Michigan Law Review

Volume 79 | Issue 7

1981

State and Local Limitations on Ballot Measure Contributions

Michigan Law Review

NOTES

State and Local Limitations on Ballot Measure Contributions

Despite the Supreme Court's observation that referendums demonstrate "devotion to democracy,"[1] some state and local governments have tempered their citizens' direct democratic participation by limiting contributions to ballot measure committees.[2] At least one court[3] has held that these limitations violate the first amendment,[4] but in *Citizens Against Rent Control v. City of Berkeley*[5]

1. James v. Valtierra, 402 U.S. 137, 141 (1971) (upholding amendment to California's constitution requiring referendum approval of publicly financed low-income housing).

2. *See, e.g.*, FLA. STAT. § 106.08(1)(d) (1979); Berkeley, Cal., Election Reform Act of 1974, § 602 (Ord. No. 4700-N.S.) (June 4, 1974).

A "ballot measure" is an electoral question submitted to the people for approval or rejection by popular vote through the referendum or initiative process. A referendum involves a constitutional amendment or statute that the legislature has referred to the people for approval or rejection. An initiative, on the other hand, is proposed by the citizens themselves and submitted for popular approval. *See* REFERENDUMS, A COMPARATIVE STUDY OF PRACTICE AND THEORY (D. Butler & A. Raney eds. 1978) [hereinafter cited as REFERENDUMS].

A "ballot measure committee" is a committee, group, or association, formed to urge the electorate to vote for or against a particular ballot measure. A "ballot measure limitation" is a dollar limitation on the amount that individuals or groups can contribute to ballot measure committees.

3. Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980), *appeal filed*, 49 U.S.L.W. 3625 (U.S. Dec. 12, 1980) (No. 80-970) (striking down a $3,000 limitation imposed on contributions for statewide ballot measures under FLA. STAT. § 106.08(1)(d) (1979)).

Several courts have held statutes prohibiting corporate spending in connection with ballot measures unconstitutional. *See* C. & C. Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978) (holding unconstitutional under the first amendment a state statute prohibiting corporate spending for political communication bearing on ballot measure questions); Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974) (holding that New York statute prohibiting corporate payments "for any political purpose whatsoever" must be construed narrowly so as not to prohibit corporate contributions to ballot measure committees).

4. U.S. CONST. amend. I states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

5. 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980), *prob. juris. noted*, 101 S. Ct. 1344 (1981) (No. 80-737). The appellant in *CARC* was an unincorporated association formed to oppose a proposed amendment to the Berkeley City Charter that would have established a citywide rent control board. The committee accepted contributions totalling $108,000. Some $18,600 of this was received in violation of the $250 limit. *See* Brief for Appellants at 5 n.4, *CARC*, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980) (on file with the *Michigan Law Review*) [hereinafter cited as Brief for Apps.]. Berkeley, Cal., Election Reform Act of 1974, § 602 (Ord. No. 4700-N.S.) (June 4, 1974) limited contributions to $250, and § 604 provided that organizations must surrender contributions in excess of the limitation to the Berkeley City Treasury.

Section 602 of the ordinance was declared invalid on its face and summary judgment for the plaintiff citizens' committee was granted at the trial court level. Summary judgment was upheld on appeal, 99 Cal. App. 3d 736, 160 Cal. Rptr. 448 (Ct. App. 1979). The California Supreme Court reversed without remanding for further findings of fact. *See CARC*, 27 Cal. 3d at 835, 614 P.2d at 751-52, 167 Cal. Rptr. at 93-94 (Richardson, J., dissenting):

(*CARC*), the California Supreme Court approved a $250 ceiling on municipal ballot measure committee contributions. The court relied on *Buckley v. Valeo*,[6] which upheld the Federal Election Campaign Act's[7] (FECA) limitations on contributions to candidates and candidate authorized campaign committees, but invalidated its direct spending limitations. The California court concluded that ballot measure limitations are constitutionally permissible because ballot measure contributions resembled the candidate contributions that *Buckley* held could be restricted.

This Note's thesis is that ballot measure limitations unconstitutionally infringe upon the rights of free speech and association. Part I analyzes *Buckley* and concludes that the *CARC* court misapplied its distinction between contributions and direct expenditures. Part II tests ballot measure limitations against *Buckley*'s "exacting scrutiny" standard.[8] It identifies the state interests asserted in defense of ballot measure limitations — lessening abuse by narrow interest groups, reducing apathy, and equalizing political expression — and concludes that ballot measure limitations do not permissibly further these governmental interests.[9]

There is no record before us and in this connection the procedural posture of the case should be noted. The trial court granted summary judgment in favor of the citizens' committee which attacked the ordinance. Assuming, only for purposes of analysis, that the trial court was improvident in the entry of its summary judgment invalidating the ordinance, it is manifestly unfair for the majority . . . to sustain the ordinance without affording the citizens' committee an opportunity to challenge or rebut the [evidence] . . . on which the majority wholly relies.

6. 424 U.S. 1 (1976) (per curiam).

7. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C.), *as amended by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified in scattered sections of 2, 18, 26 U.S.C.).

8. *See* text at notes 18-19 *infra*.

9. A sufficiently important state interest will justify abridgment of first amendment rights because "neither the right to associate nor the right to participate in political activities is absolute." United States Civil Serv. Commn. v. National Assn. of Letter Carriers, 413 U.S. 548, 567 (1973) (upholding the Hatch Act's prohibition against federal employees actively participating in political management or political campaigning). *But see* Buckley v. Valeo, 424 U.S. at 1, 27 n.2 (emphasizing "that [the Hatch Act provision reviewed in *Letter Carriers*] did not restrict an employee's right to express his views on political issues and candidates").

Additionally, the regulation in question must in fact further the interest asserted in justification of the regulation. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 525 (1960) ("[N]o relevant correlation between the power of the municipalities to impose [license taxes] and the compulsory disclosure and publication of" membership lists); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (holding that forced disclosure of civil rights group's membership list had no "substantial bearing" on the asserted state interest of monitoring compliance with foreign corporation registration statute).

The regulation also must avoid unnecessary abridgment of first amendment rights. The Court generally refers to this requirement as the "less drastic means test." *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967) (holding statute barring all Communist party members from working in defense factories invalid; restriction of first amendment freedoms of association more extensive than necessary to accomplish purpose of statute); Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating state statute requiring teachers to disclose every organization of

I. THE FIRST AMENDMENT INTERESTS

A. Buckley v. Valeo: *A Constitutional Framework*

The Supreme Court's 1976 decision in *Buckley v. Valeo*[10] provides a starting point for constitutional analysis of ballot measure limitations. In *Buckley*, the Court tested the constitutionality of the 1974 Amendments to the FECA.[11] Reacting to Watergate,[12] Congress had amended the Act to police the financing of the political process.[13] The amended Act imposed limitations on contributions to candidates and candidate authorized campaign committees,[14] and on direct expenditures by individuals and groups "relative to a clearly identified candidate."[15] In a long per curiam opinion the Court upheld the contribution limitations,[16] but struck down the restrictions

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which they were members over five-year period on the ground that the "interference with [freedom of association] goes far beyond what might be justified in the exercise of the State's legitimate inquiry").

Ordinarily, the Court simply invalidates the legislation, but in some cases it has specified a "less drastic means." *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 722-24 (1978); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 471 (1969). Under the "less drastic means" approach, the government bears the burden of showing that legislation infringing upon first amendment rights is no broader than necessary to accomplish a legitimate end. *See, e.g.*, Talley v. California, 362 U.S. 60, 66 (1960) (concurring opinion); Schneider v. State, 308 U.S. 147, 163 (1939) (rejecting the contention that a statute broadly infringing first amendment rights should be upheld because it accomplishes a legitimate state interest "more efficiently" than a narrower statute).

10. 424 U.S. 1 (1976) (per curiam).

11. *See* note 7 *supra*.

12. For a brief summary of the history of the Watergate investigation, see 2 CONGRESSIONAL QUARTERLY, INC., DOLLAR POLITICS 12 (1974).

13. The 1971 amendments were an attempt to correct the deficiencies of existing legislation in curbing campaign financing abuse. The commentators generally agree that the existing legislation was wholly ineffective. *See, e.g.*, D. ADAMANY & G. AGREE, POLITICAL MONEY 43-61 (1975).

For a detailed analysis of the provisions at issue in *Buckley*, see Comment, Buckley. v. Valeo: *The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976). Congress was apparently aware of the unprecedented scope of the amendments and provided for expedited review. 2 U.S.C. § 437h(a), (b) (1976 & Supp. III, 1979) (providing that constitutional questions under the Act could be certified to court of appeals sitting *en banc* with direct appeal to the Supreme Court).

14. Federal Election Campaign Act Amendment of 1974, Pub. L. No. 93-443, § 101(A), (B), 88 Stat. 1263 (repealed 1976). 18 U.S.C. § 608(b)(4)(a) stated that "contributions to a named candidate made to any political committee authorized by such candidate, in writing, to accept contributions on his behalf shall be considered to be contributions made to such candidate . . . ."

15. Section 608(e)(1) limited such expenditures to $1,000. 18 U.S.C. § 608(e)(1) (Supp. IV 1974) (repealed 1976). These limitations were applicable to natural persons, partnerships, committees, associations, corporations, "or any other organization or group of persons." 18 U.S.C. § 591(g) (Supp. IV 1974) (repealed 1980). In order to avoid impermissible vagueness, the Court construed the "relative to a clearly identified candidate" qualification to include only "communications that include explicit words of advocacy of election or defeat of a candidate." 424 U.S. at 43. So narrowed, the Court found the limitation incapable of accomplishing the asserted purpose of closing any "loopholes" left open by the contribution limitations.

16. Contributions to both candidates and candidate authorized campaign committees will

on direct spending.[17]

The *Buckley* Court initially posited that the first amendment subjects limitations on expression and association to "exacting scrutiny."[18] It then held that the Act's limitations on spending for political communication regulate speech and not conduct.[19] Candidate contribution and direct expenditure limitations, however, do not restrict speech to the same extent. Direct expenditure ceilings

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be referred to hereinafter as "candidate contributions." Limitations on candidate contributions will be referred to as "candidate limitations."

17. 424 U.S. at 58-60.

18. 424 U.S. at 16. The Court has often cited *Buckley* for the proposition that regulations infringing first amendment rights are subject to "exacting scrutiny." *See, e.g.*, First Natl. Bank v. Bellotti, 435 U.S. 765, 786 n.23 (1978); Elrod v. Burns, 427 U.S. 347, 362 (1976) (plurality opinion) (holding patronage dismissal practice violative of first amendment rights of political belief and association). "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." (citation omitted).

It can be argued, however, that the Court did not scrutinize the candidate limitations as carefully as it claimed. For example, the Court did not inquire whether the elimination of direct corruption could have been achieved with less first amendment infringement by establishing higher contribution limitations. The Court stated that "Congress's failure to engage in such fine tuning does not invalidate the legislation." 424 U.S. at 30. Similarly, the Court upheld the overall contribution limitation on the ground that this provision was necessary to prevent evasion of the basic contribution limitation. 424 U.S. at 38.

