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ARTICLES

CONSTITUTIONAL ISSUES IN THE REGULATION OF THE FINANCING OF ELECTION CAMPAIGNS*

ARCHIBALD COX**

CONSTITUTIONAL ISSUES GROW OUT OF SPECIFIC LEGISLATION. Legislation grows out of social, economic or political conditions and practices, and the resulting human needs. Consequently, in addressing the question of how far the first amendment limits the power of Congress to regulate the financing of election campaigns, it is advisable to recall some of the history and present practices of campaign finance.

I. HISTORY, PRACTICES AND CURRENT LEGISLATION

The first massive infusion of special interest money into a federal election campaign occurred in 1832 when Nicholas Biddle and the Bank of the United States spent $800,000 — $1,000,000 in present-day dollars in a vain effort to prevent the reelection of Andrew Jackson. President Jackson did not seek to regulate campaign finance. He destroyed the Bank.

The initial regulatory laws flowed from the flagrantly corrupt practices of the 1880's and 1890's, the disclosures of the muckraking journalists, and the leadership of President Theodore Roosevelt. In 1907, Congress

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* This Article is based on an Address delivered as the Twenty-Fifth Cleveland-Marshall Fund Visiting Scholar Lecture at the Cleveland-Marshall College of Law. The author concedes that his views have undoubtedly been affected by involvement as counsel in Buckley v. Valeo, 424 U.S. 1 (1976) and Common Cause v. Schmitt, 455 U.S. 129 (1982), and by his position as Chairman of Common Cause, a citizens' organization engaged in lobbying for government and political reforms.

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made it a crime for any corporation to make a money contribution in connection with a federal election.[1] This Corrupt Practices Act was later strengthened and expanded.

In 1943 and 1947 the prohibition was again expanded to forbid "expenditures" as well as contributions, and to apply to labor unions along with corporations.[2] The prohibition, now codified as section 441b of the Federal Election Campaign Act, declares it a crime for any corporation or labor union "to make a contribution or expenditure in connection with any primary or general election to any federal office."[3]

Another period of major revision climaxed in 1974. Television and other modern media of mass communications had transformed American politics and enormously increased the role of money in political campaigns. Spending in presidential elections[4] had risen dramatically:

1952—$11.6 million
1960— 19.9 million
1968— 44.2 million
1972— 83 million

In constant dollars, for every $1 spent in 1952, almost $3 was spent in 1968, and $4.53 was spent in 1972. Similarly, for every $100 spent by congressional candidates in 1962, $521 was spent in 1974—a fivefold increase without adjustment for inflation, a threefold increase even in constant dollars.

Given the extraordinary increase in expenditures, it is not surprising that candidates increasingly turned to those whose personal ambitions, business affairs, or organized economic interests were directly and substantially affected by government decisions. Government had become the chief buyer of goods, the largest employer, the dispenser of subsidies through direct benefit or tax advantage, the regulator and manager of the economy, and the adjuster of many conflicts among economic interests. As the role of money rose, so did the obligation that the successful candidates owed to the large contributors who supplied the supposed means of victory. Senator Russell Long once observed: "When you are talking in terms of large campaign contributions . . . the distinction between a campaign contribution and a bribe is almost a hair's line difference."[5]

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[1] Act of January 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1976)).

[2] War Labor Disputes Act, ch. 144, § 313, 57 Stat. 163, 167-68 (1944), and Amendment of National Labor Relations Act, ch. 120, § 313, 61 Stat. 136, 159 (1948) (codified at 18 U.S.C. § 610 (1970), *repealed by* Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 496).

[3] 2 U.S.C. § 441b (1976).

[4] The figures quoted in this Article on spending, contributions, and expenditures were compiled by Common Cause from the record in Buckley v. Valeo, 424 U.S. 1 (1976) and reports filed with the Federal Election Commission.

[5] *Hearings on S. 3496, Amendment No. 732, S. 2006, S. 2965, and S. 3014 Before the Senate Comm. on Finance*, 89th Cong., 2d Sess. 78 (1966).

During the Watergate period the coincidence of contribution and receipt of governmental benefit generated much public distrust, cynicism, and alienation, even when there was no proof of a direct *quid pro quo* agreement. Voters were keenly aware of the Milk Producers Association's pledge of $2 million to President Nixon's campaign for reelection, given at the same time that the Nixon Administration granted an increase in the support price of milk;[6] of the approval of American Airlines' application for profitable routes shortly after a large and unlawful corporate contribution to the party in power;[7] and of the settlement of antitrust litigation against International Telephone & Telegraph Corporation shortly after an ITT subsidiary agreed to underwrite a large portion of the expenses of the Republican Party's national convention.[8]

Public criticism led to the enactment of the 1974 amendments to the Federal Election Campaign Act (FECA).[9] As amended, the Act required extensive and detailed reporting of all campaign receipts and disbursements, and imposed the following restrictions on both contributions and expenditures:

1. Prohibited individuals from contributing more than $1,000 to any one candidate in any one primary or general election;[10]
2. Prohibited a multi-candidate political committee from contributing more than $5,000 to a single candidate in one election;[11]
3. Placed ceilings on a candidate's expenditure of personal or family funds;[12]
4. Placed ceilings on the aggregate expenditures that might be made by or on behalf of a candidate for federal office;[13]
5. Forbade any person to expend more than $1,000 in "advocating the election or defeat" of "a clearly identified candidate," even though the

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[6] *See Statement of Information, Political Contributions by Milk Producers Cooperatives: The 1971 Milk Price Support Decision, Hearings Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. bk. VI, pt. II (1974).

[7] *See Statement of Information, Papers in Criminal Cases, Hearings Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. app. II, at 203 (1974).

[8] *See Statement of Information, Department of Justice/ITT Litigation, Hearings Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. bk. V, pt. I (1974) (Richard Kleindienst nomination hearings).

[9] Pub. L. No. 93-443, 88 Stat. 1263 (1974) (enacting 2 U.S.C. §§ 437a-437h, 439a-439c, 455, 456; 18 U.S.C. §§ 614-17; and 26 U.S.C. §§ 9031, 9041; amending 2 U.S.C. §§ 431-37, 438, 439, 451-53, 5 U.S.C. §§ 1501-03, 18 U.S.C. §§ 276, 6012, 9002-12, 47 U.S.C. § 315; repealing 2 U.S.C. § 440, 26 U.S.C. § 9021, 47 U.S.C. §§ 801-05 (1976)).

