Legislative Regulation of Campaign Financing After Citizens Against Rent Control v. City of Berkeley: A Requiem

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CASE COMMENT

Legislative Regulation of Campaign Financing After Citizens Against Rent Control v. City of Berkeley: A Requiem

Federal, state, and local governments have attempted to prevent abuses that often accompany lavishly financed political campaigns by restricting campaign contributions and expenditures. In a series of decisions, the Supreme Court of the United States has become increasingly willing to invalidate these regulations on first amendment grounds. The author critically analyzes these decisions and their deleterious effect on equal access to the media in political campaigns, concluding that the Buckley v. Valeo approval of contribution limitations has been essentially overruled.

I. INTRODUCTION

During the 1952 presidential election campaign, newspapers around the country published a now-famous photograph of Adlai Stevenson sitting patiently with one leg crossed over the other. The photograph attained notoriety because it depicted a noticeable hole in the sole of a shoe worn by a candidate for the Presidency of the United States. Of the many messages that emanated from that picture, Stevenson’s frugality is one that stands out. An equally significant message conveyed by that picture to today’s viewers is the change from the modesty of campaigning in Stevenson’s time to the extravagance of campaigning in today’s political arena. Between 1952 and 1972, presidential campaign spending expanded

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In the aftermath of Watergate,\(^2\) public concern erupted over the abuses that often accompanied such lavishly financed campaigns. Consequently, legislators at all levels of government hastened to curb such election-related abuses by regulating financing.

Citizens Against Rent Control v. City of Berkeley ("CARC")\(^3\) arose after the voters of Berkeley, California, acted to mitigate the potentially corrupting influence of excessive campaign financing by adopting the Election Reform Act of 1974 ("Reform Act").\(^4\) Section 602 of the Reform Act prohibited any person from making, and any campaign treasurer from soliciting or accepting, from any one source, contributions in excess of $250 to promote or oppose a ballot measure.\(^5\) After city officials included an initiative proposing

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2. "Watergate" is the term commonly used to refer to the political events and judicial proceedings that began with the break-in at the Democratic National Committee headquarters in the Watergate complex in Washington, D.C., on June 17, 1972, and continued through the resignation of Richard Nixon as President of the United States on August 8, 1974. The published works on various aspects of Watergate are legion. See generally Presidential Campaign Activities of 1972, Senate Resolution 60: Hearings Before the Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. (1973) (the widely publicized, nationally televised hearings before the panel chaired by Sen. Ervin); L. Jaworski, The Right and the Power: The Prosecution of Watergate (1976) (the second Watergate Special Prosecutor's version); R. Nixon, RN: The Memoirs of Richard Nixon 625 passim (1978) (former President Nixon's account); J. Sirica, To Set the Record Straight: The Break-in, the Tapes, the Conspirators, the Pardon (1979) (memoirs of the federal district judge who presided at the break-in and Nixon subpoena trials).


5. Section 602 of the Berkeley Election Reform Act of 1974 provided: "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)." Id. \(^6\) 602, quoted in Citizens Against Rent Control v. City of Berkeley ("CARC"), 454 U.S. 290, 292 (1981).

"Person" was broadly defined to include all forms of business organizations and unincorporated associations, as well as individuals. Berkeley, Cal., Ordinance 4700-N.S., \(^7\) 219 (1974), cited in CARC, 27 Cal. 3d 819, 821-22 n.1, 614 P.2d 742, 743 n.1, 167 Cal. Rptr. 84, 85 n.1 (1980), rev'd, 454 U.S. 290 (1981).

"Contribution" was broadly defined to include all types of donations or loans made to support or oppose a ballot measure. Berkeley, Cal., Ordinance 4700-N.S., \(^8\) 206 (1974), cited in CARC, 27 Cal. 3d at 821-22 n.1, 614 P.2d at 743 n.1, 167 Cal. Rptr. at 85 n.1.

In section 217 of the ordinance, "measure" was defined as "any City Charter amendment, ordinance or other propositions submitted to a popular vote at an election, whether
to create a city rent control board on the April 1977 municipal election ballot, Citizens Against Rent Control ("CARC"), an unincorporated association, accepted several contributions that exceeded the $250 limit.6

Twenty days before the election, the Berkeley Fair Campaign Practices Commission, pursuant to the Reform Act,7 ordered CARC to pay the excess fund of $18,600 into the city's treasury.8 CARC, together with others,9 responded by filing a complaint for injunctive and declaratory relief, alleging that the Reform Act violated their constitutional rights to freedom of speech and association.10 The trial court granted the plaintiffs' motion for summary judgment and declared section 602 unconstitutional on its face.11 The First District Court of Appeal affirmed the trial court result,12 but the California Supreme Court reversed in a 4-3 decision. The state supreme court held that section 602's limitations were constitutionally permissible, despite the infringement upon first amendment rights, because the ceilings served a compelling state interest—prevention of the appearance or reality of political corruption—by the least restrictive means.13 On appeal, the Supreme Court of the United States reversed, holding that the Berkeley ordinance unduly constrained the fundamental rights of association and expression.14 Finding that the record failed to

by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot." Berkeley, Cal., Ordinance 4700-N.S., § 217 (1974), quoted in CARC, 454 U.S. at 292 n.1.

6. 454 U.S. at 293.

7. Section 604 of the Reform Act provided:

If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General fund of the City.

