Citizens Against Rent Control v. City of Berkeley: Constitutionality of Limits on Contributions in Ballot Measure Campaigns

In Citizens Against Rent Control v. City of Berkeley (CARC), the California Supreme Court upheld the constitutionality of a Berkeley ordinance that limits contributions supporting or opposing a ballot measure to $250. Although the law burdened contributors' first amendment rights of speech and association, the court held that it served a compelling governmental interest without unduly infringing those rights.

Two United States Supreme Court decisions, Buckley v. Valeo and First National Bank v. Bellotti, have established the framework for constitutional analysis of campaign spending laws. The Berkeley law at issue in CARC differs from the one considered in Buckley in that the Berkeley law limits contributions in ballot measure campaigns, while the Buckley law concerned candidate campaigns. It also differs from the law considered in Bellotti in that it limits contributions made by anyone, while the Massachusetts law at issue in Bellotti completely prohibited contributions and expenditures made by a corporation. Only

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one other court has faced the precise issue that the CARC court decided. In Let's Help Florida v. McCrary, the Court of Appeals for the Fifth Circuit held that a Florida law limiting contributions to committees supporting or opposing ballot measures in statewide or countywide elections was unconstitutional. Thus, the CARC court and the Fifth Circuit reached opposite conclusions.

This Note argues that the CARC decision is not consistent with the first amendment analysis in the Buckley and Bellotti decisions. After briefly describing in Part I the United States Supreme Court’s framework for first amendment analysis of campaign spending laws, Part II sets out the CARC case and opinion. Part III then argues that the governmental interest in preventing corruption of the electoral process asserted and accepted in CARC cannot be convincingly distinguished from the governmental interest in "equalizing voices," which was rejected by the Supreme Court in Buckley. Part III further argues that, even assuming the validity of the government’s asserted interest, the defendants failed to show that large campaign contributions had corrupted the initiative process in California. Finally, even given such a showing, the Berkeley law would not prevent corruption, because individuals and corporations would still be able to make unlimited expenditures to support their views.

I

THE SUPREME COURT'S ANALYTICAL FRAMEWORK

In Buckley v. Valeo, the Supreme Court considered the constitutionality of the post-Watergate amendments to the Federal Election Campaign Act. Although the Court invalidated several of the reforms, including the limits on expenditures, it upheld the limits on contributions to candidates. In First National Bank v. Bellotti, the Court invalidated a Massachusetts law that prohibited corporations from making contributions or expenditures in ballot measure campaigns.

In both cases, the Court held that campaign contributions and expenditures are pure speech rather than conduct. Additionally, the
Buckley Court held that campaign contributions and expenditures involve the right of association, since they allow people to act together to further political goals.11 Because limits on contributions and expenditures restrict core first amendment freedoms, the Court in its review of the limits must use the standard of strict scrutiny.

A first amendment restriction survives strict scrutiny only if it meets two tests: first, a compelling governmental interest must exist to justify the restriction, and, second, the restriction must serve the governmental interest by means narrowly drawn to avoid unnecessary intrusion upon first amendment freedoms.12 Although the Court has held that contribution limits intrude less upon first amendment freedoms than do expenditure limits, justification of either type of limit requires the demonstration of a compelling governmental interest.13

Proponents of the laws limiting contributions and expenditures have asserted, in Buckley and Bellotti, at least five different governmental interests to justify those laws, but the Supreme Court has accepted only one of those interests. In Buckley the Court recognized that the government's interest in preventing the existence or even the appearance of corruption is substantial. By corruption the Court meant the "coercive influence" that large financial contributions have on politicians' views and their actions.14 The importance of this governmental interest is that the quid pro quos that result from large contributions

11. 424 U.S. at 22. Since a corporation is a form of association, a restriction on a corporation's activity might infringe its owners' freedom of association. Analysis of this possible infringement was not necessary in Bellotti, because violation of the freedom of speech under the first amendment was enough to invalidate the statute. Cf. The Supreme Court, 1977 Term, supra note 4, at 165 (suggesting that analysis of corporation's rights should focus on the rights of its owners).

12. First Nat'l Bank v. Bellotti, 435 U.S. at 786; Buckley v. Valco, 424 U.S. at 25; Emerson, First Amendment Doctrine and the Burger Court, 68 Calif. L. Rev. 422, 449-50 (1980). But see Note, supra note 4, at 962 (describing the test as having three steps: first, there must be a substantial governmental interest; second, the chosen means must directly and narrowly serve it; and third, the chosen means must be the least drastic means that serves the interest).

13. The conclusion that the Buckley Court applied a different test to contribution limits than it did to expenditure limits, see, e.g., The Supreme Court, 1975 Term, supra note 4, at 178-79, is incorrect. See Note, supra note 4, at 963 n.50. The Court subjected the contribution limits to the "closest scrutiny," 424 U.S. at 25, under the "rigorous standard of review established by our prior decisions." Id. at 29. The cited decisions require that restraints on associational rights be justified by a compelling interest. Cousins v. Wigoda, 419 U.S. 477, 489 (1975); NAACP v. Button, 371 U.S. 415, 439 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 463 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring).

undermine the integrity of a system of representative democracy. The *Buckley* Court recognized that the problem of corruption is a real one, as there were numerous examples of corruption in the 1972 elections.

The government in *Buckley* offered a second interest, the interest in "equalizing voices," to justify expenditure limits. The Court characterized this interest by observing that "the limits serve to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections." Such strong language suggests that the Court would examine closely any reform that tries to democratize the election process by limiting the participation of some individuals or groups. This is important since the desire to equalize voices in the political process is the basis of many of the attempts to reform the electoral process.

The *Buckley* Court also rejected the governmental interest in reducing the great cost of political campaigns so that candidates without access to wealth would have greater opportunity to run for office. The Court held that the first amendment entrusts determination of the amount of speech in an election to the citizenry, and not to the government.

15. *Id.* at 26-27. "Quid pro quo" refers to the exchange of a campaign contribution for legislative favors or support of an issue after the candidate has been elected. See *id.*

16. *Id.* at 27. See *Buckley v. Valeo*, 519 F.2d 821, 839-40 nn.36-38 (D.C. Cir. 1975) (en banc) (documenting abuses in the 1972 election), rev'd in part and aff'd in part, 424 U.S. 1 (1976) (per curiam); Polsby, *supra* note 4, at 23-24 (defendants were "painstakingly thorough" in documenting the quid pro quo phenomenon).


18. 424 U.S. at 48-49. "[A]ny campaign-finance regulation calls for particularized balancing of the benefits it may provide by increasing diversity of political expression against its costs to political freedom. No slogan—not even Equality—can substitute for such an inquiry." Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 64-65 (1975) (footnote omitted). For defense of the equalizing voices interest, see Leventhal, *supra* note 4, at 368-75; Nicholson, *supra* note 4, passim; Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974); Wright, *supra* note 4, passim; Columbia Comment, *supra* note 4, at 869. Some commentators have noted that the *Buckley* Court's upholding of the limits required for receipt of public funds in presidential elections is consistent with the equalizing voices principle. See, e.g., U.S.F. Comment, *supra* note 4, at 162 n.99.