[10] 18 U.S.C. § 608 (Supp. V 1975), *repealed by* Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 496. The Federal Election Campaign Act as amended in 1974 is reproduced in the Appendix to Buckley v. Valeo, 424 U.S. 1, 144-235 (1976).

[11] *Id.*

[12] *Id.*

[13] *Id.*

expenditure was made without consultation with the candidate or his agents;[14]

6. Offered federal financing for presidential election campaigns from a fund provided by voluntary individual contributions of $1 checked off on their income tax return. In the general election, each major party candidate may elect to receive an equal allowance under a formula that actually yielded each major party candidate $29.4 million in 1980. In return, the candidate is required to agree that neither the candidate nor any political committee authorized by the candidate will make expenditures or incur debts in excess of the public allowance;[15]

7. Prohibited any "political committee" not authorized by the candidate from expending more than $1,000 in support of the election of a presidential candidate who has elected to receive federal funds.[16]

Unfortunately, the 1974 FECA amendments also opened a new channel for special interest money by authorizing corporations, labor unions and other groups to establish and pay the administrative expenses of political action committees (PACs) to which their executives, employees, and stockholders or members are asked to contribute and which then make contributions to selected candidates up to $5,000 apiece.[17]

Virtually all the reporting requirements and restrictions on contributions and expenditures were then challenged in one massive lawsuit, reported as *Buckley v. Valeo*.[18] The Supreme Court of the United States held on the hypothetical facts presented that:

1. The reporting requirements were constitutional;

2. The restrictions on contributions were also constitutional;

3. The restrictions upon an individual's independent expenditures in support of a candidate, upon expenditures from a candidate's personal or family funds, and upon a Senate or House candidate's overall expenditures violated the first amendment;

4. The provisions for public financing of presidential elections were constitutional.

As a result, Congress repealed the restrictions upon expenditures in connection with congressional elections but retained the ceilings upon contributions.[19] Congress also retained the provisions for voluntary public

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[14] *Id.*

[15] 26 U.S.C. § 6036 (1976); 26 U.S.C. §§ 9001-42 (1976).

[16] 26 U.S.C. § 9012(f) (1976).

[17] 18 U.S.C. § 611 (Supp. V 1975). The subject matter formerly covered by this section appears at 2 U.S.C. § 441c (1976).

[18] 424 U.S. 1 (1976).

[19] Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1978) (enacting 2 U.S.C. §§ 441a-441j; amending 2 U.S.C. §§ 431, 432, 434, 436, 437b-439c, 455, 18 U.S.C. § 591, 26 U.S.C. §§ 9002-04, 9006-09, 9012, 9032-35, 9039; repealing 2 U.S.C. §§ 437a, 441, 456, 18 U.S.C. §§ 608, 610-17).

financing of presidential campaigns, including the $1,000 limit upon independent expenditures by political committees.[20]

With the ceilings on a candidate's total expenditures removed, campaign spending skyrocketed in races for House and Senate seats:

Year	Total Expenditures[21]
1970	$ 71 million
1974	74 million
1976	99 million
1978	194.9 million
1980	300 million

The removal of the overall ceiling on expenditures vastly increased the importance of the PAC loophole. PAC contributions to Senate and House candidates skyrocketed at an even faster rate than candidates' expenditures:

Year	PACs	PAC Contributions[22]
1974	608	$12.5 million
1976	1,146	22.5 million
1978	1,653	35.1 million
1980	2,551	55.2 million
1982	3,149	80 million (estimate)

Note, too, the rate of increases in individual PAC contributions:

PAC	1978	1980	Rate of Increase[23]
Carpenters Union	$307,000	$555,000	80 percent
Milk Producers	446,000	778,000	74 percent
Life Underwriters	380,000	637,000	67 percent

Although there is little to show that PAC contributions are explicitly made *quid pro quo*, several kinds of evidence demonstrate that PAC contributions do influence votes. Occasionally, a PAC figure acknowledges the link. Justin Dart, the chief executive officer of Dart Industries, which established one of the largest corporate PACs, acknowledged that dialogue with politicians "is a fine thing but with a little money they hear you better."[24]

Grumman Aviation acknowledges that the contributions do buy access:

> As far as the political action committee's contributions are concerned, Grumman's management—which is technically separate

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[20] 26 U.S.C. §§ 9031-42 (1976). The contribution limit was retained by *id.* at § 9035(a) which incorporates 2 U.S.C. § 441a(a) (1976) by reference.

[21] *See supra* note 4.

[22] *Id.*

[23] *Id.*

[24] Wall St. J., Aug. 15, 1978, at 1, col. 6.

> from the decision-making of the committee—says it expects nothing in return for the contributions. But the corporation does rely on the committee's contributions to remind candidates, as Long Island's biggest business, Grumman puts paychecks in a lot of voters' hands.[25]

The timing of contributions often reveals that their purpose is not solely to help elect the candidate whose views are most favorable to the PAC's sponsors. During the 1976 Senate elections, the Trial Lawyers' PAC contributed $5,000 to each of five candidates, including four incumbents. All five were defeated. After the results were known, and it was too late to affect the elections, the Trial Lawyers' PAC turned around and made substantial contributions to the successful candidates it had previously opposed.

Many PACs target their contributions to reach the chairman and members of the congressional committees and subcommittees with jurisdiction to affect that PAC's selfish concerns. For example, Grumman, a defense and aerospace manufacturer, maintained one of the largest corporate PACs in 1980. *The New York Times* reported that "[i]n races for Congress, the [Grumman PAC's] list reads like a Who's Who of the House and Senate Armed Services and Appropriations Committees."[26] The members of the Armed Services and Appropriations Committees who receive Grumman-PAC contributions are regularly called upon to choose whether to spend billions of dollars buying Grumman products or those of Grumman's competitors.

Statistical evidence is also revealing. Over and over again those senators and representatives supporting measures favorable to one or another special interest can be shown to have received much larger contributions from the PACs established by those interests than those senators and representatives opposing the measure. In the spring of 1982, for example, a twenty-member House subcommittee took a key vote approving a measure that would have seriously weakened the Clean Air Act. Each of the twelve members of the majority had previously received, on the average, $24,886 in PAC contributions from industries affected by the Act. Most of the money came from industries found in violation of the existing Act. The eight members of the committee who wished to preserve the Clean Air Act, had received PAC contributions averaging only $3,600, one-seventh the sum received by the members of the majority.