Berkeley, Cal., Ordinance 4700-N.S., § 604 (1974), quoted in CARC, 454 U.S. at 293 n.3.

8. 454 U.S. at 293.

9. The other plaintiffs were three individual contributors, the Berkeley Board of Realtors, and a real estate broker. 27 Cal. 3d at 822 n.3, 614 P.2d at 743 n.3, 167 Cal. Rptr. at 85 n.3.

10. U.S. Const. amend. 1 provides in part: "Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

11. 454 U.S. at 293. For the text of § 602, see supra note 5.


demonstrate that section 602 actually maintained voter confidence in our democratic system, the Court held that the ordinance did not serve a governmental interest significant enough to justify abridgement of first amendment guarantees.\textsuperscript{15}

\textit{CARC}, \textit{Buckley v. Valeo},\textsuperscript{16} and \textit{First National Bank v. Bellotti}\textsuperscript{17} comprise a line of cases focusing on legislative regulation of political campaign financing. The thesis of this Comment is that the modicum of deference that the Burger Court exhibited toward the legislature in \textit{Buckley} has since been progressively withdrawn in \textit{Bellotti} and \textit{CARC}. Although the post-Watergate political climate might have induced the Court to sustain legislative limitations of contributions, this inducement has waned in the interim. By giving carte blanche to those who contribute or directly spend vast sums of money to influence elections, the Supreme Court effectively has decided that uninhibited spending, characterized as political speech, is a more important value than fair elections, in which neither side gains a decided advantage because of vastly greater paid-for access to the media.

Because “societies have always been shaped more by the nature of the media by which men communicate than by the content of the communication,”\textsuperscript{18} access to the media in political campaigns is critical. This is particularly relevant today, in light of formidable evidence that the mass media are exceedingly persuasive.\textsuperscript{19} Unfortunately, politics in America in recent times too often has verified the accuracy of the maxim, “the medium is the message.”\textsuperscript{20}

\textsuperscript{15} Id. at 439.
\textsuperscript{16} 424 U.S. 1 (1976) (per curiam).
\textsuperscript{17} 435 U.S. 765 (1978).
\textsuperscript{18} M. McLuhan & Q. Fiore, \textit{The Medium is the Massage} 8 (1967).
\textsuperscript{20} M. McLuhan, \textit{Understanding Media} 7 (1964). According to McLuhan, the expression, “the medium is the message,” is intended to mean that the electronic age has created a
Notwithstanding the Court's assertion to the contrary in *Bellotti*, the Founding Fathers could not have foreseen the extraordinary impact of television and other mass media. It is difficult to believe anyone in 1789 intended that fair elections would not be as worthy of first amendment protection as is political expression in the form of direct expenditures. The danger that the electorate might be influenced unduly by a deluge of one-sided political advertising is certainly not a danger that could have been contemplated in the late eighteenth century.

This Comment will trace developments in legislative regulation of campaign financing by examining each of the three cases in turn. It will then analyze the present state of the law pertaining to legislative regulation of campaign financing. The author concludes that although the first amendment problems related to contribution and expenditure limits are complex and give rise to serious dilemmas, the Burger Court has done a disservice to our political system by using the Constitution as a shield behind which wealthy political interests are given free rein.

II. *Buckley*: CANDIDATES AND CORRUPTION

In *Buckley v. Valeo*, the United States Supreme Court reviewed the constitutionality of the Federal Election Campaign Act ("FECA") Amendments of 1974. The 1974 amendments were described as "the most comprehensive legislative reform of campaign financing in this country's history." The Supreme Court divided its discussion of the amendments into four parts: (1) ceilings on

"totally new environment." *Id.* at vii.

The medium, or process, of our time—electric technology—is reshaping and restructuring patterns of social interdependence and every aspect of our personal life. It is forcing us to reconsider and reevaluate practically every thought, every action, and every institution formerly taken for granted. Everything is changing—you, your family, . . . your government . . . . And they're changing dramatically.

M. McLuhan & Q. Fiore, *supra* note 18, at 8.


campaign contributions and expenditures;\textsuperscript{25} (2) requirements for public disclosure of contributions and expenditures above specified thresholds;\textsuperscript{26} (3) provisions for public funding of presidential campaigns;\textsuperscript{27} and (4) the establishment of the Federal Election Commission to administer and enforce the amendments.\textsuperscript{28} In responding to the challenge mounted by a highly diverse group of plaintiffs,\textsuperscript{29} the Supreme Court devoted the largest single portion of its opinion to a discussion of the contribution and expenditure limitations.

