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The Constitutionality of Contribution Limitations in Ballot Measure Elections

Marlene Arnold Nicholson*

Editor's Note: Much of the discussion in this Article centers on the case of Citizens Against Rent Control v. Berkeley, which was slated for hearing by the Supreme Court during the 1981-1982 term. On December 14, 1981, after this Article had been sent to the printer, the Supreme Court handed down an early decision in that case, declaring Berkeley's ballot measure contribution limitations invalid by an eight-to-one vote, with Chief Justice Burger writing the majority opinion. Although the Court's decision obviously affects the timeliness of much of the following discussion, we feel that this Article still provides a valuable perspective on the constitutional issues raised by ballot measure contribution restrictions, and thus have decided to publish it in its present form. The discussion of alternatives to the type of ordinance invalidated in the Berkeley case (Part III) should prove especially useful as legislators and citizen groups search for alternative means to curb the domination of initiative campaigns by special interest groups. In addition, the author has added an Addendum examining the Court's decision in Berkeley and referring the reader to those parts of the Article that are especially relevant in light of the Court's approach to the issues in that case.

INTRODUCTION

The United States Supreme Court decides this term a question of great significance to environmentalists—whether limitations on contributions to ballot measure campaigns are constitutional. In Citizens Against Rent Control v. Berkeley, the Court considers the validity of a Berkeley, California ordinance that places a $250 limit on contributions to committees formed to support or oppose municipal ballot measures.2

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1. 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980), rev'd 50 U.S.L.W. 4071 (Dec. 15, 1981). The reversal occurred after this Article had been sent to the printer, see Editor's note, supra, and Addendum, text accompanying notes 275-318 infra.

2. The Berkeley case arose during an unsuccessful voter initiative campaign that would have created a rent control board empowered to fix rates for most rental units in the city. Opponents of the rent control initiative formed Citizens Against Rent Control (CARC) and subsequently accepted several contributions exceeding the $250 limit set by the Berkeley
In recent years environmentalists have attempted to use the referendum and initiative processes to pass legislation important to ecological concerns.\(^3\) Circumventing the legislature, which may be heavily influenced by unsympathetic special interest groups,\(^4\) proponents of these measures have gone directly to the voters. The effectiveness of this tactic has been diminished, however, by the massive influx of corporate funds into ballot measure campaigns.\(^5\)

The reservoirs of funds held by many large corporations can be readily allocated for political purposes with little or no accountability to investors.\(^6\) Presumably motivated by the short-term profitability of a commercial enterprise, corporations have often chosen environmental issues as their targets.\(^7\) Business interests amass huge sums for adver-
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selling blitzes, using sophisticated advertising techniques to convince voters to oppose measures. The proponents of the measures, on the other hand, may lack a moneyed group that will benefit directly from the legislation. Thus, they must often depend on modest private contributions, and they will rarely be able to obtain the large sums of money they would need to counter effectively the arguments of the well-financed opposition. Thus the communication of one side is drowned out; rather than becoming educated on both sides of the issues so that they can make a reasoned judgment, voters may base their decisions wholly or primarily on advertising campaigns designed, in the view of one commentator, to make them “misperceive their [own] interests and vote in favor of [the advertiser’s].”

Although it is difficult to establish conclusively that a given ballot measure was defeated due to an imbalance in the money available to the opposing sides, the available studies indicate a strong correlation

8. Shockley quoted Ted Carey of the Rocky Mountain News, who described one television commercial in the following way:

The atmosphere is one of expectation as the [TV] camera moves in slowly on the chocolate-covered ovoid and the background music swells to an emphatic passage reminiscent of the theme from “2001: A Space Odyssey.”

An announcer, his voice rich and somber, begins to speak. “Amendment 7,” he intones, “looks almost good enough to buy. But things are not always as they appear.” A huge knife suddenly appears, swoops down and slices the thing in two. The ovoid slowly splits open to reveal its innards.

“Amendment 7,” the announcer continues, “is a sugar-coated lemon.”


Lowenstein described the campaign of the opposition to a California initiative:

Proposition 11 started out with a large lead, no doubt reflecting the well-known popular dislike of the major oil companies. A poll in February showed 66% in favor of the measure, 26% opposed, and 8% undecided. The strategy of the anti-11 campaign was to divert attention from the measure’s main purpose of imposing an additional tax on the major oil companies for the benefit of mass transit and alternate fuel development. Billboards and other advertisements urged voters to vote against “the $100 million sting,” without further identification of the subject matter of the measure. This slogan was based on a much-criticized study that claimed the administrative costs of Proposition 11 on state agencies and energy corporations would amount to $100 million. Even if the study is accepted, these advertisements were misleading because they probably caused and were intended to cause their audience to believe the cost of Proposition 11 to the government would be $100 million, whereas the study asserted the cost to the government would be $8.8 million. Other advertisements made references to unidentified “bunglers,” or misrepresented the content of the measure, for example, by stating it would double the tax on railroads. Aside from whether or not individual statements were deceptive, the most noteworthy characteristic of the anti-11 advertising was its avoidance of the major issues raised by the measure: a surtax on energy companies, and additional funding for mass transit and alternate fuel development. The latter was not mentioned at all, and the former was usually submerged. To the extent the advertising was directed to substance, it generally argued Proposition 11 would discourage exploration for oil and gas in California, cost jobs and result in higher prices for gasoline as the surtax was passed on to consumers.

Lowenstein, supra note 5, at 53 (citations omitted).

9. See generally Lowenstein, supra note 5; Shockley, supra note 5.

between such disproportionate expenditures and ballot measure defeat. A study by Daniel Lowenstein made public in 1981 shows that of ten California ballot propositions that generated a well-financed opposition between 1968 and 1980, nine were defeated. In 1978 the tobacco industry spent six million dollars to oppose a California initiative that would have restricted smoking in public places. Setting an all-time record for spending in ballot measure campaigns, the industry outspent supporters of the unsuccessful measure tenfold. Despite the fact that polls taken prior to the opponents' saturation campaign indicated the measure would pass by a wide margin, it was in the end narrowly defeated.

John Shockley, who has done extensive research on the role of corporate spending in ballot measure elections, observed that the tobacco industry's investment was a wise one, because the industry would lose $450 million per year if every smoker in the United States smoked one less cigarette each day.

Shockley also studied ten states that had initiative measures on their ballots in 1976 concerning either nuclear safety or mandatory deposits for beverage containers. Although public opinion polls indicated that voters initially favored the measures, nearly all were defeated, some by a wide margin. Private corporations opposing the

11. See, e.g., S. Lydenberg, Bankrolling Ballots: The Role of Business in Financing State Ballot Question Campaigns (Council on Economic Priorities 1979); Lowenstein, supra note 5; Mastro, supra note 5; Shockley, supra note 5.

12. Lowenstein, supra note 5, at 65.

13. S. Lydenberg, supra note 11; Shockley, supra note 5, at 12. More money was spent on this single ballot proposition than the combined total spent in the race for governor of California. Id. at n.42.

In 1980 a second unsuccessful initiative measure, which varied only in detail from the 1978 proposal, also generated significantly disproportionate spending: Opponents raised $2,732,005 compared to the $797,113 raised by supporters. Lowenstein, supra note 5, at 55.

14. S. Lydenberg, supra note 11, at 30-31; Shockley, supra note 5, at 12.

15. S. Lydenberg, supra note 11, at 30; Shockley, supra note 5, at 12.


17. Shockley, supra note 5, at 13. This was based upon an estimate made in the St. Louis Post-Dispatch. California reportedly accounts for 10% of U.S. cigarette consumption. Lydenberg, supra note 11, at 30.

18. Shockley, supra note 5, at 5. Nuclear safety initiatives were on the ballot in the following seven states: Arizona, California, Colorado, Montana, Ohio, Oregon, and Washington.

19. Id. Four states had mandatory bottle initiatives on their ballots in 1976: Colorado, Maine, Massachusetts, and Michigan.


Mandatory deposit proposals were successful in Maine and Michigan. Shockley, supra note 5, at 9. In Maine there was no local beverage industry, however, so opponents could
measures often spent many times as much as the public interest groups supporting the measures.\textsuperscript{21}

As commentators point out, establishing the causal connection between such spending and election results is difficult at best.\textsuperscript{22} Although corporations do test their political advertising techniques for effectiveness,\textsuperscript{23} they will seldom make such studies available to researchers.\textsuperscript{24} The few studies that have been made available, however, tend to bear out the causal link.\textsuperscript{25}

The effect of corporate spending in ballot measure campaigns, as well as in candidate elections, has been a source of concern to legislators for many years. Numerous states have either barred or limited such spending.\textsuperscript{26} Another approach is exemplified by the Berkeley ordinance presently before the Supreme Court, which limits contributions to ballot measure campaigns from any source.\textsuperscript{27} On the federal not use the argument that a loss of jobs might result. Also, the press publicized the fact that the opponents' funds came from out of state. \textit{Id.} In Michigan, widespread support from Democratic and Republican officeholders and respected groups such as the Michigan United Conservation Clubs and the state Farm Bureau was apparently effective in countering the heavy corporate expenditures. \textit{Id.} at 10.

A nuclear energy initiative was successful in Missouri; it was of a rather unusual type, however. The Missouri Public Service Commission had ruled that public utilities could charge customers for the cost of nuclear plants being built. The initiative had the effect of rescinding that ruling. \textit{Id.} The obvious direct effect upon utility bills probably made this proposal difficult for the corporations to counter.


Much of the money spent to oppose the measures came from out-of-state sources. Shockley observed: "On the mandatory deposit initiative, virtually all beer and soft drink companies in the country each contributed thousands of dollars, as did most glass and can manufacturers and many distributing companies." J. SHOCKLEY, \textit{supra} note 8, at 9.


24. \textit{Id.} at 262-63.

25. One poll conducted in Colorado after the defeat of the mandatory deposit ballot measure indicated that in explaining why they voted as they did, 40\% of those voting against it used language of the slogan used in the opponents' advertising campaign. \textit{Shockley Statement, supra} note 16, at 263. See also \textit{id.} at 271-72, mentioning a poll that examined voter response to a highly sophisticated media campaign used to defeat a tax measure opposed by corporations.


27. BERKELEY, CAL., MUN. CODE § 2.12.425 (1977) provides that "[n]o 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)."

The term "person" is defined to include "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." BERKELEY, CAL., MUN. CODE § 2.12.165 (1977).

\textit{See also} FLA. STAT. ANN. § 106.08(1)(d), (e) (West Supp. 1980).
level, Congress has banned corporations and unions from contributing to or expending money on behalf of candidates, and has placed limitations on contributions from other sources.

This article explores unresolved constitutional issues in the regulation of campaign financing that are raised in the Berkeley case. First, the Court will have the opportunity to clarify the standard of review for contribution limitations. The Court has upheld contribution limitations in candidate elections without clearly identifying the standard of review being applied. It remains to be seen whether the Court will interpret the conflicting signals in the earlier cases as requiring strict scrutiny or some intermediate form of review for contribution limitations.

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Although the Supreme Court has had the opportunity to rule on the constitutionality of the federal restrictions, it has avoided doing so by narrowly interpreting them. See Pipefitters Local 562 v. United States, 407 U.S. 385 (1972) (statute does not prohibit expenditures from separate segregated account funded by voluntary contributions); United States v. CIO, 335 U.S. 106 (1948) (statute does not prevent internal union communications). For a discussion of the constitutionality of these corporate and union restrictions see generally Nicholson, The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures, 65 Cornell L. Rev. 945 (1980).


Groups qualifying as “multicandidate committees,” however, are subject to a $5,000 limitation. 2 U.S.C. § 441a(a)(2)(A) & (C) (1976). A multicandidate political committee is a “committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for federal office.” 2 U.S.C. § 441a(a)(4) (1976).

30. In general, “contribution” refers to funds given to a political committee and subsequently passed on to a candidate or otherwise expended to influence an election. “Independent expenditure,” by contrast, refers to funds spent in direct support of a candidate or political goal, either by a political committee or by an individual or private entity. See note 53 infra.

31. See text accompanying notes 60-71 infra.

32. The Court has held that as a general rule regulatory legislation “is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). On the other hand, where legislation “appears on its face to be within a specific prohibition of the Constitution,” id. n.4, the Court has applied closer scrutiny. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). In recent cases involving burdens on core first amendment rights, the Court has held that “[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.” Bates v. Little Rock, 361 U.S. 516, 524 (1960). See also First National Bank v. Bellotti, 435 U.S. 765, 786 (1978);
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Firstly, all previous cases in which the Court has upheld restrictions upon campaign funding were rationalized as a means of preventing the reality or appearance of corruption of public officials. Because that interest is not relevant to ballot measure elections, the Court will be called upon to determine whether other state interests are sufficient to justify the limitations. Part II of this Article examines the governmental interests advanced in support of contribution limitations.

Finally, a decision by the Court to apply strict scrutiny to ballot measure contribution limitations would suggest that the ordinance can be upheld only upon a finding that it is narrowly drawn to avoid unnecessary burdens on first amendment interests. Part III of this Article examines the practicality and constitutionality of alternative means of dealing with the problems caused by gross inequality in ballot measure campaign spending, and discusses whether these means should be viewed as less restrictive alternatives to contribution limitations.

I

THE STANDARD OF REVIEW

Buckley v. Valeo was the seminal decision on the constitutionality of legislation that regulates political campaign financing. In Buckley, the Supreme Court ruled on the constitutionality of the 1974 amendments to the Federal Election Campaign Act of 1971. The amendments included limitations on contributions, on expenditures made on behalf of candidates, on total campaign expenditures, and N.A.A.C.P. v. Button, 371 U.S. 415, 438-39 (1963). A further requirement of this "strict scrutiny" standard of review is that the legislation in question be no more restrictive than is necessary to achieve the governmental interest involved. First National Bank v. Bellotti, 435 U.S. at 786; N.A.A.C.P. v. Button, 371 U.S. at 438; Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).

33. See text accompanying notes 70-71, 75-77, 99, 105-08, 187-89 infra.
34. See note 103 infra and accompanying text.
35. See note 198 infra and text accompanying notes 195-201 infra.
40. Congress placed a $1,000 limitation on independent expenditures made on behalf of candidates. Id. § 101(a), 88 Stat. at 1265 (repealed 1976). An expenditure that is coordinated with the candidate's campaign is treated as a contribution under the Act. 2 U.S.C. § 441a(a)(8) (1976).
41. Limitations on expenditures in Senate elections were based upon the voting-age
on the use of personal or family wealth by candidates. The Court invalidated all of these limitations except those placed upon contributions.

As a threshold question the Court considered appellee’s arguments that the limitations imposed burdens upon conduct rather than upon speech, and that their “effect on speech and association [was] incidental at most.” Therefore, appellee asserted that the limitations in *Buckley* should be analogized to *United States v. O’Brien*, in which the Court upheld a ban on the destruction of draft cards, applying a standard of review less exacting than strict scrutiny. The *Buckley* Court rejected that analogy, responding that “the dependence of a communication on the expenditure of money [does not in itself] introduce a nonspeech element or . . . reduce the exacting scrutiny required by the First Amendment.”

The Court also rejected appellee’s analogy to cases in which it had upheld reasonable “time, place and manner” regulations of speech. The Court asserted that the statutes in those cases, unlike the limitations in *Buckley*, did not impose “direct quantity restrictions on polit-
tical communication and association."\textsuperscript{48}

Although the Court explicitly rejected the analogy to the "speech plus"\textsuperscript{49} and "time, place and manner"\textsuperscript{50} cases, it is not clear what standard of review the Court ultimately adopted, and it appears that the Court may have applied different standards to the various limitations. There were subtle differences in the Court's approach to the various expenditure limitations;\textsuperscript{51} the most striking distinction, however, was between its approaches to expenditure limitations generally and contribution limitations.\textsuperscript{52} In discussing the Court's analysis of expenditure limitations in \textit{Buckley}, this Article will focus on the limitation on expenditures made by individuals or groups on behalf of candidates without coordination with the candidate or the campaign committee.\textsuperscript{53} Because such expenditure limitations more closely resemble limitations on contributions than do the other expenditure limitations invalidated

\begin{itemize}
  \item \textsuperscript{48} 424 U.S. at 18.
  \item \textsuperscript{49} See text accompanying notes 44-46 \textit{supra}.
  \item \textsuperscript{50} See note 47 \textit{supra} and accompanying text.
  \item \textsuperscript{51} In dealing with the limitations on expenditures by a candidate of personal or family funds, the Court seemed to take an absolutist approach. After pointing out that the restrictions do not serve to prevent corruption and that they may even fail to achieve the goal of promoting "financial equality among candidates," 424 U.S. at 54, it finally asserted that "more fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." \textit{Id.} at 53-54. The Court also took an absolutist stance in considering the limitations on overall campaign expenditures. It disposed of the government's concern with "reducing the allegedly skyrocketing costs of political campaign," \textit{id.} at 57, by stating that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise," \textit{id.} In dealing with other rationales for the limitations, however, the Court was somewhat less dogmatic. It rejected the Court of Appeals' conclusion that the limitations "are necessary to reduce the incentive to circumvent... contribution limits," \textit{id.} at 55 (citing \textit{Buckley v. Valeo}, 519 F.2d 821, 859 (D.C. Cir. 1972)), on the ground that other provisions of the Act provide sufficient incentives to comply with contribution limitations, \textit{id.} at 56.