The court exhibited similar deference to congressional determination of the necessary scope of legislation effectuating a legitimate governmental interest when it upheld limitations on the partisan political activity of federal employees in Civil Serv. Commn. v. National Assn. of Letter Carriers, 413 U.S. 548 (1973). In both *Buckley* and *Letter Carriers*, the statutes addressed the day-to-day administration of the federal system and the conduct of national level candidate elections — processes with which Congress is presumably most familiar. Deference to congressional judgment in these areas is particularly appropriate. The Berkeley City Council, however, probably did not possess similar expertise with regard to the broad and largely unanswered questions of political alienation and voter apathy. The *CARC* court's deference to the city council's assessment of the relationship between large contributions to ballot measure committees and voter apathy therefore seems inappropriate. *See CARC*, 27 Cal. 3d at 831, 614 P.2d at 749, 167 Cal. Rptr. at 91.

19. The court below held that both contribution and direct expenditure limitations were regulatable as conduct under United States v. O'Brien, 391 U.S. 367 (1968). Buckley v. Valeo, 519 F.2d 821, 840 (D.C. Cir. 1975). In *O'Brien*, the Court rejected a draft card burner's claim that his activity was protected under the first amendment. Under the *O'Brien* test, legislation or government action affecting speech is valid if: (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important government interest; (3) the government interest is unrelated to the suppression of expression; and (4) the incidental restriction of first amendment rights is no greater than necessary. 391 U.S. at 377. The *Buckley* Court rejected the contention that spending money for political communication was regulatable as conduct:

> The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.

424 U.S. at 16.

The Court also stated that even if spending were treated as "conduct," the limitations would fail under the *O'Brien* test because "the governmental interests advanced in support of the Act involve 'suppressing communication.'" 424 U.S. at 17. *See generally* Henkin, *The Supreme Court, 1967 Term — Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (criticizing the "speech-conduct" distinction).

reduce "the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached."[20] The Court thus concluded that these limitations intolerably restrained political speech.[21]

Candidate limitations, in contrast, only marginally restrict a contributor's ability freely to communicate.[22] Four arguments favored this conclusion. First, the link between the size of candidate contributions and the quantity of a contributor's communication is tenuous, "since the expression rests solely on the undifferentiated, symbolic act of contributing."[23] Second, individuals and groups often contribute to candidates for reasons unrelated to their political viewpoints. A contributor might donate because of loyalty to the candidate or the candidate's party,[24] or in the hope of "purchasing" impermissible influence should the candidate be elected.[25] The dol-

20. 424 U.S. at 19. The Court found that expenditure limitations prevent citizens and groups other than candidates, political parties, and the press from using the "most effective modes of communication." 424 U.S. at 19-20.

The practical reality of the modern political process is that it costs a good deal of money to battle effectively in the political arena. *See generally* D. ADAMANY & G. AGREE, *supra* note 13, at 19-27. The Court recognized that any limitation on spending for political communication significantly curtailed expression:

> [V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

424 U.S. at 19. *See* note 54 *infra*.

21. 424 U.S. at 39, 58-59.

22. 424 U.S. at 20-21.

23. 424 U.S. at 21. In the Court's words, candidate contributions provide "a general expression of support for the candidate and his views," but do not "communicate the underlying basis for the support." 424 U.S. at 21.

24. Often loyalty to a candidate does not involve a corrupt motive; instead it amounts to reflexive support. *See* D. TRUMAN, THE GOVERNMENTAL PROCESS 309 (2d ed. 1951) (quoting V. KEY, SOUTHERN POLITICS IN STATE AND NATION 470-71 (1949)):

> Most speculation [as to corrupt motivation in making a candidate contribution] has been by professors and newspaper reporters, persons to whom $25 is a wad of money, and it is doubtful that they achieve a sophisticated comprehension of the motivation, attitudes, and expectations of persons who can blithely throw $5,000 in the pot to help elect old Joe, a college classmate, a drinking companion, and a fellow Rotarian, without being any the poorer.

Individuals that identify strongly with one of the two major political parties are far more likely to make contributions to candidates than individuals who do not profess loyalty to a particular party. *See* Adamany, *The Sources of Money: An Overview*, 425 ANNALS 17, 19-20 (1976).

25. The problem lies in distinguishing between a contribution that merely amounts to "support" and a contribution that is the "quid" in the *Buckley* Court's quid pro quo. The difficulty is probably best recognized by Congresspersons themselves: "The distinction between a campaign contribution and a bribe is almost a hairline's difference. You can hardly tell one from the other." 120 CONG. REC. 10,351 (1974) (remarks of Senator Inouye, quoting Senator Long).

Ordinarily, of course, the contributor's motivation would be irrelevant to the first amendment interests involved in making the contribution. But where the magnitude of the contribution suggests that an individual contributor could have secured effective political

lar amounts of contributions made for these reasons are only weakly linked to actual political expression. Third, contributions may not result in any political expression unless spent by a candidate or association to present views to the voters.[26]

Finally, if a contribution does produce speech, the "transformation . . . into political debate involves speech by someone other than the contributor."[27] A candidate contribution is an open-ended grant.[28] Because candidates must appeal to broad segments of the electorate, they cannot serve as surrogate speakers for contributors.[29] And contributors, expressing "general support" for the candidate and his positions,[30] neither demand nor expect communication of their viewpoints.[31] Even speech made possible by a contribution, therefore, is likely to reflect the candidate's, and not the contributor's, viewpoint.[32] For these reasons, the *Buckley* Court concluded that "contribution ceilings . . . serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[33]

Buckley's distinction between direct expenditures and candidate contributions is based not on mere form, but on the substantive im-

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communication through direct expenditures, the prospect of corruption between contributor and candidate may justify contribution limitations.

26. 424 U.S. at 21.

27. 424 U.S. at 21.

28. A contribution made directly to the candidate by the contributor is clearly in the nature of a grant. If a contribution is not an open-ended grant, but is instead conditioned upon later favorable treatment, the candidate's conduct in accepting the contribution would be tantamount to corruption. Similarly, contributions made to "candidate authorized committees," *see* note 14 *supra*, are controlled by the candidate, or by individuals who are ultimately accountable to the candidate — generally professional media managers. *See generally* Nimmo, *Political Image Makers and the Mass Media*, 427 ANNALS 33 (1976). See also A. HEARD, THE COSTS OF DEMOCRACY 408-22 (1960), for a discussion of the structure and function of candidate campaign organizations and the processes involved in "transforming" contributions into political communication.

29. For an anecdotal account of how a candidate attempts to increase general support among voters without at the same time making any commitment to specific segments of the electorate, see Lorenz, *An Insider's View of Jerry Brown*, ESQUIRE, Feb. 1978, at 66.

30. 424 U.S. at 21.

31. One example of a "contribution" that did not result in expression of the contributor's viewpoint was the American Telephone and Telegraph Company's $1.5 million contribution to the Democratic National Committee forgiving a debt of that amount incurred for services rendered in the 1968 election. *See* Miller v. American Tel. & Tel. Co., 507 F.2d 759 (3d Cir. 1974). Contributions may also be used to finance illegal activities, *see, e.g.*, CONGRESSIONAL QUARTERLY, INC., *supra* note 12, at 9-15, or to enrich the candidate, *see, e.g.*, CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL ETHICS 39-41 (1977).

32. It is possible, of course, that an individual contributor's political opinion might be so close to the candidate's that the contributor would have a fundamental free speech interest in making unlimited contributions. As a practical matter, however, few contributors, if any, will have political positions that precisely match those of the candidate across the entire range of issues that the candidate will address during the campaign.

33. 424 U.S. at 58.

pact of these restrictions on speech. Candidate limitations are permissible because they only minimally curtail the contributor's speech; direct expenditure ceilings are invalid because they substantially restrain individual political expression. The *Buckley* distinction thus affirms the first amendment interest in individual speech.[34] But the distinction is also consistent with the Court's view that the first amendment should promote "uninhibited, robust and wide open debate" on public issues.[35] Although *Buckley* upheld the Act's contribution limitations, the Court implied that even these limitations

34. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970): "First, freedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being." The Supreme Court has recognized that the first amendment's protection can be premised in some cases solely on the interest of the speaker in self-expression. *See* First Natl. Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978). The Court has held that first amendment protection of individual expression extends to unorthodox or "symbolic" speech. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (expression that communicates message in a manner that some individuals might find offensive protected under the first amendment); Street v. New York, 394 U.S. 576 (1969) (reversing conviction of individual who burned flag on street corner while distraught over the death of civil rights leader). *But cf.* New Rider v. Board of Educ., 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973) (upholding the indefinite suspension of native American Indian students for failure to conform with school hair-length regulations; no substantial constitutional question presented). *See generally* Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 61 (1973).

Other first amendment scholars have argued that the first amendment's protection flows from "the necessities of the program of self-government." *See* A. MEIKLEJOHN, POLITICAL FREEDOM 26-28 (1948) (purpose of first amendment is to protect the freedom of ideas so that individuals may capably govern themselves). *See also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (first amendment protection should be limited to speech that is "political").

35. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). *See generally* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

Under this doctrine, the speaker need not "possess" first amendment rights to be protected, because the Court also seeks to prevent governmental interference with the "marketplace of ideas." For example, the Court has protected corporate speech on commercial and political matters. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 562 n.5 (1980) (utilities enjoy the "full panoply" of first amendment rights for comment on issues of public importance); First Natl. Bank v. Bellotti, 435 U.S. 765, 777-78 (1978) (striking down complete prohibition of corporate spending for political communication; whether corporations possess first amendment rights coextensive with those of natural persons not relevant).

The marketplace metaphor is surely the most durable of first amendment boilerplate — probably because it has centuries of respectable philosophical support. *See* Cox, *The Supreme Court, 1979 Term — Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 2 (1980). Although it is far from clear that the framers were convinced of the value of such an approach, *see, e.g.*, L. LEVY, LEGACY OF SUPPRESSION (1960) (suggesting that framers would have prohibited much speech that is protected today); J. MADISON, *The Federalist No. 10*, in THE FEDERALIST 53 (1941) (1st ed. New York 1788) (danger of factions to orderly course of representative government), philosophers of the framer's era believed that unfettered critical discourse led to truth. *See* Mill, *On Liberty*, in THE GREAT LEGAL PHILOSOPHERS 380, 385 (C. Morris ed. 1959).

The Supreme Court has echoed this belief:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach

could not be set so low as to impede "robust and effective" political discussion.[36]

The *Buckley* Court also considered whether contribution and direct expenditure limitations infringed upon the right of political association.[37] As it did when discussing freedom of expression, the Court distinguished between the two types of limitations. Direct expenditure ceilings prevent most associations "from effectively amplifying the voice of their adherents."[38] Thus, constraints on the ability of groups and organizations to make unlimited expenditures interfere with members' first amendment associational rights.[39] Candidate limitations, on the other hand, less severely restrict protected freedom of association. First, such limitations do not prevent associations from aggregating large sums of money to promote effective advocacy. Second, candidate limitations affect only "one important means of associating with a candidate or committee." A

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would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971). Justice Holmes believed that a free marketplace of ideas was not only desirable, but also constitutionally ordained:

> [T]he ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of thought to get itself accepted in the competition of the market, that at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

36. 424 U.S. at 21.

37. 424 U.S. 22-26. Although the Constitution does not expressly guarantee a right of association, *see* Griswold v. Connecticut, 381 U.S. 479, 482 (1965), the right has long been recognized, *see generally* Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964), and has been vigorously protected.

Legislation that "may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." Buckley v. Valeo, 424 U.S. at 25 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958)).