At the outset, the \textit{Buckley} Court summarized the 1974 FECA amendments' contribution and expenditure limitations.\textsuperscript{30} As the Court viewed it, the "critical" constitutional questions raised were whether the amendments impermissibly interfered with first amendment freedoms or unfairly discriminated against nonincumbent candidates and minor parties in violation of the fifth amendment.\textsuperscript{31} After a lengthy discussion, the Court reached a bifurcated holding: contribution limitations are constitutional, expenditure ceilings are not.\textsuperscript{32} Labeling the contribution restrictions and the disclosure requirements as the 1974 FECA amendments' "primary weapons" against the appearance or reality of corruption associated with large-scale campaign donations, the Court concluded,

\begin{itemize}
  \item \textsuperscript{25} 424 U.S. at 12-59.
  \item \textsuperscript{26} Id. at 60-84.
  \item \textsuperscript{27} Id. at 85-109.
  \item \textsuperscript{28} Id. at 109-43.
  \item \textsuperscript{29} The list of plaintiffs in \textit{Buckley} gives credence to the famous aphorism, "Politics makes strange bedfellows." Among the plaintiffs were politicians and groups with widely divergent political views: Senator James L. Buckley, who was a candidate for reelection; Eugene McCarthy, who was a candidate for President; the American Conservative Union; the Conservative Party of the State of New York; the Conservative Victory Fund; Human Events, Inc.; the Libertarian Party; the Mississippi Republican Party; and the New York Civil Liberties Union. 424 U.S. at 7-8.
  \item \textsuperscript{30} In their complaint the plaintiffs sought a declaratory judgment and injunctive relief against certain provisions of the 1971 Federal Election Campaign Act ("FECA") and the 1974 FECA amendments. Plaintiffs alleged, inter alia, that the challenged provisions deprived them of the right to petition the government for redress of grievances, the right to privacy, and the right to due process of law. 424 U.S. at 7-11.
  \item \textsuperscript{31} The 1974 FECA amendments restricted both contributions to any one candidate per election and "independent" expenditures by individuals and groups "relative to a clearly identified candidate" to \$1,000, and limited total annual contributions by any individual to \$25,000. Pub. L. No. 93-443, \S 101(a), 88 Stat. 1263, 1263-66 (amending 18 U.S.C. \S 608(b), (c) (Supp. IV 1974)) (repealed 1976).
  \item \textsuperscript{32} For the text of the first amendment, see \textit{supra} note 10. The relevant portion of U.S. Consr. amend. V reads: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Although the Court dealt at length with the first amendment issues, it virtually ignored the fifth amendment challenge.
  \item \textsuperscript{33} 424 U.S. at 58-59.
\end{itemize}
"The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion." On the other hand, legislative constraints on campaign expenditures "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate."

Before arriving at this two-pronged holding, however, the Court began its analysis with a presentation of "general principles," in which it observed that contribution and expenditure restraints affect some of the "most fundamental" first amendment activities. Accordingly, the Constitution affords the "broadest protection" to debates concerning public issues, including the relative qualifications of candidates for political office. This protection, the Court maintained, merely reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." In concluding its introductory paragraph on these general principles, the Court added that the first amendment freedom of speech guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for political office." Moreover, because the first amendment also protects political association, the constitutional protection extends to the individual's right to associate with the political party of his choice.

With those general principles in mind, the Buckley Court then proceeded to address the most troublesome issue of the case: whether money used for election campaigns is tantamount to political speech. The United States Court of Appeals for the District of Columbia Circuit, quoting United States v. O'Brien, had sustained the FECA amendments' contribution and expenditure limitations, concluding that although the use of money contains elements of both, it is more akin to "nonspeech" than to "speech,"

33. Id. at 58.
34. Id. at 58-59.
35. Id. at 14.
36. Id.
37. Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
38. Id. at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).
40. Id. at 15-23.
and therefore subject to regulation:

"[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."42

Accordingly, the District of Columbia Circuit held that "safeguarding the integrity of elections and avoiding the undue influence of wealth"43 were "compelling governmental interests" sufficient to justify any incidental impact on first amendment guarantees resulting from the FECA amendments.44

On appeal, the Supreme Court disagreed with the District of Columbia Circuit and distinguished O'Brien at length.45 The majority in Buckley recalled that the Warren Court had sustained O'Brien's conviction for burning his draft card despite his claim that the act was "symbolic speech" and entitled to first amendment protection.46 The O'Brien Court had refused to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."47 But spending money, the Buckley Court declared, "simply cannot be equated with such conduct as destruction of a draft card."48 Elaborating on this distinction, the Court added,

Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a

43. Id. at 841.
44. Id. at 832.
46. Id.
47. 391 U.S. at 376.
48. 424 U.S. at 16.
nonspeech element or to reduce the exacting scrutiny required by the First Amendment.\textsuperscript{49}

The illogic of the latter sentence becomes evident when one dissect it. The Court did not explain why the act of paying for a political advertisement does not introduce a nonspeech element. Instead, the Court in effect said that the reason spending money is the equivalent of speech,\textsuperscript{50} and not of conduct, is "because we say so." Indeed, the Court might have reconsidered had it recalled Justice Jackson's well-stated warning: "We are not final because we are infallible, but we are infallible only because we are final."\textsuperscript{51}

Not only was the Buckley Court's argument circular, it also raised the wrong issue. As one commentator phrased it, the issue was not "whether pure speech can be regulated where there is some incidental effect on money"; instead, the real question was "[c]an the use of money be regulated, by analogy to conduct such as draft-card burning, where there is an undoubted incidental effect on speech?"\textsuperscript{52} Indeed, the FECA limitations were neutral as to

\textsuperscript{49} Id. The Buckley Court cited Cox v. Louisiana, 379 U.S. 559 (1965), in an unconvincing effort to give more substance to its attempt to distinguish O'Brien. Cox had been convicted for picketing near a courthouse in violation of a Louisiana statute. The Supreme Court of the United States reversed the conviction, reasoning that because Cox had been given permission to picket across the street from the courthouse, his arrest was effectively entrapment in violation of due process. \textit{Id.} at 569-71. The Cox Court sustained the statute, however, concluding that the state had a legitimate interest in protecting its judicial system from the "pressures" that demonstrations close to a courthouse might engender. \textit{Id.} at 562.

