Money in Politics: Judicial Roadblocks to Campaign Finance Reform

By JOHN S. SHOCKLEY*

Introduction

The modern era of campaign finance reform has lasted more than ten years, yet recent elections indicate that the issue is far from resolved.[1] With the familiar charges and counter-charges about the influence of money still ringing in our ears,[2] it is appropriate to look back upon the basic assumptions and particular circumstances from which our current system of campaign finance laws evolved. Although analysts have commented voluminously on legislative and judicial attempts to handle the multiple issues of money in politics,[3] this article will attempt to shed new light on specific aspects of the campaign finance reform struggle, in the belief both that some basic questions can benefit from re-examination, and that the stakes are high enough to

* Professor of Political Science, Western Illinois University. B.A., University of Texas, Austin, 1966; M.A., University of Wisconsin, Madison, 1967; Ph.D., University of Wisconsin, Madison, 1972. Many people were helpful in the course of doing this research. The author would like to thank especially Dan Lowenstein, Professor of Law, UCLA, Marlene Arnold Nicholson, Professor of Law, DePaul University, and Charles Helm, Professor of Political Science, Western Illinois University, for comments on an earlier draft of this article. The National Endowment for the Humanities and Western Illinois University were helpful in providing research opportunities and a sabbatical, respectively. Without such help this article would have been impossible to complete.

1. The first major campaign reform act of the modern era was passed in 1971. *See* H. ALEXANDER, FINANCING POLITICS ch. 2 (2d ed. 1980); the issue emerged slowly in the 1960's. For a review of the modern era and of the first era of campaign finance reform, see H. ALEXANDER, *supra*, ch. 2; *see also* United States. v. UAW-CIO, 352 U.S. 567 (1957); Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975).

2. The 1982 elections were the most expensive off-year elections in American history. The Federal Election Commission reported that congressional candidates raised a total of $356.7 million and spent $343.9 million. "These figures represent a 43-44% increase over monies raised and spent in the 1980 Congressional elections, and an almost 80% increase over 1978." Fed. Election Comm'n, *FEC Releases Data on 1981-82 Congressional Spending*, Press Release 1 (May 2, 1983). The total for all federal, state, and local offices has been estimated at nearly one billion dollars. *See* Nesbit, *Who Monitors Those Dirty Political Ads?*, In These Times, Nov. 17-23, 1982, at 2.

3. For the most comprehensive works, see *infra* notes 14, 34, 38, 39, 53, 55, 84, 85, 111, 127, 140.

merit continued attention.[4]

Part I will examine why the U.S. Supreme Court has viewed campaign finance reform as different from the other political process movements which likewise have sought to broaden access to politics and to create greater political equality. An understanding of the Court's perception will explain why the Court waited for the other branches of government to act before becoming heavily involved in the issue. Part II will examine certain central tendencies and anomalies in Supreme Court reasoning once the Court began to react to local, state, and federal legislative activity in this sphere. Tensions between liberty and equality and the Court's meaning of "free speech" will be reviewed within the context of *Buckley v. Valeo*,[5] *First National Bank of Boston v. Bellotti*,[6] and *Citizens Against Rent Control v. City of Berkeley*,[7] leading to the conclusion that powerful but often implicit factors are at work in the Supreme Court's decisionmaking process. Part III will briefly discuss the impact of the Court's activism by examining how the Court may have altered the nature and outcome of campaigns via its intervention. Finally, part IV will focus on alternate routes, perhaps both more effective and more difficult, to campaign finance reform—ones that are more likely to be upheld by the current majority on the Supreme Court.

I. The Possibility of Judicial Action Preceding Legislative Attempts at Campaign Finance Reform

In the areas of voting rights,[8] reapportionment,[9] poll taxes,[10] and high filing fees,[11] the U.S. Supreme Court moved on its own to ban discriminatory practices, not deferring to congressional or state legislative action before entering the fray. In fact, the inactivity by the other branches of government was often seen by the Court as the reason why

4. Campaign finance reform involves fundamental questions about the nature of democracy and the age-old question of who rules. Dean Sandalow commented upon this point: "The choice between these arguments is in the end a choice between differing views about the desirable shape of the American political system, views that rest upon strikingly different conceptions of the meaning and requirements of democratic government." *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 450 (1981).

5. 424 U.S. 1 (1976).

6. 435 U.S. 765 (1978).

7. 454 U.S. 290 (1981).

8. *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944).

9. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

10. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

11. Bullock v. Carter, 405 U.S. 134 (1972).

the judiciary should move to protect the sanctity of the ballot box,[12] and by others as the prime reason why the judiciary must be a vigilant watchguard.[13] Given their boldness in working to protect the right to vote, and in protecting the meaning of the right to vote against the forces of dilution and economic constraints, why did the judiciary not move to protect the vote against campaign finance abuses, such as those that allowed wealthy people greater access and influence, and prevented poor people from being able to run credible campaigns for office?[14]

Several factors seem crucial in explaining why campaign finance reform has become the "stepchild" of the movement for protection of the right to vote. Taken together these factors explain the complexity of the issues involved in campaign finance questions, and the unique set of forces operating on various sides of this matter.

First, campaign finance reform appears to involve a less clear constitutional justification than at least some of the related issues of which the judiciary has become an active protector. The right to vote is explicitly discussed in the Fifteenth Amendment,[15] and the apportionment of the U.S. House of Representatives is discussed in Article I, section 2 of the Constitution.[16] While both references are brief and not without ambiguity, they are at least statements on the goals of voting rights and equal apportionment. But the role (or the limitation) of money in elections is never directly discussed in the Constitution. Although this comparison alone might serve as an adequate explanation of judicial inactivity, neither poll taxes nor filing fees are discussed explicitly in the Constitution. Yet this did not prevent the Supreme Court from striking down these economic restrictions on access to the ballot.

12. *See, e.g.*, Reynolds v. Sims 377 U.S. 533, 553 (1964); Baker v. Carr, 369 U.S. 186, 193 (1962). In the case of reapportionment, there was often no other avenue besides the judiciary for citizens to follow, since reapportionment in Tennessee and most states had to be approved by malapportioned legislatures.

13. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), and J. ELY, DEMOCRACY AND DISTRUST (1980). Ely does not directly discuss campaign finance issues although he argues that the judiciary should police the process of representation and be especially vigilant in guarding against legislation which would restrict the channels of political change.

14. Perhaps Professors Joel Fleishman and Marlene Arnold Nicholson have examined this question most thoroughly. *See generally* Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C.L. REV. 349 (1973), and Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974).

15. U.S. CONST. amend. XV.

16. This section states that "[r]epresentatives . . . shall be apportioned among the several states . . . according to their respective Numbers. . . ." U.S. CONST. art. I, § 2.

As the issue of campaign finance reform re-emerged as a major issue of political debate in the 1970's, several legal scholars noted that recent judicial precedents involving the Equal Protection Clause might be interpreted as *requiring* judicial action to prevent the political process from being dominated by monied interests.[17] *Harper v. Virginia Board of Elections*,[18] *Reynolds v. Sims*,[19] and *Bullock v. Carter*[20] all contained language of concern over economic discrimination in voting. In *Bullock* the Court went so far as to criticize high filing fees:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party. . . . Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that [high filing fees] would fall more heavily on the less affluent segment of the community.[21]

In calling this practice a violation of equal protection, Chief Justice Burger, speaking for a unanimous Court, declared that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status."[22] On the basis of this precedent, Professor Marlene Arnold Nicholson noted that if candidate registration fees bar candidates of modest means from running for office, "then surely the huge sums necessary to wage an effective campaign . . . place much more formidable roadblocks in the paths of such candidates."[23]

Yet, as Nicholson,[24] Joel Fleishman,[25] and Albert Rosenthal[26] all noted, the lack of obvious "state action" involved in allowing large sums to be spent on political campaigns made judicial activism on behalf of campaign finance reform difficult. While governments had passed laws requiring poll taxes and expensive filing fees, and had set malapportioned district boundaries, governments had not passed laws requiring or supporting large private expenditures. They merely acquiesced in the practice. In order for the courts to have moved in advance of legislatures to reform campaign finance practices, they would have

17. *See, e.g.*, Fleishman, *supra* note 14; Nicholson, *supra* note 14.

18. 383 US. 663 (1966).

19. 377 U.S. 533 (1964).

20. 405 U.S. 134 (1972).

21. *Id.* at 143-44.

22. *Id.* at 144. Justices Rehnquist and Powell did not take part in the decision because they were too recently appointed to the Court.

23. Nicholson, *supra* note 14, at 816.

24. *Id.* at 830-836.

25. Fleishman, *supra* note 14, at 353-57.

26. Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. ON LEGIS. 359, 365-369 (1972).

had to hold that governments had an obligation to prevent the unequal access caused by the unequal use of money in political campaigns.[27] While this approach had precedents,[28] it would not have been an easy, obvious step for the courts to take.

Thus, at best, campaign finance reform was a frontier issue for the courts, one made more difficult by its amorphous grounding in the Constitution and the need to find state action in campaign finance practices. Yet the failure of the judiciary to take action to provide equal protection to non-wealthy candidates and voters was probably far more important than were the ameliorative effects of judicial action to protect the rights of the non-wealthy in related areas of the political process.

The second factor that influenced the judiciary was the difficulty in fashioning judicially manageable remedies.[29] "One man, one vote" could be used to construct clear standards for reapportionment and

27. Nicholson noted that state action could be found in the fact that "campaign financing today can be viewed as a very significant part of the 'machinery for choosing officials,'" Nicholson, *supra* note 14, at 831, and in state *inaction*. "Has the state permitted, even by inaction, a private party to exercise such power over matters of high public interest that to render meaningful the type of rights protected by the fourteenth amendment, the action of the private person or organization must be deemed, for constitutional purposes, to be the action of the state?" *Id.* at 833, quoting St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993, 1011 (1961).

Likewise, Fleishman argued, "A court might very well reason that, by *permitting* some candidates to spend large amounts of money which are not available to poorer citizens and candidates, the legislation inevitably violates the equal protection requirement." Fleishman, *supra* note 14, at 355 (emphasis in original). While Fleishman conceded that the differences in spending might themselves be outside governmental reach, "their impact in an election has been considered a proper subject of regulation by courts and legislators since the beginning of the century. . . . We know that even governmental inaction in some circumstances where action is required may constitute a violation of equal protection." *Id.* Fleishman reasoned that "unconstitutional inequities may arise from the impact of a classification by government that fails to compensate for significant differences in classes that are not themselves the direct product of governmental action—that is, a state can deny equal protection of the laws by treating unequals equally . . . . To rectify these denials of equal protection the state may be required . . . to perform an 'affirmative duty.'" *Id.* (quoting Karst & Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 58).

With the hindsight afforded by *Bellotti*, 435 U.S. 765 (1978), which struck down certain prohibitions on corporate spending even though state action had obviously created the corporation, we now know that the Court's views were farther from the ideas of Fleishman, Nicholson, and Rosenthal than any of them likely imagined. For more on the state action component of *Bellotti*, see Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494.

28. *See, e.g.*, Fleishman, *supra* note 14; Reitman v. Mulkey, 387 U.S. 369 (1967).

29. For a more comprehensive discussion of remedies in this area, see Fleishman, *supra* note 14, at 366-69.

voting rights, but because campaigns require money, action to broaden access did not have a single, obvious remedy. Merely prohibiting contributions or expenditures above a certain amount had been the historical answer most in use around the country since the turn of the century.[30] This required setting specific dollar limits and trying to plug loopholes, a task more legislative or administrative than judicial.[31] Other remedies would have entailed substituting government aid for corporate and individual funding no longer available from the wealthy, thus providing a floor, a ceiling, or both for campaign spending.[32] Matching governmental funds or outright grants would have required raising revenue to support these programs. Judicially instituted programs would necessitate decisions on how to intervene, what standards to set on the amount of contributions and expenditures that would be allowed, or how much government money would be used to institute campaign finance reform. The judiciary has been universally reluctant to institute such programs on its own.

Striking down poll taxes and high filing fees forced governments to raise revenue in other ways, but instituting a credible system of public financing of elections would have required the raising of far greater amounts of revenue. The severity of the problem seems at least partly responsible for making it unlikely that the courts would intervene.[33] Thus, while related action would not have made the development of remedies impossible, judicial relief contained problems of greater proportion and complexity than did reapportionment, poll taxes, filing fees, or voting rights.

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30. *See supra* note 1.

31. Of course, facing legislative or administrative problems did not stop judicial activity in numerous other areas. *See generally* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

32. For a review of campaign finance practices in other Western democracies, *see* D. ADAMANY & G. AGREE, POLITICAL MONEY, ch. 9, (1975); K. Zev Paltiel, *Campaign Finance: Contrasting Practices and Reforms*, in DEMOCRACY AT THE POLLS 138-72 (D. Butler, H. Penniman, & A. Ranney eds. 1981).

33. Referring to the public subsidization of campaigns, Fleishman said, "It is unlikely that the Court would create an affirmative obligation where the costs of performing it are as substantial as they would be here." Fleishman, *supra* note 14, at 367. It is possible, however, that court orders in cases involving matters such as prisons or school busing indirectly require expenditures as large as the cost of public campaign financing. Furthermore, while Fleishman's statement may be quite appropriate to a system of restrained judicial review, he is really noting that if the violation of rights can be remedied cheaply, the Court is more likely to act. If the violation of rights is of such a large magnitude as to require considerable expenditures, as may be the case with campaign finance practices, the Court is more reluctant to act.

