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THE CONSTITUTIONALITY OF LIMITS ON BALLOT MEASURE CONTRIBUTIONS

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I. INTRODUCTION

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, or to petition their government. . . ."[1] Against this commandment our courts must judge legislative attempts to promote government's legitimate purposes with laws whose direct as well as indirect consequences abridge free speech and assembly. In the political forum, more so than in any other context, the courts have been suspicious of such legislation because political speech and association constitute the foundation of our democratic government.[2] In addition to communications traditionally accepted

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1. U.S. CONST. amend. I.

2. Buckley v. Valeo, 424 U.S. 1, 14-15, 24-25, 39 (1976) and cases cited therein. *See also* BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle,* 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 20-23 (1971); Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245.

In *Garrison v. Louisiana,* the Court said the following: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978).

as speech, the courts have protected other forms of political speech and association, including obscene T-shirt slogans,[3] litigation to bring about social change,[4] marches and assemblies,[5] symbols,[6] and money spent in political campaigns.[7]

The courts in the 1980s will continue to wrestle with fundamental constitutional and legal issues concerning the manner in which electoral campaigns are regulated at all governmental levels. Many jurisdictions have enacted campaign reform legislation, some of which was passed in hasty and perhaps misdirected reaction to the 1972 election campaign abuses and the ensuing national embarrassment over Watergate. With a few notable exceptions,[8] the courts' attention during the mid-1970s was focused on the validity of campaign finance legislation in connection with elections for public office. During the latter part of the 1970s and continuing into the 1980s, that focus has expanded to include "issue" as well as candidate campaigns, commonly referred to as ballot measures, direct legislation, popular legislation, initiatives, and referenda[9] (hereinafter collectively referred to as "ballot measures").

As with candidate campaigns, two principal means exist by which the citizenry exercises first amendment rights through the spending of money in ballot measure elections. The interested citizen may pool his money or assets with others by making a "contribution" to an organized campaign committee, or the individual may conduct a separate campaign by making "expenditures," independent of other persons and campaign committees for such things as informational pamphlets, television advertising, and other communications.

Since the early 1970s, a growing number of state and local governments have enacted legislation regulating the amount of

3. Cohen v. California, 403 U.S. 15 (1971).
4. In re Primus, 436 U.S. 412 (1978); NAACP v. Button, 371 U.S. 415 (1963).
5. Cox v. Louisiana, 379 U.S. 536 (1965).
6. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).
7. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976).
8. *See, e.g.,* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); C & C Plywood v. Hanson, 583 F.2d 421 (9th Cir. 1978); Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1971); Hardie v. Fong Eu, 18 Cal. 3d 371, 556 P.2d 301, 134 Cal. Rptr. 201 (1976); Citizens For Jobs & Energy v. Fair Political Practices Comm'n, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976).
9. The initiative is the power of the people to propose laws or constitutional amendments independent of the legislature. An initiative is generally proposed by presenting to the designated state official a petition which sets forth the text of the proposed law or amendment and is signed by the required number of voters. BLACK'S LAW DICTIONARY 705 (5th ed. 1979); CAL. CONST. art. II, § 8(a-b).

The referendum is the power of the people to approve or reject statutes that would otherwise become law. A referendum is also proposed by a petition presented to a designated state official and signed by the requisite number of voters. BLACK'S LAW DICTIONARY 1152 (5th ed. 1979); CAL. CONST. art. II, § 9(a-b).

money that persons and entities may contribute to a ballot measure campaign committee or may independently spend[10] in such an election. While it is now clear that all expenditure limits are unconstitutional,[11] there is a recent and dramatic split in authority as to whether contribution limits in a ballot measure campaign are permissible. This divergence of opinion apparently stems from a fundamental conflict over whether in a ballot measure election the government constitutionally may act as a public guardian from what it perceives to be "dominant" influences cloaked in the veil of monetary wealth. Standing in opposition to this governmental regulation is the unfettered interchange of ideas crucial to the democratic process embodied in the voting public's right freely to receive and disseminate information.

The California Supreme Court's August 1980 opinion in *Citizens Against Rent Control v. City of Berkeley*[12] *(CARC)* recently approved the paternalistic approach by holding that limitations on the total amount of money a person may contribute to ballot measure campaign committees are constitutionally permissible.[13] Ostensibly applying a strict scrutiny standard of review, the *CARC* majority opined that such limitations serve the compelling governmental interest of preserving the integrity of the electoral system through the initiative and referendum without unduly infringing on protected first amendment speech and associational rights.[14] On February 23, 1981, the United States Supreme Court noted probable jurisdiction over the *CARC* appeal. (Docket No. 80-737).

Three weeks prior to the California court's decision, the Court of Appeals for the Fifth Circuit in *Let's Help Florida v. McCrary*[15]

10. "Contributions" are generally defined to include all types of monetary donations, loans, or expenditures directly or indirectly in aid of a candidate or ballot measure made *in conjunction with* a candidate or a political committee. 2 U.S.C. § 431 (8) (A) & (B) (Supp. 1981); CAL. GOV'T CODE § 82015 (West Supp. 1981); *see* Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 822 n. 1, 614 P. 2d 742, 743 n. 1, 167 Cal. Rptr. 84, 85 n. 1 (1980). "Independent expenditures" include all other monetary disbursements made independently of a candidate or political committee. 2 U.S.C. § 431 (17) (Supp. 1981); CAL. GOV'T CODE §§ 82025, 82031 (West 1976 & Supp. 1981).

Regulations have been promulgated at the federal level to govern candidate elections. *See, e.g.*, Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301, 86 Stat. 11, *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 201, 88 Stat. 1272; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101, 90 Stat. 475; and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339. Such regulations have not been necessary for ballot measure campaigns, however, because none exist at the federal level.

11. *See infra* notes 39-43 and accompanying text. *See also* Common Cause v. Harrison Schmitt, 512 F. Supp. 489, 493-96 (D.D.C. 1980).

12. 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980), *prob. juris. noted,* 101 S. Ct. 1344 (1981).

13. *Id.* The supreme court voted four to three to uphold the constitutionality of the ordinance. *Id.* at 832, 614 P.2d at 749, 167 Cal. Rptr. at 91.

14. *Id.* at 831-32, 614 P.2d at 749, 167 Cal. Rptr. at 91.

15. 621 F.2d 195 (5th Cir. 1980), *appeal docketed,* No. 80-970, 49 U.S.L.W. 3467 (Dec. 8, 1980).

(Let's Help Florida) held that similar Florida legislation limiting contributions to a campaign committee in a ballot measure election violated the first amendment.[16] The Fifth Circuit unanimously held that the State had failed to show a sufficiently compelling interest either in preventing corruption of its ballot measure process or in promoting disclosure to justify the legislation's abridgment of first amendment freedoms.[17] Florida sought plenary review by the Supreme Court, but at the time of this writing the Court had taken no action. (Docket No. 80-970).

This article will examine the decisional ancestry of *CARC* and *Let's Help Florida.*[18] Examination of this case law will focus on the constitutional issues that arise when contribution limitations are imposed in ballot measure campaigns.[19] In this regard, special emphasis will be placed on the strict scrutiny standard of review, which is frequently employed by courts when monetary restrictions are at issue in election campaigns.[20] This standard will then be analyzed in terms of its employment by the California Supreme Court and the Court of Appeals for the Fifth Circuit.

Finally, this article will discuss and evaluate the effect of spending in ballot measure campaigns[21] as contrasted with other influences on voter behavior and suggest the direction our courts should take in resolving a significant issue yet unresolved in the area of campaign reform: the constitutionality of limiting the amount of money that can be contributed to campaign committees supporting or opposing a ballot measure.

II. STATE INTERESTS IN CAMPAIGN REFORM

Campaign reform legislation purports to promote three state

16. Let's Help Florida v. McCrary, 621 F.2d 195, 201 (5th Cir. 1980).

17. *Id.* at 201. The court of appeals, like the California Supreme Court analyzed the legislation under a strict scrutiny standard of review. *Id.* at 199.

18. *See infra* notes 20-71 and accompanying text.

19. The primary constitutional problem in this area concerns political speech. Political speech in first amendment jargon is a term of art which is not limited to campaigning. It is generally defined as speech that participates in the process of representative democracy. Be Vier, *supra* note 2, at 300. *See also* Bork, *supra* note 2, at 26-29. Although the parameters of political speech are not definite, campaigning for a candidate or a ballot measure is clearly within any definition of political speech. Content, however, is not the test of "political" in the first amendment studies. For example, speech advocating forcible overthrow of the government would appear political to many observers. Commentators argue, however, that such speech is not political and not protected by the first amendment because it is not participatory in the system of representative democracy; it is designed to destroy it. *See* Bork, *supra* note 2, at 29-30; BeVier, *supra* note 2, at 309-11. The need to fully protect political speech, however, justifies the Court's extending first amendment protection to other speech categories. Even advocacy of violent revolution is limited only by the clear and present danger test. Be Vier, *supra* note 2, at 342-43, 358.

20. Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980).

21. *See infra* notes 128-70 and accompanying text.

interests: first, to reduce candidate dependence on large contributions;[22] second, to decrease the risk of corruption;[23] and third, to prevent the asserted distortion of public opinion caused by the greater ability of wealthy advocates to spend during a campaign to promote their viewpoints.[24] Typical legislative schemes initially restricted the amount of money a person could contribute or expend[25] in candidate and ballot measure election campaigns[26] and required disclosure of the source, amount, and recipient of contributions and expenditures.[27] Regardless of the legislative goals behind these schemes, the United States Supreme Court in *Buckley v. Valeo*[28] *(Buckley)* and *First National Bank of Boston v. Bellotti,*[29] *(Bellotti)* has joined other courts in invalidating some or all portions of such restrictive measures as being violative of first amendment speech and association guarantees.

A. CANDIDATE CAMPAIGNS

The watershed case delineating permissible spending limitations in candidate campaigns is *Buckley v. Valeo.*[30] In *Buckley* the Supreme Court scrutinized key provisions of the Federal Election Campaign Act of 1971 (Act), as amended in 1974,[31] and section 6096 and subtitle H of the Internal Revenue Code of 1954.[32] In a per curiam opinion, the Court held that the Act's contribution limitations and disclosure and record keeping provisions were constitutional.[33] It also approved the public financing scheme embodied in the Internal Revenue Code.[34] On

22. Buckley v. Valeo, 424 U.S. 1 (1976).

23. *Id.*

24. Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980).

