D. MAGLEBY, *supra* note 4, Ch. 7.

quo).<sup>77</sup> (4) How were the initiatives worded on the ballot? Particular words can help determine how the public will perceive the question and how the issues will be defined in the campaign. (5) The placement of a particular proposition on the ballot also can be important to its outcome. A measure sandwiched between two unpopular proposals will tend to fare worse than one appearing at the top of the list or alongside uncontroversial measures that are sure to pass.<sup>78</sup>

These points indicate the variety and complexity of the influences that must be considered; they also demonstrate the difficulty of affixing firm causality in an area where the Supreme Court demands it as a precondition to legitimate governmental interest. These nonfinancial factors, however, do not negate the effect of money on the outcome of ballot proposals; nor does the failure of money to decide a particular issue "mitigate the harm caused to supporters of propositions apparently favored by a majority of voters but defeated as a result of a deceptive and substanceless one-sided advertising campaign."<sup>79</sup> Yet, because money is not always determinative, opponents of campaign finance reform argue that it is not a crucial or consistent enough factor to justify the restraints that financial limits place on "free speech." This viewpoint is consistent with the Supreme Court's determination that it is not enough to show money to be influential or persuasive. According to the Court, one also must show that undue influence is undermining the democratic process.<sup>80</sup>

Although Common Cause,<sup>81</sup> Justice Thurgood Marshall,<sup>82</sup> and others often have asserted that large expenditures erode citizen confidence in the democratic process by giving people the impression that elections are a rich man's game, few scholarly studies have addressed this issue. In *Corruption in the Political System*,<sup>83</sup>

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77. M. Males, *supra* note 75, at 9.

78. See D. MAGLEBY, *supra* note 4; Shockley, *supra* note 62, at 18 n.4.

79. Lowenstein, *supra* note 13, at 546. Lowenstein further commented that, "if in certain elections the proponents (or opponents) of propositions have been overwhelmed by one-sided spending and enough voters have been misled by deceptive campaigns to produce 'wrong' results, then it is irrelevant that in other elections under other circumstances one-sided spending may have been unsuccessful." Paper presented by Professor Daniel Lowenstein, American Political Science Association Annual Meeting, in New York City (Sept. 5, 1981).

80. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

81. This citizen's group has actively lobbied for campaign finance reform. See Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603 (1980).

82. *Buckley v. Valeo*, 424 U.S. 1, 288 (Marshall, J. dissenting).

83. L. BERG, *supra* note 7.

however, Larry Berg, Harlan Hahn, and John Schmidhauser note that several national polls indicate that a majority of the American people believe that: (1) large corporations have a great deal more influence on government than the average citizen; (2) citizens have "hardly any or almost no" influence in running the government;<sup>84</sup> (3) politicians are "bought off by some private interest;"<sup>85</sup> and (4) a majority of Americans favor laws limiting campaign expenditures.<sup>86</sup>

Based on these results, the authors found that big money campaigns have led to the public's sense of alienation from the political process. The authors concluded that the steady decline in voter turnout over the past two decades, seen most clearly in presidential elections, is a logical response to the growing perception that one's vote is of no consequence.

Although this study attempts to tie all of these issues together, the work suffers from certain weaknesses that could be used to dismiss the authors' conclusions. The study would be stronger if it also considered the public's attitude toward the influence of money on ballot propositions as well as on candidate elections.<sup>87</sup> Also, if the authors had cited individual polls that contained all these questions, their conclusions would be more comprehensive; one would be able to determine whether the same people who felt powerless also believed that campaign expenditures should be limited, and if these same people also were less likely to participate in the electoral process. In short, the use of data from several different polls makes it difficult to determine how tightly these three groups fit together. In addition, other factors also influence the public's sense of trust and confidence in the political process. For example, Vietnam, Watergate, and a stagnant economy all have influenced citizens on these issues. Yet, the study makes no attempt to determine the extent to which campaign finance practices and attitudes have caused the American public to feel cynical toward and powerless in the electoral process—although these feelings have increased over the last two decades.<sup>88</sup>

Recently, a major polling organization has addressed, for the first time, the systemic question of voter attitudes toward the im-

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84. *Id.* at 47.

85. *Id.* at 49.

86. *Id.* at 48.

87. See *infra* text accompanying notes 90-91.

88. See *supra* note 6.



pact of money in elections.<sup>89</sup> In 1982, the Mervin Field organization in California found that an overwhelming eighty-two percent of those Californians surveyed<sup>90</sup> agreed that "in those proposition races where only one side of an issue has enough money to pay for expensive campaign advertising, the outcome does not usually represent the will of the people but the interest of the big campaign contributors."<sup>91</sup> This result clearly indicates that citizens believe that money not only is influential but is distorting and corrupting the process by overwhelming the will of the people.

### B. *What Social Science Techniques Can Offer*

While empirical evidence in support of the need to limit spending in ballot proposition campaigns continues to develop, what would a study of this question using the best social science techniques entail? Can a definitive study be structured on the subject to determine whether, or under what circumstances, large campaign spending on ballot measures leads to a decline in confidence in the democratic process? The expectation of a definite affirmative answer seems too optimistic, but further research would certainly increase our knowledge on this matter. The best attempt to answer this question would require polling rather than aggregate voting analysis. The polling should address questions on money in ballot measure campaigns, not simply general questions about money in politics. Also, the same poll would need to ask people about their sense of political powerlessness, their confidence in the political process, and their level of participation in politics. If the pollsters found that those people who favored limits on contributions to ballot measure campaigns were also those who lacked confidence in the process, felt powerless, and were less likely to vote, such findings would provide a strong argument that the fears to which the Court has alluded do exist.<sup>92</sup> If such a study covered

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89. See *infra* text accompanying notes 115-27.

90. The Field Institute conducted four different surveys in the fall of 1982 among an aggregate total of 3,324 registered voters. On election day in November, the institute interviewed 6,345 voters as they left the polls. FIELD INSTITUTE, CALIFORNIA OPINION INDEX (Feb. 1983).

91. *Id.* at 2. In response to a question on the "perceived effect of campaign spending" on the outcome of ballot propositions, 63% thought such spending had "a great deal of effect." Interestingly, more (73%) thought that campaign spending in candidate races had "a great deal of effect." *Id.* at 3.

92. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978) (insufficient evidence of undue influence). Even this finding, however, would not establish causation. Are voter feelings of powerlessness and alienation caused by views on campaign finance, is the

more than one time period in several states (before, during, and after ballot proposition campaigns),<sup>93</sup> and revealed that alienation and cynicism went up as spending increased (perhaps the public even attributed its alienation to the big spending), this would be the strongest evidence possible to support the conclusion that money was undermining the democratic process.<sup>94</sup>

This study would not, however, be without potential problems. One is that the same amount of money can be used with differing saliency. If campaigners were to spend their coffers primarily on mass media advertising, the public would more likely be aware of the spending than if the campaigners used the money to create a political infrastructure that ran the campaign. Polling, however, could determine the saliency of money in the campaigns. Another problem would be that citizens might not understand different types of campaign finance procedures. Although the courts seem to have closed off expenditure ceilings and general contribution limits, they have left the door open for other methods of regulation.<sup>95</sup>

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reverse true, or are both caused by some additional factor(s)? Multiple polling over the course of a campaign and/or polling of the same individuals over time would help determine causation.

93. Unanswered here is whether the study should be series of random sample polls or an ongoing panel study. A panel offers the advantage of polling the same people over time, so that the study would capture information on how an individual is influenced over time. The disadvantages, however, are that continued polling is a more obtrusive, potentially biasing measure, and that attrition always occurs in long-term studies. For more on the merits and limitations of different polling methods, see D. NIMINO & J. COMBS, *SUBLIMINAL POLITICS* (1980); L. SABATO, *THE RISE OF POLITICAL CONSULTANTS* (1981).

94. Commentator Gilbert Gaynor suggests how empirical evidence might be assembled and recommends that post-election research focus on those who did *not* vote. Note, *supra* note 24, at 456, 462-67. Noting that defenders of large contributors will always argue that the merits of a contributor's position rather than the money caused the campaign success, Gaynor responds, "The larger the number of separate electoral campaigns looked to, the less persuasive it is . . . to maintain that the results achieved proceeded from the merits, rather than from sheer economic power." *Id.* at 463. *But see* Note, *State and Local Limitations on Ballot Measure Contributions*, 79 *MICH. L. REV.* 1421, 1446-49 (1981) (noting the difficulty of establishing a "causal nexus" between large campaign contributions and the undermining of democratic processes). The notewriter argues that if undermining democratic processes is defined as voter apathy, available empirical evidence does not support the contention that unlimited spending leads to voter apathy. Although evidence presented in the Note emphasizes the difficulty financial limitation supporters face in attempting this sort of proof, the evidence hardly resolves the question of whether big money undermines citizen confidence in the process of direct democracy. *See infra* p. 27 & note 106. Perhaps something as simple as the Field Poll provides the evidence needed. FIELD INSTITUTE, *supra* note 90, at 2-3.

95. *See infra* Part V. Also, some might say that the arguments accompanying the money, rather than the money itself, contributed to voter alienation. The two are obviously closely linked. *See also* Nimmo, *supra* note 56 (suggesting scholars consider possible varieties of media impact). Researchers need better instruments for studying media impact and the susceptibility of different people to media influence. This study would not overcome

The wording of the survey questions would be important. Researchers already have compiled conflicting data on whether the American public supports public financing of congressional elections, with the Gallup Poll finding in the affirmative and the Civic Service finding in the negative.<sup>96</sup> Pollster Lou Harris has found strong opposition by the public to many features of campaign television commercials. An overwhelming majority agreed with the statements that "there ought to be a strict limit on the amount that can be spent on TV commercials" and that "there ought to be enough free commercial time given to major candidates to allow the voters to get to know them."<sup>97</sup>

If this study were done and it did not reveal a relationship between a lack of confidence in the electoral process and a desire for campaign finance reform, it would not necessarily mean that money was not making a major impact or was not perverting the democratic process. Money could be determinative—with or without deceptive advertising—without citizens recognizing its impact. Very likely this occurs in ballot proposition campaigns, with campaigners attempting to hide the amount and source of funding.<sup>98</sup> There is increasing evidence that most voters do not have even vague ideas about how much and from what sources money is funneled into campaigns. A study by the Rand Corporation of the nuclear safety initiative in California in 1976 found voters' knowledge surprisingly lacking on the sources and amount of campaign funds. In a post-election poll, the authors found that only 37% of those who voted on the proposition knew that opponents had spent more money on advertising. Yet, the opponents had spent roughly three million dollars more than the proponents (or nearly four times as much), and supporters had tried to make this fact a major

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these problems.