The Court was unimpressed with the asserted interest in "equalizing the financial resources of candidates" as a rationale for overall campaign expenditure limitations. It commented that

\begin{quote}
given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing insidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.
\end{quote}

\textit{Id.}

\begin{itemize}
  \item \textsuperscript{52} See note 51 \textit{supra} and text accompanying notes 55-58 & 60-71 \textit{infra}.
  \item \textsuperscript{53} The federal statute defines independent expenditures as an expenditure... expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.
\end{itemize}

2 U.S.C.A. § 431(17) (West Supp. 1981). The statute treats expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" as contributions, which are subject to limitation. 2 U.S.C.A. § 441a(7)(B)(i) (West Cum. Supp. 1977).
in *Buckley*, the Court's treatment of limitations on such independent expenditures will be contrasted with its approach to contribution limitations.

The Court asserted that the constitutionality of the provision limiting independent expenditures turned "on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."\(^{54}\) It stressed that this limitation imposed a severe burden on first amendment interests, and pointed out that the limitation "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication."\(^{55}\) The Court furthermore concluded that the "independent expenditure ceiling [failed] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process."\(^{56}\) This conclusion was based on two premises. First, the Court assumed arguendo that independent expenditures cause corruption, but asserted that the limitation could be so easily evaded that "unscrupulous persons and organizations" could still obtain undue influence over office holders.\(^{57}\) Second, the Court stated that independent expenditures do "not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."\(^{58}\) That the *Buckley* Court applied some form of heightened scrutiny to independent expenditure limitations is demonstrated by its willingness to substitute its judgment for that of Congress in determining whether independent expenditures pose a danger of undue influence on public

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54. 424 U.S. at 44, 45. See note 32 *supra* for a discussion of the standard of scrutiny applied to statutes burdening first amendment freedoms.

55. 424 U.S. at 19-20.

56. *Id.* at 47-48.

57. *Id.* at 45. The Court explained:

It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. . . . § 608(e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.

*Id.*

58. *Id.* at 46. This conclusion was based on the Court's view that, unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

*Id.* at 47.
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Although the Court did not explicitly articulate the test it applied to independent expenditure limitations, it did make clear its belief that such limitations imposed a far heavier burden on first amendment interests than did the contribution limitations. The Court viewed contribution limitations as entailing "only a marginal restriction" on the contributor's ability to engage in free communication.\(^59\) It characterized the communicative element of a contribution as being "a general expression of support for the candidate" that "does not communicate the underlying basis for the support," and found that the size of the contribution provides only "a very rough index of the intensity" of that support.\(^60\) The Court concluded:

A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.\(^61\)

The Court also discounted the likelihood that the limitations would have a severe impact on political dialogue, pointing to a lack of evidence that the contribution limitations "would have any dramatic adverse effect."\(^62\) The Court suggested that those prevented by the law from making large contributions would instead make independent expenditures, and that the ceilings would simply cause fund raisers to seek out contributions from larger numbers of people.\(^63\)

The Court did recognize that the contribution limitations limited "one important means of associating with a candidate or committee."\(^64\) Even in examining the degree of intrusion upon freedom of association, however, the Court clearly viewed independent expenditure limitations as the more severe restriction. The Court pointed out that individuals, though not free to make contributions greater than those allowed by the law, were "free [under the contribution limitation] to become a member of any political association and to assist personally in the association's efforts on behalf of candidates."\(^65\) In addition, the contribu-

\(^{59}\) Id. at 20.
\(^{60}\) Id. at 21.
\(^{61}\) Id.
\(^{62}\) Id.
\(^{63}\) Id. at 22.
\(^{64}\) Id.
\(^{65}\) Id.
tion limitation did not preclude the attempts of associations and candidates "[to] aggregate large sums of money to promote effective advocacy."66 The Court contrasted this result with the effect of the independent expenditure limitation, which would "preclude most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association."67

Although the Court viewed contribution limitations as less burdensome than expenditure limitations, its characterization of the standard of review applicable to contribution limitations suggested that some form of heightened scrutiny was appropriate. After describing the burden that the contribution limitations imposed on rights of association, the Court stated that "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny,"68 but that "[e]ven a 'significant interference' with . . . political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."69 As authority for these assertions the Court cited several opinions, most of which were association cases in which the Court had required a finding that a statute was a necessary means of fulfilling a compelling state interest.70 One might therefore infer that contribution limitations as well as expenditure limitations were subjected to strict scrutiny, and that the differing results are due to the fact that contribution limitations were able to satisfy the requirements of this test while expenditure limitations were not. Although the Court did not explicitly describe prevention of corruption—a goal which, the Court said, was served by the contribution limitations—as a compelling government interest, this characterization seems appropriate. The Court's language supports this view; it concluded that "under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution

66. Id.
67. Id.
68. Id. at 25 (citation omitted).
69. Id. at 25 (citation omitted). It is not clear, however, whether the Court was implying by this statement that it viewed the burdens imposed upon association by contribution limitations as significant or insignificant. Given the Court's apparent downplaying of the burden on association, perhaps it considered the burdens on association to be insignificant, so that the standard of review applied in other association cases would not be applicable.
The language of the Buckley opinion thus suggests that strict scrutiny was applied to both contribution and expenditure limitations. Nevertheless, there are indications that, despite its rhetoric, the Court applied a lesser standard of review to contribution limitations than to expenditure limitations. Daniel Lowenstein stresses the Court's very clear statements to the effect that the first amendment burdens imposed by contribution limitations are much less severe than those imposed by expenditure limitations. He asserts that this difference in the burden upon first amendment interests results in a "concomitant difference in the burden the state must bear in justifying the limitation." He acknowledges that "no new verbal formula was coined to describe the level of scrutiny applied to contribution limitations," but observes that "strict scrutiny is as strict scrutiny does."

The thesis that less than strict scrutiny was applied to contribution limitations finds support also in a comparison of the degree to which the Court deferred to congressional assessments of the necessity for and effectiveness of the restrictions. In considering independent expenditure limitations, the Court apparently refused to accept a congressional determination that such expenditures involve a significant danger of corruption. By contrast, the Court accepted almost without question Congress's determination of the connection between contributions and the appearance and reality of corruption and the necessity of contribution limitations. Of course, the Court's failure to second-guess Congress on this point could well rest on the obviousness of the connection, rather than on a lack of serious scrutiny. At least one other aspect of the Court's methodology, however, indicates that it deferred to Congress in a manner inconsistent with strict scrutiny review: the Court upheld the $1,000 ceiling on contributions to candidates against a challenge of overbreadth, refusing to examine whether a higher limit would serve the purpose equally well.

71. 424 U.S. at 29.
72. Lowenstein, supra note 5, at 112.
73. Id. n.572.
74. Id. at 112.
75. See note 58 supra and text accompanying notes 58 & 59 supra.
76. See note 187 infra.
77. The Buckley Court stated, "Congress was surely entitled to conclude that . . . contribution ceilings were a necessary legislative concomitant." 424 U.S. at 28. The Court seemed to take an intermediate position by requiring that there be no less restrictive means and yet deferring to Congress's determination that none existed.
78. The Buckley opinion quoted the Court of Appeals' observation that "a court has no scalpel to probe, whether, say, a $2,000 limitation might not serve as well as $1,000," 424 U.S. at 30 (quoting 519 F.2d 821, 842 (D.C. Cir. 1975)), and stated that "distinctions in degree become significant only when they can be said to amount to differences in kind." Id. at 30. If the statute's purpose was to prevent corruption, however, it would seem that a "scalpel" would not be necessary to conclude that a $1,000 limitation in a presidential elec-
Buckley thus appears to be inconclusive with respect to the standard of review applicable to contribution limitations. All would agree that the Court views contribution limitations as being a less serious burden upon first amendment interests than are independent expenditure limitations. This premise, however, does not necessarily lead to the conclusion that Buckley is precedent for the application of less than strict scrutiny review to contribution limitations. Not all burdens on first amendment interests are of the same magnitude; arguably, however, above some minimum level of significance the Court will require that any burden be justified by an interest that can fairly be classified as compelling and that the means used be necessary to the achievement of the government's purpose. One might question whether contribution limitations reach that minimum level of significance, and Buckley is unclear on that point. Furthermore, there is some doubt even as to the validity of the basic proposition that the same test is applied to all except insignificant burdens upon first amendment interests. In a recent case upholding a limitation upon contributions made to political committees, the Court of Appeals for the Ninth Circuit commented that "[t]he scrutiny given to a classification affecting a constitutional right is not . . . entirely a mechanical inquiry, determined in the abstract simply by reference to which constitutional amendment is being considered." Kenneth Karst has similarly noted "the Court's de facto adoption of a sliding scale of standards of review" in recent years.

The Buckley Court's reluctance to second-guess Congress could reflect the special problems the Court faces in considering the constitutionality of any numerical threshold. Perhaps because almost any figure will be subject to a challenge on the basis of over- and underinclusiveness, previous cases, including some in which fundamental rights were involved, evidence a similar reluctance to challenge the conclusions of legislative bodies. See, e.g., Marston v. Lewis, 410 U.S. 679 (1973) & Burns v. Fortson, 410 U.S. 686 (1973) (upholding 50-day duration residency requirements for voter registration because they were longer than necessary to serve the state's interest in preventing fraud. Id. at 347-49. See also Kusper v. Pontikes, 414 U.S. 51 (1973), in which the Court, applying strict scrutiny, invalidated a statute that had a cut-off date for changing party affiliation that in effect required voters to forego voting in one primary.

The Buckley Court's reluctance to second-guess Congress could reflect the special problems the Court faces in considering the constitutionality of any numerical threshold. Perhaps because almost any figure will be subject to a challenge on the basis of over- and underinclusiveness, previous cases, including some in which fundamental rights were involved, evidence a similar reluctance to challenge the conclusions of legislative bodies. See, e.g., Marston v. Lewis, 410 U.S. 679 (1973) & Burns v. Fortson, 410 U.S. 686 (1973) (upholding 50-day duration residency requirements for voting); Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding a statute requiring registration within 8 months of a presidential primary and 11 months of a non-presidential primary). It should be noted that in none of these cases did the Court appear to apply strict scrutiny. See Marston v. Lewis, 410 U.S. at 683 (Marshall, J. dissenting); Burns v. Fortson, 410 U.S. at 688 (Marshall, J. dissenting); Rosario v. Rockefeller, 410 U.S. at 756-58.

79. See note 69 supra.
81. Karst, The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 42 (1977). The Buckley Court clearly believed that if the contribution limitations imposed any significant burden, it was a burden on political association rather than on speech. See text accompanying notes 59-67 supra. Even if one were to conclude that any significant burden on speech results in the automatic imposi-
Cases decided since Buckley also have left doubt as to the standard of review applicable to contribution limitations. In 1978 the Court decided First National Bank v. Bellotti, in which corporations desiring to expend funds in a ballot measure election challenged the constitutionality of a Massachusetts statute prohibiting such expenditures. In a five to four decision, the Court invalidated the statute, stating that "the State may prevail only upon showing a subordinating interest which is compelling." It further explained that "the burden is on the Government to show the existence of such an interest" and that "[e]ven then, the State must employ means 'closely drawn to avoid unnecessary abridgement.'"

Although plaintiffs in Bellotti were seeking only to expend funds independently, the challenged statute also limited contributions. Consequently, it might be argued that the principles articulated in the Bellotti opinion apply to contribution limitations as well as to expenditure limitations. Indeed, in C & C Plywood Corp. v. Hanson, the Court of Appeals for the Ninth Circuit cited Bellotti as authority for invalidating a ban on corporate contributions in ballot measure elections, stating that "the Court did not distinguish between contribution and expenditure restrictions in Bellotti." While the Court in Bellotti did not expressly state that its holding was inapplicable to contribution limitations, it did present its opinion only in terms of expenditure limitations. Lowenstein has thus argued that, "in view of the heavy stress placed on the difference between expenditure and contribution limits in the decision of strict scrutiny, one need not reach the same result when the burden falls on association. Karst has pointed out that "[t]he Court's decisions properly recognize that some regulations press more heavily on associational choices than do others" and that "the order of the day is a sliding scale of standards of review—that is, an increasingly candid interest balancing." Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 628 (1980). His comment was made in considering burdens upon "intimate association," which he views as a "close . . . relative of political association.""

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83. Id. at 786.
84. Id. The Court quoted from both speech and association cases and drew its requirement that the statute "'avoid unnecessary abridgement'" from Buckley's discussion of contribution limitations, 424 U.S. at 25. One might infer that the Court considered the standard of review applicable to contribution limitations in Buckley to be the same as the vigorous standard that it subsequently found applicable in Bellotti. Such an assumption, however, would not doubt attach too much significance to the Court's choice of authority.
86. 583 F.2d 421, 424-25 (1978). In Bellotti, the Court explicitly pointed out that the Massachusetts statute also banned contributions and expenditures in candidate elections, but that appellants were not challenging that aspect of the statute. 435 U.S. at 788 n.26. The Court stated that its "consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." Id. The Court said nothing, however, with regard to whether its decision implied a "comparable right" of corporations to contribute to ballot measure campaigns.
87. See, e.g., text accompanying note 118 infra.
Buckley, it is far more reasonable to conclude that... the Court [did not] decide sub silentio an issue not presented in the case before it."^88

In sum, it appears that Bellotti, like Buckley, is inconclusive on the question of the appropriate standard of review for campaign contribution limitations.

The only opinion to hold explicitly that contribution limitations are subject to a standard of review less rigorous than that applicable to independent expenditure limitations is the recent plurality opinion of Justice Marshall in California Medical Association v. Federal Election Commission (C.M.A.).^89 In upholding federal limitations upon contributions to multicandidate political committees, the plurality focused on Buckley's distinction between contribution limitations and expenditures:

We would naturally be hesitant to conclude that CMA's determination to fund CALPAC rather than to engage directly in political advocacy is entirely unprotected by the First Amendment. Nonetheless, the "speech by proxy" that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in Buckley found entitled to full First Amendment protection.^90

Although the plurality did not explicitly label the standard of review it applied, this standard was clearly not strict scrutiny. In response to the argument that less restrictive means were available, the plurality stated: "Because we conclude that the challenged limitation does not restrict the ability of individuals to engage in protected political advocacy, Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme."^91

Presumably the application of less than strict scrutiny would permit contribution limitations to be upheld without a finding that they

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88. Lowenstein, supra note 5, at 112 n.572. It should be noted that even if Bellotti is authority for the application of strict scrutiny to contribution bans, the same approach might not be appropriate for limitations. Alternatively, limitations might survive strict scrutiny review whereas bans would not.


90. Id. at 2721-22 n.16. The plurality quoted a passage from Buckley wherein the Court had interpreted a contribution as merely a "general expression of support for a candidate." Id. (quoting from 424 U.S. at 21). The plurality asserted that this "attenuated form of speech does not resemble the direct political advocacy to which this Court in Buckley accorded substantial constitutional protection." Id.

91. 101 S. Ct. at 2712, 2723 n.20. The plurality explained that: "Congress could reasonably have concluded § 441a(a)(1)(C) was a useful supplement to the other antifraud provisions of the Act. Cf. Buckley v. Valeo, 424 U.S. at 27-28 (rejecting contention that effective bribery and disclosure statutes eliminated need for contribution limitations)." Id. (emphasis added). In Buckley, however, the Court had rejected the suggestion that the Constitution required the adoption of other alternatives because "Congress was surely entitled to conclude that... contribution ceilings were a necessary concomitant" to disclosure requirements. 424 U.S. at 28, (emphasis added).

See text accompanying notes 195-203 infra for a discussion of the less restrictive means test as applied to contribution limitations.
serve a compelling government interest. Such an approach could be significant in the Berkeley case because in upholding contribution limitations in ballot measure elections the Court will be required to accept as a justification for such restrictions an interest that the Court has not yet held to be compelling. Although the Court could reasonably accept one or more of the proffered interests as compelling, as will be seen in the following section, such a conclusion would not be free of difficulties.

In assessing the importance of C.M.A., it must be kept in mind that only four Justices explicitly adopted the position that contribution limitations are subject to less than full first amendment protection. Four Justices dissented on procedural grounds and thus did not express their views on the subject. Justice Blackmun's concurring opinion specifically rejects the plurality's approach, pointing out that its analysis ignored the Buckley Court's discussion of the effect of contribution limitations on the freedom of association. Justice Blackmun interpreted Buckley as authority for the application of strict scrutiny to both

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92. The plurality opinion in C.M.A. does not address this issue. Although the plurality found that the challenged restriction was justified by the asserted governmental interests, the opinion is silent as to whether the interests could be categorized as compelling. The plurality's explicit conclusion that the limitation did "not restrict the ability . . . to engage in protected advocacy," 101 S. Ct. at 2723 n.16, indicates that perhaps a compelling state interest was not required in order for the restriction to be upheld. Presumably, the Court could review a restriction such as the Berkeley ordinance pursuant to some intermediate standard of review, requiring a substantial or even compelling state interest but not requiring that the state use the least restrictive means to achieve its purpose, see note 91 supra and accompanying text.

93. See text accompanying notes 105-65 infra.

94. Justice Marshall's plurality opinion was joined by Justices Brennan, White, and Stevens. 101 S. Ct. at 2715.

95. Justice Stewart, in a dissenting opinion joined by Chief Justice Burger and Justices Powell and Rehnquist, concluded that the Court of Appeals did not have jurisdiction to decide the case. The dissent reasoned that after a party has been formally notified of an impending enforcement proceeding by the Federal Election Commission; it may not use the issues raised in that proceeding to invoke the statute authorizing declaratory judgments and certifications of questions regarding the constitutionality of the Federal Elections Campaign Act. Id. at 2725-28.