During the present session of Congress, the House of Representatives by majority vote voided a Federal Trade Commission rule requiring dealers in used cars to reveal to prospective purchasers any defect known to the dealer. The representatives' preference for *caveat emptor* can hardly have been unrelated to the National Association of Automobile Dealers'

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[25] N.Y. Times, Oct. 26, 1980, at F22, col. 5.

[26] *Id.*

PAC (NAAD-PAC) contributions. The representatives who voted to kill the rule had received $850,000 from the NAAD-PAC in the 1978 and 1980 elections. Similarly, during the 97th Congress the House passed bills carrying 155 House sponsors to exempt doctors, dentists, and other health care professionals from the jurisdiction of the Federal Trade Commission. Enactment would allow the exempted professions to revive restrictions on advertising, schedules of recommended fees, and like restraints upon competition. The 155 House sponsors had received contributions totaling $599,000 from the American Medical Association PAC (AMA-PAC).

Although some defenders of PACs deny the relation between PAC contributions and votes, many participants and observers believe that the PACs turn cash into votes. Senator Dole of Kansas observes, "When these PACs give money they expect something in return other than good government."[27] Representative Downey is sharper when he says, "You can't buy a congressman for $5,000. But you can buy his vote. It's done on a regular basis."[28] *Time Magazine* for October 25, 1982, observed in its cover story—[T]he power of PACs has upset the delicate balance between private interests and the public good. Indeed, PAC victories—continued price supports for dairy farmers, the defeat of a proposed fee on commodity trades, proposed exemption from antitrust laws for shipping companies—often come at taxpayer expense.[29]

The close correlation between PAC contributions and legislation breeds cynicism and then alienation from the political process. Special interest money also contributes to the disarray in Congress; it is a factor in the decline in the influence of the political parties and makes it harder to build broad coalitions in support of coherent programs.

Not all the PACs are established by labor unions, corporations, trade associations and other special interests. A second type of PAC is based on ideological beliefs. The National Conservative Political Action Committee and the PAC of the National Organization for Women are examples.

A third type of political action committee was developed in the 1980 presidential elections in order to assist the candidacy of Ronald Reagan. Former Governor Reagan and President Carter had both chosen to finance their candidacies by accepting public funding, and had thus undertaken not to incur obligations or make expenditures in excess of the $29.4 million available to each in public funds. Prominent Republicans—Melvin Laird, George Romney, and William Miller, for example,—set up an "independent committee" intending to spend $20-$30 million in support of Governor Reagan. A separate group made up of officials in the Nixon and Ford administration sought to raise and spend another $18 million. The latter group explained its solicitation of contributions by saying: "Reagan for

[27] *Running with the PACs*, TIME MAG., Oct. 25, 1982, at 20.

[28] *Id.*

[29] *Id.*

President in '80 is being sponsored by Americans For Change, because federal campaign" financing laws prohibit national candidates from accepting personal contributions since they receive federal funds.[30]

Both groups were "political committees" within the federal election laws. Because both they and others like them appeared to be violating section 9012(f)(1) of the Internal Revenue Code,[31] which forbids a political committee knowingly and willfully to incur expenditures for the election of a candidate who has chosen to receive public funds, the Federal Election Commission and Common Cause brought suit to stop the expenditures.[32] Although both groups protested that the statute did not apply, their strongest defense was the contention that statutory prohibition is unconstitutional because independent expenditures by a political committee are an exercise of the freedom of speech protected by the first amendment. The constitutional defense prevailed in the district court[33] and on appeal in the United States Supreme Court as a result of a 4-4 split.[34]

The question upon which the Court divided seems certain to arise again in the 1984 presidential elections. The Congress that assembled in January, 1983, will be asked to review the entire subject of campaign financing. The proposed changes will range from raising the ceiling on individual contributions but otherwise leaving the system unchanged, to proposals for forms of partial public financing coupled with ceilings on expenditures comparable to those that currently prevail in presidential elections. The seriousness of the evil and the need for reform make it especially appropriate to review the power of Congress to regulate the contribution and expenditure of vast sums of money in election campaigns and the limits imposed by the first amendment.

II. CONSTITUTIONAL LIMITATIONS

That Congress has express or implied power to legislate concerning the financing of federal election campaigns is now beyond dispute.[35] The authority includes the appropriation of public moneys to replace private contributions.[36] The only debatable constitutional issues concerning evenhanded regulation arise under the first amendment.

In *Buckley v. Valeo*,[37] the Supreme Court drew a sharp distinction between the ceilings imposed by the FECA amendments of 1974 upon cam-

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[30] Exhibits to Appendix I to the Jurisdictional Statement at 4b, Common Cause v. Schmitt, 455 U.S. 129 (1982).

[31] 26 U.S.C. § 9012(f)(1) (1976).

[32] 512 F. Supp. 489 (1980).

[33] *Id.*

[34] 455 U.S. 129 (1982).

[35] Buckley v. Valeo, 424 U.S. 1 (1976).

[36] *Id.*

[37] *Id.*

paign contributions and those imposed upon campaign expenditures. Even though the distinction is—or at least may be—misleading in some respects, it is convenient to follow.

A. *Campaign Contributions*

The first amendment does not bar Congress from imposing strict ceilings upon the size of the contributions that an individual or organization may make to a candidate for president, senator or representative in Congress. The contributor is exercising rights protected by the first amendment—freedom of association and possibly of expression—but under *Buckley v. Valeo* limiting the amount of money that may be given is not the kind of direct abridgment of freedom to speak, or of the amount or subject matter of speech, that can be justified, if at all, only by the need to obviate an overwhelming and imminent public disaster. In *Buckley*, the Court stated that:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. . . .
>
> [W]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.[38]

The need to check the actual or apparent corrupting influence of large contributions upon the successful recipient and other government officials was held to be sufficient justification for any curtailment of those lesser first amendment rights.[39]

Under *Buckley* and later cases,[40] therefore, Congress has unquestionable constitutional authority to lower the ceilings on PAC contributions to a single candidate, and to limit not only the total sum a single PAC may contribute to all House and Senate candidates together but also the total amount a single candidate may receive from all special interest PACs. The justification in each instance is the need to eliminate the special influence of money upon the conduct of government.

B. *Independent Expenditures*

Ceilings upon the size of campaign contributions will accomplish very little if individuals, organizations, political committees and others seeking to influence the outcome of elections by the infusion of money for television spots and other advertising in the mass media can circumvent the ceilings by buying advertising for the candidate. There is a strong

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[38] *Id.* at 20-21.

[39] *Id.* at 26-27.