96. For a discussion of the difference, see H. ALEXANDER, *supra* note 21, at 150; D. NIMMO & J. COMBS, *supra* note 93, at 182-83. Gallup and Civic Service used different word cues; Civic Service emphasized the proposal's negative feature.

97. Eighty-four percent and seventy-nine percent agreed, respectively, with the two statements. *Campaign Finance Reform Proposals of 1983: Hearings Before the Senate Comm. on Rules & Admin.*, 98th Cong., 1st Sess. 1 (1983) (presentation of the Harris Survey: Public Fed Up with Political TV Ads, 492-93). Taken in late November, 1982, the Harris Survey overall results showed an overwhelming fear of the power of television commercials to deceive the public. *Id.* at 492. Commercial advertising researchers give even more credence to the influence of television commercials and have found that "relative advertising expenditures appear to be more important than relative prices in allocating sales among industries." W. COMANOR & T. WILSON, *ADVERTISING AND MARKET POWER* 239 (1974).

98. See *infra* note 137 and accompanying text. With improvements in our knowledge of the impact of money, we are becoming more aware of attempts to disguise funding sources.

campaign issue.<sup>99</sup>

These results imply what many have suspected: even with disclosure laws, ordinary voters do not know who is contributing to campaigns or how much money is being contributed. In addition, like all of us, voters may forget the source of a particular argument they have heard, making it more difficult for them to assess the credibility of a particular claim.<sup>100</sup> For this reason, the research design also should examine the efficacy of disclosure laws, and ask people whether they are aware of the sources of campaign funds, and whether one side has greater financial resources than the other. Because advocates of disclosure laws often tout them as adequate alternatives to stronger campaign finance laws,<sup>101</sup> the answers to these questions could be important.

Given the above problems, negative results in the research would not quiet the fears of those who believe wealthy contributors are too powerful in ballot proposition campaigns. Rather, the point of the research would be that positive findings might be the only evidence sufficient to persuade a majority on the Supreme Court to allow limitations or prohibitions on campaign spending to stand. But, given the Court's confused signals in this area, it might choose to ignore even positive results.

Regardless of the findings, other data would be useful to corroborate or qualify the results of survey research. If the percentage of small or individual contributions, as opposed to corporate contributions, were to drop either suddenly or gradually during a campaign it could be an indication that citizens felt that giving to ballot proposition campaigns was becoming futile.<sup>102</sup> Although some research indicates this phenomenon and other research dramatically illustrates the power of large corporations to overcome many small individual contributions, researchers could document more carefully the place of small contributions in ballot proposition campaigns.<sup>103</sup> Pollsters could correlate this data with voter turnout

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99. D. HENSLEY & C. HENSLEY, *supra* note 63, at 128. The opponents spent \$4,033,590, and the proponents spent \$1,255,199. FAIR POLITICAL PRACTICES COMMISSION, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, JUNE 8, 1976 PRIMARY ELECTION 289-98 (1976). The State of Michigan is seeking to preserve its contribution limitation law, and as a consequence, is concerned about this point. See *infra* text accompanying notes 135-41.

100. See *infra* text accompanying notes 146-51.

101. See *infra* note 126.

102. The city of Berkeley offered some evidence of this occurrence in defense of its campaign finance law, however the opposition rebutted the city's inferences from the evidence. See *infra* note 120.

103. See *id.*; see also Lowenstein, *supra* note 13, at 577 (how a few large corporate contributors can overwhelm many smaller individual contributors); Lydenberg, *supra* note

for ballot propositions to see if a decline in small individual contributions corresponded with a lower voter turnout.<sup>104</sup> Because the level of voting on an issue seems to correlate with the amount of controversy and publicity surrounding a measure,<sup>105</sup> big spending may increase the number of people who vote—even as it may simultaneously increase alienation and a sense of unfairness among the electorate. A research design such as that outlined above should be able to measure these dual phenomena.<sup>106</sup>

Researchers also should interview those who have spearheaded initiatives to determine their perception of the role of money in campaigns.<sup>107</sup> Unquestionably, many of the citizens groups that have encountered financial behemoths have been disillusioned. One citizen, a state representative in Colorado, who worked actively on a tax reform initiative that was outspent twenty-one to one, commented two years later, "I wasn't about to get involved this year on initiatives, unless I knew I would have some money or no opposition."<sup>108</sup> Another citizen, a leader in the Ohio mandatory deposit initiative, felt "deeply frustrated that there was no way the Ohio Alliance for Returnables could afford to buy media time or

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66, at 33 (same). For example, in the 1978 Public Smoking Initiative, contributions to proponents totalled only one-tenth of what opponents (the tobacco industry) received. Yet, only \$70,911 of the opponents' six million dollars came from contributions under \$1,000 whereas proponents gained \$547,422, or eight times as much, from small contributions, even while their opponents were in the process of overwhelming them.

104. Here also researchers are confronted with the problem of possible multiple causation. Many factors are undoubtedly involved in declining voter turnout. Analysts could find the relative importance of the factors extremely important to the accuracy of their research. Note, *supra* note 94, at 1446-49 (briefly discusses the complexity of declining voter turnout); see also W. CROTTY & G. JACOBSON, *supra* note 6. (The fact that ballot propositions normally coincide with other races complicates the assessment of the relative alienating power of different races). Existing evidence indicates that ballot propositions do not draw many voters to the polls, except in rare circumstances such as California's Proposition 13 in 1978. See Everson, *The Effects of Initiatives on Voter Turnout: A Comparative State Analysis*, 34 W. POL. Q. 415 (1981).

105. See, e.g., J. Shockley, *supra* note 62, at 3, 45.

106. People may become more cynical and alienated even as they vote, suspecting that they are being manipulated although they do not know by whom. That voters have instituted so many campaign finance reform measures on ballot proposals indicates that people realize their susceptibility to electoral manipulation and want to reduce its occurrence. The Field Institute poll clearly states that the majority feels the "will of the people" is being thwarted by money. FIELD INSTITUTE, *supra* note 90, at 2-3.

107. See *Amicus Curiae Brief for the City and County of San Francisco at 15-16, Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

108. J. Shockley, *supra* note 62, at 43. The Colorado situation was striking because not a single consumer or environmental group even tried to place another initiative on the ballot in the two general elections following 1976.

space to refute the opposition [sic] charges."<sup>109</sup>

Feelings of frustration and helplessness abound among initiative activists on campaigns where opposition money engulfs them. Given the Court's apparent concern with public perception, the belief that money determines ballot proposition winners may be as serious a problem as the actual fact. Without doubt, the view that money can defeat proposals has quieted some groups that otherwise would have begun initiatives. It has alienated many of the people who have seen support for their cause evaporate with the onslaught of money and have found themselves without an effective way to respond.<sup>110</sup>

With the considerable and growing amount of money that is spent yearly for comprehensive polling on ballot measures to determine precise strategies for influencing voters, it would be ironic and perhaps tragic if no thorough research addressed the admittedly difficult questions that the courts have raised. The judiciary has thus far refused to accept legislative and voter determination of the need to limit contributions and spending on ballot proposi-

109. Lynda James, Ohio Alliance for Returnables Activist, has commented:

They created concern about job losses with false figures, ignoring the fact that other states with deposit laws have shown a large net increase in jobs. They repeatedly emphasized that "forced deposit" laws in Oregon, Vermont, and Michigan were disasters, and that is a complete distortion of the truth. They also neglected to tell the voters that their alternative litter-control law would amount to a one percent tax by the time it reached the consumer, would create another bureaucracy at a cost of \$15 million a year, and would do nothing to stop littering. The alternative was a sham. The Ohio Manufacturers League and the Ohio Chamber of Commerce, which were a part of Ohioans for a Practical Litter Law, are now actively opposing passage of a litter law in the state legislature.

Cahn, *supra* note 27, at 109. Outspent more than sixteen to one in the campaign, proponents saw their 80% approval margin wither away to a disastrous defeat on election day. *Id.* at 107, 109. This syndrome is common on ballot proposition campaigns where proponents with limited financial resources must battle heavily financed opponents. See Cahn, *supra* note 27.

110. Daniel Lowenstein, in support of contribution limitations on ballot issues, has said:

[This] would remove a very serious inhibition that exists against groups using the initiative process. Many groups recognize, under the present circumstances . . . that if they qualify an initiative, they will face . . . over-whelming spending against them, deceptive advertising against them, which they have little or no chance [of overcoming], no matter how good their proposal may be on the merits, and no matter how popular it may be with the voters at large . . .

Deposition of Daniel Lowenstein at 57, Michigan State Chamber of Commerce v. Austin, 577 F. Supp. 651 (E.D. Mich. 1983). Therefore, they don't act, "and the result is that we have less political activity, less political speech, and less opportunity for the people to use the initiative in the way that was intended when the initiative was adopted." *Id.* (deposition on file with the author).

tions, and apparently will not accept mere proof of impact as constitutionally sufficient grounds to justify restrictions. Thus, the survey also must address the more difficult questions of whether money is "threaten[ing] imminently to undermine democratic processes" and to "destroy the confidence of the people in the . . . integrity of government."<sup>111</sup> Can any study show this to the satisfaction of a majority on the Supreme Court, or are the standards that the Court has set deliberately so high and so vague that such a study can never be convincing? Legal scholars are themselves divided on this point.<sup>112</sup> If it is not possible to convince the Court with evidence of this sort, can other arguments be marshalled to persuade the Court, or can other ways be found to limit the impact of money?

