

ARTICLE

RETHINKING THE  
UNCONSTITUTIONALITY OF  
CONTRIBUTION AND EXPENDITURE  
LIMITS IN BALLOT MEASURE  
CAMPAIGNS

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I. INTRODUCTION

Supreme Court precedent dating back to the 1970s and 1980s precludes state and local jurisdictions from limiting financial contributions to committees formed to support or oppose ballot measures<sup>1</sup> or from barring corporate expenditures in ballot measure campaigns.<sup>2</sup> These

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1. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

2. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Precedent from the 1990s even precludes *disclosure* of some expenditures funding ballot measure campaigns. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). But the precise reach of *McIntyre* is unclear. See Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 3 ELECTION L.J. 251, 252–53 (2004). One thoughtful commentator is quite sanguine about the constitutionality of most ballot measure disclosure laws following more recent developments in the Supreme Court. See Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237, 243–44 (2004). I do not address disclosure issues in this Article, assuming that courts would hold that it is constitutional in most circumstances to require those who are spending money supporting or opposing ballot measures to file reports disclosing contributions and expenditures.

precedents emerged from the Supreme Court at the time of its greatest hostility to campaign finance regulation, when it viewed such laws as impermissibly impinging on the rights of free speech and association guaranteed by the First Amendment.<sup>3</sup>

These precedents are ripe for reexamination in light of the Supreme Court's new-found deference to campaign finance regulation, culminating in 2003's *McConnell v. FEC*,<sup>4</sup> a case upholding the major provisions of the Bipartisan Campaign Reform Act of 2002<sup>5</sup> (commonly known as "the McCain-Feingold law" or "BCRA"). *McConnell* and three other cases that make up what I have termed the "New Deference Quartet" did not concern ballot measures; yet, their analyses of campaign finance laws in the context of *candidate* elections potentially open up the door to new regulations in the *ballot measure* context.

This Article considers three potential ballot measure campaign finance regulations and their likelihood of passing constitutional muster under the more recent precedents: a law limiting contributions to ballot measure committees controlled by officeholders; a law limiting contributions to all ballot measure committees; and a law limiting expenditures in ballot measure campaigns by corporations and labor unions. Although it is fairly clear that all three proposed laws would have been struck down by the Supreme Court in earlier decades, they have a surprisingly good chance of passing muster today.

The New Deference Quartet increases the chances of such laws being sustained in three distinct ways. First, the Court has lowered the evidentiary burden for jurisdictions seeking to justify their campaign finance laws against First Amendment challenge. Second, the Court has moved closer toward embracing an equality rationale for campaign finance regulation; Third, the Court has reaffirmed some previously shaky precedent on the ability of jurisdictions to limit corporate (and now union) involvement in the political process. Thus, arguments about how ballot measure limits are necessary to prevent "corruption" or "preserve voter confidence" are more

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*See, e.g.*, *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1107 (9th Cir. 2003) ("California may well have a compelling interest in informing its voters of the source and amount of funds expended on express ballot-measure advocacy."). Issues remain as well over disclosure of identity on the face of ballot measure campaign materials. *See ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004).

3. *See* RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 108–10 (2003) (describing these cases as part of a "post-*Buckley* period of hostility to campaign finance regulation").

4. *McConnell v. FEC*, 540 U.S. 93 (2003).

5. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

likely to gain a receptive hearing by the Court than they would have in the past.

One purpose of this Article is to consider the constitutional questions that courts will inevitably confront in coming years over ballot measure limits.<sup>6</sup> A second and equally important purpose is to use this analysis to consider the role that evidence plays in the Court's campaign finance jurisprudence. The Court's demand for evidence in campaign finance cases is shifting and imprecise. In fact, evidentiary analysis often appears to be a proxy for a determination on the merits made more on faith than on evidence. In the final part of this Article, I consider the appropriate role that evidence should play in campaign finance cases. I argue that a more precise and transparent evidentiary inquiry into the connection between the goals of campaign finance laws and the means of achieving them will assist fair-minded judges in an inevitable constitutional balancing. I argue decidedly against the role that evidence currently plays in Supreme Court analysis of campaign finance cases, as well as against Richard Pildes's alternative proposed "motive" test for judging campaign finance constitutional challenges.<sup>7</sup>

Part II of the Article surveys the constitutional landscape, focusing on the Court's two most relevant ballot measure cases and the New Deference Quartet. Part III considers the constitutionality of limiting contributions to candidate-controlled ballot measure committees. Part IV examines the constitutionality of contribution limits more generally in ballot measure elections. Part V turns to corporate and labor union expenditure limits in ballot measure campaigns. Part VI addresses the broader evidentiary question in Supreme Court campaign finance jurisprudence.

## II. SURVEYING THE CONSTITUTIONAL LANDSCAPE<sup>8</sup>

Modern U.S. campaign finance jurisprudence stems from the seminal 1976 case, *Buckley v. Valeo*.<sup>9</sup> *Buckley* considered the constitutionality of

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6. My intention here is not to advocate that any or all of these regulations be adopted, but is only to discuss the constitutional questions. As a matter of policy, I am ambivalent about two of the three proposed regulations, and in favor of contribution limits for candidate-controlled ballot measure committees. See Richard L. Hasen, *Money and Influence Flow Through a Ballot Measure Loophole*, L.A. TIMES, Jan. 4, 2005, at B13 (advocating contribution limits for candidate-controlled ballot measure committees).

7. See *infra* notes 167–73 and accompanying text.

8. Some of this survey appears in slightly different forms in my other works, including, most recently, in HASEN, *supra* note 3, at 105–14 and in Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 35–47 (2004).

much of the 1974 Amendments to the Federal Election Campaign Act (“FECA”).<sup>10</sup> The FECA Amendments were complex, establishing (among other things) limits on the amounts that individuals or organizations could contribute to candidates (contribution limits), limits on the amounts that individuals or organizations could spend to support or oppose candidates for federal office independent of candidates (independent expenditure limits),<sup>11</sup> public financing for major presidential candidates, and the creation of the Federal Election Commission (“FEC”).<sup>12</sup> The Court upheld FECA’s contribution limits, struck down the expenditure limits, upheld the public financing system, and struck down the means for the appointment of members of the FEC.

Although recognizing that any law regulating campaign financing was subject to the “exacting scrutiny required by the First Amendment,”<sup>13</sup> the Court mandated divergent treatment of contributions and expenditures for two reasons. First, the Court held that campaign expenditures were core political speech, but a limit on the amount of campaign contributions only marginally restricted a contributor’s ability to send a message of support for a candidate.<sup>14</sup> Thus, expenditures were entitled to greater constitutional protection than were contributions. Second, the *Buckley* Court recognized only the interests in preventing corruption and the appearance of corruption as justifying infringement on First Amendment rights.<sup>15</sup>

The Court held that large contributions raise the problem of corruption “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders.”<sup>16</sup> But truly independent expenditures do not raise the same danger of corruption because a *quid pro quo* is more difficult if the politician and spender cannot communicate about the expenditure.<sup>17</sup>

With the corruption interest having failed to justify a limit on independent expenditures, the Court considered the alternative argument that expenditure limits were justified by “the ancillary governmental interest in equalizing the relative ability of individuals and groups to

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9. *Buckley v. Valeo*, 424 U.S. 1 (1976).

10. Federal Election Campaign Act Amendments of 1974, 2 U.S.C. § 431 (2001 & Supp. 2002).

11. FECA treats spending done in coordination with candidates as a contribution, not as an expenditure. *See* 2 U.S.C. § 441a(a)(7)(B)(i) (2001 & Supp. II 2002).

12. 2 U.S.C. § 431.

13. *Buckley*, 424 U.S. at 16.

14. *Id.* at 21.

15. *Id.* at 26–27, 45–51.

16. *Id.* at 26–27.

17. *Id.* at 46–47.

influence the outcome of elections.”<sup>18</sup> In one of the most famous and perhaps notorious sentences in *Buckley*, the Court rejected this equality rationale for campaign finance regulation, at least in the context of expenditure limits: “[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.”<sup>19</sup>

Soon after *Buckley*, the Supreme Court decided the two most important cases relevant to assessing the constitutionality of campaign finance regulation in ballot measure elections. In *First National Bank of Boston v. Bellotti*,<sup>20</sup> the Court rejected a Massachusetts law aimed at limiting corporate spending in ballot measure campaigns. Following *Buckley*, the result was not surprising: the Massachusetts law was an expenditure limit, which *Buckley* had declared impermissible even in the context of candidate campaigns in which there was someone who could potentially be corrupted by the spending. The *Bellotti* Court declared: “Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.”<sup>21</sup> The Court’s very framing of the question indicated the likely outcome: “The proper question . . . is not whether corporations ‘have’ First Amendment rights . . . [but whether the Massachusetts law] abridges expression that the First Amendment was meant to protect.”<sup>22</sup>

Defending the law, the state argued that corporate participation in the referendum process “would exert an undue influence on the outcome of . . . [the] vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to [the state], corporations are wealthy and powerful and their views may drown out other points of view.”<sup>23</sup>

The Court gave this “voter confidence” argument lip service. It first stated that if these arguments “were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First

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18. *Id.* at 48.

19. *Id.* at 48–49.

20. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

21. *Id.* at 790 (internal citations omitted).

22. *Id.* at 776.

23. *Id.* at 789.

Amendment interests, these arguments would merit our consideration.”<sup>24</sup> But in the next paragraph, the Court referenced *Buckley*’s rejection of the equality rationale and concluded that “the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”<sup>25</sup>

Similarly, in *Citizens Against Rent Control v. City of Berkeley* (“*CARC*”),<sup>26</sup> the Court rejected a city ordinance limiting contributions to ballot measure committees to \$250. The Court quickly rejected an anticorruption rationale, relying on the lack of a candidate who could appear to be corrupted by a contribution to a ballot measure committee.<sup>27</sup>

The lower court had upheld the city measure as a means of preserving “voters’ confidence” in the ballot measure process, but the Supreme Court, in rejecting the ordinance, flatly stated without elaboration that “the record in this case does not support” the lower court’s conclusion that the ordinance was necessary to preserve such voter confidence.<sup>28</sup> The Court did not explain what evidence would be sufficient to make such a showing. Three of the Justices who concurred in the judgment noted that they would have reached a different result had the state been able to come forward with enough evidence to show that the city’s regulation was a justified means of preserving voter confidence in government.<sup>29</sup>

In his dissent, Justice White stated his belief that it was “quite possible” that *Bellotti*’s voter confidence test

is fairly met in this case. Large contributions, mainly from corporate sources, have skyrocketed as the role of individuals has declined. Staggering disparities have developed between spending for and against various ballot measures. While it is not possible to prove that heavy spending “bought” a victory on any particular ballot proposition, there is increasing evidence that large contributors are at least able to block the adoption of measures through the initiative process. Recognition that

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24. *Id.* Justice Powell’s law clerk indicated that she included this language in the opinion “to communicate something of the notion that the government has an interest in keeping channels of communication open, and if a situation arises where people truly can’t [hear] what other citizens think because corporations have taken over so much, then regulation might be permissible.” HASEN, *supra* note 3, at 211 n.25 (quoting Memorandum from law clerk Nancy J. Bregstein to Justice Powell (Feb. 9, 1978)).