Justices Powell and Rehnquist had joined those parts of the majority per curiam opinion in Buckley that upheld federal contribution limitations and invalidated expenditure limitations. They might therefore be receptive to the argument that contribution limitations are not entitled to full first amendment protection. Justice Rehnquist seems particularly likely to vote to uphold contribution limitations such as those imposed by Berkeley because he views the fourteenth amendment as requiring only that the states observe "the 'general principle' of free speech," and not that they be bound by "all the strictures which the First Amendment imposes upon Congress." 424 U.S. at 291 (citations omitted). In his dissent in Bellotti he reiterated this position, stating that the first amendment has "limited application" to the states, 435 U.S. at 823. He acknowledged, however, that his view was not shared by other current Justices. Id.

96. 101 S. Ct. at 2724-25 (Blackmun, J., concurring) (citing plurality opinion at 2721-22).
contribution and expenditure limitations. Accordingly, he purported to apply strict scrutiny to the limitations at issue in C.M.A. and found them a constitutional means of preventing the corruption of public officials. Even Justice Blackmun’s concurrence, however, is surprisingly vague as to the connection between limitations on contributions to political committees and the asserted interest in preventing corruption of elected officials.

It is unlikely that the Court will feel bound by the previous cases involving campaign finance restrictions when it decides the appropriate standard of review of the Berkeley ordinance. Even if Buckley and C.M.A. had been clear with respect to the proper standard of review of contribution limitations in candidate elections, those cases would not necessarily be dispositive as to the proper standard to be applied in the Berkeley case. Arguably the first amendment burdens of limitations in candidate elections and ballot measure elections are not the same. Although Bellotti dealt with ballot measure elections, it also cannot be considered dispositive because the Massachusetts bans were clearly more burdensome than are Berkeley’s limitations. Because the Berkeley ordinance differs in significant ways from the statutes involved in Buckley, Bellotti, and C.M.A., and because the analyses in those cases are unclear, the Court will have considerable latitude in choosing the appropriate standard of review in Berkeley.

97. Id. at 2725.
98. Id.
99. See id. at 2724-25. See also note 189 infra.
100. An argument can be made that contribution limitations are more burdensome in ballot measure than in candidate elections. The California appellate court that invalidated the Berkeley limitations stated that there is a tighter nexus between a contributor and a one-issue organization, and a greater likelihood that the contribution will be used as the contributor wishes than is the case with the attenuated relationship between a contributor and a political candidate who is obligated to take a position on more than one issue. “The committee could then be viewed as a conduit for the speech of the contributor directed at a single goal.”
99 Cal. App. 3d 736-748 (deleted), 160 Cal. Rptr. 448, 453 (1979) (quoting Let’s Help Florida v. Smathers, 453 F. Supp. 1003, 1011 n.7 (1978)). It should be noted, however, that most large contributions in ballot measure elections are made by corporations. See text accompanying notes 5-7 & 13-21 supra. Thus the contributors are in reality the stockholders, rather than the corporate officials who decide the contribution allocations. There is probably a very remote nexus between the shareholders and the views of ballot measure campaign committees. See text accompanying notes 207-13 infra.
101. Justice Mosk, speaking for the majority of the California Supreme Court in the Berkeley case, observed that while the measure at issue in Bellotti completely silenced the voice of Massachusetts corporations, the ordinance here has no such purpose or effect. To the contrary, the Berkeley ordinance allows to all the right to participate in a ballot measure campaign and to join with others in so doing.
27 Cal. 3d at 829, 614 P.2d 742, 748, 167 Cal. Rptr. 84, 90 (1980).
102. See text accompanying notes 51-91 supra.
II
ASSERTED GOVERNMENT INTERESTS

Whether ballot measure contribution limitations are subjected to strict scrutiny or some lesser standard of review, the governmental interests allegedly served by these limitations must be examined.103 The following two subsections consider in turn whether the governmental interests in preventing undue influence on voters and voter disaffection would, if properly substantiated, justify limiting contributions to ballot measure campaigns. Subsection C then considers what evidence would be necessary to support the government's asserted interests.

A. Undue Influence on the Electorate

In Buckley the only government interests the Court accepted as justifying limitations on campaign funding were preventing the reality and appearance of undue influence and corruption.104 By the terms "undue influence" and "corruption" the Court clearly meant improper influence on officeholders.105 In Bellotti the Court pointed out that statutes prohibiting corporate contributions to candidates are designed to solve "the problem of corruption of elected representatives through the creation of political debts."106 It stressed that the referendum issue in Bellotti presented "no comparable problem,"107 because there were no officeholders to corrupt.108

103. In Buckley the Court invalidated campaign expenditure limitations because no governmental interest justified the first amendment burdens. 424 U.S. at 44-45. In C.M.A. the plurality held that the limitations were not entitled to full first amendment protection, but nevertheless discussed whether the governmental interest in preventing corruption justified the restrictions. 101 S. Ct. at 2721-23.

104. 424 U.S. at 25-29.

105. Although the terms were not defined in Buckley, the Court implied that they referred to more than a pre-arranged bribe:

Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected quid pro quo arrangements." But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.

424 U.S. at 27-28. As the Court implied, the terms "undue influence and corruption" should encompass a broad range of situations in which the officeholder gives more weight to the interests of a contributor than to the interests of others.


107. Id.

108. The Court stated that "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." Id. at 790 (citation omitted). However, San Francisco asserted in its amicus brief before the California Supreme Court that "it is not uncommon that the political fortunes of candidates for, and incumbents of, elected office may rise or fall on the outcome of such legislation. Hence, it is not surprising that ballot measure campaigns, like candidate campaigns, are fertile soil in which the seeds of corruption grow." Amicus Curiae Brief for the City and County of San Francisco at 27, Berkeley, 27 Cal. 3d at 819, 614 P.2d at 742, 167 Cal. Rptr. at 84 (citation omitted). Although this
It was primarily this distinction that caused the California Court of Appeal in Berkeley to invalidate the limitations on contributions in ballot measure campaigns. Laurence Tribe has stated, however, that in Bellotti "the Court voiced no doubt about the legitimacy" of the asserted state interests including "preventing corporations from exercising undue influence on the outcome" of elections. Instead he found the Court's rejection of the rationale to be due to the lack of evidence that "corporations would distort the referendum process." Therefore, he asserted, a showing of sufficient empirical evidence could generate a result contrary to that in Bellotti, where the argument justifying the bans found support only in the legislature's "unfocused fears." Tribe's view is corroborated by the Court's dictum stating that "[i]f 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." If Tribe is correct, the Supreme Court could uphold the Berkeley ordinance or similar limitations in a future case if the record adequately demonstrates distortion of the electoral process through large contributions that exert undue influence on voters.

Despite Tribe's analysis, the Court's treatment of the "equalization" rationale in both Buckley and Bellotti indicates that evi-

observation is probably accurate, the connection between the fortunes of officeholders and ballot measures still appears to be sufficiently infrequent that this interest alone would not justify ballot measure contribution limitations.

109. 99 Cal. App. 3d 749 (deleted), 160 Cal. Rptr. 448, 451-52 (1979). In two consolidated Florida cases that have been appealed to the United States Supreme Court, the Fifth Circuit Court of Appeals made the same distinction. Let's Help Florida v. McCrary, 621 F.2d 195, 199-200 (5th Cir. 1980) No. 80-969 (consolidated with Dade County Voters for a Free Choice v. Firestone 5th Cir. 1980 No. 80-970); see also C & C Plywood Corp. v. Hanson, 583 F.2d 421, 424-25 (9th Cir. 1978).

110. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 58 (Supp. 1979). The other interest was described by Tribe as "protecting the rights of those shareholders who disagreed with the views expressed by the corporation." Contrary to Tribe's assertion, the Court, at least in dicta, voiced rather strong doubts about the legitimacy of this interest. The Court stated, "Appellee does not explain why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders." 435 U.S. at 794 n.34. The opinion further commented that "the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason." id.

111. L. TRIBE, supra note 110, at 58.

112. Id.

113. 435 U.S. at 789 (citation omitted). The Court further commented that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government." Id. at 789-90 (footnote and citation omitted).

114. See text accompanying notes 166-194 infra for a discussion of whether sufficient evidence is available. See also text accompanying notes 11-21 supra.

115. The appellees in Buckley argued that the spending limitations were justified by the
CONTRIBUTION LIMITATIONS

dence of extensive influence by corporate or other large contributors in ballot measure campaigns might not alone persuade the Court to uphold such restrictions. In *Bellotti* the Court commented:

To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is uncon-vincing . . . ." Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.¹¹⁸

The Court in *Bellotti* further stated that "the First Amendment rejects the 'highly paternalistic' approach of statutes like [the Massachusetts ban]."¹¹⁹ The constitutionality of limitations could turn on whether the first amendment is consistent with the view that through the use of contribution limitations voters may be protected from being overwhelmed by one side of a ballot measure campaign. The Court in *Bellotti* cited Alexander Meiklejohn for the proposition that "[g]overnment is forbidden to assume the task of ultimate judgment [regarding conflicting political views], lest the people lose their ability to govern themselves."¹²⁰ The essence of Meiklejohn's argument, however, was that political speech should not be restricted because of its content.¹²¹ Thus the *Bellotti* Court's charge of paternalism may have been based upon a perception that Massachusetts sought to protect its voters by totally banning certain corporate expression¹²² due to a fear of its content.¹²³ This would be consistent with the Court's emphasis,

governmental interest in "equaliz[ing] the relative ability of all citizens to affect the outcome of elections." 424 U.S. at 26.

¹¹⁶. 424 U.S. at 48-49.
¹¹⁸. *Id.* at 790-92 (footnote omitted) (quoting in part from Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959)).
¹¹⁹. *Id.* at 791 n.31 (quoting from Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748, 770 (1976)).
¹²³. "Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." 435 U.S. at 785-86 (footnotes omitted). The Massachusetts statute banning corporate contributions and expenditures in ballot measure elections not "materially affecting the corporation" contained the caveat that "[n]o question . . . solely concerning the taxation of the income, property or transactions of indi-
in other parts of the *Bellotti* opinion, on the impermissibility of discrimination based on content or speaker.\textsuperscript{124} Thus Berkeley's ordinance, which limits rather than bans contributions and applies to both corporate and noncorporate contributors, might be viewed as less "paternalistic" and therefore acceptable.

Daniel Lowenstein has asserted that despite the anti-equalization and anti-paternalism language in both *Buckley* and *Bellotti*, the Court could still accept the state interest in equalization as sufficiently important to justify contribution limitations in ballot measure campaigns. He stresses that although the statute challenged in *Bellotti* banned both contributions and independent expenditures by corporations, only the expenditure limitations were challenged.\textsuperscript{125} Furthermore, in rejecting the rationale of preventing undue influence on the outcome of elections, the *Bellotti* Court asserted that "[c]orporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are subjected."\textsuperscript{126} Such visibility does not occur when large contributions are given to campaign committees that in turn use this money to purchase advertisements.\textsuperscript{127}

Lowenstein points out that the *Buckley* Court did not actually reject the equalization rationale in considering the constitutionality of limitations on candidate campaign contributions.\textsuperscript{128} The Court did not rely on this rationale in upholding contribution limitations, having

\textsuperscript{124} "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." 435 U.S. at 784-85 (citation omitted). For a discussion of discrimination on the basis of subject matter in campaign finance regulation see Nicholson, *supra* note 16, at 967-87.

\textsuperscript{125} Lowenstein, *supra* note 5, at 108.

\textsuperscript{126} 435 U.S. at 792 n.32. See also text accompanying note 118 *supra*.

\textsuperscript{127} Facilitating disclosure has been tendered as a rationale for contribution limitations in ballot measure elections. See text accompanying notes 158 & 159 *infra*. Lowenstein agrees with the conclusion of the Court of Appeals in Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980), 49 U.S.L.W. 3625 (U.S., filed Dec. 8, 1980) (No. 80-970), that this rationale is insufficient in and of itself to sustain such limitations. Lowenstein, *supra* note 5, at 109. However, given the difficulty in devising a disclosure plan that is effective in communicating the source of contributions to voters in a meaningful manner, together with the acknowledged importance of information regarding the sources of political contributions, it is conceivable that limitations could be upheld on that basis. For a discussion of the inadequacy of disclosure alone in dealing with campaign financing problems see D. Adamany & G. Agree, *Political Money: A Strategy for Campaign Financing in America* 83-115 (1975).

\textsuperscript{128} Lowenstein, *supra* note 5, at 112.
found it “unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption.”  

It is unclear, however, whether the equalization rationale, having been disregarded by the Court in the context of candidate contribution limitations and explicitly rejected as a justification for expenditure limitations, would thus be ruled out as an acceptable basis for ballot measure contribution limitations. Certainly there would have to be a reason for the Court's embracing the rationale in one context after so vehemently rejecting it in another.

Such a reason may be found in the Buckley Court's perception of expenditure limitations as inflicting significantly heavier burdens on first amendment freedoms than do contribution limitations. In reviewing the limitations on independent expenditures, the Court commented that

[the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.]

It should be recalled, however, that in Buckley, the Court considered the burdens imposed on expression by contribution limitations to be insignificant. Thus the Court might not view contribution limitations as "restrict[ing] the speech of some elements of our society." In further support of the undue influence rationale, it should be recalled that despite its anti-paternalism, anti-equalization language, the Bellotti Court implied that actual evidence of "undue influence" in ballot measure elections might lead to a different result, presumably a holding that the bans on independent expenditures were valid. This dictum would seem to apply a fortiori to contribution limitations, which involve significantly less serious first amendment burdens than do expenditure limitations.

Although the concern with paternalism demonstrated by the Court in Buckley and Bellotti might be assuaged by the foregoing arguments, the undue influence rationale presents other difficulties as well. The term "undue influence" is not easily defined. How great a disparity between the spending of various groups would be required to indicate that one side had been "drowned out," or that large donors had domi-
nated the election? Perhaps to avoid these problems and the effect of the anti-paternalism dictum in *Bellotti*, the California Supreme Court in *Berkeley* did not rely solely on evidence of domination by large contributors in upholding the limitations at issue. The next section examines the argument, accepted by the California Supreme Court in *Berkeley*, that domination by large contributors destroys the confidence of citizens in the electoral process.

**B. Loss of Confidence in the Integrity of the Electoral Process**

In both *Buckley* and *Bellotti* the Court recognized that preserving the integrity of the electoral process is an important state goal. The *Bellotti* Court stated:

Preserving the integrity of the electoral process, preventing corruption, and "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" are interests of the highest importance. . . . Preservation of the individual citizen's confidence in government is equally important.136

In *Berkeley*, the City of San Francisco argued extensively in its amicus brief submitted to the California Supreme Court that the term "corruption" should encompass more than just the undue influence on elected officials referred to in *Buckley*. Referring to the dictionary meaning of corruption, which includes "decay" and "decomposition" as well as the "compromising of public officials," San Francisco propounded the concept of "systemic corruption" put forward by some social scientists.137 Thus San Francisco stated that "the unlimited ability to make large contributions to campaign organizations . . . create[d] the conviction in the minds of the electorate that the democratic processes have been perverted, thereby impairing the institutions of government and undermining the confidence of the governed in the legitimacy of the government and its laws."138

The California Supreme Court in *Berkeley* analogized that case to *Buckley*, stating that in both cases the restrictions were justified by the need to prevent corruption.139 The California court, however, clearly meant something different by the term "corruption" than did the Supreme Court in *Buckley*. The *Berkeley* court accepted San Fran-

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137. Brief, supra note 108, at 23-24, 25. The authority relied upon in the San Francisco amicus brief asserted that "the explanation of corruption can be found in developments that have affected all public institutions. . . . [T]he definition of corruption which is basic to this study embodies a systematic concept." L. BERG, H. HAHN & J. SCHMIDHAUSER, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM 3 (1976) [hereinafter cited as L. BERG].


139. 27 Cal. 3d at 827-30, 614 P.2d at 747-48, 167 Cal. Rptr. at 89-90.
cisco's argument that "the electoral process is . . . corrupted by [large] contributions because voters lose confidence in our governmental system if they come to believe that only the power of money makes a difference." The court quoted the work of Larry Berg, a social scientist who had observed that

The mass of citizens have tended to shun the opportunity to donate to campaign coffers and to participate in other forms of political activity because they felt their limited resources would be out-matched by a small group of rich and influential 'angels.' . . . [This feeling] has also inspired the emergence of a growing sense of estrangement or disaffection from public institutions and leaders. . . . By abandoning the field of battle, the average voter leaves the political wars to be fought by big contributors and powerful interests.

Presumably in support of the estrangement rationale, the Court also quoted Shockley's study of a Colorado ballot measure campaign in which he did not find Colorado citizens apathetic, cynical, or ignorant towards the initiatives. The majority of people were interested in the issues and did have ideas on them. But on several proposals their ideas tended to reflect the latest polling techniques, campaign strategies and gimmicks of those with the most power and money.