The Buckley Court sought to distinguish Cox by stating that "direct quantity restrictions" were at issue in Buckley, while Cox involved merely "time, place and manner" constraints. \textit{424 U.S.} at 18. The Cox Court had held, however, that "this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." \textit{379 U.S.} at 564. Indeed, one easily could argue that the holding in Cox actually supports the FECA amendments.

\textsuperscript{50} The majority has given credence to the maxim, "Money talks." \textit{424 U.S.} at 262 (White, J., concurring in part and dissenting in part).


\textsuperscript{52} Wright, \textit{Politics and the Constitution: Is Money Speech?}, 85 \textit{Yale L.J.} 1001, 1007 (1976) (emphasis in original). Judge Wright suggested that the Court had "turned the Congressional telescope around and looked through the wrong end." \textit{Id.} at 1008. The FECA amendments, he argued, targeted the money itself, utterly divorced from the kind of communication—or other campaign services—the money would buy. Congress was not trying to justify suppression of pure speech by seizing on money as a nonspeech element. It was trying to justify a straightforward regulation of the excessive use of money as a blight on the political process. Like draft-card burning, however speech-related, this was a vice Congress had authority to control. \textit{Id.} at 1008 (footnote omitted). Judge Wright was a member of the panel of the United States Court of Appeals for the District of Columbia Circuit that decided \textit{Buckley}. 
the content of campaign speech. Moreover, Congress enacted them for reasons unrelated to “fear of the consequences of the political speech of particular candidates or of political speech in general.”

Justice White thus was correct when, in a separate opinion, he suggested that the pivotal issue related to campaign financing was “whether the nonspeech interests of the Federal Government in regulating the use of money in political campaigns are sufficiently urgent to justify the incidental effects that the limitations visit upon the First Amendment interests of candidates and their supporters.”

In other words, the Buckley Court failed to recognize that if Congress may constitutionally limit first amendment protection when a symbolic act is categorized as nonspeech conduct (as in the case of draft card burning), then it also has the power to impose restrictions on campaign financing. The act of draft card burning conveys no less eloquent a symbol to a disinterested bystander than does the act of contributing or spending money for political campaign purposes. Indeed, the protester who burns his draft card in public is communicating his message more comprehensibly than the individual who independently sends a check to his local television station to pay for a repeat broadcast of a political commercial. The protester is making an articulate point; he is conveying a message. The campaign contributor or person making an independent expenditure, however, is merely communicating the fact that he wants a political commercial replayed. The real message is contained in the commercial; spending money is merely a means to that end. Nonetheless, the Buckley Court accorded full first amendment protection to the act of making a campaign contribution or expenditure by equating it with the content of the commercial. Since then, the Burger Court has steadfastly maintained that money is speech.

Although the Buckley Court refused to find a constitutional difference between money and speech in the campaign financing context, it did make what it considered a principled distinction between campaign contributions and expenditures. But here, too,

53. 424 U.S. at 259-60 (White, J., concurring in part and dissenting in part).
54. Id. at 260.
55. See infra note 80 and accompanying text. Besides Wright, supra note 52, other commentators have criticized the Buckley Court’s discussion of O’Brien. See L. Tribe, AMERICAN CONSTITUTIONAL LAW 801-02 (1978); The Supreme Court, 1975 Term, 90 HARV. L. REV. 56, 174-75 (1976); Comment, Buckley v. Valeo: The Supreme Court and Federal Campaign Reform, 76 COLUM. L. REV. 852, 856-58 (1976).
56. The “contribution” provisions of the 1974 FECA amendments limited (1) the
instinct rather than logic dictated the majority's determination that limits on independently made expenditures are necessarily unconstitutional, while closely drawn restraints on contributions are permissible.

The Buckley Court described the primary purpose of the FECA amendments as limiting the appearance and reality of political corruption arising from substantial campaign contributions. Having thus framed the legislative purpose, the Court then found it "unnecessary" to look beyond this purpose when locating a "constitutionally sufficient justification" for the $1,000 individual contribution ceiling. 67 Recognizing that political campaigns were becoming exorbitantly expensive, the Court declared that the potential for corruption deriving from candidates' expanding needs for ever-greater sums of money constituted a danger to society: "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." 68 This practical assessment leaves little room for argument. Similarly, one cannot seriously disagree with the Court's later statement that "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." 69

The appearance-of-impropriety justification for congressionally imposed limits on political contributions should also apply to campaign expenditures. The milk-fund scandal of the early 1970's 60 illustrates the flaw in the Court's analysis. Assuming arguendo that the dairy industry made a $2,000,000 direct expenditure instead of pledging the money to the 1972 Nixon reelection campaign, the public's perception undoubtedly would have remained

amount of money that individuals, groups, and political action committees could give directly to a candidate or candidate committee, and (2) purchases made directly by the individual, group, or political action committee in cooperation with the candidate or candidate committee. The limitations on "expenditures" applied to (1) independent expenditures—purchases made directly by an individual, group, or political action committee without collaborating with a candidate or candidate committees could give directly to a candidate or candidate committee, (2) the use of a candidate's personal funds, and (3) an overall ceiling on money spent. FECA Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263, 1263-66.

