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All the Free Speech That Money Can Buy: Monopolization of Issue Perception in Referendum Campaigns

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BRIEFLY NOTED

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Political "free speech" is a costly item, and waging a political campaign depends on the ability to obtain financial contributions. Let's Help Florida, a committee organized to urge the passage of a constitutional amendment to legalize casino gambling in southern Florida, encountered a statutory obstacle to its fund-raising efforts; the Florida campaign financing law set a $3,000 ceiling for contributions to a committee "in support of, or in opposition to, an issue to be voted on in a statewide election."[1] Dade Voters for a Free Choice, a committee organized to oppose the passage of a county ordinance that would prohibit smoking in public places, similarly wanted to receive larger contributions than the statutory $1,000 ceiling for countywide elections.[2] Each committee sought relief in federal district court,[3] challenging the provisions of the statute under the first and fourteenth amendments of the United States Constitution. The defendants, officials responsible for enforcement of the provisions of the campaign financing statute,[4] contended that the state's overriding interest in preserving the integrity of the election process justified the contribution ceiling.[5] The court rejected this argument and struck down the statute as unconstitutional. On appeal of these consolidated cases, the Fifth Circuit Court of Appeals *held*, affirmed: The Florida statute restricting the size of financial contributions in referendum elections abridges first amendment rights and cannot be justified by the state's inter-

1. FLA. STAT. § 106.08(1)(d) (1979).

2. *Id.* § 106.08(1)(e).

3. Let's Help Florida v. Smathers, 453 F. Supp. 1003 (N.D. Fla. 1978), *aff'd*, 621 F.2d 195 (5th Cir. 1980), *cert. denied*, ___ U.S. ___ (1981). In March, 1979, the district court relied upon its earlier decision in the *Let's Help Florida* case to strike down the statute challenged by Dade Voters for a Free Choice. Dade Voters for a Free Choice v. Firestone, No. 79-0770 (Mar. 13, 1979).

4. Defendants were the Secretary of State of Florida, the Director of the Division of Elections, the Attorney General, and the individual members of the Florida Elections Commission. *See* FLA. STAT. §§ 106.22-27 (1979).

5. 453 F. Supp. at 1012.

est in preventing corruption or promoting disclosure. *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980).[6]

In *Let's Help Florida*, the court faced issues presented by the impact of campaign funding and politics on the first amendment guarantees of freedom of speech and freedom of political association. The primary first amendment problem raised by Florida's limitations on campaign contributions was the restriction of the contributors' freedom of political association.[7] The Supreme Court of the United States set the parameters of permissible government interference with this protected right in *Buckley v. Valeo*.[8] A state may limit political contributions only if it "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[9] In *Let's Help Florida*, the Fifth Circuit's decision turned on the state's failure to show a sufficiently important or compelling interest to justify restricting campaign contributions in referendum elections.

This note will analyze how the rationale of the Supreme Court's decisions in *Buckley v. Valeo*, which upheld governmental restrictions on political contributions to candidates, and *First National Bank of Boston v. Bellotti*,[10] which invalidated state restrictions on corporate expenditures and contributions in referendum elections, inevitably led the Fifth Circuit to the result in *Let's Help Florida*. The author will also consider whether the rationale justifying the restriction on the rights of association and free speech that the Supreme Court found persuasive in *Buckley* should extend to the referendum context.

In *Buckley*, the Court held that the federal government's interest in minimizing "the actuality and appearance of corruption resulting from large individual financial contributions"[11] was a constitutionally sufficient justification for the limitations imposed

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6. The court rejected the contention that the district court lacked jurisdiction because no case or controversy existed between the parties. 621 F.2d at 198 (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979)). The court also found that the principles of Younger v. Harris, 401 U.S. 37 (1971), did not preclude jurisdiction when no state proceeding was pending at the time plaintiffs filed suit. Finally, the court rejected the state's claim that the injunctive relief granted was inappropriate, reasoning that no legal remedy could correct the irreparable injury to the plaintiff's first amendment rights when an election was so imminent. 621 F.2d at 199.

7. *See* Buckley v. Valeo, 424 U.S. 1, 15, 24-25 (1976).

8. *Id.*

9. *Id.* at 25.

10. 435 U.S. 765 (1978).