25. *See supra* note 9.

26. *See* NAT'L ASS'N OF ATT'YS GEN. LEGIS. APPROACHES TO CAMPAIGN FIN., OPEN MTGS AND CONFLICT OF INTERESTS, SUMMARY OF STATE STATUTES REGULATING POLITICAL FIN. 3 (1974); AM. LAW DIV., CONG. RESEARCH SERV., ANALYSIS OF FED. AND STATE CAMPAIGN FIN. LAW (Dec. 1976).

27. *See, e.g.,* CAL. GOV'T CODE §§ 84100-84217 (West 1976 & Supp. 1981).

28. 424 U.S. 1 (1976).

29. 435 U.S. 765 (1978).

30. 424 U.S. 1 (1976).

31. *See* Pub. L. No. 93-443, 88 Stat. 1268, 1269 (1974) (current version at 2 U.S.C. § 431) (Supp. 1981). The Federal Election Campaign Act (FECA) and the 1974 amendments thereto limited contributions to candidates for federal office by an individual or group to $1,000. An annual overall ceiling of $25,000 per individual was imposed. Contributions by certain broad-based multi-candidate political committees were limited to $5,000 per candidate per election.

Independent expenditures in support of a clearly identified candidate were limited to $1,000 per individual or group. Candidates' expenditures from their personal wealth were limited depending on the federal office sought.

The FECA also detailed a disclosure and record keeping scheme for political contributions and expenditures and created an eight-member Federal Election Commission as the administering agency. The Commission was endowed with executive, legislative, and judicial functions.

32. I.R.C. § 6096; I.R.C. § 9001-13. The 1954 Code provided for financing from the United States treasury for presidential primary campaigns, nominating elections, and general elections.

33. 424 U.S. at 23-38, 60-84.

34. *Id.* at 85-108.

the other hand, the Court held that the Act's limitations on independent expenditures violated first amendment free speech guarantees.[35]

The Court's reasoning was guided by several constitutional principles. First, the Court recognized that a major purpose of the first amendment is to foster free and vigorous political debate concerning governmental and social policies.[36] Second, state action trespassing in the area of fundamental first amendment rights is subject to the strictest judicial scrutiny.[37] The *Buckley* Court reasoned that the spending of money in a political campaign, either by way of contributions or independent expenditures, is political speech because disseminating political information "in today's mass society requires the expenditure of money."[38] The Court also

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35. *Id.* at 39-59. The Federal Election Commission, also created by the FECA, was held to violate the Appointments Clause of the Constitution in all but its investigative and informative powers.

Corporate participation in federal candidate campaigns through contributions or independent expenditures has long been prohibited by the Federal Corrupt Practices Act and its successor, the Federal Election Campaign Act. *See* 2 U.S.C. § 441b (Supp. 1981). Similar limitations have been enacted by many states and local governments. *See, e.g.,* N.D. CENT. CODE § 16-20-08 (1977). The Supreme Court has not directly ruled on this prohibition in the federal act although the issue has been before the Court several times. *See* Pipefitters v. United States, 407 U.S. 385 (1973); United States v. UAW-CIO, 352 U.S. 567 (1957); United States v. CIO, 335 U.S. 106 (1948).

See also Clagett & Bolton, *Buckley v. Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing,* 29 VAND. L. REV. 1327 (1976). Clagett and Bolton are outspoken in their criticism of the chilling effect of the Federal Election Commission's broad discretionary powers and the *in terrorum* impact of its pronouncements. They are especially critical of the Federal Corrupt Practices Act's crippling expenditure limits on independent political committees, corporations, and trade unions. These authors believe that limitations on independent political committees are patently inconsistent with *Buckley,* and that limitations on corporations and trade unions should similarly be invalidated. *See also* O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti,* 67 GEO. L. REV. 1347 (1979); Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures,* 42 U. CHI. L. REV. 148 (1974); Note, *Corporate Contributions to Ballot-Measure Campaigns,* 6 U. MICH. J. L. REF. 81 (1973).

36. 424 U.S. at 14-15.

37. *Id.* at 29, 44-45.

38. *Id.* at 19. The Court of Appeals for the District of Columbia upheld both the FECA's contribution and independent expenditure ceilings as valid state regulation of conduct. Buckley v. Valeo, 516 F.2d 821, 840 (D.C. Cir. 1975). *See also* Wright, *Politics and the Constitution,* 85 YALE L.J. 1001 (1976). Wright states as follows:

> No one disputes that the money regulated by the campaign reform legislation is closely related to political expression. And no one disputes that the first amendment applies with special force to the political arena. The legal question is thus not whether the restrictions on giving and spending are subject to first amendment scrutiny at all. The question is what degree of scrutiny should apply. There are basically two choices . . . . The first is to treat campaign contributions and expenditures as equivalent to pure speech. If this approach is proper, then the giving and spending restrictions enacted in 1974 should be treated in the same way as laws imposing a prior restraint on speech or censoring particular points of view. Such laws are subject to the most rigorous scrutiny known to constitutional law. . . .
>
> The second legal alternative is to treat political giving and spending as a form of conduct related to speech—something roughly equivalent to the physical act of picketing or to the use of a sound truck. Alert and careful judicial scrutiny is still warranted. . . . The regulation is constitutional if it serves an important governmental interest and if that interest is unrelated to suppression of speech.

Id. at 1005-06. The Supreme Court rejected the contention that political spending was conduct, but

reasoned that political spending, similar to partisan party activities and political rallies, involves first amendment rights of association.[39] Because the cost of an effective political campaign is often great, it is only through resource pooling that advocates of limited means can make themselves heard in political debate and focus their otherwise individual efforts.[40] The Supreme Court concluded that since political spending is speech at the core of the first amendment, any restriction thereon can be justified only if it survives review under strict scrutiny.[41] The state thus has the burden to demonstrate a compelling interest that is advanced by regulating speech and association.[42]

In analyzing whether the state could show a compelling interest for the legislation, the *Buckley* Court differentiated between contributions and independent expenditures in candidate campaigns.[43] Contributions to candidates were defined as a "general expression of support" and an "undifferentiated symbolic act."[44] Since the amount contributed is only a "rough index of the intensity of the contributor's support,"[45] such limitations represent only a "marginal restriction upon the contributor's ability to engage" in political communication.[46] The Court noted that a contributor still retains the right to join those of similar political persuasion and to campaign and spend independently for the cause.[47] The Court, then applying the standard of strict judicial scrutiny, held that the government's interest in avoiding the actuality or appearance of corrupting elected officials justifies the contribution limits.[48]

The Court held that independent expenditures were political speech at the core of the first amendment and that the Act's expenditure limitations substantially restrained the "quantity and

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hypothesized that even if it were, the FECA's limitations would not survive the *O'Brien* test for valid regulation of conduct. The Court said the following:

> Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. . . . [I]t is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

424 U.S. at 17 (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)).

39. 424 U.S. at 22.
40. *Id.*
41. *Id.* at 19, 25, 44-45.
42. *Id.*
43. *Id.* at 21.
44. *Id.*
45. *Id.* at 21.
46. *Id.* at 20.
47. *Id.* at 28.
48. *Id.* at 26-27.

diversity of political speech."[49] It rejected the argument that any of the state interests purportedly advanced by such limitations were so compelling as to justify first amendment infringement.[50] The *Buckley* Court reasoned that expenditures only remotely, if at all, involve the risk of corruption perceived in contributions to candidates because of the distance between the spender and the candidate.[51] The suggestion that the government has a legitimate interest in regulating candidates' and advocates' access to the electorate by suppressing the speech of the more affluent was rejected.[52] The Court held that equalizing the relative ability of persons to influence the electorate was inimical rather than promotive of the first amendment interest in maximizing robust political debate.[53]

B. BALLOT MEASURE CAMPAIGNS

An important decision respecting spending limitations in ballot measure campaigns predated *Buckley* by almost two years. In *Schwartz v. Romnes*[54] the Court of Appeals for the Second Circuit held that a New York law,[55] which prohibited corporate spending for political purposes, was not applicable to corporate spending in a non-partisan transportation bond issue campaign.[56] The court reasoned that since corporations have free speech rights that can be exercised only through the expenditure of money,[57] prohibiting political contributions to ballot measure campaigns unjustifiably inhibits free speech.[58] Noting that the "spectre of a political debt" that will justify a total prohibition on corporate spending in a candidate campaign vanishes in a ballot measure campaign,[59] the Second Circuit refused to extend the law's regulatory net to corporate "expression of opinion on fundamental issues of the day."[60]

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49. *Id.* at 19, 39.
50. *Id.* at 45.
51. *Id.* at 45-47.
52. *Id.* at 47-51.
53. *Id.* at 48-49.
54. 495 F.2d 844 (2d Cir. 1974).
55. N.Y. ELEC. LAW § 460 (McKinney 1949) (repealed 1974) (political contributions by certain organizations addressed in N.Y. ELEC. LAW § 14-116 (McKinney 1978)).
56. Schwartz v. Romnes, 495 F.2d 844, 848-49 (2d Cir. 1974).
57. *Id.* at 852.
58. *Id.* at 852-53.
59. *Id.*
60. *Id.* In a California case the appellate court invalidated section 605 of the Berkeley Election Reform Act of 1974, which prohibited corporate contributions to candidate or ballot measure committees. Pacific Gas & Elec. Co. v. City of Berkeley, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976). Relying on *Buckley* and *Citizens for Jobs & Energy v. Fair Political Practices Comm'n,* the California court found that the only fact distinguishing *Pacific Gas & Elec. Co.* from *Buckley* or *Citizens for Jobs &*

In 1978 the United States Supreme Court, in *First National Bank of Boston v. Bellotti,* clarified how the *Buckley* discussion of spending limitations in candidate campaigns applies to ballot measure campaigns, at least insofar as corporate spending is concerned. Challenged in *Bellotti* was a Massachusetts law that prohibited specified corporations from making contributions or independent expenditures in either a candidate or ballot measure campaign unless the measure materially affected the corporation's property or business interests.[61] The Court applied the exacting scrutiny standard mandated by *Buckley* and invalidated the restrictions in part because the asserted state interests were insufficient to justify governmental encroachment on first amendment expression.[62]

The State contended that restricting corporate political spending in a ballot measure campaign was justified in order to promote confidence in government and to encourage citizens to participate actively in the electoral process.[63] The State argued that the spending prohibitions advanced these interests because money promoting corporate views in ballot measure campaigns threatened to drown out the voices of other advocates.[64] Although recognizing that these were state interests "of the highest importance,"[65] the Court rejected them as justifying abridgment of the first amendment on two grounds. First, the State failed to make any showing in the record that the citizen's role and confidence in government was imminently threatened by corporate participation.[66] There was no showing that corporations have played a dominant role in influencing ballot measure campaigns in Massachusetts.[67] Second, the Court noted that the risk of corruption simply is not present in a ballot measure campaign as it is in a candidate campaign.[68] The Court also reiterated what it had

Energy was the corporate character of the plaintiff; the court failed to discuss whether the *Buckley* contribution-expenditure dichotomy was significant in a ballot measure campaign. 60 Cal. App. 3d at 126-27, 131 Cal. Rptr. at 351-52. *See also* 424 U.S. 1; Citizens for Jobs & Energy v. Fair Political Practices Comm'n, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976); *infra* notes 87-89 and accompanying text.