This statement seems to contradict the Court's premise that large contributions cause voter estrangement. Indeed, the implication of Shockley's data is that voters are in need of precisely the kind of paternalistic protection from undue influence that the Court rejected in dicta in *Bellotti*. Although Shockley's studies may not directly support the California Supreme Court's position regarding voter estrangement, the conclusion he drew is consistent with that view. The majority quoted his observation that "[t]he corrosive impact of this unregulated, grossly unequal power perverted the democratic process in a manner for all to see, whether or not the final election results were to one's liking." Perhaps voters do become estranged once the results are tallied and the expenditures and contributions reported. This result may be more likely when studies such as those undertaken by Lowenstein and Shockley are given substantial publicity. A reasonably predictable effect would be disaffection from ballot measure elections, and perhaps

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140. *Id.* at 827-28, 614 P.2d at 747, 167 Cal. Rptr. at 89.
141. *Id.* at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89 (quoting L. BERG, supra note 137, at 47-51).
143. See also Mastro, *supra* note 5, at 317-27.
144. 27 Cal. 3d at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89 (quoting Shockley, *Judiciary Hearings, supra* note 142, at 188-89).
from the electoral process and public institutions generally.\textsuperscript{145}

The governmental interest in preventing disaffection of the electorate involves something of a paradox. A broad interpretation of \textit{Bellotti} is that governmental attempts to cure inequality of political influence through the use of any financing restrictions are paternalistic and thus inconsistent with the first amendment.\textsuperscript{146} Such a finding would not, however, preclude the Court from upholding such restrictions on the grounds that the inequality is perceived by the electorate as giving unfair advantage to moneyed interests and thus results in a loss of confidence in our political system.\textsuperscript{147}

In \textit{Buckley} and in \textit{Civil Service Commission v. National Association of Letter Carriers},\textsuperscript{148} which examined a statute restricting the political activities of civil service employees, the Court concluded that the governmental interest in preventing the appearance of corruption would be a valid justification for the restrictions at issue.\textsuperscript{149} Indeed, quoting in part from \textit{Letter Carriers}, the \textit{Buckley} Court stated that:

> Of almost equal concern as the danger of actual \textit{quid pro quo} arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunity for abuse inherent in a regime of large individual financial contributions . . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if the confidence in the representative system of Government is not to be eroded to a disastrous extent."\textsuperscript{150}

Although these cases imply that the public perception of impropriety would alone be a compelling government interest,\textsuperscript{151} most would probably agree that behind the appearance of corruption referred to in \textit{Buckley} and \textit{Letter Carriers} there were actual instances of corruption.

In contrast, there is a lack of unanimity regarding the effect of money on election outcomes and it might be asserted that the public perception that large sums of money determine referendum election re-

\textsuperscript{145} Daniel Lowenstein has developed an elaborate analysis explaining that in ballot measure campaigns in which there is one-sided spending the voter's decision not to participate is a rational one. See Lowenstein, \textit{supra} note 5, at 87-96.

\textsuperscript{146} 435 U.S. at 791-92. See text accompanying notes 116-119 \textit{supra}. This interpretation assumes that the Court would apply the same analysis to contribution and expenditure limitations. See text accompanying notes 68-71 \textit{supra}. It is, of course, possible that a distinction will be made, so that although the interest in preventing undue influence on election results would be considered inappropriate for expenditure limitations, it would be used to sustain contribution limitations. See text accompanying notes 72-78 \textit{supra}.

\textsuperscript{147} Possibly such a loss of confidence need not be tied to a correct perception of the facts. For instance, even if in a given election money had little impact, the incorrect perception of its impact might justify restriction because voter disaffection would still exist.


\textsuperscript{149} 413 U.S. at 565.

\textsuperscript{150} 424 U.S. at 27 (quoting in part from \textit{Letter Carriers}, 413 U.S. at 548 (citations omitted)).

\textsuperscript{151} 424 U.S. at 27.
suits is erroneous. Some might ask whether government ought to be able to restrict the rights of the wealthy because of an erroneous perception by others as to their influence upon elections. The evidence gathered by Lowenstein, Shockley, and others, which tends to show that the public perception is accurate, may play an important part in establishing a state interest sufficient to justify contribution limitations.

The voter estrangement rationale, as developed by the California Supreme Court, seems to be based on two concerns. First there is the obvious problem that voters will fail to vote or otherwise participate in elections if they feel their actions will not make a difference. The second concern, however, is even more fundamental. The San Francisco amicus brief before the California Supreme Court in Berkeley suggested that the loss of confidence in the electoral process destroys "the consensus on which a democratic society relies [and] the willingness of the minority to acquiesce in the majority will." The court, following this notion, stated that "[t]he erosion and decay caused by the acid of indifference, unconcern, and lack of participation, if prolonged, may pose a danger to the democratic institutions, far more subtle and invidious than any other." According to this argument, we must act to preserve voter confidence in the electoral process, because loss of that confidence may undermine the rule of law in our society. The concern is not whether democracy is in fact working; under this rationale, even a showing that the influence of money renders some elections

152. Justice Richardson's dissenting opinion in Berkeley referred to a "Sacramento research organization study revealing that in 28 statewide contests the highest spenders won 14 times and lost 14 times." 167 Cal. Rptr. at 94, 27 Cal. 3d at 835-836, 614 P.2d at 752. Unless these elections involved grossly disproportionate spending they would not tend to refute Shockley's and Lowenstein's findings. For instance, the fact that one side spent $3,000 and the other $3,500 would clearly be insignificant.

Daniel Lowenstein concludes that the evidence of domination is much stronger in ballot measure than in candidate elections. Lowenstein, supra note 5, at 115.

153. See text accompanying note 141 supra.

154. San Francisco elaborated in its brief:

[I]t cannot be gainsaid that democratic government's claim to legitimacy rests in large part on the commonly held existential conviction of western civilization that a democracy is of the people, by the people, and for the people. It is clear that this legitimacy is undermined when the government is in fact controlled, or appears to be controlled, by an affluent minority.

Even if people cannot be manipulated by slick advertising blitzes, enormous expenditures of money launched for or against various legislative proposals placed before the people necessarily will detract from the willingness of those on the losing side to accept the majority verdict. The first step to social disruption in a democratic society is the breakdown in the consensus of the governed in the legitimacy of the governors and their laws. . . . The preservation of the consensus to accept the law is the most compelling of all governmental purposes. For with the breakdown of this consensus comes the destruction of the government. In view of the foregoing, it is beyond dispute that in a democratic society the government is entitled to protect itself from destruction.

Brief, supra note 108, at 37-38.

155. 167 Cal. Rptr. at 89 (quoting Johnson v. Hamilton, 15 Cal. 3d 401, 471, 541 P.2d 881, 886, 125 Cal. Rptr. 129, 134 (1975)).
shams would apparently be irrelevant. The concern is whether the public believes democracy to be working. If it does not, the electoral process should be altered to the extent necessary to reinstate public confidence in the political system. While this may seem a roundabout and even cynical means of sustaining restrictions that some might argue should be sustained on the basis of the domination rationale alone, it does afford an interest sufficiently divorced from the equalization rationale that it may appeal to the Court.

A slightly different approach to the estrangement argument would focus on the positive effect contribution limitations could have on the marketplace of ideas. The appellees in Berkeley argued in their brief before the Supreme Court that when large contributions are not permitted to dominate ballot measure campaigns there will be broader participation in the political process because individuals will perceive their votes, small contributions, or volunteer efforts as significant. Indeed, campaign committees would be forced to seek out broader public support in order to mount viable campaigns. If the Berkeley appellees are correct in these assertions, the limitations could lead to more communication and greater diversity, resulting in augmentation rather than restriction of the marketplace of ideas. This result is reinforced if, as appellees assert, those who would otherwise make large contributions will instead communicate with the electorate through independent expenditures. The voices of individuals and other groups will be heard rather than only those of campaign committees. These voices will offer somewhat different views and reflect a greater variety of concerns. Inducing independent expenditures by limiting contributions will also help voters to evaluate better the ideas propounded by both sides of the ballot measure issue because contributors to a campaign committee mask their identities, whereas those who make independent expenditures can be required to reveal their identities directly to the public. The Court in Bellotti pointed out that the voter "may consider ... the source and credibility of the advocate"

156. Brief for Appellees at 19, Citizens Against Rent Control v. Berkeley, prob. juris. noted 101 S. Ct. 1344 (No. 80-737).
158. Id. at 20. It seems likely, however, that some persons who would otherwise contribute will choose not to make independent expenditures. Those who would not want to openly sponsor an advertisement would probably be deterred from doing so. Others who might desire to contribute an amount over the limitation but less than that necessary to purchase significant advertising also may not wish to make such expenditures. Presumably, however, individuals or groups could pool funds for independent expenditures without being subject to contribution limitations.
159. Id. Many jurisdictions require that political advertisements identify the individual or group sponsoring the advertisement. See, e.g., ILL. ANN. STAT. ch. 46, § 29-14 (Smith-Hurd Supp. 1981). Such requirements do not, however, force such identification of those who contribute to the coffers of the campaign committee placing the advertisement.
160. 435 U.S. at 791-92.
and recognized that identification of the source of the advertising is important if the public is to evaluate the arguments to which it is being exposed.\textsuperscript{161}

Although disclosure laws may require that contributions be reported,\textsuperscript{162} the availability of such information to the voters depends to a large extent on dissemination by opponents or by the media.\textsuperscript{163} Even assuming this information eventually reaches the voters, it may have little effect because their perceptions of the issues may already have been established.\textsuperscript{164} Although facilitation of simultaneous disclosure may be insufficient as the sole rationale for contribution limitations, it could be an important factor in upholding such limitations. Arguably, the limitations on campaign contributions in ballot measure elections have an overall positive effect on the marketplace of ideas, or at least the first amendment benefits of such restrictions may offset the burdens. Admittedly, this approach resembles the equalization rationale discussed in subsection \(A\), because contribution limitations will encourage and in fact necessitate the participation of others. The emphasis of this argument is, however, slightly different from that of the equalization rationale. The focus is not on a paternalistic attempt to protect voters from hearing too much of the views of moneyed interests, but rather on a positive attempt to augment the marketplace of ideas.\textsuperscript{165}

\section*{C. Establishing Undue Influence and Voter Disaffection}

Appellees in \textit{Bellotti} argued that corporate money “exert[s] an undue influence on the outcome of a referendum vote, and—in the end—,

\begin{footnotesize}
\begin{enumerate}
\item[161.] \textit{Id.} at 792 n.32.
\item[162.] \textit{See e.g.,} CAL. ELEC. CODE § 11708 and CAL. Gov. CODE § 84211.
\item[163.] \textit{See D. ADAMANY} \& \textit{G. AGREE, supra} note 127, for a discussion of the inadequacy of disclosure alone as a campaign finance reform measure.
\item[164.] As the dissent pointed out in \textit{Berkeley}, an ordinance required the city to publish a list of contributors of over $50 twice during the last seven days of the campaign. 27 Cal. 3d at 838, 614 P.2d at 753, 167 Cal. Rptr. at 95. This still does not solve the problem of the need for simultaneous disclosure. See note 164 \textit{infra}. Of course many voters will never see the published lists, or give sufficient attention to the tedious task of ferreting out the relevant information.
\item[165.] The majority in \textit{Berkeley} observed that under California law “campaign propaganda and the identification are not simultaneous... and voter impressions are formed substantially before the sources of committee financing are revealed.” 27 Cal. 3d at 831. 614 P.2d at 749, 167 Cal. Rptr. at 91.
\item[166.] The need for disclosure might not alone be sufficient to cause the Court to uphold contribution limitations because it would be argued that less restrictive means are available. See text accompanying notes 195-203 \textit{infra}. \textit{See Lowenstein, supra} note 5, at 109. If the need for simultaneous disclosure is viewed as very important, however, the rationale might be accepted. It may be impractical to require identification of numerous contributors to a committee in an advertisement. See note 204 \textit{infra}.
\item[165.] Indeed, if the assertions made by the Court in \textit{Buckley} are correct, contribution limitations will not mute the voice of the wealthy, because they will merely resort to independent expenditures. 424 U.S. at 22. \textit{But see note} 158 \textit{supra}.
\end{enumerate}
\end{footnotesize}
destroy[s] the confidence of the people in the democratic process and
the integrity of government." The majority concluded, however,
that there had "been no showing that the relative voice of corporations
[had] been overwhelming or even significant in influencing referenda in
Massachusetts, or that there [had] been any threat to the confidence of
the citizenry in government." The evidence in Bellotti of the influence
of money on ballot measure campaigns was rather meager. Justice White,
dissenting, referred to an earlier, defeated attempt to institute a graduated
income tax in Massachusetts through the referendum process. Opponents
of the 1972 measure raised $120,000, primarily through corporate contributions,
while proponents raised only $7,000. As noted by the majority,
however, a 1976 attempt to pass the same measure was defeated without
the aid of disproportionate corporate funding. Justice White's dissent
also cited statistics from Montana's amicus brief referring to defeated
California and Montana ballot measures that would have limited the
development of nuclear energy. Yet only one of these measures
involved grossly unequal spending.

The record before the California Supreme Court in Berkeley was
not as sparse as that facing the Court in Bellotti. San Francisco's amicus
brief relied extensively on Shockley's conclusions regarding the large
impact of disproportionate spending on several Colorado ballot
measures. The San Francisco brief also cited the results of a Montana
nuclear energy referendum, a county ordinance that would have
prohibited smoking in public places, and a municipal ordinance dealing
with oil storage. The record before the United States Supreme
Court will be augmented by studies not presented to the California
court. Lowenstein's comprehensive and intensive study of California
ballot measures between 1968 and 1980 provides convincing evidence
that high spending opponents of a ballot measure can greatly increase
the chances of its defeat if proponents are unable to spend comparable

166. 435 U.S. at 789.
167. Id. at 789-90 (footnote omitted). The Court also stated that "[i]f appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes . . . these arguments would merit our consideration." Id. at 789.
168. Id. at 811.
169. Id. at 789-90 n.28.
170. 435 U.S. at 811 n.11 (White, J., dissenting).
171. In the Montana election proponents spent just .3% of the amount spent by the corporate opponents while in the California election supporters raised 68% of the amount raised by opponents. See id.
173. Brief, supra note 108, at 32-34. The oil storage measure was also referred to in San Francisco's brief before the United States Supreme Court. U.S. Amicus Brief, supra note 138, at 21-22.
Another study of three Colorado ballot measure elections in 1976 also reaffirms Shockley's conclusions. Both studies were cited in the brief submitted to the Supreme Court by the City of Berkeley. In addition, a 1980 update of an earlier study by Steven Lydenberg was cited in San Francisco's amicus brief before the Supreme Court.

Of course, the appellees in Berkeley have not sought to justify the contribution limitations solely as a means to prevent domination of ballot measure elections. They have also asserted that this domination diminishes voter confidence in the electoral process. To support this assertion San Francisco relied on the opinions of Shockley and other social scientists. One such opinion was apparently based in part on polls indicating that the public believes that it has little ability to influence politics, that those with money control politics, and that contribution and expenditure limitations are desirable. Berkeley's brief before the United States Supreme Court also cited statistics showing a drastic drop in voter turnout in Berkeley and in contributions by indi-

174. Lowenstein, supra note 5, at 65.
175. Mastro, supra note 5, at 317-27. The authors also observed that the "degree of corporate dominance . . . was even greater . . . when viewed in terms of media spending, rather than in terms of the total dollar amount expended." Id. at 324.
176. Brief, supra note 156, at 11.
177. The brief refers to three 1980 California ballot measures in which disproportionate spending occurred. Measures that would have restricted smoking in public places and that would have taxed large oil, coal and uranium companies to raise funds for public transportation and development of alternative energy sources were defeated after disproportionate funding by corporate opposition. See brief at 22-24, citing S. Lydenberg, Bankrolling Ballots: 1980 Update (manuscript for publication spring 1981) at 33-34. These measures were also discussed in Lowenstein, supra note 5, at 50, 52-55.
178. See text accompanying notes 136-45 supra.
179. Shockley has testified that proponents of defeated ballot measures perceive the elections as having been "bought." He quoted a Colorado newspaper editorial that stated that "[t]he big money boys have undoubtedly put a chill on the efforts of citizen groups to put issues on the ballot. Obtaining the needed signatures for an initiative is hard work, and nobody wants to waste his or her time if all is to be stomped under the bankrolls of those with power." Brief, supra note 108, at 34.
180. The brief referred to the testimony given by Larry Berg in a case challenging a San Francisco contribution limitation ordinance. Brief, supra note 108, at 24-25. The litigation was dropped after the California appellate court refused to issue a writ of mandate to compel the trial court to grant a preliminary injunction. Committee for the Preservation of Quality Housing v. San Francisco (No. 743-366). Berg is a co-author of Corruption in the American Political System, supra note 137. The San Francisco brief also referred to the opinions expressed in that book. Brief, supra note 108, at 24-25, and cited a study showing that voter participation drops when voters perceive that their side will lose, id. at 36 n.15 (citing Shepard, Participation in Local Policy Making: The Case of Referenda, 56 Soc. Sci. Q. 55, 69-70 (1975)). See also U.S. Amicus Brief, supra note 138, at 25 (also citing Berg and Shepard). A newspaper article was also relied upon for the same proposition. Brief, supra note 108, at 36 n.15 (citing Levering, "Prop. 13," San Francisco Bay Guardian, June 1, 1978, at 7).
181. Brief, supra note 108, at 24-25 (citing testimony of Larry Berg, supra note 180). Although the brief does not indicate the source of Berg's opinions, he is a co-author of a book containing similar conclusions based on these polls. See L. Berg, supra note 137, at 47-49.
individuals in California.\textsuperscript{182} Justice Richardson’s dissenting opinion in the California Supreme Court attacked the majority’s reliance on a “wholly untested political hypothesis [that was] not based upon any record but rather upon the opinions and conclusions of commentators on our political scene.”\textsuperscript{183} Although the opinions of experts are appropriate evidence,\textsuperscript{184} it might have been preferable to consider their views and the basis therefor at the trial level.\textsuperscript{185} Presentation of such evidence in an appellate brief, however, has long been sanctioned.\textsuperscript{186}

In \textit{Buckley} there was no trial at which witnesses could be cross-examined and their views juxtaposed, yet the Court had little difficulty sustaining limitations upon contributions as a means of preventing the appearance and reality of corruption of public officials.\textsuperscript{187} Similarly, in

\textsuperscript{182} Although the citizens of Berkeley were described as “among the most politically active in the nation,” voter turnout decreased from 65.9\% in 1973 to 45.6\% in 1981. Brief, \textit{supra} note 156, at 7. Between 1978 and 1980 the amount contributed by individuals in California decreased by 58\%. \textit{Id} (citing \textit{STATE OF CAL., FAIR POLITICAL PRACTICES COMM’N, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, November 4, 1980 General Election (issued May 27, 1981)}).