Where reform did not involve raising government funds for campaigns, regulations limited the power of monied interests by protecting the less wealthy and supporting a greater diversity of interests.[34] In this respect the issue was similar to reapportionment in that it was viewed as though a "zero-sum" issue: One side could not "gain" without the other side "losing." The question of contribution and spending limitations thus involved ambiguous treatment of constitutional rights, because protecting the rights of the non-wealthy could be viewed as infringing on the rights of the rich.[35] With the rights of the rich and poor thus seen as potentially conflicting, reform could lead to charges of violation of the wealthy's "freedom of speech."[36] Because political money was viewed as more closely related—either directly or indirectly—to political speech than other issues aimed towards achieving equality in elections, First Amendment issues were aroused by campaign finance reform.[37] Limits on political contributions and expendi-

34. There has been limited speculation on why the Congress, states, and localities have been prone to limit spending rather than to subsidize campaigns. Spending limitations were probably viewed as the easiest and simplest method that would directly remedy the alleged wrongs of corruption and undue influence. Public financing was likely viewed as too costly and too complicated. In addition, public financing could threaten incumbents, who generally have an advantage in fundraising, and who could be considered as spending taxpayer's money to support themselves.

Restrictions on contributions and expenditures have been our traditional response from the first period of campaign finance reform, *see supra* note 1. This response may have followed such practices as regulating speakers at town meetings, and regulating the volume of sound trucks. *See generally*, Freund, *Commentary*, in FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 71-75 (D. Rosenthal ed. 1971); Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). This method of reform probably also reveals something basic about the American view of government action. Without as strong a history of a "positive state," we are more likely to prefer restrictions on private activity than governmental obligations to protect the disadvantaged. In this respect we differ from most other Western democracies. For more on this see K. DOLBEARE, AMERICAN PUBLIC POLICY ch. 1 (1982).

35. Similar arguments were made by various economic interests in reapportionment cases. It was on this issue that Chief Justice Earl Warren stated in *Reynolds v. Sims*: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or *economic interests*. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." 377 U.S. at 562 (emphasis added).

36. Fleishman, *supra* note 14, at 407-10; Nicholson, *supra* note 14, at 844-47; Rosenthal, *supra* note 26, at 372-78. This point is stated especially clearly in numerous writings by Ralph Winter. *See, e.g.*, Winter, *Commentary*, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS, 75-81 (A. Rosenthal ed. 1972).

37. The Court seems to have assumed this, *see, e.g.*, Buckley v. Valeo, 424 U.S. at 14-20, as have most commentators. *See, e.g.*, Court & Harris, *infra* note 87, especially at 214-18; Freund, *supra* note 34; Rosenthal, *supra* note 26, especially at 372-78; and Winter, *supra* note 36; *but see* Nicholson, *supra* note 14, at 816.

tures in campaigns could affect the "marketplace of ideas,"[38] muzzling those forces in the society wanting to spend more, while simultaneously allowing other, weaker forces in the polity a greater chance to be heard. Of course, this was precisely the reason campaign finance reform had been proposed. Thus, campaign finance reform, more so than with other equal rights issues, could be viewed as cutting both ways.[39]

In light of the complexities involved, some may consider campaign finance reform issues to be outside the reach of governmental edict.[40] Yet, from early in the twentieth century, laws have regulated money in political campaigns. Furthermore, in *Burroughs v. United States*,[41] the Supreme Court gave solid grounds for the regulation of campaign

38. Even to use the metaphor of the market in referring to free speech reveals certain basic assumptions about the relationship of the economy to the political system. Perhaps the most famous statement along these lines is from Justice Oliver Wendell Holmes' dissent in *Abrams v. United States*: '[T]hat the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market." 250 U.S. 616, 630 (1919). On this idea Professor Mark Tushnet commented: "If free speech was defended with the metaphor of the market, it was only a matter of time and political circumstance before the market was defended with the metaphor and the substance of free speech." Tushnet, *Corporations and Free Speech*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 258 (D. Kairys ed. 1982). For powerful critiques of what became the Supreme Court's reasoning on this point, see Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 COLUM. L. REV. 609 (1982); Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833 (1981); Comment, *Cases that Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 HARV. C.R.-C.L. L. REV. 713 (1980).

39. This was perhaps best noted by Daniel Polsby, who posed the dilemma as follows: "[W]here the speech opportunities of a group in the aggregate, or of the average member of a group, could be maximized, enhanced, or even made initially possible only by abridging the speech of an individual, what (if anything) does the First Amendment command to be done?" Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 5 (1977). Numerous scholars have noted that the First Amendment is not the guardian of "unregulated talkativeness," *see, e.g.*, A. Meiklejohn, *Free Speech and Its Relation to Self Government* 25 (1948), and that public bodies, from town meetings to the Supreme Court, set procedures for the length of time that any individual may speak. Polsby stated the fears of many in saying that "speech is not 'free' in any very important sense if it is protected only when and to the extent that such protection is consistent with a congressionally [or judicially?] defined notion of political equality." Polsby, *supra* at 42-43. For more conflicting interpretations of campaign finance reform, see *supra* notes 1, 5, and *infra* notes 62, 89.

40. On civil rights issues this same point was often raised, as when whites charged that federal laws on public accommodations moved beyond the bounds of governmental authority. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). In *Heart of Atlanta Motel*, the rights of whites in the South were limited in order to enhance the rights of blacks. The concern there, however, was with racial discrimination, not economic discrimination, and the Constitution is much clearer on the prohibition of racial discrimination. Nonetheless, it is interesting to note that Congress defended its actions on public accommodations not on Fourteenth Amendment grounds, but under the Commerce Clause. *See id.* at 250.

41. 290 U.S. 534 (1934).

finance.[42]

In the modern era the crucial issue became how campaign finance reform would be defined, for indisputably the issue could affect constitutional rights—including the rights of free speech, free association,[43] privacy,[44] and equal protection[45]—in a myriad of profound and controversial ways. This complexity made it easier to set campaign finance reform apart from related areas of concern in the political process in which, through the move toward greater equality, rights were being nurtured and protected.

The previous points explain doctrinal reasons for which campaign finance reform was to find itself a "stepchild" of the political reform movement. Undoubtedly changes in Court personnel also played a role in the decision by proponents of campaign finance reform to work primarily through the legislative process rather than to push for bold judicial action. By the time the issue had risen to political prominence and had become, after the Watergate scandal, one of the most salient issues in American politics, the Warren Court no longer existed. President Nixon's four appointees had a less expansive view of state action and the Equal Protection Clause.[46] In the place of interpretations expanding the process of representation, the Burger Court began moving toward a view characterized as protecting "the right to what money can buy."[47] This view is decidedly less sympathetic to the goals of campaign finance reform, particularly the goal of seeking equal access to the political process.

In view of the change in judicial personnel, the legislative arena offered advocates of reform more hope of success. Although rarely did campaign finance laws emerge victorious without compromise, in most

42. The issue in *Burroughs* was the power of Congress to require certain political committees involved in presidential elections to issue financial reports. The language of the Court, however, was quite broad: "To say that Congress is without power to pass appropriate legislation to safeguard such an election *from the improper use of money to influence the result* is to deny to the nation . . . the power of self protection." *Id.* at 545 (emphasis added).

43. For more on the rights of free speech and free association, see *supra* sources cited in notes 1, 5, 34.

44. Disclosure laws in particular involve potential violations of privacy, and courts have addressed this question at some length. *See, e.g.* Buckley, 424 U.S. at 60-84. This issue, however, will not be discussed here.

45. *See supra* note 14.

46. Yet the decision of Bullock v. Carter, 405 U.S. 134 (1972) was supported by Justices Burger and Blackmun.

47. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1129-35 (1978).

states, and twice in Congress, broad legislation was passed.[48] Tactically this meant that where legislative success occurred, litigation arose from forces opposed to campaign finance reform. Given the predilections of the Justices, proponents were quickly put on the defensive.

Most likely as a result of the confluence of reasons set forth above, campaign finance reform became an anomaly, to a large extent ignored and then cut off by the judiciary from the broad movement for greater political and electoral equality in the United States. While campaign finance reform seems to follow logically from the Court's earlier reform efforts for greater electoral and political equality, the merits of independent judicial action are sufficiently contestable that strong criticism of the court for inaction is unwarranted.

II. Judicial Activity in Response to Other Governmental Branches

When campaign finance reform re-emerged as a major issue upon comprehensive action at federal, state, and local levels,[49] the judiciary could have responded in three ways. It could have deferred to the other branches, as it had generally done in the period following the first wave of reform at the turn of the century.[50] Second, it could have encouraged further reform. Third, it could have discouraged reform by striking down or limiting the statutes.

Chief Justice Burger and other recent Court appointees have generally argued that the Court has been too active in a number of areas of

48. *See, e.g.* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) and Revenue Act of 1971, Pub. L. No. 92-178, tit. VII-VIII, 85 Stat. 560-74; Act of Oct. 15, 1974, Pub. L. No. 93-443, 88 Stat. 1263. For discussion of the numerous state laws passed during this same period, see H. ALEXANDER, *supra* note 1, at ch. 7.

49. *See supra* note 1.

50. With the burst of campaign finance reform activity at the turn of the century, there was almost no litigation testing the laws, and corporate prohibitions and overall expenditure limits were never directly challenged. The Tillman Act, ch. 420, 34 Stat. 864 (1907), and Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. 25 (updated as the Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070) (repealed 1972). The failure to challenge was most likely the consequence of all sides recognizing the constitutionality of the laws, and because there were enough loopholes to allow many to ignore the laws' intentions. *See* Leventhal, *The Courts and Political Thickets*, 77 COLUM. L. REV. 345, 363-65 (1977). The Supreme Court did occasionally hear arguments addressing certain features of the Corrupt Practices Act. *See, e.g.*, Newberry v. United States, 256 U.S. 232 (1921). Limits on expenditures in federal elections were promulgated in the 1911 Act, and were complemented by contribution ceilings per the Hatch Act of 1939. *See* Act of Aug. 2, 1939, ch. 410, § 4, 54 Stat. 767 (updated in Act of June 25, 1948, ch. 645, 62 Stat. 723) (repealed 1972). In 1926 two U.S. Senators were denied their seats because of excessive spending. *See* Leventhal, *supra* at 364 n.134. For a review of early litigation, see Leventhal, *supra* at 363-65; Rosenthal, *supra* note 26.

constitutional interpretation, and that access to the Supreme Court has been too broad.[51] They have also argued that greater deference to the legislative branches and to the states and localities is needed, as is the need to conserve judicial resources.[52] Yet, in spite of these concerns, the Supreme Court has generally chosen the third option in dealing with the issue of campaign finance reform. The Court has heard a great many cases on this issue and has severely scrutinized federal, state, and local legislation.[53] In fact, the recently appointed more conservative Justices, who have often been most associated with the drive for less activism and greater deference, have generally been most vociferous in

51. *See, e.g.*, Burger, *How to Break Logjam in Courts*, U.S. NEWS & WORLD REP., Dec. 19, 1977, at 21. "As judges, we should do everything we can to avoid imposing our own notions of what is good for the country. . . . Many thoughtful, responsible people believed the previous Supreme Court had gone too far in some areas." *Id.* at 27. " '[G]oing to law' is being overdone. . . . [W]e in America make excessive use of our courts. It's often been said—and I think it's probably true—that the American people are the most litigious people in the world." *Id.* at 21. NEWSWEEK recently reported that "Burger has complained for so long about the Court's docket that even he admits to sounding like the boy who cried wolf." *The Court's Clogged Arteries*, NEWSWEEK, Feb. 21, 1983, at 81.

For comment upon the narrowing of access under the Burger Court, see Kremens v. Bartley, 431 U.S. 119, 140 (1977) (Brennan, J., dissenting). What the Supreme Court has simultaneously refused to hear while it was solicitous of campaign finance reform cases is also revealing of its preferences, but an analysis of so broad an area is beyond the scope of this article.

52. Following precedents would have led to deference to the solutions of contribution and spending limitations. *See* Buckley v. Valeo, 519 F.2d 821, (D.C. Cir. 1975), and Rosenthal, *supra* note 26, at 363. Rosenthal notes: " 'Corrupt practices' had long been a phrase of art, not limited to bribery or undue influence—which a dictionary definition might suggest—but directly applicable to contributions excessive in amount or from a forbidden source." 9 HARV. J. ON LEGIS. at 363.

For a convincing effort to reconcile inconsistencies in Burger Court doctrine and behavior, *see* Comment, *supra* note 38. The authors argue that the Burger Court has engaged in "judicial deregulation of persons or entities wielding power in American society." *Id.* at 745. "Taken as a whole, the decisions manifest a consistent deference to the existing power relationships of our society," *id.* at 721, rather than a consistent deference to the other government branches, and to states and localities.