[40] *See* California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182 (1981).

likelihood that "independent expenditures" of the kind described above will overwhelm the public funding of future presidential elections unless the statutory prohibition is constitutional and is vigorously enforced. The ideological PACs are already putting some of their funds into independent expenditures. If Congress were simply to impose ceilings upon the corporate, labor union and other PAC contributions in order to eliminate their influence, the money might then flow into support of the same candidates through so-called "independent expenditures" purchasing the same kind of media space and time that the candidate would have purchased with contributions. Corporations and labor unions, moreover, might well be moved to make their own direct "independent expenditures" upon the theory that the present statutory prohibition violates the first amendment.

This Article discusses, from two points of view, whether the first amendment bars effective congressional limitation of expenditures in support of a candidate. First, the opinions in *Buckley v. Valeo* and later precedents are taken as constitutional guideposts. Here it is useful, because it may be constitutionally important, to distinguish between several kinds of independent expenditures according to their sources. Second, the decision validating expenditure ceilings in *Buckley* and the principles supposedly derived from that decision are fundamentally wrong.

1. *Buckley v. Valeo* and Related Precedents

a. *Expenditures by Individuals*

Section 608(e)(1) of the Federal Election Campaign Act as amended in 1974 provided:

> [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.[41]

Section 608(e)(1) was held unconstitutional in *Buckley v. Valeo*.[42] Spending money in support of a candidate, the majority reasoned, is a core first amendment right much like speech itself, because limitations upon spending restrict the volume and variety of speech and of the ideas expressed.[43] It was argued in defense of section 608(e)(1) that large individual expenditures must be prohibited in order to prevent circumvention of the ban on contributions and the consequent threat to the integrity of government, but these interests were held not to satisfy the exacting scrutiny applicable to limitations on "core First Amendment rights of political expression," chiefly because the Court was persuaded that the "absence of prearrangement and coordination of an expenditure with the candidate

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[41] 88 Stat. 1263, 1265 (1974).

[42] 424 U.S. at 23.

[43] *Id.* at 18-19.

or his 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 decision gave rise to a widespread belief that the first amendment secures all persons and all groups an absolute right to make unlimited independent expenditures. However, the precise scope of the decision is uncertain, even as applied to individual expenditures. The Court spoke of expenditures by "persons and groups"[45] abstractly without distinguishing among types of expenditures or defining a "group." Even one individual may spend money to elect a candidate in quite different ways. Radio or television time may be purchased to deliver an address urging the candidate's election. Expenses can be incurred in traveling around the country making speeches for the candidate. In these cases the individual is indeed speaking, and the expenditure is necessary to reach large numbers of people with the speech. Moving to the other extreme, the individual may take $100,000 to an advertising agency or a broadcasting station and use it to pay for rerunning the candidate's most successful forty-five second television spots. In such a case the spender says nothing, but the money supplied serves essentially the same function as a contribution.

Although the general language of the opinion in *Buckley* can be taken to embrace both sorts of expenditure and every sort between the extremes, it can just as easily be taken to deal only with expenditures made to reach more or larger audiences for one's own words. At the former end of the range, where the individual is truly engaging in self-expression, there may be some justification for equating restrictions on spending with restrictions on speech. At the latter end, where the individual, like the contributor, is simply putting up money in order to buy space or time for another's speech, the lower level of the constitutional protection applicable to contributions would seem appropriate even in the case of individual expenditures.

b. *Expenditures by Corporations and Labor Unions*

First National Bank v. Bellotti[46] extended to corporations a first amendment right to spend money to influence the outcome of a referendum. Massachusetts voters were to cast ballots upon a proposed amendment to the Massachusetts Constitution authorizing a graduated individual income tax. A Massachusetts statute explicitly barred corporate expenditures made to influence a referendum upon the individual income tax or the vote on any other question submitted to the people "other than one materially affecting any . . . business or assets of the corporation."[47]

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[44] *Id.* at 47.

[45] *Id.* at 45.

[46] 435 U.S. 765 (1978).

[47] MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).

The parties stipulated that experts were divided in opinion upon whether the tax on individual incomes would materially affect any of the plaintiff corporations. The United States Supreme Court held, 5-4, that the Massachusetts statute, as applied to political referendums, would violate the freedom of speech guaranteed by the first amendment.[48]

Much of the opinion explicates the majority's reasons for rejecting the opinion of the Massachusetts court that an ordinary business corporation enjoys the constitutional guarantee of freedom of speech only when the speech is to defend or promote the business interests—the "property"—of the corporation.[49] Apart from revealing strong support for corporate speech upon public issues, that portion of the opinion has little bearing upon the present question.[50] In the latter part of the opinion, however, Justice Powell dealt directly with the argument that the Massachusetts statute is justified by the danger that the participation of wealthy and powerful corporations in discussion of a referendum issue may drown out other points of view and thus distort the democratic process. He found the argument unpersuasive because there was neither an express finding by the legislature nor proof of the danger in the record.[51]

The Court obviously thought that there was no danger, but the opinion goes on to say that even the existence of the danger would not justify a restriction upon corporate expenditures for public communication because the risk "is a danger contemplated by the Framers of the First Amendment."[52] The last point is consistent with principle and sustained by authority if, but only if, two conditions are satisfied: 1) spending corporate money for speech is always the constitutional equivalent of speech; and 2) no special provision may be made to promote fair referenda. Generally, the first amendment bars government from censoring pure speech of speakers in order to "improve the quality" or "increase the fairness" of public debate.[53]

Rigidly logical extension of the reasoning in *Buckley* and *Bellotti* would lead to the conclusion that FECA section 441b, which presently bans corporate and labor union expenditures in support of a candidate for federal office, is also unconstitutional. According to *Buckley*, independent individual expenditures, however large, are pure speech and give rise to too little danger of undue influence upon a candidate's conduct in office

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[48] 435 U.S. at 795.

[49] First Nat'l Bank v. Attorney General, 371 Mass. 773, 356 N.E.2d 1262 (1977).

[50] For discussion of this aspect of the decision, see Brudney, *Business Corporations and Stockholders' Rights under the First Amendment*, 91 YALE L.J. 235 (1981); A. COX, FREEDOM OF EXPRESSION 78-81 (1980).

[51] 435 U.S. at 789-90.

[52] *Id.* at 792.