The Court has stated time and time again that restriction of the right to associate with others is subject to the same rigorous scrutiny as restrictions on other first amendment rights. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977); Elrod v. Burns, 427 U.S. 347, 356, 362 (1976) (plurality opinion) (holding that the practice of dismissing government employees on basis of party affiliation must be limited to employees in "policymaking positions"); United States v. Robel, 389 U.S. 258, 263-65 (1967) (right of association "ranks among our most precious freedoms," and state must show a compelling interest to justify infringement). Although the Court originally protected the right of association in cases involving state legislation that appeared to be motivated by a desire to harass unpopular groups, recent decisions make it clear that the application of strict scrutiny is appropriate regardless of legislative motivation or the severity of the infringement. *See* Elrod v. Burns, 427 U.S. 347 (1976); Healy v. James, 408 U.S. 169, 183 (1972).

Two policies underlie the Court's protection of the freedom to associate. First, this freedom makes the exercise of first amendment rights more effective. *See generally* VOLUNTARY ASSOCIATIONS (NOMOS XI J. Pennock & J. Chapman eds. 1969). The *Buckley* Court noted that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." 424 U.S. at 15 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958)). Second, freedom of association is protected to ensure that individuals do not suffer any loss of first amendment rights because they exercise their rights with others. *See* T. EMERSON, *supra* note 34, at 22; Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1, 15 (1977).

38. 424 U.S. at 22.

39. 424 U.S. at 22 (quoting Sweezy v. New Hampshire, 354 U.S. 234 (1957)).

contributor remains "free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates."[40]

This Note tests the validity of state and local restrictions on contributions to ballot measure committees. *Buckley*'s distinction between contribution and expenditure limitations in federal candidate elections provides the basic analytic framework. If form rather than substance controls the decision, courts should uphold ballot measure limitations. But *Buckley* requires analysis of the substantive impact of spending limitations on speech and association. Section B argues that ballot measure limitations impinge upon first amendment rights as substantially as the direct expenditure ceilings that *Buckley* invalidated.

B. *Contributions to Ballot Measure Committees*

Ballot measure limitations substantially restrain first amendment rights. Ballot measure contributions are much like direct expenditures, but have little in common with candidate contributions. This section develops that theme in four important respects.

First, citizens form ballot measure committees solely to urge the passage or defeat of a referendum proposal.[41] In candidate elections, few contributors share the candidate's views on all political issues. But ballot measures generally present a narrower range of issues than do candidate elections.[42] Contributors to ballot measure com-

40. 424 U.S. at 22.

41. The available research clearly indicates that citizen based or "grass roots" ballot measure committees are ad hoc affairs, organized for the limited purpose of addressing specific ballot measure propositions. *See* S. LYDENBERG, BANKROLLING BALLOTS 52-53, 61-62 (1979); REFERENDUMS, *supra* note 2, at Role of Initiatives in California's Environmental Politics, 28 W. POL. Q. 352, 359, 360-70 (1975). A recent empirical study of several ballot measure elections nationwide suggests that controversial issues involving the economic interests of an entire industry (*e.g.*, anti-smoking measures, "bottle-bills," nuclear power plant construction or siting measures) are likely to spark the formation of ballot measure committees that coordinate the expenditure of contributions from large corporations throughout the country. These coalitions of convenience presumably dissolve after the ballot measure election. *See* S. LYDENBERG, *supra*. For the view that corporate contributions to ballot measure committees affect the outcome of ballot measure elections, see *IRS Administration of Tax Laws Relating to Lobbying (Part I): Hearings Before the Subcomm. of the Comm. on Government Operations*, 95th Cong., 2d Sess. 256-73 (1978) (statement of John Schockley). For the view that corporate contributions can be limited, but not prohibited, see Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns*, 13 U.S.F. L. REV. 145 (1978).

42. *See, e.g.*, S. LYDENBERG, *supra* note 41, at 60-63 (describing the passage of a "denturism" measure; "denturism" is the practice of allowing dental technicians, rather than only licensed, professional dentists, to perform measurement and fitting of dental plates). Of course, not all ballot measure questions are single issue affairs as narrow in scope as the "denturism" question. See REFERENDUMS, *supra* note 2, at 94-95 for a content breakdown of ballot measure questions in California. In deciding whether to build a nuclear power plant, for example, the voter may have to balance possible environmental gains against possible economic losses. *See* S. LYDENBERG, *supra* note 41, at 35. Similarly, ballot measure questions relating to fair-housing laws and low-income housing projects raise many issues — the desirability of

mittees stand squarely behind the committee's message — "yes" or "no" on a specific proposal. Because ballot measure contests are issue specific, an individual contributes with one or few issues in mind,[43] and can choose the committee that best expresses his position. If existing committees advocate opposing positions or promote popular positions with unpersuasive arguments, individuals are free to form their own ballot measure committees.[44]

Second, ballot measure contributors generally seek only to advance their political views. Neither party or candidate loyalty nor the hope of gaining impermissible influence with elected officials affects an individual's decision to support a ballot measure committee. Ballot measure contributors' political expression is as pure in this respect as the "core"[45] political speech of direct spenders. The likeli-

integration, the possible instability of property values, and the effect that such projects might have on local fiscal capacity.

43. Although ballot measure elections are not always single issue affairs, *see* note 42 *supra*, they usually generate fewer and more sharply delineated issues than candidate elections. In fact, political observers have criticized this very aspect of ballot measure elections. *See Beverage Container Reuse and Recycling Act of 1977: Hearings on S. 276 before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 2d Sess. 124 (1978) (statement of Dana Duxbury) (arguing that intensive lobbying of industry on "bottle bill" referendum in Massachussetts resulted in the measure's defeat; advertising one-sided and erroneous). Ironically, the apparent trend toward one-sided, simplistic political communication may result from the fact that "single issue" political controversies often arise out of disputes concerning more fundamental value choices — an example of this would be the death penalty question. But the tendency to focus ballot measure communication on one, or at most a few, issues seems just as pronounced where the question posed to the voters is "technical":

> Increased complexity of measures leads quite naturally to simplification by sponsors and opponents seeking to persuade an amorphous public. The result . . . is the need for massive financial resources for public relations firms and television, billboard and newspaper advertising that usually rely more on simplistic propaganda than on reasoned discourse.

Baker, *American Conceptions of Direct vis-à-vis Representative Governance*, CLAREMONT J. PUB. AFF. 5, 13 (1977) *(quoted in* REFERENDUMS, *supra* note 2, at 104).

The same tendency is, of course, present to some extent in candidate elections. *See* Nimmo, *supra* note 28, at 42. But in candidate elections the voter will generally confront a wider range of issues than in ballot measure elections. In addition to the candidate's general political outlook and positions on specific controversies, the voter will also consider the candidate's personality, integrity, and past performance, whether in or out of office. *Id.* at 37. Furthermore, the campaign itself is often a fertile source of issues as candidates vie with each other to improve their image among voters. *See, e.g.*, D. BOORSTIN, THE IMAGE 7-44 (1961) (candidates create "pseudo-events" or fictitious issues to differentiate themselves from other candidates).

44. *See* S. LYDENBERG, *supra* note 41, at 57-58 (Oregon ballot measure committee formed at grassroots level to oppose efforts of corporate opponents; raised $3,000 for communication aimed at passing ballot measure; measure passed in face of spending by corporate opponents of close to $300,000); Lutrin & Settle, *supra* note 41, at 370 (coalition of citizen groups conduct statewide campaign for California Coastal Conservation ballot measure, making use of services donated by well-known cartoonist and professional photographers; suit filed with Federal Communications Commission under fairness doctrine resulting in free equal media time.

45. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 32 (1968). ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."); Pickering v. Board of Educ., 391 U.S. 563, 573 (1968) ("The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment . . . .").

hood that ballot measure contributions represent the contributor's speech, rather than a general expression of loyalty or an attempt to gain influence, distinguish them from candidate contributions.

Third, the *Buckley* Court's observation that the "transformation of [candidate] contributions into political debate involves speech by someone other than the contributor"[46] applies with less force to ballot measure contributions. No candidate controls the "transformation" of such contributions into speech. A ballot measure committee is merely a conduit that aggregates and channels contributions into political communication.[47] It is true, however, that a ballot measure committee's message can never perfectly mirror the views of all contributors. The force of this "congruence argument"[48] depends upon the extent to which incongruent speech is constitutionally protected. A transformation that may constitutionally justify limitations takes place between contribution and communication even in ballot measure contests.[49]

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46. 424 U.S. at 21.

47. This aggregation and channeling function allows the average individual, through contributions to ballot measure committees, to communicate with the same efficacy as individuals with greater resources who communicate through direct spending. *See* Baker, *Scope of the First Amendment Freedom of Speech*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 81 (R. Collins ed. 1980). ("In essence an association is merely an assembly displaced over time and space. . . . [T]he group [can do] things beyond merely reasoning together. People come together in assemblies or associations in order to pursue or fulfill their goals.").

48. "Congruence" is defined as "the quality or state of agreeing or coinciding." WEBSTER'S NEW COLLEGIATE DICTIONARY 236 (1978). The *Buckley* Court reasoned that the interposition of the candidate between the contributor and the communication produced by the contribution amounted to such a "transformation" that the specific dollar amount of the contribution was not central to the first amendment interests involved in making a contribution. *See* text at notes 22-33 *supra*. This Note analyzes the extent to which there is agreement or coincidence between the contributor's outlook on a ballot measure question and the message conveyed by the ballot measure committee and concludes that there is at least as much congruence in making a contribution to a ballot measure committee as there is in making a direct expenditure in the candidate election context.

This conclusion is based on the plausible assumption that contributors will not contribute to ballot measure committees unless the committee's message is consistent with their viewpoint on ballot measure issues. Congruence is, of course, a question of degree — the size of a contribution to a ballot measure committee, for example, reveals neither the intensity of the contributor's viewpoint nor the basis of the individual contributor's position. This Note argues, however, that the fact that neither the act of contributing nor the size of the contribution conveys such information does not render the spending any less protected under the first amendment than other forms of protected political expression. The ultimate message of any ballot measure committee — "vote yes" or "vote no" on a specific ballot measure — is so closely tied to the contributor's viewpoint that ballot measure contributions should enjoy full first amendment protection.

49. One could argue that as much transformation takes place in the ballot measure context as in the candidate context. Just as all ballot measure contributors stand together with their committees for or against a ballot measure, candidate contributors arguably intend to convey the same "ultimate message" as candidates: "candidate *X* should be elected to office rather than candidate *Y*." But this does not weaken the case for protecting ballot measure contributions, rather, it calls into question the *Buckley* Court's analysis of candidate limitations. *See* Buckley v. Valeo, 424 U.S. at 244 (Burger, C.J., concurring in part and dissenting in part) (arguing that distinction between contributions and expenditures is a "word game").

Aggregating funds to communicate through a ballot measure committee interposes a step that would not be present if an individual directly spent the same amount of money on political communication. Practically, however, the transformation between ballot measure contributions and communication is similar to the transformation between direct expenditures and speech.[50] Direct spenders demand the most effective communication for their dollar.[51] They thus retain political consultants, media experts, and large staffs to "package" and "deliver" their messsages as persuasively as possible.[52] Yet a "transformation" necessarily accompanies the use of such services. The message inevitably differs because the individual, seeking to communicate effectively, relies on more than a soapbox, a street corner, and his unamplified voice.

