

NOTE

Independent Expenditures: Can Survey Research Establish a Link to Declining Citizen Confidence in Government?

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Introduction

In the eight years since the United States Supreme Court specifically addressed campaign finance reform in *Buckley v. Valeo*¹, American politics has changed dramatically. One major change, and subject of heated controversy, is the astonishing increase in uncoordinated political activity.² In *Buckley*, the Court termed monies spent in pursuit of uncoordinated activities "independent expenditures," and held congressional attempts to put a dollar limit on independent expenditures unconstitutional under the First Amendment rights of free association and political expression.³

Opponents of unlimited spending decry the enormous amounts of money independent expenditures have injected into political cam-

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

2. Uncoordinated political activity is money spent outside of the control of the political candidate or ballot measure. According to the Court, "such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate." *Id.* at 47. As statutorily defined, "independent expenditure" is "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17) (West Supp. 1983). The term "clearly identified" means the name of the candidate involved appears; a photograph or drawing of the candidate appears; or the identity of the candidate is apparent by unambiguous reference. 2 U.S.C. § 431 (18) (West Supp. 1983).

3. 424 U.S. at 58-59 (1976).

paigns and point out that expenditures will continue to increase.⁴ Proponents of continued unlimited independent expenditures state that independent activity does not pose dangers of real or apparent corruption comparable to dangers of large campaign contributions.⁵ The United States Supreme Court has consistently refused to qualify *Buckley*, and has maintained constitutional protection for independent expenditures by holding that expenditure limits violate the First Amendment.⁶ Recent Supreme Court decisions have indicated, however, that the door may not be tightly closed to opponents of unlimited expenditures in ballot measure processes. Both the Court and individual Justices have begun to speak of an "evidentiary" record by which large sums of money contributed to or expended in ballot measure processes may come to be regulated.⁷ If such an evidentiary burden is met, the Court ultimately may be persuaded to uphold regulation of independent expenditures, just as it has already approved limitations on campaign contributions.⁸

This note will examine the origins of and prospects for this new evidentiary burden in light of recent legislative and judicial responses to corruption in government. The Federal Election Campaign Act of 1971 (FECA)⁹ and its 1974 and 1976 Amendments¹⁰ will be discussed with an emphasis on the provisions that apply to campaign contributions and expenditures. The impact of *Buckley* on FECA and the congressional response will be examined. It will be shown that the case

4. See, e.g., Wertheimer, *Fixing Election Law*, N.Y. Times, Sept. 3, 1981, at A19, col. 5.

5. The governmental interest of preventing real or apparent corruption was used to uphold the contribution limits in *Buckley*, 424 U.S. at 26, but was rejected as being insufficient to justify expenditure limits, *id.* at 45. See also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

6. See *supra* cases cited in note 5. The most recent example is the Court's decision in *Common Cause v. Schmitt*, 455 U.S. 129 (1982). See also *infra* text accompanying notes 116-136.

7. See *infra* text accompanying notes 54-115. For convenience and clarity this Note will refer to the evidence needed to establish a decline in citizen confidence as an "evidentiary burden" although the United States Supreme Court does not use the term.

8. See generally *Buckley v. Valeo*, 424 U.S. at 23-38. Title 2 U.S.C. § 441a(a)(1)(A) limits the amount an individual may contribute to a candidate or his or her authorized political committees and § 441a (a)(3) limits to \$25,000 the aggregate annual amount an individual may contribute; § 441a(a)(2)(A) limits to \$5,000 the contributions by a multicandidate political committee to a candidate or his or her authorized political committee. Multicandidate committees are not limited in the aggregate amount they may contribute. 2 U.S.C. § 441a(a)(1)(C).

9. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979)).

10. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (current version at 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979)), Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (current version at 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979)). See *infra* text accompanying note 53.

law since *Buckley* affecting independent expenditures reveals an apparent willingness by the Supreme Court to consider empirical data attempting to establish a link between large expenditures and declining voter confidence in ballot measures. The Court's willingness to consider such a record suggests a similar route by which future independent expenditures may be regulated in a candidate campaign.

I. Legislative and Judicial Response to Corruption in Government

A. Federal Election Law Before *Buckley*

While Watergate may have focused recent public attention on corruption in government, the legislature and judiciary have recognized similar concerns for over a century.¹¹ The 1970's witnessed several major congressional attempts to impose political reform upon federal election finance, in what has been described by one writer as "a flurry of legislation to eliminate what Congress perceived as potential abuses in the electoral process."¹² Title I of the Federal Election Campaign Act

11. Fourteen years before the United States Supreme Court cautioned against "the free use of money in elections," *Ex Parte Yarbrough*, 110 U.S. 651, 665 (1884), Congress enacted "the first comprehensive Federal statute dealing with corruption in elections," the 1870 Enforcement Act, ch. 114, 16 Stat. 140 (1870). The Enforcement Act focused on outlawing "every type of fraudulent and corrupt practice in connection with elections." *Id.* The Supreme Court held these laws invalid as applied to municipal elections, *United States v. Reese*, 92 U.S. 214 (1876), but constitutional as applied to congressional elections. *Ex Parte Siebold*, 100 U.S. 371 (1880).

Congress ushered in a new period of election law reform when it passed the Tillman Act in 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907), which prohibited national banks and corporations from contributing money to federal office candidates. "From that time on, campaign finances stood in the forefront of Federal election legislation." S. REP. NO. 916, 92 Cong., 2d Sess. 1841 (1972) [hereinafter cited as SENATE REPORT]. Disclosure of contributions and expenditures, the core of today's federal election law, was a major part of a 1910 congressional statute that required interstate political committees to report contributions over \$100 and expenditures of \$10 or more. Act of June 25, 1910, ch. 392, §§ 5, 6, 36 Stat. 823, 824. "All other persons making direct expenditures" of over \$50 also had to report. *Id.*

In 1925, Congress passed the Corrupt Practices Act, which, prior to the Federal Election Campaign Act of 1971 and subsequent amendments, "constitute[d] the major part of the material of the existing Federal law dealing with campaign finances." *Id.*; Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070 (codified at 18 U.S.C. § 2 (West 1977 & Supp. 1980)). In 1939 Congress enacted the Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (codified at 18 U.S.C. §§ 1, 5), which was designed "to prevent pernicious political activities" and which primarily prohibited federal employees from active political involvement. SENATE REPORT, *supra* at 1841. Amendments passed in 1980 extended the prohibition to state and local employees who received federal funds, limited individual contributions to a political committee, to any candidate or to any campaign for federal office, to \$5,000, and limited interstate political committees' annual contributions or expenditures to \$3 million. *Id.*

12. S. ROTHENBERG, CAMPAIGN REGULATION AND PUBLIC POLICY: PACs, IDEOLOGY, AND THE FEC 3 (1981).

of 1971¹³ had a twofold purpose: to give federal office candidates greater media access, and to "halt the spiraling cost of campaigning for public office."¹⁴ The FECA required disclosure of contributions, limited the amount of his or her own money a candidate could spend on a campaign and limited media advertising expenditures.¹⁵ Unlike the 1974 and 1976 Amendments which were intended to check corruption, the 1971 Act was designed to curb rising campaign costs.¹⁶

A companion piece of legislation passed the same year was the Presidential Campaign Fund Act (Fund Act).¹⁷ The Fund Act, which applies specifically to Presidential and Vice Presidential candidates who accept public funding in the general election, became effective in 1972, and limited independent expenditures made to advance any federally financed Presidential candidates to \$1,000.¹⁸

Three years later Congress passed the Federal Election Campaign Act Amendments of 1974.¹⁹ These Amendments were criticized for not including public financing of congressional elections,²⁰ nevertheless, the leader of campaign finance reform described the bill as "historic campaign reform legislation."²¹ The Chairman of the Senate Subcommittee on Privileges and Elections said the bill would help end the "misuse and corruption of power and a misguided dependence on the

13. Federal Election Campaign Act of 1971, 86 Stat. 3. S. 382 had three titles. "Title I consists of Amendments to Communications Act of 1934; Limitations on Campaign Expenditures for Non-Broadcast Communications Media; Title II, of Criminal Code Amendments, Disclosure of Federal Campaign Funds; and Title III. Tax Incentives for Contributions to Candidates for Federal Office." SENATE REPORT, *supra* note 11, at 1773.