20. 424 U.S. at 26, 57.
The *Bellotti* Court considered two additional governmental interests, which were asserted as justifications for prohibiting corporate contributions in most referendum campaigns. It rejected the government's interest in protecting the rights of dissenting shareholders. The second governmental interest was that of keeping individual citizens active in the electoral process and maintaining the citizens' confidence in government. The defendant contended that if wealthy corporations were not controlled, they could dominate political debate and determine the outcome of elections, thereby undermining confidence in government.

The Court rejected this interest, although its rejection was somewhat inconclusive. The defendant failed to show record or legislative findings of corporate dominance of the election process. If the defendant were to bring forth such evidence, the asserted governmental interest "would merit [the Court's] consideration." On the other hand, the *Bellotti* Court emphasized that, since there are no candidates to corrupt, the danger of quid pro quo corruption does not exist in referendum campaigns, suggesting that no showing could justify a ban on corporate contributions and expenditures. Thus, it is unclear whether the Court meant to leave an opening for further litigation were stronger evidence available.

The strict scrutiny test requires that once the government has demonstrated a compelling interest, it must then show that the law at issue narrowly serves that interest without unduly infringing upon first amendment rights. Application of this requirement led the *Buckley* Court to uphold contribution limits, but to strike down expenditure limits, in candidate campaigns.

The *Buckley* Court distinguished expenditure limits from contribution limits in two ways. First, expenditure limits would not serve the state interest in preventing corruption. Independent expenditures are not coordinated with a candidate's campaign, and therefore do not give

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22. *Id.* at 788-89.
23. *Id.* at 789.
24. *Id.* at 790. "Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum." Schwartz v. Romnes, 495 F.2d 844, 852-53 (2d Cir. 1974); accord, Let's Help Florida v. McCrary, 621 F.2d at 199-200; C & C Plywood Corp. v. Hanson, 583 F.2d 421, 424 (9th Cir. 1978); Pacific Gas & Elec. Co. v. City of Berkeley, 60 Cal. App. 3d 123, 128-29, 131 Cal. Rptr. 350, 353 (1st Dist. 1976); Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 491, 493-95, 242 N.W.2d 3, 13, 14-15 (1976).
25. The *Bellotti* Court held that the state had not offered a compelling interest, and therefore did not reach the second prong of the test.
rise to quid pro quo arrangements. Second, limits on expenditures restrict the protected freedoms of political expression and association more severely than do contribution limits. Although contribution limits impinge upon associational freedoms, they only indirectly restrict freedom of speech. The act of contributing is a symbolic show of support; the ultimate speech is that of the candidate, not of the contributor. Furthermore, contribution limits leave an individual free to make independent expenditures or to donate time. Moreover, committees can compensate for a loss in funds by collecting a greater number of contributions from a wider variety of sources. Expenditure limits, on the other hand, directly restrict free speech, since they limit "the number of issues discussed, the depth of their exploration, and the size of the audience reached."

Thus, although the Buckley Court subjected both types of limits to strict scrutiny, in the final balance only contribution limits narrowly served the interest in prevention of quid pro quo corruption without unduly infringing first amendment rights.

26. 424 U.S. at 47. The Court noted that such expenditures might even be counterproductive to the candidate's campaign. Id.

27. Id. at 19-23. Some critics have argued that the first distinction is crucial. See, e.g., AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON ELECTION REFORM, CAMPAIGN FINANCING AFTER BUCKLEY v. VALEO 68 (1976) (remarks of Ralph Winter) [hereinafter cited as CAMPAIGN FINANCING]. The vast majority of commentators have seen the second distinction as at least equal to the first in importance. See id. (remarks of Lloyd Cutler); Cox, supra note 4, at 59-60; Polsby, supra note 4, at 23-24; Wright, supra note 4, at 1010 n.40; The Supreme Court, 1975 Term, supra note 4, at 178-80.

28. 424 U.S. at 21-22. The Court thus implied that it might accept a later challenge to the law if evidence showed that contribution limits did significantly restrict the ability of candidates to raise sufficient funds. The Supreme Court, 1975 Term, supra note 4, at 171.

29. 424 U.S. at 19.

30. Both methods of distinguishing contribution limits from expenditure limits have been criticized. See Clagett & Bolton, supra note 4, at 1332; Leventhal, supra note 4, at 365-66; Polsby, supra note 4, at 22-28; The Supreme Court, 1975 Term, supra note 4, at 178-80; Columbia Comment, supra note 4, at 860. Compare Buckley v. Valeo, 424 U.S. at 241 (Burger, C.J., concurring and dissenting) (both types of limits impermissibly infringe associational rights) with id. at 263-65 (White, J., concurring and dissenting) (both types of limits are constitutional because contribution limits will not work without expenditure limits). Nevertheless, the Court's decision may be an attempt to accommodate irreconcilable but important values. The Court may have been reluctant to overrule the legislative response to such a serious problem. See Nicholson, supra note 4, at 327 (Court could not invalidate all the Amendments because of the political climate following Watergate). On the other hand, the constitutional rights of free political speech and association are possibly the most zealously guarded rights in the Constitution. Throughout its opinion, the Court tried to strike a compromise. Thus, the Court sometimes deferred to legislative judgment and at other times refused to do so, leaving neither side with complete victory. The Supreme Court, 1975 Term, supra note 4, at 173. Such a compromise has both drawbacks and benefits: on the one hand, such a decision may provide confused guidance to the lower courts, but on the other hand, it may recognize the importance of competing constitutional values. Cf. Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1, 36-37 (1975) (reconciling Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), as fostering the two values of
II
The Case

A. The Facts

The Berkeley Election Reform Act\(^3\) regulates municipal elections in Berkeley. It limits contributions in support of or in opposition to a ballot measure to $250.\(^3\)

On the ballot in an April 1977 election was an initiative\(^3\) that would have amended the Berkeley city charter to create 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). CARC accepted several contributions that exceeded the $250 limit. The Berkeley Fair Campaign Practices Committee,\(^3\) following another provision of the Election Reform Act that required payment to the city of any amounts collected in violation of the $250 limit,\(^3\) ordered CARC to pay $18,600 to the city. CARC refused, and brought suit seeking injunctive and declaratory relief from the Act's provisions. The superior court granted CARC summary judgment.

B. The Opinion

The California Supreme Court reversed, becoming the first court to uphold contribution limits in a ballot measure campaign. The majority found that the Berkeley ordinance was constitutional because it served a compelling governmental interest without unduly infringing upon first amendment rights.

The state interest accepted by the court was that of preventing corruption of the electoral process. The court noted that this corruption is distinct from the \textit{Buckley} notion of quid pro quos, and refers instead to the more subtle influence money has on the attitudes of the voters themselves. Large contributions pervert the political process by under-


\(^{33}\) There are two types of ballot measures. An initiative allows the enactment of legislation by the voters. A referendum permits voters to vote on an ordinance already passed by a legislative body. The two types are briefly described in Comment, \textit{The Initiative and Referendum's Use in Zoning}, 64 CALIF. L. REV. 74, 74 nn.1-2 (1976). For purposes of constitutional analysis, the differences between the two are not significant.


mining voter confidence and decreasing voter participation in the electoral process. The court emphasized the compelling nature of the interest by pointing to the historical importance of direct democracy—the initiative and referendum processes—in California politics.

The court concluded that the ordinance was a necessary means to promote the compelling state interest, and that it operated by means that were the least restrictive of first amendment rights. The law did not unduly infringe upon first amendment rights because contribution limits allow individuals and committees to engage in alternate campaign activities. The law focused on the corruption danger posed by large contributions, and the $250 limit was reasonable for a local campaign in a single municipality.