#### IV. RECENT CASES: OTHER ARGUMENTS FOR REFORM

The 1981 Supreme Court case of *Citizens Against Rent Control v. City of Berkeley*<sup>113</sup> (hereinafter *CARC*) and the Eastern District Court of Michigan case of *Michigan State Chamber of Commerce v. Austin*,<sup>114</sup> provide observers with a good summary of the dilemmas and prospects reformers face. The city of Berkeley had originally passed an initiative banning corporate and union contributions to ballot measure campaign committees, but this was invalidated in *Pacific Gas and Electric v. City of Berkeley*.<sup>115</sup> Following *Buckley*, the city repealed a number of sections of the ordinance that limited expenditures on ballot measure campaigns, but it retained the section at issue in *CARC* that imposed contribution limitations. Even though the Supreme Court of California

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111. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

112. There has been considerable debate over whether reasonably accessible information would convince the Court that money is undermining citizen confidence in the democratic process. After *Bellotti*, Professor Lawrence Tribe wrote that the Court was not necessarily banning corporate prohibitions, "provided the ban was designed to meet substantiated concerns and not simply unfocussed findings." L. TRIBE, *supra* note 13, at 59 n.14. Thomas Kiley, who had argued the case before the Supreme Court of the United States, was more pessimistic, saying "the broad sweep of the opinion as a whole would stand in stark contrast to [a] narrow reading of the case." He did not think that "the Commonwealth simply failed to meet its burden of demonstrating that corporate financial participation in a political campaign would unduly influence the electoral process." Kiley, *supra* note 43, at 429 n.11. More recent legal analysis has continued to reflect this disagreement. See *infra* note 125.

113. 454 U.S. 290 (1981).

114. 577 F. Supp. 651 (E.D. Mich. 1983).

115. 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976).

upheld the law in a 4-3 decision,<sup>116</sup> the city of Berkeley sensed that the available information on the impact of money on the outcome of ballot campaigns was so inconclusive that, on appeal to the Supreme Court of the United States, the city should restructure its arguments. The city, in the end, put at least as much emphasis upon the argument that its municipal ordinance was constitutional on grounds of disclosure as it did upon the grounds of preventing undue influence in the initiative process.<sup>117</sup> The city placed great weight on the argument that its \$250 limitation on contributions to a political committee contesting a local ballot issue (with no limits on the amount any person or corporation could spend directly) enabled citizens to better assess the source of money in campaigns. The city argued that this measure did not necessarily restrict the overall amount of money that campaigners would spend. Because campaign committees often use misleading names and need not acknowledge their funding source in advertising, the city argued that voters would be misled less easily about propositions if individual or corporate donors had to make their large contributions in their

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116. *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980); see also Note, *supra* note 24 (discussing *CARC*); *Limits on Contributions*, *supra* note 13 (same); Note, *supra* note 94 (same). Although the Supreme Court of California had found enough evidence to warrant Berkeley's concern over the impact of large contributions on the political process, the dissent sharply criticized the majority for relying upon "unquestioned and unverified" evidence, which did "not constitute the hard evidentiary support needed to demonstrate a state's present and *compelling interest* in the suppression of . . . First Amendment rights. . . ." *Pacific Gas*, 27 Cal. 3d at 835, 614 P.2d at 752, 167 Cal. Rptr. at 94 (Richardson, J., dissenting); see also *infra* note 120.

The Supreme Court of California's majority opinion exhibited the kind of confusion that is common on the matter of what constitutes corruption, undue influence, and declining citizen confidence in the electoral process. After saying that a "nexus between voter apathy and large campaign contributions" exists, the majority quoted from another study that did *not* find voters "apathetic, cynical, or ignorant" toward initiatives, even though the study found the influence of money to be "corrosive . . . pervert[ing] the democratic process . . ." *Id.* at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89.

117. See Brief for Appellee, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). This Article does not, however, cover all the arguments the city used to support its statute, nor the variety of points made by appellants against it.

Recently, attorney Jeffrey Blum advanced two more reasons why expenditure and contribution limitations or prohibitions in ballot issue campaigns should be viewed as containing valid regulatory interests. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. Rev. 1273, 1380 n.394 (1983). First, "the referendum process can be seen as an extension of the legislature's internal deliberative process. Expenditure limitations can be seen as analogous to decisions to prohibit lobbyists from attending closed sessions of the legislature." Second, as a means of guaranteeing territorial integrity, states already strictly prohibit individuals from one state crossing over to vote in another state's elections. A limitation on campaign funds from nonresidents might be upheld for the same reason.



own name. Citing one example, the city noted that on a measure relating to municipal ownership of electric facilities for the city, certain citizens formed a "Southwest Berkeley No No No on W Committee;" yet, Pacific Gas and Electric Company provided *all* of the Committee's contributions.<sup>118</sup> The title was even more deceptive than it first appeared, because Southwest Berkeley is the minority section of the city.<sup>119</sup> The Supreme Court's high, if not unclear, standards and the city's own unusual experience with money in ballot proposition campaigns greatly complicated Berkeley's arguments concerning the impact of money on citizen confidence and participation in ballot propositions. Although Berkeley cited evidence of decline in individual contributions and in voter turnout, and noted the greater number of victories by the side spending the most money, no comprehensive analysis supported the proposition that the spending of money clearly impacts upon ballot proposition campaigns in a predictable manner.<sup>120</sup> The city's objective in limit-

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118. Brief for Appellee at 24, *CARC*, 454 U.S. 290.

119. Oral Argument for Appellee at 30-34, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (argued by Natalie West, Berkeley City Attorney, on Oct. 13, 1981). Deceptive committee names that mask big contributions are common. For example, in Missouri, in 1980, opponents to a nuclear safety initiative advertised themselves as a "citizens committee of over 25,000 Missouri men and women," and later as a "committee of over 1,000 Missouri scientists and physicans." There was never any evidence of who these 25,000 or 1,000 people might be, and of the total of \$1,790,157 contributed to the opposition campaign, \$1,782,784, or more than 99.5%, came from business sources. *Id.* at 64-65; Lydenberg, *supra* note 9, at 4-5.

120. Appellants charged that "Berkeley merely recites selective statistics in an attempt to show that fewer people are voting now than in certain years past." Appellants' Reply Brief at 7, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). The appellants noted that the appellees cited statistics showing that Berkeley voter participation decreased from 65.9% in April 1973 to 45.6% in April 1981. Appellants argued that the appellee discriminately selected the statistics and that in 1953 the turnout was only 38.8% increased to 83.3% in 1963, and decreased to 43.1% in 1979. *Id.* at 8-9. Although Berkeley cited statistics of a *statewide* decline of 58% in contributions by individuals between 1978 and 1980 that both the city and the California Fair Political Practices Commission found alarming, appellants argued that the difference resulted from having fewer hotly contested issues on the ballot in 1980. *Id.* at 9. Although Berkeley conceded that there was not a direct correlation between money spent and the outcome of a municipal ballot proposition, the city cited the "widespread public perception that large amounts of money skew the outcome of ballot measure campaigns" and noted that several recent studies supported these perceptions. Brief for Appellee at 11, *CARC*. Appellants pointed out that in Berkeley between 1977 and 1980, the side spending the most money succeeded in only three of the six contested ballot measures in which contributions exceeded the \$250 limit. Appellants Reply Brief at 9, *CARC*. These rebuttals called attention to the lack of strong empirical evidence relating specifically to the City of Berkeley that might have bolstered its case and to the possible uniqueness of Berkeley's experience with money on ballot proposition campaigns. *See infra* notes 130-31 and accompanying text. Of course, the Field Institute data was not available at the time. *See* FIELD INSTITUTE, *supra* note 90 and accompanying text.

ing contributions rather than expenditures was to avoid having the Court strike down the ordinance under the *Bellotti* holding that prohibitions on expenditures are invalid. Berkeley expected, or at least hoped, that the Supreme Court would find its ordinance a less severe infringement upon first amendment rights, because, in *Buckley*, the Court had found that a contribution limitation "entails only a marginal restriction upon the contributor's ability to engage in free communication."<sup>121</sup> In *California Medical Association v. Federal Election Commission*,<sup>122</sup> a plurality of the Court held that "'speech by proxy' is not the sort of . . . advocacy that this Court in *Buckley* found entitled to full First Amendment protection."<sup>123</sup>

The majority in the *CARC* decision, however, made no distinction between expenditures and contributions on ballot propositions and merely stated that limitations on either are unconstitutional.<sup>124</sup> Under these heightened standards, Berkeley failed to present sufficiently convincing empirical evidence on the issue of undermined citizen confidence.<sup>125</sup> In response to the city's argument

121. 424 U.S. at 20-21.

122. 454 U.S. 182, 196 (1981).

123. *Id.* at 196.

124. "[R]eferences to *Buckley* relate to contributions to candidates and their committees; the case before us relates to contributions to committees favoring or opposing ballot measures." *CARC*, 454 U.S. at 299 n.6.

125. What keeps the issue of evidence unclear and tantalizing, even after *CARC*, is that the Court keeps referring to empirical evidence as if it could make a difference, although none of the majority gives any clear suggestion of what would constitute satisfactory proof. This indicates that (1) better evidence would convince some of the justices, or (2) some of the justices are using the lack of empirical evidence as an excuse for striking down the restrictions, and/or (3) some of the justices are uncomfortable and uncertain of what social science evidence can and cannot convincingly "prove." Writing for the majority, Chief Justice Burger stated that "the record in this case does not support the California Supreme Court's conclusion that [the Berkeley statute] is needed to preserve voters' confidence in the ballot measure process." *CARC*, 454 U.S. at 299. Does this imply that a more detailed record might support such a conclusion or that the Court would allow another town with a different record to use campaign finance reform methods that Berkeley could not use? See *infra* note 132. Justice Marshall stated: "[I]f I found that the record disclosed sufficient evidence to justify the conclusion that large contributions to ballot measure committees undermined the 'confidence of the citizenry in government' . . . I would join Justice White." *CARC*, 454 U.S. at 301 (Marshall, J. dissenting) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978)). Justice Blackmun, joined by Justice O'Connor, stated in his concurring opinion that "Berkeley has neither demonstrated a genuine threat to its important governmental interests nor employed means closely drawn to avoid unnecessary abridgement of protected activity" and "[t]he city's evidentiary support in this case is equally sparse." *CARC*, 454 U.S. at 302-03 (Blackmun, J., concurring). Thus, these justices have indicated that if a comprehensive record existed showing that money undermined citizen confidence in the process, they would be convinced of the need for campaign finance limitations.