Despite this incongruence, *Buckley* recognized a first amendment right to use advanced communication technology in candidate elections, precisely because of its effectiveness.[53] Ballot measure committees afford individuals the same opportunity to communicate effectively on referendum issues. Only by contributing to a ballot measure committee can average individuals use these media to express their views.[54] A ballot measure contributor's interest is in this

50. A comparison with candidate contributions illustrates this point. If a candidate contributor makes a contribution that the candidate uses to defray nonspeech related expenses, the first amendment does not protect every dollar of the contribution because it has resulted in no speech at all. *See* text at notes 22-33 *supra*. But if the candidate uses the contribution to rent a hall equipped with loudspeakers, the contribution results in speech. The speech, however, is the candidate's and not the contributor's — the contributor thus has no fundamental free speech interest in making unlimited contributions. If, on the other hand, the contributor and candidate shared viewpoints, and the candidate used the contribution for political expression, the first amendment would afford its greatest protection. Although unrealistic in the federal candidate context, the contribution in this example is analogous to activities such as lobbying and legal representation — activities that the Supreme Court has held enjoy full first amendment protection. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1967) (lobbying); NAACP v. Button, 371 U.S. 415 (1963) (litigation).

Candidate contributions will almost always fall into the first two categories. Like direct expenditures, ballot measure contributions, however, will almost always be analogous to lobbying and litigation.

51. There is no dearth of literature on how to spend money most effectively for political communication. *See, e.g.*, A. STEINBERG, THE POLITICAL CAMPAIGN HANDBOOK (1976); THE POLITICAL MARKETPLACE (D. Rosenbloom ed. 1972) (see especially part VII, "The Professional Campaign Managers," an alphabetical index of all campaign management firms). *See generally* THE NEW STYLE IN ELECTION CAMPAIGNS (2d ed. R. Argranoff ed. 1976).

52. Ironically, the sophisticated "packaging" and "delivery" of political communication might have begun in California with Whitaker and Baxter, a firm that rose to prominence through its successful management of referendum campaigns. *See* REFERENDUMS, *supra* note 2, at 106-07.

53. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

54. The *CARC* Court noted that although the limitation prohibited contributions of more than a modest size "an individual or business entity . . . remains free to *spend* money in unlimited amounts, by mass advertising or any other method, to inform the public of its reasons why the measure should be adopted or defeated." 27 Cal. 3d at 829, 614 P.2d at 748, 167 Cal. Rptr. at 90 (emphasis original). But what is the average individual likely to be able to secure for his or her direct expenditure dollar? Although it is not clear how much money the

respect equivalent to the interest that *Buckley* found sufficient to invalidate direct spending limitations. Divergence of group expression from the views of individual members remains a possibility, but this does not justify equating ballot measure contributions, which are possibly divergent, with candidate contributions, which are almost

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"average individual" spends annually on political communication, *see* Adamany, *supra* note 24, at 17-28 (few citizens regularly contribute to political parties), it is possible to hazard a guess at what an "effective" media campaign for or against the ballot measure at issue in *CARC* would cost an individual were he to spend directly:

TELEVISION COVERAGE

1. KBHK TV (Field Communications Affiliate)
   1. *most expensive periods* ..... $1,312.00 (mean)
   2. *before/after most expensive periods* ..... $ 525.00 (mean)
   3. *least expensive periods* ..... $ 195.00 (mean)
2. KDTV (Spanish speaking, SIN Affiliate)
   1. *most expensive periods* ..... $ 200.00– $ 120.00 (range)
   2. *before/after most expensive periods* ..... $ 85.00 (mean)
   3. *least expensive periods* ..... $ 40.00 (mean)

[figures are for 30 seconds of broadcast time, mean(s) derived from figures for specific time periods within general time period indicated.]

SPOT TELEVISION RATES AND DATA, May 15, 1980, at 59.

NEWSPAPER COVERAGE

1. SAN FRANCISCO EXAMINER & CHRONICLE (black & white)
   1. *1/4 page ad, 1 day*
      a. Examiner $2,028.21
      b. Chronicle $3,130.40
      c. Examiner & Chronicle $6,678.12
   2. *1/8 page ad, 1 day*
      a. Examiner $1,014.10
      b. Chronicle $1,565.20
      c. Examiner & Chronicle $3,339.06

[The *Chronicle* is the evening newspaper, circulation 504,644 (excluding Sunday). The *Examiner* is the morning newspaper, circulation 157,709 (excluding Sunday). NEWSPAPER RATES AND DATA, May 12, 1980, at 214-16.] Cost figures from Revised National Rate Card No. 14, *San Francisco Chronicle* and *Examiner*, Jan. 1, 1981 (on file with the *Michigan Law Review*).

2. INDEPENDENT GAZETTE (Berkeley/Richmond area) (black & white) (daily rate)
   1. *full page ad* $1,620.00
   2. *1/4 page ad* ..... $ 405.00

[Circulation of 50,500 (excluding Sunday).] Cost figures from Independent & Gazette Retail Advertising Rates, Jan. 1, 1981 (on file with the *Michigan Law Review*).

3. WALL STREET JOURNAL (Western Edition) (black & white) (daily rate)
   1. *1/8 page ad* $1,265.40
   2. *1/6 page ad* $1,687.20
   3. *1/4 page ad* $2,530.80

[Circulation of approximately 320,000.] Cost figures from Wall Street Journal Western Edition Advertising Rate Sheet, Jan. 1, 1981 (on file with the *Michigan Law Review*).

The above figures do not include preparation or production costs, or the costs associated with professional political consulting and media planning. Accordingly, these figures are only illustrative of what a direct expenditure ballot measure campaign effort would cost a private individual. Nevertheless, the magnitude of the figures suggests that the *CARC* court was misguided in concluding that because the limitations applied only to contributions, they would not significantly infringe on expression.

necessarily so.[55]

Finally, ballot measure contribution limitations undercut basic associational rights, for the same reason that direct expenditure ceilings undercut such rights. Such limitations prevent individuals from effectively amplifying their political communication.[56] *Buckley* does not demand a different result. Underlying the Court's conclusion that candidate limitations only marginally restrict a contributor's freedom of association was its finding that such contributions gener-

55. The contrary argument was asserted and rejected in First Natl. Bank v. Bellotti, 435 U.S. 765, 792-93, 794 n.34 (1978). The Court acknowledged that the political views of some shareholders were likely to be at odds with corporate political communication regarding a ballot measure, but concluded that this did not justify lesser first amendment protection for such communication.

In other contexts the Court has rejected similar arguments. *See* United Mine Workers, Dist. 12 v. Illinois State Bar Assn., 389 U.S. 217, 223 (1967) (rejecting argument that full-time attorney retained by Union was likely to compromise members' interests out of loyalty to Union; possibility "purely theoretical"). As a general matter, the Court has assumed that groups or associations can engage in activity protected under the first amendment on behalf of their members because the interest of the group is identical with that of its members. *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (group can lobby Congress to further members' political and economic interests); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (groups can pursue constitutional rights of members through litigation). In *Buckley* the Court reaffirmed the principle that an interference with group activity is "simultaneously an interference with the freedom of the member[s]." 424 U.S. at 22 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion)).

Indeed, it has been noted that divergence between individual political views and the political communication of groups to which individuals belong is in fact *desirable* because it promotes the interchange of ideas, and thereby facilitates the process of consensus formation in society. *See* R. MICHELS, POLITICAL PARTIES — A SOCIETAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 36 (1962) ("In essence, democracy in modern society may be viewed as involving the conflict of organized groups competing for support. . . . This image of democracy as conflicts of organized groups . . . may be far from the ideal of the Greek city state or of small Swiss cantons, but in operation as a system it is far better than any other political system which has been devised."); D. TRUMAN, *supra* note 24, at 508-09.

Like the larger political system within which they operate, groups formed for the purpose of political expression and advocacy must accommodate the differing views of their membership. *See* J. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 269 (1947) (one advantage of the democratic form of government is formation of "elite groups," or decision-making centers, with only episodic participation of voters). *See generally* Chapman, *Voluntary Association and the Political Theory of Pluralism*, in VOLUNTARY ASSOCIATIONS, *supra* note 37, at 114:

> In one way or another, every political theory faces the various implications of the distinction and divergence between collective and individual rationality; each attempts to prescribe and to institutionalize against them. All the dimensions of pluralist politics exhibit a common shape and rhythm. For these massive regularities, the political theory of pluralism offers an abstract and general explanation in the permanent and contrasting facets of human rationality.

See also, McBride, *Voluntary Association: The Basis of an Ideal Model and the "Democratic" Failure*, in VOLUNTARY ASSOCIATIONS, *supra* note 37, at 202, 229-30 (arguing that membership in voluntary associations increases individual responsibility and participation in social change).

56. An individual's right to spend directly for political communication is not less protected when exercised in concert with others who have similar views. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958) (The association "is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views."); note 37 *supra*.

ally are "undifferentiated, symbolic act[s]."[57] Ballot measure contributions, however, are neither "symbolic" nor "undifferentiated." Unlike candidate contributors, supporters of ballot measure committees seek to secure effective advocacy of a particular policy. Limitations on their contributions should, therefore, be "subject to the closest scrutiny."[58]

Close scrutiny will reveal that ballot measure limitations create more than a "merely theoretical" threat to a contributor's right to amplify his political views. *CARC*, for example, upheld a $250 limitation. This will prevent individuals with moderate incomes from securing the fullest possible access to the indispensable "expensive modes of communication."[59] The California court concluded that because only seventeen percent of the total value of contributions exceeded $250, the limitation was not unduly burdensome.[60] But the court ignored the value of additional contributions that individuals might have made had there been no limitation. Instead of trying to find a level of limitation that would not infringe on contributors' rights, the *CARC* court should have followed *Buckley*'s explicit refusal to defer to legislative assessments of what constitutes a "fair" or "reasonable" political fight.[61] The courts can ensure effective political advocacy only by letting individuals set their own upper limits on contributions.[62]

In four important respects, ballot measure contributions are both distinguishable from candidate contributions and comparable to direct expenditures. Ballot measure limitations reduce the quantity of political expression and the ability of individuals to associate for the advancement of common political beliefs. The constitutionality of ballot measure limitations thus "turns on whether the governmental interests advanced in [their] support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[63] Part II considers those governmental interests, and

57. 424 U.S. at 21.

58. 424 U.S. at 25.

59. *See* notes 20 & 54 *supra*.

60. 27 Cal. 3d at 830, 614 P.2d at 748, 167 Cal. Rptr. at 90.

61. The *Buckley* Court stated: "In the free society ordained by our Constitution it is not the government, but the people — individually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate . . . ." 424 U.S. at 57.

62. The state's decision to limit contributions to a certain dollar amount will inevitably be arbitrary because not all individuals will be able to use their resources in an equally effective manner.

63. 424 U.S. at 44-45. It is important to note that the *Buckley* Court *did not* conclude that candidate contributions deserved no first amendment protection. Rather, the Court found that "although the Act's contribution and expenditure limitations *both implicate fundamental First Amendment interests*, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." 424 U.S. at 23 (emphasis added). The Court upheld the contribution limita-

concludes that they either are not furthered by ballot measure limitations or could be furthered by less restrictive means.

II. THE STATE INTERESTS

Because ballot measure limitations restrict first amendment rights, *Buckley* makes clear that they must withstand "exacting scrutiny." A state or local government may restrict ballot measure contributions only if it "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment" of first amendment freedoms.[64] Courts have not agreed whether ballot measure limitations actually further such a compelling[65] state interest.[66]

Buckley sustained the FECA's candidate limitations solely because of the governmental interest in preventing quid pro quo corruption between contributors and candidates.[67] This concern does not justify ballot measure limitations. Ballot measure contests do not involve candidates for public office, and ballot measure contributions do not create political debts of the kind contemplated in *Buckley*.[68] Large contributions to ballot measure committees influence only the voters, and only "in a manner protected by the first amendment."[69] Because ballot measure limitations are not necessary to prevent quid pro quo corruption, courts must find other compelling governmental interests.