III
Analysis

The California Supreme Court in CARC did not find a governmental interest that the United States Supreme Court has deemed compelling. It did not meaningfully distinguish the asserted interest in preventing corruption of the electoral process from the interest of equalizing voices rejected in both Buckley and Bellotti. Secondly, even if the CARC court had distinguished the new state interest from the equalizing voices interest, the court had no evidence before it that moneyed interests have corrupted the electoral process in California. Thirdly, the Berkeley law would not effectively further the proposed governmental interest.

A. Compelling State Interest: Theoretical Questions

1. Corrupting the Electoral Process

As used in CARC, corruption of the electoral process refers to the loss of confidence and interest among the electorate as the voters come to believe that only money makes a difference in political campaigns. The Berkeley ordinance sought to remove the source of this corruption, thereby assuring citizens that their votes and participation in the initia-
tive process would be significant. The CARC court sought to justify its decision by noting that Bellotti speaks of the government's interest in preserving citizen confidence and participation as an important interest.

To prevent corruption of the electoral process, however, the government must restrict the voices of moneyed interests in order to enhance the voices of average citizens, a practice that the Supreme Court declared antithetical to first amendment values in Buckley and Bellotti. The Supreme Court has recognized maintaining citizen interest and confidence as a compelling interest only in the context of governmental attempts to rid the electoral system of real or perceived corruption. Such corruption has been found to exist only in the context of partisan campaigns. Thus, in Buckley, the federal government sought to remedy the problem of candidates trading political favors for campaign contributions. In the Hatch Act cases, the government sought to prevent civil servants from being coerced into campaign activity and to mitigate the danger that the increasing numbers of civil servants could be employed to "build a powerful, invincible and perhaps corrupt political machine." The government may try to prevent quid pro quo corruption, both because it is dangerous in itself, and because it alienates the electorate. The alienation of the electorate is dangerous to a democratic society because the legitimacy of the government depends on the support of the people.

Ballot measure campaigns do not present the same danger of corruption that partisan campaigns do. There is no danger that the moneyed interests can use quid pro quo corruption to attain their ends, because the people themselves are the legislators in a ballot measure campaign.

Moneyed interests can use their wealth in a ballot measure campaign to persuade citizens how to vote, but such persuasion is the very activity the first amendment was designed to protect. In the end, the

42. 27 Cal. 3d at 827-29, 614 P.2d at 747-48, 167 Cal. Rptr. at 89-90.
43. Id. at 823, 614 P.2d at 744, 167 Cal. Rptr. at 86. "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." 435 U.S. at 788-89 (footnote omitted) (quoting United States v. Automobile Workers, 352 U.S. 567, 575 (1957)).
objection to such expenditures is simply that wealthy contributors are more able than less wealthy contributors to influence election results. This interest, however, is indistinguishable from that of equalizing voices. Thus, the Bellotti Court and the CARC dissent ultimately rejected the corruption of the electoral process interest by quoting the Buckley rejection of the equalizing voices interest.49

Additionally, the Bellotti Court faulted the Massachusetts law because it was paternalistic in that it assumed that the voters were not intelligent enough to resist the persuasive power of highly financed political advertising.50 The Court has exhibited a distrust of paternalism in cases involving other areas of first amendment law, such as in the commercial speech cases. There the Court has recognized the public's right to receive as much information as possible.51 Paternalistic laws are especially inappropriate in the context of ballot measures because such measures are based on the idea that the electorate is sufficiently intelligent to govern itself directly, without relying on the expertise of legislators. It is anomalous to restrict attempts to persuade voters in ballot measure campaigns while permitting lobbyists to make unlimited expenditures to influence legislators.52 In Berkeley, for example, landlords may freely lobby city council members on the issue of rent control, but they are restricted in their ability to contribute money for leaflets urging voters to oppose a rent control initiative. Such distrust of the voters' ability is contrary to first amendment values, which rest on the assumption that the people are capable of self-government.53

Furthermore, government involvement in the electoral process is

49. 435 U.S. at 790-91 (quoting 424 U.S. at 48-49); 27 Cal. 3d at 837, 614 P.2d at 753, 167 Cal. Rptr. at 95 (Richardson, J., dissenting) (quoting 424 U.S. at 48-49).

50. 435 U.S. at 791 n.31.


It is harder to make the paternalism argument in CARC than it was in Bellotti because most of the limitations on spending in ballot measure campaigns were enacted by initiative. The Berkeley Reform Act had its genesis in the Political Reform Act of 1974, CAL. GOVT. CODE §§ 85300-85305 (West 1975) (repealed 1977), which was supported by 70% of the people of California. Diamond, supra note 19, at 453. Thus, the people are imposing paternalism on themselves. Nevertheless, the people acting through the initiative must comply with the requirements of the state and federal constitutions, just as they must when acting through their elected representatives. Hunter v. Erickson, 393 U.S. 385, 392 (1969).


53. First Nat'l Bank v. Bellotti, 435 U.S. at 791 n.31 (citing Mieklejohn, The First Amend-
potentially dangerous not only because it expresses a lack of trust in the electorate, but also because it assumes too much trustworthiness in politicians in power. The officeholders may shape electoral regulations with partisan motives. For example, laws that limit corporate and union spending might differ depending on which special interest has the most support in Congress. Also, even without any improper motive at work, campaign spending limits inherently favor incumbents and discriminate against third parties. Political motives for passing contribution limits in initiative campaigns may be more subtle, but still present. A city council may wish to preserve the status quo and therefore seek limits that would impair the people’s ability to change legislative policy. Or, contribution limits may have the effect of favoring a particular political group or point of view. For example, in Berkeley, where renters vastly outnumber landlords, contribution limits clearly work to the advantage of renters. These dangers increase the need for close scrutiny of any asserted governmental interest.

2. The Referendum and Initiative in California

The CARC court sought to distinguish the case before it from Bellotti by stressing the importance of the referendum and initiative in California’s political history. The court reasoned that this history heightened the government's interest in preventing corruption of those processes. Initiatives and referenda were originally designed to curb the corrupting influence of special interest groups by enabling the people to enact legislation directly. Unfortunately, these methods too can become tools of special interest groups. The ballot measure, especially at the local level, is susceptible to the influence of money because personalities and partisanship are less important factors than in

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54. Clagett & Bolton, supra note 4, at 1343-44.
55. Redish, supra note 53, at 915-19; see Clagett & Bolton, supra note 4, at 1336 (Buckley Court generally receptive to this argument, but not in the context of a facial attack on campaign spending laws). Such laws would also favor well-known candidates. Redish, supra note 53, at 915-19.
56. See generally Note, supra note 51, at 1133 & nn.179-80.
57. Three-quarters of the population of Berkeley are renters (approximately 75,000); there are only 4,500 landlords. Westcott, The “respectable radicals” and the politics of Berkeley, 12 CAL. J. 143, 143-44 (1981).
58. See First Nat’l Bank v. Bellotti, 435 U.S. at 777 & n.11; Buckley v. Valeo, 424 U.S. at 248-50 (Burger, C.J., concurring in part and dissenting in part). See also T. Emerson, Toward a General Theory of the First Amendment 103-05 (1966) (purification of the democratic process by government is generally antithetical to first amendment values, although campaign spending laws may provide one exception to this general rule).
59. See 27 Cal. 3d at 824-27, 614 P.2d at 745-46, 167 Cal. Rptr. at 87-88.
60. Id. at 825-27, 614 P.2d at 746, 167 Cal. Rptr. at 88.
candidate campaigns. Thus, the CARC court stated that the people should be allowed to regain control over a process that was originally meant to increase their power vis-à-vis organized special interests.