The California court reverted to the *Schwartz* analysis based on the nature of corporate speech and held that the statute was unconstitutional because it abridged appellee's right to speak about an issue that closely touched its property interests. 60 Cal. App. 3d at 129, 131 Cal. Rptr. at 353. *See also* Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974).

61. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).

62. 435 U.S. at 786-88.

63. 435 U.S. at 787. The State also contended that the spending prohibition protected shareholders' first amendment rights that might otherwise be infringed should their political views differ from management's as expressed through the corporation's political spending. *Id.*

64. *Id.* at 787-89.

65. *Id.* at 788-89.

66. *Id.* at 789.

67. *Id.*

68. *Id.* at 790.

stressed in *Buckley:* the first amendment forbids the enhancement of political expression for some at the sacrifice of reduced first amendment rights for others.[69]

While the supporters of the Massachusetts legislation urged that corporate political spending may unduly influence the electorate, the Court concluded that the risk that the voters may be influenced to make an unwise decision is inherent in democracy;[70] courts cannot presume that the electorate is incapable of evaluating the merits of political information, particularly when it is informed of the source of the information.[71]

III. THE STRICT SCRUTINY STANDARD

Buckley and *Bellotti* outline the constitutional principles for testing the validity of campaign spending limitations and, in particular, limitations on the amount an individual or group can contribute to a ballot measure campaign committee. Since political spending is protected as political speech and association, any alleged encroachment on these fundamental rights mandates review under the strict scrutiny standard. This standard first requires the finding of a compelling state interest to justify the restrictions.

Elrod v. Burns[72] is perhaps the Supreme Court's most complete synthesis of first amendment jurisprudence concerning the strict scrutiny standard of review.[73] In *Elrod* the Court held that patronage practices, particularly dismissals on the basis of political affiliation, were unjustified restrictions on non-civil service employees' first amendment rights.[74] Postulating that the first amendment is not absolute, Justice Brennan stated that restraints, whether direct or indirect, were permitted "for appropriate reasons,"[75] but must survive the exacting scrutiny standard by which encroachment can be justified only to advance a

69. *Id.* at 790-91.

70. *Id.* at 790.

71. *Id.* at 791-92. As for the state's interest in protecting shareholders' first amendment rights that might be infringed by the corporation's political spending, the Court could find no substantial correlation between the state's goal and restricting corporate political spending in ballot measure campaigns since the corporation was still free to attempt to influence legislation through lobbying. Furthermore, the Court held that the statute was overinclusive because it would prohibit corporate spending to influence a ballot measure campaign even when unanimously authorized by the shareholders. *Id.* at 793-95.

72. 427 U.S. 347 (1976).

73. Although *Elrod* is a plurality opinion, even the dissenting justices agreed on the formulation of the strict scrutiny standard. Elrod v. Burns, 427 U.S. 347, 381 (1976) (Powell, J., dissenting; Burger, C.J., and Rehnquist, J., concurring in dissent).

74. *Id.* at 373.

75. *Id.* at 360.

"paramount" state interest "of vital importance."[76] The State bears the burden to show that such a compelling interest exists and that the legislative means chosen to achieve the state's interest are precisely tailored to that end and represent the least drastic degree of first amendment impairment.[77] If the means infringe unnecessarily on first amendment values or are not substantially related to achieving a legitimate state goal, the legislative scheme will fail.[78]

The initial step of the strict scrutiny analysis is to determine whether there is a legitimate and important state interest, *i.e.*, a compelling state interest.[79] In *Elrod* one of the interests asserted to support patronage dismissals was the preservation of party politics.[80] The Court rejected this as a legitimate state interest, pointing out that preservation of party politics was an interest not of the government but of the traditional party organizations.[81] In both *Buckley* and *Bellotti* the Court analyzed the legislation under the strict scrutiny standard and required the government to show a compelling interest for the legislation. The Court recognized only the risk of avoiding corruption or the appearance of corruption of a candidate for public office as a compelling state interest.[82]

Establishing the state's legitimate interest, however, is not a "talismanic incantation" that, like magic, will support the state's curtailment of the first amendment.[83] The State must also show that the exercise of free speech actually and imminently threatens that state interest.[84] This is the second step in the strict scrutiny analysis. The nature of the threat that will justify an infringement on free speech sometimes has been described by the Court as a "clear and present danger."[85] Although the "clear and present danger" test is not explicitly mentioned in *Buckley* and *Bellotti,* it is the logical basis of the second step of the strict scrutiny analysis applied in those cases. The "clear and present danger" test for permissible first amendment encroachment was defined by Justice

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76. *Id.* at 362.

77. *Id.* at 362-63.

78. *Id.*

79. Democratic Party of the United States of America v. La Follette, 101 S. Ct. 264 (1980); Cousins v. Wigoda, 419 U.S. 477, 489 (1974). The state has limited powers, and its legitimate sphere of interest is constitutionally defined. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 12-20 n. 13 (1972).

80. 427 U.S. at 368, 369 n. 22.

81. *Id.* at 368-70 & n. 22.

82. Common Cause v. Harrison Schmitt, 512 F. Supp. 489, 494-95 (D.D.C. 1980).

83. Greer v. Spock, 424 U.S. 828, 852-53 (Brennan, J., dissenting).

84. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Schenck v. United States, 249 U.S. 47, 52 (1919).

85. Schenck v. United States, 249 U.S. 47 (1919). Justice Holmes stated that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.* at 52.

Holmes in *Schenck v. United States*[86] and reformulated in *Brandenburg v. Ohio*.[87] The test as stated in *Brandenburg* is as follows:

> [T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.[88]

The *Buckley* Court implicitly recognized the applicability of the *Brandenburg* criteria to the strict scrutiny analysis when it concluded that it is the risk of actual or apparent corruption inherent in candidate contributions that justifies candidate contribution limitations.[89] In *Bellotti* the Court again implicitly recognized the relevance of the *Brandenburg* test. Rejecting the argument that corporate spending would unduly influence the electorate and destroy confidence in government, Justice Powell wrote, "If appellee's arguments were supported by record or legislative findings that corporate advocacy *threatened imminently* to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration."[90] Justice Powell concluded his opinion quoting *Thomas v. Collins*:[91] "'[a] restriction so destructive of the right of public discussion . . . without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.'"[92] Thus, it appears well established that in order to justify a curtailment of free speech,

86. *Id.*; Kalven, *Ernst Freund & the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 236 (1973).

87. 395 U.S. 44 (1969). *Brandenburg* was a per curiam opinion from a unanimous Court.

88. *Id.* at 447 (emphasis added). *But cf. Id.* at 454-57 (Douglas, J., dissenting). Justice Douglas stated the following:

> My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it. . . . [S]peech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.

Id. at 454, 457. *See also* Linde, *"Clear and Present Danger" re-examined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1183, 1185-86 (1970)).

89. 424 U.S. at 26-29.

90. 435 U.S. at 789 (emphasis added).

91. *Id.* at 792. *Thomas v. Collins*, 323 U.S. 516 (1945) was decided on the basis of the "clear and present danger" test.

92. 435 U.S. at 792 (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)).

the Government must demonstrate an immediate threat of harm to a legitimate state interest.

A. APPLYING THE STRICT SCRUTINY STANDARD

Once the State establishes that the speech presents an imminent threat or clear and present danger to compelling government interests, it must also show a sufficient nexus between the speech sought to be restrained and the protection of the compelling interests asserted.[93] In *Greer v. Spock*[94] Justice Brennan noted that in all cases in which the State has successfully asserted a compelling interest over free speech "the inquiry has been whether the exercise of First Amendment rights *necessarily* must be circumscribed in order to secure those interests."[95] The inquiry turns on whether the suppression of speech or association rights abates the threat to the state interest, *i.e.*, whether a precise relationship exists between the legislation and the interests sought

93. In re Primus, 436 U.S. 412 (1978). In *Primus* the Court held that the state's strong interest in regulating the legal profession and in preventing undue influence, overreaching, misrepresentation, invasion of privacy, and conflict of interest by attorneys was not threatened by mailed soliciation by a nonprofit organization using litigation as a means of political education and action. *Id.* at 434-36.

The Court stated:

> [C]onsiderations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment [against appellant]. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied.

Id. at 434 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 284-85 (1964)).

Cf. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460-68 (1978) (solicitation of paying clients did threaten state's interest but no need to show that solicitation in the case before the Court actually resulted in anticipated harm). *See also* United Transp. Union v. Michigan Bar, 401 U.S. 576, 581 (1971) (record devoid of any evidence or allegation of conduct on the part of appellant or its members that would support the state's restrictive interpretation and application of a law making it a misdemeanor to solicit damage suits against railroads).

In Sherbert v. Verner, 374 U.S. 398 (1963), the Court stated the following:

> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. . . . "[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation. . . ." No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court. . . . Nor, if the contention had been made below, would the record appear to sustain it; there is no proof to warrant such fears of malingering or deceit as those which respondents now advance.

Id. at 406-07 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)) (citations ommited). *See Thomas*, 323 U.S. at 536. *See also* Hess v. Indiana, 414 U.S. 105, 107-08 (1973); Pickering v. Board of Educ., 391 U.S. 563, 570 (1968); Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

94. 424 U.S. 828 (1976).