Justice White, alone in voting to uphold the Berkeley statute, seemed to acknowledge

that the measure was justified on the ground of disclosure, the

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the barriers that the majority erected to prevent empirical evidence from convincingly resolving the dispute. Justice White stated: "While it is not possible to prove that heavy spending 'bought' a victory on any particular ballot proposition, [the] widespread conviction in legislative halls, as well as among citizens, that the danger is real" is sufficiently convincing. *CARC*, 454 U.S. at 307, 311 (White, J., dissenting).

With these signals from the Court, legal scholars seeking to interpret the decision continued with views as diverse as the justices. On one end of the spectrum is the strong statement that the *CARC* decision "lays to rest the possibility that *Buckley* and *Bellotti* together would countenance the preservation of confidence in government as a compelling state interest that could justify campaign spending controls." *The Supreme Court*, 1981 Term, 96 HARV. L. REV. 62, 165 (1982). On the other end of the spectrum is the more carefully pessimistic statement that a narrowly drawn statute must demonstrate "a high correlation, if not causal relationship, between the more financially endowed sides in ballot measure campaigns and the winning sides of those elections and show by means of surveys or other evidence that the faith of the people in the integrity of elections has been gravely undermined." Hoffman, *Legislative Regulation of Campaign Financing After Citizens Against Rent Control v. City of Berkeley: A Requiem*, 36 U. MIAMI L. REV. 563, 582 (1982) (footnotes omitted). Commentator Hoffman calls these tests the "virtually insurmountable barriers that have been constructed piece-by-piece by the Burger Court . . ." *Id.* at 582. Other pessimistic commentators have stated: "[T]he *CARC* decision makes it clear that the political system will have to be virtually crumbling before a political spending restriction will be upheld in the ballot measure setting." Lansing & Sherman, *The "Evolution" of the Supreme Court's Political Spending Doctrine: Restricting Corporate Campaign Contributions to Ballot Measure Campaigns After Citizens Against Rent Control v. City of Berkeley, California*, 8 J. CORP. L. 79, 108 (1982).

For other commentators with more optimistic viewpoints, see Baldwin G. Karpay, *Corporate Political Free Speech: U.S.C. § 441b and the Superior Rights of Natural Persons*, 14 PAC. L. J. 209, 231 n.149 (1983) (concluding that Justices Marshall, Blackmun, O'Connor, White, and Rehnquist would uphold narrowly drawn corporate campaign restrictions, provided the evidence is "(1) a specific study focusing on the jurisdiction enacting the statute, or (2) a study specifically relied on by a legislative body in enacting the corporate restrictions"); Nicholson, *supra* note 47, at 741 ("[I]f the majority opinion in *Berkeley* is read narrowly, or if one or more Justices stray from the Chief Justice's fold, a majority of the Court could uphold limitations on contributions in ballot measure elections if an adequate record is presented showing loss of voter confidence caused by large contributions."); Note, *supra* note 24, (Despite writing before the *CARC* decision, the author went the furthest in suggesting how a study could amass the necessary empirical evidence.). Although Nicholson believes presenting an adequate record will be "a very difficult task," she exhorts researchers to "continue to amass statistics showing domination by large contributors," especially "to connect the alienation of voters to the perception that large contributors dominate such elections." Nicholson, *supra* note 47, at 741-42.

Adding to the confusion over what the Burger Court will or will not allow as convincing evidence, Archibald Cox agrees with Hoffman, Lansing, and Sherman on the difficulty of establishing an empirical record that convincingly demonstrates the impact of money, but he nonetheless believes this may not be necessary:

Although it would seem difficult, if not impossible, to prove categorically the factual connection that Justices Marshall, Blackmun and O'Connor found not to have been demonstrated, it seems quite probable that judicial understanding may change as public comprehension of the evil increases. Counsel advising legislative committees and litigating these constitutional issues may well be able to establish stronger records by expert testimony and the recitation of findings in committee reports and findings by a judge upon evidence.

Court held that Berkeley's current disclosure statute already satisfied the voters' need for knowledge on the sources of campaign funds.<sup>126</sup>

Berkeley's failure before the Supreme Court heightened the need for new arguments and new evidence to achieve campaign finance reform. New approaches to the general issue of undue influence of money in ballot proposition campaigns are necessary, because Berkeley's method, which was an attempt to adhere to the Court's escalating and unclear standards, was already quite limited. The city's original campaign finance reform law of 1974 had been much more comprehensive. It more effectively would have prevented vastly disparate campaign spending. The city justified the 1974 ordinance by what it thought was the constitutional goal of providing greater equality in campaign participation by restricting monied interests. But, by dropping both corporate spending prohibitions and general expenditure limitations in response to court rulings, Berkeley, by 1981, had had much of the original justification for its law declared unconstitutional. Because of its weakened ability to fulfill its original purpose, the Berkeley ordinance was vulnerable to the Court striking it down.<sup>127</sup>

Even if the law had survived the Court's scrutiny, however, it would have been merely one step toward balancing the unequal impact of spending on ballot proposition campaigns. For example, San Francisco, with its own contribution limitation of \$500, had found that committees still found ways to raise considerable sums of money.<sup>128</sup> Opponents defeated the rent control initiative of 1978

Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395, 418 (1982).

126. Chief Justice Burger confidently announced that "[h]ere, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure . . ." *CARC*, 454 U.S. at 298. Burger, however, also noted that campaign committees "often adopt seductive names that may tend to conceal the true identity of the source." *Id.*; see D. HENSLER & C. HENSLER, *supra* note 63; *infra* text accompanying notes 135-41. The Berkeley disclosure ordinance was in fact stricter than many because it required the city to publish the names of contributors in city newspapers twice in the last week of the election.

127. Burger commented: "To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *CARC*, 454 U.S. at 296. Noting this aspect of the law, Justice White stated in his dissenting opinion that it is "tailored to the odd measurements of *Buckley* and *Bellotti* . . . It is for that very reason perhaps that the effectiveness of the ordinance in preserving the integrity of the referendum process is debatable." *Id.* at 303-04 (White, J., dissenting).

128. Levering, *How the Landlords Stretch the \$500 Spending Limit*, San Francisco Bay Guardian, Oct. 26, 1978, at —. The newspaper reporter uncovered a memo from consul-

by contributing more than a quarter of a million dollars. They also spent money directly, outfinancing the tenant proponents by twenty-five to one.<sup>129</sup> This illustrates the inherent weakness of laws imposing contribution limitations.

At the same time that San Francisco voters narrowly defeated rent control, Berkeley voters approved a similar rent rebate ordinance.<sup>130</sup> Coming only one year after the election from which the *CARC* case stemmed, support for some type of rent control had grown because the passage of Proposition 13 statewide had drastically lowered property taxes and afforded landlords significant savings. The rent rebate proposition in Berkeley passed even in the face of the city's inability to enforce its contribution limitation. Because of successful litigation, opponents of rent control were able to contribute over \$330,000 to the campaign, nearly all of it in amounts of over \$250. Proponents, on the other hand, had less than \$8,000 to spend.<sup>131</sup> The success of the rent control proposition, despite tremendous financial opposition, demonstrates that although significant spending often leads to defeat, the large scale expenditure of money does not always mean defeat.<sup>132</sup>

In Santa Cruz, another California city with a contribution limitation, the Lockheed Corporation simply decided to bypass the limit through direct expenditures and defeated a ballot proposition

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tants for the opposition that encouraged contributors to maximize their gifts by making contributions in their own names, spouse's name, adult children's names, corporation name, and partnership names. The memo concluded: "If you are a partner in a dozen different partnerships, all twelve partnership may contribute the full amount as partnerships." *Id.* at

129. See Levering, *How Did Prop. U Lose in a City with 70% Renters?*, San Francisco Bay Guardian, Nov. 16, 1978, at \_\_\_. The newspaper reporter states that "money was the major factor in [the] defeat, according to most people we contacted who were familiar with the campaign." The measure lost by a narrow margin—52.7% to 47.3%.

130. *Id.*; see also BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION, REPORT ON CAMPAIGN SPENDING IN BERKELEY BALLOT MEASURE CAMPAIGNS 1977-1980 (May 13, 1981) (noting that the rent tax relief measure passed by a 58.1% margin).

131. *Id.* at 1, 13-17. The contribution limitation was not in force between 1977 and 1980.

132. See *supra* notes 75, 120. As California officials involved in the case were aware, Berkeley's experience with the impact of money on ballot measures has been different from that of San Francisco or the state as a whole. Interviews with city officials in Berkeley and San Francisco (April, 1982). Monied interests have not dominated ballot measures in Berkeley as much as elsewhere. A possible explanation is perhaps that the city is a much smaller community than San Francisco or the state itself, thereby allowing easier and more effective campaign responses to monetary influence. Another possible explanation is perhaps that Berkeley is a more highly educated community than most. In addition, citizens voted on the issue of rent control repeatedly, so that over time voters became familiar with the issue. Although the monied position won the vote in 1977, it lost the next two votes.

that would have banned the production or testing of nuclear weapons in the county. In spending \$213,685 against the proposal, Lockheed was the only financial opponent of the measure, and it outspent proponents, who relied on small contributions, by more than five to one.<sup>133</sup> These recent examples from California municipalities indicate that as a method of campaign finance reform on ballot propositions, the contribution limitation is not necessarily an effective prophylactic for undue influence in ballot proposition campaigns, even if the Supreme Court had upheld its constitutionality. The opponents avoided the limitations by disbursing the gifts through various family members and business partnerships and through direct expenditures. *CARC* and other Court decisions reduce the importance of contribution limitation weaknesses because in these decision the Court has held that these limitations are unconstitutional. Nonetheless, reformers who still search for effective and yet constitutional ways to limit the impact of money on ballot propositions, should not overlook these loopholes for avoiding compliance with limitation ordinances.<sup>134</sup>

The most recent judicial struggle has occurred in Michigan. Because of the uniqueness of the state statute and the quality of evidence presented in the case, a potential exists for limited controls on ballot proposition contributions to withstand judicial scrutiny. Michigan seems to be the last state still enforcing contribution limitations on ballot propositions.<sup>135</sup> The statute applies only

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133. Lydenberg, *supra* note 9, at 90-94. Passage of the measure would likely have forced a local Lockheed plant that manufactures an explosive detonator, after a five-year grace period, to convert or shut down.