This same argument, however, was rejected in Bellotti. Although referenda and initiatives pose some special problems that allow for differential treatment, the special nature of such elections increases the importance of the first amendment rights at issue. Such elections were intended to return the electoral process to the people. Thus, the people should have every opportunity to persuade others how to vote. More important, because the public has the responsibility for deciding ballot questions, the government must not obstruct the widespread dissemination of information to the public. Because ballot issues are often of low visibility due to a lack of partisanship and personality, there is danger that people will not receive enough information to make a knowledgeable decision. Governmental limits on attempts to persuade the electorate only increase that danger and thus threaten first amendment values.

It might be argued, analogously to Buckley, that there is no danger to first amendment values because contribution limits could not ultimately restrict the quantity of political information disseminated, since the lost income from large contributors would be made up by a greater number of smaller contributions. The CARC court correctly noted that such an argument becomes relevant only after the government has established a compelling interest. If such an interest exists, then contribution limits can be shown to burden first amendment rights less than do expenditure limits.

Furthermore, this argument would be less valid in a local initiative election than in the federal elections at issue in Buckley. Ballot issues may have a substantial effect on a small group with a large financial

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62. "But far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for "the widest possible dissemination of information from diverse and antagonistic sources."" 435 U.S. at 790 n.29 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945))).

63. The California Supreme Court had earlier noted the unique dangers that arise in ballot measure campaigns. In upholding strict disclosure requirements in such campaigns, the court noted that, while parties in a candidate election provide political discourse, in a ballot measure campaign, issues may not be exposed should one side be so poorly financed that it is unable to put forth its viewpoint. Brown v. Superior Court, 5 Cal. 3d 509, 522, 487 P.2d 1224, 1232, 96 Cal. Rptr. 584, 592 (1971).

64. 435 U.S. at 790 n.29.

65. 27 Cal. 3d at 824, 614 P.2d at 744-45, 167 Cal. Rptr. at 86-87.
stake in the outcome. In a rent control initiative, for example, landlords may not be able to collect funds from a wide variety of sources. Especially with little or no television news coverage of local issues, these groups may not be able to raise sufficient funds to reach the electorate. Furthermore, opponents of an emotional issue such as rent control may have little chance to win an election in Berkeley unless they can disseminate their arguments widely.

3. Creating a New State Interest
   a. The Bellotti Ambiguity

   The CARC court distinguished the corruption of the electoral process interest from that in Bellotti in a second way: it found evidentiary support for the asserted interest. The Bellotti Court based its decision in part on the failure of the government to show that money had had a corrupting influence on the political process. The Supreme Court

66. This analysis raises the possibility that the Berkeley law was not a "content neutral" statute, but instead was intended to discriminate against wealthy groups with few members, such as landlords. See generally Police Dep't v. Mosley, 408 U.S. 92 (1972). This seems especially possible given the peculiar characteristics of the City of Berkeley, where three-fourths of the residents are renters (approximately 75,000), while there are only 4,500 landlords. Westcott, supra note 57, at 143-44.

67. The CARC court noted that only 17% ($18,600) of CARC's funds were contributions that violated the limits. Id. at 830, 614 P.2d at 748, 167 Cal. Rptr. at 90. This evidence is very inconclusive support for the proposition that the contribution limits did not significantly restrict CARC's ability to raise funds, since this figure ignores the possibility that the law had a "chilling effect," that is, that the law had already inhibited activity that should be protected by the first amendment. Large contributions were illegal, and the city did confiscate monies donated in excess of the limits. Thus, many people who might have otherwise contributed large sums to CARC may have been deterred by the law from doing so. The Supreme Court cited similar statistics in Buckley v. Valeo, 424 U.S. at 21 n.23, but with the difference that those statistics were based on the 1974 election when limits had not been in effect, and thus there could have been no chilling effect.

The CARC court also noted that CARC ceased fundraising almost a month before the election. 27 Cal. 3d at 830, 614 P.2d at 748, 167 Cal. Rptr. at 90. This evidence does appear to support the view that CARC was able to raise sufficient funds for the election. Possibly, however, CARC stopped fundraising because the cost of its continuation was greater than the marginal return. Although the Supreme Court in Buckley did not consider the economics of fundraising when it stated that contribution limits merely require that candidates increase the numbers of their contributors in order not to have their ability to speak reduced, see 424 U.S. at 21-22, fundraising is very costly. In the setting of the Berkeley rent control initiative, the costs of fundraising may have been too high to justify its continuation once a certain percentage of landlords had contributed.

There are two further possible effects that the Supreme Court should have considered in Buckley. First, voter interest might reduce the marginal cost of fundraising, thus allowing more funds to be raised, and therefore increasing the amount of speech. Second, it is possible that if contribution limits succeed in reducing quid pro quo corruption, the result will be greater campaign spending. Those prevented from attempting quid pro quo corruption may increase their independent expenditures in order to make candidates aware of their ability to influence election results. See also note 122 infra.

68. 27 Cal. 3d at 823, 826-29, 614 P.2d at 744, 746-48, 167 Cal. Rptr. at 86, 88-90.

69. Cox, supra note 4, at 67, 70.
noted:

[The state’s arguments] hinge upon the assumption that [corporate] participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of the government. According to [the state], corporations are wealthy and powerful and their views may drown out other points of view. If [the state’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. But 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.

This passage is problematic because it appears to contradict the rest of the Bellotti opinion by suggesting that the equalizing voices interest might be acceptable. The importance of this passage is undercut by the paragraph in Bellotti that follows it, which begins: “Nor are appellee’s arguments inherently persuasive or supported by the precedents of this Court.” This implies that even if the state had presented evidence of corruption, a different legal conclusion would not necessarily have followed. Nevertheless, the Bellotti majority did argue against the dissent’s contention that enough evidence had been produced, and it is hard otherwise to explain the inclusion of the quoted passage.

There are two plausible reconciliations of the apparent conflict created by this passage. First, the law in Bellotti prohibited only corporate speech. As the two Bellotti dissenting opinions noted, restricting only corporate speech is different from equalizing voices, because the state gives corporations economic advantages, such as limited liability and perpetual life, that allow them to amass great wealth. In limiting corporate speech, the state would seek only to prevent corporations

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70. 435 U.S. at 789-90 (citation and footnote omitted) (emphasis added).
71. 435 U.S. at 790.
72. Still, many commentators have seen the passage as leaving an opening for further litigation in which the Court’s decision could be narrowed. See Fox, supra note 4, at 85-86; Hart & Shore, supra note 4, at 814; The Supreme Court, 1977 Term, supra note 4, at 171-72; U.S.F. Comment, supra note 4, at 165. “The perhaps more interesting other interest, that the concentrated impact of major corporate expenditures would ‘drown out’ other voices, was rejected only because not ‘supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes.’” R. Jennings & R. Buxbaum, Corporations—Cases and Materials 89 (5th ed. 1979). But see Cox, supra note 4, at 67; Fox, supra note 4, at 93-94. The Bellotti Court may have followed Buckley’s policy of allowing future litigants to work changes in its constitutional decision when they are able to produce evidence on the state of the political process. See 424 U.S. at 74, 94 n.128; The Supreme Court, 1975 Term, supra note 4, at 173.
73. 435 U.S. at 789 n.28.
from using these state-created economic advantages to dominate the political process.\textsuperscript{74} Thus, a law that only limits corporate contributions may be permissible, even though a prohibition of corporate contributions has been found invalid.\textsuperscript{75} If this is the correct interpretation of the \textit{Bellotti} passage, it does not help save the Berkeley ordinance, which limits contributions from all persons, not just corporations.