\textsuperscript{183} 27 Cal. 3d at 835, 614 P.2d at 751, 167 Cal. Rptr. at 93 (quoting majority opinion at 27 Cal. 3d at 819, 614 P.2d at 742, 167 Cal. Rptr. at 84). He also noted that not all commentators conclude that contribution limitations are desirable. \textit{Id} at 835, 614 P.2d at 751, 167 Cal. Rptr. at 93.

\textsuperscript{184} Kenneth Karst has pointed out that [e]ven in testifying as to adjudicative facts, expert witnesses are permitted to draw inferences from experience which includes their special training. There is all the more reason to ignore the opinion-evidence rule when experts testify as to legislative facts; since the judge will decide such issues with or without enlightenment, he should have the benefit of whatever assistance is available. Karst, \textit{Legislative Facts in Constitutional Litigation}, 1960 SUP. CT. REV. 75, 103.

\textsuperscript{185} \textit{See id} at 100-01. In its brief before the California Supreme Court, San Francisco discussed the reason for its submitting an amicus brief before the appellate court. San Francisco stated that it was attempting to dissuade the court from invalidating the statute on the basis of broad principles that would apply to all ballot measure contribution limitations, including San Francisco’s $500 limitation. Because the City of Berkeley had offered no evidence to establish a compelling state interest for the restriction, the amicus brief asked the court to “fully recognize [the] absence of evidence and that the court’s articulation of constitutional principles as they apply to contribution limitations in ballot measure campaigns should be carefully written so as to be confined to the record before the trial court.” Brief, \textit{supra} note 108, at 5. Instead, the appellate court invalidated the statute and failed to confine its holding to the particular record in the \textit{Berkeley} case, thus realizing San Francisco’s fears by precluding “local governments from establishing the validity of their campaign contribution limitations ordinances by competent evidence.” \textit{Id} at 6. San Francisco’s amicus brief before the California Supreme Court took the same position. \textit{Id}. The California Supreme Court went even further than San Francisco had requested, however, validating the Berkeley ordinance partially on the basis of the expert opinions referred to in the San Francisco amicus brief.

\textsuperscript{186} The “Brandeis brief,” which was used in Muller v. Oregon, 208 U.S. 412 (1908), to demonstrate the need for protective legislation for women workers, was not the first to supply legislative facts through a brief, but as Karst has explained, it used such facts “more extensively and dramatically there than had been the practice.” Karst, \textit{supra} note 184, at 100 n.92. Karst also pointed out the benefits of presenting such evidence at the trial level, however. \textit{Id} at 100-02.

\textsuperscript{187} 424 U.S. at 27. In upholding the $1,000 limitation upon contributions to candi-
C.M.A., although there was no trial, a majority of the Court upheld limitations upon contributions to political multicandidate committees to serve the same government interests. This result was reached even though the connection between the contributions in question and prevention of corruption was not nearly as clear as it is when contributions are given directly to a candidate. Indeed, the briefs and the plurality and concurring opinions were all rather vague as to just how such contributions cause corruption of public officials; although convincing arguments could be made in support of this conclusion, they were referred to only obliquely.

For a discussion of the Court's approach to the $25,000 limitation on aggregate contributions see note 190 infra.


189. The plurality and concurring opinions both described the main purpose of the restriction as preventing circumvention of the $1,000 limitation applicable to contributions made directly to the candidates or their official campaign committees. 101 S. Ct. at 2723, 2725. The plurality stated that "[s]ince multicandidate political committees may contribute up to $5,000 per year to any candidate, . . . an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channeling funds through a multicandidate political committee." Id. at 2723. Judge Wallace's dissent in the 9th Circuit, however, pointed out that because the federal restrictions also place a $5,000 limitation upon contributions from a multicandidate committee to a candidate, 2 U.S.C. § 441a(a)(2)(A) (1976), the limitation at issue in C.M.A. is not necessary to prevent the circumvention of contribution limitations. Indeed it does nothing to prevent the channeling of a $5,000 contribution from a contributor through a multicandidate committee to a candidate. 641 F.2d at 649. Under present law the $1,000 limit on contributions to a given candidate can be circumvented in precisely the same manner as it could be without the $5,000 contribution limitation challenged in C.M.A. There are, however, other ways in which the $5,000 limitation could prevent the corruption of public officials. The limitation at issue in C.M.A. would prevent a contributor from channeling several $5,000 contributions to different candidates through a contribution to a multicandidate committee. Judge Kennedy briefly referred to this possibility in his majority opinion for the Ninth Circuit Court of Appeals in C.M.A. 641 F.2d 625. The plurality may have been referring to a similar problem when it suggested in a footnote that,

[i]f unlimited contributions for administrative support are permissible, individuals and groups like C.M.A. could completely dominate the operations and contribution policies of independent political committees such as CALPAC. Moreover, if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into
The Court's lack of specificity regarding the government interests supporting contribution limitations in both *Buckley* and *C.M.A.* may

contributions, the use of which might well be dictated by the committee's main supporter. In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finance the committee's operation would be able to do acting alone. In so doing, they could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit.

101 S. Ct. at 2723 n.19. Because the plurality refers to the effect on the "electoral process" and talks of a resultant corruption of the "political process," it could be asserted that they were concerned with preventing grossly unequal influence on the political process, and were therefore embracing the equalization rationale. Arguably, because that rationale was not specifically rejected in *Buckley* in the context of contribution limitations, it could be used as a rationale to support those limitations in *C.M.A.* See text accompanying notes 125-134 *supra*. Perhaps the plurality was referring, however, to the additional undue influence large donors could achieve by channeling the contributions of others as well as themselves into numerous $5,000 contributions to separate candidates.

It should be noted that all the above arguments made in support of the $5,000 limitations at issue in *C.M.A.* seem to depend upon an assumption that a $5,000 contribution is high enough to unduly influence at least some officeholders. If it is not, then presumably the ability of an individual to funnel numerous $5,000 contributions to different candidates, or the ability of a committee to give numerous $5,000 contributions to numerous candidates, would not be significant. Such an analysis, however, overlooks the possibility that several $5,000 contributions may be received by one candidate from several separate but like-minded sources. In the aggregate they could convince some officeholders to accord undue weight to the views held by the contributors. The $5,000 limitation at issue in *C.M.A.* could reduce the likelihood of such an occurrence by reducing the funds that multicandidate committees have available to distribute.

The plurality in *C.M.A.* suggested that "individuals could evade the $25,000 limit on aggregate annual contributions to candidates if they were allowed to give unlimited sums to multicandidate political committees, since such committees are not limited in the aggregate amount they may contribute in any year." 101 S. Ct. at 2723 (footnote omitted). However, this point assumes that the $25,000 limitation on aggregate contributions would not apply to contributions to multicandidate committees, whereas the statute does seem to cover such contributions. See 2 U.S.C. § 441a(a)(3). Since the $25,000 aggregate limitation applies only to individuals, however, groups such as plaintiff California Medical Association could give unlimited sums to multicandidate committees but for the $5,000 limitation challenged in *C.M.A.*

The *C.M.A.* plurality also observed that the congressional conferees had expected the limitations to "minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign." 101 S. Ct. at 2723 n.18. Presumably the conferees feared that multicandidate committees might sometimes use large contributions for supposedly independent expenditures that are actually secretly coordinated with the candidate's campaign. Thus huge contributions, far in excess of the $5,000 contribution limitation, could be channeled to the candidate. Even if the original donor did not intend to channel funds to a candidate, his large contribution would enable the multicandidate committee to accumulate such large sums that there would be a serious temptation of secret coordination with the campaign. As a result the multicandidate committee could gain undue influence. This danger was, however, apparently insufficient to cause the Court to uphold limitations upon independent expenditures in *Buckley*.

In that case the Court ignored the possibility that secretly coordinated expenditures would be used to circumvent contribution limitations. The Court of Appeals in *C.M.A.*, however, pointed to the greater danger of such secret coordination when multimember committees are able to amass huge sums. That court explained that "[m]ulticandidate political committees are natural targets for candidate influence, and from this it follows that there
indicate that the Court will demand less of a showing of necessity when limitations upon contributions are at issue than when the limitations fall upon independent expenditures. Indeed, the assertion that independent expenditures involve dangers of corruption very similar to those generated by large contributions was summarily rejected in Buckley.

Such an approach is consistent with the C.M.A. plurality's as-

will be temptations to characterize what in fact are contributions as expenditures." 641 F.2d at 625.

The C.M.A. plurality opinion also pointed out that the conference report described the limitations as assuring "that candidates' reports reveal the root source of the contributions the candidate received." 101 S. Ct. at 2723 n.18. This interest was referred to by appellees in a footnote. Brief for Appellees at 32 n.42, C.M.A., 101 S. Ct. at 2712. See text accompanying notes 126 & 127 supra for a discussion of this interest.

Indeed in Buckley, although the Court invalidated expenditure limitations in part because it found that such expenditures entailed a “substantially diminished potential” for undue influence, 424 U.S. at 47, it summarily upheld a $25,000 limitation upon aggregate contributions that seemed to involve a similar diminished potential, id. at 38. In dealing with the $25,000 limitation on aggregate contributions by an individual for a single election the Court concluded that “this quite modest restraint upon protected political activity serves to prevent the evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.” 424 U.S. at 38.

The Court did not discuss the connection between this limitation and corruption. In Buckley it had found that independent expenditures entail a diminished potential for corruption because they “may provide little assistance to the candidate's campaign and indeed may prove counterproductive.” 424 U.S. at 47. As a result the Court found that the danger of a quid pro quo being given was alleviated due to the absence of coordination or prearrangement. Likewise, an unearmarked contribution made to a political committee that is “likely” to contribute to a candidate is of less value to a candidate than a direct contribution. If the contribution is truly unearmarked, the likelihood of quid pro quo seems almost nonexistent. Frequently, the candidate would not even be aware of the identity of the initial contributor. The more serious problem would seem to be the secretly earmarked contribution that would not be detected. (Earmarked contributions are treated as contributions made directly to the candidate under 2 U.S.C. § 441a(a)(7).) Perhaps the Court ignored this interest because it had ignored the problem of the sham independent expenditure that is secretly coordinated with the campaign when it invalidated limitations on independent expenditures. 424 U.S. at 46-47. Coordinated expenditures are treated as contributions to the candidate. 2 U.S.C. § 431(p).

The fact that the Court concluded that the potential for corruption had not been shown with respect to independent expenditures, but assumed such a potential with respect to the limitation on aggregate contributions, supports the assumption that a lesser standard of review was applied to the contribution limitations.

In Buckley the Court stated that

[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and may indeed prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as quid pro quo for improper commitments from the candidate.

424 U.S. at 47. The Court largely ignored the possibility that an expenditure could be secretly controlled by the candidate, or that the candidate would be subject to undue influence after the expenditure out of gratitude, or in the hope of obtaining similar support in the future. Because very large contributions are no longer permitted, it would seem that the importance of independent expenditures will continue to grow and that candidates will de-
sertion that contributions are not entitled to the "full First Amendment protection" accorded expenditure limitations.\textsuperscript{192}

It is difficult to predict when a court will find that a sufficient factual basis has been established to justify a restriction upon constitutional rights.\textsuperscript{193} Obviously the predilections of individual judges will have an effect on whether this threshold is found to have been met.\textsuperscript{194} For instance, a judge who believes that large contributions have undue influence upon elections will be more easily convinced that such influence undermines the confidence of voters in the electoral process. By contrast, a judge who views large contributions as merely a method of enhancing political expression may demand a great deal of particularized evidence of the connection between large contributions and voter loss of confidence before sustaining the restrictions. Because of the rather confused constitutional status of restrictions on political contributions, the predilections of a majority of the Court in \textit{Berkeley} cannot be easily predicted. However, even if the Court concludes that the record in \textit{Berkeley} is inadequate, this conclusion should not foreclose a later validation of a similar restriction if additional evidence of undue influence and voter estrangement can be produced.

\section*{III

\textbf{ALTERNATIVES TO CONTRIBUTION LIMITATIONS}}

The plurality in \textit{C.M.A.} concluded that Congress did not have "to select the least restrictive means of protecting the integrity of its legislative scheme," because the limitation on contributions to multicandidate committees that was upheld in that case did "not restrict the ability of individuals to engage in protected political advocacy."\textsuperscript{195} As noted in Section I of this Article, however, the \textit{C.M.A.} plurality ignored the arr


\textsuperscript{193}Kenneth Karst has stressed the

\textsuperscript{194}Judges also may base their opinions on "legislative facts" not in the record even when such facts would not be appropriate for "judicial notice" of adjudicative facts. \textit{See Davis, Evidence in the Administrative Process,} 55 Harv. L. Rev. 364, 404-07 (1941).

\textsuperscript{195}101 S. Ct. 2712, 2723 n.20. Justice Blackmun stated in his concurring opinion, how-
gument that the limitation impinges upon freedom of association.\textsuperscript{196}

There is substantial authority to the effect that burdens upon association are not constitutional if other less restrictive means are available.\textsuperscript{197} Indeed, in its analysis of the constitutionality of contribution limitations in \textit{Buckley} the Court quoted other cases that had applied the least restrictive alternative test.\textsuperscript{198} Commentators have pointed out that the Court has been neither clear nor consistent in applying this ever, that such a limitation must be "no broader than necessary to achieve" the state's purpose. \textit{Id.} at 2725.

The \textit{C.M.A.} plurality upheld the limitation because it was a "useful supplement to the other antifraud provisions of the Act." \textit{Id.} at 2723 n.20 (emphasis added). The plurality made a comparative reference to the \textit{Buckley} opinion, stating that in that opinion the Court had rejected the "contention that effective bribery and disclosure statutes eliminated [the] need for contribution limitations." \textit{Id.}, citing \textit{Buckley}, 424 U.S. at 27-28. The Court in \textit{Buckley} had stated, however, that "laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental action," 424 U.S. at 27-28, suggesting that perhaps the restrictions would not have been upheld if they had borne a less than "necessary" connection to the governmental objective. Also, other language used by the \textit{Buckley} Court indicates that it was not totally rejecting the least restrictive means requirement. See note 76 \textit{supra}.

\textsuperscript{196} See text accompanying note 96 \textit{supra}.

\textsuperscript{197} In \textit{Kusper v. Pontikes}, 414 U.S. 51 (1973), the Court invalidated a statute that had the effect of requiring voters to forego voting in one primary before they could change party affiliation. The Court explained:

As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. For even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty. "Precision of regulation must be the touchstone in an area so closely touching upon our most precious freedoms." If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. \textit{Id.} at 58-59 (citations omitted). \textit{See also Dunn v. Blumstein}, 405 U.S. 330, 343 (1972); \textit{N.A.A.C.P. v. Button}, 371 U.S. 415, 438 (1963); \textit{Shelton v. Tucker}, 364 U.S. 479, 488 (1960); \textit{Bates v. City of Little Rock}, 361 U.S. 516, 524 (1960).

However, in \textit{Rosario v. Rockefeller}, 410 U.S. 752 (1973), the Court upheld a statute requiring voters to register within eight months of a presidential primary and within eleven months of a non-presidential primary. The majority refused to require less restrictive means, apparently because a voter desiring to change affiliation could simply register within the prescribed period and avoid missing an election. \textit{Id.} at 759. The Court ignored the fact that voters may not decide to change affiliations until closer to the election, when the issues are clearer. \textit{See also Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers}, 413 U.S. at 548, in which the Court upheld restrictions on the political associations of civil service employees without discussing possible less restrictive means; \textit{Marston v. Lewis}, 410 U.S. 679 (1973) & \textit{Burns v. Fortson}, 410 U.S. 686 (1973) (upholding 50-day durational residency requirements for voting).

\textsuperscript{198} "Even a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25 (citing \textit{Cousins v. Wigoda}, 419 U.S. 477, 488 (1974), \textit{N.A.A.C.P. v. Button}, 371 U.S. 415, 438 (1963), and \textit{Shelton v. Tucker}, 364 U.S. 479, 488 (1960)) (emphasis added).