53. *E.g.*, California Medical Ass'n v. FEC, 454 U.S. 270 (1981); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n 447 U.S. 557 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Abood v. Board. of Educ., 431 U.S. 209 (1977); Buckley v. Valeo, 424 U.S. 1 (1976); Pipefitters v. United States, 407 U.S. 385 (1971). Joel Fleishman, although sympathetic to many of the goals of campaign finance reform, has argued that strict scrutiny was appropriate "because a sizable portion of those who are regulated by the legislation are the same as those who wrote the legislation . . . ." Fleishman, *The 1974 Federal Election Campaign Act Amendments: The Shortcoming of Good Intentions*, 1975 DUKE L.J. 851, 885. In this he differs from others such as Harold Leventhal and Justice Byron White. *Compare* Fleishman, *supra*, *with* Leventhal, *supra* note 50, *and* Buckley v. Valeo, 424 U.S. 1, 257-66 (1976) (White, J., concurring in part and dissenting in part).

attacking campaign finance laws.[54]

The Court's dislike has been selective, as not all campaign legislation that equalizes access to the political process has been invalidated. The court has generally been passive about those laws that minor parties and civil libertarians claimed discriminated against them and sympathetic to the claims of corporations and wealthy individuals.[55] *Buckley v. Valeo*,[56] *First National Bank of Boston v. Bellotti*,[57] and *Citizens Against Rent Control v. City of Berkeley*[58] best serve to illustrate the reactive use of the courts to oppose reform.[59] The Court's decision in *Buckley* emphasizes how differently the Court has treated campaign finance legislation from other political process issues. It is also the opinion which best articulates the Burger Court's philosophy in this area. In *Buckley*, the Court overturned or modified important parts of the broad federal legislation passed in 1974; the Court also overruled much of the District of Columbia Court of Appeals decision,[60] which used quite different arguments and standards, and found the legislation constitutional.[61]

54. Typical of the general view of what conservatives on the Court support, Alan Ehrenhalt has reported "distinct conservative trends" in Court rulings, stating that "justices were inclined to place more power and responsibility in the hands of state and local officials . . . . Ehrenhalt, CONG. Q. 1663 (July 10, 1982). *But see* Comment, *supra* note 38. The general exception to this voting practice has been Justice Rehnquist, who dissented in *Bellotti*, 435 U.S. 765, 822 (1978), Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 30, 548 (1980) and Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 583 (1980). For more on *Bellotti* see *infra* text accompanying notes 100-39. For more on *Con Ed* and *Central Hudson*, see *infra* note 141. For a review of the rankings of the Justices on liberal-conservative scales, see Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981).

55. For considerable elaboration on this point, see Nicholson, Buckley v. Valeo: *The Constitutionality of the Federal Election Campaign Act Amendment of 1974*, 1977 WIS. L. REV. 323, and *infra*, text accompanying notes 59-99.

56. 424 U.S. 1 (1976).

57. 435 U.S. 765 (1978).

58. 454 U.S. 290 (1981).

59. This review will be selective because much has already been written about these cases, especially *Buckley*. For the best comprehensive reviews of *Buckley* consult *supra* sources cited in notes 34, 39, 55 and *infra* sources cited in note 111.

60. 519 F.2d 821 (1975). The D.C. Court of Appeals did strike down one small section of the act. *Id.* at 843.

61. The appellate court had held that regulating money in campaigns was speech-related conduct, and therefore subject to less rigorous scrutiny under the First Amendment. The Supreme Court, however, held that money equaled speech, and that consequently the law should be subject to strict scrutiny. The appellate court relied heavily on cases involving wealth discrimination in the exercise of the franchise, and approved the government's goal of equalizing access to political influence. The circuit court reasoned as follows: "It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the

A. Equal Liberty, or Equality v. Liberty?[62]

The clash over equalizing access or protecting the rights of wealthy candidates and individuals was met head on in the approaches taken by the Supreme Court and the court of appeals.[63] The lower court viewed the federal statutes as designed to effectuate the one person, one vote principle, and to safeguard the integrity of elections;[64] the Supreme Court, however, found much of the legislation to be a violation of the First Amendment right of free speech.

Given the importance of the topic and the dispute within the judiciary, the *Buckley* decision produced a torrent of responses from a wide variety of sources.[65] Because of the quantity and quality of responses to the decision, only a few basic points will be deeply probed here. The goal, as in part I, will be to understand why the judiciary acted as it did by examining the Court's stated reasons and underlying assumptions.

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unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited." *Id.* at 841.

The Supreme Court rejected the appellate court's construction of the issue, and showed less sympathy to the goal of establishing greater equality of access to campaign financing. The Court commented: "[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. . . ." 424 U.S. at 48-49. With this premise they struck down overall expenditure limits on federal campaigns and limits on what an individual could spend on his own campaign. The Court also rejected any limits on what an individual could spend "independently" on another's campaign. Based on the governmental interest of preventing corruption or the appearance of corruption, the Court did allow limitations on what an individual could contribute to another's campaign. The majority upheld public funding of presidential candidates, but made such procedures voluntary. The Court also upheld the general disclosure requirements of the legislation, arguing that such procedures work to dampen corruption and the appearance of corruption.

62. This general clash has been noted by a number of scholars. One especially prominent attempt at resolution comes from Kenneth Karst, who notes that while some say that First Amendment interests involve not equality but liberty, "[t]his line of argument is misleading. . . . The principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the 'central meaning of the First Amendment.'" Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (footnote omitted). *See also infra* text accompanying note 89.

63. Some might object to framing the issue in this manner, arguing that the distinction should be couched in terms of protecting the "rights of hearers," the "rights of candidates," or the "rights of supporters." Yet the rights of any of these groups become relevant only if one believes that the wealthy have *more to say* than others, and that non-wealthy interests should listen more carefully to the wealthy than to other sources of ideas in society.

64. Yet even here there was some difficulty. Judge Bazelon remarked: "This case involves the agonizing process of weighing competing values of the most fundamental importance in a democratic society: a statute designed to effectuate the one person, one vote principle and to safeguard the integrity of elections *against* first amendment guarantees for candidate and voters." 519 F.2d at 907 (emphasis in original).

65. *See supra* note 59.

The fact that a majority of the Supreme Court decided to view money as speech, rather than as speech-related conduct, has been commented on by many.[66] This article will probe the ideological and political implications of such a conceptual leap.

The goal of the Supreme Court in *Buckley* seems to have been to prevent *quid pro quo* corruption of politicians[67] while preserving the prerogatives of the wealthy to continue exercising greater influence in the political arena. This conclusion is derived from an examination of what was allowed and disallowed by the decision, and what reasons were given for so ruling. By protecting the wealthy's right to spend unlimited sums on their own races, to spend unlimited amounts on elections so long as it is done "independently,"[68] and to reject public funds if the candidate feels that a more effective campaign can be accomplished through increased private spending, the Court preserved important prerogatives of the wealthy while trying to "clean up" and legitimize this power by detaching it from *quid pro quo* corruption. By upholding disclosure and contribution limitations, as well as the idea of public financing of elections, *Buckley* was a compromise decision; a majority on the Court felt it important to uphold the restraints upon those forms of financial activity most clearly connected with corrupt practices. The Court was no doubt sensitive both to the Watergate scandal and to the shaken public confidence in government and the electoral process.[69] Yet with *Buckley*, the wealthy were able to keep

66. *See, e.g.*, Wright, *supra* note 34; Freund, *supra* note 34.

67. This point is developed in another article. *See* Shockley, Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found? (1983) (unpublished manuscript, on file at HASTINGS CONSTITUTIONAL LAW QUARTERLY).

68. In *Buckley*, 424 U.S. at 19-23, the Court argued that money spent "independently" of a candidate's campaign could not be subject to the spending limitation because such funds were expenditures rather than contributions. This distinction has created a loophole in the 1974 Act that is of increasing importance as more funds are channeled into "independent" expenditures, some of which may not really be "independent" of a candidate's campaign. For problems with the abuse of this judicially created loophole, see Buchsbaum, *Campaign Finance Re-Reform: The Regulation of Independent Political Committees*, 71 CALIF. L. REV. 673 (1983).

69. This lack of public confidence has continued since *Buckley*. The campaign finance reform after *Buckley* seems to have had little effect on citizen discouragement over the role of money in politics. The Center for Political Studies of the Institute for Social Research at the University of Michigan has been asking citizens for a number of years: "Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all people?" A consistently increasing percentage of people are answering that government is run by a few big interests. In 1958 only 15% of the survey agreed with that view, while in 1980 76% were agreed that government is run by a few big interests. *Public Opinion* 34 (June/July, 1981). Ira Mickenberg noted: "It seems ironic that the Court should recognize the dangers posed by the excessive importance of these mass-

their options open in a manner that middle class and poorer citizens, and candidates with only middle class or poorer supporters, simply could not.

To protect the differential impact of wealth by striking down laws on grounds of a violation of "free speech" has been imitated by no other Western democracy.[70] The Court's opinion in *Buckley* has led to analogies and inconsistencies that are helpful in discovering underlying ideological presuppositions. There may be reasons to protect the prerogatives of the wealthy in American politics, but to do so on the grounds of *free speech* is remarkable.[71] A more accurate justification would be that "our social system is based on the premise that inequalities of wealth serve valid and useful purposes," and that "the wealthy need means to exercise their financial power to defend themselves politically against the greater numbers who may believe that their economic interests militate toward leveling."[72] Since "money can be considered as a countervailing force to a natural majority, or to a large aggregate of voters,"[73] and such a countervailing force is *needed*,[74] the

media techniques, while simultaneously institutionalizing such excessive use by equating expenditure of money with pure speech." Mickenberg, *The Constitutionality of Limitations on Contributions to Ballot-Measure Campaigns*, 12 SW. U.L. REV. 527, 535 n.55 (1981). He concluded that "the Supreme Court accepts the idea of a political system dominated by those wealthy enough to have access to mass media and excluding those who express their political views by other means." *Id.* at 534 n.44. The fact that citizen confidence in the electoral process is very low, and that many attempts by federal, state and local governments to restrict money in elections have been struck down by the Court, implies that the Court is imposing a particular view of the First Amendment on our society. *See infra* text accompanying notes 72-158.

70. *See supra* note 32. Of course, judicial review is quite rare in most other Western democracies.

Some might argue that the protection of the wealthy was the result of the *Buckley* decision, not its cause, with the actual cause being the right to spend one's money in the "marketplace of ideas" as one sees fit. But to have selected such a cause in these circumstances, and not in circumstances where the result would lead to a weakening of established power (*e.g.*, the list of assertions upheld and denied in Comment, *supra* note 38 at 719-21, and the comparison of the concern for the poor in CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) with the cases discussed by Laurence Tribe, *supra* note 47, at 1129-35) suggests the use of a cause to achieve a desired result. *See supra* note 52, *infra* note 83, and text accompanying notes 123-39.

71. Each of these concepts will be explored more fully below. *See infra* part II-B.

72. Clagett & Bolton, Buckley v. Valeo, *Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327, 1335 (1976).

73. H. ALEXANDER, *supra* note 1, at 17.

74. Although this need is never explicitly stated in the Constitution, James Madison's *Federalist Paper No. 10* is probably the most famous defense of the necessity for barriers in the Constitution. THE FEDERALIST, No. 10, at 56 (J. Madison) (J. Cooke ed. 1961). Others have noted that such a view of the First Amendment fosters ideological hegemony by the economic elite in our society. *See* Meadow, Political Advertising as Grassroots Lobbying:

wealthy should be allowed, or indeed, should be considered to have earned, special political privileges not given to the majority of citizens. These beliefs are alive today in the ideas that the wealthy have more at stake in the political system and that their activity is particularly necessary to the overall health of the economic, social, and political structure of the society.[75]

The Supreme Court majority did not explicitly use this argument in protecting the rights of the wealthy, but analysis of what the Supreme Court struck down leads to the conclusion that these beliefs must have been the motivating force behind their decision.[76] In a revealing passage, the majority stated that limiting a candidate and his family to personal expenditures of $25,000, $35,000, or $50,000 *annually* (depending upon the office), "imposes a *substantial restraint* on the ability of persons to engage in protected First Amendment expression."[77] If one agrees with the Court that being able to spend only

New Forms of Corporate Political Participation 20 (paper presented at the Midwest Political Science Association Annual Convention, Cincinnati, Ohio (Apr., 1981)).

75. Of course "Reaganomics," as either "supply-side" or "trickle-down" theory, would fit well with this view of the First Amendment. The political concept, however, is broader than either of these economic theories. *See* Greider, *The Education of David Stockman*, 248 ATLANTIC 27 (Dec., 1981).

Professor Tribe may have stated this view most clearly: "[W]hat emerges from the decisions of the past several years is a wavering commitment to maintain for the poor access to . . . the political process . . . and a determined . . . though again not openly proclaimed, commitment to preserve for the non-poor ways of purchasing distance and distinction from the less fortunate—to preserve, in effect, plenty of room at the top, without wholly abandoning protection at the bottom." L. TRIBE, *supra* note 47, at 1135.

76. Some might argue that without clear state action, wealth classifications are not germane to the First Amendment. Yet the legislative branches of the government believed wealth is germane since they found it necessary to impose limits on the wealthy. In coming to the rescue of the rich, the Supreme Court had to ignore or avoid powerful reasons for governmental action. *See* L. TRIBE, *supra* note 47, at 802 n.9; *see also supra* note 63. In noting that Court decisions in this broad area of "the right to what money can buy" are not insupportable, Tribe has said that "the confidence with which the Court espoused conclusions that were at best debatable leads one to wonder whether unarticulated premises must not have been strongly guiding the Court's hand." L. TRIBE, *supra* note 47, at 1132 n.12.