57. 424 U.S. at 26.
58. Id. at 26-27.
59. Id. at 30 (emphasis added).
60. For a concise account of the milk-fund scandal, see Buckley v. Valeo, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975), aff'd in part, 424 U.S. 1 (1976).
unchanged. Regardless of whether the money was spent directly (expenditure) or indirectly (contribution), the appearance of impropriety would have arisen once it became known that the President contemporaneously decided to increase milk price supports. The Buckley Court logically could not have expected anyone to believe that the specter of corruption appears when there is an extravagant contribution but vanishes when the largesse takes the form of an expenditure.61

If, as the Court observed, the “major evil” accompanying the rapid growth of campaign spending is “the danger of candidate dependence on large contributions,”63 then surely the evil does not dissipate merely because the money allocated takes the form of a direct, independent expenditure as opposed to a contribution. The Buckley Court held that contribution ceilings “safeguard” the “integrity of the electoral process” without directly constraining the rights of voters and office seekers to engage in political discussion,63 while expenditure limits “place substantial and direct restrictions” on the political expression of individuals, candidates, and associations that the first amendment “cannot tolerate.”64 This holding is, in short, untenable. Chief Justice Burger, in his separate opinion in Buckley, succinctly proffered his displeasure with the contribution-expenditure dichotomy: “For me contributions and expenditures are two sides of the same First Amendment coin. ... The Court’s attempt to distinguish the communication inherent in political contributions from the speech aspects of political expenditures simply ‘will not wash.’”68

III. Bellotti AND BALLOT MEASURE CAMPAIGNS

In First National Bank v. Bellotti,69 the United States Su-
preme Court faced a challenge to a state criminal law that limited contributions during certain elections. The statute at issue in *Bellotti* pertained to ballot measure campaigns, and thus differed significantly from the candidate-related legislation reviewed in *Buckley*. This difference enabled the *Bellotti* Court to distinguish the *Buckley* decision, which had allowed restrictions on campaign contributions.

*Bellotti* arose from an act passed by the Massachusetts Legislature that prohibited banks and business corporations from making contributions or expenditures for the purpose of "influencing or affecting" the election outcome for any ballot measure "other than one materially affecting any of the property, business or assets of the corporation." The statute further provided that no ballot measure solely concerned with individual property or income taxes "shall be deemed materially to affect the property, business or assets of the corporation." Any corporate official convicted of violating the act faced a fine, imprisonment, or both; any corporation violating the statute was subject to a fine.

When a state constitutional amendment permitting legislative establishment of a graduated personal income tax was slated for the November 1976 ballot, the First National Bank of Boston and others opposed the proposed measure. The Massachusetts Attorney General informed the banks and business corporations that he intended to enforce section 8 against them should they choose to "spend" money to publicize their views. These companies then brought suit, alleging that the statute was unconstitutional.

The Massachusetts Supreme Court viewed the principal issue in simplistic terms: "[w]ether business corporations . . . have First Amendment rights coextensive with those of natural persons.

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70. Id.
71. Id.
72. The others were the New England Merchants National Bank, Gillette Company, Digital Equipment Corporation, and Wyman-Gordon Company. 435 U.S. at 768 n.1.
73. Id. at 769. Justice Powell, writing for the *Bellotti* Court, did not clarify whether "spend" meant contributions, expenditures, or both. The distinction was unnecessary, however, because § 8 applied to both.
74. 435 U.S. at 769-70. The plaintiffs argued that § 8 deprived them of property without due process of law in violation of their rights as "persons" under the fourteenth amendment. This Comment is more concerned, however, with the alleged denial of their first amendment rights of free speech.
or associations of natural persons." The court recognized that corporations possess constitutional rights, although these rights are less extensive than the rights of natural persons. Nevertheless, the court let section 8 stand, holding that corporations may claim first amendment protection to promote or oppose a ballot measure "only when a general political issue materially affects [their] business, property or assets."

On appeal, the United States Supreme Court began its opinion by brusquely remarking that the Massachusetts court had "posed the wrong question." The "proper question," according to Justice Powell, "must be whether § 8 abridges expression that the First Amendment was meant to protect." In other words, the Court viewed the overriding issue of Bellotti as analogous to that of Buckley: To what extent can the legislature regulate political campaign funding?

As in Buckley, the Court in Bellotti viewed the constitutionality of the challenged statute as turning on whether it could "survive the exacting scrutiny necessitated by a state-imposed" abridgement of first amendment rights. Quickly attempting to dismiss any lingering doubts about whether the statute regulated conduct or speech, the Court flatly declared that section 8 was "directed at speech itself." Accordingly, the state shouldered the burden of demonstrating a compelling interest. Even then, the Court added, the statute must be "closely drawn" to avoid unnecessary infringement of first amendment rights.