Possibly the Court was implying that the contribution limitations in \textit{Buckley} were not such a "significant interference" and therefore need not necessarily be subjected to a least restrictive means requirement. See note 69 \textit{supra}. The Court implied, however, that it did apply this test, stating that "under the rigorous standard of review established by our prior
In *Buckley* the Court added to the confusion by apparently deferring to Congress's determination that contribution limitations were necessary. The Court showed even greater deference to Congress when dealing with the threshold levels set for contribution limitations and mandatory disclosure, apparently not even requiring that Congress determine if those particular thresholds were necessary to prevent corruption.

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decisions, the weighty interests served by restricting the size of financial contributions... are sufficient to justify the limited effect upon First Amendment freedoms." 424 U.S. at 29.

199. John Hart Ely has suggested that there are two formulations of the least restrictive alternative test. The weakest, according to Ely, was applied in the draft card burning case, United States v. O'Brien, 391 U.S. at 367, in which the Court required only "that there be no less restrictive alternative capable of serving the state's interest as efficiently as it is served by the regulation under attack." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-85 (1975) (emphasis in original). Cases banning the distribution of hand bills were offered as examples of a strict test in which "a serious balancing of interests" took place. The question, according to Ely, was

[w]hether the marginally greater effectiveness of an anti-hand-bill ordinance relative to alternative means of litter control justifies the greater burden on communication. In order to clear room for effective expression, the Court was saying, cities will simply have to put up with some litter, to be satisfied with less than optimal vindication of the interest they were pursuing... Id. at 1486-87. Which test the Court would apply in a case such as *Berkeley* would presumably be influenced by its perception of the importance of the governmental interest and the degree of the perceived burden on the first amendment.

A student writer has commented that the Court seldom actually compares the government action that has in fact been taken with possible alternatives, and that "[t]he closest that any Justice usually comes to analyzing alternative means in a first amendment case is an admission that such analysis is necessary." Comment, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 469 n.24 (1969). The author suggested two reasons for the Court's seeming failure to compare government action taken with other possible alternatives. First, the implied validation of an alternative means entails a possible advisory opinion since "[t]o balance loss in effectiveness and resources against gain in first amendment freedoms where the alternative is very dissimilar, the Court may also have to decide the constitutionality of the alternative means." Id. at 471. The second reason suggested was that the Court does not believe itself competent to analyze alternative means. "There are no committees to look into alternative measures for the Justices, no staff of specialists to interpret data; there are only the arguments of lawyers to show what the cost and effectiveness of other means would be." Id. at 472. Both of these factors may have played a role in the Court's approach to the problem in *Buckley* and could affect the analysis in *Berkeley*.

200. See note 76 supra.

201. In reviewing the $1,000 contribution limitation the Court stated that "distinctions in degree become significant only when they can be said to amount to differences in kind." 424 U.S. at 30 (citations omitted). The Court further asserted that "[i]f [Congress] is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 424 U.S. at 30 (quoting *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)). Chief Justice Burger asserted in his dissent that the Court's conclusion was hardly consistent with its statement that the legislation must "employ means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 245 (quoting the majority, id. at 25).

In dealing with the disclosure thresholds (a $10 contribution to any one candidate or a total of $100 to any number of candidates), the Court acknowledged that disclosure of political contributions may burden association, especially that of persons making small contributions, who may be "especially sensitive to recording or disclosure of their political
The Court's deference stands in striking contrast to its refusal in the same case to accept the congressional conclusion that independent expenditures must be limited to prevent corruption.\textsuperscript{202} It seems clear that the perceived degree of burden on first amendment interests will affect the Court's application of the least restrictive alternative requirement.\textsuperscript{203}

The legislative alternatives discussed in this section are (a) limitations applicable only to corporations, (b) government subsidies, and (c) government speech. Although these approaches might be more effective than some other procedures discussed by commentators,\textsuperscript{204} as will be seen they are nevertheless of limited effectiveness,
politically infeasible, and subject to serious constitutional challenges. Thus it is highly unlikely that the Court would invalidate contribution limitations on the theory that there is a less restrictive alternative. Nevertheless it is important to consider alternative means in order to realize the significance of the Court’s decision with respect to the constitutionality of contributions in ballot measure elections. If such limitations are invalidated, reformers will find it difficult to substitute effective and constitutional alternatives. The Court’s decision could be crucial to the maintenance of the ballot measure as a tool of direct democracy, and more generally, could have a profound effect on the attitude of the citizenry towards our governmental institutions.

A. Corporate Limitations

Contribution limitations applicable only to business corporations might be viewed as a less restrictive alternative than universally applicable limitations for two reasons. First, the limitations apply only to those contributors who are likely to threaten the state interests sought to be protected. Because the available evidence indicates that it is business corporations that have dominated ballot measure elections, large corporate contributions from treasury funds, corporations would probably respond by creating political action committees funded by employee donations. In the context of candidate elections, such committees have been extremely successful in raising large funds for contributions. See discussion in Nicholson, supra, at 954-55.

Disclosure is a frequently suggested alternative to limitations. See, e.g., Hart & Shore, supra note 16, at 823-25. In Buckley the Court rejected the argument that disclosure was a less restrictive means of preventing corruption than contribution limitations, recognizing that it is “only a partial measure.” 424 U.S. at 27-28. For an outstanding discussion of the inadequacy of disclosure alone as a reform measure see D. Adamany & G. Agree, supra note 127, at 83-115.

In the context of referendum campaigns, disclosure of contributions to committees would probably only be effective if it were simultaneous with the committee’s political expression. Statutes could require, for instance, that large contributors to the committee be listed in its printed ads or announced in radio or television ads. Such a requirement would, however, be very cumbersome and would significantly increase the cost of committee expression, possibly to the point of discouraging it. Also, committees receiving their funding in very large contributions from a few people would be burdened less than committees with numerous contributions that were slightly above the threshold chosen for disclosure.

If the Court were to invalidate contribution limitations on the theory that there is a less restrictive alternative, it would be implying that the alternative was itself constitutional. As will be seen, the constitutional problems surrounding the alternative means discussed in this article are serious enough that the Court would want to examine them thoroughly before suggesting their validity. Such a searching inquiry would probably not be feasible in the context of a challenge to contribution limitations. A student commentator has suggested that such an implied validation of an alternative means entails a possible advisory opinion. Comment, supra note 199, at 471.

206. See text accompanying notes 136-155 supra.

207. See text accompanying notes 13 & 21. Lowenstein’s study indicates that of the ten measures opposed by significantly one-sided spending nine were defeated. Lowenstein, supra note 5, at 65. In almost every instance the funds came from corporate sources. See id. at 16, 19, 24, 37, 45, 53. In two of the ten defeated ballot measures organized labor contrib-
itations on contributions from other sources might be viewed as an unnecessary restriction. Second, contribution limitations applicable only to business corporations burden only relatively weak first amendment interests. When treasury funds of business corporations are used for political contributions, it is the assets of shareholders that are being donated; the shareholders should be viewed as the contributors. 208 Thus when corporations contribute, as opposed to individuals, the person who owns the property does not ordinarily make the decision to contribute. Rather, that decision is made by corporate executives who may not even be shareholders, and who do not necessarily have the same political beliefs as all or even a majority of the shareholders. 209 When an organization formed for ideological purposes makes political contributions it can ordinarily be assumed that the contributions at least roughly reflect the political views of its members, resulting in a stronger first amendment interest than that possessed by business corporations.

Justice White observed in his dissent in *Bellotti* that what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profit-making corpora-

Lydenberg states in his study that “in most initiative or referendum campaigns the corporate backed side outspent its opponents by significant margins. Of the 16 campaigns covered in this report, the side with corporate financial support outspent its opponents in 12 cases (in eight of the cases by margins of 10 or more to one).” S. Lydenberg, *supra* note 11, at 1. Lydenberg’s statistics show no instance of labor participating in one-sided funding opposing a ballot measure, except a defeated “right to work initiative.” *See id.* at 25-82.

208. David Ratner has described *Bellotti* as “holding that not only does a person have an unabridgeable right to spend his own money in support of his political views, but he also has an unabridgeable right to spend the money of others (over which he exercises legal control) for the same purpose.” Ratner, *Corporations and the Constitution*, 15 U.S.F. L. REV. 11, 18-19 (1981). It is not clear, however, that *Bellotti* should be interpreted as going that far. Although the Court in dicta expressed a lack of enthusiasm for the government interest in protecting shareholders who might disagree with the corporate expression, see note 110 *supra*, it did not explicitly hold that the rationale was inappropriate. Rather, it refused to accept that rationale because of the over- and underinclusiveness of the means chosen. 435 U.S. at 793-94. The Court also commented that “[u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.” *Id.* at 794. Although the present structure of “corporate democracy” would be largely ineffective in dealing with the problem of shareholders who disagree with political expression by managers, see note 6 *supra* and accompanying text, it would seem that reforms could be instituted, consistent with *Bellotti*, that would require shareholder approval of corporate political expression. Thus the right of corporate managers to use shareholder assets to express their political views is probably not “unabridgeable.” Nevertheless, devising effective means for preventing such a use of shareholder funds may be difficult. See note 204 *supra*.

209. *See note 208 supra*. Of course there is very little difference between a contribution from a closely held corporation and one from an individual.
tions are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self." They do not represent a manifestation of individual freedom of choice.\textsuperscript{210} Implicitly acknowledging that corporate speech does not involve an element of "self-expression,"\textsuperscript{211} the majority in \textit{Bellotti} focused upon the interest of hearers and refused to decide whether corporations have the same first amendment rights as individuals.\textsuperscript{212} Thus \textit{Bellotti} does not foreclose a later determination that political expression by business corporations is entitled to lesser protection than the expression of individuals and ideological groups. While political expression of individuals and ideological groups involves the first amendment interests of both speakers and hearers, such expression by business corporations involves only the interests of hearers.\textsuperscript{213}

Although limitations applicable only to business corporations could be viewed as a less restrictive means of dealing with the problems created by large contributions in ballot measure elections, such an approach might be subject to an equal protection challenge as an underinclusive burden on a fundamental right. Contributions by business entities such as large business trusts and partnerships would seem to involve no greater first amendment interests than those of corporations, because decisions to contribute would not necessarily reflect the views of those who own the assets. Labor unions present a similar problem in that the political expression of officials does not necessarily correspond with the beliefs of the members.\textsuperscript{214} Thus the first amendment interests of such entities in political contributions seem similar to the interests of corporations. On the other hand, such entities have not demonstrated a

\begin{itemize}
\item \textsuperscript{210} 435 U.S. at 804-05. See Nicholson, \textit{supra} note 28, at 985-61, 999-1007. See generally Ratner, \textit{supra} note 208.
\item \textsuperscript{211} The majority commented that "[t]he individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge." 435 U.S. at 777 n.12.
\item \textsuperscript{212} The Court stated that the appellate court was incorrect in "framing the principal question . . . as whether and to what extent corporations have First Amendment rights." 435 U.S. at 775-76. It explained that "[t]he Constitution often protects interests broader than those of the party seeking vindication." \textit{Id.} at 776. The majority described the proper question as "whether [the statute] abridges expression that the First Amendment was meant to protect." \textit{Id.} See Nicholson, \textit{supra} note 28, at 953-54. Chief Justice Burger's concurrence went further, explicitly stating that non-media and media corporations should be viewed as having the same first amendment rights. 435 U.S. at 795-97. See Nicholson, \textit{supra} at 958-65.
\item \textsuperscript{213} The majority's comments in dicta, however, expressing a lack of concern for protecting the interests of dissenting shareholders, could indicate that it would not view corporate expression as involving weaker first amendment interests. See notes 204 & 208 \textit{supra}.
\item \textsuperscript{214} In \textit{Abood} v. Detroit Bd. of Educ., 431 U.S. 209 (1977), the Court held that a state statute forcing public school teachers to pay the equivalent of union dues, part of which were used for political expression rather than for collective bargaining, violated the first amendment. The Court suggested that a rebate to dissenters of that portion of the fees used for political expression would be an appropriate remedy. \textit{Id.} at 240-41. See Nicholson, \textit{supra} note 28, at 999-1007.
\end{itemize}
propensity to dominate ballot measure campaigns through large contributions,\textsuperscript{215} and thus the legislative decision to exclude them from contribution limitations may be justified; indeed, more widely applicable limitations may be subject to a charge of overinclusiveness.

If the financial ability to dominate such campaigns, rather than a history of domination, is seen as the justification for the limitations,\textsuperscript{216} then the question also arises whether limitations should be applied to individuals and ideological organizations. Although exclusion of these groups from the coverage of contribution limitations might be justified by their seemingly stronger first amendment interest as compared to business corporations, some individuals and ideological groups may have the ability to dominate ballot measure campaigns through large contributions.

Seemingly the National Rifle Association or one or more individual billionaires would be capable of contributing enough money to dominate a ballot measure campaign and perhaps cause a loss of voter confidence. Corporate political action committees, which could be viewed as ideological organizations,\textsuperscript{217} would also be capable of dominating a ballot measure campaign.\textsuperscript{218}

The question thus becomes whether a legislature may impose restrictions on only one type of entity, such as corporations, because they present a somewhat greater danger than other entities, have a somewhat lesser constitutional interest, or both. The Court has held that when fundamental rights are burdened, statutes must be strictly scrutinized to insure equal protection.\textsuperscript{219} It is not at all clear, however, what

\textsuperscript{215} Their lack of involvement probably is explained by the fact that ballot measures to date have seldom directly affected them. There is some evidence of participation by labor organizations in significantly one-sided funding opposing certain ballot measures. See note 207 supra.

\textsuperscript{216} See note 230 infra and accompanying text.

\textsuperscript{217} The extent to which corporate and union political action committees are truly voluntary is open to serious debate. See Mayton, \textit{Politics, Money, Coercion, and the Problem with Corporate PACs}, 29 \textit{Emory L.J.} 375 (1980); Nicholson, supra note 28, at 962 n.73. If such committees are funded through subtle employer coercion, their first amendment interest would be less than that of organizations created to express the ideological interests of their members.

\textsuperscript{218} A limitation excluding political action committees may do little to reduce corporate dominance. Instead it might encourage corporate use of such committees, just as the present federal bans on direct corporate contributions have stimulated the use of such committees in candidate elections. If such committees are exempted, stringent controls should be enacted to assure that such contributions are voluntary. See note 217 supra.

Some concern has arisen that political action committees will very soon dominate campaigns in candidate elections. The Vice-President of Common Cause, Fred Wertheimer, asserted that we are "heading toward a new political system of PAC democracy"... with Congress representing the political action committees of America instead of its citizens." 5 \textit{Campaign Practices Rpts.}, # 18, at 6 (Sept. 18, 1978).

the application of strict scrutiny means when a statute is challenged only on underinclusiveness grounds. In *Bellotti* the Court rejected the proffered rationale of protecting dissenting shareholders as a basis for the corporate spending restrictions, stating that the bans were both over- and underinclusive with respect to that purpose.\(^{220}\) Although it had earlier asserted that the statute was subject to "exacting scrutiny,"\(^ {221}\) the Court's language on this point was reminiscent of "middle-tier" equal protection analysis.\(^ {222}\) One author has described the test used in middle-tier equal protection cases as requiring that

[a] classification must substantially further an important government interest. . . . [A] mere recitation of a benign purpose as the justification for a classification is not enough. The asserted purpose must be plausible in light of the legislative history and circumstances surrounding the enactment of the legislation.\(^ {223}\)

Therefore, limitations on corporate contributions in ballot measure elections could arguably be upheld if there is a plausible justification for the classifications. The Court's analysis in *Police Department of Chicago v. Mosley*\(^ {224}\) suggests, however, that because a fundamental right is at stake, it may refuse to accept generalizations regarding the role of corporations in ballot measure elections in determining whether there are "plausible" reasons for the statutory classification. In *Mosley* the Court invalidated a ban on picketing near schools because the ban excluded labor picketing, despite a rather convincing argument that labor picketing is usually less disruptive than other types.\(^ {225}\) The Court

\(^{220}\) 435 U.S. at 792-95. The statute was found to be overinclusive because it would not have permitted contributions or expenditures even with unanimous shareholder approval. The statute's underinclusiveness, as demonstrated by the absence of bans applying to labor unions, business trusts and partnerships, which might also have dissenting members, was said to "undermine the plausibility of the State's purported concern for . . . shareholders." *Id.* at 793.

\(^{221}\) 435 U.S. at 786.

\(^{222}\) The majority stated that "[a]ssuming *arguendo*, that protection of shareholders is a 'compelling' interest under the circumstances of this case, we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking," 435 U.S. at 795 (quoting Shelton v. Tucker, 364 U.S. 479, 485 (1960)). The language used is very similar to that of the gender-based discrimination case *Craig v. Boren*, 429 U.S. 190 (1976), in which the Court found the state's asserted rationale to be "too tenuous to satisfy [the] requirement that . . . the . . . difference be substantially related to achievement of the statutory objective," *id.* at 204.

Because the statute at issue in *Bellotti* was grossly overinclusive, a stricter standard of review was not necessary for invalidation. It remains to be seen whether the Court would apply a stricter standard to less extreme examples of over- or underinclusiveness.


\(^{224}\) 408 U.S. 92 (1972).

\(^{225}\) See Brief for Petitioners 29-30, and Reply Brief for Petitioners 7-8, Police Dep't. of Chicago v. Mosley, 408 U.S. at 100-02. See discussion in Nicholson, *supra* note 28, at 983 n.174.