25. *Bellotti*, 435 U.S. at 790.

26. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

27. *Id.* at 296–99 (citing, in addition to *Bellotti*, two lower court cases addressing the question: *Let’s Help Fla. v. McCrary*, 621 F.2d 195, 199 (5th Cir. 1980); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978)).

28. *Id.* at 299.

29. *Id.* at 301–02 (Marshall, J., concurring in the judgment); *id.* at 302–03 (Blackmun & O’Connor, JJ., concurring in the judgment).

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.<sup>30</sup>

Though they were decided in 1978 and 1981 respectively, *Bellotti* and *CARC* represent the Supreme Court's most recent pronouncements on the constitutionality of contribution and expenditure limits in ballot measure campaigns. In the meantime, in the last five years, the Court has decided four cases that have markedly lowered the bar for upholding the constitutionality of campaign finance regulations in *candidate* campaigns. These cases—which I dub the New Deference Quartet—could well portend a rethinking of the logic of *Bellotti* and *CARC*.

Elsewhere I analyze in detail this seismic shift in the Court;<sup>31</sup> here, I simply report the highlights. The most significant of these cases is the 2000 case, *Nixon v. Shrink Missouri Government PAC*.<sup>32</sup> There the Court majority upheld the constitutionality of Missouri's low campaign contribution limits for state offices in four ways of jurisprudential significance.<sup>33</sup> First, the Court reduced the level of scrutiny for reviewing contribution limits from *Buckley*'s "exacting" level of scrutiny<sup>34</sup> to one in which interests need only be "sufficiently important" and not narrowly tailored to the government's interest.<sup>35</sup>

Second, the Court expanded the definition of corruption and the appearance of corruption sufficient to justify campaign finance regulation. The Court explained that corruption extended beyond quid pro quo arrangements to embrace "the broader threat from politicians too compliant with the wishes of large contributors."<sup>36</sup> As for the appearance of corruption, the Court remarked, "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."<sup>37</sup>

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30. *Id.* at 307–08 (White, J., dissenting) (internal footnotes omitted).

31. Hasen, *supra* note 8.

32. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

33. I provide greater details on these claims in Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing that Wouldn't Leave"*, 17 CONST. COMM. 483, 489–97 (2000).

34. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

35. *Shrink Mo.*, 528 U.S. at 388 ("[T]he dollar amount of the limit need not be 'fine tun[ed].'").

36. *Id.* at 389.

37. *Id.* at 390.

Third, and perhaps most significantly, the Court lowered the evidentiary burden for proving corruption or the appearance of corruption. The Court began by noting that the “quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”<sup>38</sup> Although the Court insisted that “mere conjecture” was not enough to support a campaign limit,<sup>39</sup> it held that Missouri could justify the need for its contribution limits to fight corruption or the appearance of corruption with some pretty flimsy evidence: the affidavit from a Missouri legislator who had supported the legislation stating that “large contributions have ‘the real potential to buy votes;’”<sup>40</sup> newspaper accounts suggesting possible corruption in Missouri politics;<sup>41</sup> and the passage of an earlier Missouri voter initiative establishing campaign contribution limits.<sup>42</sup>

Fourth, the Court created a difficult test for challenging the constitutionality of a contribution limit as too low to prevent effective advocacy. Refining (or changing) the effective advocacy test from *Buckley*, the Court stated: “We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”<sup>43</sup> In an era of faxes, web pages, and e-mails, it is hard to imagine any low contribution limit that would fail this test of constitutionality.

*FEC v. Colorado Republican Federal Campaign Committee* (“*Colorado II*”)<sup>44</sup> continued the trend toward relaxing *Buckley*’s rules. The question in this case concerned the constitutional rights of political parties to spend unlimited sums in coordination with the parties’ candidates. FECA treats a coordinated expenditure as a contribution, and limits the amount of coordinated expenditures that a party may make to a party’s candidate.<sup>45</sup> By a 5-4 vote, the Court upheld the FECA provision, primarily on the grounds that parties may serve as conduits for corruption: “[W]hether they like it or not, [parties] act as agents for spending on behalf of those who

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38. *Id.* at 391.

39. *Id.* at 392.

40. *Id.* at 393.

41. *Id.*

42. *Id.* at 393–94.

43. *Id.* at 397.

44. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001).

45. 2 U.S.C. §§ 441a(a)(7)(B)(i), 441a(d)(3) (2001 & Supp. II 2002).



seek to produce obligated officeholders.”<sup>46</sup> In support of this conclusion, the Court once again relied upon some rather casual empirical evidence.<sup>47</sup>

Then, in *FEC v. Beaumont*,<sup>48</sup> the Supreme Court held it was permissible to ban campaign contributions made by corporations organized solely for ideological purposes. *Beaumont* called into question *Bellotti*'s statement that the corporate form of the speaker is irrelevant for purposes of determining the degree of First Amendment protection.<sup>49</sup>

Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' *First Amendment* speech and association interests are derived largely from those of their members, and of the public in receiving information. A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.<sup>50</sup>

The final member of the New Deference Quartet is *McConnell v. FEC*,<sup>51</sup> the mammoth 2003 decision that upheld the major provisions of the McCain-Feingold law. There are two points about *McConnell* most relevant to an inquiry about the continued vitality of *Bellotti* and *CARC*. First, the Court was very casual in the evidence it required to sustain both the “soft money” and “issue advocacy” provisions of the law.<sup>52</sup> Thus, it upheld a limit on soft money raising and spending by *local* political parties and candidates despite any evidence whatsoever that these entities and people were or could be used as conduits for the sale of access to *federal* elections officials.<sup>53</sup> Similarly, the Court upheld the law's provisions redefining the line between regulated election advertising and unregulated issue advertising without a serious examination of the extent to which the law's provisions were unconstitutionally overbroad in regulating protected speech.<sup>54</sup>

Second, the Court reaffirmed and strengthened its 1990 holding in *Austin v. Michigan Chamber of Commerce*.<sup>55</sup> At issue in *Austin* was a

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46. *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 452.

47. See Richard L. Hasen, *The Constitutionality of a Soft Money Ban after Colorado Republican II*, 1 ELECTION L.J. 195, 203 (2002).

48. *FEC v. Beaumont*, 539 U.S. 146 (2003).

49. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

50. *Beaumont*, 539 U.S. at 162 n.8 (internal citations omitted).

51. *McConnell v. FEC*, 540 U.S. 93 (2003).

52. See Hasen, *supra* note 8, at 46–52.

53. See *id.* at 48–52.

54. See *id.* at 52–56.

55. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

Michigan law that barred corporations, other than media corporations, from using general treasury funds for independent expenditures in state election campaigns.<sup>56</sup> Under the reasoning of *Buckley* and *Bellotti*, the law regulating independent expenditures should have been struck down, at least absent proof that corporate independent expenditures in fact allowed for quid pro quo corruption of candidates. Instead, the Court upheld the law under a tortured definition of “corruption” that looked much more like an equality rationale for regulation:

Regardless of whether [the] danger of “financial *quid pro quo*” corruption may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.<sup>57</sup>

*Austin* was considered a questionable precedent for many years,<sup>58</sup> in part because it stood in tension with *Bellotti* and *Buckley* as a regulation of corporate participation in the political process and of independent expenditures. *McConnell* not only reaffirmed *Austin*’s application to corporations engaged in election-related activity, it (without discussion) upheld *Austin*’s application to labor union spending as well.<sup>59</sup>

With this background, I turn to consider three potential campaign finance regulations for ballot measure campaigns. I then examine the light that this consideration sheds on broader questions of the role of evidence in campaign finance regulation.

### III. LIMITING CONTRIBUTIONS TO CANDIDATE-CONTROLLED BALLOT MEASURE COMMITTEES

*Bellotti* and *CARC* depend upon a fixed demarcation between the world of candidate campaigns and the world of ballot measure campaigns. In the former, there are candidates who may be subject to undue influence, or at least may appear to be corrupt in the minds of voters who observe them. In the ballot measure world, in contrast, there is no candidate to corrupt and hence no basis for contribution limits—*Bellotti* tells us that the risk of candidate corruption “simply is not present” in referenda.<sup>60</sup>

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56. *See id.* at 652.

57. *Id.* at 659–60 (internal citation omitted).

58. *See Hasen, supra* note 8, at 42.

59. *See id.* at 57.

60. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

But the real world of politics is not so neatly demarcated. Candidates and parties may become intimately involved in ballot measure campaigns, and a contribution to a ballot measure campaign may inure—or at least appear to inure—to the benefit of the candidate supporting that measure. In this Part, I consider whether there is enough evidence of this potential for candidate corruption or the appearance of corruption to justify contribution limits on ballot measure committees that are controlled by political candidates.

The issue is not just an academic one. The California Fair Political Practices Commission (“FPPC”) recently adopted a regulation imposing such contribution limits,<sup>61</sup> and a legal challenge to this regulation has been mounted.<sup>62</sup> Here I argue that a court could uphold a contribution limit on candidate-controlled ballot measure committees against a constitutional challenge.<sup>63</sup>

The idea that politicians may benefit from contributions to ballot measure committees is not a new observation. An amicus brief submitted by the City and County of San Francisco in the *CARC* case in 1981 noted the “danger that large contributions in ballot measure campaigns will be transformed into a political debt.”<sup>64</sup> The brief further remarked that “it is not uncommon that the political fortunes of candidates for, and incumbents of, elective office may rise or fall on the outcome of [ballot measure] legislation.”<sup>65</sup>

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61. CAL. CODE REGS. tit. 2, § 18530.9 (2004).

62. Gary Dehlon, *FPPC Sued over Donation Limits*, SACRAMENTO BEE, Feb. 10, 2005, at A1. As this Article went to press, a trial court judge issued a preliminary injunction enjoining the enforcement of the FPPC regulations. The FPPC has appealed the trial court order. See News Advisory, Fair Political Practices Commission, FPPC Appeals Superior Court Ruling on Contribution Limits, (Apr. 19, 2005), at <http://www.fppc.ca.gov/releasespdf/fppc4-19-05b.pdf>.

63. There may be other valid bases for challenging the regulation, such as the argument that the FPPC had no statutory basis to adopt the regulation. See Minutes of Meeting, California Fair Political Practices Commission, Public Session 15 (June 25, 2004), at <http://www.fppc.ca.gov/minutes/2004-06.pdf> (detailing the comments of Arnold Schwarzenegger’s attorney Chuck Bell). The regulation also may be attacked as vague and ineffectively drafted. See Margaret Talev, *Election Funding Limits Added: Some Say New Rules on Ballot Initiatives Could Fetter Governor*, SACRAMENTO BEE, June 26, 2004, at A21 (quoting Bell as saying “[w]hen you look at a piece of Swiss cheese, it does have holes in it”); *infra* text accompanying note 97 (discussing whether the particular drafting of the regulation makes it easy to circumvent); *infra* text accompanying notes 99–100 (discussing whether there is a vagueness problem with the statute).