134. Lowenstein, *supra* note 13, at 599-600. Professor Lowenstein argued that contribution limitations would still be helpful because of increased disclosure and because the inability to avoid disclosure of massive spending might discourage some groups from contributing.

135. The Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388, *codified as amended* at MICH. COMP. LAWS ANN. § 169.201-82 (West Supp. 1984-1985) (MICH. STAT. ANN. § 4.1703(1)-(82) (Callaghan 1977)). Section 54(3) of the Act provides in part:

A corporation or joint stock company, whether incorporated under the laws of this or any other state or foreign country, except a corporation formed for political purposes, shall not make a contribution or provide volunteer personal services . . . in excess of \$40,000, to each ballot question committee for the qualification, passage, or defeat of a particular ballot question.

1976 Mich. Pub. Acts 388, § 54(3).

Oklahoma, and perhaps other states, have laws on the books limiting contributions by individuals, corporations, or unions. In Oklahoma, no more than \$5,000 can be contributed to committees working for or against a "state question." OKLA. STAT. tit. 26, § 15-1101 to -112 (1981). It is unclear whether contributors obey the law, but no one has challenged the law or attempted to judicially enforce it. See Raley, *Constitutional Law: A Price Tag on Expression: The Constitutional Infirmities of Oklahoma's Ballot Measure Contribution Limitation*, 36 OKLA. L. REV. 683 (1983) (arguing that the law is unconstitutional in light of *CARC*

to corporations and limits each corporation to \$40,000 in contributions per ballot proposition, with no limit on direct corporate expenditures or individual contributions or expenditures. In 1982, the major utility companies in the state challenged the present law and in so doing spent and contributed more than \$6.2 million on three propositions relating to regulation of the utility companies.<sup>136</sup> Aware of the state law, the utilities avoided the law by directly expending money on political activities not visible to voters, such as paying directly for pollsters, salaries, and overhead expenses in the campaigns. For funding advertising, however, the utilities set up conduit committees around the state that funneled money into "Citizens for Michigan Jobs and Energy" and "Voters for Responsible Regulation." Despite the fact that the committees shared the same treasurer and address, the appearance of multiple campaign committees enabled the companies to contribute far more than \$40,000 each on each ballot proposition.<sup>137</sup>

When the state realized what was happening, the Secretary of State charged the utilities with violating the intent of the law. In an administrative settlement, the utility companies agreed to pay the state \$130,500 in settlement and agreed not to engage in such activity again.<sup>138</sup> But shortly thereafter, the companies brought

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and other Court decisions).

136. *Michigan State Chamber of Commerce v. Austin*, 577 F. Supp. 651 (E.D. Mich. 1983). Other parties in the case included James Barrett, President of the Michigan State Chamber of Commerce, and the three large utility companies in the state: Consumers Power Company, Detroit Edison Company, and Michigan Consolidated Gas Company. The figure of \$6.2 million is derived from official campaign statements filed with the Secretary of State.

The three propositions were: 1) Proposition D (opposed by the utilities), eliminating automatic pass through rate increases, allowed consideration by the Public Service Commission of only one requested increase at a time; 2) Proposition H (supported by the utilities and placed on the ballot by the Michigan legislature) considered a mild alternative to Proposition D; and 3) Proposition G (opposed by the utilities because they preferred the current system of appointment by the governor) provided for direct election of the members of the state's Public Service Commission.

137. Some of the well-known ways the utilities operated involved going "to great lengths to separate themselves from the two campaign committees" that they had set up. *Utilities Use Subtle Offense To Win at the Polls*, Detroit Free Press, Nov. 7, 1982, at A1, A6. "From beginning to end the committees carefully avoided using the word 'utility' when describing their supporters" because their polling results indicated considerable voter concern over rising utility costs; 75% of the electorate considered the increases unfair. *Id.*

138. Wall Street Journal, Mar. 10, 1983 at 7, col. 3. Initiative News Report, Mar. 25, 1983, at 2-3. Michigan's attempt to plug a potential loophole may have strengthened the chances that the courts will find the act constitutional. In *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), *aff'd sub nom. Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982), the Fifth Circuit Court of Appeals affirmed the striking down of a Florida law limiting contributions to ballot measure committees. In ruling against the state's argument that restrictions on the size of contributions are necessary to promote adequate disclosure of

suit charging that the law itself was an unconstitutional violation of the first amendment, as interpreted in *Bellotti* and *CARC*. At the federal district court level, Judge Feikens proceeded in a manner helpful to proponents of reform. Although precedents seemed to weigh against the constitutionality of the act, he observed that courts had held such laws unconstitutional because of the absence of evidence that restrictions prevented undermining the citizenry's confidence in government. Judge Feikens stated: "The teachings of *Bellotti* and *Berkeley* indicate that in order for contribution limitations to pass constitutional muster, the state must generate an evidentiary record which clearly demonstrates the compelling need for such limitations."<sup>139</sup> With that, he gave Michigan the opportunity to build an evidentiary record in support of its law. The state obtained polling and campaign data on the 1982 election. Legal scholars and political analysts examined this evidence and gave expert testimony in depositions supporting the Michigan law.<sup>140</sup> The state gathered evidence showing the inadequacy of current disclosure laws in assuring voter awareness of the source and amount of campaign expenditures. Further, this evidence suggested voter unawareness may have been responsible for the utility companies' victory at the polls.

Equally important, the state examined the utility companies' political motive for seeking the right to make unlimited campaign contributions by contrasting those activities supported by direct expenditures with those supported by contributions funnelled through campaign committees. Do corporate efforts to protect their right to contribute stem from a concern for the first amendment right of "freedom of association" to express views that otherwise would be "faint or lost?"<sup>141</sup> Or do corporations fight for this

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campaign financing, the Fifth Circuit commented:

The primary effect of the statutes is to compel large contributors who support or oppose a referendum issue to form multiple partisan committees, each of which can receive the maximum amount from a single contributor under the statute. These multiple partisan committees provide no additional disclosure; the public still sees only the innocuous names of the different committees, and not the identities of the underlying contributors.

*McCrary*, 621 F.2d at 200.

139. *Michigan State Chamber of Commerce v. Austin*, No. 83-CV-2263-DT (E.D. Mich. 1983) (interlocutory order granting continuance to complete discovery) (final opinion appears at 577 F. Supp. 651).

140. The author was an expert witness in this case.

141. In *CARC*, Justice Burger defined the "value" of "volunteer committees" as the "collective effort individuals can make their views known when, individually, they would be faint or lost." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981).



right to conceal their campaign involvement and prevent information from reaching the public? Michigan argued the latter.

Because the Michigan law was in force during the 1982 elections, the state can compare and document the different campaign uses of money laundered through contributions and of money spent directly by the utilities. With this evidence available to support its narrowly drawn statute, Michigan may have the best chance yet of sustaining its contribution limitation law because the evidence directly refutes the Courts' reasons in *CARC* for protecting the right of unlimited contributions. Michigan's evidence may convince a majority of the Court of the true reasons powerful financial interests fight the limitation of campaign contributions.<sup>142</sup>

Yet, the Michigan law still allows individuals, including corporate executives, to contribute unlimited sums, and all those corporations with the financial means retain the right to spend unlimited amounts on ballot issues. A victory for Michigan is thus but a step toward limiting the influence of the financially powerful in direct democracy campaigns.

#### V. OTHER AVENUES TO REFORM

The Michigan case has only limited applicability to the general phenomenon of financial domination of ballot issue campaigns. Difficulty exists both with conducting a study that could meet the Court's unclear standards and with compiling evidence that would overcome the Court's stated reasons for protecting the right to make unlimited campaign contributions. The values of the justices<sup>143</sup> may lead to their rejection of new arguments or evidence in support of directly limiting the expenditure of money in ballot issue campaigns. Thus, persons believing that the expenditure of large sums of money has too great of an influence upon ballot pro-

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Note that in *CARC*, Burger is speaking only of individuals contribution limitations in ballot measure campaigns. Corporations would seem quite different because their views would not be "faint or lost" because of the lack of money to spend directly. The \$40,000 limit concedes that corporations may spend more on political campaigns if they wish.

142. On September 28, 1984, Judge Feikens ruled that the case was not yet ripe for decision because no corporation had tried to contribute more than \$40,000 to a proposition on the ballot in Michigan in 1984. Ruling in favor of the state, he held that "[i]n these circumstances, it is apparent that Plaintiffs are motivated not by a desire to engage in first amendment activity, but by the desire to obtain a declaration that the challenged statute is unconstitutional." *Michigan State Chamber of Commerce v. Austin*, No. 83-CV-2263-DT (E.D. Mich. 1983) (final opinion appears at 577 F. Supp. 651). He therefore did not address the merits of the argument. Plaintiffs appealed.

143. These values seem to include such broad philosophical goals as "the right to what money can buy." L. TRIBE, *supra* note 13; *see also* Shockley, *supra* note 1.

position campaigns need to explore other avenues beside prohibitions or limitations upon campaign contributions and expenditures. No alternate approach will be easy, but several alternatives seem to follow logically from earlier court opinions.

First, one feasible approach may be to require more stringent disclosure of campaign contributions without restricting the amount of money that can be contributed or spent in campaigns. The evidence now being accumulated demonstrates that voters often are unaware of the principal donors to campaigns or the magnitude of funds being spent on ballot propositions campaigns.<sup>144</sup> If the principal donor(s) to committees had to be disclosed in all committee advertising, the average voter would be more likely to know the source of campaign funds than if statements merely had to be filed periodically with a secretary of state or city official. Defining "principal donor(s)" and enforcing their disclosure even on advertisements as short as thirty-seconds would present difficulties.<sup>145</sup> If states require adequate disclosure at the time of the advertising, then voters who view "negative cost" advertising<sup>146</sup> will be better able to evaluate the hidden agendas that so often accompany ballot proposition campaign advertisements. Viewers will be able to associate the argument with the sponsor in

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144. There are still surprising lapses in our disclosure laws. See *Schwarz v. Romnes*, 495 F.2d 844 (2d Cir. 1974); Lydenberg, *supra* note 55; *infra* note 157. Ruth Jones found that because state law governs state election financing, considerable variation exists among states in their reporting requirements and the quality of the data that campaigners report. Thus, comparative analysis is extremely difficult. JONES, *Financing State Elections*, in *MONEY AND POLITICS IN THE UNITED STATES* 172, 209 (M. Malbin ed. 1984). Moreover, the problems in garnering good disclosure information seem to be getting worse, not better: "In state after state, agencies that prepare and publish the official reports . . . are under attack." *Id.* at 209. In many states, "there is neither the mandate nor the resources needed to analyze and report the data." *Id.*; see also *Issue Campaigns*, 2 INITIATIVE Q. 4, 9 (1983) (discussing the difficulties of comparative analysis of financing, including the problem that "many campaigns involve large unreported costs").