The Court stated that "discrimination among pickets must be tailored to serve a sub-
stated that "[p]redictions about imminent disruption . . . involve judgments appropriately made on an individualized basis, not by means of broad classifications." Thus the Court might conclude that even if corporate referendum contributions are particularly likely to cause domination of the electoral process, and usually involve less significant first amendment interests than other contributions, the discriminatory classification could not be upheld.

The Court's approach in Mosley does not, however, necessarily compel this conclusion. In that case there was another way for the legislature to deal with the danger of disruptive picketing that would not have required classification based upon subject matter or speaker. The Court suggested that a statute could "[focus] on the abuses and [deal] evenhandedly with picketing regardless of subject matter." Presumably the city could merely have prohibited disruptive picketing and allowed law enforcement officials to determine, subject to judicial review, whether a particular instance of picketing was disruptive. In contrast, it would not be feasible to consider on a case-by-case basis whether a given large contribution would result in domination of a ballot measure campaign by a particular point of view. Nor would it be possible to decide on a case-by-case basis whether the contribution of a particular entity would entail such significant first amendment interests as to preclude limitation. Furthermore, it should be recalled that the Court does not view contribution limitations as significant burdens on speech. Therefore it could well apply a less stringent standard of review to contribution limitations than that applied to political picketing in Mosley.

Although arguably constitutional, contribution limitations applicable only to business corporations involve constitutional difficulties of sufficient magnitude that it is unlikely that the Court would view them as a less restrictive alternative to limitations applicable to all. Furthermore, even if corporate limitations are constitutional, they may not be feasible; the present political clout of business may make such limita-

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226. 408 U.S. at 100-01.
227. Id. at 102.
228. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1971), where a statute making it a crime to "willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of [a] school session or class" was upheld against a vagueness challenge.
229. See text accompanying notes 59-63 supra.
tions impossible to legislate. Finally, even though the incidence of domination by non-corporate groups in ballot measure elections is apparently low to date, it seems inappropriate to prevent states from legislating now to prevent abuses that may well occur with greater frequency in the near future. The growth of ideological groups with extremist views and easy access to funds received through direct mail techniques suggests that organizations other than corporations are in a position to dominate ballot measure campaigns through the use of money.

B. Government Subsidies

Some political scientists feel that rather than limiting contributions, government should deal with the inequality that exists in political campaigns by granting subsidies so that all sides would have adequate funding to make themselves heard. The Supreme Court has demonstrated its receptivity to public funding of presidential primary and general elections by upholding the public subsidy provisions of the Federal Election Campaign Act of 1974. Thus, augmenting funds spent in political campaigns rather than trying to limit them may be a more promising approach for the future.

A practical difficulty with this approach is that, in these austere times, when the balanced budget is the political war cry of both major political parties and when other pressing public needs are not being adequately funded, it is not politically realistic to expect public funds to be allocated for ballot measure campaigns. Still, some public fund-

231. See, e.g., Federal Election Campaign Act of 1973: Hearings on S. 372 Before the Subcomm. on Communications of the Sen. Comm. on Commerce, 93rd Cong., 1st Sess. (1973) (statement of Herbert E. Alexander): "To counteract the advantages of . . . wealth, we need not enact questionable ceilings, but rather look toward establishing floors. By floors are meant minimal levels of access to the electorate for all legally qualified candidates."
233. It is unclear whether the Court would take political feasibility into account in assessing the availability of government subsidies as a less restrictive alternative.

As an alternative to a direct government subsidy, a state could raise sufficient funds by requiring persons who expend more than some minimum amount in referendum campaigns to pay a like amount into a state fund to be allocated to persons on the other side of the controversy. Such a burden on expression, however, would probably be invalidated. In Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Court recognized a first amendment right to be free of state action that compels persons to use their funds for the expression of political views with which they disagree.

In Miami Herald v. Tornillo, 418 U.S. 241 (1974), the Court invalidated a statute requiring newspapers to grant a right of reply to candidates attacked in their pages, in part because it would chill expression. Requiring one side to fund their opponents in political campaigns could result in a similar chilling effect.
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ing of state candidate campaigns has been instituted in recent years, so this approach is a remote possibility. However, the huge sums contributed by corporations in some elections would probably never be matched by government subsidies, so that serious inequalities would persist.

Even assuming that government funds would be forthcoming, there are other practical and constitutional problems to overcome. The most troublesome problem is deciding how to allocate these funds. The federal subsidies for presidential elections are allocated among candidates. Although not every candidate receives funds, eligibility is determined by statutory formulas that leave little discretion to govern-

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235. For instance, it is doubtful the government would have matched the 6 million dollars spent by the tobacco industry in the California smoking restriction ballot measure campaign. See text accompanying note 13 supra.

236. One problem has been resolved by Daniel Lowenstein. He points out that it is not “feasible to provide large amounts to both sides of every measure that appears on the ballot.” Lowenstein, supra note 5, at 128. His plan would concentrate resources in those races in which one side is significantly outspending the other and would allocate funds only to the underfinanced side.

He explains that

[the agency would keep a running total of the amounts received (or spent independently) on each side. Whenever the reported total of one side exceeded a specified sum—say, $1,000,000—the agency would immediately issue to the other side one dollar for each dollar by which the total for the first side exceeds $1,000,000, offset by the amount, if any, by which the total for the second side also exceeds $1,000,000.

Id. (footnote omitted). In response to a possible first amendment challenge he states that [t]he only “chilling effect” that would arise would result from the fact that beyond the $1,000,000 level, the other side would be guaranteed the opportunity to campaign equally, dollar for dollar. The fear that one’s own speech will give rise to a reply that may be more effective is not a “chilling effect” that offends the First Amendment or sound policy. If a well-funded group believed that a large-scale campaign was needed to communicate its point of view to the electorate, but that once that point of view was communicated its validity would stand up to opposition arguments, the group would not be hindered by the public financing plan. On the other hand, a group that seeks to prevail by deception, distortion and arguments that could not stand up to rebuttal would be deprived of the advantage it presently enjoys merely by reason of its concentration of wealth.

Id. at 129.

In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) the Court invalidated a statute requiring that candidates be given a right to reply when a newspaper printed an attack on their record. Such a statute is distinguishable from Lowenstein’s proposal because in Tornillo the reply would have been financed by the paper, which would have to forego other expression to print the reply. Because the subsidy will come from the government under Lowenstein’s plan, the well financed side will not have to forego any expression.
ment administrators. There are, however, no candidates in ballot measures to whom funds could be given. Subsidies could hardly be given to every person or group desiring to express support for or opposition to a ballot measure. Lowenstein has devised a plan that would use objective criteria to determine subsidy recipients. When the affirmative side is entitled to funding, the “legal proponents” of the measure would be the recipients. In choosing among several groups opposing the measure, the organization that has raised the most funds by a given date would be the recipient. Although this plan should work well in most elections, it could upon occasion result in arbitrary and undesirable allocation decisions. From a practical standpoint, the most desirable allocations would be made on the basis of the credentials, responsibility, and representativeness of the organization seeking the funds. The application of such criteria, however, would involve the state in an editorial role that might be unconstitutional. In *Bellotti* the

237. For example, in the primary election, contributions of $250 or less are matchable once $5,000 has been raised in each of 20 states. I.R.C. § 9033(b). In the general election, candidates of parties receiving 25% of the vote in the last presidential election are classified as “major party” candidates and are entitled to flat grants. I.R.C. § 9004(a)(1). Candidates of parties receiving 5 to 25% of the vote in the last presidential election are entitled to an amount based on the ratio of the number of votes received by the party’s candidate in the preceding election to the average number of votes received by the major party candidates. I.R.C. § 9004(a)(2).

Some discretion is, however, lodged in the Federal Election Commission. In the 1980 election, for instance, it had to decide whether John Anderson’s campaign should be classified as a “new party” and thus should be entitled to post-election reimbursement of campaign expenses. See 7 Campaign Practices Reports, #17, 1-2 (Sept. 15, 1980).

In *Buckley*, the Court rejected challenges to the allocation procedures under the Act. See note 232 *supra.*

238. Lowenstein observes that “[i]n the past, there has almost never been more than one major campaign organization on either side.” He acknowledges, however, that “[t]he prospect of public funds . . . could cause committees to emerge from the woodwork.” Lowenstein, *supra* note 5, at n.639.

239. Lowenstein, *supra* note 5, at 130.

240. *Id.*

241. Allocation of funds to the “legal proponents” could create competition among various groups favoring a measure to be the first to become the “legal proponents” of an initiative. There is no assurance that the winner of the race would be the most deserving recipient. Under California law, persons presenting to the Attorney General a petition and a written request that a title and summary be prepared are designated “proponents.” Cal. Elec. Code § 3502 (West 1977). Presumably such “proponents” would be chosen on a first-come, first-served basis. Lowenstein’s proposal would work better for measures sponsored by the legislature. Presumably a “legal proponent” would be the legislative author of the proposal. Lowenstein’s proposal for opponents to ballot measures “would be to designate the committee that has raised the most private funds by some specified date, say three months prior to the date of the election.” Lowenstein, *supra* note 5, at 130.

Some closely-knit extremist organizations might be able to obtain either petition signatures or contributions more quickly than other groups and thus be in a position to receive a subsidy and dominate one side of an important ballot measure. Such an organization might see the campaign as an opportunity to enhance its visibility. On the other hand, the fact that such a group would have a crucial role in the campaign might alienate other voters.
Court stated that “[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”

Although the Court’s statement is not entirely consistent with precedent, there is no doubt that discrimination on the basis of content is particularly disfavored by the Court, and discrimination on the basis of source is frequently the functional equivalent of content discrimination. The problem of content discrimination is exacerbated given the nature of ballot measure elections. Any allocation criterion based on source or content would, of necessity, have to be very general and thus broad discretion would be vested in governmental administrators.

242. 435 U.S. at 784-85 (citing Police Dep’t of Chicago v. Mosley, 408 U.S. at 96.)

243. Despite assertions in several cases to this effect, see, e.g., Mosley, 408 U.S. at 95-96, the Court has on numerous occasions upheld restrictions based upon the subject matter of speech. See the discussion in Justice Stevens’s concurring opinion in Consolidated Edison Co. v. Public Service Comm’n, 447 U.S. 530, 544-48, 545 n.2 (1980). In a number of cases, the Court has not even subjected such restrictions to strict scrutiny. Nicholson, supra note 28, at 165-75.


245. Discriminatory restrictions upon speech aimed at particular persons or entities are frequently examples of the most serious form of content discrimination—that aimed at suppressing a particular viewpoint. In his concurring opinion in Consolidated Edison v. Public Service Comm’n, 447 U.S. at 546, Justice Stevens commented that [a] regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a “law... abridging the freedom of speech, or of the press.” A regulation that denies one group of persons the right to address a selected audience on “controversial issues of public policy” is plainly such a regulation. (Footnote omitted.)

See generally Stone, supra note 244, for the proposition that viewpoint-neutral content discrimination might be subject to a lesser degree of scrutiny than viewpoint discrimination. The Court apparently rejected this view in Consolidated Edison, 447 U.S. at 537-40. See Nicholson, supra note 28, at 967-75.


246. In Kunz v. New York, 340 U.S. 290 (1951) the Court invalidated a statute allowing a police commissioner to refuse a permit for religious meetings on public property without stating any reason, as granting undue discretion to an administrator in placing prior restraints on speech.

A student commentator has questioned the constitutionality of state statutes that allow state administrators undue discretion in selecting the arguments by proponents and opponents of ballot measures in voter pamphlets that are sent to voters at state expense. Comment, supra note 245, at 434-35. That problem is particularly analogous to the problem of subsidy allocation. The California procedure, discussed in the student comment above, provides that, when more than one argument on a side is presented to the Secretary of State, he or she must select the arguments to be printed by the state. Cal. Elec. Code § 3565 (West 1977). In the case of an initiative or referendum measure, the argument of the “proponent” of the petition will be chosen. Id. § 3565(b). This is a simple solution requiring no real
Kenneth Karst has pointed out that “any . . . discretionary power over speech content carries an enormous risk of abuse.” In subsidy allocation, this danger would occur in the sphere of political speech, which the Court has singled out for special first amendment protection. Furthermore, the possible impact on the electoral process caused by distortion of the public will raise the stakes considerably and heightens the danger of improper use of discretion.

An additional argument against viewing subsidies as an alternative to contribution limitations is that the two do not perform precisely the same task. Indicative of this is the fact that the campaign financing laws upheld in *Buckley* contained both contribution limitations and subsidy provisions.

administrative discretion because “proponent” is defined elsewhere in the act as the person or group who follows the statutory procedures required to begin the process of getting the measure on the ballot. *Id.* § 3502. Guidelines for selecting among arguments filed by opponents to an initiative or referendum measure allows great discretion to officials. The statute provides that officials shall give priority first to “Bona Fide associations of citizens” and then to “Individual Voters.” *Id.* § 3565(c)-(d).


The risk of abuse created by subsidy allocation provisions would be similar to that which exists in the administration of government-established public forums, such as parks and streets, where free speech may be exercised. Indeed, the giving or withholding of large sums of money has the potential for a greater effect than the giving or withholding of physical space for expression.

The Court has dealt with public forum cases in a rather simplistic manner. Where it has found a forum it has not allowed editorial discretion. Karst, *supra*, at 251-52. In order to allow content discrimination in certain cases the Court has strained to find that no public forum existed. *Id.* Karst has observed that such an “all or nothing” view of content regulation in the public forum is not a desirable way of analyzing such problems. *Id.* at 252-54. There are factual contexts in which a public forum exists and yet some editorial discretion by the state is necessary. *Id.* at 252-59. Karst would apply first amendment strict scrutiny to such problems, *id.* at 253, and thus preserve the “presumptive unconstitutionality of content discrimination,” but recognize that some “governmental interests in content regulation . . . may be both legitimate and weighty,” *id.* at 255.


249. Professor Lowenstein sees contribution limitations and subsidies as addressing two separate problems arising from ballot measure funding. He posits two standards of fairness—those of equality and intensity. The equality standard is satisfied “when both sides have a roughly equal opportunity to present their arguments to the voters.” Lowenstein, *supra* note 5, at 7. The intensity standard of fairness is met when “the ability of either side to present its arguments more or less reflects the number of people who actively support that side and the strength of their feelings.” *Id.* The intensity standard is best served by contribution limitations because they allow individuals to make contributions of modest size; thus the total amount of contributions will roughly reflect the intensity of support. *See id.* at 104-05. Although some might object that this solution would nevertheless frustrate the desire of the individual to express the intensity of his or her support by increasing the size of the individual contribution, Lowenstein asserts that “there is no basis for supposing that large contributions . . . reflect intensities of opinion,” *id.* Subsidies would serve the equality standard, which protects the interest of the voters at large in being presented with relevant facts and arguments on both sides. *Id.* at 97.

In short, there is little chance the Court would find government subsidies a less restrictive alternative to contribution limitations. The constitutional problems associated with subsidies and the fact that they serve somewhat different purposes from contribution limitations indicate that subsidies are not a true alternative. Their lack of political feasibility indicates that in any case they are not a realistic alternative.

C. Government Speech

In City of Boston v. Anderson, Justice Brennan commented that government ought to be free to spend public funds to express its views on ballot measures in order to counter the lavish spending of corporations. That case arose in the aftermath of the Court’s decision in Bellotti, which had invalidated Massachusetts’ bans on corporate expenditures in referendum campaigns. After the Bellotti decision, the City of Boston attempted to counter corporate spending by expending municipal funds in support of a property tax reform measure. The Massachusetts Supreme Judicial Court enjoined the expenditure, and Boston applied to the United States Supreme Court for a stay of the injunction. Justice Brennan, acting as Circuit Justice, granted the stay. The full Court later upheld the stay by a vote of 6-3, but ultimately dismissed the case summarily for “want of a substantial federal question,” thereby allowing the state court’s injunction to stand. Apparently a majority of the Court rejected Boston’s argument that a state statute prohibiting the use of taxpayers’ money for such political expression violates the first amendment. This resolution would not, of course, be dispositive of the question whether a state could statutorily authorize such political spending.

The general question of the constitutionality of government speech is very complex and does not lend itself to neat rules or broad generalizations. Governments constantly spend public money on expression...
with which taxpayers may disagree. Officeholders have press conferences; teachers teach; the list of expressions by government is endless. When clearly partisan government expression is financed by taxpayers' money and used in an apparent attempt to influence election results, however, a serious constitutional question arises. Laurence Tribe, who represented the City of Boston in *Anderson*, would distinguish government speech that "adds to public debate from [that which] monopolizes" it.260 Presumably, in his view, so long as other voices were being heard, the allocation of public funds for partisan electoral speech would be appropriate. Steven Shiffrin has convincingly argued, on the other hand, that "[t]he idea that government may add its voice to the many it must tolerate until it drowns out private communications is an unworkable test."261 His conclusion is based in part upon the inadequacy of "ad hoc determinations" by the judiciary as to when private communication has been drowned out.262 On the other hand, the fact that corporate speech usually dominates the public dialogue on those measures in which there is intense interest by certain industries is hardly a basis for a general rule that government expression should always be permitted in ballot measure elections. Such an approach could result in government domination in numerous elections.