11. 424 U.S. at 26.

by the Federal Election Campaign Act[12] on individual and group campaign contributions to candidates or to campaign committees.[13] In *Bellotti,* the Court invalidated a Massachusetts statute[14] that absolutely prohibited corporate contributions or expenditures to support or oppose referendum questions not materially affecting the corporation's assets. Because the statute totally banned corporate political speech, the Court held that it was an unconstitutional restriction. Distinguishing between referendum and candidate elections, the *Bellotti* Court precluded the application of the *Buckley* rationale to referendum elections: "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."[15]

The coercive and corrupting influence of unrestricted contributions to a candidate's campaign arises from the probability that elected officials will give favored treatment to their large financial supporters. Courts view the potential for this kind of influence on an elected official's future decisions and actions as a threat to the integrity of our system of representative government.[16] Courts do not, however, equate the motivation of financial supporters of referendum committees with attempts to secure a political quid pro quo, because in the referendum context, the voters themselves directly and independently decide the particular political issue on one occasion.[17]

The court in *Let's Help Florida* relied on the distinction between candidate and referendum elections to reject the state's argument that the statutory restrictions on political contributions helped prevent corruption of the democratic process.[18] Other courts have stricken down state restrictions on contributions, presuming that corrupt motivation does not play a substantial role

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12. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1273 (codified in scattered sections of 2, 47 U.S.C. (1976)) (amended 1976 & 1980).

13. The Court also held, however, that this governmental interest did not justify the Act's limitations on the size of independent expenditures. 424 U.S. at 39-51. The Court noted that since persons make direct expenditures without prearrangement and coordination with the candidate or his agents, there is less risk that such an expenditure will be a quid pro quo for improper commitments from the candidates. *Id.* at 47.

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

15. 435 U.S. at 790.

16. 621 F.2d at 199-200.

17. *Id.* at 200.

18. The court also rejected the state's contention that the limitations were necessary to promote adequate disclosure of the identity of campaign financers, "because the statutes [were] not closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.*

in attempts to influence votes in a referendum.[19] In *Schwartz v. Romnes*,[20] for example, the Second Circuit Court of Appeals stated that "[b]y their very nature referenda . . . do not lend themselves to those corrupting influences."[21] This presumption about referendum elections combines the principles of *Buckley* and *Bellotti* and effectively closes off the inquiry into whether allowing unlimited financial contributions to referendum committees undermines the integrity of our system.[22]

A close reading of *Bellotti*, however, indicates that the Supreme Court may be willing to give further consideration to the potential ability of wealthy and powerful corporations to "drown out other points of view."[23] The Court noted that if the record or legislative findings supported the argument "that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests,"[24] then such an argument would merit consideration. Although this dictum does not invite courts to envision the consequences of allowing unlimited individual contributions to referendum committees, it does justify an inquiry in those in-

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19. 621 F.2d at 200 (citing C & C Plywood Corp. v. Hanson, 583 F.2d 421, 424-25 (9th Cir. 1978); Citizens Against Rent Control v. City of Berkeley, 99 Cal. App. 3d 736, 160 Cal. Rptr. 448, 451-55 (1979).

20. 495 F.2d 844 (2d Cir. 1974).

21. *Id.* at 851. The court noted:

> Although large private companies have undoubtedly been tempted to "buy" the election of political candidates in the expectation of receiving favors if their candidates should be elected, it is difficult to see how such motivation would play any substantial role in an attempt to influence votes for or against a referendum.

Id. Contra, Sutherland, O'Neal, Fish & Currier, *Argument Against the Initiative and Referendum*, in THE INITIATIVE AND REFERENDUM (1912):

> If . . . as alleged, corporate and corrupt influences are now able to determine the choice of representatives, who are elected by the direct vote of the people, is there any reason to suppose that these same influences will be any less able, or less likely, to determine the acceptance, or rejection, of legislative measures by that same direct vote through the referendum?

Id. at 36.

22. *See* 424 U.S. at 26-27.

23. 435 U.S. at 789.

24. *Id. See also* S. KELLEY, JR., POLITICAL CAMPAIGNING, PROBLEMS IN CREATING AN INFORMED ELECTORATE (1960). In a critique of campaign expenditure ceilings, the author noted:

> The danger—at least from the public's point of view—is not that some politicians will talk too much, but that others will be able to say too little . . . . Rather than adopting this view of campaign expenditures, legislators have been prone to consider large-scale spending as an evil in itself, and therefore as something to be kept in check.