14. SENATE REPORT, *supra* note 11, at 1774. In 1971, Congress was at a disadvantage regarding the proper limits to accompany reform measures since expenditures at that time were not required to be reported: "In all candor, it is extremely difficult to establish any limitation without having complete and accurate facts concerning existing campaign practices and expenditures. Under the present law, candidates are not required to disclose their exact expenditures. Consequently, Congress has nothing upon which to base a realistic limitation. Nevertheless, we are convinced that some limitation is necessary to curb campaign costs." *Id.* at 1856, supplemental views of Provty, Cooper and Scott (1972).

15. Federal Election Campaign Act of 1971, current version at 2 U.S.C. §§ 431-455 (West 1972 & Supp. 1980).

16. This is clear from the stated purpose of the legislation, and from the "Background and General Discussion" of the Act: "The crisis level has been reached in American Campaign spending. . . . The costs of running for public office have doubled in the last decade. . . . How are financial demands of this magnitude met?" *Id.* at 1774-77. When the Court in *Buckley* speaks of the stated purpose of the Act as being to halt corruption, presumably the 1974 Amendments to the Act are being described.

17. 26 U.S.C. §§ 9001-13.

18. *See infra* text accompanying notes 116-136.

19. Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

20. *See* CONG. Q. ALMANAC 1974 at 611, 612 (1975).

21. *Id.* at 612.

influence of large political contributors."²² Among its major provisions, the bill limited political contributions to federal office candidates,²³ limited to \$1,000 expenditures by individuals or groups "relative to a clearly identified candidate,"²⁴ specified detailed reporting and record keeping requirements of contributions and expenditures for candidates and political committees,²⁵ created the Federal Election Commission (FEC) to administer and enforce the FECA,²⁶ and instituted public financing for presidential elections.²⁷ Within two years the United States Supreme Court held that certain expenditure limitations under the Act violated the First Amendment.²⁸

B. *Buckley v. Valeo*

The Supreme Court opened its lengthy per curiam opinion in *Buckley*²⁹ with the "general principle" that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."³⁰ The Court recognized that the First Amendment protects the freedoms of political expression³¹ and political association.³² Acknowledging that political debate is integral to our system of government, the Court was equally firm in its statement that such debate may be limited: "Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.'"³³ Under certain circumstances "[e]ven . . . significant interference with protected rights of political association may be sustained . . ."³⁴

The Court recognized one such circumstance in the primary purpose of the Federal Election Campaign Act: "to limit the actuality and appearance of corruption resulting from large individual financial contributions."³⁵ The Court in *Buckley* was nearly as concerned with the appearance of corruption as it was with corruption itself, recognizing that "the impact of the appearance of corruption stemming from public

22. *Id.* at 616.

23. 18 U.S.C. § 608(b)(b)(3) (1974) (repealed 1976).

24. 18 U.S.C. § 608(e)(1)(repealed 1976).

25. 2 U.S.C. §§ 431-455 (1982).

26. 2 U.S.C. §§ 437c-439(c)(1982).

27. Pub. L. No. 93-443, §§ 403-08, 88 Stat. 1291 (1974).

28. *Buckley v. Valeo*, 424 U.S. 1. *See infra* text accompanying notes 29-53.

29. The Court's opinion, together with separate concurrences and dissents by every Justice except Brennan, Stewart and Powell, was 294 pages.

30. *Buckley*, 424 U.S. at 14.

31. *Id.*

32. *Id.* at 15.

33. *Id.* at 25 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 567 (1973)).

34. 424 U.S. at 25.

35. *Id.* at 26. The Court was apparently addressing the 1974 Amendments; the 1971 FECA addressed rising campaign costs.

awareness of the opportunities for abuse [is] inherent in a regime of large individual financial contributions."³⁶

After accepting the governmental interest in preventing the reality or appearance of *quid pro quo* corruption resulting from large contributions, the Court considered the Act's limits on political contributions and expenditures. The Court stated that both contribution and expenditure limits implicated First Amendment interests,³⁷ but sustained the constitutionality of contribution limits on the basis of the legislative intent behind the Act.³⁸ Using the post-1972 election abuses as an example, the Court stated, "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office-holders, the integrity of our system of representative democracy is undermined."³⁹

In the Court's view, the amount one may contribute to a candidate or to the candidate's authorized committee does not directly restrain the contributor's political communication because "the transformation of contributions into political debate involves speech by someone other than the contributor."⁴⁰ The act of contributing permits the "symbolic expression of support" but does not infringe upon the contributor's freedom to discuss candidates and issues.⁴¹ The Court concluded that contribution limits "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues"⁴²

The Court found the governmental interest in preventing the reality and appearance of corruption inadequate, however, when it came to restricting independent expenditures.⁴³ The Court reasoned that large

36. *Id.* at 27.

37. *Id.* at 23.

38. *Id.* at 26.

39. *Id.* at 26-27.

40. *Id.* at 21. Chief Justice Burger criticized the Court's attempt to distinguish the communication inherent in political *contributions* from the speech aspects of political *expenditures*. According to the Chief Justice, the Court merely engaged in "word games" instead of recognizing that candidates and contributors spend money on political activity to communicate ideas; their constitutional interest in doing so is the same even though someone else may utter the words. *Id.* at 244.

41. *Id.* at 21.

42. *Id.* at 29.

43. *Id.* at 45, 51. The *Buckley* opinion summarized § 608(e)(1) as providing that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000." 424 U.S. at 193. The *Buckley* Court noted that the phrase "relative to" a candidate was not defined in the Act, and stated that unconstitutional vagueness could be avoided only by reading § 608(e)(1) as indicating communications advocating the election or defeat of a candidate. 424 U.S. at 45. Nevertheless, the Court determined that even a narrowly construed § 608(e)(1) impermissibly burdened free expression. *Id.*

expenditures made independently of the candidate and his or her campaign posed little danger of corruption:

the absence of prearrangement and coordination of an expenditure with the candidate or [the candidate's] agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.⁴⁴

The majority also concluded that limits on independent expenditures could not be sustained on the basis of the governmental interest in equalizing the voices of individuals and groups seeking to influence the outcome of elections.⁴⁵ The Court then somewhat broadly proclaimed: "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."⁴⁶ The future constitutional protection of independent expenditures appeared secure.⁴⁷

In the 1976 Amendments to the Federal Election Campaign Act, Congress reworked those portions of the 1974 Amendments found unconstitutional in *Buckley*.⁴⁸ To reflect the Court's interpretation,⁴⁹ Congress also defined "independent expenditure" as one "expressly advocating the election or defeat of a clearly identified candidate . . .

