

The California Campaign Spending Limits Act of 1988: A Constitutional Analysis

Introduction

The role of money in modern electoral politics has substantially increased in the last decade as the cost of campaigning for public office has escalated.¹ The increased influence of money on campaigns has generated concern that the importance of wealth is transforming the public policymaking process into an exclusive preserve for the affluent, who now have a greater capacity to win elections and to influence their outcome.² In the aftermath of "Watergate",³ the enormous cost of campaigns has led to a vigorous movement to reform the campaign finance process in order to reduce the corrupting influence of money.⁴

While the power of state and federal legislatures to regulate campaigns is well established,⁵ restrictions on campaign financing are not free from constitutional controversy.⁶

Campaign expenditures arguably are a crucial means for communicating political views; therefore, restrictions on the amount of money

1. See A. COX, FREEDOM OF EXPRESSION 68-69 & n.253 (1980); 8 F.E.C. REC. 5-8 (Mar. 1982). The total money expenditure for 1986 campaigns in California, including initiatives, was close to \$150 million. This is a significant increase over earlier campaign years and represents a steady increase in the cost of politics. *Obscene Campaigns*, S.F. Chron., Dec. 14, 1986, at F-1, col. 2.

2. See A. COX, *supra* note 1, at 69.

3. The term "Watergate" of course refers to the period during the Nixon Administration when highly placed political figures committed numerous crimes, some involving the illegal use of campaign money, which cast a cloud of doubt over the role of money in the political process. See Cox, *Forward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 56 (1980).

Campaign finance measures actually "boast a much longer . . . pre-Watergate history." SPECIAL COMMITTEE ON ELECTION REFORM, THE AMERICAN BAR ASS'N, CAMPAIGN FINANCING AFTER *BUCKLEY V. VALEO* vii (1976). For example, by the end of the nineteenth century, many states required disclosure of campaign contributions and expenditures by candidates and their committees. Hart & Shore, *Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti*, 29 CASE W.L. REV. 808, 816 (1979).

4. In 1974, for example, California voters adopted Proposition 9, which imposed requirements for reporting campaign income and expenditures. However, these requirements did nothing to stop the drastic increase in amounts spent on campaigns. See *Obscene Campaigns*, *supra* note 1. See also *infra* note 15 and accompanying text.

5. See *Smiley v. Valeo*, 285 U.S. 355, 359 (1932); *Ex parte Yarbrough*, 110 U.S. 651, 661-62 (1884). The Court has also recognized Congress' right to regulate primary elections in *United States v. Classic*, 313 U.S. 299, 320 (1941).

6. See *infra* notes 81-165 and accompanying text.

that can be spent on a political campaign reduce the ability to express political ideas as vigorously as possible.⁷ In general, the First Amendment of the United States Constitution⁸ guarantees citizens the right to speak freely on political matters without fear of governmental interference.⁹ The United States Supreme Court, however, has upheld limitations on campaign contributions as long as certain constitutional standards are met.¹⁰ Limitations on candidate expenditures,¹¹ on the other hand, consistently have been struck down as unconstitutional, unless the limitations are voluntary.¹²

California, unlike the federal government and thirty-four other states,¹³ has not passed legislation that would limit campaign spending and financing.¹⁴ Although California's political campaigns constitute the

7. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

8. The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech. U.S. CONST. amend I.

9. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Thomas v. Collins*, 323 U.S. 516 (1945); *Grosjean v. American Press Co.*, 297 U.S. 33 (1925). *But see Schenck v. United States*, 249 U.S. 47 (1919) (constitutional right of free speech on political matters is not absolute).

10. *See Citizens Against Rent Control (CARC) v. Berkeley*, 454 U.S. 290 (1981); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

Campaign contributions, as defined by the Supreme Court in *Buckley*, consist of: (1) anything of value, such as gifts, loans, advances, and promises to give; (2) contributions made directly to the candidate, to an intermediary, or to a committee authorized by the candidate. 424 U.S. at 23.

11. Section 441(b) of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 301-406, as amended by 2 U.S.C. §§ 431-455 (1976), broadly defines "expenditure" to include "provisions of anything of value made for the purpose of influencing any election . . ." 2 U.S.C. § 441(b) (1985). An expenditure also must constitute "express advocacy" in order to be subject to § 316's prohibition. *Federal Election Comm'n v. Massachusetts Citizens For Life*, 107 S. Ct. 616, 618 (1986) (citing *Buckley*, 424 U.S. at 80).