Having set the standard for review, the Court found no showing "by record or legislative findings" that the relative voice of corporations had been "overwhelming or even significant in influencing referenda . . . or that there ha[d] been any threat to the

76. Id. at 785, 359 N.E.2d at 1270.
77. 435 U.S. at 776.
78. Id.
79. Id. at 786.
80. In a footnote, the Court stated, "It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.'" 435 U.S. at 786 n.23 (quoting Buckley v. Valeo, 424 U.S. 1, 16 (1976)). The Court then added that "§ 8 is an attempt directly to control speech." 435 U.S. at 786 n.23 (quoting Speiser v. Randall, 357 U.S. 513, 527 (1958)).
81. 435 U.S. at 786.
82. Id.
83. Id. (quoting Buckley, 424 U.S. at 25).
confidence of the citizenry in government." \(^{84}\) Noting that ballot measures are held on issues, not individuals seeking public office, the Court reasoned that the "risk of corruption perceived in . . . candidate elections, simply is not present in a popular vote on a public issue." \(^{85}\)

Corporate advertising might affect the results of a ballot measure campaign, the *Bellotti* Court acknowledged, "[b]ut the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" \(^{86}\) Moreover, the first amendment rejects the "highly paternalistic" approach of statutes similar to section 8. \(^{87}\) The Court refused to accept the proposition that the electorate was incapable of judging the relative merits of the banks' and corporations' arguments. "[I]f there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment." \(^{88}\) Without proof of a more imminent danger to state interests, the statute was unconstitutional because section 8's constraints on first amendment freedoms were too great.

IV. *Citizens Against Rent Control v. City of Berkeley*

In December 1981, the United States Supreme Court decided another case arising from legislative regulation of campaign financing: *Citizens Against Rent Control v. City of Berkeley*. \(^{89}\) According to Chief Justice Burger, the issue in CARC was "whether a limitation of $250 on contributions to committees formed to support or oppose ballot measures violates the First Amendment." \(^{90}\) The Court held that the Berkeley ordinance was unconstitutional because it failed to serve a state interest significant enough to "justify" infringement of the fundamental first amendment freedoms of both association and expression. \(^{91}\)

Having framed the issue narrowly, Chief Justice Burger devel-

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84. *Id.* at 789-90 (footnote omitted).
85. *Id.* at 790 (citation and footnote omitted).
86. *Id.* (quoting Kingsley Int'l Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684, 689 (1959)).
87. *Id.* at 791 n.31.
88. *Id.* at 792; see *supra* text accompanying notes 18-21.
90. *Id.* at 298 (emphasis added). See *supra* text accompanying notes 3-14 for a review of the facts and procedural history of CARC.
91. *Id.* at 299.
oped his theme that ceilings on ballot measure campaign contributions unconstitutionally constrain the right of association. As a backdrop, the Chief Justice concisely reviewed the facts and procedural history of CARC. Noting that the City of Berkeley had conceded that the challenged ordinance inhibited first amendment rights, Burger quickly presented authority92 for the proposition that regulations infringing protected freedoms are "always subject to exacting judicial review."93 The Chief Justice then embarked on a recapitulation of the traditional role of group association in the American political process. From that context, the Court turned to its review of the Berkeley ordinance.94

The CARC Court began its analysis of the challenged ordinance by positing three premises: (1) effective political advocacy is enhanced by collective action;95 (2) there is a "close nexus" between the freedoms of association and speech;96 and (3) "[t]he First Amendment protects political association as well as political expression."97 Having thus supplied precedential support for the general proposition that associational rights are as fundamental as those of speech, the CARC Court addressed the specifics of the case. Chief Justice Burger observed that although section 602 of the Berkeley ordinance allowed an affluent person acting alone to spend without inhibition, its restrictions on the rights of contributors to act in concert violated the first amendment: "To place a spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."98 Reiterating the interrelatedness of the freedoms of speech and association, the Court bluntly declared that it would not permit Berkeley "to hobble the collective expressions of a group."99

Citing Buckley, the CARC Court noted that there is a "single narrow exception" to the rule that restraints on political participa-

93. 454 U.S. at 294.
94. See supra notes 4-7 and accompanying text.
95. 454 U.S. at 295 (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958)).
96. Id. (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. at 460).
97. Id. (quoting Buckley, 424 U.S. 1, 15 (1976)).
98. Id. Section 602's expenditure limitations applied to campaign treasurers. The Court apparently inferred that a treasurer is the officer of an organization, and therefore interpreted § 602 as applying solely to organizations. See 454 U.S. at 292 n.2. For the text of § 602, see supra note 5.
99. 454 U.S. at 296.
tion violate the first amendment. That exception relates to the "perception" of improper influence that often accompanies large contributions to candidates.\textsuperscript{100} Buckley sustained ceilings on contributions to candidates and their campaign committees, the CARC Court explained, precisely because the "appearance" of corruption undermines our system of representative government. But, as two United States courts of appeals\textsuperscript{101} and the Bellotti court\textsuperscript{102} had recognized, the Buckley rule allowing limits on contributions to candidates did not extend to ballot measure elections.\textsuperscript{103} Quoting from Bellotti, the Court in CARC reiterated its view that whatever risk of corruption may be perceived in candidate elections, the risk is not present in ballot measure campaigns. Just as importantly, the CARC Court saw fit to repeat the point made in Bellotti that constitutional protection of "eloquent" as well as "unconvincing" speech extends to advertising that may influence the outcome of a ballot measure election.\textsuperscript{104}

As in Bellotti, the Court in CARC observed that separate legislative provisions compelling disclosure of the identities of large contributors served to eliminate the potential for secret machinations by moneyed interests.\textsuperscript{105} With disclosure requirements preserving the confidence of the citizenry in government, the need for more intrusive measures, such as restrictions on contributions, disappears.\textsuperscript{106} Moreover, the CARC Court concluded, the alleged state interest did not justify sustaining section 602 because the record in the case failed to demonstrate any real diminution of voters' confidence in the ballot measure system.