44. 424 U.S. at 47.

45. *Id.* at 48-49; see *infra* text accompanying note 93.

46. *Id.* at 48.

47. Six of the eight Justices (Justice Stevens did not participate) did not object to contribution limits. Chief Justice Burger and Justice Blackmun dissented. The Chief Justice stated that limiting contributions would as a practical matter limit expenditures and the amount of political activity and debate permitted by the Government. *Id.* at 19. Justice Blackmun was unpersuaded that "a principled constitutional distinction" could be made between contribution and expenditure limits. *Id.* at 290 (Blackmun, J., dissenting).

Seven of the eight Justices agreed not to limit expenditures. Justice White joined in the Court's opinion upholding contribution limits but stated that expenditure limits should also be upheld as not violating the First Amendment. *Id.* at 259. "[T]he case depends on whether the nonspeech interests of the Federal Government in regulating the use of money in political campaigns are sufficiently urgent to justify the incidental effects that the limitations visit upon the First Amendment interests of candidates and their supporters." *Id.* at 260. White would defer to congressional judgment the issue of whether limiting independent expenditures is essential to prevent transparent and widespread evasion of the contribution limits. *Id.* at 258.

Justice White was adamant that "steps must be taken to counter the corrosive effects of money in federal election campaigns." *Id.* at 260. He predicted, "Without limits on total expenditures, campaign costs will inevitably and endlessly escalate." *Id.* at 264.

48. The Supreme Court in *Buckley* also held the Act's fixed ceilings on overall candidate campaign expenditures unconstitutional as burdening First Amendment free expression, *id.* at 55, held the Act's limits on the amount of personal expenditures by a candidate unconstitutional, *id.* at 54, and held the method of appointment of members of the FEC unconstitutional as a violation of the principle of separation of powers, *id.* at 143.

49. *Id.* at 42, 44.

made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate"⁵⁰ Other than certain reporting requirements,⁵¹ independent expenditures were not regulated, except those made by or on behalf of presidential and vice presidential candidates accepting public finance for the general election.⁵² The 1976 Amendments were the last major congressional change in federal election law.⁵³

II. The Evidentiary Record in Ballot Measure Processes

A. *First National Bank of Boston v. Bellotti*

Independent expenditures received strong constitutional protection from the Court's reasoning in *Buckley*, apparently closing the door to their regulation. In a series of campaign reform cases after *Buckley*, however, the Court stated its willingness to consider empirical data purporting to link independent expenditures made in a ballot measure campaign to a threat to citizen confidence in government.

Two years after the *Buckley* decision, the United States Supreme Court reviewed a Massachusetts statute that forbade specified corporations from making expenditures directed toward influencing the vote on referendum measures, unless the measure materially affected the property, business or assets of the corporation.⁵⁴ In *First National Bank of Boston v. Bellotti*,⁵⁵ the Court held that the statute abridged the corporation's freedom of speech in violation of the First and Fourteenth

50. 2 U.S.C. § 431(17) (1976).

51. 2 U.S.C. §§ 434(b)(6), (c) (1976).

52. 2 U.S.C. § 441a(b)(1976).

53. The 1979 Amendments were of minor significance. They were enacted to make reporting and compliance requirements easier for candidates. The effect on independent expenditures was minimal, and affected procedure rather than substance: political committees that made independent expenditures over \$200 had to itemize, while individuals had to report independent expenditures in excess of \$250. 38 CONG. Q. WEEKLY REP. at 31-33 (Jan. 5, 1980).

Campaign finance reform since the 1979 FECA Amendments generally has been directed toward limiting what is seen by some critics as a dangerous increase in political action committee (PAC) activity, rather than focusing specifically on independent expenditure provisions. For example, the 1980 Obey-Railsback bill proposed to limit PAC contributions to House races; the bill was passed in the House but was defeated by Senate opponents who argued it would set a precedent that would lead to ceilings on PAC spending in Senate elections. H.R. 4970, 96th Cong., 1st Sess., *added to S.832*, 96th Cong., 1st Sess. (1979). Senator Slade Gorton (R-Wash) has drafted bills to restrict independent expenditures and the use of personal money in campaigns. 41 CONG. Q. WEEKLY REP. at 170 (Jan. 22, 1983). One proposal introduced in the House in the 97th Congress sought to amend the Constitution to allow legislation against independent expenditures. *Id.*

54. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 767 (1978).

55. *Id.*

Amendments.⁵⁶ In a suggestive comment, the Court noted the burden which must be met to prohibit speech: "the State may prevail only upon showing a subordinating interest which is compelling."⁵⁷ The Court in *Bellotti* set out three such interests drawn from its *Buckley* opinion and added a fourth: "[1] Preserving the integrity of the electoral process, [2] preventing corruption, and [3] 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government,'⁵⁸ [4] Preservation of the individual citizen's confidence in government is equally important."⁵⁹

The Court considered the argument in *Bellotti* that political participation by wealthy and powerful corporations in discussion of a referendum issue endangered these four interests by exerting an undue influence on the outcome of a referendum, thereby "destroy[ing] the confidence of the people in the democratic process and the integrity of government."⁶⁰ The Court's response may be interpreted as suggesting a route to regulation of independent expenditures:

If appellee's arguments were supported by *record* or *legislative findings* that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, *these arguments would merit our consideration* . . . But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.⁶¹

56. *Id.* at 776-83. The majority declared, "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 . . . or individual." *Id.* at 777.

The four dissenting Justices (White, Brennan, Marshall and Rehnquist) stressed the special advantages enjoyed by corporations as permitted by the state, and concluded that corporate speech could be limited through the charter the state granted corporations. *Id.* 802-28.

57. *Id.* at 786 (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

58. *Id.* 435 U.S. at 788-89 (citing *Buckley*, 424 U.S. at 11).

59. 435 U.S. at 789 (citing *Buckley*, 424 U.S. at 27).

60. 435 U.S. at 789.

61. *Id.* at 789-90 (footnote omitted; emphasis added).

The Court's indicated willingness to consider a state interest in preserving the confidence of its citizenry in a ballot measure vote is particularly interesting in light of the *Bellotti* Court's strong disbelief that the risk of corruption is present in a ballot measure vote: "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Id.* at 790 (footnote omitted). In a footnote the Court contrasted the problem of the elected representative corrupted by political debts with the case before it which "present[ed] no comparable problem," *id.* at 788 n.26, and suggested that Congress might be able to demonstrate a real or apparent danger of corruption "in independent expenditures by corporations to influence *candidate* elections." *Id.* (emphasis added).