Id. at 40.

stances in which real abuses have distorted the election process. Judicial willingness to consider whether unlimited corporate funding of political activities aimed at shaping public perception of issues destroys the public confidence in the democratic process and the integrity of government could well lead to a broader interpretation of the contribution process. Without the benefit of a presumption, this argument will demand a strong evidentiary showing.[25]

The state did not make such a showing in *Let's Help Florida*, and the court refused to acknowledge the potentially corrupting influence of large campaign contributions on the referendum process, noting that "when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves."[26] This interpretation of the nature of the referendum process is consistent with a first amendment theory that one who has the ability to marshal sufficient financial resources may wage an unrestricted campaign in the battle of ideas. Whether people can sift through the outpouring of information directed at them and, as political decisionmakers, make considered judgments based on that information, is not the concern of courts in upholding the first amendment. The Supreme Court recognizes the danger that people will not be able to evaluate the information, to the extent that the Court acknowledges that the framers of the first amendment contemplated this danger.[27] Accordingly, the potential to control issue perception does not as clearly threaten our democratic ideals as does corruption in office. In fact, the Supreme Court emphatically rejected as "wholly foreign to the First Amendment"[28] the notion that "government may restrict the speech of some elements of our

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25. In *Buckley*, evidence of specific abuses and "pernicious practices" supported judicial recognition of the corrupting influence of large campaign contributions to candidates and their campaign committees. 424 U.S. at 27 & n.28.

In Citizens Against Rent Control v. City of Berkeley, ___ Cal. 3d ___, 614 P.2d 742, 167 Cal. Rptr. 84 (1980), the dissent criticized the majority for inadequately supporting its conclusion that large financial contributions to referendum campaigns corrupt the electoral process.

> The study of a Colorado ballot measure, or a 16-year-old analysis which concludes that the California initiative and referendum process is "largely a tool of interest groups" . . . do [*sic*] not constitute the hard evidentiary support needed to demonstrate a state's present and *compelling interest* in the suppression of the multiple First Amendment rights of our California citizens.

Id. at ___, 614 P.2d at 752, 167 Cal. Rptr. at 94 (Richardson, J., dissenting) (emphasis in original); *see* note 30 *infra*.

26. 621 F.2d at 200.

27. 435 U.S. at 792.

28. 424 U.S. at 49.

society in order to enhance the relative voice of others."[29] A problem with this first amendment doctrine, in light of the impact of modern campaign financing, is that the policies implemented through the referendum process may represent only the best that money can buy.

The Fifth Circuit's narrow interpretation of the dynamics of the referendum process did not acknowledge the risks of unrestricted funding of campaigns.[30] Just as the political quid pro quo can threaten the independence of the elected decisionmaker, so can the control of issue perception through monopoly or saturation of the media potentially threaten the independence of the voter decisionmaker. Furthermore, the court's focus on the act of voting overlooked the role of wide public discussion of issues in the functioning of the democratic process. The significance of that role stems from the notion that "hearing what can be said about [a subject] by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind,"[31] will lead to rational choice. The referendum process is highly sensitive to and dependent on an informed citizenry,[32] and it is pre-

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29. *Id.* at 48-49.

30. In Citizens Against Rent Control v. City of Berkeley, ___ Cal. 3d ___, 614 P.2d 742, 167 Cal. Rptr. 84 (1980), the California Supreme Court upheld the validity of a municipal ordinance limiting the amount of contributions to committees formed to support or oppose initiative and referendum issues. The court found that the municipality had a compelling interest in seeking "to reverse the trend toward loss of confidence in our political system and apathy in elections by assuring the voters that their vote and their participation . . . are significant." *Id.* at ___, 614 P.2d at 747-48, 167 Cal. Rptr. at 89-90. More specifically, the court found corruption of the electoral process because "the domination of these processes [referenda and initiatives] by large contributors leaves other citizens with a stilled voice in the very domain of our electoral system set aside for accomplishing the popular will," *Id.* at ___, 614 P.2d at 746, 167 Cal. Rptr. at 88, and because "voters lose confidence in our governmental system if they come to believe that only the power of money makes a difference." *Id.* at ___, 614 P.2d at 747, 167 Cal. Rptr. at 89.

31. J. S. MILL, ON LIBERTY 19 (Rapaport ed. 1978). *See also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948): "Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good."