[53] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); Mills v. Alabama, 384 U.S. 214 (1966). *But cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the "fairness doctrine" applied to broadcast licensees).

to justify restriction, unless they are "controlled by or coordinated with" the candidate, in which case they would be treated as contributions.[54] According to *Bellotti*, corporate expenditures are also speech, and speech cannot be curtailed because of the character of the "speaker," whether corporation or labor union.[55] There is no reason to suppose that an "uncontrolled" and "uncoordinated" corporate expenditure of $25,000 or $50,000 to promote the election of a particular candidate will be either more or less corrupting than an expenditure of like size by the individual president of the same corporation. According to both opinions, the danger that individual ideas and voices will be drowned out by massive advertising campaigns is not sufficient to justify prohibiting vast expenditures for political advertising by individuals or corporations.

Happily, other stronger indications illustrate that the Court will not follow the logic of the *Buckley* and *Bellotti* opinions so rigidly when a case actually arises involving corporate expenditures in support of a candidate in an election. The *Bellotti* opinion itself reserved judgment upon the constitutionality of section 441b in a cautionary footnote:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.[56]

The recent opinion in *Federal Election Commission v. National Right To Work Committee*[57] appears to uphold the constitutionality of section 441b. Unless the announcement of unanimity is misleading, the opinion also indicates a substantial shift in the Justices' thinking.

At first glance, the *NRWC* case presents only a narrow question of statutory interpretation. In 1974, Congress authorized corporations and labor unions to establish, pay the administrative expenses of, and manage separate segregated funds to receive and make contributions on behalf of federal candidates.[58] Section 441b forbids the use of corporate funds to solicit contributions "from any person other than its stockholders and their families and its executive or administrative personnel and their

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[54] 424 U.S. at 46-47.

[55] 435 U.S. at 777.

[56] *Id.* at 788 n.26.

[57] ___ U.S. ___, 103 S. Ct. 552 (1982).

[58] 2 U.S.C. § 441b(b)(4)(A). *See supra* notes 9-17 and accompanying text.

families" except that a corporation without capital stock may solicit contributions from "members" of the corporation.[59] The National Right to Work Committee (NRWC), a corporation formed to oppose compulsory unionism, established such a PAC and solicited contributions to it from 267,000 individuals who had previously contributed to NRWC's anti-union purposes. When the Federal Election Commission charged NRWC with violation of section 441b(4)(A), NRWC responded that it had no stockholders and that the 267,000 individuals who had previously contributed to its general purposes were "members" of the corporation. The Supreme Court rejected this interpretation.[60]

Because the court below had adopted a contrary interpretation in order to avoid constitutional doubts, Justice Rehnquist, speaking for a unanimous Court, embarked upon a far-reaching discussion of the constitutionality of section 441b.[61] Preventing the corruption of elected representatives through the creation of political debts, he postulated, is a sufficient public interest to overbear the rights to political association asserted by NRWC. Justice Rehnquist then summarized the evolution of section 441b and concluded that this careful adjustment of federal electoral laws to account for the particular legal and economic attributes of corporations and labor unions not only "warrants considerable deference" but "also reflects a permissible assessment of the dangers posed by those entities to the electoral process."[62]

NRWC can be limited on its facts to a holding that Congress has power to limit the corporate solicitation of *contributions* to a fund from which contributions will be made to candidates.[63] So narrow a reading is inconsistent, however, with the specific mention of the broadening of the prohibition on contributions to include expenditures, and also with the stamp of constitutionality put upon "this careful legislative adjustment" and "the statutory prohibitions and exceptions we have considered."[64] The deference accorded presumed congressional assessments also contrasts with the Court's previous rigorous insistence upon specific legislative findings or evidence of record in the court below.[65] There is scant reason for continued doubt about the constitutionality of the section 441b prohibition of independent expenditures by labor unions and corporations.

c. *Expenditures by Political Committees*

Common Cause v. Schmitt[66] left unsettled the question whether the pre-

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[59] 2 U.S.C. § 441b(b)(4)(C) (1976).

[60] ____ U.S. at ____, 103 S. Ct. at 556-57.

[61] *Id.*

[62] *Id.* at ____, 103 S. Ct. at 560.

[63] ____ U.S. ____, 103 S. Ct. 552 (1982).

[64] *Id.* at ____, 103 S. Ct. at 560.

[65] *See infra* notes 85-91 and accompanying text.

[66] 455 U.S. 129 (1982).

sent section 9012(f) ban upon expenditures by "political committees" in excess of the public funds accepted by the major party presidential candidates violates the first amendment. A parallel question is raised by proposals to ban independent PAC expenditures in congressional races. Three sets of differences suggest that the constitutionality of section 9012(f)[67] and the proposed measure could and should be upheld without overruling *Buckley* or *Bellotti*.

First, section 9012(f), unlike former FECA section 608(e), applies only to expenditures in a publicly funded election. The program of public funding serves the compelling purpose of preserving the integrity of, and public confidence in, the presidency by eliminating the dependence of candidates upon large contributors and fundraisers. As Senator Chiles explained, the Fund Act would enable the Nation

> to have a President elected who would be able to make his appointments without determining that he has to send this man as ambassador there because he raised $100,000 or to do this for this group because the money they raised.[68]

The ban on expenditures by independent committees above the candidate's ceiling is essential to any effective public funding. Otherwise, the public funding would be swamped by a sea of private money and its effectiveness as a safeguard against undue influence would be lost.[69]

Second, section 9012(f) applies, and limitations upon PAC expenditures in congressional races could be drafted to apply, only to "political committees"—to organizations the major purpose of which is the nomination or election of a candidate and which accept contributions and make expenditures in order to achieve that purpose. Implicit in this definition, as the Supreme Court has recognized,[70] is a degree of structure and continuity not characteristic of the kind of small groups of unorganized individuals who may join together *ad hoc* for a specific purpose such as buying a newspaper advertisement. Typically, political committees raise funds from a wide circle of individuals who have only the slightest control over how the money is spent or over what words and ideas are broadcast in support of the candidate.

Restrictions upon the money raised and spent by political committees affect speech and are therefore entitled to some first amendment protection, but because of the characteristics just described their affect upon speech and associational rights is, for all substantial purposes, the same as the effect of the contribution ceilings upheld in *Buckley*. Conversely, the restriction upon expenditures by political committees is quite unlike the restrictions upon individual expenditures held unconstitutional as

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[67] 26 U.S.C. § 9012(f) (1976).

[68] 117 CONG. REC. 41,945 (1971).

[69] *See supra* notes 24-29 and accompanying text.