If there had been empirical data before the Court in *Bellotti* which showed that certain (corporate) expenditures threatened democratic processes, at least one of the five Justices in the majority might have been persuaded to join in the dissent.⁶²

B. *California Medical Association v. Federal Election Commission*

Three years after *Bellotti*, the Court was presented with an opportunity to define the type of speech entitled to full First Amendment protection under *Buckley*. Although the likelihood of future regulation of independent expenditures may not have been affected materially by the decision in *California Medical Association (CMA) v. Federal Election Commission*,⁶³ the concurring opinion of Justice Blackmun forecast the position of the Court in a ballot measure case it was to decide six months later.⁶⁴

In *CMA* the Supreme Court upheld against First Amendment challenges a FECA provision that limited contributions from individuals and unincorporated associations to multicandidate political committees.⁶⁵ The Court in *CMA* reaffirmed the analysis used in *Buckley*: the contribution limitation did not violate the First Amendment since it did not limit what the unincorporated medical association (CMA) or any of its members could spend independently to advance their political views.⁶⁶

The Court also considered the argument that the contribution limit on the California Medical Political Action Committee (CALPAC) was "akin to an unconstitutional expenditure limitation."⁶⁷ The appel-

62. See *supra* note 56. The "swing vote" could have been Justice Blackmun. Three years after *Bellotti* in a concurring opinion in which Justice O'Connor joined, Justice Blackmun reviewed the State interests explicitly recognized in *Bellotti* and stated: "We did not find those interests threatened in *Bellotti*, however, in part because the State failed to show "by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes" or "the confidence of the citizenry in government." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 303, (quoting *Bellotti*, 435 U.S. at 789-90) (1981). See *infra* text accompanying notes 83-116.

63. *California Medical Ass'n v. Federal Election Comm'n (CMA)*, 453 U.S. 182 (1981).

64. The reference is to *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1982); see *infra* text accompanying notes 82-115.

65. *CMA*, 453 U.S. at 200-01. The case involved a factual dispute over contribution restrictions to a multicandidate committee; it is included in part II of this Note to focus on Justice Blackmun's concurring opinion discussing the effect of issue (i.e., non-candidate) committees that make independent expenditures. See *infra* text accompanying notes 77-81.

Four members of the Court (Justices Stevens, Burger, Powell and Rehnquist) dissented on the procedural ground that the Court lacked jurisdiction since a 2 U.S.C. § 437(g) enforcement proceeding had been commenced. The dissenting Justices concluded that such a proceeding precluded the issues from being raised again in an action for declaratory relief under 2 U.S.C. § 437(h). 453 U.S. at 204-09.

66. 453 U.S. at 201-02.

67. *Id.* at 195.

lants insisted that contributions to CALPAC should receive the same constitutional protection as independent expenditures since this was "the manner in which [they] ha[d] chosen to engage in political speech."⁶⁸ The Court admitted that these arguments had "some surface appeal" but found them "in the end unpersuasive."⁶⁹ Speech through CALPAC was not direct speech,⁷⁰ stated the Court, but "speech by proxy"⁷¹ in which CALPAC, a separate legal entity that received funds from multiple sources, engaged in its own political advocacy.⁷² "Speech by proxy"—indirect speech under the *Buckley* analysis—was not the type of speech the Court found entitled to full First Amendment protection.

The appellants' alternative contention was that the challenged provision was "qualitatively different" from the *Buckley* contribution limits. The petitioners argued that since their contributions flowed to a political committee instead of to a candidate, the danger of real or apparent corruption of the political process was absent; consequently, there was no governmental interest to justify the contribution restriction.⁷³ The Court disagreed, stating that the governmental interest in upholding the provision limiting contributions to multicandidate political committees was partly to prevent circumvention of the "very limitations on contributions that this Court upheld in *Buckley*."⁷⁴ If appellants' position was accepted, individuals and unincorporated associations could easily evade contribution limits pertaining to candidate elections and annual aggregate contributions.⁷⁵ Since no aggregate contribution limits are imposed on multicandidate committees,⁷⁶ individuals and groups could circumvent current contribution restrictions if allowed to make unlimited contributions to multicandidate committees. The Court in *CMA* essentially said that the govern-

68. *Id.* at 196.

69. *Id.* at 195.

70. *Id.* See *Buckley*, 424 U.S. at 19, 39.

71. "Speech by proxy" was not a phrase used by the Court in *Buckley*; it originated with the *CMA* opinion. It is nonetheless descriptive of the *Buckley* reasoning that money given to a committee which later spends it or contributes it to a candidate or issue is not "direct speech." Instead, it is speech "transformed" into political debate by one other than the contributor. Compare *CMA*, 453 U.S. at 196 with *Buckley*, 424 U.S. at 21.

72. 453 U.S. at 196.

73. *Id.* at 197-98.

74. *Id.* *Buckley* upheld all of the 1971 FECA contribution limitations as amended in 1974. 424 U.S. at 23-38. Individuals and unincorporated associations may contribute \$1,000 to a candidate per calendar year, 2 U.S.C. § 441a(a)(1)(A) (1976 & Supp. III 1979), but are limited to an annual aggregate of \$25,000 in political contribution, 2 U.S.C. § 441a(a)(3). Multicandidate committees may contribute \$5,000 per year to a candidate, 2 U.S.C. § 441(a)(2)(A) and are not limited in the aggregate amount they may contribute annually, 2 U.S.C. § 441a(a)(1)(C).

75. 453 U.S. at 198.

76. *Id.*

mental interest was plugging a loophole through which contribution limits might otherwise be evaded.

In his concurring opinion, Justice Blackmun was more direct in identifying the governmental interest involved: "Multicandidate political committees are . . . essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption."⁷⁷ A different analysis, Blackmun stressed, would follow if the issue was whether to limit contributions made to a political committee established for the sole purpose of making independent expenditures.⁷⁸

Justice Blackmun's apparent reluctance to acknowledge that independent expenditures may pose a danger of real or apparent corruption must be viewed in the light of his opinions before and after *CMA*. In the context of his reasoning in *Bellotti*⁷⁹ and *Citizens Against Rent Control v. Berkeley*,⁸⁰—in which he indicates his willingness to consider empirical evidence purporting to establish a causal link between large expenditures and contributions in a ballot measure and actual or apparent corruption of the democratic processes⁸¹—Justice Blackmun may be a more likely swing vote in favor of regulating independent expenditures in a candidate campaign than his *CMA* concurring opinion would indicate.

C. *Citizens Against Rent Control v. Berkeley*

The Supreme Court followed the reasoning in Justice Blackmun's *CMA* concurrence when it decided *Citizens Against Rent Control (CARC) v. Berkeley*⁸². The majority, concurring and dissenting opinions in *CARC* discussed the type of empirical data necessary to establish a causal relationship between large sums of money spent in a ballot measure campaign and a resulting decline in voter confidence.

77. 453 U.S. at 203. Justice Blackmun concurred in parts I and II of the *CMA* judgment but he echoed the reservations he expressed in *Buckley*, *supra* note 47, in part III of the opinion.

The Justice did not discuss committees that contribute to candidates *and* make independent expenditures. Nor was such a situation before the Supreme Court in *Common Cause v. Schmitt*, 455 U.S. 129 (1982). *See infra* part III.

Justice Blackmun's refusal to limit contributions posing no threat of corruption was consistent with his partial dissent in *Buckley*, in which he disagreed with the majority holding that contributions to candidates and candidate committees were entitled to less First Amendment protection than expenditures. 424 U.S. at 290.

78. *Id.* at 584.

79. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *See supra* text accompanying notes 53-61.

80. 454 U.S. 290 (1981); *see infra* text accompanying notes 82-115.