64. Brief in Support of Appellees by Amicus Curiae City and County of San Francisco at \*18 n.6, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (No. 80-737), available at 1981 WL 390096.

65. *Id.* at \*18. Along the same lines, an amicus brief submitted by the City of Santa Monica in the *CARC* case noted:

The *CARC* Court simply ignored the issue, understandably, since it was not highlighted by the parties and it was not the basis of the lower court's decision to uphold the law. A Second Circuit case predating *Bellotti* and *CARC* addressed the issue, but failed to give it much credence:

Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.<sup>66</sup>

Even thoughtful commentators have minimized the concern over candidate corruption in ballot measure campaigns.<sup>67</sup>

Nonetheless, a court confronting the FPPC regulation or a similar law today could well uphold it. Three things have changed since *CARC*: First, we have better data on the extent to which candidates and parties are involved in ballot measure campaigns; Second, we are witnessing an unprecedented expansion in the willingness of at least one elected official—California Governor Arnold Schwarzenegger—to use the ballot measure campaign as part of an integrated political strategy; Third, the New Deference Quartet creates a more hospitable judicial environment for regulation, particularly regulation aimed at preventing candidate corruption and the appearance of corruption. I address each of these factors in turn.

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Whatever the actual corrupting influence of large contributions on ballot measure campaigns—and we cannot agree that in local elections, where issues and candidates often go hand-in-hand, political favors may not be as readily, if somewhat more discreetly obtained, by supporting a candidate's favorite issue—the perceived potential for economic domination of political processes can not be gainsaid.

Brief of the City of Santa Monica, California, as Amicus Curiae in Support of Appellees at \*13, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (No. 80-737), available at 1981 WL 390098.

66. *Schwartz v. Romnes*, 495 F.2d 844, 852–53 (2d Cir. 1974) (internal footnote omitted).

67. For example, Richard Briffault has commented that

[i]n the candidate context, there may be incentives for donors to give directly to a candidate in order to build up good will and influence with that candidate. In the initiative context, however, there would be no comparable incentive for big money to donate as opposed to engaging in direct expenditures.

Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 413, 433 (1996). See also Marlene Arnold Nicholson, *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 ECOLOGY L.Q. 683, 702 n.108 (1981) (“[T]he connection between the fortunes of officeholders and ballot measures still appears to be sufficiently infrequent that this interest alone would not justify ballot measure contribution limitations.”). But see John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 386 (1985) (“[C]andidates can ride into office on the coattails of ballot proposition issues.”).

A. EVIDENCE OF CANDIDATE INVOLVEMENT IN BALLOT MEASURE  
CAMPAIGNS

I focus here on evidence from California,<sup>68</sup> a state with an active ballot measure process: in the 1990 to 2004 period, California voters voted on 198 ballot measures,<sup>69</sup> not to mention a number of local ballot measures which varied from jurisdiction to jurisdiction.

My earlier work examined the role that political parties, and to some extent, candidates, played in California's initiative process.<sup>70</sup> Among my earlier findings:

In the 1990s, elected officials and candidates like [Governor Pete] Wilson lent their name and money to particular initiatives both to pass the initiatives and to add content to their own candidacies. Wilson, for example, spent heavily or lobbied hard for Proposition 165 (welfare reform), Proposition 187 (ending government benefits for illegal immigrants), Proposition 209 (anti-affirmative action), and Proposition 226 (making it more difficult for unions to raise political money from members). Observers believe that Wilson and the Republican Party's support for Proposition 187 were responsible both for Wilson's gubernatorial reelection and, as the political mood shifted, for the later decline of the Republican Party's popularity in California.

Like elected officials and candidates, parties have used the initiative process to boost their electoral chances. State party organizations endorsed at least some initiatives, and they publicized their positions through means such as 'slate mailers' mailed to California voters before the election. . . . The Republicans spent over \$5.4 million supporting or opposing thirty initiatives; Democrats spent just under \$2 million supporting or opposing thirty-three initiatives.<sup>71</sup>

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68. I have limited my empirical examination to California. California's experience could be atypical compared to the twenty-three other states with the initiative process. If so, this raises an interesting question that I do not address in this Article: if there is enough evidence of a problem in California but not in other states, might a contribution limit be constitutional as applied only to California? See Shaun Bowler, Todd Donovan & Jeffrey Karp, *Popular Attitudes Towards Direct Democracy* 22 (Aug. 2003) (unpublished manuscript, on file with the author) (noting that focusing on California may skew the results of a study of the initiative process).

69. See Richard L. Hasen, *Supplement to Rethinking of Unconstitutionality of Contribution and Expenditure Limits to Ballot Measure Campaigns* tbl.1, at <http://electionlawblog.org/archives/usc-appendix.doc> (last visited Apr. 20, 2005) [hereinafter *Supplement*].

70. See Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731 (2000).

71. *Id.* at 737–39 (internal footnotes omitted).

Wilson was hardly the first California candidate to tie his fortunes to the initiative process,<sup>72</sup> nor was he the last. There were at least thirty-seven committees controlled by candidates or elected officials and organized to affect the outcome of ballot measure elections from 1990 to 2004, and together they have raised at least \$84 million.<sup>73</sup> Eliminating candidate-controlled committees involved in the March 2003 gubernatorial recall election, the figure drops to a little over \$58 million.

Some candidates are significantly involved in the initiative process in ways other than controlling committees. For example, candidates can raise funds for measures they support, even if they do not control the committee. Those who are in the legislature can place ballot measures directly before the voters. Many elected officials also are authors or proponents of ballot initiatives.<sup>74</sup> They can (and do) publicly advocate for or against ballot measure proposals. I examined the arguments and rebuttals contained in the official ballot materials distributed by the Secretary of State from 1990 to 2004. Of the 198 ballot measures in the period, 126 of them—more than 63%—featured at least one argument or rebuttal signed by at least one current state senator, assembly member, or other public official elected in a statewide election.<sup>75</sup>

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72. Another candidate who tied his fortunes to the initiative process was 1990 Democratic gubernatorial candidate John Van de Kamp:

Van de Kamp spent much of his fundraising time and his political capital raising money for three propositions on the November 1990 ballot. The propositions dealt with crime, the environment, and term limits. "The three initiatives were devised by Van de Kamp and his advisers as a general election stratagem—'Vote for me, vote for my platform.'" But by the time the initiatives appeared on the ballot in the general election, Van de Kamp had been eliminated in a primary run against Dianne Feinstein. Observers believe that Van de Kamp depleted his organizational resources from party officials by supporting the initiatives. He also lost party goodwill: Van de Kamp alienated other Democrats by authoring a term limits proposal, Proposition 131. Other Democrats opposed the initiative, and the measure went down to defeat.

*Id.* at 745 n.58 (internal citations omitted). Also, in 1974, Jerry Brown ran for governor and cosponsored a campaign finance ballot measure "to strengthen his credentials in his run for governor." DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 118 (2004).

73. See *Supplement, supra* note 69, at tbl.2. The California Secretary of State's office compiled the committees listed at my request. Note that at the time he controlled his committee supporting Proposition 49, Schwarzenegger was neither governor nor a candidate for governor. I therefore have not included his committee supporting Proposition 49 on this list.

74. Charles Bell & Charles Price, *Are Ballot Measures the Magic Ride to Success?*, XIX CAL. J. 380, 380 (Sept. 1988) ("Since 1970, approximately 15 percent of all initiatives filed have been by officeholder-proponents. Indeed, over the last several years (since 1983) about 22 percent of initiatives introduced yearly have been authored by current or ex-officeholders.").

75. See *Supplement, supra* note 69, at tbl.1. My count did not include former (or future) officials who ran for state office, nor did it include federal or local elected officials. Of course, legislators were more likely to write ballot arguments for legislatively proposed ballot measures than for initiatives,

## B. THE ARNOLD FACTOR

If California candidates have continued to use the ballot measure process to pump up their campaigns, Governor Arnold Schwarzenegger's use of the initiative process is not business as usual. Even before he was governor, Schwarzenegger was involved in fundraising for a 2002 initiative, Proposition 49, regarding after-school funding. "Citizens for After School Programs—Yes on 49," the committee controlled by Schwarzenegger, raised \$9.6 million for the initiative, which some viewed as simply a way for the former actor to test the waters for a gubernatorial run.<sup>76</sup>

Then, during California's unprecedented recall election, Schwarzenegger's "Total Recall" committee, a ballot measure committee favoring the recall and controlled by Schwarzenegger, raised over \$4.5 million in donations not subject to contribution limits.<sup>77</sup> The advertisements the committee funded favoring the recall used Schwarzenegger as a spokesperson. This funding was on top of the contributions he raised for his gubernatorial run. To the candidate committee, contributions were limited to \$21,100 per person—except for Schwarzenegger himself, who, facing no limit on contributions to his own committee, donated \$10.5 million to his "Californians for Schwarzenegger" committee.<sup>78</sup>

The most interesting aspect of the story is how Schwarzenegger has used the ballot measure process as governor. As a popular governor facing a recalcitrant legislature dominated by members of the other party, Schwarzenegger has resorted to using (and sometimes threatening to use) the initiative process to further his legislative agenda and to block initiatives he opposes.<sup>79</sup>

He has also set up a controlled committee, "Governor Schwarzenegger's California Recovery Team," that raises money for his

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writing in 90% of the former and 35% of the latter. Legislators may campaign for or against either kind of ballot measure.

76. R. J. Whittier & Christopher Gearon, *Schwarzenegger Terminates the Opposition to Proposition 49*, AARP.ORG, at <http://www.aarp.org/nrta-watch/articles/a200302-20-schwarzenegger.html> (last visited May 23, 2005).

77. See Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 251 (2004). The recall campaign is somewhat of a hybrid between a candidate election and a ballot measure election. Without going into details here, I believe that many limits that apply to candidate elections could apply to recall elections as well. Elizabeth Garrett explores these issues in detail.

78. *Id.* at 247.

79. See *id.* at 280 (explaining that Governor Schwarzenegger threatened to place a workers' compensation measure on the ballot if the legislature did not enact reforms he favored).

ballot measure projects.<sup>80</sup> He then set up separate controlled committees to fund particular campaigns for or against certain ballot measures. Finally, he directs the California Recovery Team fund to contribute to his other controlled committees.

In calendar year 2004, the California Recovery Team received over \$18.6 million in contributions.<sup>81</sup> As Table 1 indicates, these figures include: \$1.5 million from an Orange County billionaire, Henry Nicholas; over \$1 million from Ameriquest Capital; \$800,000 from the California Republican Party; \$750,000 from Jerry Perenchio, head of Univision television; \$500,000 from Alex Spanos (and another \$250,000 from his company); \$450,000 from William Robinson; and donations of \$250,000 each from Hewlett-Packard, Paul F. Folino, American Sterling Corporation, and William Lyons Homes, Inc.<sup>82</sup> Among the donors at the \$200,000 level were Target Corporation and Twentieth Century Fox.<sup>83</sup>

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80. See Cal-Access, *Campaign Finance Activity: Schwarzenegger's California Recovery Team*, at <http://cal-access.ss.ca.gov/campaign/committees/Detail.aspx?id=1261406&session=2005> (last visited Apr. 20, 2005).