Second, the \textit{Bellotti} Court may have been referring to two different governmental interests in its discussion. One of them, that of equalizing voices, is an unacceptable governmental interest. The Court did not define the other one, although the language of the passage suggests what its nature would have to be.

\textbf{b. A New State Interest}

The \textit{CARC} analysis may be seen as an attempt to establish a governmental interest different from that of equalizing voices. While the government may not limit the speech of some in order to enhance the speech of others, the government might claim that it had another motive, prompted by a special set of facts. The theory would be that, if corporations and wealthy individuals control access to the media or to the public forum so as to make participation of the average citizen meaningless, which leads to apathy and loss of confidence in the system, the government would have a compelling interest in limiting the participation of corporations and wealthy individuals in public debate. The difference between this new interest and the equalizing voices interest may be one more of degree than of kind.\textsuperscript{76} If voices were to

\begin{footnotesize}
\textsuperscript{74} 435 U.S. at 809-10 (White, J., dissenting); \textit{id.} at 825-27 (Rehnquist, J., dissenting). Justice Powell, the author of the majority opinion in \textit{Bellotti}, has written of the dangers to the election process that result from "major participation in politics by the largest aggregations of economic power, the great unions and corporations." Pipefitters Local 562 v. United States, 407 U.S. 385, 443 (1972) (Powell, J., dissenting). The fear of this danger is consistent with the Court's "long-standing concern to eliminate the effects of aggregated wealth on the election process." Epstein, \textit{Corporations and Labor Unions in Electoral Politics}, 425 \textit{ANNALS} 33, 57 (1976); see \textit{Cort v. Ash}, 422 U.S. 66, 82 (1975); Pipefitters Local 562 v. United States, 407 U.S. 385, 416 (1972); United States v. Auto Workers, 352 U.S. 567, 570 (1957); United States v. CIO, 335 U.S. 106, 139 (1948) (Rutledge, J., concurring).

Corporate contributions and expenditures in federal candidate elections have been banned since 1907. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (current version at 2 U.S.C. § 441b (1976)). Strict adherence to the \textit{Buckley/Bellotti} logic would compel the view that this law is unconstitutional. Cox, \textit{supra} note 4, at 68; \textit{The Supreme Court, 1977 Term, supra} note 4, at 172. The \textit{Bellotti} Court, however, specifically noted that it was not considering this law and implied that the law might be upheld. 435 U.S. at 788 n.26. A likely rationale for upholding the law would be that the danger of quid pro quo corruption exists even with independent corporate expenditures, since such expenditures are highly visible, and could result in tacit quid pro quo corruption. \textit{See id.}; Cox, \textit{supra} note 4, at 69.

\textsuperscript{75} Fox, \textit{supra} note 4, at 85-86; Hart & Shore, \textit{supra} note 4, at 829; U.S.F. Comment, \textit{supra} note 4, at 159 n.83.

\textsuperscript{76} Indeed, the difference between preventing quid pro quo corruption and equalizing voices
become so unequal that people were to abandon the electoral system, the government could act, not to equalize voices completely, but to put them back into a position where they would not be totally out of balance.

Such an interest would be analogous to a current version of the clear and present danger test. In brief, this theory provides that speech that advocates illegal action cannot be prohibited unless the speech is likely to lead to imminent lawless activity.\textsuperscript{77} The rationale is that while the remedy for dangerous speech generally is further speech,\textsuperscript{78} at some point the unrestrained exercise of speech may threaten to destroy the democratic system in which opposing points of view may be expressed. In such a situation, the government has a right to maintain the marketplace of ideas by suppressing such speech. Likewise, a democratic system requires that its citizens be politically active. If this activity is curtailed, the very system that gives first amendment rights existence is imminently threatened.

The Court has also used the test in broader contexts than cases involving imminent violent activity. In one line of cases, for example, the Court has considered the allegation of a clear and present danger to the orderly and fair administration of justice.\textsuperscript{79} In these cases, the Court has employed the test more broadly, analyzing the effect of unrestrained speech on the integrity of the judicial system.\textsuperscript{80} The \textit{CARC} court's discussion of the corruption of the electoral process suggests that the City of Berkeley is asserting a similar argument: large contri-


\textsuperscript{78} \textit{E.g.}, Thornhill v. Alabama, 310 U.S. 88, 95 (1940); \textit{see} Redish, \textit{supra} note 53, at 911 & n.70 (“The theory of the ‘marketplace of ideas’ is that irrational information will merely spotlight by contrast the rational or correct course.”) (citing J. M\textsc{ill}, \textit{On Liberty} 19 (Crofts Classic ed. 1947)).

\textsuperscript{79} \textit{See} Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (publication of information about proceedings before a state judicial review commission); Wood v. Georgia, 370 U.S. 375 (1962) (statement issued by sheriff, criticizing judge for instructing grand jury to investigate voting patterns of blacks); Pennekamp v. Florida, 328 U.S. 331 (1946) (newspaper editorials criticizing trial court as too lenient on criminals); Bridges v. California, 314 U.S. 252 (1941) (newspaper editorials on cases pending in state court). Note, however, that in all of the aforementioned cases, the danger was not thought to be imminent enough or likely enough to justify the restrictions on speech. Landmark Communications, Inc. v. Virginia, 435 U.S. at 842-45; Wood v. Georgia, 370 U.S. at 387-88; Pennekamp v. Florida, 328 U.S. at 347-49; Bridges v. California, 314 U.S. at 271-73. In the most recent case, \textit{Landmark}, the Court doubted the relevance of the clear and present danger test to such cases. 435 U.S. at 842. Nevertheless, the Court applied the test, noting that the government must show that the danger immediately imperils the judicial system, and that the degree of imminence must be extremely high. \textit{Id.} at 845.

\textsuperscript{80} In employing the test so broadly as to analyze the dangers to a governmental objective rather than to the political system itself, the Court's analytical method is more akin to the balancing test than to the clear and present danger test. \textit{See} Emerson, \textit{supra} note 12, at 43.
butions present a clear and present danger to the integrity of the electoral system.81

The Supreme Court has never used the clear and present danger test in the context of election laws.82 Still, the Bellotti opinion suggests that the test may be a useful analogy. First, the Court seems to paraphrase the clear and present danger test when it discusses the possibility of large contributions imminently threatening to denigrate first amendment values.83 Furthermore, the Bellotti Court cited Thomas v. Collins84 and Wood v. Georgia,85 two cases in the development of the clear and present danger standard. As in Collins, the Bellotti Court rejected the defendant’s arguments because “[a] restriction so destructive of the right of public discussion [as the Massachusetts law], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.”86 This implies that a showing of a “greater or more imminent danger to the public interest” would justify otherwise unjustifiable burdens on first amendment rights.