[70] 435 U.S. 765 (1978).

direct curtailments of speech. Those who give the money to a political committee are not themselves engaging in communication. As in the case of a contribution directly to a candidate, there is "only a marginal restriction upon the contributor's ability to engage in free communication" because "the transformation of contributions into political debates involves speech by someone other than the contributor."[71] Those who constitute the committee seldom speak; their concern is to provide the money. Having combined many contributions into a pool, the committee turns the pooled money over to one or more advertising agencies to conduct an advertising campaign through the mass media. The print advertising will present the picture and slogans of the candidate. The television spots will present the visage and voice of the candidate taken from newscasts and previous television appearances. It would not be surprising to find an independent committee simply buying additional time to rerun the candidate's own spots. In short, consistency with precedent would seem to permit, indeed require, judging regulation of the financial activities of political committees by less strict standards than those applicable to pure speech.

Third, there is strong reason to conclude that in a milieu free of direct contributions the corrosive effect of independent expenditures upon the integrity of, and public confidence in, government is scarcely less than the threat inherent in large contributions—a danger that *Buckley* held sufficient to justify the effect of the regulation upon the first amendment rights of contributors[72] and the danger that the opinion of the Court in *Bellotti* indicated would justify even restrictions upon what it described as core first amendment rights.[73]

To put the point concretely, it is universally agreed that money buys access to legislators and executive officials. When an assistant to the President telephones an assistant secretary in one of the departments and asks him to see Richard Roe, a corporate or labor union official who has "a little problem in your Department," the request will carry the same force whether the explanation be that "Dick Roe contributed $250,000 in the last election" or that "Dick's PAC raised and expended $250,000 in the last election." Wherever gratitude for the past or fear that the money may not be forthcoming in the future is enough to influence official action, little will turn upon whether the financial help takes the form of a contribution or a so-called independent expenditure in a campaign in which contributions are prohibited.

The point has been emphasized by experts in campaign finance. Douglas L. Bailey in testimony on behalf of the Republican National Committee, acknowledged:

> the people who wield the authority coming out of private fundrais-

[71] 424 U.S. at 20-21.

[72] *Id.* at 26-27.

[73] *See supra* notes 46-56 and accompanying text.

> ing are not the people who give the money so much as the people who raise the money and that has not significantly changed . . . . the guy who can raise $51,000 in contributions is the guy who is incredibly important to that campaign and therefore has a significant amount of power.[74]

Similarly, David Adamany wrote: "The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to PAC campaign warchests. The candidate knows the programs and objectives of the PAC officers that preferred access is given."[75]

A particularly unsubtle example may illustrate the point. The National Conservative Political Action Committee (NCPAC) is an "independent" political committee that spent over $2 million in the 1980 presidential campaign. In 1981, NCPAC's National Chairman wrote to Congressman Neal:

> If you will make a public statement in support of the President's tax cut package and state that you intend to vote for it, we will withdraw all [independent, hostile] radio and newspaper ads planned in your district. In addition, we will be glad to run radio and newspaper ads applauding you for your vote to lower taxes.[76]

In *Buckley v. Valeo*, the Supreme Court opined that independent expenditures create little risk of corrupting government because the absence of prearrangement and coordination will make such expenditures of little value to the candidate; indeed, may render them counterproductive.[77] That might well be true of any expenditures by individuals to publicize their own ideas and words. The assumption made by the Court is much less plausible as applied to individuals who simply buy advertising services and time or space in the media. The assumption seems utterly implausible as applied to expenditures by political committees, organizations whose primary purpose is to promote the election of a candidate or candidates and whose managers either are, or rely upon the services of, practicing politicians or professional campaign managers. Political committees, whose primary purpose is, by definition, to further the election of a candidate, do not need to be told by the candidate that straightforward, massive media advertising will help. They will have little difficulty in identifying the themes of the candidate's advertising. Nor do they need to be told how to follow those themes (particularly when they hire the same consultants and media experts used by the official campaign).

Where consultation will be helpful, it can easily be accomplished behind

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[74] Deposition of Douglas L. Bailey in Republican National Committee v. Federal Election Comm'n, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980).

[75] Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 596 (1980).

[76] 127 CONG. REC. H4911 (daily ed. July 27, 1981).

[77] 424 U.S. at 47.

the scenes through persons who hold positions with both an "independent" committee and one or more of the candidate's authorized committees;[78] or through interlocking campaign consultants, vendors and suppliers who work for both an "independent" committee and the official campaign;[79] or through "indirect" communications between persons who work for an "independent" committee and others on the staff of the official campaign;[80] or sometimes through an "independent" committee's use of the facilities of, and campaign materials derived from, the candidate's official campaign.[81] Whether and how far large financial support through independent expenditures gives the fundraisers and managers a "call" on the successful candidate that corrupts the conduct of government are, in the first instance, questions of fact.

Therefore, there are convincing reasons to conclude that large "independent" expenditures by political committees in support of candidates do threaten both the actual and apparent corruption of government. It follows,

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[78] The record in *Common Cause v. Schmitt*, for example, showed that the assistant treasurer of Americans for Change was concurrently the treasurer of the 1980 Republican Presidential Unity Committee and a consultant to the Republican National Committee; that members of the AFC steering committee served concurrently on various arms of the Republican National Committee and the Reagan for President Committee; and that two of the organizers of Americans for an Effective Presidency took full-time positions on the official Reagan campaign. 455 U.S. 129 (1982).

[79] For example, expenditure and disbursement reports filed with the Federal Election Comm'n show that: 1) the Reagan for President Committee, AFC, NCCC and NCPAC all shared the same direct mail and telephone solicitation firms; 2) the Reagan for President Committee, NCCC and NCPAC all shared a common political consultant and pollster; 3) the Reagan for President Committee, the Republican Presidential Unity Committee, the Republican National Committee, AFC, FCM and NCPAC all shared the same printing house and office supplier; and 4) AFC and the Republican National Committee shared the same supplier of mailing lists, the same political consulting firm, and the same political telephoning and mailing company. *See supra* note 4.

[80] Senator Jesse Helms said in a television interview during the 1980 campaign—"Well, as you may know, we have an independent effort going on in North Carolina. Uh, the law forbids me to consult with him [Mr. Reagan], and it's been an awkward situation. I've had to, sort of, uh, talk indirectly with Paul Laxalt [Mr. Reagan's campaign Chairman] and hope that he would pass along . . . uh, and I . . . I think the messages have gotten through all right . . . ." Brief for Appellants at 31, Common Cause v. Schmitt, 455 U.S. 129 (1982).