12. *See Buckley*, 424 U.S. at 57-58.

13. For a list of the 34 states and their campaign spending limits legislation, see THE CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, THE NEW GOLD RUSH: FINANCING CALIFORNIA'S LEGISLATIVE CAMPAIGNS 192-93 (1985) [hereinafter THE NEW GOLD RUSH].

14. Legislative attempts to impose expenditure limitations have been unsuccessful thus far. Tom Houston, former chairman of the California Political Practices Commission (CPPC), was an outspoken yet unsuccessful proponent of contribution limitations:

In 1982, under Houston's Chairmanship, the CPPC sponsored three pieces of legislation: one bill limited campaign contributions in any election to \$500 an individual and \$1500 per Public Action Committee ("PAC"), another limited off-year contributions to \$100 an individual and \$250 a PAC, and a third bill prohibited money from being solicited or received in any state building including the Capitol. The first two bills were quickly killed in their first committee hearing. The third bill, after being amended to prohibit contributions received in any state building, was enacted by the legislature.

THE NEW GOLD RUSH, *supra* note 13, at 174, n.29.

California Assembly Speaker Willie Brown recently authored a bill to limit campaign spending. However, shortly after initiating the bill, Brown withdrew it, having concluded that contributions have no material effect on the decisions of elected officials. *See Willie Brown*

most costly state elections in the nation,¹⁵ there are no significant state restrictions on the sources or amounts of contributions to candidates for state offices.¹⁶ After extensive study, the California Commission on Campaign Financing has concluded that comprehensive reforms are necessary to address the full range of legislative campaign financing problems.¹⁷ A proposed initiative scheduled for the November 1988 ballot, the Proposed Ballot Measure to Adopt The Campaign Spending Limits Act ("Proposed Ballot Measure"),¹⁸ addresses these problems by limiting campaign contributions and independent expenditures.¹⁹ Proponents of the initiative argue that these limitations will decrease campaign

Calls Movement for Campaign Reform a 'Fraud', The S.F. Recorder, July 14, 1987, at 1, col. 2. Several other California legislators introduced campaign reform measures in 1987. State Senator Quentin Kopp sponsored two measures which never made it out of the Senate Elections Committee, according to administrative assistant Barbara Katz. *Id.* State Senator Bill Lockyer is the sponsor of a bill which is currently pending before the Assembly Election Committee. *Id.*

15. "During the 1982 California election, legislative candidates spent over \$43 million, candidates for Governor and all other statewide ballot measures spent \$36 million and congressional candidates spent \$31 million." Walters, *An Old-Timer vs. New Breed*, Sacramento Bee, Sept. 26, 1984, at A3, col. 1, *quoted in* THE NEW GOLD RUSH, *supra* note 13, at 23. In the 1982 gubernatorial race, Tom Bradley and George Deukmejian spent more than \$18 million, a 120% jump over the \$8.2 million spent by Jerry Brown and Evelle Younger in the 1978 race. THE NEW GOLD RUSH, *supra* note 13, at 23.

The California Commission on Campaign Financing compiled these statistics from published CPPC reports. For the most part, the CPPC relied on OWENS, TRENDS IN CAMPAIGN SPENDING IN CALIFORNIA, 1958-1970: TEST OF FACTORS INFLUENCING COSTS (1973). The data from years before 1974 may be imprecise because of the absence of disclosure requirements for candidates.

16. Girard, *Campaign Finance Reform in California*, 10 HASTINGS CONST. L.Q. 567, 568 (1983).

17. THE NEW GOLD RUSH, *supra* note 13, at 1.

18. *See Text of Proposed Ballot Measure to Adopt The Campaign Spending Limits Act of 1986* [hereinafter *Proposed Ballot Measure*] (copy on file with the *Hastings Constitutional Law Quarterly*). The ballot measure comes in the form of an initiative because of the failure to pass campaign spending limits through the ordinary political process. *See supra* note 14.

19. The phrase "independent expenditures" refers to spending that is not connected directly to a candidate or to a candidate's political committee. *See Buckley v. Valeo*, 424 U.S. 1, 40 (1976); *Proposed Ballot Measure*, *supra* note 18, § 85600.

According to the Secretary of State, the Proposed Ballot Measure has qualified for the June 1988 ballot. Wiegand, *Campaign Initiative on June Ballot*, S.F. Chron., Oct. 24, 1987, at A7, col. 1.