81. 435 U.S. at 789.

82. 454 U.S. 290 (1981).

The voters of Berkeley, California adopted by initiative a municipal ordinance placing a \$250 limit on contributions to committees formed to support or oppose ballot measures.⁸³ The appellant unincorporated association accepted contributions over \$250 and was ordered to pay the excess into the city treasury.⁸⁴ Citing *Buckley*, the California Supreme Court upheld the constitutionality of the ordinance,⁸⁵ concluding that the law "furthered compelling governmental interests because it insured that special interest groups could not 'corrupt' the initiative process" by spending large sums of money to support or oppose a ballot measure.⁸⁶ The court found that corruption resulting from the expenditure of large amounts to support or oppose a ballot measure could produce apathetic voters.⁸⁷ The state high court then upheld the ordinance, ruling that the governmental interest in electoral participation outweighed any infringement on First Amendment rights.⁸⁸ In reaching this conclusion, the California court also held that the law accomplished its goals by the least restrictive means available—the disclosure required by the ordinance provided insufficient protection against corruption.⁸⁹

Chief Justice Burger, writing the plurality opinion for the United States Supreme Court, framed the issue as whether the limit on contributions to ballot measure committees violated the First Amendment.⁹⁰ The Court noted that "regulation of First Amendment rights is always subject to exacting judicial review"⁹¹ and reviewed the history of Americans sharing common views "banding together to achieve a common end."⁹² The Chief Justice stressed that the concept of freedom of association guarantees people the right to be heard—particularly on controversial issues—and reaffirmed the Court's rejection in *Buckley* of

83. "Section 602 is authorized by Elections Code section 22808 and provides: 'No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by one person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars (\$250).'

27 Cal.3d at 822-23 n.1, 614 P.2d at 743 n.1, 167 Cal. Rptr. at 85 n.1.

84. *Id.* at 822-23 n.1, 614 P.2d at 743 n.1, 167 Cal. Rptr. at 85 n.1.

85. *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 832, 614 P.2d 742, 749, 167 Cal. Rptr. 84, 91 (1980).

86. *Id.* The California Supreme Court also stated that "large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures." 27 Cal. 3d at 831, 614 P.2d at 749, 167 Cal. Rptr. at 91.

87. *Id.*

88. *Id.*

89. Section 112 of the Berkeley ordinance required the City to publish in Berkeley newspapers (considered appropriate by the Berkeley Fair Campaign Practices Commission), a list of all contributors of over \$50 to candidates or committees twice during the last week of the campaign. *Id.* at 826, 614 P.2d at 746, 167 Cal. Rptr. at 87-88.

90. 454 U.S. at 291.

91. *Id.* at 294. *See also Buckley*, 424 U.S. at 25; *Bellotti*, 435 U.S. at 786.

92. 454 U.S. at 294.

a governmental interest in "equalizing voices."⁹³ The plurality's emphasis on the rights of citizens to freely associate and to participate in public discussion regardless of financial standing supported the first of its two main criticisms of the Berkeley ordinance: under the ordinance an affluent person acting alone could independently spend without limit to express his or her views on a ballot measure, whereas contributions made in conjunction with other individuals exercising their freedom of association were restricted.⁹⁴

The plurality's second criticism of the ordinance was based on the exception discussed in *Buckley* to the rule prohibiting restrictions on political activity. "[P]erception of undue influence of large contributors to a *candidate*," Chief Justice Burger reminded the California court, was the "single narrow exception" justifying contribution limits.⁹⁵ Quoting with approval from its opinion in *Bellotti*, the plurality stated, "Referenda are held on issues, not candidates for public office. The risk of [*quid pro quo*] corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."⁹⁶ The judgment of the Court concluded that the integrity of the political system would be protected adequately by public identification of contributors and the amounts contributed. Since the Berkeley ordinance already required disclosure, the plurality ruled that the city of Berkeley's asserted interest was insufficient and the means employed too drastic.⁹⁷

In an aside apparently referring to the empirical data presented by the appellees to support their claim of a governmental interest in the supposed causal relationship between large sums of money "spent"⁹⁸ in a campaign and a decrease in voter confidence, the plurality stated that "the record . . . does not support the California Supreme Court's conclusion that the ordinance is needed to preserve voters' confidence in the ballot measure process."⁹⁹ Thus, the emerging evidentiary burden to be met by opponents of unlimited spending in the ballot measure

93. *Id.* at 295-96. "[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 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." *Id.* (quoting *Buckley*, 424 U.S. at 48-49).

94. 454 U.S. at 296.

95. *Id.*

96. *Id.* (quoting *Bellotti*, 435 U.S. at 790).

97. 454 U.S. at 298-99.

98. The California ordinance limited the size of *contributions* to ballot measure committees, but the Supreme Court in *CARC* spoke in terms of money "spent," which presumably also included expenditures by the ballot committees. See *infra* note 100.

99. 454 U.S. at 299. The California court cited a "commentator on that political scene," a political scientist, and a "student of the California initiative process." 27 Cal. 3d at 829, 614 P.2d at 747-48 167 Cal. Rptr. at 89-90. See also *infra* note 109.

process was acknowledged by the four-member plurality. This burden received fuller consideration by three of the four concurring Justices and by the one dissenting Justice in *CARC*.

Justice Marshall concurred in the judgment in *CARC*, but noted that the plurality opinion failed to indicate "whether or not it attache[d] any constitutional significance to the fact that the Berkeley ordinance [sought] to limit *contributions* as opposed to direct *expenditures*."¹⁰⁰ Citing *Buckley* and *CMA*, Marshall declared that the Court had "always" distinguished between permissible restrictions on contributions to political campaign committees, which as "speech by proxy" are not entitled to full First Amendment protection, and impermissible limits on the amount of expenditures an individual chooses to make to advance his or her own views.¹⁰¹ The Justice noted that the plurality opinion did not specify which of the two tests it was applying to the Berkeley contribution limit, and assumed the Court was applying the "less rigorous" contribution standard.¹⁰² Based on this assumption Marshall was receptive to the argument that the Berkeley ordinance was necessary to maintain voter confidence in government:

If I found that the record before the California Supreme Court disclosed sufficient evidence to justify the conclusion that large contributions to ballot measure committees undermined the "confidence of the citizenry in government," . . . I would join Justice White in dissent on the ground that the State had demonstrated a sufficient governmental interest to sustain the indirect infringement on First Amendment interests resulting from the operation of the Berkeley ordinance. Like Justice Blackmun and O'Connor, however, I find no such evidentiary support in this record.¹⁰³

Justices Blackmun and O'Connor jointly concurred in the Court's judgment in *CARC*.¹⁰⁴ Citing the *Bellotti* standard, they agreed with the plurality opinion that contribution limits must withstand "exact-ing scrutiny" to survive constitutional challenge.¹⁰⁵ In order to meet the standard, the Justices continued, the challenged ordinance must

100. *Id.* at 301 (emphasis in original). The plurality stated that "Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression." *Id.* at 299. While the Berkeley ordinance sought to limit *contributions*, the four members of the *CARC* plurality took the effect of the ordinance one step further and held that the ordinance "in turn limited *expenditures*." (emphasis added). Justice Marshall was perplexed by the Court's blurring of contributions and expenditures. *Id.* at 301. The Court's logic is important in determining whether independent expenditures in ballot measure processes and candidate campaigns can be regulated.