32. For a discussion of the idealized perception of the referendum process espoused by the Progressive movement in American politics, see D. BUTLER & A. RANNEY, REFERENDUMS, A COMPARATIVE STUDY OF PRACTICE AND THEORY 27-29 (1978) [hereinafter cited as REFERENDUMS]. The Man of Good Will, John Q. Public, would not be a member of a pressure group or organization to advance his own interests:

> [H]e would dissociate himself from such combinations and address himself directly and high-mindedly to the problems of government . . . . [H]e would study the issues . . . [and] it was assumed that somehow he would really be capable of informing himself in ample detail about the many issues that he

election activities that provide the information upon which the voters will make their choice. Discussing freedom of political thought and communication, Professor Meiklejohn stated:

> In the specific language of the Constitution, the governing activities of the people appear only in terms of casting a ballot. But in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. That freedom implies and requires what we call "dignity of the individual." Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express. The citizens' understanding, evaluating, and deciding of political issues are the activities to whose freedom the first amendment gives unqualified protection.[33]

The proliferation of information favoring one side of an issue, which results not from the expression of many views in the community but from the one view supported by an interested and wealthy portion of the community, distorts the classical free speech model of the "marketplace of ideas."[34] Since messages packaged and presented in the media generate most of the political discussion, "what the media choose to print or televise has a very great, perhaps too great, influence on how the choice is perceived"[35] by the voters. And access to the media is readily reducible to money terms, when dollars contributed are the essence of

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> would have to pass on . . . . Without such assumptions the entire movement for such reforms as the initiative, the referendum, and the recall is unintelligible.

Id. at 29 (quoting R. HOFSTADTER, AGE OF REFORM 261 (1955)). *But see id.* at 226 (noting as a deficiency of referendums their tendency to force decisions by the electorate before the decision process has fully worked itself out).

33. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255. *See also* BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 308 (1978) (noting the importance of Meiklejohn's work "in establishing that the integral relationship between freedom to engage in discussion about government and freedom to participate as citizens in the process of representative government is a legitimate initial premise of first amendment reasoning").

34. *See* Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 981-90 (1978), for a critique of the "market-failure model" of the scope of speech protected by the first amendment. The market-failure model asserts that factors such as monopoly control of the media and unequal access to the media prevent the "marketplace of ideas" from operating successfully. *Id.* at 965-66.

35. REFERENDUMS, *supra* note 32, at 36.

the speech activity.[36] If courts would recognize that the monopolization of public discussion through saturation of the "marketplace" can predetermine how the voter will cast his ballot, they might acknowledge that such monopolization can jeopardize the political process just as surely as does an elected official's "debt" to his financial supporters that predetermines the outcome of the official acts and decisions.[37]

In the progression of first amendment decisions, *Let's Help Florida* rests solidly on the precedent of *Buckley* and *Bellotti.* Without a showing that the voice of large moneyed interests has "drown[ed] out other points of view,"[38] the first amendment will continue to protect the indirect influence of large campaign contributions on voter decisionmakers. The fear that a political committee with a large amount of contributed funds will "buy up" the mass market of ideas, and thus buy the vote on a mass level through issue saturation, still seems too attenuated, and the value of first amendment freedom is too precious, for one to expect the court to validate state-imposed restrictions on contributions in the referendum context.

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Clash Between Due Process and the Right to Trial by Jury in Complex Litigation

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[1]

36. The Supreme Court decision in Consolidated Edison Co. v. Public Serv. Comm'n, 100 S. Ct. 2326 (1980), adds a new dimension to the threat posed by corporate expenditures in furtherance of political causes to the ideal conception of a free marketplace of ideas. *See* note 24 *supra.* Although the decision did not involve the electoral process, it demonstrates that the Court apparently extends first amendment protection for the political messages of monopolies as far as it does for the speech of any individual wishing to express political views to an audience.

37. *See generally* Lee, *California,* in REFERENDUMS, *supra* note 32. In discussing referendum campaigns and campaign expenditures, the author conceded that the success or failure of an initiative does not necessarily correspond to the amount of money expended, but noted that disparities in funds can be decisive in a closely contested campaign. In particular, a lengthy and complicated issue on which technical experts disagree, such as the safety of nuclear power, puts a heavy burden on campaign publicity to educate the voter. *Id.* at 101-07.

38. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1980).

1. 631 F.2d 1069 (3d Cir. 1980) (*In re* Japanese Elec. Prods. Antitrust Litigation).