145. Oral Argument for Appellee at —, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (argued by Natalie West, Berkeley City Attorney, Oct. 18, 1981); see also Nicholson, *supra* note 47, at 721 n.204.

146. "[S]ome information has a negative cost in that it would take a greater expenditure of resources for the voter to avoid the information than to absorb it." Lowenstein, *supra* note 13, at 560. Professor Lowenstein comments: "It would take heroic efforts, and thereby be prohibitively costly, for a voter to avert his eyes from all the slogans on billboards or in large type in full-page newspaper ads, or to change stations every time a 30-second spot is presented." *Id.* at 561; see also Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494 (1981). Professors Patton and Bartlett call this "subsidized information," noting that someone else wishes the voters to have this information and is "willing and able to pay the voter's costs of acquisition." Patton & Bartlett, *supra* note 146, at 504.

a way that rarely happens now.<sup>147</sup> Simultaneous disclosure also would allow voters to assess the credibility of the arguments before they form their perception of the issues.<sup>148</sup> In such a way, voters who watched only thirty-second and sixty-second spots could have learned, for example, that "Californians for Common Sense" was in fact composed of non-California tobacco companies with a special interest in defeating the proposition restricting smoking in enclosed public places,<sup>149</sup> or that AMAX, a mining company that stood to pay millions of dollars in extra state taxes if a tax reform initiative passed, was the primary supporter of a group formed to challenge the initiative—"Coloradans for Responsible Taxation."<sup>150</sup> Apparently, political committees deliberately disguise their names to avoid disclosure of the true financial interests involved in funding ballot proposition campaigns, and the committees expend considerable effort in arriving at the most electorally potent name.<sup>151</sup>

Efforts to stop such deception received a boost during San Francisco's nonsmokers' rights referendum campaign in the fall of 1983. Supporters of the measure won an unprecedented victory after persuading one television station and two radio stations to refuse opposition advertising unless it disclosed that the tobacco industry funded the opposition committee ("San Franciscans Against Government Intrusion").<sup>152</sup> Vigorous enforcement of sec-

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147. Of course, disclosure would not necessarily prevent big spending, any more than the contribution limitations in Santa Cruz prevented Lockheed from directly spending nearly a quarter of a million dollars. Lydenburg, *supra* note 9, at 90-94.

148. Nicholson, *supra* note 47, at 711.

149. See Lowenstein, *supra* note 13, at 537-40, 631-32; Lydenberg, *supra* note 9, at 44-49; Lydenberg, *supra* note 66, at 30-34.

150. See Shockley, *supra* note 62, at 20-29.

151. For example, the tobacco industry employed multiple polling to determine whether California voters would give less credence to the advertisements if they were aware that the tobacco industry paid for the political advertisements against the Smoking and No Smoking Sections initiatives. The polling results revealed that they would in fact be more likely to vote *for* the proposition merely because the tobacco industry opposed it. The results were significant. In the 1980 poll, 67.2% of the California public said they would be *less* likely to vote for a proposition endorsed by the tobacco industry. Only 4.2% would be more likely to vote for it. Yet, if "Californians Against Regulatory Excess," the tobacco industry's devised name for the 1980 campaign, endorsed a measure, 70.9% would be either indifferent or more likely to vote for the measure, while only 28.9% would be less likely to support the measure. Brief for Petitioner at 4, 23, *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1982).

152. Initiative News Report, Oct. 28, 1983, at 3. Section 317 of the Federal Communications Act requires broadcasters to reveal the true sponsors of political advertisements, but how sponsorship is defined and how diligently station managers should attempt to verify the identity of sponsors is subject to dispute. 47 U.S.C. § 317 (1982). For more on the FCC's

tion 317 of the Federal Communications Act requiring broadcasters to reveal the true sponsors of political advertisements, not those of front organization sponsors with misleading "seductive names,"<sup>153</sup> would be an important step toward more effective campaign funding disclosure. It would also remove the primary incentive monied groups now have for making contributions rather than direct expenditures. But pressure within the Federal Communications Commission is for less regulation, not more;<sup>154</sup> therefore, effective enforcement of section 317 will have to await changed circumstances and/or new appointees.

Second, it follows logically from the Court's statement in *Bellotti* that corporate shareholders have the right to know the political causes that their corporations spend money on. In *Bellotti*, the Court stated: "Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."<sup>155</sup> If, as the Court suggested in *Bellotti*, shareholders can simply withdraw their capital from a corporation when they disapprove of the political activities of the corporation,<sup>156</sup> they should know what those political activities are. In most instances, however, shareholders are not informed of corporate political activity and find it is difficult to get the information when they try.<sup>157</sup> A 1980 staff report by the Securities and Exchange Commission stated that shareholders "must have infor-

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regulations, including guideline amorphousness and lack of enforcement, see Brief for Petitioner at 4, 23, *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1982); Lowenstein, *supra* note 13, at 599-600, n.353.

153. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

154. See *Heffron*, *infra* note 176.

155. *Bellotti*, 435 U.S. at 794.

156. *Id.* n.34. For a discussion of this part of the *Bellotti* decision, see Propp, *The SEC's Shareholder Proposal Rule: Corporate Accountability at a Crossroads*, 11 SEC. REG. L.J. 99, 111-13 (1983). Propp, attorney-advisor for the State Department, argues that Justice Powell did not clarify what procedures were possible for corporate democracy and failed "to distinguish between accountability for economic and for political activities." *Id.* at 122.

157. The Council on Economic Priorities (CEP) asked thirteen corporations that were active in ballot proposition campaigns whether they informed shareholders about the amount of money that the company contributed to campaigns. The CEP also asked what management level made the decisions on whether and how much to contribute and how much in fact the company had contributed over the past five years. Ten of the thirteen corporations declined to respond. One corporation responded by saying that the answers to the questions were "confidential" and that aside from reporting contributions when the law required disclosure, it was "simply not information that we can release." Lydenberg, *supra* note 9, at 36-37. Another corporation responded that its contributions were "not the sort of information which [we] or to our knowledge, other companies ordinarily make available to stockholders." *Id.*; see also *Patton & Bartlett*, *supra* note 146, at 510 n.32 (discussing SEC regulations).

mation on 'Bellotti-type' corporate expenditures in order to evaluate" the corporation.<sup>158</sup> The report suggested that the SEC also consider "whether disclosure of corporate expenditures for political activities should be required by the Commission in the annual report to shareholders or the proxy statement."<sup>159</sup>

The SEC neither has taken public action on the 1980 suggestion by its staff nor publicly responded to a petition filed in 1980 by the Institute for Public Representation of the Georgetown University Law Center. The petition requested the SEC to require corporations to disclose information about money spent on political activities to shareholders, including money spent by political action committees (PACs).<sup>160</sup> Undoubtedly, the SEC has the authority to require this disclosure as a necessary response to *Bellotti*, but getting the SEC to act is another matter entirely.<sup>161</sup>

The law is presently in a paradoxical, contradictory state that benefits corporations. The court in *Bellotti* excluded much state regulation of corporate political activity on the false belief that procedures for "corporate democracy" existed and could be used in

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158. DIVISION OF CORPORATION FINANCE, SECURITIES AND EXCHANGE COMMISSION, 96TH CONG., 2D SESS. STAFF REPORT ON CORPORATE ACCOUNTABILITY B151 196 (Comm. Print 1980).

159. *Id.* at 200. For further ideas on the need for greater corporate responsibility to stockholders, see Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981); Curzan & Pelish, *Revitalizing Corporate Democracy: Control of Investment Managers' Voting on Social Responsibility Proxy Issues*, 93 HARV. L. REV. 670; Nicholson, *supra* note 47, at 721 n.204; Comment, *supra* note 35, at 145, 172-75.

160. Petition for an Amendment of Rule 14a-3 to Provide for Corporate Political Activities to Shareholders, by the Institute For Public Representation of Georgetown University Law School (IPR) to the Securities and Exchange Commission, File No. 4-235 (July 21, 1980). In June 1982, the Institute also petitioned the SEC to require that corporations report political expenditures for ballot proposition campaigns in quarterly and annual reports to stockholders. The petitioners noted that corporations not only withheld this information from stockholders, but also at least one corporation nearly lied to deny its involvement in a nuclear power campaign. (A draft of the petition is on file with the author.) See also Propp, *supra* note 156, at 124-26 (discussing the IPR petitions).

161. Due to a recent turn of events at the SEC, the chances of furthering shareholder rights to information have diminished or vanished. See NEWSWEEK, Mar. 1, 1982, at 61. It is difficult to imagine the SEC requiring corporations to report campaign expenditures to their shareholders when it will not even require corporations to reveal criminal behavior to their shareholders. For a discussion of SEC confusions and inconsistencies in the wake of *Bellotti*, see Propp, *supra* note 156.

Theoretically, state governments could require corporations to inform their shareholders of corporate political activity. The least common denominator syndrome exemplified by the State of Delaware suggests, however, that action by individual states would not be as effective and is unlikely to occur. For a discussion of Delaware's impact on corporate chartering, see R. NADER, M. GREEN, & J. SELIGMAN, *TAMING THE GIANT CORPORATION* 50-61 (1976).

place of state regulation. Since then, the SEC has refused to require that corporations practice the "corporate democracy" spoken of by the Supreme Court.