81. Cal-Access, *Campaign Finance Activity: Schwarzenegger's California Recovery Team, 2003-2004 Election Cycle*, at <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1261406&session=2003&view=general> (last visited Apr. 20, 2005).

82. See Cal-Access, *Campaign Finance Activity: Schwarzenegger's California Recovery Team, 2003-2004 Election Cycle, Contributions Received*, at <http://cal-access.ss.ca.gov/campaign/committees/Detail.aspx?id=1261406&session=2003&view=received&psort=NAME> (last visited Apr. 26, 2005); Dan Morain, *Schwarzenegger a Big Fundraiser in 2004*, L.A. TIMES, Feb. 1, 2005, at B1. Many of the large donors are part of the California Chamber of Commerce, which has emerged as a key Schwarzenegger ally. Peter Nicholas, *Business Sees an Ally in Governor*, L.A. TIMES, Oct. 18, 2004, at B1 ("The governor has collected more than \$1 million in political contributions from companies represented on the chamber's board, including \$250,000 each from Hewlett-Packard and Anheuser-Busch and \$200,000 from PG&E.').

83. Cal-Access, *supra* note 80.



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TABLE 1. Six-figure donors to Gov. Schwarzenegger's California Recovery Team, 2004

<u>Name of Contributor</u>	<u>Amount</u>
Henry Nicholas	\$1,500,000.00
Ameritrust Capital Corporation/ Long Beach Acceptance Corp.	\$1,054,000.00
California Republican Party	\$800,000.00
Jerry Perenchio Living Trust	\$750,000.00
Mr. Alex G. Spanos	\$500,000.00
William A. Robinson TTEE	\$450,000.00
AG Spanos Companies	\$250,000.00
American Sterling Corporation	\$250,000.00
Robin P. Arkley II	\$250,000.00
Paul F. Folino	\$250,000.00
Hewlett-Packard Company	\$250,000.00
News America Incorporated	\$250,000.00
William Lyon Homes, Inc.	\$250,000.00
Schwarzenegger's Total Recall Committee	\$200,000.00
Target Corporation	\$200,000.00
Twentieth Century Fox Film Corporation	\$200,000.00
John T. Walton	\$200,000.00
Committee for Workers' Compensation Reform and Accountability	\$168,517.00
Timothy Draper	\$150,000.00
P G & E Corporation-Pacific Gas & Electric	\$150,000.00
Castle & Cooke, Inc. and Affiliate Dole Food Company, Inc.	\$125,000.00
Dole Food Company, Inc. and Affiliate Castle & Cooke, Inc.	\$125,000.00
Eli Broad	\$111,887.25
American Financial Group, Inc.	\$100,000.00
Anheuser Busch Companies	\$100,000.00
Ron Burkle	\$100,000.00
ChevronTexaco Corporation	\$100,000.00
William Cronk	\$100,000.00
Robert A. Day	\$100,000.00
E & J Gallo Winery	\$100,000.00
H & S Ventures, LLC	\$100,000.00
The Home Depot	\$100,000.00
The Irvine Company	\$100,000.00
Lewis Pacific Partners and Affiliate Lewis Investment Company, LLC	\$100,000.00
Mercury General Corporation	\$100,000.00
Mr. L. A. Arena Company	\$100,000.00
The New Majority PAC	\$100,000.00
New West Petroleum	\$100,000.00
Pacific Telesis Group and Its Subsidiaries, Affiliates of SBC Communications, Inc.	\$100,000.00
Pfizer, Inc.	\$100,000.00
The Spielberg Family Living Trust	\$100,000.00
The Zenith-Zenith Insurance Company	\$100,000.00

The California Recovery Team itself contributed over \$5.3 million to Schwarzenegger's controlled committee aimed at passing 2004's Propositions 57 and 58, which the Governor supported as a way of getting California out of its financial crisis.<sup>84</sup> Direct donors to the 57/58 committee at the \$100,000 or greater range included the Toyota Corporation, the Kaiser Foundation Health Plan, and Anheuser Busch Companies.<sup>85</sup>

During the November 2004 election, the Governor transferred over \$4.3 million from his California Recovery Team to fund opposition to Propositions 68 and 70, two gaming initiatives.<sup>86</sup> In addition, the Republican Party funded \$2 million for five million voter guides mailed to voters from Schwarzenegger stating his position on a number of key initiatives.<sup>87</sup>

Contributions to Schwarzenegger's committees became the subject of some controversy in early 2004. Propositions 57 and 58 required California to sell a large number of bonds.<sup>88</sup> Schwarzenegger's campaign team sent an invitation to New York bond traders who wished to have a "private dinner" with Schwarzenegger. The invitation listed a check box to contribute up to \$500,000 to the committee, at which point the donor would be named a "chairman" of the California Recovery Team.<sup>89</sup>

Largely in response to the Governor's fundraising, as well as to the large fundraising for a ballot measure committee done by California Lieutenant Governor Cruz Bustamante (while Bustamante was running as a

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84. Cal-Access, *Campaign Finance Activity: Schwarzenegger's California Recovery Team, 2003-2004 Election Cycle, Contributions Made*, at <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?Id=1261406&type=all&session=2003&view=contributions> (last visited Apr. 20, 2005).

85. Cal-Access, *Campaign Finance Activity: Yes for a Balanced Budget—Yes on 57 & 58, 2003-2004 Election Cycle, Contributions Received*, at <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1261936&session=2003&view=received> (last visited Apr. 20, 2005).

86. Cal-Access, *supra* note 84.

87. Dan Morain, *GovMakes His Pitch*, L.A. TIMES, Oct. 15, 2004, at B1. The mailing represented the Governor's position, not the party's: "And although the Republicans are paying for the pamphlet, the governor's stand differs from that of the party on three measures: the stem cell proposition and two competing initiatives, Propositions 60 and 62, involving California's primary election system. On each of the three, Schwarzenegger takes no position." *Id.*

88. See California Primary Election, *Official Voter Information Guide: Propositions*, at <http://primary2004.ss.ca.gov/propositions/propositions.html> (last visited Apr. 20, 2005).

89. Fredric U. Dicker, *Gov Hosting 500G Arnie Fund-Raiser*, N.Y. POST, Feb. 3, 2004, at 16; Dan Glaister, *Schwarzenegger Breaks Fundraising Record at up to \$500,000 for Dinner Seat*, GUARDIAN, Feb. 21, 2004, at 2; Dan Morain, *Tickets to Schwarzenegger Fundraiser in New York Will Cost up to \$500,000*, L.A. TIMES, Feb. 5, 2004, at B8; Margaret Talev, *Donors Drop \$500,000 Each for Schwarzenegger*, SCRIPPS HOWARD NEWS SERV., Feb. 4, 2004, at [http://www.shns.com/shns/g\\_index2.cfm?action=detail&pk=FUND-RAISER-02-04-04](http://www.shns.com/shns/g_index2.cfm?action=detail&pk=FUND-RAISER-02-04-04).

replacement in the recall election),<sup>90</sup> the FPPC in June 2004 adopted a new regulation effective after the 2004 elections that would limit contributions to candidate-controlled ballot measure committees to the same amount that the candidate could raise for his campaign committee.<sup>91</sup> In adopting the resolution, FPPC members discussed the relevance of *CARC* and *McConnell* to the constitutionality of the provision, and voted 4-1 to approve the measure. Commissioner Pamela S. Karlan, a noted election law scholar, cast the sole vote against the provision, voicing both constitutional and policy concerns.<sup>92</sup>

### C. CONTRIBUTION LIMITS TO CANDIDATE-CONTROLLED BALLOT MEASURE COMMITTEES AND THE NEW DEFERENCE QUARTET

The constitutional argument in favor of a limit on contributions to candidate-controlled ballot committees is easy to frame. If it is constitutional to limit a candidate (as in federal elections) to accepting no more than \$2000 from an individual donor in an election cycle so as to prevent corruption and the appearance of corruption, it should similarly be constitutional to limit large contributions to candidate-controlled ballot measure committees whose activities may inure—even if somewhat less directly—to the candidate’s benefit. California appears to have just as strong an interest in preventing an individual from contributing \$750,000 to the governor’s controlled ballot measure committee as it has in preventing a donor from contributing the same amount to the governor’s campaign committee.

The constitutional burden on California to defend the law has been considerably eased by the New Deference Quartet. In upholding contribution limits to candidate-controlled ballot measure committees, a court following these precedents could distinguish *CARC* as a case that did not address the particular question of candidate-controlled committees. A court could stress as well *Buckley*’s point that contribution limits impose only a “marginal restriction”<sup>93</sup> on free speech.

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90. Talev, *supra* note 63.

91. CAL. CODE REGS. tit. 2, § 18530.9 (2004). For current limits on contributions to candidate committees, see Hal Dasinger, *Gift and Contribution Limits Adjusted*, FPPC BULLETIN 4 (Dec. 2004), at <http://www.fppc.ca.gov/Bulletin/12-04Bulletin.pdf>.

92. Minutes of Meeting, California Fair Political Practices Commission, Public Session 15 (June 25, 2004), at <http://www.fppc.ca.gov/minutes/2004-06.pdf>.

93. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

The court likely would then turn to the eased evidentiary rules from *Shrink Missouri*.<sup>94</sup> It is neither novel nor implausible that a donor could seek to curry favor with a candidate by making large donations to his controlled ballot measure committee. The rise of this form of fundraising, as detailed in Parts II.A and B, shows the extent to which the concern about candidates using such funds—especially given California’s new limits on contributions in candidate campaigns—is not hypothetical.

Even absent any proof of actual corruption, a court applying *Shrink Missouri* would not need much evidence beyond concern about the *appearance* of corruption stemming from six-figure donations. “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”<sup>95</sup> As a *Los Angeles Times* columnist remarked,

I think I could raise [\$50,000], but I don’t want to end up shoved into a corner, talking to some sap who hasn’t gotten over the Dodgers bolting Brooklyn. Get me the \$500,000, which makes me a “California Recovery Team Chair,” and I’ll be able to whisper in Arnold’s ear like all the Big Apple’s high rollers.<sup>96</sup>

Moreover, the contribution limit would not be onerous under the new standards. A contribution limit, such as the generous \$22,300 limit that applies to gubernatorial candidates, for example, would not be so low as to drive the sounds of a candidate’s voice below the level of notice. One can send a lot of faxes and e-mails with relatively smaller donations.

Following *Colorado II* and *McConnell*, the law could well be upheld as an anticircumvention measure. Just as a limit on contributions to parties (particularly local parties and officeholders) might be justified as a means of preventing donors from circumventing contribution limits to candidates,<sup>97</sup> limits on candidate-controlled ballot measure committees could serve the same purpose. Indeed, in a recent advisory opinion, the FEC noted that a federal candidate’s involvement with a state ballot measure committee can be subject to *federal* regulation:

The Commission finds that all activities of a ballot measure committee “established, financed, maintained or controlled” by a Federal candidate,

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94. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000).

95. *Id.* at 390.