The *CARC* court found compelling Berkeley's interest in preserving the integrity of the referendum process.[70] Although the opinion lacks clarity, it does suggest three more specific governmental interests: lessening abuse of the ballot measure process by narrow interest groups, reducing apathy, and equalizing political expression.

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tions because it found that they served a compelling governmental interest. To the extent that ballot measure limitations serve no such governmental interest, *see* Part II *infra*, *Buckley*'s distinction between direct expenditure and candidate contributions becomes less important. Part I's equation of ballot measure and direct expenditure limitations, however, remains critical because it indicates the severity of the restriction of first amendment rights against which asserted governmental interests must be balanced.

64. 424 U.S. at 25.

65. The Supreme Court has "employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (footnotes omitted).

66. *See* note 3 *supra*.

67. 424 U.S. at 26-29. *See* Let's Help Florida v. McCrary, 621 F.2d 195, 199 (5th Cir. 1980), *appeal filed*, 49 U.S.L.W. 3625 (U.S. Dec. 12, 1980) (No. 80-970).

68. First Natl. Bank v. Bellotti, 435 U.S. 765, 790 (1978); Let's Help Florida v. McCrary, 621 F.2d 195, 199-200, *appeal filed*, 49 U.S.L.W. 3625 (U.S. Dec. 12, 1980) (No. 80-970).

69. Let's Help Florida v. McCrary, 621 F.2d 195, 200 (5th Cir. 1980), *appeal filed*, 49 U.S.L.W. 3625 (U.S. Dec. 12, 1980) (No. 80-970).

70. 27 Cal. 3d at 829, 614 P.2d at 748, 167 Cal. Rptr. at 90.

Part II considers these asserted interests and demonstrates that they cannot justify ballot measure limitations.

A. *Narrow Interests*

The *CARC* court initially observed that large contributors could dominate the ballot measure process by overpowering the efforts of other citizens to disseminate opinions.[71] Because such domination could transform ballot measures into a "tool of narrow interests,"[72] the court concluded that candidate contributions and contributions to ballot measure committees differed very little in their effect upon the election process.[73] According to the court, contribution limitations would combat this problem by preventing large contributors from leaving other citizens with a "stilled voice,"[74] and by restoring the power of reason.[75] The court also implied that the ineffectiveness of disclosure regulations in overcoming narrow interest domination justified contribution limitations.[76]

1. *Lessening Domination by Narrow Interests*

The problem of narrow interest domination of the political process has troubled many commentators.[77] The "narrow interests"

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71. 27 Cal. 3d at 826-27, 614 P.2d at 746, 167 Cal. Rptr. at 88.

72. 27 Cal. 3d at 827, 614 P.2d at 746, 167 Cal. Rptr. at 88.

73. 27 Cal. 3d at 826, 614 P.2d at 746, 167 Cal. Rptr. at 88.

74. 27 Cal. 3d at 827, 614 P.2d at 746, 167 Cal. Rptr. at 88.

75. 27 Cal. 3d at 827, 614 P.2d at 746, 167 Cal. Rptr. at 88.

76. 27 Cal. 3d at 831, 614 P.2d at 749, 167 Cal. Rptr. at 91.

77. The initiative and referendum were originally established in an attempt to limit the influence of corporations and other "special interest groups" on the legislative process. *See* note 79 *infra*. Those who inveigh against the domination of the electoral process by narrow interests argue that these interests make disproportionate use of the media to sway voter opinion. *See* Mastro, Costlow & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COM. L.J. 315, 319-20 (1980):

> A core value in American Society is that the democratic process works best when the electorate is well-informed. Therefore the public deserves to have a fair exchange of ideas and opinions. If one side can dominate any forum of ideas and opinions to the extent that only its viewpoint is heard, the electorate is ill-equipped to make wise decisions on issues of public importance. To editorialize their views and to influence the electorate, advocates usually rely on mass media advertising which regularly reaches large audiences. But mass media advertising, especially on television, is so expensive that only well-financed organizations, whether corporations or citizens groups, can afford to pay.

Id. (footnotes omitted).

Other observers have noted the tension between a commitment to both free political expression and a predominantly laissez-faire economic system:

> [F]irst amendment freedoms of speech, assembly, and association protect political activity. The ordinary exercise of these rights creates only marginal inequalities in political influence. Because financial participation is expandable, however, it produces inequalities that can be very high and that cannot be ameliorated by real choices open to the citizenry at large. . . . An ordinary citizen struggles to find the means to contribute $100. Money's extreme potential for multiple voting points to an important issue of political finance policy in a democracy: preventing gross inequalities in the meaning of the vote.

whose domination the *CARC* court feared could include both contributors with "impure" motives and groups with a "disproportionate" impact on the ballot measure process. The Supreme Court, however, has never recognized a compelling interest that justifies restricting the first amendment rights of these individuals or groups. In fact, the Court has repeatedly emphasized that a speaker's first amendment protection does not decrease because he is motivated by narrow self-interest, whether economic or otherwise apolitical.[78] It has also underscored the right of groups to pursue their self-interest through political expression, even though their impact may be regarded by some as disproportionate.[79]

The *CARC* court, however, ignored this teaching because of its concern that the ballot measure process adopted by Californians to retain control over the legislature[80] would somehow be tainted by

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Adamany, *PAC'S and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 571 (1980) (footnotes omitted).

78. The Court has stated that restricting speech because of the interests of the speaker "amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication." First Natl. Bank v. Bellotti, 435 U.S. 765, 784 (1978). In deciding that commercial speech deserved first amendment protection because of society's strong interest in the free flow of commercial information, the Supreme Court rejected the notion that speech was unprotected because it is "carried in a form that is 'sold' for profit." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976). The Court noted that:

> Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices . . . . We see little point in requiring him to do so, and little difference if he does not.

425 U.S. at 764-65 (1976).

79. The Court stressed this principle in *Bellotti* when it stated that:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

435 U.S. at 790 (quoting Kinglsey Intl. Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959)).

80. Ballot measure enabling legislation is largely a product of the "progressive era" of the early twentieth century. *See generally* R. HOFSTADTER, THE AGE OF REFORM (1955); C. LOBINGIER, THE PEOPLE'S LAW (1909); REFERENDUMS, *supra* note 2, at 1-37; L. TALLIAN, DIRECT DEMOCRACY (1977).

The progressive movement sought to limit the influence of wealth, special interest groups, and corporations in the political process. The ballot measure mechanism was one of a host of reforms aimed at this end:

> [The] central programmatic thrust was for a number of reforms in the nation's and state's law-making machinery, all intended to increase ordinary citizens' participation in and power over governmental decisions. The main Progressive reforms included the Australian (secret) ballot; nonpartisan elections, especially at the local level; legal regulation of the organization, membership requirements, finance, and campaign activities of political parties; the direct primary; the recall of elected officials; and the initiative and referendum.

REFERENDUMS, *supra* note 2, at 27.

For the view that the ballot measure process has in many respects succeeded as an alternative to the representative (*i.e.*, legislative) political process, see Bone & Benedict, *Perspectives on Direct Legislation: Washington State's Experience 1914-1973*, 28 W. POL. Q. 330, 349 (1975)

the participation of "narrow interests." This argument merely assumed its conclusion that the state may limit the ability on "narrow" interest groups to express their positions on public issues. This conclusion is untenable because the Supreme Court has held that weakening the power of "special interests" cannot justify limitations on first amendment rights.[81]

2. *Promoting the "Power of Reason"*

The *CARC* court also found compelling Berkeley's interest in promoting the "power of reason." California enacted its ballot measure provisions to enable the electorate to govern directly by majority rule, but large contributions threatened to transform this "vision of direct democracy" into a "tool of narrow interests."[82] According to the court, "[w]hen large contributors use the power of

("[T]he direct legislation process does continue to be a vital part of the state's political system and culture. Some of the State's most exciting political battles are centered around propositions. . . . The process . . . has helped to educate the citizenry on many public problems."); Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 261-62 (1975) ("The initiative does provide a last resort to the public to bypass a recalcitrant legislature and or governor . . . . Clearly, initiatives do allow for decisive decisions on particularly sensitive, hard to resolve, issues.").

81. The argument that the state can control debate on issues of public importance by imposing restrictions on expression based on either the identity or the interests of the speaker was most recently and resoundingly rejected in First Natl. Bank v. Bellotti, 435 U.S. 765 (1978). *Bellotti* involved legislation forbidding corporate expenditures for political communication relating to ballot measure issues not materially affecting the corporation's business interests. 435 U.S. at 768. In striking down the statute, the Court stated:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . If a legislature may direct business corporations to "stick to business," it also may limit other corporations — religious, charitable, or civic — to their respective business when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.

435 U.S. at 784-86 (footnotes and citations omitted).

The *CARC* court did not offer any definition of what constitutes a "narrow interest." If the *CARC* court conceived a "narrow interest" to be a particular point of view it was clearly wrong in holding that such points of view can be constitutionally cordoned out of the arena of public debate. *See, e.g.*, Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control."). Alternatively, if the *CARC* court viewed well-heeled, financially powerful speakers as narrow interests, its holding is equally erroneous. In rejecting the argument that the state could restrict the expression of corporations with respect to ballot measure questions because corporations were wealthy and capable of dominating debate, the court stated: "The potential impact of this argument . . . is unsettling. . . . Except in the special context of limited access to the channels of communication . . . this concept contradicts basic tenets of First Amendment jurisprudence." First Natl. Bank v. Bellotti, 435 U.S. at 791 n.30 (citations omitted). *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) ("Wealth, like race, creed, or color, is not germane to one's ability to participate in the electoral process.").

82. 27 Cal. 3d at 827, 614 P.2d at 746, 167 Cal. Rptr. at 88.

their purse to overcome the power of reason, they thwart the intended purpose" of ballot measures.[83] Contribution limitations, the court implied, were necessary to promote rational political dialogue. This justification, however, conflicts with first amendment doctrine, which bars governmental interference with expression precisely because no single "voice of reason" appeals to all individuals.[84]

Even if a single "voice of reason" represented the entire public interest, and ballot measure committees expressed only "unreasonable" positions, contribution limitations would nevertheless be objectionably paternalistic. The *CARC* court assumed that voters respond to the volume or quantity of political communication rather than to its merit. The court's implicit premise was that the slanted propaganda of free spending interest groups, if unchecked, would confuse voters into making unwise decisions.[85] These assumptions evince a paternalism that the Supreme Court has rejected.[86] In recent com-

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83. 27 Cal. 3d at 827, 614 P.2d at 746, 167 Cal. Rptr. at 88.

84. Madison himself appreciated this fact. During the time Madison was working on Federalist Paper # 10, he stated in a letter to Thomas Jefferson that:

> Those who contend for a simple Democracy, or a pure republic . . . assume or suppose a case which is altogether fictitious. They found their reasoning on the idea, that the people composing the Society, enjoy not only an equality of political rights, but that they have all precisely the same interests, and the same feelings in every respect. . . . We know however that no society ever did or can consist of so homogenous a mass of Citizens. . . . In all civilized societies, distinctions are various and unavoidable. . . . In addition to . . . natural distinctions, artificial ones will be founded, on accidental differences in political, religious, or other opinions. . . . However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman or benevolent philosopher, the bulk of mankind who are neither Statesmen nor Philosophers, will continue to view them in a different light.

5 THE WRITINGS OF JAMES MADISON 17, 28-29 (G. Hunt ed. 1904).

The Supreme Court has also recognized that first amendment protection is essential because no single "voice of reason" leads inevitably to one conclusion on political issues. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) ("The Constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ."); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.").