77. 424 U.S. at 52 (emphasis added). This idea has been stated even more strongly by others. *See, e.g.*, M. JOHNSTON, POLITICAL CORRUPTION AND PUBLIC POLICY IN AMERICA 163-64 (1982): "A genuine equalization of contributions would require limits set so low—at, say, $100 or $250—that it would make political giving meaningless as a form of expression and thoroughly impoverish political campaigns." But how wealthy must one be to consider a gift of $250 meaningless?

These ideas are contrary to the reasoning behind Reynolds v. Sims, 377 U.S. 533 (1964), wherein the Warren Court stated that "each and every citizen has an inalienable right to *full and effective participation* in the political processes. . . . [This] requires . . . that each citizen have an *equally effective voice* in the election. . . . Modern and viable state government needs, and the Constitution demands, no less." *Id.* at 565 (emphasis added). *See* Nicholson, *supra* note 14, at 828.

$25,000 to $50,000 annually on campaigning is in fact a substantial restraint upon constitutional expression, what does this say about the rights of the ninety-nine percent of the American electorate who cannot expend even this "substantially restrained" amount?[78] Since their ability to speak is presumably restrained even more, where are they to look for the protection of their First Amendment rights?[79] The greatest revelation of the Court's perspective on the special rights of the wealthy is the Court's own *lack* of concern for the basic rights of the majority. The right to spend tens of thousands of dollars annually influencing political campaigns is simultaneously fundamental and exclusive. It belongs only to those few who have the resources.

In an equally revealing quote, the Supreme Court stated that the $1,000 ceiling on spending for a clearly identified candidate "would appear to *exclude* all citizens . . . from *any* significant use of the most effective modes of communication."[80] In thus striking down limits on expenditures the Court freed the wealthy to engage in significant use of

78. While numerous scholars have discussed income and wealth inequality in American society, Lester Thurow's analysis is one of the most persuasive. *See* L. THUROW, THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE (1980). In addition to noting that the United States has the second-highest *in*equality of all Western democracies (far higher than either West Germany or Japan), *id.* at 7-8, Thurow states that "the top quintile of all households has almost 80% of total wealth . . . . *Id.* at 168.

79. It hardly needs pointing out at a time with from 15% to 17% of our work force unemployed, underemployed, or too discouraged to look for work, *see, e.g.*, Thurow, *The Cost of Unemployment*, NEWSWEEK, Oct. 4, 1982, at 70, that many Americans may not be able to contribute or spend *any* money on campaigns. ADAMANY & AGREE, *supra* note 32, at 123-28. The overwhelming majority of Americans do not contribute, for no doubt a variety of reasons. *See, e.g.*, G. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS 199-200 (1980).

80. 424 U.S. at 19-20 (emphasis added). The complete quotation reads: "The $1,000 ceiling on spending 'relative to a clearly identified candidate' [citation omitted] would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication."

Elsewhere in the *Buckley* decision the Court noted that virtually every means of communicating ideas in today's mass society requires the expenditures of money, and that the "electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communications *indispensable instruments* of effective political speech." *Id.* at 19 (emphasis added). Two years later in First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978), the Court held that where the "suppression of speech suggests an attempt to give one side of a debatable public question an *advantage* in expressing its views to the people, the First Amendment is plainly offended." *Id.* at 785-86 (emphasis added); *see infra* text accompanying notes 100-39. Yet the Court had already noted that the side with money has the advantage, since money is "indispensable." The ironies of this point are missed completely in Note, *Money Talks: Constitutional Protection of Corporate Political Speech*," 8 CAP. U.L. REV. 575 (1979), which quotes approvingly of these passages. As Patton & Bartlett, *supra* note 27, at 510, have noted, "[T]he law is not given the luxury of adopting a political position which has no political consequences."

the most effective modes of communication. But what are the Justices saying about the great majority of the American people who cannot spend more than $1,000 on candidates they support? By the Court's own words, a majority of the American people are excluded from effective communication.

To justify supporting such fundamental and exclusive rights in a democracy, the Court presumably must believe that such rights should not be hereditary or discriminatory. To put the matter in constitutional language, these rights should not be exercised in a manner which violates the due process or equal protection rights of others seeking the opportunity to become wealthy enough so that spending $25,000 to $50,000 a year would be a "substantial restraint" upon their First Amendment rights.[81]

To reconcile the concepts of due process and equal protection of the laws with *Buckley*, it seems that one must believe that the American economic system is open and fair enough to allow each citizen an equal opportunity to gain enough monetary resources such that being able to spend only tens of thousands of dollars a year on campaigns actually would *violate* the person's First Amendment rights. Whether a majority on the Supreme Court endorses this notion is unclear, since such reasoning about the fundamentals of democracy, justice, equality, and liberty is not explicitly expressed, but must be inferred from the Court's opinion.[82] Yet, without such an ideological perspective, is there any other way the Court could have reached such conclusions in *Buckley*?[83]

81. Many have discussed the degree of social mobility in American society. *See generally* L. THUROW, *supra* note 78, at ch. 7. Thurow notes that 50% of the very rich received their fortunes through inheritance. *Id.* at 172. By capitalizing on above average returns on investments others have rapidly acquired large fortunes. *Id.* at 173. Yet, "since no one can predict these opportunities for capitalizing, real disequilibriums . . . will appear; the winners are, as in any lottery, *lucky* rather than smart or meritocratic." *Id.* at 175 (emphasis added). For discussion of governmental complicity in the accumulation of wealth, see L. TRIBE, *supra* note 47, at 802 n.9; Patton & Bartlett, *supra* note 27, at 496, 510 n.32 and see Justice White's dissent in *CARC*, 454 U.S. 290 (1981).

82. Another famous statement from Buckley also reveals underlying ideological beliefs: "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." 424 U.S. at 49. In its stark form, it is difficult to see how, once one decides money is speech, such a statement could coexist with the concept of taxation. *See* sources cited *supra* note 81.

83. *See supra* note 63. When the results lead in a different direction, the Court can be surprisingly cognizant of the "dangers" of wealth. In CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), Chief Justice Burger agreed to allow CBS to refuse to run a paid political advertisement against the Vietnam War. The public interest in providing access to the marketplace of ideas "would scarcely be served," *id.* at 123, by compelling broadcasters to accept paid political advertisements, because this procedure would be "so heavily weighted in

If the answer is no, it appears that the Supreme Court's theory of the First Amendment and campaign finance reform rests upon the assumptions of free market capitalism. This is a very narrow base for a theory of free speech[84]—and certainly goes against some of the basic ideas of the meaning of the First Amendment and the concept of democracy in Western political thought.

The First Amendment has "usually been thought of as a vehicle by which otherwise powerless people can gain power," not as a means to protect those in power against the powerless.[85] As money has become

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favor of the financially affluent, or those with access to wealth." *Id.* at 123. Skelly Wright summarized the Court's view as follows: "Even under a first-come, first-served system, the Chief Justice continued, 'the views of the affluent could well prevail over those of the others, since they would have it within their power to purchase time more frequently,' and they might monopolize the available time. Requiring broadcasters, under the Fairness Doctrine, to provide free time for opposing views would not redress the imbalance, because 'the affluent could still determine in large part the issues to be discussed.' The right of access, the Chief Justice concluded, 'would have little meaning to those who could not afford to purchase time in the first instance.' " Wright, *supra* note 38, at 630 (footnotes omitted). Wright found irony in the Court's reasoning when comparing it to the campaign finance reform decisions. *Id.* at 631-32.

84. *See generally* Tribe, *Toward a Metatheory of Free Speech*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 1 (R. Collins ed. 1980). Edwin Firmage and Kay Christensen speak of the "canonization" of Adam Smith, Firmage & Christensen, *Speech and Campaign Reform: Congress, the Courts and Community*, 14 GA. L. REV. 195, 198 (1980), and argue that "the Court should play a decisive role in assuring that the various checks and balances and interest groups within our governmental and economic systems do not become so disparate as to render any metaphor of the 'marketplace' completely unrealistic." *Id.* at 218. Wright explains the Court's philosophy as follows: "A latter-day Anatole France might well write, after observing American election campaigns, 'The law, in its majestic equality, allows the poor as well as the rich to form political action committees, to purchase the most sophisticated polling, media, and direct mail techniques, and to drown out each other's voices by overwhelming expenditures in political campaigns.' " Wright, *supra* note 38, at 631.

It is important to note that not all aspects of the Court's decisions in campaign finance fit neatly into a simple view focusing on protection of the prerogatives of the wealthy. The refusal to allow the California Medical Association to contribute unlimited funds to a political action committee, California Medical Ass'n v. FEC, 435 U.S. 182 (1981), and the refusal to hear the case brought by the Republican National Committee challenging the constitutionality of expenditure limitations applying to candidates who accept public funds, Republican Nat'l Comm. v. FEC, 445 U.S. 955 (1980), are examples of the Court ruling against monied interests. But the fact that the Court has not applied its campaign finance extension of *Lochner*, *see infra* note 94, to every opportunity does not negate the fact that it has used this approach in important cases which have twisted the impact of attempted campaign finance reform away from the goal of equality. The Court's goal, despite occasional inconsistencies or the necessity of compromise, still seems to be the preserving of the prerogatives of the wealthy to continue exercising greater political influence, while preventing their narrowly defined *quid pro quo* corruption of politicians.

85. Tushnet, *supra* note 38, at 257. For further development of this analysis, see Wright, *supra* note 38: "[B]y 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. "[T]he core notion

more important to electoral success or for citizen influence,[86] our system has lost able candidates.[87] One need not be a political radical to question whether having our political leaders come only from the wealthier strata, or be dependent on these strata, is necessarily best for the society. As John Stuart Mill said,

> We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves: it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked: and, when looked at is seen with different eyes from those of the person whom it directly concerns.[88]

More recently, John Rawls has propounded a constitutional principle of equal liberty, which "requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply."[89] In arguing for governmental obligations to "underwrite a fair opportunity to take part in and influence the political process . . . irrespective of their economic and social class,"[90] Rawls noted that "[t]he liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate."[91] Of

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of the first amendment remains the protection of diverse, antagonistic, and unpopular speech from restriction based on substance. To invoke the first amendment, not to protect diversity, but to prevent society from defending itself against the stifling influence of money in politics is to betray the historical development and philosophical underpinnings of the first amendment." *Id.* at 636.

For a critique of the Burger Court's attempt to require that "freedom of association" be enforced through the protection of multi-million dollar corporate advertising campaigns from regulation, see Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 U.C.L.A. L. REV. 505, 584-85 (1982).

86. *See infra* text and accompanying notes 159-81 and the Supreme Court's own words on the subject, *supra* notes 77 and 80.

87. See *infra* text and accompanying notes 159-91 for some conjecture and limited empirical evidence on this point. Leonard Court and Charles Harris discuss this point, saying that it is one of the basic reasons for campaign finance reform. Citing congressional hearings and other sources, they state, "[T]oday the ablest citizens may be dissuaded from seeking elective office because of the soaring costs of campaigns and the obligations, real or imaginary, which large contributions may entail." Court & Harris, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. C.R.-C.L. L. REV. 214, 216 (1972).

88. J.S. MILL, *That the Ideally Best Form of Government is Representative Government*, in CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT ch. III (1875), *quoted in* Court & Harris, *supra* note 87, at 216-17.

89. J. RAWLS, A THEORY OF JUSTICE 221 (1971). *See also* Karst, *supra* note 62.

90. *Id.* at 224-25.

91. *Id.* at 225. Rawls also observed: "Historically one of the main defects of constitutional government has been the failure to insure the fair value of political liberty. The nec-

course, Rawls was writing as a political philosopher, not as a constitutional scholar,[92] but for the Court to rule that the First Amendment *prohibits* the governments of the United States from moving in this direction requires an exceptionally narrow ideological interpretation of the meaning of the First Amendment. Furthermore, this ruling implies a concommitant view that the Fourteenth Amendment's Equal Protection Clause is either irrelevant or so weak that it does not hinder the Court's interpretation of the First Amendment.[93] In this conception of a supposedly free market capitalist First Amendment, just how far we are from *Lochner v. New York*[94] is not clear.

B. The Meaning of "Free Speech"

Most of us are aware that some persons can change the meaning of words and force us to accept one metaphor rather than another.[95] For the Supreme Court to call money *free* at the very time that they are aware of its exclusivity, and in fact are protecting its exclusivity, is a powerful example of the Court's ability to influence our political thinking. Presumably the Court does not mean that money is *free*, but that it is associated with freedom, or perhaps is a prerequisite to freedom, in a sense that must be very close to or synonymous with liberty. Yet to link money to freedom or liberty, as one does in protecting its exclusivity, and then to yoke it to speech, furthers our deference towards money. Defending the prerogatives of money in campaigns under the concept of free speech requires a unique ideological perspective. Although many have noted that equating money with speech as a means

essary corrective steps have not been taken, indeed, they never seem to have been seriously entertained." *Id.* at 226. Rawls was writing in 1971, as the campaign finance reform issue was about to re-emerge as a central issue in American politics.

92. *But see* Wiseman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical*, 10 HASTINGS CONST. L.Q. 315, 392-93 (1982) (documenting the influence of modern political philosophers, including Rawls, on constitutional law commentators).