96. Steve Lopez, *Brother, Can You Spare \$500,000?*, L.A. TIMES, Feb. 6, 2004, at B1.

97. See Hasen, *supra* note 8, at 48–52 (discussing whether the Supreme Court found enough evidence of corruption or its appearance to justify federal limits on activities of local parties and candidates).

as is the case here . . . are “in connection with any election other than an election for Federal office.” This includes activity in the signature-gathering and ballot qualification stage, as well as activity to win passage of the measure after it qualifies for the ballot.<sup>98</sup>

If an activity can benefit a candidate for office, as the argument accepted in *McConnell* and applied by the FEC goes, it may constitutionally be regulated. And the relationship here is even closer when we are talking about *state* regulation.

This is not to say that the First Amendment costs would be minimal. In fact, such a law will force some ballot measure committees into making the difficult choice between a committee headed by a candidate or elected official who could bring great attention to the committee’s views on a ballot measure but to whom contributions would be limited, and a committee that could take unlimited contributions but which could not allow a candidate or elected official to be involved enough so as to be found to “control” the committee. The law thus might force some committees to give up affiliating with the most effective advocates for the committees’ positions. But under the New Deference Quartet, it does not appear that such concerns would trump the state’s ability to enact such laws.

Faced with this precedent, opponents of contribution limits would be left to second-order arguments about unconstitutionality. These arguments would necessarily be specific to the technical details of such a limit’s implementation. For example, opponents have attacked the FPPC regulation as too vague regarding what constitutes candidate “control” of a committee, particularly when control includes indirect control through an agent to exercise “significant influence on the actions or decisions of the committee.”<sup>99</sup> The FPPC provision raises other vagueness issues. As a means of preventing circumvention of a limit on contributions to candidate-controlled ballot measure committees, the FPPC adopted a BCRA-like regulation that imposes a \$25,000 contribution limit on any ballot measure committee that spends at least \$50,000 on advertisements within forty-five days of an election that clearly identify a candidate for state office and that are made at the candidate’s “behest.”<sup>100</sup> What does it mean to act at a candidate’s behest?

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98. 2003-12 Op. Fed. Election Comm’n 4 (2003).

99. See Letter from Thomas W. Hiltachk to Liane Randolph, Chair, and Commissioners, Fair Political Practices Commission 3-4 (June 21, 2004), at <http://www.fppc.ca.gov/Agendas/06-04/Hiltachk.pdf>.

100. CAL. CODE REGS. tit. 2, § 18531.10(3) (2004).

The *McConnell* Court gave the back of its hand to vagueness arguments in the federal campaign finance context, suggesting that common sense and subsequent FEC regulations could remove uncertainty over the meaning of terms in BCRA such as to “promote, support, attack, or oppose” a candidate for federal office.<sup>101</sup> A court could be similarly comfortable with words such as “control” or “behest.” On the other hand, the Court examining BCRA could expect the FEC to solve some of the vagueness problems, whereas the FPPC’s regulation will not be subject as readily to further administrative fine-tuning before being implemented. Only a court—or further FPPC regulation or adjudication—can solve some of the vagueness issues.

The law could also be attacked for being unfair or ineffective. For example, suppose two officeholders, a governor and a state assembly member, are on different sides of a ballot measure and each controls a committee. In California, the governor could accept donations of \$22,300 from individuals, while the assembly member may accept only \$3300 from individuals.<sup>102</sup> Or imagine that they are both on the same side of a ballot measure and have formed a joint committee (subject to the higher limit under the regulation), but face an opponent who is not an officeholder and features no officeholders in the committee’s advertisements. The opponent can take unlimited donations.

It is doubtful that these fairness problems would scuttle the regulation as a matter of constitutional law. The relevant constitutional question is not whether the rules are perfectly fair—equal protection challenges have failed in campaign finance cases as a matter of course<sup>103</sup>—but whether the contribution limits prevent “effective advocacy.”<sup>104</sup> Under *Shrink Missouri*’s relaxed test, it is hard to see such a challenge succeeding. Moreover, candidates often run in elections in which they are subject to contribution limits while their wealthy opponents can spend unlimited amounts of their own money in furtherance of their campaigns. Still, as a

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101. *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).

102. Dasinger, *supra* note 91.

103. *See, e.g., McConnell*, 540 U.S. at 93 (rejecting an equal protection challenge to a law that bars certain corporate and union-paid television advertisements but does not bar Internet and other nonbroadcast activities); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (rejecting an equal protection challenge to a law that prohibits corporate expenditures, but exempts media corporations and unincorporated labor unions); *Buckley v. Valeo*, 424 U.S. 1 (1976) (rejecting an equal protection challenge to a public financing system for presidential campaigns that is more generous to major party candidates).

104. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397 (2000); *Buckley*, 424 U.S. at 21.

matter of policy, it seems to make more sense to have all candidate-controlled committees subject to identical limits.

In addition, opponents of contribution limits might argue—again, depending on the precise wording of the statute—that contribution limits would be ineffective because candidates could form multiple committees and take donations from individuals to all of them. Consider Governor Schwarzenegger’s multiple committees, for example. The lack of an aggregate cap on contributions to all controlled committees in a single election might indeed make the regulation less effective. But a court might not view the law as so ineffective as to be useless and simply an infringement on First Amendment speech and association rights.<sup>105</sup>

Some of these second-order challenges could be successful in scuttling early attempts to limit contributions to candidate-controlled committees. But once the kinks in such laws are worked out, they stand a very good chance of passing constitutional muster. They are a straightforward extension of recent cases’ deference to legislative judgments on the need for prophylactic measures to prevent corruption and the appearance of corruption of candidates in the political process.

#### IV. LIMITING CONTRIBUTIONS TO BALLOT MEASURE COMMITTEES GENERALLY

Contribution limitations for candidate-controlled ballot measure committees could be useful in serving certain anticorruption/ appearance of corruption/ anticircumvention goals. It is possible that an aggressive reading of the New Deference Quartet could be used to justify across-the-board contribution limits in ballot measure campaigns as well. That is, supporters of such limits will argue that candidates will increasingly conduct large fundraising through controlled ballot measure committees when faced with limits on contributions to their candidate committees. And as limits are slapped on candidate-controlled committees, candidates will take whatever steps short of control to remain involved in ballot measure campaigns and seek large contributions. Thus, to prevent circumvention of valid candidate contribution limits it is necessary to limit contributions to *all* ballot measure committees.

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105. *Cf. Buckley*, 424 U.S. at 45 (“[N]o substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office.”).

It is plausible that a court could accept the anticorruption/ anticircumvention argument in this context, but it is a stretch. There were about 622 ballot measure committees in the 1990 to 2004 period,<sup>106</sup> and fewer than forty were candidate-controlled committees. And a great deal of the fundraising has nothing to do with candidates or parties. Think, for example, of the noncandidate and non-party-related \$92 million spent on Proposition 5, an Indian gaming proposition, in 1998.<sup>107</sup>

Assuming anticorruption/ anticircumvention would not serve to limit contributions in ballot measure campaigns, supporters of such laws are likely to turn to equality and voter confidence arguments. The equality arguments come in two varieties. One is that the amount of money spent on each side of an election campaign should reflect rough public support for that side. Elsewhere, I have termed this idea the “barometer” equality rationale.<sup>108</sup> The other argument is that “both sides [of a campaign should] have a roughly equal opportunity to present their arguments to the voters.”<sup>109</sup> I will refer to this idea as the “equal time” equality rationale.

From *Buckley*, it would appear that both equality arguments are simply off the table as bases for campaign finance regulation. *Bellotti* and *CARC* similarly are dismissive of the idea that ballot measure elections can be regulated to achieve any kind of parity of spending on ideas.

But more recent cases have moved toward accepting an equality rationale. In *Austin*, the Court’s agreement to independent expenditure limits for corporations in candidate elections was couched in the language of “corruption” but in fact hinged on the barometer equality rationale;<sup>110</sup> Clearly, concern about the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”<sup>111</sup> is an appeal to barometer equality.<sup>112</sup>

In addition, the New Deference Quartet appears to mark a move toward acceptance of Justice Breyer’s view of limiting money as a means

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106. Personal communication from Pam Banford, California Secretary of State’s office, to the author (Oct. 14, 2004) (on file with the author).

107. See Hasen, *supra* note 70, at 744.

108. HASEN, *supra* note 3, at 110. Daniel Lowenstein refers to this as the “intensity” standard of fairness. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 515 (1982).

109. Lowenstein, *supra* note 108, at 515.

110. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

111. *Id.* at 660.

112. See HASEN, *supra* note 3, at 113.



of promoting political equality, which he has termed the “participatory self-government” objective.<sup>113</sup> That is, although the Court continues to speak the language of *Buckley*’s anticorruption framework, the shift in recent cases reflects a willingness to defer to legislative determinations to take money out of the political process in the name of increased democratization.

To be sure, these recent cases do not endorse the equality rationale explicitly, and it would be quite surprising to see the current Court go so far as to accept equality as a basis to limit *expenditures* outside the corporate and union contexts.<sup>114</sup> It would be somewhat less surprising, however, to see the Court uphold *contribution limits* in ballot measure campaigns as a means of promoting greater political equality.

If the Court moved in this direction, I would not expect it to do so explicitly in the name of promoting political equality. Instead, the Court could uphold contribution limits in ballot measure campaigns on a different basis—promoting voter confidence in the electoral process. Recall that the *Bellotti* Court first raised this argument as a possible rationale for regulation in the ballot measure context: the idea in *Bellotti* was that large corporate spending could “exert an undue influence on the outcome of . . . [the] vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to [the state], corporations are wealthy and powerful and their views may drown out other points of view.”<sup>115</sup>

We may think of this voter confidence argument alternatively as an “appearance of inequality” argument. If corporate spending (or perhaps large or one-sided spending) does not appear to allow for fair debate, it could appear to violate either barometer or equal time equality rationales.

Could a decline in voter confidence be proven? Recall that the *Bellotti* Court imposed a strict test for judging whether voter confidence had been undermined: one would need support “by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests.”<sup>116</sup> Moreover, the Court suggested that regulation could *still* run afoul of the First Amendment even if such evidence could be marshaled.

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113. See Hasen, *supra* note 8, at 31 (developing an extended argument for reading the New Deference Quartet in this way).

114. In Part IV, I discuss limiting corporate and union expenditures in the ballot measure context.

115. First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978).

116. *Id.*

Again in *CARC*, the Court accepted *in theory* the argument that concerns over voter confidence could justify a limit in ballot measure campaigns—this time a contribution limit.<sup>117</sup> And again, the Court quickly rejected that argument *on the facts*, given a paucity of evidence of such problems.