Two other initiatives have been registered with the Secretary of State and the State Attorney General but have not yet qualified for the June, 1988 ballot. They are still in the signatory stage. The first is sponsored by State Assembly Representative Bill Thomas. State senators Russ Johnson, Joseph Montoya, and Quentin Kopp are supporting the second proposed initiative. In general, these two initiatives limit campaign contributions only, and thus are not as comprehensive as the Proposed Ballot Measure. Telephone Interview with Marian Markus, Ass't Executive Director, Common Cause (Nov. 3, 1987). Common Cause is a Los Angeles-based advocacy group.

spending and provide easier access to public office for those without great wealth.

The constitutional validity of the proposed Campaign Spending Limits Act is in question. Many of the initiative's limitations are similar to restrictions contained in the Federal Election Campaign Act Amendments of 1974,²⁰ which have been found constitutional.²¹ Some of the initiative's provisions, however, impose limitations on which the Court has not directly ruled.

Part I of this Note discusses California's campaign spending problem and some of its causes. Part II summarizes the proposed initiative. Lastly, Part III analyzes the constitutionality of the initiative in light of recent Supreme Court decisions. This Note contends that if the Court follows present reasoning, some of the initiative's provisions will not pass constitutional muster.²² Even if these few provisions were struck down by the Court, however, the most significant limitations would remain intact, having the likely effect of decreasing the role of wealth in California's political process.

I. The Problem of Rampant California Campaign Spending²³

The cost of running a legislative campaign in California is on the rise.²⁴ This section explores the areas of concern over rising campaign costs and discusses some of the reasons why costs have risen so greatly.

A. Major Areas of Concern Over Rising Campaign Costs

There are four major areas of concern associated with the rising cost of legislative campaign financing: (1) incumbent advantage; (2) reliance

20. Pub. L. No. 93-443, § 101(b)(1), 88 Stat. 1263, 1272, *repealed by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified at 2 U.S.C. §§ 431-455 (1982)). *See also infra* notes 54-81 and accompanying text.

21. *See generally Buckley*, 424 U.S. at 1.

22. Indeed, one commentator has speculated that the Court may abandon its present mode of analysis and hold *all* limitations on campaign spending unconstitutional. Richards, *The Rise and Fall of Contribution-Expenditure Distinction: Redefining the Acceptable Range of Campaign Finance Reforms*, 18 NEW ENG. L. REV. 367, 394 (1983). If this shift were to occur, the most significant parts of the referendum would be rendered invalid.

23. The view that rampant campaign spending is a "problem" in California elections is not universally shared. Some observers argue that more money is needed to inform voters adequately in California campaigns. *See THE NEW GOLD RUSH, supra* note 13, at 29. Other supporters of increased campaign spending argue that legislators in California must spend more to reach their constituencies, which are the largest in population compared to other states. *Id.* Some commentators analogize California campaign spending to the amount of money some private businesses spend to promote products. California campaigns are relatively inexpensive by commercial standards. *See 100 Leading National Advertisers, ADVERTISING AGE*, Sept. 8, 1983.

24. *See supra* note 15.

on wealthy contributors; (3) off-year fund raising; and (4) disproportionate contributor influence on legislation.

Incumbents are generally more successful in winning elections for various reasons including proven performance, name recognition, and experience in office. To compensate for these advantages, challengers must spend large sums of money to bring their names and views before the public eye. Yet, incumbents have superior fundraising ability because they have made contacts during their tenure in office and have the experience that successful fundraising requires. Incumbents are widening their advantage, making campaigns unfair.²⁵ This financial advantage alone is frequently sufficient to defeat challengers at the polls.²⁶ Moreover, the increased ability of incumbents to outspend challengers deters newcomers from entering politics,²⁷ and thus limits the voters' choice.

A second problem is that rising campaign costs force incumbents to seek wealthy contributors with large financial stakes in pending legislation.²⁸ Only these contributors have the ability and willingness to provide the large sums of money needed to run a successful campaign.²⁹ This financial relationship between candidates and large contributors creates at least an appearance of impropriety, and fosters corruption of the political process in the form of *quid pro quo* arrangements.³⁰ The Supreme Court has found this a problem which states have a compelling interest to rectify.³¹

25. In 1976, the average Assembly incumbent spent \$25,100, while the average challenger spent \$9400, a ratio of almost three to one. By 1984, the incumbent's spending advantage had increased to fourteen to one. Incumbent outlays increased fourfold during this period while challengers' expenditures actually decreased from \$9400 in 1976 to \$8500 in 1984. In the 1984 primary elections, Assembly incumbents outspent challengers by 105 to 1. Senate incumbents outspent challengers by 229 to 1. *THE NEW GOLD RUSH*, *supra* note 13, at 31-32.