93. To be more precise, the Supreme Court has not ruled out *all* avenues to greater political equality. *See infra* text and accompanying notes 192-200. It has, however, ruled out or created loopholes in most of the approaches tried by federal, state, and local governments. For more on the havoc wreaked by the annulments and loopholes caused by Court rulings, see Darr & Tifft, *Campaign Finance Reform Fails in Essential Mission*, Legal Times of Wash., Apr. 20, 1981, at 8, col 1.

94. 198 U.S. 45 (1905). This case invalidated a New York statute that forbade bakery employees from working more than 10 hours a day or 60 hours a week, on grounds that government intervention to protect workers violated the right of freedom of contract between employee and employer, and thus violated the free market system. For an analysis comparing current Supreme Court doctrines on campaign finance to the Court's approach in *Lochner*, see Note, *supra* note 38, at 1853.

95. For an analysis of this point, see M. EDELMAN, POLITICAL LANGUAGE (1977).

of protecting the influence of money in politics is already an ideological leap,[96] to do so under the concept of free speech can easily lead to confusion. The Court is saying simultaneously that free speech is not free, and that some should apparently have more free speech than others. The rich must be protected in their free speech, which others obviously do not have.[97]

If the government wants to subsidize the rights of the majority via the fairness doctrine, tax credits, or matching funds,[98] it may do so—but it is under no constitutional obligation to so act. The government *is* obligated *not* to infringe on the fundamental rights of the wealthy to spend whatever they want on their own campaigns, in independent expenditures on any other races, or in expenditures or contributions to ballot propositions.[99] The exercise of our constitutional rights of free speech *requires* the amount of money that only a few in our society have.

C. Corporate Free Speech and Ballot Propositions

Much of the Court's reasoning in *Buckley* was amplified and extended in *First National Bank of Boston v. Bellotti*,[100] a case decided two years later by a 5-4 majority.[101] In *Bellotti*, the Court protected

96. *See, e.g.*, Wright and Freund, *supra* note 34, and the comments of Justice White, cited *supra* note 81.

97. *See* L. TRIBE, *supra* note 47, at 1135. In this case, however, it is not at all clear that Tribe is correct when he states that "whatever the doctrinal strains, the Burger Court will not refuse lifelines to those about to drown, even if it will throw them from a point perched safely above the disquieting signs of distress . . . ." *Id.* at 1135. Rather, the Court reluctantly allows *other* branches of the government to throw lifelines, but does so *only* if the rescues still preserve "plenty of room at the top." *Id.* The result is that many ordinary citizens drown.

98. To receive matching funds one must first have raised a certain amount of money. For this reason Fleishman argued that having an exclusively monetary measure to qualify for government subsidies violated the equal protection of those without significant financial resources. Fleishman, *supra* note 53, at 885-96. On many of the points discussed the Court could have given much more sympathetic treatment to constitutional bases supporting greater equality of access to the political process. It did not do so because it was not in sympathy with the goal.

99. *See infra* text accompanying notes 100-39.

100. 435 U.S. 765 (1978).

101. Changes in Court personnel were likely crucial in the outcome of the case. Four of the five Justices appointed by Presidents Ford and Nixon were in the majority. For comprehensive works on *Bellotti*, see Fox, *Corporate Political Speech: The Effect of* First National Bank of Boston v. Bellotti *Upon Statutory Limitations on Corporate Referendum Spending*, 67 KY. L.J. 75 (1978-79); Kiley, *PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear After* First National Bank v. Bellotti, 22 ARIZ. L. REV. 427 (1980); Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Cam-*

from state interference the right of corporations to spend unlimited funds on ballot propositions.

The case arose in Massachusetts,[102] a state that has had a long history of litigation over legislative attempts to limit corporate spending on ballot proposals.[103] The law challenged by corporations in *Bellotti* was a moderate reform measure that prohibited corporate spending on ballot proposals in which corporations were not "materially affected" by the outcome.[104] Corporations, however, feared that if this prohibition were upheld, limits on campaign contributions might be placed on "materially affected" corporations.[105] The Massachusetts law stipulated that a personal income tax (as opposed to a corporate income tax) did not "materially affect" corporations.[106] As a result, corporations were forbidden from spending corporate treasury funds to oppose a referendum instituting a progressive personal income tax.[107]

The Supreme Court side-stepped the historically thorny question of to what extent a corporation could be considered a "person" entitled to First Amendment rights of free speech.[108] Justice Powell, writing for the majority, couched the matter in terms of the citizen's right to hear all sides of an issue, including a corporation's speech.[109]

In *Bellotti*, the Court refined the concept of *quid pro quo* corruption enunciated in *Buckley*, holding that ballot propositions concern

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paign Contributions and Expenditures, 65 CORNELL L. REV. 945 (1980); Patton & Bartlett, *supra* note 27; Note, *supra* note 38.

The critique of aspects of the Court's reasoning set forth in this Article is not meant to imply that the Massachusetts law was without fault. The purpose here is to show that the reasoning the Court employed reveals certain unarticulated, ideological premises. For critiques of the Massachusetts law, *see, e.g.*, Nicholson, *supra* and Fox, *supra* note 101.

102. 371 Mass. 773, 359 N.E. 2d 1262 (1977).

103. For a thorough discussion of the history of *Bellotti*, see Fox, *supra* note 101.

104. MASS. ANN. LAWS ch. 55, §§ 8-88a (Michie/Law. Co-op. 1978). "No corporation . . . shall . . . expend or contribute . . . any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."

105. Oral Argument, *Bellotti*, 435 U.S. 765 (Nov. 9, 1977).

106. MASS. ANN. LAWS ch. 55, §§ 8-88a (Michie/Law. Co-op. 1978). "No question submitted to the voters solely concerning the taxation of the income property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

107. Fox, *supra* note 101, at 77-78. The provision of the Massachusetts Constitution which allows income taxes has always forbidden graduated rates, *see* MASS. CONST. amend. art. 44, and voter approval is required to amend the Constitution. *See* Fox, *supra* note 101, at 78 n.21.

108. 435 U.S. at 776-78.

109. *Id.* at 777. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.*

ideas, not people, and therefore could not be bought.[110] Although the *Buckley* decision contained some factual analysis of the role and impact of money, the Court there was internally inconsistent—at times demanding proof of adverse effects and at other times merely assuming that certain practices could lead to corruption, the appearance of corruption, or to the undermining of voter confidence.[111] In *Bellotti* the Court consistently demanded a higher level of proof: "[T]he risk of corruption,"[112] "undue influence," or destruction of "the confidence of people in the democratic process and the integrity of government"[113] all needed to be supported by "record or legislative findings."[114]

In light of the Court's emphasis on empirical evidence, how such evidence was used, or not used, in the Massachusetts case is worthy of note. Four years before the 1976 referendum, Massachusetts voted on a graduated personal income tax measure. The referendum was defeated by a wide margin, with corporations opposing the measure spending far more than proponents.[115] In 1976, with the new Massachusetts law in effect, corporate treasury funds could not be spent to oppose the measure, but the measure was still defeated. From this Justice Powell concluded that "any inference that corporate contributions 'dominated' the electoral process on this issue is refuted by the 1976 election."[116]

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110. 435 U.S. at 790. "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Id.* See Shockley, *supra* note 67, for a discussion of this subject in greater detail.

111. A number of scholars have commented on this point, using a variety of examples. *See* Chevigny, *The Paradox of Campaign Finance*, 56 N.Y.U. L. REV. 206, 207 (1981); Leventhal, *supra* note 50, especially at 358-59; Mickenberg, *supra* note 69, at 529, 538, 539 n.73; Schneider, Buckley v. Valeo: *The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852, 854 (1976).

112. 435 U.S. at 790.

113. 435 U.S. at 789-90. Powell tempered the decision by stating that if evidence were marshalled to show that "corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration." *Id.* at 789. *But see infra*, text accompanying notes 137-38.

114. 435 U.S. 789-90. See *infra* text accompanying notes 137-38. The Court did not say what kind of evidence would be considered convincing.

115. 435 U.S. at 811 (White, J., dissenting). "The Committee for Jobs and Government Economy . . . raised and expended approximately $120,000 to oppose the proposed amendment, the bulk of it raised through large corporate contributions. . . . In contrast, the Coalition for Tax Reform, Inc., the only political committee organized to support the 1972 amendment, was able to raise and expend only approximately $7,000." *Id.*

116. 435 U.S. at 790 n.28. Even on this point, logic might have led to a different result. In *Bellotti*, Powell carefully emphasized the right of listeners to hear all sides, and avoided a decision on whether or not corporate rights to First Amendment freedoms should be viewed as coextensive with those of natural persons. Given this emphasis on the listeners, the Court

Justice Powell's conclusions may have been premature. The 1976 results did prevent reformers from arguing that without corporate spending in opposition, the side in favor of progressive taxation would win. But the Court failed to recognize that despite the prohibition on direct corporate spending, the forces against the proposal still had ten times as much money at their disposal as did the proponents.[117]

Of equal importance to these totals is the fact that corporations *were* able to spend money fighting a variety of other Massachusetts ballot proposals in 1976 in which they would have been "materially affected" by the outcome. A record-breaking $3,000,000 in corporate funds was used to defeat a variety of proposals in the state.[118] On three of these measures, corporations and trade associations made the same arguments that were used against the graduated personal income tax proposal. Corporations charged that these measures would hurt the "business climate" of the state, leading to relocation of plants in other states or to a slowdown in growth, resulting in a loss of jobs, and a weakening of the already slack Massachusetts economy.[119] Two days after the election, the *Boston Globe* remarked that, "Massachusetts business flexed its political muscle Tuesday as never before, climaxing a massive spending campaign and an unprecedented grassroots drive with the defeat of four economic referendums, capitalizing on the growing public concern over the state's economy."[120]

An examination of the 1976 campaign in Massachusetts therefore does not lead to the conclusion that Justice Powell reached. If anything, analysis reveals the weakness and limitations of the Massachusetts law. The statute did not stop corporations from pouring millions

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could have concluded that the public was hearing corporate points of view quite adequately without direct corporate spending because the voters rejected the referendum.

117. Opponents spent approximately $115,000 in individual contributions in 1976, while proponents mustered only $10,000. Boston Globe, Nov. 3, 1976, at 7, col. 2. This most likely occurred because corporate personnel were still free to spend their own wealth to present their own point of view. The sources of the $115,000 may never be known because the state of Massachusetts accidentally destroyed the contribution records for the 1976 elections. Interview with Steve Lydenberg, a research associate for the Council on Economic Priorities, Brookline, Massachusetts, Summer, 1982.

118. Boston Globe, Nov. 4, 1976, at 1, col. 4. These included proposals for a public power authority, uniform electric rates that would end discrimination against small users, a ban on certain private handguns, and the imposition of a mandatory 5¢ deposit on bottles and cans. *See* P. Guzzi, *Massachusetts Information for Voters* (1976).

119. For example, see advertisements against flat utility rates and the bottle bill. Boston Globe, Nov. 1, 1976, at 9, 16; Nov. 2, 1976, at 3; Nov. 3, 1976 at 7; and Nov. 4, 1976, at 9. The latter article includes a statement by then Representative Barney Frank: "The argument that we must give first priority to improving the climate for business is about the most powerful political force currently operative in Massachusetts." *Id.*, Nov. 4, 1976, at 9.

120. Boston Globe, Nov. 4, 1976, at 1, col. 4.

of dollars into the state's referendum campaigns. In fact, corporate contributions may have dominated the Massachusetts electoral process in 1976.[121]

Having disposed of the corruption and domination issues,[122] the majority was able to protect powerful economic interest in the political process. Yet Justice Powell's arguments in *Bellotti* are curiously different from those he made only six years earlier in another case involving limits to campaign spending, *Pipefitters v. United States*.[123] In *Pipefitters*, Justice Powell, joined by Chief Justice Burger, dissented from the Court's holding that under federal law, unions could maintain a political fund so long as money was collected from voluntary contributions and went into a separate funding account.[124] Powell believed that allowing unions and corporations to amass contributions for political campaigns would "have a profound effect upon the role of labor unions and corporations in the political life of this country."[125] There was apparently no need then for sound empirical evidence to prove the "profound effect" such money would have. Powell lamented that the holding in *Pipefitters*

> revers[es] a trend since 1907, [and] opens the way for major participation in politics by the largest aggregations of economic power, the great unions and corporations. This occurs at a time, paradoxically, when public and legislative interest has focused on limiting—rather than enlarging—the influence upon the elective process of concentrations of wealth and power.[126]

He reasoned that allowing voluntary contributions from union members

> goes a long way toward returning unions and corporations to an unregulated status with respect to political contributions. This opening of the door to extensive corporate and union influence on the elective and legislative processes must be viewed with genuine concern. This seems to me to be a regressive step as contrasted with the numerous legislative and judicial actions in recent years designed to assure that elections are indeed *free* and

121. The Court's emphasis on empirical evidence and subsequent conclusion that corporations did not dominate the electoral process is problematic for reasons other than those already mentioned in this text. It was not established at any stage of the proceedings that corporations were not dominating the process. Even if they were not controlling the electorate, to strike down a statute such as MASS. ANN. LAWS ch. 55, § 8 (Michie/Law. Co-op. 1978) might allow corporations to dominate the electoral process in the future.