Another basis for constitutional challenge is suggested by *Abood v. Detroit Board of Education*,263 in which the Court found a constitutional violation when public employees were forced to pay union fees in order to maintain their jobs and part of those fees were used for political expression with which they disagreed. The analogy to taxpayers faced with the allocation of public funds in support of a ballot measure with which they disagree is obvious. However, Shiffrin has cautioned that the *Abood* model may not be appropriate.264 He points out that "compelled contributions to ideological causes with which some taxpayers violently disagree are the norm, not the exception."265

261. Shiffrin, *supra* note 259, at 600-01. Shiffrin points out that, even if general rules could be formulated based on the "drowning out" principle, to do so would be unsuitable because some expression that is appropriate would be barred while other expression "'which should not be tolerated' would be permitted." *Id.* at 601. To illustrate, he notes that "a government subsidy designed to elect Democrats or Republicans should be unconstitutional wholly apart from whether it would drown out private sources." *Id.* at 608.
262. Shiffrin states: "The judiciary may be less biased than the legislature, but ad hoc determinations invite the same measurement problems, similar problems of institutional stress, and serious threats to the democratic process." *Id.* at 600.
265. *Id.* at 593. For instance, taxpayers would often disagree with the use of funds for military buildup, to finance abortions, to finance a city's lobbying efforts, or to espouse certain views in the classroom. *Id.* Shiffrin also states that where the use of government funds is clearly inappropriate, such as for subsidizing one particular candidate, a prorated rebate
Since the constitutionality of many such government expenditures is not in doubt, it appears that "something beyond the fact of financial compulsion would be necessary to prove that [government speech] violates the first amendment." Shiffrin and others who have considered the subject recognize the special danger of government speech in the context of electoral contests. One commentator has suggested that "permitting the government to depart from a neutral position would threaten both the reliability of the election result as an expression of the popular will and the appearance of integrity crucial to maintaining public confidence in the electoral process." This principle was said to apply with special force to ballot measure elections because in such elections the electorate is substituted for officeholders in making policy decisions. Allowing the use of public funds in such an election "would partially return [public officials] to a role from which they have been excluded by constitutional design."

As a practical matter, it is highly unlikely that government would use its funds to counter the lavish spending of special interests. Indeed, public money in some elections would probably be added to the already well-financed side of a question; wealthy interests might simply redirect their energies at unduly influencing public officials to expend government funds in a particular manner. Finally, even assuming a good faith attempt to achieve a balance in expression, government cof-
fers would rarely be adequate for the job, and taxpayer opposition would probably deter even the use of available sums for such a purpose. These practical difficulties, combined with the constitutional ones, suggest that government speech as an antidote for undue influence by wealth in ballot measure elections raises more problems than it solves, and does not present a viable alternative to ballot measure contribution limitations.

CONCLUSION

The constitutionality of contribution limitations in ballot measure elections will probably depend upon the Court’s choice of the appropriate standard of review together with its perception of the legitimacy and importance of the asserted government interests. Prior campaign financing cases have given conflicting signals as to the level of constitutional scrutiny applicable to contribution limitations. Thus, it is unclear how strong or well-supported the government’s interest must be and whether or not the least restrictive means of achieving it must be employed.

In order to uphold Berkeley’s ballot measure contribution limitation, the Court will have to accept as a justification an interest that it has not yet exclusively relied on to sustain campaign financing restrictions. The undue influence rationale is a variation of the equalization rationale that the Court rejected as a basis for expenditure limitations. Although the Court has accepted as legitimate the interest in preventing voter loss of confidence in the electoral system, it relied on this justification for contribution limitations only in conjunction with the interest in preventing corruption of public officials, not in the context of ballot measures. Although precedent would not preclude a finding that either of the proffered rationales are compelling, Berkeley’s limitations stand a greater chance of being upheld if the Court does not require a compelling state interest.

The Court’s choice of an appropriate standard of review also may affect its determination as to whether available data is sufficient to support the conclusion that undue influence and voter estrangement are serious dangers that can be ameliorated through contribution limitations. Despite the uncertainty over the standard of review applicable to contribution limitations, it is clear that in considering those limitations the Court has shown more deference to the judgments of legislative bodies than it has when expenditure limitations were at issue. This approach apparently is due to the Court’s view that in previous cases the

272. But see note 234 supra and accompanying text.
273. One student commentator has observed that among the cases challenging the appropriation of public funds for political expression, only one has resulted in vindication of the government action. See, Comment, supra note 259, at 1129-31.
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first amendment interests in political contributions have not been substantial. Affirmance of the California Supreme Court's decision in Berkeley may turn on whether the Court also perceives the contribution limitations at issue in that case as imposing no significant burden on free speech and association.

One critic of the Court's previous campaign financing cases has charged that the Court has "confused [free private enterprise] with free expression." Such a judgment may be too harsh. In distinguishing between contributions and expenditures, the Court seems to be seeking a balance that will permit government to deal with the most serious inequities and abuses in campaign financing while leaving ample room for expression of political ideas. The Court could reasonably determine that such a balance is well-served by Berkeley's ballot measure contribution limitations.

ADDENDUM

On December 14, 1981, the Supreme Court decided Citizens Against Control v. City of Berkeley. This Addendum describes the majority, concurring and dissenting opinions, and comments upon the extent to which the various arguments discussed in the preceding article have been accepted or rejected. The first part of this Addendum deals with the standards of review applied by the various Justices, and the second part considers the Justices' treatment of the relevant government interests.

The Standards of Review

Chief Justice Burger's majority opinion, which was joined by Justices Brennan, Powell, Rehnquist, and Stevens, asserted that "regulation of First Amendment rights is always subject to exacting judicial review." In discussing the burdens on first amendment interests imposed by the ordinance, the opinion described the Berkeley limitations as restraints upon both association and expression. Noting that "[t]he two rights overlap and blend," the Court stated that "[a] limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression." The Court reasoned that the limits placed on contributions to campaign committees affect the committees' expenditures, so that group expression is directly limited. In Buckley, however, the Court created a federal

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274. Rembar, supra note 10, at 32.
276. Id. at 4072.
277. Id. at 4072-74.
278. Id. at 4074.
279. Id. at 4073.
regulatory framework with precisely the same effect when it upheld contribution limitations but invalidated independent expenditure limitations. Expression through association with a candidate's campaign was thus limited, while independent expression was not. While in *Buckley* the Court described the burden on expression caused by contribution limitations as "marginal," in *Berkeley* it viewed "[c]ontributions by individuals to support concerted action by a committee advocating a position on a ballot measure [as] beyond question a very significant form of political expression." In *Buckley* the Court minimized the burden on association whereas in *Berkeley* it seemed particularly troubled by the fact that under the ordinance persons expressing themselves in concert were subject to limitation, while a person acting alone could spend unlimited sums.

Significantly, the majority opinion totally ignored the plurality opinion in *C.M.A.*, authored by Justice Marshall, which had asserted that contribution limitations are subject to a standard of review less stringent than that applicable to limitations upon expenditures. Both Justice Marshall, who concurred in the *Berkeley* judgment, but not in the majority opinion, and Justice White, the lone dissenter, reiterated this view. Justice Marshall interpreted the majority opinion as not identifying the standard of review employed; he therefore assumed that the majority applied "less rigorous scrutiny than [would be appropriate for] a direct restriction on expenditures." Although Justice Marshall is correct that the majority did not explicitly state that contribution limitations are subject to the same standard of review as expenditure limitations, the tone of the majority opinion and its description of both the first amendment burdens and the applicable standard of review do

280. 424 U.S. at 23-38. See text accompanying notes 59-71 *supra*.
281. *Id.* at 39-59. See text accompanying notes 54-58 *supra*.
282. The Court also conditioned such an effect by upholding limitations on contributions to multicandidate committees in *C.M.A.* See text accompanying notes 89-90 *supra*.
283. 424 U.S. at 20. See text accompanying notes 59-63 *supra*.
284. 50 U.S.L.W. at 4073. Although the Court in *Berkeley* did not offer an explanation for this apparent inconsistency, others have argued that there is a "tighter nexus between a contributor and a one-issue organization" than exists between a contributor and a candidate committee. See note 100 *supra*.
285. 424 U.S. at 22. See text accompanying notes 64-67 *supra*.
286. 50 U.S.L.W. at 4073.
288. 50 U.S.L.W. at 4074-75.
289. *Id.* at 4074. Apparently even this standard has teeth, however, because Justice Marshall agreed with the majority and the concurring opinion of Justices Blackmun and O'Connor that the record was inadequate to support the asserted government rationale. See text accompanying notes 304 & 305 *infra*.
290. See text accompanying notes 277-286 *supra*.
291. See text accompanying note 276 *supra*.
not support his view.292

The Court’s distinction between contribution and independent expenditure limitations in Buckley had been based primarily on two rationales. First, the Court seemed to view independent expenditures as involving much more important first amendment interests than contributions.293 Second, it considered independent expenditures to involve no significant danger of improper influence on public officials.294 In Berkeley, the majority explained Buckley solely in terms of the second rationale,295 thereby, contrary to C.M.A., impliedly rejecting the view that contribution limitations are appropriately subject to less than strict scrutiny review.296

The Government Interests

The majority opinion described Buckley as identifying “a single narrow exception to the rule that limits on political activity were contrary to the First Amendment.”297 The exception, according to the majority, “relates to the perception of undue influence of large contributors to a candidate.”298 Quoting Letter Carriers and Buckley, the majority noted the connection between the appearance of impropriety and the loss of “‘confidence in the system of representative Government.”299

Berkeley’s primary rationale for its limitations also was to restore confidence in the electoral process.300 In its discussion of the burdens upon association created by the ordinance, the majority concluded that “the record in this case does not support the California Supreme Court’s conclusion that [the limitation] is needed to preserve voters’ confidence in the ballot measure process.”301 In its discussion of the burdens upon freedom of expression, however, it seemed to take a

292. Had the Berkeley limitation applied to independent expenditures, however, arguably the Court would have found an even greater burden and applied an even stricter standard of review. This approach would be consistent with Kenneth Karst’s observation that the Court has “de facto [adopted] a . . . sliding scale of standards of review in” recent years. See note 81 supra and accompanying text.
293. 424 U.S. at 22-23, 48. See text accompanying notes 54-55 & 59-67 supra.
294. 424 U.S. at 46-47. See text accompanying notes 56-58 supra.
295. 424 U.S. at 56-58 supra.
296. 50 U.S.L.W. at 4073.
297. See text accompanying notes 287 supra. Such an approach would not necessarily lead to the result that contribution and expenditure limitations are subject to the same standard of review. See note 292 supra.
298. 50 U.S.L.W. at 4073.
299. Id. (emphasis in original). It is somewhat puzzling that the Court referred only to the perception of undue influence, whereas in Buckley itself the Court had also relied on the interest in preventing actual corruption. 424 U.S. at 26-27.
301. See text accompanying notes 136-165 supra.
more rigid position. Contrasting ballot measure and candidate elections, the majority stated that "there is no significant state or public interest in curtailing debate and discussion of a ballot measure."

Arguably this comment should be interpreted narrowly as based only upon the record in this case. In any event, this statement should be considered dictum, because the Court had already held that the record was inadequate to support the interest in restoring voter confidence. Nevertheless, the Court's broad statement may explain in part why Justices Marshall, Blackmun, and O'Connor refused to join in the majority opinion; their concurring opinions made clear that they consider the voter estrangement rationale important in the context of ballot measure elections, and that their rejection of that rationale in Berkeley was due to the inadequacy of the record.

The equalization rationale has been further weakened by the Berkeley decision. Although the interest was apparently not explicitly asserted by the City, the majority commented that "Buckley . . . made clear that contributors cannot be protected from the possibility that others will make larger contributions." It then quoted from Buckley the well known admonition that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." The clear implication is that equalization of political influence will not be considered an adequate interest to support contribution limitations. Thus, the argument that the Court's rejection of that interest in the context of expenditure limitations in Buckley and Bellotti does not indicate rejection in the context of contribution limitations has seemingly been put to rest.

The majority opinion and the concurring opinion of Justices

302. Id. at 4073-74. It further stated that "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions." Id.

It should be recalled that in Buckley the Court did not view contribution limitations as curtailing debate. 424 U.S. at 21-22. See text accompanying notes 62-63 supra.

303. See text accompanying note 301 supra.

304. Justice Marshall apparently was also motivated by a desire to explicitly state that a standard of review less stringent than that applicable to expenditure limitations is appropriate for contribution limitations. 50 U.S.L.W. at 4074 (Marshall, J., concurring). See text accompanying note 289 supra. Justices Blackmun and O'Connor also indicated disagreement with the Court's treatment of the interest in facilitating disclosure, although they, like the majority, found that interest insufficient to justify limitations. 50 U.S.L.W. at 4074-75 (Blackmun and O'Connor, JJ., concurring).

305. Id. at 4074 (Marshall, J., concurring); id. (Blackmun and O'Connor, JJ., concurring).

306. Id. at 4072.


308. See text accompanying notes 125-35 supra.

Only Justice White in dissent treated equalization as a legitimate government interest. He commented that "[t]he role of the initiative in California cannot be separated from its
Blackmun and O'Connor explicitly rejected the interest in facilitating disclosure as a rationale sufficient to support the limitations. Both opinions concluded that less intrusive means were adequate to achieve that goal. They did not address the argument that disclosure that is not simultaneous with the communication is of limited effectiveness.

Conclusion to Addendum

In attempting to reconcile the apparent contradictions between Buckley and Berkeley, it may be helpful to recall that Chief Justice Burger, who authored the majority opinion in Berkeley, dissented from the portion of the Buckley opinion that upheld candidate contribution limitations. Indeed, he specifically repudiated the majority's distinction between contributions and expenditures in that case. Although four other Justices joined his majority opinion in Berkeley, it is not clear that each necessarily agrees with its every nuance and implication. Indeed, Justices Brennan and Stevens had, less than a year earlier, joined Justice Marshall's plurality opinion in C.M.A., which took a very different approach to the first amendment burdens imposed by contribution limitations.

If the majority opinion in Berkeley is read narrowly, or if one or more Justices stray from the Chief Justice's fold, a majority of the Court could uphold limitations on contributions in ballot measure elections if an adequate record is presented showing loss of voter confidence caused by large contributions. At the very least, however, Berkeley indicates that convincing the Court that voter alienation is caused by large contributions in ballot measure elections will be a very difficult task. In dealing with candidate elections in Buckley, the Court was willing to infer that voter alienation would occur due to a perception of undue influence on public officials. Because the Court apparently does not view unequal influence upon electoral outcomes due to wealth as an impropriety, however, it may be less willing to infer that voter alienation would occur, even in the face of extensive evi-

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309. 50 U.S.L.W. at 4073-75.
310. See note 164 supra.
311. 424 U.S. at 241-46 (Burger, C.J., dissenting in part and concurring in part).
312. Id.
313. 101 S. Ct. 2712 (1981) See text accompanying notes 89-99 supra. Also, Justices Powell and Brennan had joined the majority opinion in Buckley, which found contribution limitations to involve only a marginal burden on expression. 424 U.S. at 20. See text accompanying notes 59-63 supra.
314. See text accompanying notes 301-05 supra.
315. In Bellotti, the Court stated that "corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it." 435 U.S. at 790.
vidence of domination of ballot measure elections. Although researchers should continue to amass statistics showing domination by large contributors, they should also attempt to connect the alienation of voters to the perception that large contributors dominate such elections.

Legislative reformers should perhaps focus their attention on limitations applicable only to corporations, particularly if they find impressive evidence that the public's perception of the corporate role in ballot measure elections causes voter alienation. Two of the five Justices joining the majority opinion in Berkeley, and one of the Justices concurring in the judgment, had dissented in Bellotti, and would have upheld complete bans on both corporate contributions and expenditures in ballot measure elections. One of the bare five-Justice majority in Bellotti has retired. Corporate limitations on ballot measure contributions could be distinguished from both Bellotti and Berkeley as involving less significant first amendment burdens than those cases presented. Although Berkeley has clearly made it more difficult to deal with the serious inequities in ballot measure campaign financing, it has not yet closed every door.

316. For a discussion of the practical and constitutional difficulties presented by such an approach see text accompanying notes 207-230 supra.

317. Justice Rehnquist wrote a separate dissenting opinion in Bellotti. 435 U.S. at 822-28. In his Berkeley concurrence he reiterated his view that corporate speech can be constitutionally limited. 50 U.S.L.W. at 4074. Justice Brennan joined Justice White's dissenting opinion in Bellotti. 435 U.S. at 802. That opinion also relied in part on the special status of corporations. See id. at 809-10, 812-20. Justice Marshall, who concurred only in the judgment in Berkeley, also joined Justice White's dissent in Bellotti. Therefore, Justices Rehnquist, Brennan, Marshall, and White would probably uphold limitations upon corporate ballot measure contributions, even on the basis of a record as sparse as that presented in Bellotti. Such a decision could be justified on the basis that such limitations are less restrictive than the outright bans on corporate spending invalidated in Bellotti. See text accompanying notes 166-71 supra. Justice O'Connor's appointment to the Court, replacing another member of the Bellotti majority, increases the chance of affirmance of corporate limitations. That chance would be further increased if adequate evidence could be presented of voter estrangement caused by perceived corporate dominance in ballot measure elections. In their Berkeley concurrence, Justices Blackmun and O'Connor indicated their willingness to consider such evidence. 50 U.S.L.W. at 4074. See text accompanying note 305 supra.


319. Bans on expenditures and contributions are clearly more burdensome than are limitations on contributions. Across-the-board limitations could be viewed as unnecessarily burdensome, while corporate limitations would focus more precisely on the entities that have dominated ballot measure elections. See note 207 supra and accompanying text.