However, for such an interest to be recognized as compelling, it must have some basis in reality. The court must analyze the condition of the electoral process to see if such an extreme danger exists, and that it is both imminent and likely. In doing so, the court must be careful to distinguish the government’s interest in preventing this danger from the government’s interest in equalizing voices.

B. Compelling State Interest: Evidentiary Questions

1. The Standard of Proof

The burden of proof is on the government to establish a compelling interest,87 and the preceding analysis suggests that the burden in this case should be a substantial one. It cannot merely show that some voices in the political community are stronger than others, or that money may be effective in influencing elections. It must show a severe distortion in the political system that imminently threatens the democratic process. The Bellotti passage requires a showing that some voices have been “overwhelming,” that they “drown out” other voices.

81. See 27 Cal. 3d at 826-27, 614 P.2d at 746-47, 167 Cal. Rptr. at 88-89.
82. The dominant test is still the balancing test. Emerson, supra note 12, at 438. Some commentators have suggested expanding the clear and present danger test to other areas of first amendment analysis. See id. at 435-38; Comment, Brandenburg v. Ohio: A Speech Test for All Seasons?, 43 U. CHI. L. REV. 151 (1975).
83. See text accompanying note 70 supra.
84. 323 U.S. 516 (1945), cited in 435 U.S. at 792.
86. 435 U.S. at 792 (quoting Thomas v. Collins, 323 U.S. at 537).
to the extent that first amendment rights have been "denigrated." 88 Other first amendment cases suggest that a very substantial showing is required. 89

The analysis of how the new interest differs from that of equalizing voices suggests that the government must meet a two part test. It must show, first, the ability of moneyed interests to dominate elections, and, second, the resulting loss of interest and confidence on the part of the electorate.

There is no one way by which to prove both parts of the test. The ability of moneyed interests to dominate elections might be shown by election results consistently favorable to their interests in races in which they greatly outspend their opponents. The second part might be shown by a marked decrease in the number of people contributing to political campaigns or in the number voting or otherwise participating in political activity. Opinion polls conducted over a period of time might be an acceptable but less desirable method of proof.

Finally, the court must analyze the evidence to make sure that it is the increase in the size of contributions and expenditures that causes political disenchantment. Although empirical studies of this area are likely to be difficult, the court must ascertain that disenchantment is related to campaign spending and not to general dissatisfaction with governmental policies.

The standard of proof is more severe than the standard of an "appearance of corruption" that the Buckley Court applied. Such a standard was appropriate in Buckley because of the danger of real and substantial corruption, whereas no similar danger exists in initiative campaigns. If such a standard were applied in CARC, the city could circumvent the Court's prohibition against equalizing voices by making generalized assertions as to the effect of money on the political process. Likewise, the city could circumvent the Bellotti Court's requirement of "imminent danger" by merely speculating about a potential danger. 90 Also, although the Buckley Court spoke of "appearance of corruption," the documentation of quid pro quo corruption there showed that, in fact, the defendants had established more than an appearance of cor-

88. See text accompanying note 70 supra.
89. E.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 245, 250 (1974) (rejecting the state interest of furthering the flow of information to the public, despite proof that the power to inform was concentrated in the hands of a few, and that the public's ability to debate the issues was not meaningful), cited in First Nat'l Bank v. Bellotti, 435 U.S. at 791 n.30; Thomas v. Collins, 323 U.S. at 530 (controls on orderly discussion and persuasion "must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."). See also note 79 supra. But cf. Leventhal, supra note 4, at 369 (Tornillo unique in that it is a press case).
90. 27 Cal. 3d at 835, 614 P.2d at 751, 167 Cal. Rptr. at 93 (Richardson, J., dissenting).
It is unclear what standard the CARC court applied, since it never specifically announced any standard. At one point, it appears that the court may have applied the more lenient "appearance" standard. If so, the court engaged in an analysis that dangerously threatens first amendment rights.

2. The Evidence in CARC

The government in CARC did not provide any evidence that would substantiate its purported compelling interest. The court cited no data that provided proof of any consistent effect of money on the initiative process in California or in the City of Berkeley. Instead, the court quoted the opinions of three political scientists and a study of the 1976 elections in Colorado. Even this evidence is weak. Two of the three books cited are nearly twenty years old. The third is more recent, but its author recently testified before the United States Senate that "there is no evidence to support the position of those who fear that special interests will be able to buy themselves special privileges through the initiative process."

Since the plaintiffs had been granted summary judgment, opposing viewpoints and evidentiary proof were never presented. At least, the CARC court should have remanded the case to allow contradictory testimony. The testimony of commentators who believe that campaign spending limits or other factors, not money, lead to apathy, should

91. See note 16 supra.
92. "The Bellotti Court rejected the view that the possible influence of corporate advertising on the outcome of the vote justified the complete prohibition of such advertising." 27 Cal. 3d at 823, 614 P.2d at 744, 167 Cal. Rptr. at 86. This phrase could mean that a "possible influence" would justify contribution limits, although not a complete prohibition.

Further evidence for such an interpretation is that the court extensively cited U.S.F. Comment, supra note 4. At one point, that Comment notes:

The suggestion in Bellotti that the government must show actual undue influence of corporate speech or actual lack of confidence in the electoral process seems inapposite with the determination in Buckley that even the appearance of corruption can be a sufficiently compelling interest upon which to sustain a regulation of campaign finance. Id. at 175. Although throughout the opinion, the court seems to rely more on the idea that sufficient evidence is available, see, e.g., 27 Cal. 3d at 826-29, 614 P.2d at 746-48, 167 Cal. Rptr. at 88-90, the court's repeated citing of the U.S.F. Comment suggests that it might accept the analysis of the quoted passage.

93. Only the dissent cited any statistics, which showed that the highest spenders lost as often as they won. 27 Cal. 3d at 836, 614 P.2d at 752, 167 Cal. Rptr. at 94 (Richardson, J., dissenting).
95. Hearings, supra note 61, at 48 (testimony of Larry Berg, Professor of Political Science, University of Southern California).
96. 27 Cal. 3d at 835, 614 P.2d at 751-52, 167 Cal. Rptr. at 93-94.
have been heard.\textsuperscript{97}

Furthermore, it is doubtful that a defendant could ever produce evidence to show the overwhelming influence of special interests in California.\textsuperscript{98} Early informal studies of the electoral process have concluded that proposition campaigns cannot be bought.\textsuperscript{99} More recent evidence has indicated that highly financed interests are often unable even to qualify their propositions for the ballot, even though California requires signatures from only five percent of the registered voters in the state.\textsuperscript{100} Professor Berg has concluded that "[e]xperience in California also suggests that those critics who charge that the initiative will become the tool of special interests to enact legislation for their direct benefit are not basing their views on factual evidence."\textsuperscript{101}

Recent California election history supports Professor Berg's view. In June 1980, two highly financed ballot measures were defeated at the polls. One was Proposition 10, an anti-rent control measure in which proponents outspent opponents $6,550,135 to $178,271, a ratio of thirty-seven to one.\textsuperscript{102} The proposition was soundly defeated.\textsuperscript{103} A second highly financed proposition, a tax-cutting measure popularly known as Jarvis II, met a similar fate.\textsuperscript{104}

Moreover, the court had slender support for the contention that the injection of money into campaigns has undermined confidence in the political process. The court referred to its earlier judicial notice of

\textsuperscript{97} E.g., Clagett & Bolton, \textit{supra} note 4, at 1381; Redish, \textit{supra} note 53, at 907 n.49.