85. *See* 27 Cal. 3d at 839, 614 P.2d at 753, 167 Cal. Rptr. at 95 (Richardson, J., dissenting). The fear is unfounded because it appears that:

> California's well-educated voters seemed far more able to cope with intricate initiatives than had been presumed by political scientists. It may be that the surprising voting results on initiatives over the last several years is a temporary phenomenon, but for whatever the reasons, the easy assertions about the apathy, indifference, and susceptible nature of voters can at least be questioned by the California experience.

Price, *supra* note 80, at 260-61 (footnotes omitted). *See* REFERENDUMS, *supra* note 2, at 110-14. "[V]oters who are reasonably alert may well be confronted with more information than they can absorb. . . . [A] large body of voters appears to know what it is doing." *Id.* at 112.

86. *See* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring):

> But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth,

mercial speech cases, for example, the Court has assumed that

> information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . .
>
> But the choice is not ours to make. . . .
>
> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the first amendment makes for us.[87]

According to the Court, the Constitution vests in the people, not in the legislatures or courts, the responsibility for judging and evaluating conflicting ideas.[88]

Berkeley presented no evidence that the electorate was incapable of performing its evaluative role. It is reasonable to assume that the average voter understands that self-interested groups sponsor and support ballot measures.[89] The first amendment contemplates that voters will consider the source and credibility of the advocate in evaluating the relative merits of conflicting arguments.[90] But the conflicting arguments must be adequately presented to the voters. Because positions on ballot measure issues do not generally divide along party lines, political parties rarely contribute actively to ballot measure debate.[91] Communication by ballot measure committees thus serves an important informational need, and contribution limitations restrict expression that may be essential to informed decision making.

3. *Empirical Evidence of Domination*

The empirical evidence buttresses the conclusion that first amendment theory compels: lessening interest group domination is not a compelling justification for ballot measure limitations. Finan-

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because the forefathers did not trust any government to separate the true from the false for us.

Accord, Thornhill v. Alabama, 310 U.S. 88, 95 (1940). *See generally* Note, *Restrictions on Electric Utility Advertising*, 78 MICH. L. REV. 433 (1980).

87. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976).

88. First Natl. Bank v. Bellotti, 435 U.S. 765, 791 (1978).

89. 27 Cal. 3d at 838, 614 P.2d at 753, 167 Cal. Rptr. at 95 (Richardson, J., dissenting).

90. 27 Cal. 3d at 840, 614 P.2d at 755, 167 Cal. Rptr. at 97 (Richardson, J., dissenting) (quoting First Natl. Bank v. Bellotti, 435 U.S. 765, 791-92 (1978)). *See generally* A. MEIKLEJOHN, *supra* note 34.

91. Typically, there is an "absence of the party label on ballot measures and a general lack of party activity." REFERENDUMS, *supra* note 2, at 114. Another commentator has noted that although "parties can be extremely important in shaping opinion on the propositions, . . . this influence is limited (and made difficult to examine fully) by the fact that the parties take positions on only a few ballot measures. . . . They do not wish their position on the propositions to harm them in the partisan races — after all, every stand alienates somebody." Meuller, *Voting on the Propositions: Ballot Patterns and Historical Trends in California*, 63 AM. POL. SCI. REV. 1197, 1206-07 (1969) (emphasis deleted).

cially powerful and well organized interests might "dominate" the ballot measure process, first, as the only groups that can afford to qualify ballot measures, and second, as the groups whose positions consistently prevail in elections. Both tests of domination reveal that control of the California ballot measure process has eluded the powerful interests feared by the *CARC* court.

First, powerful interests have no monopoly on qualifying ballot measures. Qualifying a ballot measure *is* difficult and expensive in California,[92] but less affluent and poorly organized groups have placed a number of measures on the ballot.[93] Ballot measure limitations, moreover, do not enable poorly financed or understaffed groups to amass the 300,000 and 500,000 petition signatures required to qualify referendums and initiatives.[94] In fact, contribution limitations may make the qualification process more difficult for individuals with modest incomes by reducing their ability to cooperate with others.[95] Thus limitations may increase "narrow interest" domination of the qualification process.

The second test of control — successful advocacy of ballot measures — similarly refutes the domination hypothesis. "Narrow interests" have failed to thwart the will of the people in ballot measure contests. High powered groups have been notably unsuccessful advocates:

> What may one conclude about initiative campaigns? Certainly, they are risky investments . . . Between 1964 and 1976 no major economic group was able to enact an initiative measure. Realtors and land developers, state employees, agri-business, farm labor, and greyhound racing interests all failed in their attempt to bypass the legislative process. Instead, victories were achieved by groups with minimum economic clout but with the ability to capitalize on high public interest in such contrasting issues as coastal conservation and the death penalty.[96]

California's actual experience makes clear that the *CARC* court relied more on suspicion than on hard evidence that spending has a controlling influence on ballot measure results or that limitations are necessary to prevent "narrow interest" domination.[97]

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92. *See* REFERENDUMS, *supra* note 2, at 101.

93. Price, *supra* note 80, at 260.

94. *See* REFERENDUMS, *supra* note 2, at 101.

95. *See* note 54 *supra*.

96. REFERENDUMS, *supra* note 2, at 106. *See* Meuller, *supra* note 91; Price, *supra* note 80, at 260.

97. The *CARC* court's suspicion seems totally unfounded, given the demonstrable failure of major special interest groups in California to pass any initiative. Although it has been suggested that special interests, generally corporate interests, have been successful in *blocking* the passage of popular measures, *see* S. LYDENBERG, *supra* note 41, at 30-31 (corporate campaign opposing anti-smoking measure employed fraudulent advertising), this generalization must be discounted in light of the fact that corporate opposition failed to block the passage of a major environment ballot measure in California. *See* Lutrin & Settle, *supra* note 41, at 369-71. In short, there is

4. *Contribution Limitations as a Substitute for Disclosure*

The *CARC* court feared that the anonymity surrounding ballot measure contributions would mislead citizens, and apparently concluded that the ineffectiveness of disclosure laws justified limitations. According to the court, disclosure laws inadequately curtail the influence of "narrow interests" because campaign propaganda and the identification of contributors are not simultaneous; voters form impressions on campaign issues before committees reveal their source of financing, and evaluation of contributor motives may thus come too late.[98] Recent studies of candidate elections indicate that disclosure legislation may not effectively correct this problem.[99] Two factors indicate that the need for disclosure may be even greater in ballot measure elections. First, in ballot measure contests, the voters evaluate ideas rather than candidates. Second, ballot measure committees often receive contributions from large, out-of-state corporations,[100] whose motives will be of interest to local voters.

The Supreme Court has recognized that disclosure serves a legitimate state interest,[101] but it has never held that governments can impose contribution limitations to complement or substitute for disclosure. Mandatory disclosure seeks to enrich political communication; ballot measure limitations merely restrict it. Contribution limitations improve or replace disclosure legislation only by suppressing political expression to levels that make disclosure an academic issue. Even the impossibility of devising more effective disclosure laws, if proved, would not justify such a restriction of political expression.

Berkeley, however, did not attempt to show that its disclosure laws are inadequate and cannot be improved. Berkeley requires ballot measure committees to report the names of contributors, their

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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 . . . financial outlays cannot guarantee victory in elections.

A. HEARD, *supra* note 28, at 16 (1960).

98. 27 Cal. 3d at 831, 614 P.2d at 749, 167 Cal. Rptr. at 91.

99. *See* Adamany, *supra* note 77, at 598:

Disclosure laws generate more information than can be mastered by the media, the politicians, or the voters — at least in the short run of a campaign. Media may show little interest in political financing practices, and their partisan or editorial positions may color their coverage of such practices by competing candidates. Voters, too, are likely to evaluate such information through a "perceptual screen" that is colored by their own partisan allegiances and candidate preferences.

100. *See* S. LYDENBERG, *supra* note 41, *passim*; Mastro, Costlow & Sanchez, *supra* note 77.

101. *See, e.g.*, First Natl. Bank v. Bellotti, 435 U.S. 765, 792 n.32 (1978); Buckley v. Valeo, 424 U.S. 1, 67 (1976).

addresses, and the amounts contributed.[102] The city then publishes this information in local newspapers prior to the election.[103] If the current laws are ineffective, Berkeley could require committees to make more extensive disclosures contemporaneously with their messages. More demanding disclosure regulations would infringe on political expression less than an absolute ban on contributions over a certain dollar amount. The city could also increase its use of voter information pamphlets.[104] For many voters these pamphlets are a primary source of information on ballot measure issues,[105] and other states have used them successfully. These alternatives and others, all less restrictive of first amendment rights than contribution limitations, were not adequately explored by the *CARC* court.

A reduction of "narrow interest" domination is unnecessary, violates the first amendment, and is attainable by less restrictive means. This asserted governmental interest, therefore, cannot justify ballot measure limitations. The next section considers whether a desire to reduce apathy can justify such limitations.

B. *Apathy*

Apathy is a vague concept, but the *CARC* court defined it as "indifference, unconcern, and lack of participation,"[106] and found com-

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102. Berkeley, Cal., Election Reform Act of 1974, § 412(9) (Ord. No. 4700-N.S.) requires ballot measure committees to file in their campaign statement:

> The full name of each person from whom a contribution or contributions totalling fifty dollars ($50) or more has been received together with his or her street address, occupation, and the name of his or her employer, if any, or the principal place of business he or she is self-employed, the amount which he or she contributed, the date on which each contribution was received during the period covered by the campaign statement, and the cumulative amount he or she contributed.

103. Berkeley, Cal., Election Reform Act of 1974, § 112 (Ord. No. 4700-N.S.) provides:

> The City of Berkeley shall publish, in all newspapers whose editorial offices are in Berkeley, which during at least six (6) months of the year generally publish a newspaper at least five days a week and at least two-thirds of whose newspapers are delivered in Berkeley a list of all contributors of over $50 to all candidates or committees under the heading of Public Notice, at least two times in the seven days prior to the election. In addition, the City of Berkeley shall publish a list of all contributors of over $50 to all candidates or committees under the heading Public Notice, at such time or times and in such newspaper or newspapers as the Commission shall find is appropriate to inform minority group members of such contributions. In addition, the City of Berkeley may publish notices in such newspapers or other media as the Commission shall find is appropriate to inform the public.

104. Berkeley mails a voter information pamphlet to all registered voters. The ballot measure election at issue in the *CARC* case was consolidated with the election for city council and school district members. The pamphlet ran 67 pages; less than two pages were devoted to analysis of the ballot measure. *See* City of Berkeley, California, Sample Ballot & Voter Information Pamphlet, Consolidated General Municipal Election and Peralta Community College District 41-42 (1977) (on file with the *Michigan Law Review*).

105. *See* REFERENDUMS, *supra* note 2, at 112 n.45.

106. 27 Cal. 3d at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89 (quoting Johnson v. Hamilton, 15 Cal. 3d 461, 471, 541 P.2d 881, 886, 125 Cal. Rptr. 129, 134 (1975)).

pelling Berkeley's interest in reducing voter apathy.[107] The court's defense of ballot measure limitations premised that many individuals shun political activity because they feel dwarfed by the spending of others.[108] The *CARC* court assumed that it could constitutionally restrict the expression of some individuals to encourage the participation of others. A finding of apathy, however, would not justify restrictions on expression because a desire to reduce apathy assumes an optimal or minimally acceptable level of political debate and participation. The first amendment prohibits precisely this sort of calculation.[109] In rejecting the contention that spending in federal

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107. 27 Cal. 3d at 829, 614 P.2d at 748, 167 Cal. Rptr. at 90.