Almost as an afterthought, Chief Justice Burger recalled that the rights of freedom of association and expression "overlap and

\begin{footnotes}
\item[100] Id. at 296-97 (citing Buckley, 424 U.S. at 26-27).
\item[103] 454 U.S. at 297-98.
\item[104] Id. The CARC Court quoted from Bellotti, 435 U.S. at 790, which had incorporated language from Kingsley Int'l Pictures Corp. v. Regents of the University of the State of New York, 380 U.S. 684, 689 (1959). See supra text accompanying notes 85-86.
\item[105] 454 U.S. at 298. Section 112 of the Berkeley ordinance required publication in local newspapers of a list of all contributors who had given more than $50. Berkeley, Cal., Ordinance 4700-N.S., § 112 (1974), cited in CARC, 454 U.S. at 299 n.4.
\item[106] 454 U.S. at 298-99.
\end{footnotes}
blend”; a burden on one constrains the other. “Apart from the impermissible restraint on freedom of association, but virtually inseparable from it in this context, § 602 imposes a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees.”107 The Court thus invalidated section 602 primarily because it unduly infringed upon associational rights and secondarily because it impermissibly burdened speech rights.

V. POST-CARC LEGISLATIVE REGULATION OF CAMPAIGN FINANCING: WHITHER BUCKLEY?

In the aftermath of CARC, little remains of Buckley. Both the alignment of the Justices and the practical effects of CARC indicate that the Burger Court has denuded much of the already circumscribed legislative regulation of campaign financing that the Buckley Court had sustained. Although the Court still appears to be committed to sustaining disclosure provisions, its support for maintaining contribution limitations is suspect at best—even in the case of candidate elections. In the portentous penultimate paragraph in the majority opinion of CARC, Chief Justice Burger stated,

Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate’s committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed . . . 108

In effect, the Chief Justice dismembered contribution limitations twice: first, by grouping them together with expenditure restrictions in the context of candidate elections; and second, by proclaiming unequivocally that disclosure requirements suffice to safeguard the integrity of elections. It is no accident that Chief Justice Burger wrote the majority opinion, nor is it insignificant that he used the disjunctive “or” between the words contributions and expenditures, thereby implying that they are in some sense interchangeable. Indeed, the Chief Justice, in his dissent in Buck-

107. Id. at 299.
108. Id. at 299-300 (emphasis added).
ley, asserted that any attempt to make a constitutional distinction between contributions and expenditures "will not wash."\(^{109}\)

From being a dissenter in pertinent part in *Buckley*, the Chief Justice has come to forge a path that has taken him to the authorship of *CARC*. He has formed a new majority behind his views. *Buckley* was a per curiam opinion, joined in all parts by only three Justices: Brennan, Stewart, and Powell. Moreover, Justice Stevens, who joined the Chief Justice’s majority opinion in *CARC*, took no part in the consideration or decision of *Buckley*.\(^{110}\) In the meantime, Justice O’Connor had replaced Justice Stewart. In their joint concurrence, Justices Blackmun and O’Connor made apparent their agreement with the Chief Justice that the contribution-expenditure dichotomy is specious.\(^{111}\) And Justice Rehnquist, with his concurrence in the opinion as well as the judgment, also appears to be lining up behind the Chief Justice.\(^{112}\) In sum, it seems likely that if *Buckley* were decided today, a majority composed of the Chief Justice together with Justices Blackmun, Rehnquist, Stevens, and O’Connor would invalidate the FECA amendments’ contribution limitations, as well as the limitations on direct expenditures.

The practical result of this prediction is that legislators should realize that any hopes they harbor about regulating contributions—even in candidate elections—will likely be dashed upon judicial review by the Burger Court. Indeed, by deciding *CARC* primarily on associational rather than speech grounds, the Court discovered the means to effectively circumvent *Buckley* without expressly overruling it. If, as the the court stated in *CARC*, disclosure provisions serve the same purpose as contribution ceilings—preserving the integrity of the electoral system—and, moreover, do so with less intrusion on first amendment freedoms,\(^{113}\) then according to the Court’s reasoning, there is no need for contribution limitations. In the final analysis, it appears that legislators who want to limit campaign contributions will have to: (1) propose a narrowly drawn ballot measure that is constitutional on its face; (2) demonstrate with an overwhelming abundance of re-

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109. *Buckley* v. Valeo, 424 U.S. 1, 244 (1975) (Burger, C.J., concurring in part and dissenting in part); see supra text accompanying note 65.
110. *See Buckley* v. Valeo, 424 U.S. at 144.
111. 454 U.S. at 302-03 (Blackmun & O’Connor, JJ., concurring).
112. *Id.* at 300 (Rehnquist, J., concurring). Justice Rehnquist wrote a brief concurrence, not to distance himself from the Court, but merely to explain his dissent in *Bellotti*.
113. *Id.* at 299-300.
cord evidence that there exists a high correlation, if not causal relationship, between the more financially endowed sides in ballot measure campaigns and the winning sides of those elections.\textsuperscript{114} and (3) show by means of surveys or other evidence that the faith of the people in the integrity of elections has been gravely undermined.\textsuperscript{115} In other words, legislators seeking campaign funding reforms face virtually insurmountable barriers that have been constructed piece-by-piece by the Burger Court in the name of the Constitution.