The number of truly competitive races, defined by the California Commission on Finance as races in which each candidate spent \$35,000 or more, is decreasing in number. In state Senate primary elections the percentage of competitive races has dropped by ten to fifteen percent. *Id.* at 32-33.

26. "In a district with fairly even Democratic and Republican strength, campaigns can be highly competitive. Candidates have to spend large amounts to influence the crucial swing voter and tip the electoral results." *THE NEW GOLD RUSH*, *supra* note 13, at 34.

27. "Escalating campaign costs discourage qualified new candidates from running." *THE NEW GOLD RUSH*, *supra* note 13, at 141.

28. Pollard, *Campaign Financing: It's Thoroughly Institutionalized Corruption*, *Stockton Record*, Nov. 19, 1984, at 11, col. 1.

29. *Id.*

30. *Quid pro quo* literally means "what for what, something for something, [or] the giving of one valuable thing for another." *BLACK'S LAW DICTIONARY* 1123 (5th ed. 1979). In campaign financing, the *quid pro quo* for the contributor rests on the assumption that the candidate, if elected, will support or oppose legislation to the benefit of the contributor.

31. *See Buckley v. Valeo*, 424 U.S. 1, 30 (1976). However, the interest may not be sufficiently compelling to overcome the first amendment interest with which direct campaign limitations interfere. *Id.* at 27 n.29. *See infra* notes 96-97 and accompanying text.

The third area of concern is off-year fundraising.³² Off-year fundraising diverts incumbents' attention from work,³³ further increases incumbents' fundraising power,³⁴ and decreases real competition in campaigns.³⁵ Off-year fundraising is particularly susceptible to *quid pro quo* abuse.³⁶ Moreover, it fosters the appearance of corruption because legislators often schedule fundraising events shortly before key legislative votes to obtain larger contributions, thus making it appear as if contributors buy votes.³⁷

Fourth, large contributions inevitably influence legislation. Rising campaign costs force candidates to seek new fundraising sources.³⁸ Finding it less efficient to seek small contributions from individual constituents inside their own districts, candidates cultivate large, organized contribution sources from central state locations. Political action committees ("PAC's"),³⁹ corporations, and labor organizations are the largest sources of campaign money in California.⁴⁰ Legislators who need the contributions to succeed are likely to gear their campaigns, and indeed their actions in office, towards satisfying the goals of these contributors.⁴¹

These four factors—incumbents' fundraising advantage, reliance on wealthy contributors, the practice of off-year fundraising, and the inevitable influence of wealthy contributors on legislation—contribute to a se-

32. Off-year fundraising refers to fund-raising activity in any year other than the year the candidate is listed on the ballot. *See Proposed Ballot Measure, supra* note 18, § 85309(a).

33. In 1983, incumbent legislators raised a record \$14.3 million even though they were not up for reelection, had no foreseeable opponents, and had no debt. *THE NEW GOLD RUSH, supra* note 13, at 7. The time and energy incumbents spend to raise off-year funds obviously detracts from time which could be focused on legislation. *See also id.* at 117.

34. In 1983, incumbents raised 99.7% of all off-year campaign contributions. *Id.* at 8.

35. *See id.* at 118-20.

36. "In 1983, legislators raised 76 percent of their off-year money by soliciting Sacramento based lobbyists, businesses, and PAC's that had ongoing relations with legislators." *Id.* at 8. Lobbyists complain that undue pressure is placed on them to contribute during the off-year. *Id.*

37. *Id.* at 117. The number of fundraisers during the off-year, however, makes it "difficult to conclude that any one fundraiser was specifically scheduled before a particular vote." *Id.*

38. *Id.*

39. A PAC is any committee sponsored by a corporation, labor union, or other group of persons which receives contributions or makes expenditures over a total of \$1,000 during a calendar year. 2 U.S.C. §§ 431(4), 441(b) (1985). The definition of a PAC (or "committee") under California law is similar. CAL. GOV'T. CODE § 82013 (West 1987).

40. During the 1980 through 1984 general election, legislative candidates received an average of 56 percent of their contributions from PAC's, labor unions, and businesses. *THE NEW GOLD RUSH, supra* note 13, at 6.