Following *CARC*, some commentators favoring contribution limits in ballot measure elections argued that new social science data could provide enough evidence that ballot measure campaign spending undermines voter confidence.<sup>118</sup> In particular, the commentators pointed to a study by Daniel Lowenstein showing that one-sided spending in a ballot measure campaign is “almost invariably successful when it is in opposition.”<sup>119</sup> The study was not available to the trial court deciding *CARC* and therefore it was not part of the record in the case,<sup>120</sup> but Justice White cited the Lowenstein study in his *CARC* dissent as a reason for believing one-sided spending could lead to a decline in voter confidence.<sup>121</sup>

It is not clear that Lowenstein’s study would have impressed the majority in *CARC* had it considered the study. In any case, since the publication of Lowenstein’s study, others have examined the role of money in the electoral process.<sup>122</sup> Elisabeth Gerber conducted the most important and in-depth recent study of the role of money in ballot measure campaigns.<sup>123</sup> Gerber’s study paints a nuanced picture of the role of money in politics.<sup>124</sup> She finds that economic interest groups typically lack the resources, particularly in terms of voter mobilization, “to persuade a statewide electoral majority to support a new initiative.”<sup>125</sup> Furthermore, Gerber finds that “empirical evidence provides further basis for rejecting the allegation that economic interest groups buy policy outcomes through the direct legislation process.”<sup>126</sup> In addition, the “theory and data suggest that economic groups may also be able to use their financial resources to

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117. See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 290–91 (1981).

118. See Nicholson, *supra* note 67, at 711–18; Shockley, *supra* note 67, at 400.

119. Lowenstein, *supra* note 108, at 511.

120. DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 814 (3d ed. 2004).

121. *Citizens Against Rent Control*, 454 U.S. at 308 n.4 (White, J., dissenting).

122. Compare CALIFORNIA COMM’N ON CAMPAIGN FINANCING, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* 290–91 (1992) (affirming Lowenstein’s thesis), with John R. Owens & Larry L. Wade, *Campaign Spending on California Ballot Propositions, 1924–1984: Trends and Voting Effects*, 39 W. POL. Q. 675, 682–87 (1986) (disputing Lowenstein’s thesis).

123. ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999).

124. See *id.* at 137–40.

125. *Id.* at 137.

126. *Id.* at 138.

wage opposition campaigns to block initiatives they oppose.”<sup>127</sup> Gerber also finds that

the direct legislation process gives [economic] groups a potentially powerful means for pressuring state legislators. . . .

. . . .

. . . Citizen groups have a comparative advantage at mobilizing the necessary resources to achieve direct modifying influence. Their problem is mobilizing other resources, especially money, to overcome barriers inherent in the drafting, qualifying, and campaigning phases of the direct legislation process.<sup>128</sup>

It is not clear how much this social science evidence would sway a court considering the voter confidence question anew. First, does it show that money dominates the process? Moreover, the evidentiary question set forth in *Bellotti* is not primarily about the *actual* role that money plays in ballot measure elections. Instead, it is about *perceived* roles: what do the voters think the role of money is in ballot measure elections, and do those views undermine voter confidence in the electoral process?

Public opinion polls conducted in California shed some light on the perception question. In 2004, 48% of respondents to a Field poll believed that statewide ballot proposition elections come out the way “a few organized special interests want” rather than “the way most people want.”<sup>129</sup> Only one-third believed that the initiative elections came out the way most people want (10% were mixed and 9% had no opinion).<sup>130</sup> The “Special Interest” response was up five percentage points over the 1999 survey, and the “Most People Want” response was down nine percentage points.<sup>131</sup> More negatively, a February 2001 survey by the Public Policy Institute found that 52% of Californians believe the initiative process was controlled “a lot” by special interests, and another 44% thought it was controlled “somewhat” by them.<sup>132</sup> Some of this skepticism translates into support for campaign finance reform of ballot measure campaigns. In a 1997 Field poll study, 77% of voters favored limits on the amount of money that can be spent by supporters and opponents of statewide ballot

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127. *Id.*

128. *Id.* at 139–40.

129. Field Research Corporation, *A Summary of the Findings from a Statewide Survey of California Voters About Proposition Elections* 5 (Sept. 2004), at [http://www.healthvote2004.org/Prop\\_Elections\\_Report.pdf](http://www.healthvote2004.org/Prop_Elections_Report.pdf).

130. *Id.*

131. *Id.*

132. Public Policy Institute of California, *The California Initiative Process—How Democratic Is It?* 3 (Feb. 2001), at <http://www.cainitiative.org/pdf/InitiativeHandoutCmmnw1thOP.pdf>.

measure campaigns.<sup>133</sup> These statistics appear to show that a large number of voters (though not necessarily a majority) are concerned about the role of money in the initiative process.

These statistics do not, however, tell the full story. By large majorities, Californians approve of statewide ballot measure elections.<sup>134</sup> In 2004, 68% of Californians thought statewide ballot proposition elections were a “good thing” and another 17% had a “mixed” opinion while only 9% saw them as a bad thing.<sup>135</sup> The “good thing” figure is down from a high of 83% in 1979, but is higher than the low of 62% in 1999.<sup>136</sup> When asked in 2004 whether the voting public or elected representatives could be better trusted to make decisions in the public interest, respondents favored the voting public over the legislature 56% to 35%.<sup>137</sup> In addition, 67% of respondents thought elected representatives were more easily influenced and manipulated by special interest groups, compared to 24% who thought the public was more easily influenced and manipulated.<sup>138</sup>

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133. Field Institute, *California Opinion Index, A Digest on How California Voters View State Wide Ballot Proposition Elections* 4 (Oct. 1997), at <http://www.field.com/fieldpollonline/subscribers/COI-97-Oct-Props.pdf>.

134. See Field Research Corporation, *supra* note 129, at 2 tbl.1.

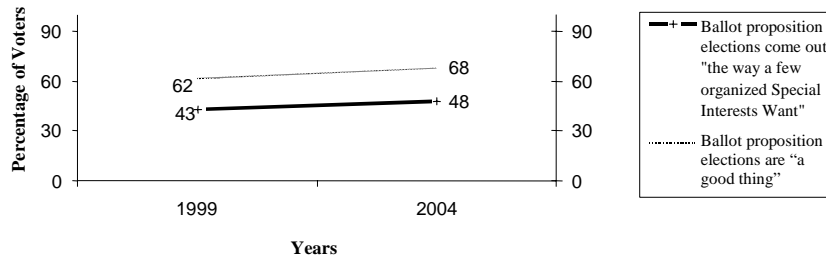
135. *Id.*

136. *Id.*

137. *Id.* at 4 tbl.3. Similarly, respondents favored the voting public over elected representatives 63% to 22% regarding who could be trusted more to “do what is right” on important government issues, and 65% to 24% on the question of who is better suited to make decisions about large-scale government programs. *Id.* See also Public Policy Institute of California, *Californians and the Initiative Process* 2 (Oct. 2004), at [http://ppic.org/content/pubs/JTF\\_InitiativeJTF.pdf](http://ppic.org/content/pubs/JTF_InitiativeJTF.pdf) (reporting that 74% of Californians say the initiative process is a “good thing”).

138. Field Research Corporation, *supra* note 129, at 6 tbl.5.

TABLE 2. California attitudes on ballot measure elections  
(Field poll survey data, 1999 and 2004)



Do these additional data—on both the role of money in the ballot measure context and on public attitudes toward the process—provide enough evidence of a problem with voter confidence to convince a court to sustain a contribution limit in ballot measure campaigns?<sup>139</sup> Table 2 shows how difficult it is to judge public opinion on this issue.

It seems likely, but by no means certain, that a court applying the more deferential standards of the New Deference Quartet could uphold a ballot measure contribution limit in the name of promoting voter confidence. To be sure, the relaxed evidentiary standards in those cases concerned questions of corruption, not voter confidence, but the Supreme Court clearly is sympathetic to concerns about voter confidence. In a somewhat cryptic footnote in *McConnell*, the Court wrote that BCRA's preservation of electoral integrity, prevention of corruption, and maintenance of citizen oversight of government "sets it apart from the statute [at issue] in *Bellotti*—and, for that matter, from the Ohio statute banning the distribution of anonymous campaign literature, struck down in *McIntyre v. Ohio Elections Comm'n.*"<sup>140</sup> This language signals a broader deference to legislative determinations that campaign finance regulation is necessary, as well as a potential easing of *Bellotti's* tough standard for

139. One commentator is still doubtful that such an evidentiary burden can easily be met:

But what evidence would satisfy the Court? The language of the opinion suggests that the Court was looking for evidence that corporations exerted "undue influence on the outcome of a referendum vote," enjoyed a "relative voice" that was "overwhelming," or at least "significant in influencing referenda." The operative words of these phrases—"undue" or "significant" influence and "overwhelming" voice—are ambiguous and the opinion does not sort them out with any clarity. Yet the language appears to require the state to show that corporate speech can dictate the outcome of initiative votes.

Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 177 (1998) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978)).

140. *McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003) (internal citations omitted).

showing a voter confidence problem—at least in the context of contribution limits.

As I will show in Part VI, if the Court took its evidentiary duty seriously, it would examine the sufficiency of the evidence a state could marshal to prove: (1) that voters lack confidence in the ballot measure electoral process, and (2) unlimited contributions are to blame for this lack of confidence.<sup>141</sup> But it is not clear how deeply the Supreme Court would examine the question.<sup>142</sup> Depending on the spin the Court puts on the evidence, it is possible to write an opinion upholding ballot measure contribution limits in the name of promoting voter confidence. To be sure, the existing evidence of both (1) and (2) is relatively weak. But given the amount of deference that the Court is giving to legislatures in crafting campaign finance rules these days, my bet would be that the Court will uphold such limits on the basis of concerns over voter confidence—especially because it could mask support for these rules under one of the equality rationales for regulation.

Part of my reason for reaching this conclusion is the extent to which the Court in *McConnell* seemed receptive to a broad imposition of contribution limits even absent proof of candidate corruption. In a cryptic but crucial footnote,<sup>143</sup> the Court explained (or rather reinterpreted) its earlier decision in *California Medical Ass'n v. FEC* (“*CMA*”).<sup>144</sup> *CMA* involved a challenge to FECA’s \$5,000 limit on contributions to political action committees (“PACs”) that contribute or spend money in candidate elections. The *McConnell* Court stated that the statute at issue in *CMA* was

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141. See Nicholson, *supra* note 67, at 707–11 (discussing ways in which data on the role of money in ballot measure elections may reflect on public confidence about such elections); Shockley, *supra* note 67, at 389–90 (same).

142. This is especially true if the limits are generous, such as the \$100,000 limit proposed by the California Commission on Campaign Financing. See CALIFORNIA COMM’N ON CAMPAIGN FINANCING, *supra* note 122, at 296.

143. *McConnell*, 540 U.S. at 152 n.48.

144. *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981). A four-Justice plurality as well as Justice Blackmun’s separate concurring opinion appeared to focus solely on the pass-through problem. *Id.* at 198 (plurality opinion) (“If appellant’s position . . . is accepted, then both these contribution limitations could be easily evaded.”); *id.* at 203 (Blackmun, J., concurring) (“I conclude that contributions to multicandidate political committees may be limited to \$5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee . . .”). Justice Blackmun then went on to stress that “a different result would follow if [the statute] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates.” *Id.* See also *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002) (raising, but not resolving, the constitutionality of limiting contributions to independent expenditure committees). The *McConnell* Court also pointed to *Buckley*’s decision to uphold a \$25,000 aggregate yearly limit on individual contributions to candidates’ political committees and party committees. *McConnell*, 540 U.S. at 152 n.48.

justified as an appropriate measure for not only preventing “pass-throughs” of contributions to federal candidates (an anticorruption rationale) but also for limiting contributions funding “express advocacy and numerous other noncoordinated expenditures.”<sup>145</sup>

The footnote’s statement that it could be consistent with the First Amendment to limit contributions funding independent expenditures in candidate elections—in which the Court views the risk of corruption as absent—suggests that perhaps it is also consistent with the First Amendment to limit contributions in ballot measure campaigns.