95. 424 U.S. at 852-53 (Brennan, J., dissenting) (emphasis added). *See also* United States v. Robel, 389 U.S. 258, 263-64 (1967).

to be protected. Further, the Court must determine whether other means are available to protect the interest with less infringement on first amendment rights.

In *United States Civil Service Commission v. National Association of Letter Carrier*[96] the Supreme Court upheld broad federal prohibitions against partisan political activities by certain federal civil servants. In that case the Government was successful in both aspects of the state interest analysis. The Government established an important interest in preserving a nonpartisan civil service, thereby promoting confidence in its impartial functioning,[97] and produced extensive evidence that partisan activities by civil servants imminently threatended that interest.[98] On the contrary, in *Madison School District v. Wisconsin Employment Relations Commission*[99] the Supreme Court held that state action curtailing the speech of non-union teachers was unconstitutional when the record was inadequate to show any clear and present danger to what has been recognized in other contexts to be a substantial state interests—protecting union labor and management relations.[100]

B. APPLYING STRICT SCRUTINY TO BALLOT MEASURE CAMPAIGN SPENDING

The central question addressed by this article is whether the state constitutionally can limit the amount of money a person or group can contribute in ballot measure campaigns. Since it has been clearly established that such political spending is political speech and association,[101] which are afforded ultimate protection under our legal system, the resolution of this question lies in the proper application of the strict scrutiny standard.

In 1976 the California Supreme Court addressed a related issue, the validity of expenditure limitations in ballot measure campaigns, and firmly adhered to the classical first amendment jurisprudence enunciated in *Buckley* and later in *Bellotti*. In *Citizens for Jobs and Energy v. Fair Political Practices Commission (Citizens)* the California court held that certain laws[102] limiting expenditures to influence the electorate for or against a state-wide ballot proposition

96. 413 U.S. 548 (1973).
97. *Id.* at 557, 564-65.
98. *Id.* at 566-67.
99. 429 U.S. 167 (1976).
100. *Id.* at 173-74. *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Machinists v. Street, 367 U.S. 740 (1961).
101. Buckley v. Valeo, 424 U.S. 1, 19 (1976).
102. CAL. GOV'T CODE §§ 85300-85305 (West 1976) (repealed 1977).

were constitutionally invalid.[103] The court reasoned that *Buckley's* invalidation of independent expenditure limitations in a candidate campaign was dispositive, despite the fact that *Buckley* dealt with spending limits in a candidate campaign rather than a ballot proposition.[104] The court applied the strict scrutiny standard employed in *Buckley* and held that the ballot measure expenditure restrictions were not justified by any state interest in avoiding the risk of corruption, equalizing the relative financial voice of advocates, or curbing campaign costs.[105]

In *Hardie v. Eu*[106] the California Supreme Court addressed another spending restriction in ballot measure campaigns, the legality of California's Government Code imposed limits on the amount spent for circulating or qualifying petitions for the statewide ballot.[107] The court first noted that the circulation process was a principal means of political advocacy for a proposed initiative and that limiting the amount that could be spent in that process severely curtailed political speech.[108] The State contended that the legislation was justified by the state's interests in preventing corruption and in assuring that positions on the ballot not be bought.[109] Subjecting the legislation to strict scrutiny, the court relied on *Buckley* and similarly held that the state's interest in preventing corruption did not warrant direct infringement on political speech through these expenditure limitations.[110] The court, citing *Buckley* and *Citizens,*[111] also held that preventing "the purchase of ballot positions" by moneyed interests did not justify the limits.

In *Citizens* and *Hardie* the California Supreme Court acknowledged that the strict scrutiny analysis, as expressed in *Buckley,* was applicable to expenditure limitations in ballot measure campaigns.[112] Before analyzing the California court's application of that test to the ballot measure contribution limitations in *CARC,* however, it is necessary to clarify the fundamental differences

103. Citizens for Jobs & Energy v. Fair Political Practices Comm'n, 16 Cal. 3d 671, 675, 547 P.2d 1386, 1388, 129 Cal. Rptr. 106, 108 (1976).

104. *Id.*

105. *Id.*

106. 18 Cal. 3d 371, 556 P.2d 301, 134 Cal. Rptr. 201 (1976).

107. CAL. GOV'T CODE §§ 85200-85202 (West 1976) (repealed 1977).

108. Hardie v. Fong Eu, 18 Cal. 3d 371, 376-77, 556 P.2d 301, 303, 134 Cal. Rptr. 201, 203-04 (1976).

109. 18 Cal. 3d at 377, 556 P.2d at 303, 134 Cal. Rptr. at 204.

110. *Id.*

111. *Id.* at 378, 556 P.2d at 304, 134 Cal. Rptr. at 204. The court did acknowledge, however, that contribution limitations "remain a constitutionally valid means of dealing with undue influence by moneyed interests in the electoral process." *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 23-38 (1976)).

112. *See supra* notes 102-11 and accompanying text.

between candidate and issue-related elections and the constitutional analysis pertinent to each.

IV. THE DISTINCTION BETWEEN BALLOT MEASURE CAMPAIGNS AND CANDIDATE CAMPAIGNS

The Supreme Court has recognized the difference between ballot measure and candidate campaigns. In *Bellotti* it implicitly recognized this dissimilarity by not distinguishing between corporate contributions and independent expenditures in ballot measure campaigns. Although this distinction would have been at the Court's fingertips after *Buckley,* the Court held instead that the challenged Massachusetts law, which prohibited both, was unconstitutional *in toto.*

The primary governmental interest asserted by the State in both *Buckley* and *Bellotti* concerned the avoidance of actual corruption and the appearance of corruption.[113] Although the Court in *Buckley* recognized the danger that arises when a political debt is created in a candidate campaign,[114] when presented with the identical argument in *Bellotti,* the Court reached a contrary conclusion. The *Bellotti* Court reasoned that the state interests which support contribution limitations in a candidate campaign are not determinative in a ballot measure campaign.[115] The Court relied on *Schwartz v. Romnes*[116] and its progeny[117] in stating that "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."[118]

In *Schwartz* the Court of Appeals for the Second Circuit also rejected the argument that a statutory prohibition on corporate political expenditures was necessary to minimize corruption.[119] The court reasoned that, "[t]he spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights."[120]

113. 424 U.S. at 25. The State in *Buckley* also argued that the spending limitations equalize access to the political arena and serve to curb the expense of campaigns. *Id. See also Bellotti,* 435 U.S. at 787-88. The State also urged that the legislation was necessary to ensure the active participation by the citizenry in the electoral process in order to sustain public confidence in government. *Id.* at 788-89. Finally, the assertion was made that the spending limitations protect shareholders whose political views differ from those of management. *Id.* at 787.

114. 424 U.S. at 27.

115. 435 U.S. at 790.

116. 495 F.2d 844 (2nd Cir. 1974).

117. C & C Plywood Corp. v. Hanson, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd,* 583 F.2d 421 (9th Cir. 1978); Pacific Gas & Elec. Co. v. Berkeley, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich. 465, 242 N.W.2d 3 (1976).

118. 435 U.S. at 790.

119. Schwartz v. Romnes, 495 F.2d 844, 852-53 (2nd Cir. 1974).

120. *Id.*

Thus, the state interest analysis results in a different conclusion when applied to a statute regulating ballot measure campaigns as opposed to candidate campaigns. The corruptive influence argument apparently does not justify restrictions on contributions in a ballot measure campaign.

The difference between candidate and ballot measure contributions was also recognized by the Court of Appeals for the Ninth Circuit in *C & C Plywood Corp. v. Hanson.*[121] That court rejected the State's argument that a statute forbidding corporate or bank contributions to ballot measure campaigns[122] was constitutional under *Buckley* as a "contribution limitation." The court stated as follows:

> [T]he Commissioner's reliance on *Buckley* is misplaced. . . .
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> . . .
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> As noted in *Bellotti, Buckley* was concerned with the regulation of contributions and expenditures in partisan election campaigns. . . . In contrast, the statute here, as in *Bellotti,* applies to nonpartisan campaigns regarding ballot issues. Although the relevant statute in *Bellotti* forbade both contributions and expenditures by corporations, the Court did not distinguish between the two activities in deciding that the statute was unconstitutional.[123]

The distinction between contribution-speech and expenditure-speech in candidate campaigns cannot be meaningfully applied to contributions to ballot measure campaign committees. The United States District Court for the District of Columbia in *Common Cause v. Harrison Schmitt*[124] described in dicta the character of contributions to campaign committees—albeit candidate support committees that were independent from the control of a candidate. The court stated the following:

> The defendant political committees are simply pooling agents for many small voices wishing to make intelligible political statements. . . . Political committees pool money from individuals who are interested in politics and

121. 583 F.2d 421 (9th Cir. 1978).
122. MONT. REV. CODES ANN. § 23-4744 (1975).
123. C & C Plywood Corp. v. Hanson, 583 F.2d 421, 424-25 (9th Cir. 1978) (citation omitted).
124. 512 F. Supp. 489 (D.D.C. 1980). In *Common Cause* the District Court for the District of Columbia held that section 9012(f) of the Presidential Election Campaign Fund Act, limiting independent expenditures in a presidential campaign by a political committee, was unconstitutional as an abridgment of free speech. *Id.* at 500. *See* 26 U.S.C. §§ 9001-9012 (1976).

> amplify their shared viewpoint into an efficient political message. . . .
>
> The communication sponsored by the political committees is the language of their members and contributors. . . .[125]

The relationship of ballot measure contributions to the committee's speech is likewise direct, unlike candidate contributions in which the resulting speech is controlled by someone other than the contributor. The ballot measure committee exists only to organize and effectively communicate the message of its adherents for or against the proposed measure. The Supreme Court's characterization of candidate contributions as a "general expression of support"[126] for the candidate is not applicable in ballot measure elections. Hence, limitations in such elections should not be characterized as representing only a "marginal encroachment" on speech and association rights. The authors also postulate that contributions to ballot measure campaigns are similar to independent expenditures which *Buckley* held to be direct speech by the spender.[127] Thus, any analysis of limitations on ballot measure contributions seemingly should proceed from the theory that such limitations are substantial rather than marginal first amendment restrictions.

V. CITIZENS AGAINST RENT CONTROL V. CITY OF BERKELEY

In *CARC* sections of the Berkeley Election Reform Act of

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125. 512 F. Supp. at 496-97.