41. *See id.* at 5:

In the California Legislature, the voice of the people is being increasingly ignored amid an unprecedented scramble for campaign money. Powerful special interests bankrolling the election of our representatives have attained such a position of privilege that even some lawmakers fear that the Legislature is becoming a kept house.

rious erosion of public confidence in the democratic system.⁴² The major cause underlying these problems is rising campaign costs.

B. Causes of Rising Campaign Costs

Three factors have caused the cost of campaigns to increase: (1) the candidates' fear that opponents will outspend them; (2) an increased availability of political money; and (3) the use of more expensive campaign techniques.

Initially, since candidates equate the amount of money spent in a campaign with the number of votes obtained, they consider it important to outspend their opponents. As the California Commission on Campaign Financing stated in a 1985 report,

[c]ampaign management is not a scientific process and strategists cannot predict the precise impact of an additional mailer or an extra \$50,000. Candidates therefore raise and spend as much as they can, hoping their campaign will not be overwhelmed by large expenditures from the other side. At the very least they try to spend as much as the other side to prevent defeat or ensure victory.⁴³

This constant attempt to outspend the opposition creates a never-ending spiral of increasing costs.

Second, candidates are able to obtain greater amounts of money from political parties and individual contributors.⁴⁴ Twenty years ago, candidates knew their opponents could raise only modest amounts.⁴⁵ Private contributions and partisan political transfers have grown rapidly in recent years, giving candidates quick access to enormous sums of money.⁴⁶ Knowing that opponents have increased access to money and that an election can be lost by spending too little, many candidates spend twice what they need to ensure their success.⁴⁷ The result is an increase in the overall cost of campaigns.

An additional reason for rising election costs is the increased use of

42. Opinion polls indicate a low public confidence in government. . . . In 1984, 74 percent of Californians reported that "state legislators are either very or somewhat obligated to their campaign contributors"; 46 percent of this group believed the result is "unfairness" to the average citizen. Massive campaign expenditures, large private donations and legislative bills linked to sizable donations contribute to the loss of public confidence in California's governmental institutions.

Id. at 16.

43. *Id.* at 47.

44. *Id.* at 49-50. See generally J. HARRIS, CALIFORNIA POLITICS (1967); D. CRESAP, PARTY POLITICS IN THE GOLDEN STATE (1954); Lowenstein, *Forecast from Lowenstein: Campaign Finance Scandals Ahead*, CAL. J., Mar. 1979, at 103.

45. THE NEW GOLD RUSH, *supra* note 13, at 47.

46. *Id.* at 95.

47. "Some unopposed legislators spend over \$100,000 on campaigns just to deter future challengers." *Id.* at 4.

direct mail.⁴⁸ Although other forms of spending are still used to win campaigns,⁴⁹ direct mail has become the largest and fastest growing portion of overall spending. Candidates now send a higher volume of targeted direct mail,⁵⁰ adding enormous costs to campaigns.⁵¹

II. The Proposed Initiative

The Proposed Ballot Measure,⁵² designed to address the problems arising from increased campaign spending, can be broken down into three main sections: contribution limitations, expenditure limitations, which include independent expenditure regulations, and campaign reform fund requirements.⁵³

A. Contribution Limitations

The Proposed Ballot Measure limits contributions by persons, small contributor PAC's,⁵⁴ and non-individuals, such as corporations and labor unions. The Proposed Ballot Measure limits contributions from persons to \$1,000 per candidate for each election.⁵⁵ Organizations are limited to \$2,500 per election.⁵⁶ Small contributor PAC's are limited to \$5,000 per candidate for legislative office.⁵⁷ These limitations apply to money given to controlled committees or to any committee that supports

48. Direct mail techniques, engineered by Michael Berman in 1972, revolutionized the modern campaign process and drastically increased its cost. Direct mail involves a procedure by which detailed information taken from voter registration forms is entered into a computer. Voters are then classified by sex, age, place of birth, occupation, and other characteristics. The computer divides the voters into smaller and more specialized campaign groups, making it possible for candidates writing general campaign messages to bypass unfriendly and friendly voters and to focus on the undecided. *See Tobe, New Techniques in Computerized Voter Contact, Campaigns & Elections, Summer, 1984; THE NEW GOLD RUSH, supra note 13, at 35.*

49. *THE NEW GOLD RUSH, supra note 13, at 38-40.*

50. *Id.* at 36.

51. *Id.* at 37.

52. *See supra* note 18.

53. The campaign fund is the fund out of which limited matching funds will be given to candidates who voluntarily accept the expenditure limitations.