108. 27 Cal. 3d at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89 (quoting BERG, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM 47 (1976)) (" 'The mass of citizens have tended to shun the opportunity to donate to campaign coffers and to participate in other forms of political activity because they felt their limited resources would be outmatched by a small group of rich and influential "angels" . . . .' ").

109. The *Buckley* Court stated that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." 424 U.S. at 57. The state is forbidden to make this calculation because the first amendment itself embodies the relevant decision:

> We have decided to be self-governed. We have measured the dangers and the values of the suppression of the freedom of public inquiry and debate. And, on the basis of that measurement, having regard for the public safety, we have decided that the destruction of freedom is always unwise, that freedom is always expedient. The conviction recorded by that decision is not a sentimental vagary about the "natural rights" of individuals. It is a reasoned and sober judgment as to the best available method of guarding the public safety.

A. MEIKLEJOHN, *supra* note 34, at 57.

Other commentators argue that although unfettered individual expression furthers society's long-run interest, individual expression would still merit protection even if this were not the case. *See* Baker, *supra* note 47, at 46:

> The liberty model holds that the free speech clause protects not a marketplace but rather an arena of individual liberty from certain types of governmental restrictions. Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the protected conduct fosters individual self-realization and self-determination without improperly interferring with the legitimate claims of others.

Dworkin also argues that individual rights cannot be restricted merely because society finds the restriction expedient:

> The institution of rights against the government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive.
>
> . . . .
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> . . . It makes sense to say that a man has a fundamental right against the government, in the strong sense, like free speech, if that right is necessary to protect his dignity. . . . It does not make sense otherwise.

R. DWORKIN, TAKING RIGHTS SERIOUSLY 199 (1978). *See also* R. NOZICK, ANARCHY, STATE AND UTOPIA 32-33 (1975) (emphasis original):

> But why may not one violate persons for the greater social good? Individually, we each sometimes choose to undergo some pain or sacrifice for a greater benefit or to avoid a greater harm. . . . Why not, *similarly*, hold that some persons have to bear some costs that benefit some other person more, for the sake of the overall social good? But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this

elections had grown excessively, *Buckley* reiterated a fundamental principle:

> In the free society ordained by our Constitution it is not the government but the people — individually as citizens and candidates and collectively as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign.[110]

The *CARC* court also assumed the existence of a causal nexus between large ballot measure contributions and voter apathy in California.[111] Apathy is a complicated and poorly understood state of mind that reflects socioeconomic and demographic factors, individual responses to particular issues, and the socialization of the family.[112] Voter turnout, for example, has been explained by both

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> up. . . . He does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him — least of all a state or government that claims his allegiance.

110. 424 U.S. at 57.

111. 27 Cal. 3d at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89. The court relied on BERG, *supra* note 108, whose conclusions were not specifically addressed to the California ballot measure process. As the dissent observed:

> [T]his wholly untested political hypothesis is not based upon any record but rather upon the opinions and conclusions of "commentators on our political scene," "a political scientist," or a "student of the California initiative process."
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> . . . [T]hese opinions do not constitute the hard evidentiary support needed to demonstrate a state's present and *compelling interest* in the suppression of the multiple First Amendment rights of our California citizens. The existence of such a threat and its potential are wholly undocumented.

27 Cal. 3d at 835, 614 P.2d at 751-52, 167 Cal. Rptr. at 93-94 (Richardson, J., dissenting) (emphasis original).

The *CARC* court's reliance on Professor Berg's general commentary on corruption in the political system is instructive because it demonstrates the danger of relying on broad generalizations and facile assertions in situations where individual political expression is at stake. Berg is in fact a staunch supporter of the ballot measure process, and his support for a proposed national ballot measure process was based on his "systematic analysis of what has occurred in California." Berg stated: "The problem of money is a problem of politics. It is not unique to the initiative process. It affects other aspects of our society, I would argue, adversely." But Berg stated that the

> fundamental strength of [the ballot measure process is that people] deal with issues. You debate issues. You debate them on their merits. You do not have to deal with the question of image. You do not have to deal with the question of personality. People deal with these issues as they are.
>
> . . . .
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> It seems to me that out of the debate that will occur over these kinds of issues people are going to be more informed. I do not think there is any question about that. I suspect that my own faith is based upon looking at the experience in the state of California and elsewhere. I would like to believe that the people will in most cases make the right judgment.

Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 47, 49 (1977) (testimony of Professor Berg).

112. The classic study of electoral behavior is A. CAMPBELL, THE AMERICAN VOTER (1960). Campbell believed that party identification was the principal factor in voting choice, and that coherent belief patterns, or ideologies, were largely absent in the mass electorate. *See also* Pomper, *The Impact of* The American Voter *on Political Science*, 93 POL. SCI. Q. 617, 621-25 (1978) (indexing research supporting or refuting propositions advanced in *The American Voter*). *See generally* W. CROTTY, POLITICAL REFORM AND THE AMERICAN EXPERIMENT 46-57; Scammon, *Electoral Participation*, 371 ANNALS 59 (1967) (demonstrating that voter

sophisticated economic theory and the weather.[113] Large expenditures may not in fact influence participation; if individuals decide for independent reasons not to participate, ballot measure limitations would represent a misguided attempt to encourage participation in the face of individual decisions not to exercise first amendment rights.[114] Because such limitations do not affect the size of direct expenditures, they represent a futile attempt as well.

The evidence before the *CARC* court not only failed to establish the crucial causal link between large contributions and voter apathy, but also fell short of demonstrating that apathy was a problem in California. Instead of requiring Berkeley to submit evidence of apathy and prove that ballot measure limitations in fact curtailed apathy,[115] the Court based its findings on judicial notice and conjecture.[116] Had the court looked to objective evidence, it would

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turnout is greater among the well educated, older, male, nonminority, higher income segments of the population); Verba, *Democratic Participation*, 373 ANNALS 53 (1967), and sources cited therein.

113. Verba, *supra* note 112, at 63.

Voter apathy has been attributed to the changing nature of society and individual feelings of powerlessness. J. LIVINGSTON & R. THOMPSON, THE CONSENT OF THE GOVERNED 298 (2d ed. 1966) (quoting D. RIESMAN & N. GLAZER, FACES IN THE CROWD 33 (1952)):

> In the traditional democratic model . . . politics was viewed as the arena in which men could control their collective destinies. Politics was a means by which society could be continuously adapted to men's moral purposes and public goals. A paradox of recent society is that while politics increasingly affects men's lives as the boundaries of governmental activity are expanded, the individual's feeling of control and competence and his sense of mastery over the future seem to have diminished.

Other scholars make a convincing argument that state-imposed restrictions and failure to promote the franchise account for low voter turnout in the United States. *See* Zisner & Dawson, *Encouraging Voter Participation*, in POLITICAL FINANCE 221, 227 (H. Alexander ed. 1979). *See generally* W. CROTTY, *supra* note 112, at 239-42 (comparing franchise restriction in 1860 with franchise restriction in 1968 on state-by-state basis).

114. The state probably cannot compel individuals to express political views. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (individual cannot be punished for covering state motto, "live free or die," stamped on license plate; the freedom "of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (school children could not be compelled to salute the American flag). Though the practice would be contrary to historical tradition, there is no apparent constitutional objection to requiring individuals to register to vote and make an appearance at a polling place on election day. Compulsory registration would no more intrude upon individual liberty than compulsory draft registration or other regulations that the state imposes. Other democracies require minimal political participation from their citizens. *See* K. PHILLIPS & P. BLACKMAN, ELECTORAL REFORM AND VOTER PARTICIPATION 23-34, 98-99 (comparing electoral laws of various countries and voter turnout). Read narrowly, *Wooley* and *Barnette* may only preclude the state from requiring citizens to espouse official messages or ideologies. The state could avoid these difficulties by providing a "no preference" option for the individual.

115. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 362 (1976) ("burden is on the government to show the existence" of a compelling interest). *See* note 9 *supra*.

116. 27 Cal. 3d at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89. Berkeley argued that the ballot measure committee "did not show as a matter of law . . . that a $250.00 contribution limitation in a small local election failed to comply with the . . . concerns analyzed by the *Buckley* court." Brief for App., *supra* note 5, at 8. Berkeley was mistaken on the burden of proof question. *See* note 116 *supra*. The City argued that "[t]he contribution limitation at

have concluded that Californians are not apathetic about ballot measures.

Citizen apathy toward ballot measures could manifest itself in three ways. First, one could infer indifference toward ballot measures if citizens considered few and only a narrow range of ballot measure issues. Between 1960 and 1976, however, Californians used the ballot measure process twenty-six times.[117] They have considered issues as diverse as decriminalization of marijuana and reinstatement of the death penalty; they have voiced opinions on pay television, greyhound racing and school busing; they have limited property taxes and defeated anti-homosexual and anti-smoking measures.[118] Poorly organized groups lacking financial clout qualified many of these measures.[119] Second, individuals might sense the futility of their participation, and fail to communicate unpopular positions or oppose "narrow interests" during ballot measure campaigns. But Californians have formed committees to take unpopular positions and to fight powerful interest groups. The CARC for example, opposed a rent-control measure that was probably popular in a university community such as Berkeley.[120] At the statewide level, smaller interest groups have formed ballot measure coalitions and effectively used free media time under the FCC fairness doctrine.[121] Third, citizens might fail to vote on ballot measure issues. In all but four of the twenty-six ballot measure elections between 1960 and 1976, however, over 90% of those voting in the general elections also voted on the ballot measure issue.[122] Controversial issues drew a higher percentage.[123]

Ballot measure limitations are invalid unless the "record or legislative findings" demonstrate that large ballot measure contributions

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issue is supported by a legitimate governmental interest," Brief for Apps., *supra* note 5, at 6, but it did not submit evidence that the limitation would in fact curtail apathy.

117. *See* REFERENDUMS, *supra* note 2, at 95.

118. *Id.* at 94-95.

119. *See* text at note 93 *supra*.

120. Berkeley voters eventually passed a ballot measure establishing a Rent Stabilization Board empowered to fix rental rates on all real property within the city. Berkeley Election Statistics, Rent Stabilization and Eviction for Good Cause Program (election of June 3, 1980) (on file with the *Michigan Law Review*).

121. *See* Lutrin & Settle, *supra* note 41, at 370. *But see* Mastro, Costlow & Sanchez, *supra* note 77, at 327-33 (arguing that "gross imbalances" in the coverage of issues resulted despite the use of free media time by citizen groups under the FCC fairness doctrine).

122. REFERENDUMS, *supra* note 2, at 94.

123. *Id.* at 108: "In general, the vote on initiatives — reflecting their more controversial nature — almost always exceeds by several percentage points the vote for constitutional amendments proposed by the legislature." This statement accords with the experience in other states. *See* Bone & Benedict, *supra* note 80, at 340 ("questions of governmental structure and reform bring out the lowest participation"). A 1973 tax and expenditure proposal drew a turnout in excess of 98%, even though it did not coincide with a candidate election. REFERENDUMS, *supra* note 2, at 94.

"threaten . . . imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests."[124] The three indicia for apathy indicate that unlimited spending for political communication does not imminently threaten the ballot measure process. A desire to reduce apathy cannot justify contribution limitations absent three findings. First, there must be evidence of substantial apathy. Second, there must be a causal relationship between large contributions and apathy. Third, the court must find that restricting political expression is an effective and constitutionally permissible means for reducing apathy. The *CARC* court substituted assumptions for proof on each of these points, and its treatment of the apathy question must, therefore, be rejected. The next section will examine a final possible interest in contribution limitations.