122. Further critiques of the majority's handling of these issues can be found in Justice White's dissent in *Bellotti*, 435 U.S. at 804-22.

123. 407 U.S. 385 (1972).

124. 407 U.S. 442-50.

125. *Id.* at 442-43.

126. *Id.* at 443.

representative.[127]

In contrast to his opinion in *Bellotti*, in his *Pipefitters'* dissent Justice Powell never mentioned the word "corruption" but referred to "influence,"[128] "major participation,"[129] and the "consequences"[130] and "effect"[131] of the decision upon political life in the country. In *Pipefitters* the Justice was alarmed by the increased political power which would accrue to "the largest aggregations of economic power,"[132] but saw no need for a "record or legislative findings"[133] or a "showing"[134] that union money was influencing the political process. Furthermore, Powell did not express any concern about how restrictions on campaign spending might limit the rights of hearers to become informed.

Six years later Justice Powell's reluctance to overturn "numerous legislative and judicial actions . . . designed to assure that elections are indeed free and representative"[135] had diminished considerably. *Direct* corporate expenditures (in contrast to voluntary contributions from shareholders and management) were not legal only if a state so chose, but a state could not prohibit this political participation unless it could meet the rigorous standard of showing electoral domination by corporations.[136] Even a showing of electoral domination would merely

127. *Id.* at 450 (emphasis added). Others have discussed the inconsistency between Justice Powell's *Bellotti* and *Pipefitters* opinions, including Brudney, *Business Corporations and Stockholders' Rights under the First Amendment*, 91 YALE L.J. 235, 242 (1981), and Miller, *On Politics, Democracy, and the First Amendment: A Commentary on* First National Bank v. Bellotti, 38 WASH. & LEE L. REV. 21, 22-23. Both consider Justice Powell's pro-business views as expressed shortly before he was appointed to the Court to be the most sensible way to reconcile Justice Powell's *Pipefitters* and *Bellotti* opinions. These views of the Justice are most clearly expressed in *Confidential Memorandum: Attack on the American Free Enterprise System*, WASH. REP., SUPP., Vol. 12, no. 24, Aug. 23, 1971, an article written for the U.S. Chamber of Commerce. In this article Powell states: "Business must learn the lesson, long ago learned by labor and other self-interest groups. This is the lesson that political power is necessary, that such power must be assiduously cultivated, and that when necessary, it must be used aggressively and with determination—without embarrassment and without the reluctance which has been so characteristic of American business." *Id.* The hard-hitting memorandum also describes Ralph Nader as openly seeking destruction of the American free enterprise system and calls for the Chamber to "evaluate social science textbooks" with the object of "restoring the balance essential to genuine academic freedom."

128. 407 U.S. at 443, 449.

129. *Id.* at 443.

130. *Id.* at 448.

131. *Id.* at 442.

132. *Id.* at 443.

133. 435 U.S. at 789.

134. *Id.*

135. 407 U.S. at 450.

136. Shockley, *supra* note 67, discusses the difficulty of convincing the Court that corporations are in fact dominating the process.

"merit our consideration."[137] Proving influence would likely *not* be enough: "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it."[138]

Why such a dramatic change? Justice Powell would perhaps say that *Bellotti* dealt only with ballot propositions, which do not involve the same kind of corruption as candidate races. But his concern in *Pipefitters* was with influence and power, not the narrow *quid pro quo* concept of corruption that he used in *Bellotti*.[139] Furthermore, the corporations in *Bellotti* made no claim that their political expenses came from voluntary contributions. These facts raise the issue of what ideological currents run underneath the explicit logic of the Supreme Court's campaign finance reform decisions. Does wealth (but not labor union wealth?) have certain prerogatives in society? Do the interests of the wealthy need greater protection and greater deference than ordinary citizens' needs? Analysis of *Bellotti* and *Buckley* indicates that the Court is implicitly imposing what they perceive to be a free market capitalist First Amendment upon the rest of the polity.

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137. 435 U.S. at 789.

138. 435 U.S. at 790.

139. The importance of the distinction between ballot propositions and candidate races was a subject of debate in *Bellotti*, with White fearing that "[i]f the corporate identity of the speaker makes no difference, all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day." 435 U.S. at 821.

If the test is "the inherent worth of the speech in terms of its capacity for informing the public," *id.* at 777, then the distinction between candidates and propositions should be irrelevant. In the five years since the decision, the Court has not extended its rationale to candidate elections. Moreover, in FEC v. Nat'l Right to Work Comm., 459 U.S. 197, (1982) a unanimous Court distinguished candidate from referendum elections, and concluded that regulations on candidates can be more drastic because "unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption." *Id.* at 560-61 n.7.

The Court has also distinguished corporate spending from union spending, allowing direct corporate spending without provisions to accommodate shareholders who oppose the political causes supported by the corporation, *see Bellotti*, 435 U.S. at 792-95 (1978), but prohibiting unions from requiring contributions from employees for the support of candidates or issues with which those employees disagree. *See* Abood v. Board of Educ., 431 U.S. 209 (1977). While Justice Powell might distinguish *Pipefitters* from *Bellotti* on similar grounds, his dissent consistently linked union and corporate funds together, charging that both were inimical to the democratic process. *See supra* text accompanying notes 125-27. David Ratner has discussed the Court's different treatment of corporate and union campaign funds, comparing *Bellotti* with *Abood*. Ratner, *Corporations and the Constitution*, 15 U.S.F. L. REV. 11, 25 (1981).

D. Recent Inconsistencies and Continued Insensitivities

In *Citizens Against Rent Control v. City of Berkeley (CARC)*,[140] the Burger Court further developed ideas from its previous campaign finance reform cases, although not without some awkward inconsistencies and departures from those decisions.[141] In both *Buckley* and *California Medical Association v. Federal Election Commission*,[142] the Court made a significant distinction between restrictions on contributions and expenditures, with expenditures receiving far more protection.[143] In *CARC*, the Court made no distinction between contributions and expenditures when striking down that part of Berkeley's campaign finance reform act which limited the amount that could be contributed on ballot measure campaigns.[144] In response to Justice

140. 454 U.S. 290 (1981). Thorough analyses of this opinion are Lowenstein, *supra* note 85, at 584-602, and Nicholson, *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 ECOLOGY L.Q. 683, 737-42 (1981). Reviews of *CARC* here will be selective, and will focus upon aspects of the Court's implicit and explicit reasons for striking down the law.

141. It is significant that in two cases decided the term previous to *CARC*, the Court further protected corporations from governmental restrictions on their political activity. In Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980), the Court ruled that the state of New York could not prohibit corporate advertising inserts in customer utility bills. These inserts had extolled the benefits of nuclear energy, obviously a controversial matter of public policy. In Central Hudson Gas & Electric v. Public Serv. Comm'n, 447 U.S. 557 (1980), the Court had struck down another New York Public Service Commission regulation which had prohibited the promotional advertising of electricity by the public utility.

142. 454 U.S. 270 (1981). In this case the Court upheld federal limitations on contributions to multicandidate political committees.

143. The majority opinion in *Buckley* stated that contribution limitations entail "only a marginal restriction upon the contributor's ability to engage in free communication," 424 U.S. at 20-21, but that "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do limitations on financial contributions." *Id.* at 23. The *California Medical Ass'n* plurality opinion written by Justice Marshall called contributions "speech by proxy that . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." 453 U.S. at 196 n.16.

144. BERKELEY, CAL., MUN. CODE § 2.12.425 (1977). These provisions were narrowly upheld by the California Supreme Court in Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980) (4-3 decision). Berkeley's initial, more comprehensive measure was invalidated in Pacific Gas & Elec. Co. v. City of Berkeley, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976). For a discussion of the California Supreme Court's treatment of *CARC*, see Burns, Citizens Against Rent Control v. City of Berkeley: *Constitutionality of Limits on Contributions in Ballot Measure Campaigns*, 69 CALIF. L. REV. 1001 (1981); Gaynor, *Preventing Corruption in the Electoral Process: The California Supreme Court Expands the* Buckley v. Valeo *Analysis of Campaign Finance Regulation to Non-Candidate Elections*, 3 WHITTIER L. REV. 431 (1981); and Note, *State and Local Limitations on Ballot Measure Contributions*, 79 MICH. L. REV. 1421 (1981).

Chief Justice Burger wrote in *CARC* that "[t]he contribution limit thus *automatically* affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression." 454 U.S. at 299 (emphasis added). This statement is inconsistent with the dis-

White's dissent and Justice Marshall's concurring opinion, both of which stressed the importance of this distinction in prior campaign finance cases, the Chief Justice simply noted that "references to *Buckley* relate to contributions to *candidates* and their committees; the case before us relates to committees favoring or opposing *ballot measures*."[145] This statement indicates that, as in *Bellotti*, the Court did not believe "corruption" was possible in proposition campaigns; hence, the distinction between contributions and expenditures was superfluous.[146]

Perhaps sensitive to charges that the Supreme Court's campaign finance reform cases were revealing a commitment to defend existing wealth distributions and their prerogatives in American society, Burger tried to frame the Court's decision in *CARC* to show that the Court was actually acting to protect the rights of the non-wealthy. He stated that under the Berkeley ordinance, "an affluent person can, acting alone, spend without limit to advocate individual views on a ballot measure. It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted . . ."[147]

Burger did not note that the original Berkeley ordinance restricted both contributions and expenditures and was far more comprehensive. The reason the current statute was modified to restrict contributions but not expenditures was the Court's decision in *Buckley v. Valeo*![148] The city of Berkeley was trapped in a "Catch-22" situation: To effectively limit the power of the affluent through expenditure restrictions would result in the ordinance being struck down as a violation of the First Amendment under *Buckley*; to selectively restrict the power of the affluent by requiring direct expenditures over the contribution limit opened the city to the attack that the city was showing favoritism to the

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tinction drawn between contributions and expenditures. Though he ignored precedent, the Chief Justice was at least consistent with his own position, as he dissented from this distinction in *Buckley*. 424 U.S. at 235 (Burger, J., concurring in part and dissenting in part).

145. 454 U.S. at 299 n.6 (emphasis in original).

Chief Justice Burger also stated that "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment." *Id.* at 296-97. This "single narrow exception," contributions to candidate races, nonetheless involves the vast majority of all electoral contests in the country.

146. There is growing evidence that voters are more susceptible to domination by monied interests in ballot proposition campaigns than in partisan races, and that the undermining of voter confidence or undue influence may be occurring more systematically in proposition campaigns than in candidate elections. For a further discussion of this point see Magleby, *infra* note 180 at 300-16, and accompanying text.

147. 454 U.S. at 296.

148. Interview with Natalie West, Berkeley City Attorney, in Berkeley, California (Spring 1982).

rich by allowing them an alternative unavailable to less affluent individuals, and was trampling on the associational rights of the less affluent. The Court adopted this criticism of the second approach,[149] courageously striking a blow for the non-wealthy. Apparently, there was no way Berkeley could win as the arguments kept changing to meet each attempted refinement of the original campaign finance reform act passed by the voters of the city in 1974.[150]

Upon examination, Burger's concern for the non-wealthy showed again an insensitivity to the conditions of the majority of American citizens. Since the municipal ordinance allowed contributions up to $250 per person per measure, his concern for the non-wealthy referred only to those who were able to give *more* than $250, but did not have the necessasry funds to spend directly to cover "the cost of a single mailing to each of the 71,088 persons registered to vote in Berkeley, which in 1977 was $12,800," or "[t]he cost of a full-page advertisement in a Berkeley area newspaper, the *Independent Gazette*," which in 1977 was $1,620.[151] The Supreme Court's concern was not with the violation of the rights of free speech and free association of the majority of individuals for whom a per person contribution of $250 to a single municipal campaign would be either impossible or a considerable personal sacrifice. The Court's concern was for those who were financially able to contribute *more* than $250.[152]

149. 454 U.S. at 295-96.

150. *Id.* at 296 n.5. In fact the Berkeley ordinance was not entirely clear on the distinction between a contribution and an expenditure. In oral argument (Oct. 7, 1981), City Attorney Natalie West said that the distinction centered on whether the person retained control over how the money was spent.

151. Justice White, for example, noted that the measure was "tailored to the odd measurements of *Buckley* and *Bellotti*. Precisely because it reflects those decisions, the ordinance regulates contributions but not expenditures and does not prohibit corporate spending. It is for that very reason perhaps that the effectiveness of the ordinance in preserving the integrity of the referendum process is debatable." 454 U.S. at 303-04 (White, J., dissenting). Lowenstein, *supra* note 85, at 598-601, argues that contribution limitations without expenditure limitations would nonetheless help reduce the influence of money in ballot proposition campaigns.

152. The appellant's brief stated this point succinctly: "The right to speak implies the right to be heard. With an electorate of tens of thousands of voters in Berkeley, a single effort to convey one's views to the electorate on any measure requires at a minimum a sizeable advertisement in a newspaper of wide circulation, a general mailing, a radio speech, or television time. Such communications require substantial funds. A campaign sufficient to win the attention of the voters and to express the facts, views and reasons may well require extensive use of all these media. In today's context, to limit one's "voice" to $250 is to stifle it." Appellant's Reply Brief, Oct. 5, 1981, at 1-2.