[81] The record in *Common Cause v. Schmitt* shows that AFC used press facilities of, and was on the official program at, the 1980 Republican National Convention. Similarly, FCM acquired and used a mailing list of 180,000 names that had been compiled by an earlier Reagan campaign. *See* N.Y. Times, June 30, 1980, at B13, col. 3. Assistance flowed the other way as well. Campaign materials prepared by the NCCC "Americans for Reagan" project were distributed at Reagan-Bush Committee offices by David Schwartzbaum, Oct. 18, 1980, Affidavit of Peter Butzin, Nov. 6, 1980 submitted to the Federal Election Commission on Nov. 17, 1980. *See supra* note 4.

under the key footnote in *First National Bank v. Bellotti*[82] and *Federal Election Commission v. National Right to Work Committee*,[83] that the prohibition of such expenditures would not violate the first amendment. Whether the expenditures do create such risks is, however, a question of fact; and consequently the constitutional decision may turn upon who makes the determination and how the determination is made. Where the constitutional challenge is to legislation regulating property or economic activity, a presumption of constitutionality requires the judiciary to assume the existence of facts supporting the constitutionality of the legislation unless the challenger proves that those facts cannot exist. The Court has failed, however—indeed, it seems not even to have tried—to develop rules governing the treatment of questions of fact in cases calling for strict scrutiny of the challenged legislation. Opinions under the first amendment, even those of individual Justices, are filled with inconsistencies upon this question.[84]

In *Buckley v. Valeo*, the per curiam opinion seemingly withholds the deference to the implicit congressional findings for which Justice White contended in dissent.[85] In *Bellotti*, Justice Powell's opinion for the Court stressed that the Commonwealth's arguments concerning the evils of corporate expenditures in a referendum were not supported "by record or legislative findings,"[86] and in reserving judgment upon the ban against corporate expenditures in support of a candidate, he observed that "Congress might well be able to demonstrate the existence of a danger or real or apparent corruption . . . ."[87] Does this imply that Congress or a state legislature is required to make formal findings of fact supported by evidence as required by statute or common law in the case of an administrative agency? If the Court is to make its own determinations, should the Justices look to their library research, to personal observations and, perhaps, to personal prejudices, as Justice Powell's reference to record findings suggests, or should an elaborate trial be held to establish the constitutional facts with deference given to the finding of the trial judge who saw and heard the witnesses?

If the unanimous opinion in *Federal Election Commission v. National Right To Work Committee*[88] is reliable, the Court has now reverted to a policy of giving considerable weight to the congressional findings that implicitly underlie legislation regulating campaign contributions and expenditures. In holding that the section 441b ban upon campaign contributions and expenditures is constitutional because it serves the important

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[82] 435 U.S. at 788 n.26.

[83] ___ U.S. ___, 103 S. Ct. 552 (1982).

[84] A. COX, FREEDOM OF EXPRESSION 37-38, 85 (1980).

[85] 424 U.S. 1 (1976).

[86] 435 U.S. at 789.

[87] *Id.* at 788 n.26.

[88] *Id.*

interest of preventing both actual corruption and erosion of public confidence in government through the appearance of corruption, Justice Rehnquist said for all the Justices—

> In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. [Citations omitted]. While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress's judgment that it is the potential for such influence that demands regulation. Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.[89]

The reasoning cannot be squared with the prevailing opinions in *Buckley* and *Bellotti*, but it is supported by such cases as *Rostker v. Goldberg*[90] and *Columbia Broadcasting System v. Democratic National Commission*.[91] It also represents a sounder view of the proper relationship between the legislative and judicial functions. The judicial process is not well-suited to the determination of social and political conditions or tendencies. Such facts are hardly susceptible to proof in a judicial trial. Justices who make their own decisions based upon independent reading or personal experience are as susceptible to prejudice or preconception as a legislature. Congress rarely makes explicit and specific findings of fact; to require them as a condition of deference would greatly impede the legislative process. While the extreme deference required by the normal presumption of constitutionality should be withheld in strict scrutiny cases in order to prevent dilution of fundamental rights, the Court should ask no more than whether there is solid support for any debatable conclusions concerning conditions and tendencies upon which the justification for the legislation rests.

Under the precedents, the constitutionality of legislation putting strict ceilings upon expenditures by political committees, whether formed by special interest groups or by a candidate's friends and associates, rests upon satisfying the Court that there is sufficient support for a determination that such expenditures will have undue influence upon the integrity of government officials or the confidence of the public. The constitutionality of section 441b's prohibition upon expenditures by corporations and labor unions apparently will turn upon a similar inquiry into the facts of political life. There is solid support for such determinations. The determinations are implicit in the enactment of the legislation. This should

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[89] *Id.* at 560.

[90] 448 U.S. 1306 (1980).

[91] 412 U.S. 94 (1973).

be enough to establish the constitutionality of such legislation without further judicial inquiry.

2. A New Departure

Under conventional first amendment principles, legislation that restricts expression because the lawmakers feared its impact upon the minds or emotions of the audience, and so upon its action, violates the amendment unless justified by overwhelming public necessity to avoid imminent disaster.[92] A somewhat less demanding test is applicable to restrictions upon expressions that are designed to obviate serious public evils other than dangers supposedly inherent in the content of speech and its impact upon the public of the ideas or information expressed.[93] Large contributions and expenditures by political committees, corporations and labor unions present evils of the second class. In *Buckley v. Valeo*, the Court applied the first, conventional principle in rejecting "fairness" or "equality of opportunity" as a justification for limiting expenditures made by or on behalf of a candidate:

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[94]

Restrictions upon massive campaign spending, however, cannot be condemned as efforts to restrict the circulation of bad ideas quite so easily as the Court asserted, even though their actual and apparent tendency to corrupt the conduct of government be put aside. The infusion of large sums of money also gives rise to three other consequences scarcely related to the substance of any message or its tendency to affect the conduct of the audience.

First, large differences in ability to finance mass media advertising, including television spots, give the wealthy candidate or the candidate supported by great wealth, an advantage unrelated to his or her personal merit or the merits or popularity of his or her political views. It is difficult to prove precisely how much difference money makes but no practical politician doubts its importance in an election campaign. The ability of a senator to spend $5 million of his own money in a senatorial campaign gives him a tremendous advantage over his opponent. The ability

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[92] New York Times Co. v. United States, 403 U.S. 713 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Mills v. Alabama, 384 U.S. 214 (1966).