101. *Id.* at 301.

102. *Id.*

103. *Id.* at 301-02 (quoting *Bellotti*, 435 U.S. at 790).

104. 454 U.S. at 302.

105. *Id.* (quoting *Bellotti*, 435 U.S. at 786).

meet two tests: 1) it must advance a sufficiently important governmental interest, and 2) be "closely drawn to avoid unnecessary abridgement of First Amendment freedoms."¹⁰⁶

Justices Blackmun and O'Connor concluded that the Berkeley ordinance failed both tests.¹⁰⁷ They agreed that the critical flaw in the city's argument asserting its governmental interest was the lack of evidentiary support. While recognizing Berkeley's interest in maintaining voter confidence,¹⁰⁸ they found "sparse" evidence in the record to support that interest.¹⁰⁹

Justice White, the sole dissenting Justice in *CARC*, found that the evidence by record or legislative finding met the burden suggested in *Bellotti*.¹¹⁰ White argued that the Berkeley ordinance was tailored to the requirements of both *Buckley* and *Bellotti* in that it regulated contributions rather than expenditures, and did not restrict corporate spending.¹¹¹ Taking judicial notice of several California ballot stud-

106. 454 U.S. at 302 (quoting *Buckley*, 424 U.S. at 25).

107. 454 U.S. at 302.

108. "We would not deny the legitimacy of that interest." *Id.* Justices Blackmun and O'Connor emphasized that in *Bellotti* the Court had explicitly recognized "'interests of the highest importance' in ballot measure elections," *id.* (quoting *Bellotti*, 435 U.S. at 788-89), with which the Berkeley interest in maintaining voter confidence in government was clearly compatible.

109. The two Justices explained that they "did not find those interests threatened in *Bellotti* . . . in part because the State failed to show 'by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes' or 'the confidence of the citizenry in government.'" 454 U.S. at 303. (quoting *Bellotti*, 435 U.S. at 789-90). Justices Blackmun and O'Connor then stated flatly: "The city's evidentiary support in this case is equally sparse." *Id.*

Justice Richardson of the California Supreme Court was also critical of the appellees' evidence. In his dissent in *CARC v. City of Berkeley*, 27 Cal. 3d 819, 835-36 614 P.2d 742, 751-53, 167 Cal. Rptr. 84, 93-95 (1980), Richardson assessed the data on which the California high court had relied on as "the opinions and views of the 'commentator,' 'political scientist,' and 'student' . . . Unquestioned and unverified, however, these opinions do not constitute the hard evidentiary support needed to demonstrate a state's present and *compelling interest* in the suppression of the multiple First Amendment rights of our California citizens. The existence of such a threat and its potential are wholly undocumented. Indeed the only empirical data that appear in the record are studies of spending on statewide initiative campaigns in California during the period 1954-1974. The studies conducted by a Sacramento research organization, reveal that in 28 statewide contests the highest spenders won 14 times and lost 14 times. I must leave to the reader what that arithmetic proves." 27 Cal. 3d at 835-37, 614 P.2d at 751-753, 167 Cal. Rptr. at 93-95.

110. 454 U.S. at 303. White began his dissent with his long held conviction that the Court had erred in *Buckley* and its progeny by not allowing regulation of expenditures. *Id.* He argued that the Court should have deferred to Congress, "the body most expert in the matter," to restrict expenditures in campaigns for federal office. *Id.*

111. *Id.* at 305 n.1 Justice White noted that "[a]s originally passed by the voters the Berkeley ordinance restricted expenditures as well as contributions to ballot measure campaigns." Berkeley repealed the ordinance expenditure restriction after the Court's decision in *Buckley*. 454 U.S. at 304, n.1.

ies,¹¹² Justice White stated, "Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals *may have* discouraged participation in ballot measure campaigns and undermined public confidence in the *referendum* process."¹¹³ Although White recognized that "Berkeley cannot present conclusive evidence of a causal relationship between major undisclosed expenditures and the demise of the referendum as a tool of direct democracy,"¹¹⁴ he felt that the Berkeley ordinance was justified by the rationale developed in *Buckley* and *CMA* upholding regulation of contributions.¹¹⁵ At this point, the Supreme Court was conscious of the use of empirical evidence to establish a governmental interest sufficient to limit political activity in ballot measure processes. One month after *CARC*, an equally divided Court affirmed a district court judgment in a case involving allegations of corruption resulting from independent expenditures made on behalf of a candidate.

III. The Evidentiary Record in Candidate Campaigns: *Common Cause v. Schmitt*

In *Common Cause v. Schmitt*,¹¹⁶ the Court was presented with a constitutional challenge to a section of the Presidential Election Campaign Fund Act¹¹⁷ limiting independent expenditures made to advance a publicly financed presidential candidate.¹¹⁸ The validity of the limit

112. 454 U.S. at 307-08, nn.2-5.

113. *Id.* at 308 (emphasis added).

114. *Id.* at 309. White ended his dissenting opinion with a similar sentiment: "Perhaps, as I have said, neither the City of Berkeley nor the State of California can 'prove' that elections have been or can be unfairly won by special interest groups spending large sums of money, but there is a widespread conviction in legislative halls, as well as among citizens, that the danger is real. I regret that the Court continues to disregard that hazard." *Id.* at 311.

115. *Id.* at 309.

116. 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided Court*, 455 U.S. 129 (1982) (Justice O'Connor did not participate).

117. 26 U.S.C. §§ 9001-213 (1976).

118. Section 9012(f) provided in pertinent part that "[i]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding \$1,000."

The legislative history of § 9012(f) is somewhat unclear. There is no suggestion that independent expenditures were intended to be limited under § 9012(f). During the 1971 floor debate on the Fund Act, its sponsor, Senator Pastore, was quizzed by Senator Goldwater about independent political activity. Pastore cited the FECA, not § 9012(f), as the method by which to limit independent activity.

Senator Goldwater: "[W]hat is there to stop me from supporting the candidate of my choice, by forming a committee without his knowledge, without his having any way of

was based on the Court's statements in *Buckley* approving expenditure limits conditioned on the receipt of public funding.¹¹⁹

Common Cause, a public interest organization, and the Federal Election Commission¹²⁰ brought actions against five groups of Ronald Reagan supporters alleging that the groups had violated section 9012(f) of the Fund Act by proposing to spend more than the \$1,000 limit.¹²¹ The district court upheld the constitutionality of the limitation using the analysis conceived in *Buckley*.¹²² The court accurately stated that election laws "regulating political expression require a demonstration of 'compelling governmental interest' to withstand a constitutional challenge calling for 'strict scrutiny' by the reviewing court."¹²³ Prevention of corruption, the district court continued, justified a limit on

knowing about my committee, and, under my constitutional right of those associated with me, to spend that money, to buy radio advertising—and use it—which he knows nothing about, to spend it in any way I see fit? . . . Suppose [a candidate's] brother buys some time on television and the candidate says, I did not know my brother was spending money that way. There is no way we can prevent that."

Senator Pastore: "That is covered by S.382 [FECA]. I keep repeating that. What we are trying to do is to characterize this particular bill [the Fund Act] as *complimentary legislation on campaign expenditures* and campaign financing. This is the financing part. . . . On the proposition that the Senator is talking about, *we took care of that three months ago when we passed* [the 1971 Federal Election Campaign Act]." 117 CONG. REC. 41953 (1972) (emphasis added).