\textsuperscript{98} \[\text{[The\, unquestioned assumption that injections by interest groups of large amounts of money into the electoral process would so determine the outcome of elections as to undermine political democracy in the United States has been challenged by recent electoral analysis which demonstrates quite convincingly that no simple correlation can be drawn between the amount of money spent by or on behalf of a candidate and his or her ultimate success.}\]

\textsuperscript{99} Epstein, \textit{supra} note 74, at 36.


\textsuperscript{101} \[\text{See \textit{Hearings, supra} note 61, at 48, 53-54 (testimony of Larry Berg, Professor of Political Science, University of Southern California).}\]

\textsuperscript{102} Id. at 54; accord, Price, \textit{The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon}, 28 W. POLITICAL Q. 243, 260-61 (1975), \textit{cited in \textit{Hearings, supra} note 61, at 225-26 ("voters do not seem as easily misled by deceptive advertising or expensive campaigns as was once thought. . . . [T]he easy assertions about the apathy, indifference, and susceptible nature of voters can at least be questioned by the California experience.")}.

\textsuperscript{103} Eu, Secretary of State, Statement of Vote, Primary Election of June 5, 1980, at 40 (final vote total of 35.4% for, and 64.6% against).

\textsuperscript{104} \[\text{The proposition's proponents spent over $2 million just to qualify it for the ballot, and then outspent opponents $3.6 million to $1.8 million. \textit{Bulletin, supra} note 102, at 2. The initiative failed by a vote of 60.8% to 39.2%. \textit{Eu, supra} note 103, at 39.}\] 

In a third important proposition, financing may have had more of an impact. Opponents to an initiative to tax excess oil profits outspent proponents $5.6 million to $4.5 million, a ratio of twelve to one. \textit{Bulletin, supra} note 102, at 2. The measure failed by a vote of 55.7% to 44.3%. \textit{Eu, supra} note 103, at 40.
growing voter apathy. Since the court specifically claimed that people have abandoned the political arena, it would have been helpful to provide statistics on the number of people who vote, contribute to campaigns, and participate as volunteers in Berkeley elections. It might be that apathy is more pronounced in candidate campaigns, because voters are cynical about politicians, than it is in ballot measure campaigns. The initiative process, at least in California, appears to be fairly vigorous.

3. Further Evidentiary Problems

If the CARC court had required more extensive documentation, it should have considered the following factors in judging that documentation. First, its analysis should have concentrated on the effects of campaign spending on local elections. Most recent analyses of the effect of money on elections have centered on the television commercial, which is both extremely expensive and extremely effective. In local elections, television does not play the same role. The contributions in the Berkeley election underwrote not television, but printed matter, which has always enjoyed special constitutional protection.

Second, it is possible that the deleterious influence on the election process can be traced primarily to corporate contributions. If this is so, a law that restricts all contributions would be impermissibly overbroad. Thus, the court's analysis should distinguish between limitations on corporations and those on individuals.

Because of difficulties in determining cause and effect, the court should have required well-documented studies that accurately ascertain the influence of special interests on elections. The CARC court did

105. 27 Cal. 3d at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89 (citing Johnson v. Hamilton, 15 Cal. 3d 461, 471, 541 P.2d 881, 886, 125 Cal. Rptr. 129, 134 (1975)).
106. See Shockley, supra note 61, at 176.
107. 27 Cal. 3d at 836, 614 P.2d at 752, 167 Cal. Rptr. at 94 (Richardson, J., dissenting).
108. The CARC court's analysis used studies of statewide elections. See 27 Cal. 3d at 827-29, 614 P.2d at 746-48, 167 Cal. Rptr. at 89.
109. Shockley, supra note 61, at 188.
112. One suggestion is that a court should not rely on evidence from only one election. For example, critics of the initiative process often point to the "no smoking" proposition on the 1978 ballot, see, e.g., Hart & Shore, supra note 4, at 820. The effect of money on that particular initiative is not as clear as the critics have suggested. In November, 1980, the voters again defeated that
not require such extensive proof.

C. Serving the State Interest

Even if the City of Berkeley had been able to establish a compelling governmental interest, it would still have had to show that the ordinance effectively furthered that governmental interest. In Buckley, this prong of the strict scrutiny test did not pose a significant problem for the government. Expenditures made independently of a candidate and his or her campaign were not thought to pose the danger of quid pro quo corruption that contributions did; therefore the contribution limits by themselves were sufficient to further the state interest.\textsuperscript{3}

In CARC, on the other hand, it is unclear how contribution limits alone could effectively prevent moneyed interests from dominating the electoral process. As the court emphasized, the law leaves affluent individuals free to spend unlimited funds independently of any committees.\textsuperscript{4} As a result, the danger of wealthy individuals drowning out the voices of others, causing loss of confidence and participation by the electorate, is still present. As the Buckley court noted: "Contribution limitations alone would not reduce the greater potential voice of affluent persons . . ., who would remain free to spend unlimited sums directly to promote candidates and policies they favor."\textsuperscript{115} Thus, contribution limits in a ballot measure campaign would not by themselves appear to serve any valid governmental interest.

measure, by an almost identical margin (54% to 46%), even though the funding gap had been greatly reduced. In 1978, the opponents of the initiative spent $6 million and outspent the proponents by almost ten to one. Forecast from Lowenstein: Campaign Finance Scandals Ahead, supra note 111, at 105. In 1980, the opponents spent only $2 million and outspent the proponents by a ratio of less than three to one. L.A. Times, Nov. 6, 1980, § 1, at 3, col. 1. See also First Nat'l Bank v. Bellotti, 435 U.S. at 789 n.28.

Even a pattern of victories for spenders in one election may be deceptive. For example, the best evidence to date of the power of money in an election is Shockley's study of the 1976 election in Colorado. There, a series of reform measures opposed by highly financed committees, usually funded by large industries, were defeated. Shockley, supra note 61, at 178-85. That those committees were responsible for the defeats is not so clear. The election also resulted in the Democratic party losing control of the Colorado House of Representatives. The reform measures had been associated with the Democratic Governor and House. The Republican electoral victory was thus consistent with defeat of the reforms. The large expenditures may have added only slightly to what was already a dissatisfaction with Democratic policy in the state.

There is evidence that suggests that a well-financed campaign may be able to persuade voters to reject an initiative where it would be unable to convince them to pass an initiative. Hearings, supra note 61, at 54-55 (testimony of Larry Berg, Professor of Political Science, University of Southern California); Shockley, supra note 61, at 187. While examples of big spenders failing to pass initiatives are plentiful, examples of a proposition passing in the face of a highly financed effort to stop it are harder to find.