[93] United States v. O'Brien, 391 U.S. 367 (1968).

[94] 424 U.S. 48-49 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964) quoting Associated Press v. United States, 326 U.S. 1, 20 (1945), and Roth v. United States, 354 U.S. 476, 484 (1957)).

of Governor Jay Rockefeller to spend $10 a voter in West Virginia was bound to be a factor in a close election. Similarly, the ability of one candidate or the candidate's supporters, or the persons on one side of a referendum to marshall vastly larger sums than their opponents with which to buy time or space in the mass media often becomes decisive of the outcome.

Second, the infusion of massive amounts of money emphasizes competition of mass media advertising rather than of ideas or ability to perform well in public office. In *Buckley*, the Court said that a restriction on campaign expenditures "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[95] No doubt a restriction does reduce the size of the audience reached. The amount of money spent in modern campaigns, however, bears almost no relation to the number of issues discussed or the depth of their exploration. As Judge Skelly Wright observed, "[t]he ceilings on giving and spending take from wealthy citizens, candidates, and organizations only certain limited political advantages totally unrelated to the merits of their arguments—advantages which all too frequently *obscure* the merits of the arguments."[96]

Third and conversely, massive advertising campaigns discourage individual involvement in campaign activities.

Fourth, public observation of these trends is all too likely to undermine the confidences of citizenry in the present process—and perhaps in all—representative government, because citizens observe that it is money that wins elections and, therefore, money that influences the conduct of government.

In *Citizens Against Rent Control v. City of Berkeley*,[97] the prevailing opinion rejected these concerns as irrelevant. The majority treated as dispositive the language from *Buckley* quoted above.[98] Were the Court to take a second look, two themes might be pressed upon it.

First, restrictions upon campaign spending neither suppress ideas nor effect the competition of ideas based upon their intrinsic merit and appeal to the electorate. The almost insurmountable obstacle that the first amendment places in the way of governmental limitations upon expression flows from and implements the underlying premise that no legislative or other government official should be trusted to determine the relative value of ideas, the extent of the hearing to be accorded any idea, or which ideas are true and which are false. No such judgment is required to restrict campaign expenditures. The money buys chiefly repetition. After a certain level is reached even the size of the audience will be only marginally

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[95] *Id.* at 19.

[96] Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976).

[97] 454 U.S. 290 (1981).

[98] *See supra* note 38 and accompanying text.

affected. When Justice Holmes expressed the essence of the first amendment by saying that the only way to determine truth was to leave it to competition in the marketplace of ideas and opinion, he was not asserting that a necessary measure of truth is the frequency of reiteration or even the size of the audience purchased by those with the most money to spend in promoting their opinions.

Second, the first amendment would bar government from limiting the volume or reiteration of speech of the size of the audience unless necessary to serve some important public purpose outside the field of expression. We must also assume that government ordinarily may not set limits upon the amounts of money expended in propagating ideas on the theory that public opinion should not be shaped by money. But these principles are subject to exceptions designed to minimize irrelevant inequalities where the competition of ideas is shaped by a limiting framework. Town meetings, although impractical for large populations, are often correctly cited as the highest form of self-government. A town meeting cannot be conducted without rules of procedure akin to *Roberts Rules of Order*. The moderator is expected to limit the length of specific time to apportion the time fairly on controversial issues so that everyone gets a fair hearing. No one regards these practices as inconsistent with the philosophy of the first amendment. Similarly, the rules of the Supreme Court of the United States limit the length of briefs and equally apportion the time allowed for oral argument. The "fairness doctrine" sets limits to the editorial as well as the commercial liberty of radio and television broadcasters.[99] And one would suppose that a municipality forced by excess demand to apportion the use of its public auditorium, might allocate use by some otherwise neutral rule providing a variety of programs instead of auctioning the facility to the highest bidders.[100]

Should not an election or political referendum be viewed as a special occasion with a limited framework somewhat like a town meeting? There are identified candidates or referendum issues. There is a campaign season, not precisely limited in duration but nonetheless identifiable. Workable distinctions can be drawn between campaign expenditures targeted in direct support of a candidate and both the publication of newspapers and magazines and the on-going discussion of public issues. The ideals of democratic self-government, including the first amendment, can hardly be supposed to guarantee those who can command the most money the opportunity to use the imbalance to win an election.

Even though the majority rejected these themes in the *Berkeley* case, there is some encouragement in individual opinions. Justice White argued in a dissenting opinion that it is permissible to limit contributions to be spent on propaganda on one side of a referendum issue because massive

[99] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[100] *Cf.* Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975) (denial of the use of municipal facilities for a musical production on the basis of the board member's judgment was a prior restraint).

expenditures on one side may discourage participation in ballot measure campaigns and undermine public confidence in the referendum process.[101] Justices Blackmun and O'Connor seem to recognize in a concurring opinion that the Berkeley ordinance would have been valid if the city had shown a factual connection that Justice White believed to be apparent.[102] Earlier, in *First National Bank v. Bellotti*, Justice Powell partially recognized that the prohibition upon corporate expenditures might be sustained if it were shown by the record or legislative findings that "corporate advocacy threatened imminently to undermine democratic processes" or "the confidence of the citizenry in government."[103] Justice Marshall took this view in the *Berkeley* case.[104]

III. CONCLUSION

Since 1980 there has been growing fear that money is corrupting the democratic process. Although it would seem difficult, if not impossible, to prove categorically the factual connection that Justices Marshall, Blackmun and O'Connor found not to have been demonstrated, it seems quite probable that judicial understanding may change as public comprehension of the evil increases. Counsel advising legislative committees and litigating these constitutional issues may well be able to establish stronger records by expert testimony and the recitation of findings in committee reports and findings by a judge upon evidence. Furthermore, the *National Right To Work* case indicates, as explained above, that the burden may no longer rest upon the proponents of such legislation.

The decisions sustaining campaign expenditures by corporations and organized groups are libertarian in the superficial sense that they sustain claims under the first amendment. Their effect, however, is to increase the influence of organized groups, especially of groups with access to money, and to diminish the voice of the individual. If liberty means the opportunity of the individual man or woman to express himself or herself in a society in which ideas are judged principally by their merit, increasing the relative influence of organizations and shrinking the attention paid to individual voices means a net loss of human freedom.

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[101] 454 U.S. at 303-11.

[102] *Id.* at 302-03.

[103] 435 U.S. at 789.

[104] 454 U.S. at 301-02.

[105] *See supra* notes 63-65 and accompanying text.