Faced with the reduced evidentiary standard and the Court’s new-found deference to campaign finance measures, arguments here, too, might be reduced to second-order complaints against particular laws. One large concern is the ease of circumvention: those supporting or opposing a ballot measure might create multiple committees that could work together, thereby effectively avoiding a contribution limitation.<sup>146</sup> If the contribution limit is wholly ineffective, it could be said to serve no state purpose and simply is an infringement on the First Amendment. A more tightly written law could include either an aggregate limit on contributions, as the Supreme Court has upheld in the candidate context, or else prevent ballot measure committees from coordinating with one another.<sup>147</sup> These “fixes” themselves raise constitutional questions, though perhaps ones that are not as serious under the New Deference Quartet.

In sum, there is a plausible, but by no means ironclad, argument that the current Supreme Court would uphold contribution limits in ballot measure elections.

#### V. LIMITING CORPORATE AND UNION EXPENDITURES IN BALLOT MEASURE CAMPAIGNS

The tension between the *Bellotti* and *Austin* cases has been long-noted.<sup>148</sup> *Bellotti* is highly protective of corporate First Amendment rights to participate in the electoral process,<sup>149</sup> while *Austin* takes the position that

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145. *McConnell*, 540 U.S. at 152 n.48.

146. Briffault, *supra* note 67, at 433. “Any limit on how much a donor can give to a campaign committee is likely to be meaningless in the ballot-proposition context.” *Id.* at 432.

147. Lowenstein, *supra* note 108, at 600–01 (appearing to assume that the government can constitutionally prevent ballot measure committees from coordinating with one another by suggesting a rule in which contributions to committees are not “centrally coordinated”).

148. The best treatments are Winkler, *supra* note 139 and Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after Austin*, 21 *CAP. U. L. REV.* 381 (1992).

149. *See supra* notes 20–24 and accompanying text.

corporate speech can distort the political process and therefore can be limited.<sup>150</sup> The two cases coexist uneasily in election law, and that coexistence depends on the fact that *Bellotti* involves referenda and *Austin* involves candidate elections.

As Part II shows, that distinction may be relevant when it comes to issues of candidate corruption, but it does not appear relevant when it comes to *Austin*-like distortion: corporations can “distort” the outcome of referenda as easily as they can “distort” the outcome of candidate elections through spending that is out-of-sync with public support for their positions.

The tension between the two cases came to a head in 2000 in *Montana Chamber of Commerce v. Argenbright*,<sup>151</sup> when the Ninth Circuit considered a Montana initiative that required corporations to use separate segregated funds (PACs) to fund ballot measure election spending. The Ninth Circuit noted the tension between *Bellotti* and *Austin*, but refused to consider *Austin*'s effect on *Bellotti*'s vitality.<sup>152</sup> “Even if *Austin* may plausibly be read as undermining *Bellotti*, this is for the Supreme Court, not us, to say.”<sup>153</sup> The dissent argued that

the best way to reconcile these cases is to acknowledge that *Austin* identified a new rationale for limiting corporate campaign spending that does not turn on whether candidate elections or ballot initiatives are at issue. . . . Because the initiative also allows for a segregated fund, I think it is justified by Montana's asserted interest in eliminating what its people have determined to be distorting effects of corporate wealth on the electoral process.<sup>154</sup>

As set out in Part II, two of the Supreme Court's New Deference cases since *Argenbright* have further undermined *Bellotti*'s continued vitality. *Beaumont* indicated that corporate speech rights are entitled to lesser constitutional protection: “A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.”<sup>155</sup> The same could likely be said for corporate expenditures. Moreover, in *McConnell*, the Supreme Court not only affirmed the *Austin* rationale in candidate

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150. See *supra* notes 55–57 and accompanying text.

151. *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000).

152. *Id.* at 1057.

153. *Id.*

154. *Id.* at 1062 (Hawkins, J., dissenting).

155. *FEC v. Beaumont*, 539 U.S. 146, 162 n.8 (2003).



elections, but also extended the rationale from corporations to labor unions.<sup>156</sup>

To be sure, the continued vitality of *Austin* hangs by only a one-Justice majority in the Supreme Court, and it could change with an alteration in Supreme Court personnel. But as far as the current Court is concerned, *Austin* distortion could well be the basis for limiting corporate and union contributions and expenditures in the ballot measure context.

## VI. BROADER LESSONS: THE ROLE OF “EVIDENCE” IN SUPREME COURT CAMPAIGN FINANCE CASES

I have used the last three sections to shed some light on constitutional questions surrounding campaign finance limits in ballot measure campaigns, especially in the New Deference Quartet. But the analysis above also illustrates the varied role that “evidence” has come to play in analyzing these constitutional questions. The inconsistent pattern that emerges demonstrates that the search for evidence is often a proxy for the simple value judgments of the Justices on the wisdom of particular campaign finance laws or on the blanket need to defer to political branches.

The search for evidence in some election law cases is rather straightforward. For example, in cases under the Voting Rights Act,<sup>157</sup> political scientists may testify as to the percentage of whites that may be placed in an African-American majority legislative district without endangering the chances of an African-American preferred candidate being reelected from that district.<sup>158</sup> At least until recently, Congress set the normative baseline and the question was simply empirical: what does it take to ensure that a particular district elects African-American preferred candidates?<sup>159</sup>

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156. See Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361, 369 (2004) (calling *Bellotti* “a singular oddity in the larger body of relevant cases,” and stating that “*McConnell* confirms that corporations are subject to a set of doctrinal principles which both guarantee baseline corporate speech rights and permit special restrictions, such as segregated funds, to insure the voluntariness of political expenditures.”).

157. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 (2001).

158. But the empirical question, though easily stated, is often difficult to answer in practice. See Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

159. That normative clarity is now clouded by the Supreme Court’s recent decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004) (discussing new uncertainty in Voting Rights Act cases created by *Georgia v. Ashcroft*); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 83–101 (2004).

In campaign finance cases, however, normative and empirical questions are often intertwined; thus, in ascertaining whether campaign contributions “corrupt,” courts need to have a workable definition of corruption as well as a measurement of the extent of corruption (or its appearance) in government.<sup>160</sup> Without clear standards, empirical work is of only limited utility.

But there is another fundamental problem: the Court is inconsistent regarding the extent to which evidence is even necessary to sustain a challenged campaign finance measure. Consider Table 3, which sets out the three state interests discussed earlier that justify various ballot measure campaign finance restrictions and the evidentiary burden under each.

TABLE 3. Evidentiary standards in ballot measure campaign finance cases

<b>State Interest</b>	<b>Corruption and the appearance of corruption</b>	<b>Voter confidence in the electoral process</b>	<b>Corporate “distortion” (barometer equality)</b>
<b>Evidentiary standard</b>	Deferential in contribution context; onerous in expenditure context	Onerous, but subject to revision under New Deference Quartet	None
<b>Supporting case law</b>	New Deference Quartet; <i>NCPAC</i> <sup>161</sup>	<i>Bellotti</i> ; <i>CARC</i>	<i>Austin</i> ; <i>McConnell</i>

Thus, when a campaign finance contribution limit in candidate elections has been challenged on First Amendment grounds, the Court has been quite deferential to states that have defended their laws as necessary to prevent at least the appearance of corruption. Under the “appearance of corruption” evidentiary standard, it will nearly always be possible for the state to point to public perceptions of corruption to justify contribution limits; as Nathaniel Persily and Kelli Lammie have demonstrated, the public almost always perceives the political system as corrupt, and that

160. Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1114–15 (1999).

161. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985). See *infra* text accompanying note 163.

perception does not seem to vary with the passage of various contribution limits.<sup>162</sup>

As deferential as the Court has been in reviewing evidence of corruption and its appearance in the *contribution limit* context, it has been decidedly nondeferential in the *expenditure limit* context. Thus, in *FEC v. National Conservative Political Action Committee* (“NCPAC”), the Supreme Court rejected a provision of federal law that provided public financing for presidential candidates that limited independent expenditures supporting or opposing a presidential candidate who has accepted public financing to \$1000.<sup>163</sup> The FEC tried to prove a connection between the independent spending by political action committees and corruption or its appearance. It pointed to “evidence of high-level appointments in the Reagan Administration of persons connected with the PACs and newspaper articles and polls purportedly showing a public perception of corruption.”<sup>164</sup> Without elaboration, the majority stated that it would defer to the lower court’s finding that the evidence of corruption or its appearance was “evanescent.”<sup>165</sup>

This internal inconsistency over the role of evidence of corruption in resolving campaign finance cases is just the beginning of the problem. Consider the Court’s treatment of other state interests to justify campaign finance limits. The burden placed on the state to prove a decline in voter confidence so as to sustain campaign finance limits in ballot measure campaigns is quite onerous, at least if *Bellotti*’s standard continues to apply (an issue discussed in Part IV, where I suggest that the current Court may no longer view the standard as onerous). Yet compare that tough standard with the Court’s treatment of limits on corporate expenditures in the candidate context, in which absolutely *no proof* is required that corporate spending can have a distorting effect on the political process. The distortion proposition is taken as self-evident as applied to corporations, and the Court extended the proposition to labor unions in *McConnell* without discussion.

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162. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 141–42 (2004). See also Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 WASH. U. J.L. & POL’Y 171, 176–77 (2001).

163. *Nat’l Conservative Political Action Comm.*, 470 U.S. at 480.

164. *Id.* at 499.

165. *Id.* (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 578 F.Supp. 797, 830 (E.D. Pa. 1983) (incorrectly cited as 587 F.Supp. 797, 830 (E.D. Pa. 1983))).

It is hard to escape the conclusion that the search for evidence is simply a proxy for the value judgments made by the Justices. In other words, the Justices make an a priori decision to uphold, for example, a limit on corporate expenditures or to strike down a limit on contribution limits in ballot measure campaigns (or to defer to the process more generically) and use the evidentiary argument as makeweight.<sup>166</sup>

Some have defended the Court's failure to be stricter in its evidentiary analysis. Pildes has written that

though social science cannot definitively establish the empirical effects of campaign contributions on political behavior, that does not mean there are no such effects. Important public policy judgments must often be made in the absence of firm empirical foundations. Indeed, it might be that the more significant the issue, the more difficult the empirical proof, precisely because the causal interactions are more complex.<sup>167</sup>

Pildes disagrees with my earlier criticism of *McConnell*'s vast deference to Congress<sup>168</sup> in upholding certain parts of BCRA on grounds that such criticism "seek[s] to preserve the illusion of a form of judicial review that in all likelihood cannot realistically be given substantive effect in this context. . . . The only real judicial judgment, inevitably, is the more global one of whether the underlying legislative judgments were animated by permissible or invalid aims."<sup>169</sup> Pildes's own read of *McConnell* is that the Court made the right call in upholding the major provisions of BCRA, because under Pildes's review of the statute, most of its provisions were not "impermissible self-entrenchment" but rather were justified as "permissible expression of democratic disaffection through ongoing experimentation with the design of democratic institutions."<sup>170</sup>

To the extent Pildes is right that the empirics do not matter to the Justices in determining the constitutionality of campaign finance measures, his approach surely is preferable to the status quo. Why make lawyers jump through evidentiary hoops that are ultimately meaningless? And perhaps this is the underlying message of the New Deference Quartet—a reading that bodes well for many of the campaign finance laws that might be applied in the ballot measure context.