\textsuperscript{113} 424 U.S. at 28, 46-47.
\textsuperscript{114} 27 Cal. 3d at 829, 614 P.2d at 748, 167 Cal. Rptr. at 90.
\textsuperscript{115} 424 U.S. at 26 n.26.
The CARC court did not adequately resolve this dilemma. It noted that unlimited expenditures might be as dangerous as unlimited contributions, but deferred to the legislative judgment to restrict only contributions.116 Such deference is unwarranted, since the court had ruled earlier that expenditure limits in initiative campaigns were unconstitutional.117 The legislative judgment here was merely to enact the only type of campaign spending law not clearly unconstitutional, rather than to choose between two available means.

The court offered one reason for applying only contribution limits. Wealthy contributors are able to hide behind committees “shrouded in anonymity” which adopt “seductive names promising to save taxes, preserve resources, or prevent crime.”118 Although disclosure laws are designed to eliminate this problem, disclosure of donors may not occur simultaneously with advertising.119 Thus, contribution limits could be seen as an attempt to perfect campaign disclosure laws.

Even assuming that perfecting disclosure laws might rise to the level of a compelling governmental interest for the same reason that the prevention of quid pro quo corruption does, the Berkeley law still would fail the least drastic means test.120 The Berkeley law is not the narrowest, most efficient way to achieve the state interest. If disclosure laws are inadequate, the narrower remedy is better disclosure laws, not laws that limit the amount of political speech and association. Furthermore, there was no evidence that the Berkeley disclosure laws were inadequate. The ordinance provided for very strict disclosure requirements.121 Thus, the disclosure rationale is not sufficient to uphold contribution limits.

Since other justifications fail, contribution limits can only be justified if it can be assumed that wealthy contributors would not respond to those limits by making large independent expenditures.122 Not only

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116. 27 Cal. 3d at 831, 614 P.2d at 749, 167 Cal. Rptr. at 91.
118. 27 Cal. 3d at 831, 614 P.2d at 749, 167 Cal. Rptr. at 91.
119. Id.
120. The Courts of Appeals for the Fifth and Ninth Circuits have held that an interest in perfecting disclosure laws does not justify limits on contributions in referendum elections. See Let's Help Florida v. McCrary, 621 F.2d at 200-01; C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir. 1978) (prohibitions rather than limits on corporations).
121. The Berkeley ordinance required the city to buy space in Berkeley newspapers and other newspapers to list all contributors of over $50. The publications had to appear at least twice in the last week of the election. 27 Cal. 3d at 838, 614 P.2d at 753, 167 Cal. Rptr. at 95.
122. The CARC court seems to have made two assumptions: (1) that contribution limits would force committees to solicit more small contributions, and (2) that wealthy individual contributors would not make large independent expenditures. If these assumptions were correct, the law would serve the asserted state interest. First, the committees, in soliciting more funds, would
would this assumption be speculative, it would be inconsistent with the Supreme Court's assumption that contribution limits do not overly restrict campaign activities because a contributor is still free to make independent expenditures.

**CONCLUSION**

The analysis illustrates how difficult it is for a government constitutionally to limit campaign spending in ballot measure campaigns. Unless a law limits only corporate contributions, it will face a variety of constitutional difficulties. Even if substantial evidence documents corruption of the electoral process, it is doubtful that the Supreme Court would accept such a state interest. Governments would also experience difficulty in demonstrating that contribution limits alone could be effective in reducing the influence of moneyed interests on campaigns. Although some states and municipalities may continue to pass such laws, it would be more advisable for them to seek alternative methods of reform.

One reform still open is public subsidy of campaign costs. State or local governments could provide grants to both sides of the most important or most controversial ballot questions. Political scientists have proposed this method of providing floors rather than ceilings for candidate elections; there is no reason why it would not work in ballot measure campaigns. Such a system would not completely equalize spending, but it would assure a minimal exposure for both sides. The system could be financed by a tax check-off system, such as that already used by the federal and some state governments for candidate elections. The main difficulty in proposing such a system is that it

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123. A floor system is used throughout Europe for candidate elections, but the problems posed by third parties have impeded its enactment in the United States. With a ballot measure, this problem is not present; both sides would be granted a base amount or a matching amount. Both proponents and opponents would be free to solicit unlimited contributions so that no constitutional questions could arise. See generally CAMPAIGN FINANCING, supra note 27, at 15-16; Agree, Public Financing after the Supreme Court Decision, 425 ANNALS 134, 136 (1976); Alexander, Rethinking Election Reform, 425 ANNALS 1, 13 (1976).

124. For example, if one side were being outspent $1,000,000 to $100,000, a grant to both sides of $200,000 would narrow the gap from 10:1 to 4:1. Furthermore, because private money tends to "dry up" as public money becomes available, see CAMPAIGN FINANCING, supra note 27, at 15-16, public funds could result in a significant narrowing of a spending gap.

125. See THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, CAMPAIGN FINANCE LAW: LEGISLATIVE APPROACHES AND CON-
would require expenditure of public funds at a time when competition for such funds is intense. However, the expense need not be exceedingly high if the grants were limited to the few propositions that exhibit great disparities in funding. In the end, the people would have to decide if they wish to make the financial sacrifice to regain control over the initiative process.

A second approach, which would probably require federal legislation, would confront the main source of the problem, the media. Television and radio stations could be required to provide free advertising to one or both sides of a ballot proposition. Although this reform might present some constitutional difficulties, it would conform to the fairness doctrine, which requires full coverage of both sides of controversial issues. This suggestion would attack directly the main source of the problem: the brief television commercial, which is the most effective, and most expensive, type of political advertising.

Although these reforms may encounter political difficulties, they do seek to increase the access of all to the political process rather than to reduce the participation of some. Thus, advocates of greater political participation might more seriously consider these reforms, since it seems clear after Buckley and Bellotti that governmental restriction of individual expression in ballot measure campaigns is impermissible.

STITUTIONAL LIMITATIONS 15-23 (1977). California does not have public funding, although it does allow a $100 deduction for campaign contributions. Id. at 19.

126. See Alexander, supra note 123, at 5-6.

127. The Political Reform Act not only limited total expenditures, but also precluded one side from outspending the other by more than $500,000. CAL. GOV'T CODE § 85303(b) (West 1975) (repealed 1977). A similar formula could be devised under which public funding would begin when, for example, one side has raised $1,000,000 or when one side has outspent its opposition by $500,000.

One problem with this scheme is that it would be directed at the state rather than the municipal level. Most local governments would have severe difficulties providing the necessary funds in the wake of Proposition 13.

128. The Supreme Court held in CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), that a television station, absent legislation, is not required to accept paid political advertising. The question of whether requiring free advertising would be unconstitutional has not been considered, although under the fairness doctrine a station's license can be revoked for not allowing fair reply time or not fully covering both sides of an issue. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 372-75 (1969).

129. See Council for Employment & Economic Energy Use v. FCC, 575 F.2d 311, 314-15 (1st Cir.) (radio station may provide free rebuttal time to a political organization on one side of a proposition even though subsequent events show that the organization could have paid for the time received), cert. denied, 439 U.S. 911 (1978); Public Media Center v. KATY, 59 F.C.C.2d 494, 496, 516, 518-23 (1976) (fairness doctrine requires a station to provide free advertising or programming when presentation of an issue is imbalanced), remanded on other grounds sub nom. Public Media Center v. FCC, 587 F.2d 1322, 1323-29 (D.C. Cir. 1978) (remanded for clarification of reasons for citing only eight of twelve stations); The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 32-33 (1974).
Further attempts to pass restrictive laws are unlikely to survive constitutional scrutiny.

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