> A word is in order to point out how speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the nonpublicly funded candidate). A candidate strives to satisfy and mollify his or her supporters whenever possible; the politician, after all, depends considerably on pleasing supporters in order to maintain the campaign's momentum and coherence. Candidates are loosely tethered, not bound, to the notions of political speech held by their supporters. Political committees, on the other hand, are bound to reify the political thoughts of their member-contributors. The political communication by political committees is circumscribed by the expectations and understandings of the associates. The organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors. The candidate, however, is free to exercise his or her own judgment as to what is in his or her own best interests based on a broader constituency.

Id. at 497-98. *See also* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments,* 86 YALE L.J. 953, 959 (1977). A contribution to a political committee, unlike a contribution to a candidate "involves the donor's own speech. The donor does not give money in order that someone else speak; he constitutes a part of that which is speaking." *Id.*

126. 424 U.S. at 21.

127. 424 U.S. at 16, 19. Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments,* 86 YALE L.J. 953, 957-61 (1977).

1974 were in issue.[128] Section 602 provides as follows: "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)."[129] Reversing two lower courts, the California Supreme Court held by a narrow majority that this section of the Act was constitutional because it served the compelling governmental interest of preserving the integrity of the initiative and referendum processes from perversion by large contributions[130] with only minimal infringement on first amendment rights.[131]

The court initiated its discussion of the interests asserted by the state by noting the significant democratic function served by the initiative and referendum,[132] which allow the electorate the opportunity to participate directly in the political process.[133] The court concluded that this function is perverted when large contributions are injected into the electoral process.[134] Asserting that large contributions detrimentally affect both ballot measure and candidate campaigns, the court delineated the impact of this phenomenon. It reasoned that instead of fostering participation by the electorate, large contributions engender participation only by special interests.[135] The ultimate effect is voter apathy and loss of voter confidence in the electoral process.[136] The court concluded that these interests were protected by the legislation and should be recognized as compelling.[137]

Opponents of the legislation contended that the ordinance abridged first amendment speech by stifling the amount of information disseminated to the public. The court concluded that

128. BERKELEY, CAL., BERKELEY ELECTION REFORM ACT §§ 602, 604 (Ord. No. 4700-N.S.) (1974).

129. Section 219 of the Berkeley Election Reform Act defines "persons" as "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert." *Id.* at § 219.

130. 27 Cal. 3d at 830, 614 P.2d at 748, 167 Cal. Rptr. at 90.

131. *Id.* at 831-32, 614 P.2d at 748-49, 167 Cal. Rptr. at 91.

132. *Id.* at 824, 614 P.2d at 745, 167 Cal. Rptr. at 87. The court described initiative and referendum as "one of the most precious rights of our democratic process." *Id.* (citation omitted).

133. *Id.* at 825, 614 P.2d at 745-46, 167 Cal. Rptr. at 87-88.

134. *Id.* The court reached this conclusion even though acknowledging that ballot measure elections do not create the same problems as candidate elections. The court noted that candidate elections raise the risk of creating future political debts. *Id.* (citing *Bellotti*).

135. *Id.* The court explained that "[w]hen large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative and referendum: instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interests." *Id.* at 827, 614 P.2d at 746, 167 Cal. Rptr. at 88.

136. *Id.* at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89.

137. *Id.* at 829, 614 P.2d at 748, 167 Cal. Rptr. at 90.

the infringement was only minimal since the legislation here, unlike that in *Bellotti,* only limited contributions; it did not prohibit them.[138] As a result, the ordinance only marginally restricted political expression.[139] The court further justified the infringement by noting that independent expenditures by the contributor remain unlimited and that an individual is still free to volunteer services to a ballot measure campaign.[140] The argument that the contribution limit encroached on association rights was rejected, with the court observing that the contributor still remains free to join any political association.[141]

Although the legislation in *CARC* was purportedly examined under strict judicial scrutiny, the court actually appeared to balance the city's asserted interest in protecting the initiative and referendum process against the contributor's first amendment rights. Finding that the restriction only "marginally" encroached on first amendment rights, the court never inquired whether the record demonstrated that contributions in excess of $250 perverted the electoral process.[142] Even assuming that the contribution limit only marginally infringed on speech and association rights, the court's balancing under the guise of strict scrutiny is inconsistent

138. *Id.* The court stated that "while the measure at issue in *Bellotti* completely silenced the voice of Massachusetts corporation, the ordinance here has no such purpose or effect." *Id.*

139. *Id.* The California court adhered to the Supreme Court's reasoning in *Buckley* that contribution ceilings merely require candidates and committees to raise funds from a greater number of sources and compel individuals who wish to exceed the contribution ceiling to expend such funds on direct political expression. *Id.* (citing *Buckley,* 424 U.S. at 21-22).

140. *Id.*

141. *Id.* at 830, 614 P.2d at 749, 167 Cal. Rptr. at 90-91.

142. *Id.* at 835-36, 614 P.2d at 751-52, 167 Cal. Rptr. at 93-94 (Richardson, J., dissenting). The dissent stated as follows:

> What, then, is the compelling interest requiring imposition of a restraint so substantial on two rights so fundamental? The majority identifies it thus: "large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures; . . ." [citation] My colleagues of the majority urge a theory that public confidence in the electoral processes is undermined by permitting unrestricted contributions in ballot measure elections. It is noteworthy that it is not the *fact* of a danger but the *potential* of a danger that alone generates the *compelling* interest found by the majority. It will readily be seen that this 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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> . . .
>
> Unquestioned and unverified, however, these 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. Indeed the only empirical data that appear in the record are studies of spending on statewide initiative campaigns in California during the period 1954-1974. The studies conducted by a Sacramento research organization, reveal that in 28 statewide contests the highest spenders won 14 times and lost 14 times. I must leave to the reader what the arithmetic proves.

Id. (original emphasis) (citations omitted).

with the Supreme Court's first amendment principles.[143] In *Buckley* the Court said that even though contribution limitations in candidate campaigns represented a marginal restriction on first amendment rights, the legislation still must be analyzed under the strict scrutiny standard.[144] The degree of impairment is significant only after the state has demonstrated it has a compelling interest that is imminently threatened. Unfortunately, the California Supreme Court seemed to ignore this first amendment standard, which requires the government to demonstrate that the restricted speech poses an imminent threat to the state's asserted interests.[145] The court also failed to examine whether the legislation was narrowly drawn to achieve the state's goal.[146]

The court found that the electoral process is "perverted" when special interests participate through unlimited contributions.[147] The result is the loss of voter confidence in the

143. Morial v. Judiciary Comm'n of La., 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). In *Morial* the court held that a Louisiana law requiring a judge to resign before running for elective office did not violate the first and fourteenth amendments. Circuit Judge Goldberg applied the "means-end scrutiny" test:

> The standard to be applied in any case is a function of the severity of impairment of first amendment interests. As the burden comes closer to impairing core first amendment values . . . the requisite closeness of fit of means and end increases accordingly. The teaching of *Letter Carriers,* considered as part of the jurisprudence of the first amendment . . . is that restrictions on the partisan political activity of public employees and officers, where such activity contains substantial non-speech elements . . . are constitutionally permissible if justified by reasonable necessity to burden those activities to achieve a compelling public objective.

Id. at 300 (citations omitted).

Morial described a variable standard of scrutiny based upon the degree of first amendment encroachment. The court found that the "resign to run rule" infringed upon fundamental first amendment rights but that the impairment was not sufficiently grievous to require the strictest constitutional scrutiny. *Id.* at 301-02. The court then adopted "a reasonable necessity" standard and held that the Louisiana law was reasonably necessary to promote the state's interest in avoiding the appearance of impropriety. *Id.* at 302-03.

Under *Morial,* if the infringement on first amendment freedoms is direct but minimal, the state need not seek the narrowest or least drastic means of achieving its end even if that end could be achieved with no infringement at all. The *Morial* court was aware that the Supreme Court never sanctioned or articulated this analysis. *Id.* at 300 n. 5. Unfortunately, in an effort to reconcile what seemed to be inconsistent first amendment decisions applying strict scrutiny, the court in *Morial* focused on the degree of impairment rather than on the State's crucial burden to establish and demonstrate a threatened interest.

144. 424 U.S. at 23-28.

145. *See* Elrod v. Burns, 427 U.S. at 347; First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 765.

146. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 786; Elrod v. Burns, 427 U.S. at 363; Buckley v. Valeo, 424 U.S. at 25. *See also* NAACP v. Button, 371 U.S. 415, 438 (1962). In *Letter Carriers* the Court was careful to point out that the broad restrictions imposed on civil service employees were indeed the least drastic means to achieve the government's legitimate and threatened goals. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 566-67 (1973).

147. 27 Cal. 3d at 827-28, 614 P.2d at 746-47, 167 Cal. Rptr. at 88. The court used a small selection of articles from the wealth of academic opinions available on the subject to buttress its contention that ballot measures are perverted when special interests participate. *See infra* notes 129-45. The articles were used to support the proposition that the integrity of the ballot measure election is threatened when wealthy special interests participate, because the citizenry loses confidence in the system. Numerous other articles and academic opinions refute this logic, however. Although the court suggested that it is harmful for "special interest" groups to utilize the ballot measure process, the term "special interest" does not necessarily connote a malignancy in our democratic process. It

electoral system and the creation of voter apathy.[148] In reaching this conclusion the court glossed over the *Bellotti* Court's recognition that the corruptive influence present in a candidate campaign does not exist in a ballot measure election.[149] The majority, however, reconciled its holding by distinguishing *Bellotti*.[150] The essence of the distinction was that Berkeley's $250 contribution limit differs from the invalidated Massachusetts statute, which prohibited corporate spending in certain ballot measure elections.[151] This factual difference, however, appears constitutionally meaningless in terms of the strict scrutiny standard. Whether a law's prohibitory effect is total or partial is irrelevant if there is no compelling governmental interest to justify the encroachment on first amendment rights. The *Bellotti* Court did not rest its holding on the law's prohibition of contributions, but on the fact that no demonstrable danger to the election process was present; hence no compelling governmental interest was or could be established.[152]

The California court concluded that the domination of the ballot measure process by large contributors stilled the voices of

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is the voters themselves, grouped together to promote or oppose ballot measures or other issues of public importance, who comprise the "special interests" which *CARC* reasoned threatened the integrity of the electoral process. *See* V.O. KEY, JR., POLITICS PARTIES AND PRESSURE GROUPS 130 (5th ed. 1967). Key suggested the following:

> As he speculates about the significance of pressure groups the student may well keep in mind a warning about the popular stereotypes of these organizations. . . . The view that pressure groups are pathological growers in the body politic is likewise more picturesque than accurate. A safer assumption is that groups developed to fill gaps in the political system.