Not only do putatively constitutional obstacles obstruct campaign reform-minded legislators, but so does a possibly troubling message that underlies Buckley, Bellotti, and CARC.\textsuperscript{116} In one sense, this message is that the Court construes the first amendment as giving greater weight to free campaign spending than to fair elections. In a more cynical sense, the message is that “money talks,” and the Constitution ensures that it will continue to talk.\textsuperscript{116} It would not be unduly harsh to criticize the Court for failing to see the implications of its decisions.

A careful analysis of the premises posited by the Court reveals the consequences of the CARC decision. The Court stated that it is “undeniable” that group association enhances “effective” advocacy.\textsuperscript{117} Moreover, the Court was undoubtedly correct when it noted that freedom of association is “diluted” when people are denied the right to pool money, “for funds are often essential if ‘advocacy’ is to be truly or optimally ‘effective.’”\textsuperscript{118} Aligning these two statements with the CARC Court’s language that the first amendment protects associational rights as well as freedom of speech gives rise to the following syllogism: (1) the first amend-

\textsuperscript{114} See supra text accompanying note 84.
\textsuperscript{115} 435 U.S. at 791-92.
\textsuperscript{116} See supra note 50 and accompanying text.

For two recently published articles critical of the Burger Court on this ground, see Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 39 U.C.L.A. L. Rev. 505 (1982) (advocating that contribution limits, even in ballot measure campaigns, should be sustained on the ground of making elections fairer); and Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 Colum. L. Rev. 609 (1982). Judge Wright excoriates the Burger Court for its “warped interpretation of the first amendment,” id. at 644, its “missteps,” id. at 633, and its “perverse” decisions in Buckley and Bellotti: “Paradoxically, by equating political spending with political speech and according both the same constitutional protection, the Court placed the first amendment squarely in opposition to the democratic ideal of political equality.” Id. at 631-32.

\textsuperscript{117} 454 U.S. at 295 (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958)).
\textsuperscript{118} Id. at 296 (quoting Buckley, 424 U.S. at 65-66).
ment protects freedom of association; (2) freedom of association promotes effective advocacy; therefore, (3) the first amendment protects the promotion of effective advocacy. But in the midst of discussing these very points, Chief Justice Burger inserted the following lengthy quotation from Buckley:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.119

In other words, a government regulation that induces some degree of parity in the dissemination of ideas is "wholly foreign" to the Constitution. In the same vein, the first amendment does not countenance restraints on expression by the wealthy. Were the din of the rich to drown out the voices of the poor, the Constitution would not be offended. And because the wealthy are equally entitled to exercise their undiluted rights of association, they could pool their resources to amplify their speech even more. It is not implausible to envisage affluent people uniting to buy virtually all of the available television and radio time and newspaper space to promote or oppose a particular ballot measure. Indeed, such situations have already occurred. For example, in his dissent in CARC, Justice White pointed out that the proponents of one California ballot measure gathered thirty-four times as much money in contributions than the opponents.120 In these circumstances, constitutional protection of effective advocacy is available only to those who can afford it.

In sum, the CARC Court was either ostrich-like or extraordinarily deferential to moneyed interests when it declared that on the one hand, the first amendment cannot enhance the relative voice of some elements of society,121 while on the other hand, that it protects the promotion of effective advocacy.122 Although it is

119. Id. at 295-96 (quoting Buckley, 424 U.S. at 48-49 (citations omitted)).
120. Id. at 307 n.3 (White, J., dissenting) (citing S. Lydenderg, Bankrolling Ballots: The Role of Business in Financing State Ballot Question Campaigns 98-101 (1979)).
121. See supra text accompanying note 119.
122. See supra text accompanying notes 117-118.
true that the CARC Court’s invalidation of the Buckley contributions limitations allows the less affluent to aggregate their voices, the same applies in potentially greater degree to the more affluent.

VI. CONCLUSION

In the aftermath of Watergate, Congress sought to tighten controls over campaign financing. In *Buckley v. Valeo*, the Supreme Court sustained legislative regulation of campaign contributions to candidates, but invalidated the restrictions on independent expenditures for office seekers. The Court made this distinction because contributions were equated only with indirect speech and were thus entitled to lesser first amendment protection than expenditures, which were considered tantamount to pure political speech. In *Bellotti*, however, the Court invalidated both contribution and expenditure limitations in ballot measure elections because no significant state interest justified the infringement of corporations’ and others’ first amendment rights. Finally, in *CARC* the Court applied the *Bellotti* blanket rule and struck down an attempt to regulate contributions by individuals during ballot measure elections. Some of the language in *CARC*, when combined with the shifting alliance on the Court, suggests that the Burger Court is ready to invalidate all contribution ceilings, including those applicable to candidate elections.123

The law governing legislative regulation of campaign financing has come almost full circle since the mid-1970’s. Regardless of the progressive easing of restrictions on contributions, one hopes that the CARC Court was right in at least one respect—that “[t]he integrity of the political system will be adequately protected”124 by disclosure requirements. Legislative regulation of campaign financing is an area where one hopes that the maxim “past is prologue” does not hold true.

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123. See supra text accompanying notes 108-109.
124. 454 U.S. at 299.