C. *Equalization*

The *CARC* court expressed concern not only for nonparticipants, but also for participants in the ballot measure process who felt that their contributions were insignificant. A "free marketplace" of political ideas implies that the poor as well as the rich can effectively present their views.[125] The court concluded that ballot measure limitations "assur[e] voters that their vote and their participation, whether in the form of money or services, are significant."[126] Although it is not clear whether the court considered equalization as an independent goal or as merely another facet of the "narrow interests" problem, it apparently thought that the tendency of ballot measure limitations to equalize contributors' ability to participate had justificatory force.

Proponents of contribution limitations argue that unrestricted

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124. First Natl. Bank v. Bellotti, 435 U.S. 762, 789 (1978).

125. *See, e.g.*, T. EMERSON, *supra* note 34, at 629: "In general, the government must affirmatively make available the opportunity for expression as well as protect it from encroachment. This means that positive measures must be taken to assure the ability to speak despite economic or other barriers."

Baker, *supra* note 47, at 55:

> The marketplace works if and only if all people are equally able to participate in making or influencing the choice. Moreover, providing each person a roughly equal opportunity to generate equal quantities of carefully packaged messages increases the role of reason; the equalization neutralizes the advantages which packaging presently gives to well-financed perspectives. . . . [T]he marketplace of ideas seems perfectly coherent as long as people have equal opportunities (e.g., equal resources) for participating.

126. 27 Cal. 3d at 829, 614 P.2d at 747-48, 167 Cal. Rptr. at 90. The concept of significant participation is as vague as that of apathy. The *CARC* court was probably concerned, as are some commentators, *see* note 77 *supra*, that some citizens would be demoralized because their participation would seem less effective than that of individuals or groups able to spend greater amounts of money to promote their political viewpoints. But this approach falsely assumes that large spenders speak with a single voice, a notion that the Supreme Court rejected in *Bellotti*. *See* 435 U.S. at 785 n.22 ("Corporations, like individuals or groups, are not homogenous.").

spending for communication results in multiple voting,[127] or at least in repetition that impedes the search for "truth" in the electoral process.[128] They conclude that such limitations open the marketplace to diverse views. Certain language in *Buckley* and other recent Supreme Court cases supports this position. The Court has validated governmental action that "facilitate[s] and enlarge[s] public discussion and participation in the electoral process."[129] It applied this principle to uphold public financing of presidential campaigns and "fairness" regulation of the electronic media.[130] And in *Reynolds v. Sims*,[131] the Court held that an individual is entitled to "an equally effective" voice in the political process. These decisions indicate that equalization is a legitimate goal in certain contexts.

Opponents of ballot measure limitations, on the other hand, argue that the first amendment protects political communication from any governmental intereference. They claim that unfettered individual expression,[132] not restrictions on speech,[133] promotes a free mar-

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127. A. HEARD, *supra* note 28, at 648:

> A deeply cherished slogan of American democracy is "one man-one vote." . . . By their talents and energies, some men have always taken greater part in government than others and thus, in a way, cast more than one vote. Concern over the private financing of political campaigns stems in significant measure from the belief that a gift is an especially important kind of vote.

128. The *CARC* court, for example, believed that "large contributors use their purse to overcome the power of reason." 27 Cal. 3d at 827, 614 P.2d at 746, 165 Cal. Rptr. at 88.

129. Buckley v. Valeo, 424 U.S. 1, 92-93 (1976).

130. 424 U.S. at 92-93 (upholding public financing of Presidential Campaigns). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969) ("The broadcaster must give adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views.").

See generally Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15 (1967); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

131. 377 U.S. 533, 565 (1964).

132. *See, e.g.*, Z. CHAFEE, THE BLESSINGS OF LIBERTY 108 (1956): "[T]he First Amendment and other parts of the law erect a fence inside which men can talk. The law-makers, legislators and officials stay on the outside of that fence. But what the men inside the fence say when they are let alone is no concern of the law." The Court has traditionally viewed the first amendment as a guarantor of *unrestricted* interplay of beliefs and ideas; it has often rejected the notion of governmental regulation designed to achieve a more "balanced" or perfect marketplace. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 310 (1940):

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

See United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.) ("[The first amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.").

133. Even Emerson, who argues for affirmative state efforts to promote the "system of expression," points out that:

ketplace of ideas. Ballot measure limitations allow the state to decide that an individual's expression conflicts with its view of an ideal marketplace. The Supreme Court, however, has never sanctioned an attempt to equalize political influence by restricting speech.[134] In fact, *Buckley* explicitly rejected this approach: "[T]he 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."[135] The Court reaffirmed this position in *Bellotti*.[136] Several additional objections to equalization through ballot measure limitations can also be raised.

First, ballot measure limitations "equalize" only haphazardly. Ballot measures are only one part of the electoral process, and contributions to ballot measure committees are only one form of ballot measure spending. Ballot measure limitations do not limit direct expenditures, which are protected under *Buckley*; they "equalize" only the expression of contributors to ballot measure committees.[137] Courts should not underestimate the importance of this point. Ballot measure limitations will not reduce the political expression of

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> [W]hile certain limited forms of control may improve the performance of the system, such controls cannot be imposed on any broad scale without destroying the system altogether. This is true not only because the government has no authority to determine the content or value of particular expression. Even if the regulation does not touch on such matters, the mere presence of the government, with its apparatus for investigating, deciding and enforcing, is repressive and likely to inhibit the system.

T. EMERSON, *supra* note 34, at 633-34.

134. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating a state statute requiring newspapers to make available space at no cost for replies from candidates criticized in editorials).

135. 424 U.S. at 48-49.

136. First Natl. Bank v. Bellotti, 435 U.S. 765, 790-91 (1978) (citing Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).

137. The *CARC* court's reasoning that the contribution limitations passed muster under the first amendment, or were less onerous than they might be, because individuals remained free to spend *directly*, 27 Cal. 3d at 829, 614 P.2d at 748, 167 Cal. Rptr. at 90, runs counter to several Supreme Court decisions. In Spence v. Washington, 418 U.S. 405 (1974) (per curiam), for example, the Court reversed a conviction under a flag misuse statute for hanging a flag with a peace symbol attached upside down in a private residence. The Court rejected the lower court's reasoning that the state could prevent the defendant from treating the flag as he did because there were "thousands of other means available" for expressing his position. 418 U.S. at 411 n.4 (quoting State v. Spence, 81 Wash. 2d 788, 800, 506 P.2d 293, 301 (1973)). Similarly, in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court rejected the argument that a state prohibition of prescription drug price advertising was justifiable because consumers could secure the information from alternative sources. 425 U.S. at 757 n.15. And in Schneider v. New Jersey, 308 U.S. 147 (1939) (holding invalid an ordinance prohibiting the door-to-door distribution of handbills where the state interests asserted could be achieved by less drastic means), the Court stated that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U.S. at 163. The availability of alternative channels of communication becomes relevant only when the restriction on speech arises as a result of government regulation that is otherwise a "reasonable time, place or manner" regulation. In such cases the Court will strike down the regulation if it has the effect, even incidentally or accidentally, of foreclosing the dissemination of expression by certain speakers or the receiving of communication by certain listeners.

wealthy persons and groups, whose direct expenditures are large enough to guarantee access to the most effective modes of communication. Rather, limitations will affect persons of more modest means, who are unable to afford mass media communication unless they pool resources with others similarly situated.[138] Because limitations will restrict such cooperation, they may actually impede equalization. Second, the patterns of expression that contribution limitations alter are caused by income inequality.[139] Although the first amendment may not oblige the government to provide the resources necessary for individuals to express political views effectively,[140] the state could encourage political expression less restrictively through redistributive taxing and spending.[141]

A desire to "equalize" does not justify ballot measure limitations. Because of their haphazard impact, these limitations do not equalize political influence. They do, however, throttle political expression[142] and aim to equalize by a means that is more drastic than use of the tax laws or the budget. Ballot measure limitations thus unnecessarily conflict with the first amendment's primary concern — protection of individual political expression.[143]

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138. *See* note 54 *supra*.

139. Income inequality is a longstanding phenomenon in this country. *See generally* Miller, Rein, Roby & Gross, *Poverty, Inequality, and Conflict*, 373 ANNALS 16 (1967).

140. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) ("[W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.") (emphasis original). The Court in *Rodriguez* rejected the contention that unequal funding of local school systems violated the equal protection clause of the fourteenth amendment. The plaintiffs argued, *inter alia*, that equal educational resources were necessary if individuals were to make "intelligent utilization of the right to vote." *Cf.* Harris v. McRae, 448 U.S. 297 (1980) (upholding so-called "Hyde Amendment" limiting federal funding under Medicaid to abortions necessary to preserve life of mother, or in cases of rape or incest); Maher v. Roe, 432 U.S. 464 (1977) (upholding state refusal to provide Medicaid funds for "non-therapeutic" first trimester abortions); Ross v. Moffitt, 417 U.S. 600 (1974) (the state need not provide counsel for indigent defendants for discretionary state appeals or application for Supreme Court review).

141. *Buckley* specifically rejected the argument that public financing of federal campaigns violated the first amendment. The Court upheld the scheme under the general welfare clause, and merely noted that "every appropriation made by Congress uses public money in a manner to which some taxpayers object." 424 U.S. at 92. *But cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that nonmembers of public employee unions required to pay a "service fee" in lieu of union dues were entitled to a refund of funds spent for ideological and political communication unrelated to collective bargaining activities).

142. *See* notes 41-63 *supra*. The fact that a limitation does not completely prohibit expression does not seem relevant. If spending money for political communication is speech, as *Buckley* held, every dollar that the contributor is prohibited from contributing amounts to a restriction of expression. Moreover, the very purpose of the restriction is to limit expression. Ballot measure limitations therefore run afoul of the *O'Brien* requirement that a regulation affecting speech not have as its principal aim the suppression of expression. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). *See* Buckley v. Valeo, 424 U.S. at 16-17; note 19 *supra*.

143. Political expression lies at "the very core of the first amendment." Buckley v. Valeo, 424 U.S. at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)). *See* First Natl. Bank v. Bellotti, 435 U.S. at 777 n.12 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964));

CONCLUSION

Ballot measure limitations restrict the free speech rights of individual contributors to the same extent as the direct expenditure limitations that *Buckley* struck down. They restrict the use that individuals of modest income levels can make of the mass media and directly curtail the contributor's ability to associate with others for "effective amplification" of political views. As direct abridgments of "core" first amendment rights, the constitutionality of ballot measure limitations turns on whether they can withstand "exacting scrutiny." They cannot. Because they either are not furthered by the limitations or are attainable by less restrictive means, none of the asserted state interests justify limitations.

Only by allowing individuals to set their own upper limits on ballot measure contributions can courts guarantee a fair hearing to all sides of a referendum issue. Inevitably arbitrary state dollar limitations frustrate this goal. Upholding ballot measure limitations would be tantamount to giving constitutional sanction to the "not altogether pleasing prospect that a citizen's most fundamental First Amendment rights may expand and contract with the Consumer Price Index."[144]

Milkwagon Driver's Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 301-02 (1941) (Black, J., dissenting):

> I view the guaranties of the First Amendment as the foundation upon which our government structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.

(Footnotes omitted). *See also* A. MEIKLEJOHN, *supra* note 34, at 25; BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 358 (1978).

144. 27 Cal. 3d at 838, 614 P.2d at 753-54, 167 Cal. Rptr. at 96 (Richardson, J., dissenting).