The legislative history of the 1976 FECA Amendments, which included amendments to the Fund Act, does not contain a single reference to § 9012(f). Senator Cannon, Chairman of the Committee on Rules and Administration and floor manager of the 1976 Amendments believed that expenditure limitations did not apply to supporters acting on behalf of a publicly financed presidential candidate. During the Senate Hearings on the 1976 FECA Amendments, Senator Cannon stated, "Of course, under the Court's decision [in *Buckley*] if we went to the public financing aspect, then we could get back to the limitation on expenditures, but it would go only to the candidate itself and still would not apply to the independent person or to the committee." *Federal Election Comparison Act Amendments of 1976: Hearings on S. 2911 S.511 - Amendment No. 1396, S. 2912, S. 2918, S.2953, S. 2980 and S. 2987 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 177 (1976).*

This legislative history was considered by the Court in *Common Cause*. See Brief for Appellees Harrison Schmitt, *et al.*, at 16-19, *Common Cause v. Schmitt*, 455 U.S. 129 (1982).

119. "[A]cceptance of public financing entails voluntary acceptance of an expenditure ceiling. Non-eligible candidates are not subject to that limitation," 424 U.S. at 95.

120. *Common Cause* initially brought suit in the United States District Court, *Common Cause v. Schmitt*, 512 F. Supp. 469 (D.D.C. 1980), against Americans for Change, a political action committee formed to raise and spend funds to support presidential candidate Ronald Reagan. The Federal Election Commission filed a motion to intervene pursuant to 2 U.S.C.A. § 437c(b)(1), which states that the Commission has exclusive jurisdiction over the civil enforcement of FECA. For a discussion of the procedural background of the *Common Cause* suit, see Claude & Kirchhoff, *The "Free Market" of Ideas*, 57 N.D. L. REV. 337 (1981).

121. *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980).

122. *Id.* at 493-96.

123. *Id.* at 494.

contributions but “[t]he right of citizens and groups to make expenditures in a campaign pose[d] . . . only the most attenuated danger of *quid pro quo*.”¹²⁴ In a reference to the five defendant groups, the court reasoned:

It is difficult . . . to imagine how the thousands of ‘small voices’ associated together in a political committee could compromise a candidate for President The candidate will be no more beholden to the political committees than Presidents typically are to those elements of their constituency who voted for them.¹²⁵

The court noted that the \$5,000 annual contribution limitation was a further check on political committees’ possible corruptive influence.¹²⁶ The court then ruled that the Fund Act provision failed the strict scrutiny test since the governmental interest in fighting electoral corruption was insufficiently compelling to justify a direct limitation on speech.¹²⁷ The district court thus held section 9012(f) to be unconstitutional without developing any factual record of Common Cause’s theory that the defendant committees were in fact affiliated with Ronald Reagan and his authorized committees.¹²⁸

Underlying the Supreme Court’s affirmance in *Common Cause* may have been the lack of evidence showing corruption or establishing a decline in citizen confidence in the democratic processes. In its brief before the Supreme Court, Common Cause alleged that section 9012(f),

124. *Id.* at 495.

125. *Id.* at 498. The defendants in *Common Cause* were three committees and two individuals: Americans for Change raised \$1,072,549 and independently spent \$1,061,123 to advance the candidacy of Ronald Reagan; Fund for a Conservative Majority raised \$3,163,528 and spent \$3,150,496; and Americans for an Effective Presidency raised \$1,899,905 and spent \$1,845,403. Federal Election Commission Public Records, “Committee Index of Disclosure Documents,” as of Feb. 22, 1982. The two individual defendants were the chairman and treasurer of Americans for Change, Harrison Schmitt and Carl Curtis.

126. 512 F. Supp. at 498-99. 2 U.S.C. § 441(a)(1)(C) limits to \$5,000 the amount an individual may contribute to a political committee.

127. *Id.* at 501. The district court also relied on Republican Nat’l Comm. (*RNC*) v. Fed. Election Comm’n, 487 F. Sup. 289 (S.D.N.Y.), *aff’d summarily*, 445 U.S. 955 (1980) which upheld public financing of presidential elections. The District of Columbia district court stated that a decision by a Presidential candidate to accept public financing “cannot bind his or her supporters outside the official campaign . . . ‘most important . . . is that uncoordinated expenditures are permitted without limits.’” *Common Cause*, 512 F. Supp. at 495, (citing *RNC*, 487 F. Supp. at 286).

128. 512 F. Supp. at 500. Count II of the Common Cause complaint alleged that the defendant committees were not independent of the Reagan campaign, and that “coordination and concerted action” existed between the committees and the Reagan general presidential campaign. *Id.* at 501. The district court dismissed Count II on the ground that the FEC was charged with exclusive jurisdiction over enforcing federal election laws, and because “[i]t would be . . . cumbersome for a three-judge court, ordered by Congress to expedite its consideration to supervise extensive discovery and receive detailed factual evidence.” *Id.*

as part of the statutory scheme providing public funding for presidential campaigns, served a compelling governmental interest in preserving the integrity of and public confidence in the presidency.¹²⁹ Using the Court's language in *Buckley*, the appellant argued, "It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest."¹³⁰ Specifically, the effect of limiting expenditures under section 9012(f) eliminated the real or apparent danger that publicly financed presidential candidates would be "[b]eholden to [p]rivate [f]undraisers."¹³¹ Asserting that the district court erred by missing the "obvious influence acquired by the handful of fundraiser-managers who run the political committees and control the aggregated funds,"¹³² Common Cause stated that "it is with these managers—and not the contributors—that the real leverage (and thus the real danger) lies."¹³³ Common Cause reasoned that the fundraiser-manager can influence a candidate—even though the committee is "independent"—by "financing and running consciously parallel campaigns."¹³⁴

Specific evidence of the corrosive effect of private financial support, however, was contained in but one footnote in which Common Cause claimed that "such 'preferred access' to the White House has already been given to the fundraiser-managers of two 'independent' political committees."¹³⁵ A newspaper article reference and the names of two Republicans who communicated with the President after his election, however, is presumably not the "evidence" by legislative record or finding that the Supreme Court discussed in *Bellotti* and *CARC* as sufficient to justify a restriction on political activities. In fact, Common Cause omitted this argument in its subsequent reply brief and termed the Reagan groups "unauthorized political committees."¹³⁶ Thus, it may be that in *Common Cause*, as in *Bellotti* and *CARC*, the losing party failed to present enough evidence of corruption or of a decline in citizen confidence in the democratic process.

129. Brief for Appellants Common Cause, *et al.*, at 23, *Common Cause v. Schmitt*, 455 U.S. 129 (1982) (quoting *Buckley*, 424 U.S. at 95).

130. Brief for Appellants, *supra* note 129, at 24 (quoting *Buckley*, 424 U.S. at 96).

131. *Id.* at 26.

132. *Id.* at 29.

133. *Id.*

134. *Id.* at 27.

135. *Id.* at 29-30, n.44. The fundraisers were Robert C. Heckman, Chairman of Fund for a Conservative Majority, and John T. Dolan, Chairman of the National Conservative Political Action Committee. Cited by Common Cause as support for this information was the *New York Times*. *N.Y. Times*, Mar. 8, 1981, at 24, col. 1.