A third approach could require either (1) that a majority of shareholders approve any proposed corporate political expression, possibly with a provision giving a special dividend to objecting shareholders;<sup>162</sup> or (2) that unanimous shareholder approval precede all political or noncommercial corporate speech.<sup>163</sup> The shareholder approval procedure need not restrict corporate activity too much, because the views of many shareholders would probably be congruent with management decisions.<sup>164</sup> To require majority or unanimous shareholder approval before corporate treasury funds could be spent on political campaigns would be admirable. Professor Nicholson has appropriately noted, "Society does not benefit when dissenters are misrepresented as favoring a policy or candidate they actually oppose."<sup>165</sup>

Fourth, governments that allow direct democracy could subsidize ballot proposition campaigns by matching funds and direct grants, or by a voucher system.<sup>166</sup> Many states and the federal gov-

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162. See *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 173-74 (1978). The article also suggests that states only permit corporate political expenditures that corporations finance by voluntary shareholder contributions. Professor Victor Brudney suggests the same concept in greater detail. See Brudney, *supra* note 159.

163. See Brudney, *supra* note 159. The unanimity requirement protects "the rights of the stockholder against a particular form of 'waste' that is singled out not for its communicative capacity, but because it is more difficult to detect than other forms of [management] waste, more likely to be used to implement management's personal views and less likely to create assets that stockholders can recover from errant management." *Id.* at 251-52. Instead, Brudney suggests, stockholders could band together in a voluntary structure "parallel to the business venture, to express themselves on the same subject and in the same way as the 'entity' might have done." *Id.* at 257.

164. Shareholder contributions would presumably be voluntary, but at least one author has expressed fears over just how "voluntary" management giving can be when the corporation will know who refused to contribute. See Mayton, *Politics, Money, Coercion, and the Problem with Corporate PACs*, 29 EMORY L.J. 375 (1980). If contributions were to become truly voluntary, the "free rider" problem could cause a drop in corporate financial activity on ballot proposition campaigns. If so, corporations would confront problems no worse than public interest groups face, because they must rely on voluntary contributions to support their activities. For a more thorough discussion of the free rider problem, see Patton & Bartlett, *supra* note 146; *infra* note 198.

165. Nicholson, *supra* note 13, at 1005. The Court has drawn a revealing distinction between concern for the rights of minority shareholders and the rights of union members who are opposed to particular political activity. See *Bellotti*, 435 U.S. at 812-20 (White, J., dissenting); Patton & Bartlett, *supra* note 146, at 511 n.35; Comment, *supra* note 35, at 170 n.136.

166. In a voucher system, the state gives voters vouchers worth a specified amount to spend on political campaigns of their choice. For more information, see D. ADAMANY & G.

ernment<sup>167</sup> have already instituted fund and grant matching programs.<sup>168</sup> The manner of support would vary, depending upon whether the government placed emphasis upon minimal support, or upon the maximum expendable amount as now occurs at the presidential level.<sup>169</sup> Political and operational problems would result and require resolution. One of the most difficult problems would be to convince legislators and taxpayers to allocate funds for the program when revenues are declining.<sup>170</sup> It would be even more difficult to devise such a system at the municipal level because localities do not have as much flexibility with revenue sources as state and federal agencies do.<sup>171</sup>

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AGREE, POLITICAL MONEY, Chs. 10-11 (1975). No states yet have adopted a voucher system. One of the main criticisms of the procedure is the high cost of administering the program. For a critical response, see Peck & McDowell, *infra* note 167, at 944 (quoting SPECIAL COMMITTEE ON ELECTION REFORM, AMERICAN BAR ASSOCIATION, SYMPOSIUM ON CAMPAIGN FINANCE REGULATION (1975)).

167. Seventeen states funded general elections for one or more statewide offices in 1981. See Bone, *Campaign Financing in the States: Broadening the Base*, 9 WASH. PUB. POL'Y NOTES 1 (Winter, 1981); Peck & McDowell, *Dollar Democracy: An Analysis of Public Financing of State Politics*, 15 THE URB. LAW. 921 (1983).

168. Other Western democracies have generally been more supportive of public financing than the United States. The debate often centers on whether the government should provide floors or ceilings on campaign spending. For information on funding of ballot propositions, see A. Ranney, *Regulating the Referendum*, in THE REFERENDUM DEVICE 89-112 (A. Ranney ed. 1981). For information on public funding of elections in Western democracies, see generally D. ADAMANY & G. AGREE, *supra* note 166, Ch. 9; E. DREW, MONEY AND POLITICS (1983); K. PALTIEL, *Campaign Finance: Contrasting Practices and Reforms*, in DEMOCRACY AT THE POLLS 138-72 (D. Butler, H. Penniman & A. Ranney, eds. 1981).

169. Judicial decisions that allow independent expenditures and procedures that require voluntary acceptance of public funds and expenditure ceilings have complicated ceilings on presidential campaign funds. See *Buckley v. Valeo*, 424 U.S. 1, 95 (1976); *Common Cause v. Schmitt*, 512 F. Supp. 489, 496-501 (D.D.C. 1980), *aff'd*, 455 U.S. 129 (1982). Political commentator Elizabeth Drew notes that these limits are increasingly ineffective because of "soft money" contributions and expenditures. Drew, *supra* note 168, at 12-19.

170. For a sensible proposal that would institute public financing in ballot proposition campaigns, see Lowenstein, *supra* note 13, at 578-83. Professor Allen Easley proposed a "spending differential limit" that would not involve state subsidies, contribution limits or expenditure limits. It would tie spending by the richer side of a ballot proposition to a ratio based on the amount the poorer side is spending. Easley, *supra* note 48, at 749. This scheme, however, is similar to the repealed California scheme voters adopted in the Political Reform Act of 1974. CAL. GOV'T CODE §§ 81000-81016 (West 1976 & Supp. 1982) (parts of Act repealed in 1977). California repealed the scheme in response to the *Buckley* decision. The scheme may be more constitutionally suspect than the one proposed by Lowenstein, but the feasibility of its passage may be greater. It does not involve taxpayers' dollars, and a similar proposal has already found favor with California voters. For general reasons why legislators have not viewed public financing favorably, see for example Quinn, *Why the State Hasn't Bought Public Financing of Elections*, CAL. J. 60-62 (Feb. 1978).

171. See Burns, *supra* note 13, at 1025 n.127. Because those in need of funds always scramble for public funds in the face of declining government revenues, the chances of implementing public funding appear remote.

Fifth, the Federal Communications Commission could develop and refine the "fairness doctrine"<sup>172</sup> and *Cullman* corollary,<sup>173</sup> to prevent one side from dominating the media.<sup>174</sup> Political groups with few financial resources have occasionally made effective use of cost-free air time,<sup>175</sup> but the current mood at the FCC is to weaken or scrap the doctrine, not to strengthen it.<sup>176</sup> There are indications that forces without money have become more adept at using the fairness doctrine. On the other hand, forces with money have deliberately avoided using funds in ways that would bring the doctrine into play.<sup>177</sup>

Providing public subsidies and strengthening the fairness doctrine are two ways to increase access to the political process rather than to restrict participation by those already politically powerful. If political opposition to these two routes can be overcome, then these routes stand an excellent chance of surviving judicial

172. The "fairness doctrine," developed by the Federal Communications Commission, requires that broadcasters: (1) devote a reasonable percentage of time to the coverage of public issues and (2) assure the coverage is fair in providing an opportunity for the presentation of contrasting points of view. See *Fairness Report*, 48 F.C.C.2d 1 (1974).

173. The *Cullman* doctrine classifies ballot propositions as closer to general political discussion than discussion involving election of individuals to office. *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). Thus, the FCC requires licensees to present contrasting views, even if they have to grant free time to a side without money. *Fairness Report*, 48 F.C.C.2d 1, 33 (1974).

174. For a discussion of media domination and the problems with implementing the fairness doctrine, see Mastro, *supra* note 62. For a general review of the fairness doctrine and equal access questions, see M. FRANKLIN, *THE FIRST AMENDMENT AND THE FOURTH ESTATE* 177-203, 571-609 (1981). Political commentator Elizabeth Drew suggests "a ban on the purchase of airtime and a provision for free airtime." Drew, *supra* note 168, at 147. She notes that "America is one of the very few countries in the world that allow any purchase of television time for political broadcasts; no Western European nation does." *Id.* at 150.

175. See D. SCHMIDT, *BALLOT INITIATIVES: A BRIEF HISTORY, 1980 ELECTION ANALYSIS, AND A LOOK AT TRENDS* 9 (1981); Lydenberg, *supra* note 9, at 107-10.

176. See, e.g., Koppel, *The Applicability of the Equal Time Doctrine and the Reasonable Access Rule to Elections in the New Media Era*, 20 HARV. J. ON LEGIS. 499 (1983); Paper presented by Andrea Bonnicksen, *The Supreme Court and the Convergence in Communications Law: Implications for Litigation Strategy*, Midwest Political Science Association Convention, Cincinnati, Ohio (Apr. 15-18, 1981); Paper presented by Florence Heffron, *The Politics of Deregulation: The Federal Communications Commission*, Western Political Science Association Convention, Denver, Colorado (Mar. 26-28, 1981).

177. For instance, when Dade County, Florida, placed on the ballot its second initiative to restrict smoking in enclosed public places, tobacco companies switched strategies after they learned that proponents had made arrangements to have Hollywood celebrities do public service announcements under the fairness doctrine. By making extensive use of mass mailings, telephoning, newspaper advertising, and by avoiding television and radio, tobacco companies prevented these advertisements from appearing. Lydenberg, *supra* note 9, at 53-54.



scrutiny.<sup>178</sup>

Sixth, Oregon now is trying a somewhat more novel approach. The state has passed legislation permitting false advertising lawsuits in ballot proposition campaigns.<sup>179</sup> Many states have tried this approach in candidate elections, but its use in ballot proposition campaigns is novel. The results in candidate elections, however, are not encouraging. Courts have been reluctant to find false advertising by candidates, partly because this can be viewed as infringement of the first amendment right to freedom of speech and partly because the worst abuses tend to be deceptions rather than outright lies.<sup>180</sup> Yet, in Oregon, parties in a suit brought by under-financed proponents reached an out-of-court settlement. Other lawsuits stemming from 1980 campaigns are in progress but the parties face numerous difficulties.<sup>181</sup> If the judiciary upholds the Oregon legislation, and damages are large enough to allow the under-financed side to be able to respond effectively to their opponents' charges, this approach could be helpful in overcoming one-sided public communication. The legislation's remedial effect, however, may be limited to those campaigns where the side with money can be proven to have engaged in deliberate deception and falsehoods.<sup>182</sup>

Analysts have suggested other reforms, but they seem less promising. These suggested reforms include government-funded

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178. Political opposition (as distinct from judicial opposition) may be too great to overcome, because the issue of using tax dollars to support campaigns is a less popular one among the public than is the issue of limiting big spenders.