Granted, wealth discrimination in *CARC* was less dramatic than the $50,000 limit struck down in *Buckley*. Burger was quick to squelch any idea that a higher limitation might be constitutional: "To place a Spartan limit—or indeed any limit—on individuals

In a view equally insensitive to the plight of ordinary citizens, Chief Justice Burger found unconvincing Berkeley's rationale that the ordinance should be upheld on the ground that it furthered disclosure of the source of funds in ballot proposition campaigns:

> [T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under § 112 of the ordinance, which requires publication of lists of contributors in advance of the voting.[153]

Chief Justice Burger assumed that ordinary voters would go down to the courthouse to check over the list of contributors to a municipal ballot proposition, or that, under Berkeley's stricter disclosure statute, they would read the list of contributors which must be run in local newspapers.[154] Strong evidence exists, however, which shows that most voters are not so conscientious, and that even if the one side tries to make an issue of the sources of an opposing side's funding, many voters will not receive the message.[155] When disclosure is not concurrent with the advertising message, voters are unlikely to assess the credibility of the message before their perception of the issue is established.[156] With limited and often obscure disclosure weeks or months after the advertising, voters cannot easily evaluate the hidden agendas that may accompany ballot proposition campaigns, nor translate the sometimes deliberately misleading names of political committees formed in support of or in opposition to ballot measures.[157]

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wishing to band together to advance their views on a ballot measure . . . is clearly a restraint on the right of association." 454 U.S. at 296. In contrast to the argument advanced by the appellants, Chief Justice Burger went so far as to imply that the modified law was ineffective because it placed limits on associational rights while it "does not seek to mute the voice of one individual." *Id.*

153. 454 U.S. at 298.

154. Election Reform Act of 1974, Ord. No. 4700-NS, § 112.

155. Perhaps the best evidence on this point comes from a study by the Rand Corporation of the 1976 nuclear safety initiative in California. This research showed a surprising lack of knowledge by voters on the sources and amount of campaign funds being spent. In a post-election poll, only 37% of those who voted on the proposition knew that there was more advertising on the "no" side. Yet the opposition had spent roughly three million dollars more than proponents (or nearly four times as much), and supporters had tried to make this fact a major issue in the campaign. D. HENSLER & C. HENSLER, EVALUATING NUCLEAR POWER: VOTER CHOICE ON THE CALIFORNIA NUCLEAR ENERGY INITIATIVE 128 (1979).

156. *See* Nicholson, *supra* note 140, at 711, and Lowenstein, *supra* note 85, at 562-63.

157. Chief Justice Burger acknowledged in *CARC* that committees "often adopt seductive names that may tend to conceal the true identity of the source of funds." 454 U.S. at 298. Although not discussed in particular by the Chief Justice, Berkeley has had frustrating examples of misleading, "seductive" names in its municipal ballot proposition campaigns. One example, cited by Berkeley City Attorney Natalie West in oral argument before the United States Supreme Court on Oct. 13, 1981, concerned a measure allowing for municipal

In *CARC*, the Supreme Court revealed its apparent naivete towards the political process as experienced by ordinary voters,[158] and again showed its bias towards the practices of the upper class and upper middle class, for whom large contributions and careful reading of lists of contributors to campaigns may come easily.

III. The Impact of Judicial Activism

There has been considerable speculation as to the impact on American politics of the Supreme Court's activity protecting monied interests in the electoral process.[159] Hard evidence is difficult to develop, but it is undeniable that the Court's campaign finance decisions have affected who has won and who has lost elections, the nature of the

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ownership of electric facilities for the city. A "Southwest Berkeley No No No on W Committee" was formed to oppose the measure, but *all* of its contributions came from one source, Pacific Gas & Electric Company. The title was even more deceptive than it first appears, in that Southwest Berkeley is the minority section of the city.

158. To speak to the "naivete" of the Supreme Court will strike some as unduly charitable. The Court may indeed recognize the class bias of their arguments in *CARC*, as they more likely do in their view of the "restraints" that the $50,000 limitation places on candidates for federal office. Motives, however, are no more important than results, and the charity of John Stuart Mill may be accurate here. *See* MILL, *supra* note 88, at 216-17.

159. *See, e.g.*, Church, *Slinging Mud and Money*, TIME, Nov. 15, 1982, at 43. Of the 33 Senators elected in 1982 "27 outspent their opponents, frequently by wide margins in close races." *Id.* The Church article contends that "escalating spending is undermining the political process," because it "tends to confine political office to candidates who are either independently wealthy or willing to sell their votes to the proliferating political action committees (PACs) of special-interest groups." Edward Roeder, author of a directory of PACs, is quoted as saying: "Many Senate seats have been bought but not yet paid for. We will see whether they are put up for sale." *Id.*

Discussing the 1982 elections, Representative Guy Vander Jagt, chairman of the Republican Congressional Committee, stated that but for the Republicans' superior funding, the GOP might have lost "40 or 50 or 60" House seats. NEWSWEEK, Nov. 15, 1982, at 34. Likewise, Nancy Sinnott, executive director of the National Republican Congressional Committee, commented that Republican money "preserved many seats that might have gone down otherwise." Clymer, *Campaign Funds Called a Key to Outcome of House Races*," N.Y. Times, Nov. 5, 1982, § 1, at 1, col. 5. Clymer noted that "the Republicans . . . won just 43.7 percent [of the national vote for the House of Representatives], a percentage that might have cost them 44 seats instead of 26 if past results proved predictive." *Id.* at B10, col. 3.

Analysis of the results of daily polling by candidates shows that new advertisements and different themes can make a considerable impact on voter opinion. *See, e.g.*, L. SABATO, THE RISE OF POLITICAL CONSULTANTS ch. 6 (1981); Dionne, *The Voters Make Some Pollsters Losers Too*, N.Y. Times, Nov. 7, 1982, at E4; Blumenthal, *Media and Illusion*, WORKING PAPERS MAGAZINE, July/Aug., 1982, at 46, 49-50. While much evidence of this sort exists, it is generally available only to those who conducted the polls, generally wealthy candidates, thereby further perpetuating a monied bias in campaign techniques and sophistication.

campaign process, and public policy.[160] A series of complementary trends, including the decline of partisan identification and increasingly sophisticated campaign techniques, indicates that money is becoming more important in our political process.[161] Both campaign laws and the judicial response to these laws are premised on the idea that money makes a difference in the electoral and governing process. If money was not seen as important to political campaigns and government, there would be little need for regulation, and little controversy on the subject.[162] Rather than engage in a review of the best attempts at methodological techniques for isolating the specific role of money in politics,[163] this Article will note the multifaceted ways in which money

160. Observers have noted that political consultants and pollsters are an enormous "growth industry" as campaigns have become increasingly expensive. *See, e.g.*, SABATO, *supra* note 159 at ch. 3, and Drew, *Money and Politics*, THE NEW YORKER, Dec. 6, 1982, at 54-149, and Dec. 13, 1982, at 57-111. This is just what some have feared. *See, e.g.*, Wright, *supra* note 38, at 620-22. Numerous commentators have speculated on the impact escalating contributions are having on public policy. *See, e.g.*, Green, *Political PAC-MAN*, THE NEW REPUBLIC, Dec. 13, 1982, at 18; Osborne, *Can This Party Be Saved?*, WORKING PAPERS MAGAZINE, July/Aug., 1982, at 36. A main difficulty is assessing causation. What Alexander heard said over twenty years ago is still true: [There is] [n]o neat correlation . . . between campaign expenditures and campaign results. Even if superiority in expenditures and success at the polls always ran together, the flow of funds . . . might simply reflect . . . prior popular appeal rather than create it. Our understanding of voting behavior is not so precise that all the financial and non-financial factors that contribute to success can be sorted out with confidence. Yet it is clear that under some conditions the use of funds can be decisive. And under others no amount of money spent . . . could alter the outcome . . . . A. HEARD, THE COSTS OF DEMOCRACY 16 (1960).

Debate rages over the extent to which special interest groups are literally "buying" favors or whether they are giving to politicians who already support their views and would support them regardless of their expenditures. While both undoubtedly occur, Drew offers some dramatic examples of the influencing of public policy through contributions. Drew, *supra* at 80-92, 131-34. To the extent that Drew and others of like view are correct, the Supreme Court in *Buckley* was wrong in asserting that expenditure limits are superfluous for preventing corruption as long as contribution limits exist. With the proliferation of PACs and other forms of giving, candidates can become increasingly indebted to monied interests even as contribution limits are retained. *See* Lowenstein, *supra* note 85, at 597 n.347.

161. *See* Wright, *supra* note 38, at 620-21, and Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569 (1968).

162. While this point may appear obvious, it has occasionally given the judiciary trouble. The Supreme Court has reasoned that money is not dominating the electoral process, but is so important its use must be protected. *See supra* Part II. When the government has spent sums on ballot propositions, opponents, even if wealthy, have been known suddenly to argue that the government expenditure will cause them "irreparable harm." *See, e.g.*, Mountain States Legal Found. v. Denver School Dist. 459 F. Supp. 357 (D. Colo. 1978). *See generally* Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980) (discussion of the issues involved in government spending on ballot propositions).

163. Professor Gary Jacobson has developed a sophisticated method of isolating the impact of money in campaigns by assessing the differential impact of partisanship, incum-

influences our electoral campaigns, and suggest ways in which future research might better document its impact.

The perception that money "buys" elections influences our polity. It frustrates many people without adequate resources in their attempts at running for office.[164] In addition to those who cite money as a reason for dropping out of a campaign, undoubtedly far more never enter a race because of their obvious financial weaknesses. The number of voters who have dropped out of the system or never become involved, because of what they see as a deck stacked in favor of the rich, is equally significant.[165] Furthermore, startling examples of victories by unknown or little-known candidates with strong financial backing suggest that money can be decisive in political campaigns.[166]

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bency, and money. G. JACOBSON, *supra* note 79. He has found money to make a difference, although it has seemed far more helpful to challengers than to incumbents. *Id.* at chs. 2, 5. The method by which he implements his two-stage least squares simultaneous equation model has been called into question by Welch, *Money and Votes: Simultaneous Equation Model*, 36 PUB. CHOICE 209 (1981).

164. Although many known examples of this exist, two will suffice: "I'll tell you something has to be done," said State Senator Peyton McKnight, a millionaire Texan who dropped out of the 1982 gubernatorial primary election because campaigning was too expensive. "You've got to be immensely wealthy to run for office. There's something wrong when anybody can't run for office and there are fewer and fewer people voting. I don't know what the answer is." The Texas Observer, Sept. 17, 1982, at 14. An older story makes the same point: "After the last dollar was spent in Oklahoma's Democratic senatorial primary, U.S. Senator Robert Kerr turned in a report of his personal campaign expenses to the state election board. The amount: $2,675. The Board was awaiting a report from former Governor Roy Turner, who ran some 30,000 votes behind Kerr . . . but Oklahomans knew that his total would be no more than $3,000, because state law limits individual campaign expenses to that amount. Actually, Oklahoma observers estimated that about $1,000,000 was spent in Kerr's campaign . . . The campaign of Turner . . . cost about half a million. When Turner started telephoning his friends last week to talk about the forthcoming runoff primary, he found his outside financial sources pretty well dried up. Furious, he charged that "deluges of money" had been spent to defeat him, and that "pressure" had prevented many of his friends from advancing more funds. The same day, Turner announced his withdrawal from the runoff, virtually handing the Senate seat to Kerr. Roy Turner, only a millionaire, had decided that he could not match campaign dollars with multimillionaire Bob Kerr. TIME, July 26, 1954, at 15, quoted in Newman, *Money and Elections Law in Britain—Guide for America?* 10 W. POL. Q. 582 (1957).

165. Apparently, there have not been any studies on this point, although some have examined the motives of non-voters. *See, e.g.*, W. CROTTY & G. JACOBSON, AMERICAN PARTIES IN DECLINE 22-25 (1980). An obvious difficulty in conducting such a study is isolating the money factor from other sources of alienation and estrangement.

166. *See, e.g.*, Spiegel, *Surprise Showing by GOP Candidate Probed*, L.A. Times, Aug. 19, 1982, at II, 1, col. 1. In this case an unemployed, sick, and unknown GOP candidate narrowly lost the primary; her near upset victory undoubtedly occurred because $40,000 was mysteriously funneled into her race shortly before the election. Primary elections are particularly susceptible to the power of money because partisanship is not a factor and multicandidate races leave many voters uninformed and undecided.

Public financing of political races in the United States, albeit of limited extent, also illustrates the significance of money in politics. In general, more candidates enter these races.[167] Of course, races with numerous candidates crowding the ballot may not be desirable because many candidates might lead to voter confusion or disillusionment. Even so, one must ask whether the appropriate screening procedures for candidates should be wealth or some procedure more in concert with the stated ideals of a democracy, such as voter support indicated by a candidate collecting a minimum number of signatures[168] or attracting broad financial support through modest contributions.

With the increase in spending for federal offices has come heavy personal spending by wealthy candidates,[169] which may be responsible for the record number of millionaires in the Senate.[170] The growth of independent spending, including negative independent spending,[171] attests to the considerable use of practices that would have been outlawed except for the Supreme Court's decision in *Buckley v. Valeo*.