Id. See also Note, *Corporate Contributions to Ballot-Measure Campaigns,* 6 U. MICH. J.L. REF. 781, 786 (1973). The author stated:

> A pattern of association for political purposes pervades American politics. Theorists may point to individual participation in politics as a basic element of a pluralistic democratic society, but individual values are successfully achieved in politics by group action. In initiative campaigns especially, interest group involvement is important to the proper functioning of the political process. Justice Frankfurter, in his concurring opinion in *United States v. CIO,* one of the few cases interpreting the Federal Corrupt Practices Act, noted, "The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative process. They could hardly go on without it." Interest groups inform the electorate of how the enforcement of particular measures would affect them, allowing voters to balance competing claims.

Id. See SHERWOOD & GABLE, THE CALIFORNIA SYSTEM OF GOVERNMENT 33-45 (1968); C. P. SHONER, CALIFORNIA GOVERNMENT & POLITICS TODAY, 19-20 (2d ed. 1973); H. A. TURNER & J. A. VIEG, THE GOVERNMENT AND POLITICS OF CALIFORNIA, 51-64 (3d ed. 1967).

148. 27 Cal. 3d at 828-29, 614 P.2d at 747, 167 Cal. Rptr. at 89.

149. 435 U.S. at 790.

150. 27 Cal. 3d at 829, 614 P.2d at 748, 167 Cal. Rptr. at 90.

151. *Id.*

152. 435 U.S. at 788-92. The Court also seized upon *Buckley* dicta that a contributor's free speech rights were only marginally impaired by a contribution limitation because the amount of the contribution was only a rough index of support for the candidate, who remained free to speak his own views. In so doing, the Court refused to recognize the differences between a ballot measure and candidate contributions. *Id.* at 790-91.

other contributors.[153] Yet the Buckley Court rejected virtually identical rationale for limiting expenditures when it said, "[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. . . ."[154] As the Court said in *Bellotti,* "[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . ."[155]

Tied to this reasoning was the court's theory that large contributions cause "voters [to] lose confidence in our governmental system if they come to believe that only the power of money makes a difference."[156] The Supreme Court addressed similar contentions in *Miami Herald Publishing Co. v. Tornillo*[157] *(Miami Herald Publishing)* when it considered the reverse side of the *CARC* coin—legislation that compelled speech in the form of a right-of-reply statute. While not entirely on point, the case is instructive because it shows the Court's view of governmental attempts to protect the public from domination by powerful interests. In *Miami Herald Publishing,* Florida asserted that it had an interest in controlling the press in order to assure public awareness of competing points of view.[158] The state claimed this statute was necessary because, among other reasons, the press had become noncompetitive, enormously powerful, and influential in its capacity to manipulate popular opinion by excluding less affluent competing points of view that were financially unable to enter into the press establishment.[159] None of the asserted factors, standing alone or considered together, were sufficient to convince the Court that the first amendment restrictions were justified. The Supreme Court stated, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[160]

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153. 27 Cal. 3d at 826-27, 614 P.2d at 747, 167 Cal. Rptr. at 89.

154. 424 U.S. at 48-49. *See* Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963).

> [T]he soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth in behalf of or against any proposition. . . . Hence an individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view. He must consider all alternatives, test his judment by exposing it to opposition, make full use of different minds to sift the true from the false.

Id. at 881.

155. 435 U.S. at 790.

156. 27 Cal. 3d at 827-28, 614 P.2d at 747, 167 Cal. Rptr. at 89.

157. 418 U.S. 241 (1974).

158. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249-56 (1974).

159. *Id.* at 249-56.

160. *Id.* at 256. Justice White said the following in his concurring opinion:

The ordinance in *CARC,* like the Florida legislation, was designed to avoid the influence of powerful interests. Unlike the right-of-reply statute, however, the Berkeley contribution limitation seemingly lacks the virtue of directly promoting this goal. The more plausible effect of the restriction, as the Supreme Court recognized in *Bellotti,*[161] will be to reduce the overall vigor of debate to a low common denominator.

Less than one month before the *CARC* opinion, the Court of Appeals for the Fifth Circuit, on closely analogous facts, reached a result opposite to that of the California court. In *Let's Help Florida v. McCrary,*[162] a political committee challenged a Florida statute which limited the amount an individual could contribute to a committee in a ballot measure campaign. The legislation provided that "[n]o person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts: . . . (d) To any political committee in support of, or in opposition to, an issue to be voted on in a statewide election, $3,000."[163] Florida attempted to justify this statute by asserting that the limitation prevented corruption and promoted disclosure concerning the financing of election campaigns.[164]

The Fifth Circuit rejected these asserted interests and concluded that the legislation was "ill-suited for preventing corruption or for promoting disclosure. . . ."[165] The court explained that in ballot measure elections the only decision-maker that large contributions tend to influence is the voter, which involves the very speech activity protected by the first amendment.[166] On this point, the court adhered to the Supreme Court's distinction in *Bellotti* regarding the potential for corruption

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> Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.
>
> Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. . . . Any other accomodation — any other system that would supplant private control of the press with the heavy hand of government intrusion — would make the government the censor of what people may read and know.

Id. at 259-60 (White, J., concurring) (footnote omitted).

161. 435 U.S. at 790 n. 29.
162. 621 F.2d 195 (5th Cir. 1980).
163. FLA. STAT. ANN. § 106.08 (1) (d) (West 1977).
164. 621 F.2d at 197.
165. *Id.* at 201.
166. *Id.*

in a candidate election as opposed to a ballot measure election.[167] Based on *Bellotti,* the court concluded that the statute could not be justified on the rationale that it prevents corruption.[168] As for the second asserted interest, the court reasoned that the limitations did "little to promote disclosure" and unnecessarily abridged first amendment associational freedoms.[169]

Let's Help Florida and *CARC* are factually and legally similar.[170] Yet, while both cases purported to apply the strict scrutiny standard and to rely on *Buckley* and *Bellotti* for guidance, conflicting results were reached.

VI. MONEY AND BALLOT MEASURE ELECTION RESULTS

At the heart of the *CARC* opinion is the assumption that the amount of money contributed in a ballot measure election potentially threatens to destroy the ballot measure process and has a direct and predictable impact upon election results. Available literature and studies suggest, however, that methods of direct popular legislation through ballot measure elections are thriving in the United States. Furthermore, there is no clearly predictable effect of money on such elections because campaign funding is only one of many factors that influence the outcome of elections.[171]

Currently, every state except Delaware permits some form of direct legislation.[172] The constitutional referendum is the most widely used, and at least half of the states provide for some form of initiative or popular referendum.[173] At least thirty-nine states require or allow local government units to hold referenda on

167. *Id.* at 200.

168. *Id.*

169. *Id.* The court held that Florida can promote disclosure of the source of campaign funding through "appropriate legislation." The appropriate legislation approved in other contexts has been legislation requiring identification of the source of campaign funds. *See, e.g.,* First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 792 n. 32; Buckley v. Valeo, 424 U.S. at 67; United States v. Harriss, 347 U.S. 612, 625-26 (1954). The court in *Let's Help Florida* held that prohibiting ballot measure campaign spending did little to promote disclosure. 621 F.2d at 200.

170. If anything, Berkeley's limit is even more restrictive than Florida's: Berkeley put a $250 limit on the amount one can contribute to all committees on one side of a ballot measure (*i.e.,* if there were five committees, one could contribute $50 to each), while Florida's limit applies separately to each committee even if there are more than one on a given side.

171. *See generally* D. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1980) (unpublished dissertation); REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE & THEORY (Butler & Ranney, eds. 1978) (hereinafter Butler & Ranney); AM. POL. SCI. ASS'N, THE INITIATIVE PROCESS & PUBLIC POLICY-MAKING IN THE STATES: 1904-1976, address by L. Berg (Aug. 31-Sept. 3, 1978); THE INITIATIVE NEWS REP., 4-8 (Jan. 12, 1981); NEW YORK SENATE RESEARCH SERV. TASK FORCE ON CRITICAL PROBLEMS, THE POPULAR INTEREST VERSUS THE PUBLIC INTEREST . . . A REPORT ON THE POPULAR INITIATIVE, 10-14.31 (1979).

172. *See generally* Ranney, *The United States of America,* in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE & THEORY 69-73, *supra* note 171; MAGLEBY, *supra* note 171, and 62.

173. *Id.*

proposed local ordinances.[174] Notwithstanding varying trends throughout the years, the vitality of direct legislation is evidenced by statistics regarding the total number of measures on the ballot. Between 1898 and 1976, 2,474 proposals have appeared on ballots in the various states that permit the use of both the initiative and referendum,[175] approximately 700 of which have been initiated by popular petition.[176]

Since 1970 the use of direct legislation has substantially increased in the United States.[177] This increase, however, cannot be attributed to legislation designed to place limits on the amount contributed in ballot measure campaigns as a means of averting the purported danger of special interest money. In fact, "grass roots" special interests have been and are successful competitors in the direct legislation process.[178] Moreover, the number of votes cast on ballot measures is not significantly less than those cast for candidates.[179] The continuing interest in the direct legislation process is further evidenced by the approximately one hundred bills currently pending in state legislatures relative to introducing and amending the initiative and referendum processes.[180] There appear to be no facts to sustain the *CARC* majority's conclusion that contribution limits are necessary to sustain an alert and active electorate in a ballot measure election.

The second concern in *CARC* was the allegation that large contributions injected into a ballot measure campaign would unfairly affect the outcome. However, the theory that the amount of money spent in a campaign is the single accurate predictor of which side will win is unfounded. The conclusions of political

174. Butler & Ranney, *supra* note 171, at 71-73. *See also* Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda,* 64 AM. POL. SCI. REV. 124, 125 (March 1970).