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166. The same may be said of the Court's explicit refusal to consider evidence of "voter confusion" to sustain onerous ballot access laws. The Court simply takes such confusion as a given. *See* HASEN, *supra* note 3, at 96.

167. Pildes, *supra* note 159, at 136.

168. Hasen, *supra* note 8, at 48–57.

169. Pildes, *supra* note 159, at 139.

170. *See id.* at 141.

But I am not ready to give up on the evidentiary inquiry just yet and leave the question to the Court's examination of legislative *purpose* or *motive*. Pildes does not say how a court is to determine whether a legislature's motive was in fact "permissible expression of democratic disaffection" rather than "impermissible self-entrenchment."<sup>171</sup> As hard as it might be to judge an individual's motive, the question is exponentially complicated when it comes to larger groups. How can one "realistically" give "substantive effect" to a motive test when considering the actions of a multimember body? Are we to examine the outward manifestations of intent of the 435 members of the House and the 100 senators who passed BCRA? Does this reduce the constitutional inquiry to an examination of legislative history, which is often filled with self-serving declarations of legislators?

Consider how Pildes would have a court examine the constitutionality of a contribution limit imposed on ballot measure campaigns. If the question is reduced to whether there exists a legislative *motive* to engage in incumbency protection, most campaign finance regulations in ballot measure campaigns would be constitutional simply because of the absence of a plausible incumbency-protecting motive.<sup>172</sup> Should that end the inquiry? It is unclear what emphasis Pildes would place on the First Amendment speech and association costs of such laws, given that he generally eschews balancing tests in election law cases.<sup>173</sup>

In my view, the Court is invariably going to engage in balancing in such cases, and evidence can be useful in making an informed decision. At least for the median Justice<sup>174</sup> who comes into some of these campaign finance cases with an open mind, transparency and forthrightness in the evidentiary inquiry may be useful in the end result of balancing. It certainly seems more promising as a way of ensuring consistency and fairness in the Court's decisions than does the search for legislative motive.

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171. *See id.*

172. The legislature sometimes may have a motive to make the initiative process more difficult so as to forestall the opportunity for the people to bypass the legislature. *See* Elizabeth Garrett, *Who Chooses the Rules?*, 4 ELECTION L.J. 139, 142 (2005) ("[R]eforms' are often proposed by self-interested legislators who hope to restructure the process so that it no longer poses a threat to legislative supremacy over policymaking, not by those who support some element of vibrant direct democracy as part of the larger hybrid system."). Under Pildes's view, it is not clear how we are to discern such intent. *See supra* notes 167–70 and accompanying text.

173. *See* HASEN, *supra* note 3, 139–56 (analyzing Pildes's structural view of election law).

174. On the concept of the median Justice, see Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the U.S. Supreme Court* (Sept. 2004) (unpublished manuscript), at <http://news-info.wustl.edu/pdf/MedianJustice.pdf>.

As I have argued in greater detail elsewhere,<sup>175</sup> in adjudicating First Amendment challenges to campaign finance laws, courts should defer to a legislature's normative decisions about the rationales for campaign finance law, yet should engage in a more skeptical evidentiary examination of means and ends. Let me give a few examples to illustrate my approach.

The soft money provisions of BCRA were touted as a means to end the sale of access to federal elected officials through large soft money donations to the parties. The Court was right to defer to Congress that the sale of access could count as corruption,<sup>176</sup> something that Justice Kennedy rejected in his dissent.<sup>177</sup> But the Court could have looked more closely at the evidence to see whether the various provisions would in fact end the sale of access.

There was ample evidence that the national parties were selling access, and a smattering of evidence as to state parties, but no evidence whatsoever that local parties or local officeholders were facilitating the sale of access to national candidates and officeholders, or would likely be in the position to do so if only national and state parties were banned from raising soft money. The Court was right to uphold the national party soft money ban but it likely erred in upholding the soft money provisions applied to local candidates and officeholders.

This is not to say that proof of the sale of access would be enough to uphold *every* campaign finance law aimed at candidate elections. There may have been ample evidence that the Court could have considered more seriously in *NCPAC* that those who engaged in large independent spending supporting a presidential candidate received extraordinary access to that candidate—even in *NCPAC* there were allegations that large spenders were getting coveted ambassadorships.<sup>178</sup> But the First Amendment costs of a rule that left only candidates and parties as political actors allowed to advertise in presidential elections may have made the law too onerous. The evidence of access should have been considered in *NCPAC* and balanced against the First Amendment costs of the expenditure limit. Instead of the evidence being dismissed in a single word, the Court should have looked more closely at the evidence that large, independent spending can lead to the sale of access (or worse), and then forthrightly explained why the First Amendment speech and association rights should trump a regulation that

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175. HASEN, *supra* note 3, at 116–20.

176. See *McConnell v. FEC*, 540 U.S. 93 (2003).

177. See *id.* at 299–308 (Kennedy, J., dissenting).

178. See *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 516–17 (1985).

likely would have been at least partially effective in eliminating the sale of access.

Now consider the question of the constitutionality of contribution limits in ballot measure campaigns. Though the evidence adduced in Part IV is not ironclad, it does suggest that California voters continue to support the ballot measure process even though current California law allows unlimited contributions to and expenditures by individuals and corporations in ballot measure elections. It also shows that voters have more confidence in the ballot measure process than in the legislative process in protecting against special interest legislation. The evidence on voter confidence in the process is mixed, but so far there is nothing to show that contribution limits would increase voter confidence. Thus, upholding ballot measure contribution limits on voter confidence grounds, as I demonstrate in Part IV, is doctrinally possible, but it is wrong absent stronger evidence.

Courts should require concrete proof that voter confidence has indeed suffered as a result of unlimited spending in ballot measure campaigns and that contribution limits stand to improve voters' confidence. Such proof likely will come in the form of public opinion polling, focus groups, or other means of gathering information about public attitudes toward money in the ballot measure process. Persily and Lammie's work strongly suggests that it will be quite difficult to find proof that contribution limits in ballot measure campaigns are indeed linked to an increase in voter confidence.<sup>179</sup>

As I have suggested, if the Court upholds contribution limits in ballot measure campaigns, it would likely be—perhaps silently and using the language of “voter confidence”—on equality grounds. Suppose a jurisdiction sought to justify such contribution limits explicitly on equality grounds—my approach requires transparency and forthright balancing: the Court would have to make an initial, albeit controversial, decision whether a government interest in promoting greater equality in campaign financing should trump the First Amendment rights of those who would contribute large sums to ballot measure campaigns. Assuming the Court then defers to the governmental interest on the value judgment point, it would then look closely at the evidentiary question of whether a contribution limit would indeed promote equality.

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179. Similarly, courts should accept the appearance of corruption as a state interest that can justify some campaign finance limits but should require the state to offer actual proof that a particular law in fact will *reduce* the appearance of corruption, judged by empirical measurement of public attitudes. This evidence will often be lacking, not because appearance of corruption is difficult to measure, but because the effect does not exist.

This search for such evidence would not be unrealistic.<sup>180</sup> For example, contribution limits in ballot measure campaigns aimed at promoting equality might be ineffective in doing so if they imposed no aggregate limit on contributions or limited committee coordination in the presence of unlimited expenditures. Social scientists could examine the contribution and spending patterns of political committees in such an environment.<sup>181</sup> If such evidence shows that contribution limits did not do much to promote either “barometer” or “equal time” equality, the Court should strike such measures down on grounds that they would impose high First Amendment costs without doing much to further the aim of political equality.

Alternatively, a more tightly written contribution limit could well be found by social scientists to be more effective at promoting equality. On this basis, the Court could uphold such a limit. But a more tightly written limit would have greater difficulty being passed by legislative bodies or the people through the initiative process. And, if it does pass, courts are more likely to view it as infringing on core First Amendment rights.

The upshot of this analysis is that in the current political and judicial environment, it will be difficult to write effective campaign finance laws aimed at promoting political equality that would be passed and upheld. As I have stated elsewhere,<sup>182</sup> campaign finance laws aimed at promoting political equality should stand the best chance of being upheld when they provide generous subsidies for campaign finance related activities, such as publicly financed campaign finance vouchers. “Leveling up” in addition to “leveling down” both increases the extent to which a law actually promotes political equality and decreases First Amendment concerns that the law curtails too much political speech and association.<sup>183</sup>

My aim is not to have courts impose such a high evidentiary burden so as to make most campaign finance laws unconstitutional. Preventing corruption could still serve as the basis for upholding contribution limits in candidate campaigns. A state would not have to demonstrate as a fact that campaign contributions affect the roll call votes of legislators. Instead, by using an appropriately testable definition of corruption, such as the sale of access, social scientists could demonstrate when and how contributors

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180. See Pildes, *supra* note 159, at 139.

181. This suggests that courts may not wish to enjoin new campaign finance laws as they adjudicate challenges to them, so that courts may learn how the political system in fact changes under the new laws.

182. Hasen, *supra* note 8, at 71.

183. *Id.*



secure access with large contributions and therefore how contributions may corrupt. The state may choose to further other interests with campaign finance laws, but it will need to defend such laws with evidence that they in fact promote their stated interests.

In the end, the evidentiary analysis will not be dispositive of campaign finance challenges, but it is relevant and probative to the constitutional inquiry. Evidence should not be given lip service, acting as mere window dressing for an ad hoc value judgment made without careful analysis. Instead, a serious evidentiary analysis can cause both legislative bodies and courts to be more transparent and forthright. Legislatures will need to articulate their goals explicitly, and courts will examine the connection between means and ends as part of a difficult First Amendment balancing process.

## VII. CONCLUSION

Recent court decisions and evidence make it fairly likely that attempts to impose additional campaign finance regulations in ballot measure elections can sustain constitutional challenge, despite earlier precedent that seemed to foreclose such regulations. Whether this development deserves praise or scorn depends in part upon one's views of the appropriate role of money in ballot measure elections.

The varied tests that would apply to determine the constitutionality of such regulations also illustrate some vagaries in the Supreme Court's use of evidence. While some would abandon the search for evidence altogether, evidence may play an important role when the courts must balance states' interests with the freedoms of speech and association protected by the First Amendment. A clearer and more forthright look at the evidence and a frank discussion of the necessary balancing that courts must undertake in resolving these difficult questions would improve both the process and the outcome.