136. Reply Brief for Appellants at 3, *Common Cause v. Schmitt*, 455 U.S. 129 (1982).

Conclusion

The United States Supreme Court has indicated its awareness of and willingness to receive empirical evidence designed to establish a compelling state interest by which First Amendment rights legitimately might be restrained. The state must show a "subordinating interest which is compelling"¹³⁷ and "employ means closely drawn to avoid unnecessary abridgment."¹³⁸ Proponents of limits on independent expenditures and contributions in *ballot* measure campaigns have failed in their use of empirical data: the evidence presented to the Supreme Court in *Bellotti* and *CARC* was not strong enough to establish a causal relationship between the amounts of money spent and a threat to voter confidence in government. Four members of the Court, however, are receptive to the "hard evidentiary support needed to demonstrate a State's present and compelling interest" in restricting the use of money in ballot measure campaigns.¹³⁹

The fact that the Supreme Court has acknowledged a possible link between large sums of money in a ballot measure campaign and a threat to voter confidence suggests a similar openness to an attempt to link large expenditures in a candidate campaign with declining voter confidence. The appellants in *Common Cause* attempted to establish such a link and failed, perhaps in part for lack of sufficient evidence.

Properly executed survey research¹⁴⁰ is admissible at the discretion

137. *Bellotti*, 435 U.S. at 786.

138. *Id.*

139. The four Justices are Blackmun, O'Connor (*see supra* text accompanying notes 62, 104-09), Marshall (*see supra* text accompanying note 104) and White (*see supra* text accompanying notes 111-16).

140. The use of a public opinion poll as evidence can be problematic. The alternatives available to those polled and the categories in which responses are grouped can lead to wide disparities in results. *See Polls Can Be Tricky*, PUBLIC OPINION 34 (Oct./Nov. 1979).

Civic Service, Inc., a political research organization, has conducted a series of polls over the past four years to study the public's opinion on whether there should be public financing of campaigns for congressional offices. Opposition to public financing increased over the period of the four surveys, from a 63-32% opposition in 1977 to a 69-23% opposition in 1980. Pfautch, *Campaign Finance: The Signals from the Polls*, PUBLIC OPINION, 52, 52-53 (Aug./Sept. 1980).

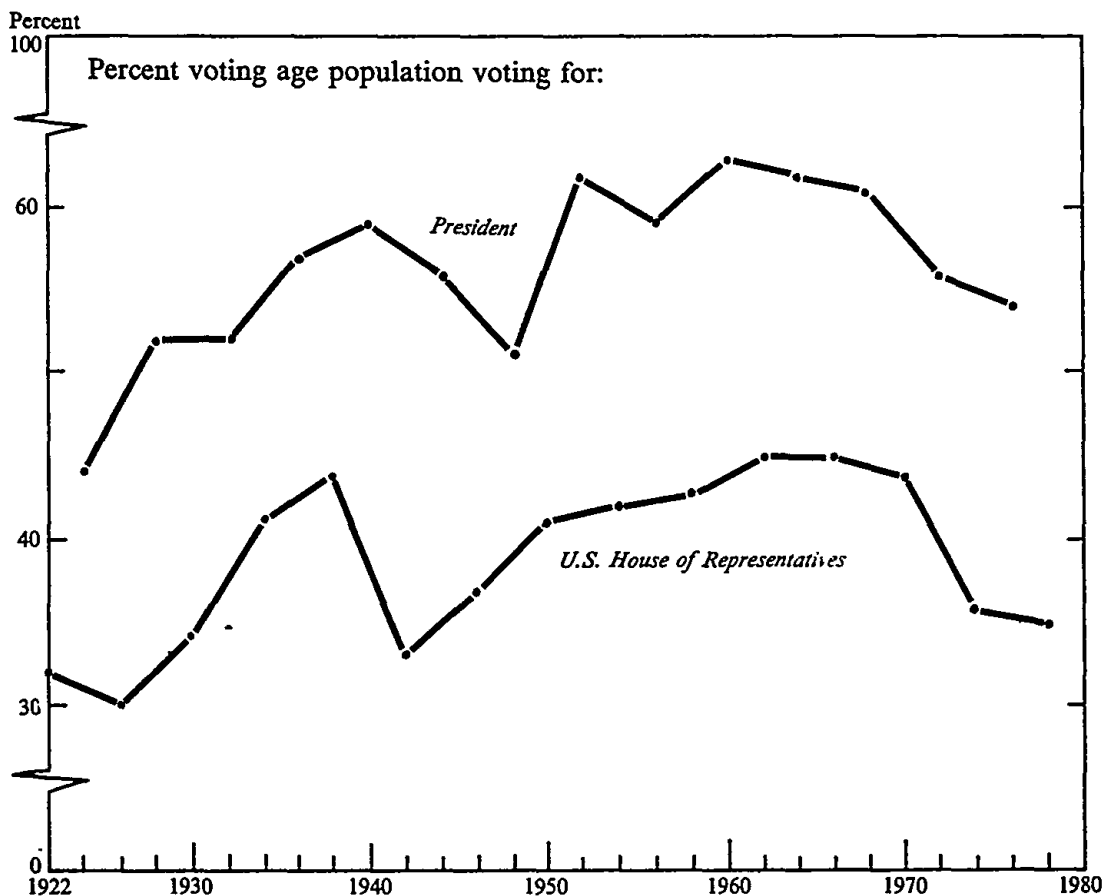
Two of the major polling firms indicate majority support for public finance. A Gallup poll asked persons whether they approved of the federal government providing a fixed amount of money for congressional campaigns if all private contributions from other sources would be prohibited. In 1977 the public approved by a 57-32% majority and in 1979 by a 57-30% margin. *Id.* A 1977 Harris poll inserted President Carter's endorsement into a question similar to that asked by the Gallop organization. Harris respondents approved by a 49-28% majority. *Id.*

The president of Civic Service, Inc. stated that his four-year study does not impeach the findings of Gallup or Harris: "[i]t underscores a long held view in survey research that in order to understand true public sentiment about a complex issue, one must pose questions to

of the trial judge under the Federal Rules of Evidence.¹⁴¹ Survey research has been increasingly used in the past decade for a variety of legal purposes.¹⁴² If opponents of independent expenditures—whether in the context of a ballot measure or candidate campaign—can establish that the sample polled is adequate, the data gathering techniques reliable and the conclusions drawn to be statistically significant,¹⁴³ survey research also may be used to effect a change in election finance law.

the public in a series of different ways to determine whether different phrases in a question prompt different responses." *Id.*

Consulting editor to *Public Opinion* magazine, Everett Carl Ladd, states the "reigning myth" that "voter turnout is plunging to near-record lows . . . as a product of the increased alienation of Americans from their political system" is refuted when examined in historical context:



Ladd, *Opinion Roundup*, *PUBLIC OPINION*, 32 (Apr./May 1980).

141. FED. R. EVID. 703. *See, e.g.,* *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (D.C.N.Y. 1963).

142. *See* Dutka, *Bringing Polls to Justice*, *PUBLIC OPINION*, 47 (Oct./Nov. 1982).

143. *Cf. Guardians Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm'n*, 633 F.2d 232, 240 (2d Cir. 1980).