175. Butler & Ranney, *supra* note 171, at 81; MAGLEBY, *supra* note 171, at 110-17.

176. Butler & Ranney, *supra* Note 171, at 81; MAGLEBY, *supra* Note 171, at 110-17.

177. THE INITIATIVE NEWS REP., *supra* note 171.

178. "While these high costs [of the initiative process] are identified primarily with economic special interest groups, including not only business, but also labor unions and public employees, 'grass roots' organizations will continue to be able to compete successfully in the initiative process with relatively modest financial resources." Butler & Ranney, *supra* note 171, at 118. *See also* Price, *The Initiative: A comparative State Analysis and Reassessment of a Western Phenomenon,* 28 W. POL. Q. 243, 260 (June 1975).

179. The drop-off rate (*i.e.*, proportion of voters who cast ballots but do not vote in a particular candidate race or on a proposition) varies according to such factors as the type of election (*i.e.*, primary, general, presidential), the type of proposition (*e.g.*, popularly initiated proposal as opposed to legislative proposal), ballot length, and position on the ballot. In California the overall drop-off rate for propositions in the 1970-1978 general elections was approximately 16%; thus, on the average, 84% of voters who cast ballots vote on state-wide propositions. Moreover, the overall drop-off rate for initiatives in the 1970-1978 California general elections was only 7%, a figure comparable to the drop-off rate for several of the candidate races on those ballots. Voter fatigue (*i.e.*, the further down the ballot, the greater the drop-off), on the other hand, has much greater effect on candidate elections and legislative propositions than on initiatives. *See generally* MAGLEBY, *supra* note 171, at 146-77.

180. NAT'L CENTER FOR INITIATIVE REVIEW, SUMMARY OF PENDING LEGISLATION RELATIVE TO THE INITIATIVE & REFERENDUM PROCESS IN THE STATES 1 (1981).

scientists vary widely with regard to the effect of spending in election campaigns.[181] These political scientists do not ignore the presence and impact of money spent in a ballot measure election, but most commentators acknowledge that political communication enhanced by spending is only one of numerous factors which coalesce in the electorate's decision-making process and thus in the ultimate passage or defeat of a measure.[182] Analyzing voting behavior is a difficult task, as it necessarily involves the interpretation of a plethora of factors, motivations, and predelictions.

Literature on the subject of voter behavior in ballot measure contests almost always mentions the impact of various information sources, including media exposure, the official voter's handbook, and endorsements by newspapers, radio and television stations, and public figures.[183] Moreover, factors such as the length of a measure, the complexity of the issue, and the clarity of its presentation are recognized influences on voter awareness.[184]

Studies also indicate that the extent of voter participation is affected by, among other things, the timing of candidate elections and various socioeconomic factors.[185] Personal predispostions such as party affiliation and personal ideology also influence the vote.[186] Finally, commentators continue to debate the significance of liberal and conservative trends both as to cause and effect of voter behavior in ballot measure contests.[187]

Money spent on ballot measures may very well influence voter behavior. Nevertheless, historical research reveals that money

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181. *See generally* Butler & Ranney, *supra* note 171; LYDENBERG, BANKROLLING BALLOTS—THE ROLE OF BUSINESS IN FINANCING STATE BALLOT QUESTION CAMPAIGNS (1979); MAGLEBY, *supra* note 171; MASTRO, COSTLOW & SANCHEZ, TAKING THE INITIATIVE: CORPORATE CONTROL OF THE REFERENDUM PROCESS THROUGH MEDIA SPENDING AND WHAT TO DO ABOUT IT (1980); SHOCKLEY, THE INITIATIVE PROCESS IN COLORADO POLITICS: AN ASSESSMENT (1980); TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM & RECALL PROCESS (1977); Price, *supra* note 178; Note, *The California Initiative Process: A Suggestion for Reform,* 48 S. CAL. L. REV. 922-41 (1975).

182. *See, e.g.,* MAGLEBY, *supra* note 171; Butler & Ranney, *supra* note 171; LYNDENBERG, *supra* Note 181, at 1, 4, 8-9; Price, *supra* Note 178; Hamilton, *supra* Note 174; 48 S. CAL. L. REV. 922-41, *supra* note 181.

183. *See, e.g.,* GREGG, NEWSPAPER ENDORSEMENTS & LOCAL ELECTIONS IN CALIFORNIA 27 (1966): MAGLEBY, *supra* note 171, at 248-70, 316-31; Butler & Ranney, *supra* note 171, at 111-12; 48 S. CAL. L. REV., *supra* note 181, at 938-39; Hamilton, *supra* note 174, at 129, 132-36; Henderson & Rosenbaum, *Prospects for Consolidating Local Government: The Role of Elites in Electoral Outcomes,* 17 AM. J. POL. SCI. 695 (1973).

184. *See, e.g.,* MAGLEBY, *supra* note 171, at 250-51, 272-81; Butler & Ranney, *supra* note 171, at 110-13; 48 S. CAL. L. REV., *supra* note 181, at 934-35.

185. *See, e.g.,* MAGLEBY, *supra* note 171, at 254, 263, 268-70, 278-81; Butler & Ranney, *supra* note 171, at 108-10, 114; Hamilton, *supra* note 174, at 126-28, 133-34; Address by H. D. Hamilton, *Political Ethos: The Evidence in Referenda Survey Data* (Sept. 4-9, 1973).

186. *See, e.g.,* MAGELBY, *supra* note 171, at 344-50; Butler & Ranney, *supra* note 171, at 116-17; Hamilton, *supra* note 174, at 126, 130.

187. *See, e.g.,* MAGLEBY, *supra* note 171, at 82-83, 114, 224; *The Popular Interest, supra* note 171, at 34.

alone does not dictate or explain the results of ballot measure elections. In January 1980 the California Fair Political Practices Commission published an official study of state elections from 1958 through 1978, including a study of statewide ballot measures entitled *Campaign Costs: How Much Have They Increased and Why?* The study concludes that in California, campaign spending for state-wide ballot measures has remained fairly constant during the last twenty-five years.[188]

Analysis of official spending statistics gathered by the Fair Political Practices Commission and earlier spending reports and election results obtained from the California Secretary of State's office, reveals that the higher spender prevails fifty-four percent of the time. (Appendix 1). Results tabulated up to the 1974 general election reveal that the split was equal at that time, with the high and low spenders each winning fifty percent of the time. (Appendix 1).[189] Further, there appears to be no correlation between the spending differential of the opposing sides and the success or failure of the higher spender (*i.e.*, the higher spender cannot ensure success even by substantially outspending an opponent). (Appendix 2).

From 1912 to 1979, 165 initiative measures qualified for the ballot in California. One hundred eighteen, or seventy percent of these, were rejected by the voters.[190] In major ballot measure elections since 1954, just over sixty-eight percent failed. (Appendix 1). Of these, the high spender was the opponent fifty percent of the time. Tabulating elections in which one side outspent the other by

188. CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, CAMPAIGN COSTS: HOW MUCH HAVE THEY INCREASED & WHY? 8 (1980). The Commission's report rants selected state-wide ballot measures from 1956-1978 in terms of actual or "current" dollars spent. This table is reproduced as Appendix 1. A comparison ranking then considers these same ballot measures but ranks according to constant dollars spent. (Appendix 2). The constant dollar is determined by using 1958 as the year in which a dollar is assumed to be worth a dollar, then adjusting campaign costs in all other years according to consumer price indices.

This comparison produces a rather startling rebuttal to the arguments of those wishing to cap purportedly spiraling campaign costs with spending limitations. Appendix 1 shows that the Proposition 5 campaign for the 1978 general election ballot to regulate smoking was the most expensive in terms of current dollars spent. It ranks only fourth, however, in terms of constant dollars. Proposition 4 for Oil and Gas Conservation on the 1956 general election remains the most expensive California campaign in the last 20 years in terms of constant dollars. The Commission's study concludes as follows: "These findings do not support a conclusion that costs for statewide ballot measures are increasing significantly."

189. *See* Appendices 1, 2 and 3 (compiled from CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, CAMPAIGN CONTRIBUTION & SPENDING REPORT, JUNE 8, 1976 PRIMARY ELECTION; NOV. 2, 1976 GENERAL ELECTION; JUNE 6, 1978 PRIMARY ELECTION; NOV. 7, 1978 GENERAL ELECTION; JUNE 3, 1980 PRIMARY ELECTION; CALIFORNIA RESEARCH, SURVEY OF SPENDING IN STATEWIDE INITIATIVE CAMPAIGNS 1954-1974 cited in Petitioner's Brief, Citizens for Jobs & Energy v. FPPC, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976)); MARCH FONG EU, CALIFORNIA SECRETARY OF STATE, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS 10-12 (Oct. 1979).

190. MARCH FONG EU, CALIFORNIA SECRETARY OF STATE, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS 10-12 (Oct. 1979).

at least a two to one margin (Appendix 3), the failure rate remains between sixty percent and eighty percent whether the money was spent to pass or defeat the measure. This correlates with the general overall failure rate of ballot measures. The failure rate for initiatives is approximately seventy percent; for ballot measures as a whole, the failure rate is between fifty and sixty percent.

Rent control measures in the City of Berkeley present an interesting case. Rent control has been proposed by initiative four times: in 1972; in 1977 (the election giving rise to the *CARC* case); in 1978; and in 1980. In at least three of the contests, the rent control opponents significantly outspent the measure's proponents. Nevertheless, the measures were passed into law three out of four times. (Appendix 4).

Thus, there appears to be no substantive evidence to show that the spectre of large contributions has dimmed the popularity of direct legislation, or that voter interest and confidence has waned. Moreover, legislation that imposes limits on contributions will not resolve the problem of dominant voter influence. The amount of money spent in an election is only one of numerous factors to consider in evaluating the outcome.

VII. CONCLUSION

Ballot measure elections exemplify the ideal of the democratic process and perhaps the embodiment of its most pristine form—self government by direct popular legislation.[191] The objective of governmental neutrality in the electoral process has been reaffirmed repeatedly by the courts.[192] The exercise of governmental restraint in this process is a goal sought when first amendment speech is unduly abridged. Such regulations should be promulgated only in the most compelling circumstances. Courts must continue to scrutinize stringently government attempts to limit free political debate of important public issues. Our system of democracy is based upon a respect for the intelligence and common sense of the citizenry. Legislation regulating campaign contributions to ballot measure committees, well intentioned as it may be, reflects a basic departure from this principle and substitutes government's judgments for those of the public.