179. OR. REV. STAT. § 260.532 (1979); see Lydenberg, *supra* note 9, at 29-30.

180. For examples of the difficulties, see *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Committee to Retain Judge Jacob Tenzer v. Lee*, 270 Or. 215, 527 P.2d 247 (1974).

181. Lydenberg, *supra* note 9, at 29-30, 83-84, 88-89; Initiative News Report, Feb. 25, 1983, at 5-6.

182. Because the judicial process is slow, the plaintiffs would most likely not receive any money until after the election was over, although they might receive valuable publicity during the campaign by bringing the suit. Current difficulties with the Oregon law include a provision that the side suing must be fully in compliance with the state's reporting laws—even the slightest discrepancy is sufficient grounds for throwing the suit out of court. OR. REV. STAT. § 260.532(6) (1979). The side charged with intentional falsehoods thus tends to respond to the charge by looking for errors in their opponent's compliance with the law. Without a provision for retroactive compliance, poorly funded groups are handicapped in their ability to bring successful suits. In addition, there continues to be a dispute within the judiciary over the constitutionality of the state's false campaign advertising statute. An earlier and unsuccessful attempt to use false advertising lawsuits in a ballot proposition campaign occurred in Colorado in 1976. Shockley, *supra* note 62, at 31.

For an earlier discussion in California over whether to move against false advertising claims in initiative campaigns, see Bestoff, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 938 n.78 (1975).

voter pamphlets<sup>183</sup> and redistributive taxation and spending.<sup>184</sup> Several states send registered voters campaign pamphlets written by political activists. The pamphlets present arguments for and against the proposals. Although these pamphlets are helpful to some voters, they seem no match for the slick advertising campaigns of heavily funded political organizations. In addition, because the pamphlets are written at a reading level beyond comprehension by most of the voting public,<sup>185</sup> they seem unable to significantly influence the voting public. If ways could be found to make the pamphlets more understandable to the average voter, the case for voter pamphlets would be stronger.

Another approach, advocated by one notewriter, begins with the obvious point that "the pattern of expression that contribution limits seek to alter are caused by income inequality."<sup>186</sup> Although arguing against contribution limitations on first amendment grounds, the notewriter suggests that "the states could encourage political expression less restrictively through redistributive taxing and spending."<sup>187</sup> Nonetheless, because income inequality is so deeply interwoven in the fabric of American society,<sup>188</sup> any attempt

183. Lydenberg, *supra* note 9, at 140-41; Note, *supra* note 94, at 1444.

184. Note, *supra* note 94, at 1452.

185. See Paper presented by David Magleby, *Voter Pamphlets: Understanding Why Voters Don't Read Them*, American Political Science Association Convention, New York (Sept. 5, 1981). Magleby found the ballot descriptions for propositions in the voter pamphlets in Oregon and California during the 1970's averaged at the eighteenth grade level (two years of post graduate work). In Massachusetts and Rhode Island, the descriptions were somewhat more readable, averaging at the fifteenth grade level. *Id.* at 28. This is far above the reading level of the average voter. For a summary of these findings, see D. MAGLEBY, *supra* note 4, at 137-39.

186. Note, *supra* note 94, at 1452.

187. *Id.* This point, however, may be useful as a reminder that if it takes money to have "free speech," then all government taxing and expenditures are constantly affecting the reality of the first amendment. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (White, J., dissenting).

Although subsidies and tax credits may be alternative ways to increase small donations to campaigns, the results of these techniques on candidate elections have been disappointing. Some people believe these methods are a waste of federal money because the great majority of those who give would have contributed anyway. See Lowenstein, *supra* note 13, at 603-04. For a proposal to expand tax credits, see Paper presented by Richard Conlon, *A New Problem in Campaign Financing . . . and a Simple Legislative Solution*, 1984 American Political Science Association Convention, Wash., D.C. (Sept. 1, 1984).

188. The extent and the relative stability of income and wealth inequality in American society is not generally known. See, e.g., R. CHRISTENSON, *CHALLENGE AND DECISION*, Ch. 5 (1976); G. D. GARSON, *POWER AND POLITICS IN THE UNITED STATES*, Ch. 7 (1976); L. THURLOW, *THE ZERO-SUM SOCIETY* (1978); J. WILLIAMSON, *AMERICAN INEQUALITY: A MACRO-ECONOMIC HISTORY* (1980). As merely one example, economist Paul Samuelson has noted that "[i]f we made an income pyramid out of a child's blocks, with each layer portraying \$1,000 of in-

to alter campaign spending patterns through redistributing wealth in the entire society would be sure to fail—short of major political upheaval. To cite merely one example of the tremendous financial disparity that redistributive taxing would have to overcome, Standard Oil of Ohio (Sohio) spent nearly a million dollars on a city-wide ballot proposition in Long Beach, California, to assure the right to construct an oil storage terminal in that city. Only four months after the election, Sohio cancelled all plans for the terminal, stating that other factors had made the idea no longer attractive. Sohio sales in 1978 alone were over five billion dollars and their profits for that year were over four hundred million dollars.<sup>189</sup> With such financial resources at corporate disposal, what sort of redistributive state and municipal taxation would be necessary to allow citizens working against large corporations an equal chance for effective political expression?<sup>190</sup>

A less promising reform, because of SEC and judicial interpretations, is the institution of shareholder suits. In these suits, shareholders seek recovery of corporate expenditures on the ground that the funds are *ultra vires* political contributions.<sup>191</sup> Although such actions as Procter and Gamble's little-known decision to contribute thousands of dollars to defeat a nuclear power referendum in Missouri might be susceptible to such a suit,<sup>192</sup> corporations have considerable latitude under articles of incorporation in Delaware that have allowed a corporation "self-determination" to "conduct business in any way it chose as long as the state did not explicitly prohibit it."<sup>193</sup> Under the "business judgment" rule the corporations enjoy additional latitude.<sup>194</sup> By arguing that their effort preserves the free enterprise system, corporations may escape the *ultra vires* charge because courts have so loosely interpreted it so as

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come, the peak would be far higher than the Eiffel Tower, but most of us would be within a yard of the ground." P. SAMUELSON, *ECONOMICS* 80 (1980). Disparity of wealth is even greater than disparity of income.

189. Lydenberg, *supra* note 8, at 4.

190. Any attempt would be sure to raise fears of driving industry and jobs to other municipalities and other states. For a brilliant account of the myriad difficulties small governments face in trying to tax multi-national corporations, see J. GAVENTA, *POWER AND POWERLESSNESS* (1981).

191. Nonetheless, such a tactic would be constitutional and politically useful. Brudney, *supra* note 159. The difficulty rather lies in changing SEC and judicial priorities.

192. See W. Dobrovir, *Memorandum of Law*, at 1 (on file with the Council on Economic Priorities, New York and on file with the author).

193. Nader, *supra* note 161, at 52.

194. See Brudney, *supra* note 159, at 258 n.82; M. Underberg, *The Business Judgment Rule in Derivative Suits Against Directors*, 65 *CORNELL L. REV.* 600 (1980).

to be "a virtual immuniser of managerial judgments."<sup>195</sup> As of early 1984, shareholders had made no attempt to bring ultra vires charges against any corporation. Additionally, the heaviest spending on state and local ballot propositions almost always is related to company business. It is this relatedness that evokes the spending.

Therefore, these proposals, as well as the previous six avenues of reform, have serious drawbacks. Each would undoubtedly lead to some unforeseen consequences, with loopholes or inequities that would need resolution. None would be easy to implement, both because they involve changes in long-established practices,<sup>196</sup> and because money is likely to be used to prevent the enactment or effective implementation of alternatives. But to stay with the status quo is to invite the continued actual or potential domination of ballot proposals by individual, corporate, union, and special interest wealth.<sup>197</sup> The result is the damage to the democratic system that so many states, municipalities, and citizens have already perceived.

As long as wealth is as unequally distributed as it is in American society, and political interest groups are organized around private rather than public rewards,<sup>198</sup> ballot proposition campaigns, like American politics, generally will reflect the power of the best

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195. Brudney, *supra* note 159, at 258 n.82; Dobrovir, *supra* note 192. Brudney, however, believes that a legislative program to regulate corporate political speech based upon preventing ultra vires speech (waste) and protecting intra vires speech (shareholder consent) could constitutionally lessen corporate political activity.

196. Many earlier laws in the twentieth century have severely regulated money in elections, both for candidates and on ballot proposals, in a way that the Burger Court has now declared unconstitutional. See H. ALEXANDER, *supra* note 21. The irony is that states and courts rarely enforced these laws. In addition, these laws had serious loopholes, so that decades of legal regulation of campaign finance practices never became legitimized constitutionally or politically. The Burger Court majority has forced a renouncement of this lax attitude toward campaign finance regulation instead of building upon this history.

197. Corporations are best known in raising considerable sums of money on ballot proposition campaigns, but other sectors of the society also have shown they can raise fairly large amounts of money. Unions have spent substantial sums of money fighting right-to-work laws, as have professional associations such as dentists and teachers, and single issue groups like gun owners. Lydenberg, *supra* note 9, at 126-36 & app. C; Lydenberg, *supra* note 66, at 60-63, 76-79. For a discussion of a labor campaign against a right-to-work ballot issue in Missouri, see Mockus, *Geodemographics II: Targeting Your Turnout*, CAMPAIGNS & ELECTIONS, Summer, 1980, at 55-63. Lydenberg notes that in the 1980 campaigns, forty-nine of the top fifty-nine contributors were corporations or business associations. See Lydenberg, *supra* note 9, app. C.

198. For recent works on the endemic weaknesses of public interest groups, see T. MOE, *THE ORGANIZATION OF INTERESTS: INCENTIVES AND THE INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS* (1980); Lowenstein, *supra* note 13, 573-80; Patton & Bartlett, *supra* note 146.

organized and wealthiest groups in society. With the Court's active participation, direct democracy is left ever more vulnerable to the very abuses it seeks to overcome.