The precise impact of these influences is difficult to measure because it varies with other factors which also influence the electoral process. It is likely, however, that campaign finance laws, such as public financing, were decisive in the election of some candidates,[172] and that the Court's invalidation of campaign finance reform measures resulted

167. The large field entering the 1981 New Jersey gubernatorial race, which was waged with public financing of the primary as well as general election, is indicative of this trend. *Large Primary Field for New Jersey Governor*, CONG. Q., May 16, 1981, at 861; *Must New Jersey Pay the Piper Because It Pays the Candidates?*, N.Y. Times, May 31, 1981, at E 6, col. 4. Although the low threshold to qualify for funds was criticized, it contrasts with and hence highlights the barrier money normally erects in our political process.

168. For further discussion on this point, see Fleishman, *supra* note 14, at 349-50.

169. For accounts of pressure to spend personal resources on campaigns, see Firmage & Christensen, *supra* note 84, at 210-12. For the increase in personal spending, see Chevigny, *supra* note 111, at 211, and Crotty & Jacobson, *supra* note 165, at ch. 6.

170. CROTTY & JACOBSON, *supra* note 165, at 107. Note that by 1978 over 40% of all United States senators were millionaires. The figure has increased from both the 1980 and 1982 elections. Of course inflation might partially account for the increase in millionaires.

171. For works on the growth of independent spending and negative independent spending, see Nesbit, *supra* note 2, and Bannon, *NCPAC in the 80's: Action v. Reaction*, 4 CAMPAIGNS & ELECTIONS 36 (Winter 1983).

172. A number of scholars think that Jimmy Carter's capture of the Democratic party nomination and his victory against President Ford in 1976 were facilitated by the new laws governing public financing of presidential elections. *See, e.g.*, Abrams & Settle, *Economic Analysis of Federal Election Campaign Regulation*, 2 RESEARCH IN LAW & ECONOMICS 129 (1980), and Alexander, *"Equal Time" Election Reform: A Mixed Blessing*, 1 CAMPAIGNS & ELECTIONS 9 (Fall 1980).

in the election of other candidates.[173]

Evidence from congressional races indicates that money spent by challengers is more important than money spent by incumbents.[174] With this evidence in mind, scholars are divided over what is the best method of limiting the impact of money in politics. Some suggest government funding floors: government funds would provide candidates a minimum level of finances high enough to insure a credible campaign.[175] Others promote ceilings on funding: contributions or expenditures above a certain amount would be prohibited, as in the ill-fated 1974 act.[176] In part, this disagreement comes from a dispute over whether too much is being spent on campaigns, or too little.[177] Apparently no scholars, however, are comfortable with present government regulations, or lack thereof, and the impact money is now having on our political process.[178]

It appears that money is an even greater factor in ballot propositions than in candidate elections, although success is heavily tied to the money being spent in opposition to measures rather than in support.[179] When voting on a ballot proposition, one does not have the orienting devices of party labels or candidate names to serve as anchors.[180] In addition, because some issues present problems of great complexity, the electorate sometimes votes against something for which they actually

173. Jacobson believes that the 1974 expenditure limits on congressional races would have prevented several wealthy challengers from winning office. JACOBSON, *supra* note 79, at 209-14.

174. *See id.* at chs. 2, 5.

175. *See, e.g.*, SABATO, *supra* note 159, at 330-37; Alexander, *supra* note 172, at 12 and Ranney, *Regulating the Referendum*, THE REFERENDUM DEVICE ch. 5 (A. Ranney ed. 1981).

176. The Supreme Court's decisions in *Buckley*, *Bellotti* and *CARC* have made this alternative unfeasible. It is interesting to note that those advocating floors feared that ceilings set too low would prevent challengers from mounting credible campaigns, and that the reforms would become an "incumbent protection" act. *See, e.g.*, JACOBSON, *supra* note 79, at ch. 7.

177. *See, e.g.*, SABATO, *supra* note 159, at 330-37. Alexander, has noted that: "Relatively, the dollar price of U.S. elections is not high. The $540 million spent on campaigns in 1976 was less than the total of the advertising budgets for that year of the two largest corporate advertisers, Proctor & Gamble and General Motors." Alexander, *supra* note 172, at 19.

178. After discussing more comprehensive campaign finance regulations, Chevigny comments, "It may be that we would all end up despising such a system of regulation as an administrative nightmare. Yet we must confront the proposal fully, because the present system is arguably even more objectionable." Chevigny, *supra* note 111, at 226. *See also* Ehrenhalt, *The Campaign System No One Asked For*, CONG. Q., Oct. 16, 1982, at 2703, and Darr & Tifft, *supra* note 93.

179. *See* Lowenstein, *supra* note 85, at 544-47, and Shockley, The Initiative Process in Colorado Politics: An Assessment 20-33, 39-48 (1980) (monograph).

180. For discussion on this point, see Magleby, Direct Legislation: Voting on Ballot Propositions in the United States, ch. 7 and Appendix C (1980) (Ph.D. dissertation, University of California, Berkeley) and Shockley, *supra* note 179 at 48.

approve;[181] this possibility of confusion likely increases the use of deception.

The disparity in spending between sides on ballot propositions is often much greater than in candidate races[182] for two reasons. First, most propositions do not generate party support. Second, the Supreme Court in *Bellotti* upheld the right of anyone, including corporations, unions, and trade associations, to spend unlimited amounts on ballot issues. In supporting candidates one must work through voluntary contributions to PACs[183] of limited amounts.[184] Consequently, some of the most extreme examples of monied interests overwhelming less wealthy foes have occurred in ballot proposition campaigns.[185]

The importance of this rapidly accumulating evidence is itself open to dispute because it is unclear how receptive the Supreme Court will be to newly generated empirical evidence.[186] Perhaps if studies focused on the Court's unexamined empirical assumptions, contrary evidence would lead the Court to alter its campaign finance decisions. Competent research designs will not be easy to construct. Simple correlation does not necessarily mean causation, and assessing the relative importance of money is no easy task.[187] Vagueness by the Court on what are permissible and impermissible roles for money in the electoral process has left scholars with uncertain guidelines for research.

An area that undoubtedly is worth examining is the assumption in *Buckley* that "a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by *restricting the number of issues discussed*, *the depth of their exploration*, and the size of the audience

181. Magleby discusses voter confusion on the tax measure that resulted in the *Bellotti* case, noting that lower-income and less-educated voters were more likely to vote against their stated preferences. Magleby, *supra* note 180, at ch. 5. Hensler and Hensler have also examined voter confusion over whether a vote in favor of a proposition means to support an issue or to oppose it. HENSLER & HENSLER, *supra* note 155, at § V.

182. *See* Lowenstein, *supra* note 85, at 589.

183. For discussion on how the *Bellotti* decision allows corporations to overcome the "free rider" problem inherent in voluntary organizations, see Patton & Bartlett, *supra* note 27, at 507-08; Lowenstein, *supra* note 85, at 572-78.

184. Individuals and unincorporated associations are limited in the amount that they can contribute to a PAC. *See* Richards, *In Search of a Consensus on the Future of Campaign Finance Laws:* California Medical Assoc. v. FEC, 20 AMER. BUS. L.J. 243 (1982).

185. *See* Lowenstein, *supra* note 85, at 609-32, and Shockley, *supra* note 179, at 20-33.

186. *Compare* L. Tribe, AMERICAN CONSTITUTIONAL LAW 58-59 (SUPP. 1979) *with* Kiley, *supra* note 101, at 429 n.11.

187. Organizations are often eager to claim that their activity or contributions were "responsible" for a particular outcome. For more on the difficulty of analyzing the impact of money on an election, see *supra* note 163, and Shockley, *supra* note 67.

reached."[188] With multi-million dollar campaigns routinely pouring money into spot announcements of such quality as "They're at it again! Vote NO on 5,"[189] this untested assumption is open to question. If the First Amendment "rests on the assumption that the widest possible dissemination of information from *diverse and antagonistic sources* is essential to the welfare of the public,"[190] one may validly question whether this goal is furthered by allowing wealthy individuals and corporations the judicially-created loopholes they now enjoy.

Working against amassing evidence on these unsupported judicial conclusions is the belief by some that the Court's use of empirical evidence has been so inconsistent as to indicate that data is used to rationalize conclusions rather than to influence results.[191] If this is true, only changes in judicial personnel, or different avenues to reform, will possibly effect major changes in the use of money in political campaigns.

IV. Alternative Routes to Reform

This section will attempt to explore the alternatives that might be pursued by those sharing the goals of the original campaign finance reformers. These reformers viewed their efforts to curb the impact of money in elections as a natural outgrowth of the broader effort to widen access to the political process, create greater political equality, and secure the sanctity of the ballot.[192] Such goals will not be easy to implement,[193] but it is important to remember that the Court never closed off all avenues to reform. The following alternatives are still open: public funding of political campaigns, which could include the development of floors rather than ceilings; changes in the franking privilege to benefit non-incumbents; government funding of television time; and the prohibition of paid political advertising on television and radio.[194] If banning paid political advertising is held to be unconstitutional, expansion of the "fairness doctrine"[195] and the *Cullman* corol-

188. 424 U.S. at 108-09 (emphasis added). Among others, Leventhal, *supra* note 50, has attacked this unsupported assumption.

189. *See* Lowenstein, *supra* note 85, at 585 n.292.

190. Associated Press v. United States, 326 U.S. 1, 20 (1945) (emphasis added).

191. *See supra* text accompanying notes 49-158.

192. *E.g.*, Rosenthal, *supra* note 26, at 360-61.

193. *See* JOHNSTON, *supra* note 77, at 149.

194. *See* Wright, *supra* note 38, at 642-44; and Lembke, *A Bipartisan Push for Some Campaign Finance Reforms*, CAL. ST. B. 155 (Apr. 1983). Green has discussed other ideas being considered in the wake of the 1982 elections. Green, *supra* note 160, at 24-25.

195. The "fairness doctrine" as developed by the Federal Communications Commission basically requires that broadcasters (1) devote a reasonable percentage of time to the coverage of public issues and (2) that this coverage must be fair in providing an opportunity for

lary[196] to benefit the less wealthy could be pursued.[197] Another alternative is the development of disclosure laws aimed at reaching more voters, and providing information before the advertising has effectively shaped voters' perceptions of contests. Oregon's recent approach of permitting false advertising lawsuits in campaigns, with potentially meaningful damage claims, should be closely followed and perhaps implemented elsewhere.[198] Finally, greater shareholder democracy should be pursued so that corporate spending might be better controlled and more widely disclosed.[199]

None of the reforms suggested would be a panacea. The complexities of fair standards and effective implementation on a subject as sensitive and important as the role of money in politics requires a "trial and error" approach. Each reform adopted could lead to unforeseen consequences which might affect the nature and outcome of election campaigns. Nevertheless, not to act is to acquiesce in the regularly attempted and sometimes successful buying of elections and public policy by those whose greater financial resources can dominate and overwhelm the political process.[200]

Conclusion

None of these alternatives suggested will be easy to adopt. Monied interests will likely fight these proposals; regulatory agencies, such as the Federal Communications Commission and the Securities and Exchange Commission, whose support may be necessary for implementation, have shown little sympathy, and sometimes outright hostil-

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the presentation of contrasting points of view. *See* Fairness Report, 48 F.C.C.2d 1-2, 30 R.R.2d 1261 (1974).

196. The *Cullman* principle, also discussed in the Fairness Report, states that ballot propositions are to be considered closer to general political discussion not involving elections of individuals to office, and that licensees are required to present contrasting views, even by granting free time to a side without money if necessary. *Id.*, at 31-33, 30 R.R.2d at 1302.

197. *See* Mastro, Costlow & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COM. L.J. 315 (1980).

198. *See* OR. REV. STAT. § 260.532 (1979). Shockley, *supra* note 67, at 27, discusses this approach in more detail. There are obvious difficulties with this route to reform, the most apparent perhaps being that courts are reluctant to find false advertising by candidates. The worst abuses may often be deception rather than outright lies. For examples of the difficulties, see Committee to Retain Judge Jacob Tenyer v. Lee, 270 Or. 215, 527 P.2d 247 (1974), and Kennedy v. Voss, 304 N.W.2d 299 (Minn. 1981).

199. *See* Brudney, *supra* note 127.

200. Even when financial resources are not mobilized, the knowledge that funding can enter the process surely affects campaign strategies and public policy. *See supra* note 160.

ity, to the goals of campaign finance reform.[201] When the difficulty of achieving campaign reform is viewed in light of the Supreme Court's development of a free market capitalist First Amendment, the inescapable conclusion is that money will continue to exercise considerable influence in our politics. Campaign finance reform involves higher stakes and is more complex than many of the other political process issues which have arisen in American society to foster greater democracy. In becoming a "stepchild" of this broader reform movement, campaign finance reform has exposed tensions between the ideas and practices of democracy and capitalism. On what terms these forces are ultimately compatible remains to be seen.

201. For a discussion of the FCC's lack of sympathy, see F. Heffron, The Politics of Deregulation (unpublished paper presented at the Western Political Science Association Conference, Denver, Colorado 1981). An example of dominant opinion within the current SEC is the Commission's 1982 decision overruling an SEC staff report which sought to require corporations which were guilty of breaking laws of foreign nations to disclose the wrongdoings to their shareholders. *See* NEWSWEEK, Mar. 1, 1982, at 61. If the SEC rules that even criminal behavior can be kept secret from shareholders, it is difficult to imagine the SEC requiring Corporations to report campaign expenditures to their shareholders.