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191. *See* Butler & Ranney, *supra* note 171, at 93-99.

192. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978). *See also* Polsby, *Buckley v. Valeo: The Special Nature of Political Speech,* 1976 SUP. CT. REV. 1; A. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 76-81 (1972).

APPENDIX 1[a]

Prop.	Description	Results	Spending For	Spending Against	Lo/Hi %[b]	High Spender
1954	**GENERAL ELECTION**					
4	Aid to needy aged	Failed	$ 134,928	$ 218,032	62	Won
1956	**GENERAL ELECTION**					
4	Oil and gas conservation	Failed	$3,450,211	$1,428,056	41	Lost
1958	**GENERAL ELECTION**					
16	Abolishing tax exemption for religious school property	Failed	$ 499,188	$1,340,817	37	Won
18	"Right to work"	Failed	892,862	2,316,200	39	Won
1960	**GENERAL ELECTION**					
15	Reapportion Senate	Failed	$ 241,852	$ 334,468	72	Won
1962	**GENERAL ELECTION**					
22	Osteopath	Passed	$ 275,525	$ 66,839	24	Won
23	Initiative Reapportion Senate	Failed	136,888	243,975	56	Won
24	Declaring subversive	Failed	104,074	12,985	12	Lost
1964	**GENERAL ELECTION**					
14	Repeal "Rumford Act"	Passed	$ 660,940	$1,174,056	56	Lost

a. This spending survey considers only ballot measure campaigns in which there were expenditures in excess of $1,000.00 by each side. When the spending threshold for both sides is increased, the percent win-loss record for the high spender changes, but no pattern emerges that would suggest that as the issue is more "hotly" contested in monetary terms, the higher spender will prevail:

Each side spent:	Higher Spender % Win	% Loss
>$ 100,000.00	64	36
>$ 500,000.00	53	47
>$1,000,000.00	67	33

b. This percentage represents the ratio of the amount spent by the low spender to the amount spent by the high spender.

15	Prohibiting Pay TV	Passed	878,506	198,191	23	Won
16	Statewide Lottery	Failed	549,884	46,245	8	Lost
17	Eliminate "featherbedding" on railroad train crews	Passed	1,934,786	925,827	48	Won
1968	**GENERAL ELECTION**					
9	Limiting ad valorem tax	Failed	$ 230,908	$1,024,392	23	Won
1970	**PRIMARY ELECTION**					
8	Reducing property tax	Failed	$1,082,175	$ 325,212	30	Lost
1972	**PRIMARY ELECTION**					
9	Environment	Failed	$ 228,233	$1,381,199	17	Won
1972	**GENERAL ELECTION**					
14	Limiting taxes	Failed	$1,277,803	$ 776,487	61	Lost
15	Establish state employee salaries at prevailing rates	Failed	1,781,687	22,537	1	Lost
17	Death penalty	Passed	44,224	60,068	74	Lost
18	Obscenity initiative	Failed	162,899	877,256	19	Won
19	Legalizing marijuana	Failed	191,619	4,995	3	Lost
20	Coastal initiative	Passed	294,786	1,156,583	25	Lost
21	Prohibit busing	Passed	42,683	12,917	30	Won
22	Agricultural labor	Failed	956,137	229,281	24	Lost
1973	**SPECIAL ELECTION**					
1	Tax limitation	Failed	$2,018,527	$ 926,681	46	Lost
1974	**PRIMARY ELECTION**					
9	Political reform	Passed	$ 608,658	$ 201,879	33	Won
1974	**GENERAL ELECTION**					
17	Wild and scenic rivers	Failed	$ 447,497	$ 247,258	55	Lost
1976	**PRIMARY**					
5	Banks, Corporations, Franchises & Insurers Taxation	Passed	$ 22,733	$ 24,409	93	Lost

6	Insurance Company Home Office Tax Deduction	Passed	12,605	237,747	5	Lost
8	Deposit of Public Monies in Savings & Loan Associations	Passed	198,878	4,210	3	Won
15	Nuclear Power Plants	Failed	1,257,132	4,033,590	31	Won
1976 GENERAL ELECTION						
5	Interest Rates Allowable	Failed	$ 661,767	$ 48,051	17	Lost
13	Greyhound Dog Racing	Failed	652,677	1,315,557	50	Won
14	Agriculture Labor Relations	Failed	1,358,437	1,898,649	72	Won
1978 PRIMARY ELECTION						
13	Tax limitation[c]	Passed	$2,158,560	$2,096,723	98	Won
1978 GENERAL ELECTION						
5	Regulation of Smoking	Failed	$ 700,606	$6,411,318	11	Won
6	School Employees-Homosexuality	Failed	1,033,722	1,279,811	81	Won
7	Murder-Penalty	Passed	657,885	12,352	2	Won
1980 PRIMARY ELECTION						
1	Parklands Bond Act	Failed	$ 90,976	$ 26,397	28	Lost
9	Taxation (Income tax)	Failed	3,633,565	1,777,740	49	Lost
10	Rent control	Failed	6,655,212	178,271	3	Lost
11	Taxation -Surtax	Failed	455,899	5,611,457	8	Won
				WON	22	(54%)
				LOST	19	(46%)

c. Includes spending in the Proposition 8 campaign, Owner-Occupied Dwellings - Tax Rate.

VOTE TOTALS

PROPOSITION	YES	NO
1954 General		
#4	1,688,319 (45.4%)	2,030,132 (54.6%)
1956 General		
#4	1,208,752 (23.4%)	3,950,532 (76.6%)
1958 General		
#16	1,686,122 (32.8%)	3,446,829 (67.2%)
#18	2,079,975 (40.4%)	3,070,837 (59.6%)
1960 General		
#15	1,876,185 (35.5%)	3,408,090 (64.5%)
1962 General		
#22	3,407,957 (68.9%)	1,536,470 (31.1%)
#23	2,181,758 (46.6%)	2,495,404 (53.4%)
#24	1,978,520 (40.3%)	2,928,350 (59.7%)
1964 General		
#14	4,526,460 (65.4%)	2,395,747 (34.6%)
#15	4,515,013 (66.4%)	2,286,775 (33.6%)
#16	2,063,617 (30.9%)	4,606,070 (69.1%)
#17	4,074,648 (61.0%)	2,602,731 (39.0%)
1968 General		
#9	2,146,010 (32.0%)	4,570,097 (68.0%)
1970 Primary		
#8	1,321,092 (28.5%)	3,316,919 (71.5%)
1972 Primary		
#9	2,128,087 (35.3%)	3,901,151 (64.7%)
1972 General		
#14	2,700,095 (34.1%)	5,213,485 (65.9%)
#15	2,539,611 (32.5%)	5,271,067 (67.5%)
#17	5,447,165 (67.5%)	2,617,514 (32.5%)
#18	2,603,927 (32.1%)	5,503,888 (67.9%)
#19	2,733,120 (33.5%)	5,433,393 (66.5%)
#20	4,363,375 (55.2%)	3,548,180 (44.8%)
#21	4,962,420 (63.1%)	2,907,776 (36.9%)
#22	3,348,179 (42.1%)	4,612,642 (57.9%)
1973 Special		
#1	1,961,685 (46.0%)	2,303,026 (54.0%)
1974 Primary		
#9	3,224,765 (69.8%)	1,392,783 (30.2%)
1974 General		
#17	2,615,235 (47.1%)	2,935,365 (52.9%)
1976 Primary		
#5	3,204,294 (59.4%)	2,188,419 (40.6%)
#6	3,645,372 (67.0%)	1,795,486 (33.0%)
#8	3,978,512 (74.2%)	1,383,010 (25.8%)
#15	1,950,430 (32.5%)	4,648,355 (67.5%)

1978 Primary		
#13	4,280,689 (64.8%)	2,326,167 (35.2%)
1978 General		
#5	3,125,148 (45.6%)	3,721,682 (54.4%)
#6	2,823,293 (41.6%)	3,969,120 (58.4%)
#7	4,480,275 (71.1%)	1,818,357(28.9%)
1980 Primary		
#1	2,800,038 (47.0%)	3,163,823 (53.0%)
#9	2,538,667 (39.2%)	3,942,248 (60.8%)
#10	2,247,395 (35.4%)	4,090,180 (64.6%)
#11	2,821,150 (44.3%)	3,544,840 (55.7%)

APPENDIX 2

LO/HI%	HIGH SPENDER WON
0-10%	3 out of 8 times = 37%
10-20%	3 out of 4 times = 75%
20-30%	4 out of 9 times = 44%
0-30%	10 out of 21 times = 48%
30-40%	4 out of 4 times = 100%
40-50%	2 out of 5 times = 40%
0-50%	16 out of 30 times = 53%
50-60%*	1 out of 3 times = 33%
60-70%	1 out of 2 times = 50%
70-80%	2 out of 3 times = 67%
80-90%	2 out of 2 times = 100%
90-100%	1 out of 2 times = 50%

*Example: When the low spender spent 50-60% of what the high spender spent, the high spender won in 1 out of 3 elections.

APPENDIX 3
AMOUNT OF SPENDING
41 BALLOT MEASURES
1954-1980 PRIMARY

	41 ballot measure campaigns	Proponents Spent 66% + More in 15 ballot measure campaigns	Neither Proponents Nor Opponents Spent 66% More Than The Other Side in 18 ballot measure campaigns	Opponents Spent 66% + More In 8 ballot measure campaigns
Passed:	13 = 32%	6 = 40%	5 = 25%	2 = 25%
Failed:	28 = 68%	9 = 60%	13 = 75%	6 = 75%

APPENDIX 4

BERKELEY RENT CONTROL BALLOT MEASURES [a]

Measure	Proponents	Opponents	Results
1972 Measure I, Rent Control Board:	(Spending reports not available)		Passed
1977 Measure B, Rent Control:	$ 5,500.00	$136,000.00	Failed
Contributions over $250.00:	-0-	8	
1978 Measure I, Rent Tax Relief:	$7,000.00[b]	$ 81,000.00	Passed
Contributions over $250.00:	-0-	50	
1980 Measure D, Rent Stabilization:	$23,500.00[b]	$ 80,000.00	Passed
Contributions over $250.00:	1	63	

a. Statistics available in elections results and spending reports in the City Clerk's Office, City of Berkeley, California.

b. Includes spending in support of candidates.