54. A "small contributor political action committee" is a committee which meets the following criteria: (a) All contributions to the committee from any single person in a twelve-month period total \$50 or less; (b) The committee has existed for at least six months; (c) The committee contributes to at least five candidates; (d) The committee is not controlled by a candidate. *Proposed Ballot Measure, supra note 18, § 85202.*

55. *Proposed Ballot Measure, supra note 18, §§ 85300(a), 85300(c).* Primary and general elections are treated as separate elections. *Id.* § 85300(a). Contributions made before July 1 of the election year are primary contributions; those made from July 1 through December 31 of the election year are general election contributions. *Id.* § 85317.

56. *Id.* §§ 85300(b), 85300(d). "Organization" refers to "a proprietorship, labor union, firm, partnership, joint venture, syndicate, business trust, company, corporation, association or committee which has 25 or more employees, shareholders, contributors or members." *Id.* § 85206.

57. *Id.* § 85300.

the candidate.⁵⁸ The limits apply to contributions to political parties and legislative caucus committees as well.⁵⁹

The Proposed Ballot Measure also limits the aggregate contributions candidates or candidate-supporting committees may receive. For contributions by non-individuals, Assembly candidates are limited to an aggregate of \$50,000 and Senate candidates to an aggregate of \$75,000. The provision applies to both general and primary elections; however, it exempts contributions from political parties and legislative caucuses.⁶⁰ The Proposed Ballot Measure limits the aggregate contributions by persons to \$25,000 over a two-year period.⁶¹ Organizations and small contributor PAC's are limited to aggregate contributions of \$200,000 over a two-year period.⁶²

The Proposed Ballot Measure prevents large contributors from evading the contribution limits by prohibiting candidates or their controlled committees from accepting any form of honorarium or gift valued at more than \$2,000.⁶³ Thus, contributions exceeding the \$2,000 limit cannot be disguised as gifts. Furthermore, transfers between candidates, candidate-controlled committees, and other candidates and their committees are prohibited.⁶⁴

The Proposed Ballot Measure prohibits off-year contributions. Legislative candidates may not accept contributions in "any year other than the year in which the legislative candidate or legislator is listed on the ballot as a candidate for legislative office."⁶⁵ Legislative caucus committees and political party committees that support or oppose legislative candidates are prohibited from making contributions in odd-numbered years.⁶⁶

Finally, the Proposed Ballot Measure contains a loan limitation which provides that "a loan shall be considered a contribution from the maker and the guarantor of the loan and shall be subject to the contribution limitations" of the Measure.⁶⁷ However, a loan made to a candidate by a commercial lending institution in the regular course of business, on the same terms as those available to the public, and which is secured or guaranteed is not subject to the contribution limit.⁶⁸

58. *Id.* §§ 85300, 85301.

59. *Id.* § 85302.

60. *Id.* § 85305.

61. *Id.* § 85306. The two-year period commences on January 1 of an odd-numbered year. *Id.* § 85204.

62. *Id.* § 85307.

63. *Id.* § 85310.

64. *Id.* § 85308.

65. *Id.* § 85309(a).

66. *Id.* § 85309(b).

67. *Id.* § 85313(a).

68. *Id.* § 85313(c).

B. Expenditure Limitations

The Proposed Ballot Measure caps all expenditures in California legislative races if candidates accept limited matching funds.⁶⁹ The Proposed Ballot Measure provides that “[n]o candidate for State Assembly who files a statement of acceptance of financing from the Campaign Reform Fund [nor] any controlled committee of such a candidate shall make qualified expenditures above” \$150,000 in a primary election or \$225,000 in a general election.⁷⁰ State Senate candidates who accept matching funds can accept no more than \$250,000 in a primary election and \$350,000 in a general election.⁷¹ In both general and primary elections, if an opposing candidate runs for the same seat and declines matching funds, exceeding the expenditure limits, the expenditure ceiling will no longer apply and the complying candidate may receive an additional \$35,000 from the matching fund.⁷²

C. Independent Expenditures

Persons who make independent expenditures for a mass mailing supporting or opposing candidates for legislative office must put a statement on the mailing, giving their name and disavowing any financial connection to any candidate.⁷³ The Proposed Ballot Measure also imposes a \$1000 ceiling per person and a \$75,000 ceiling per organization on contributions to any person or group who makes independent expenditures supporting or opposing a legislative candidate.⁷⁴ This provision discour-

69. A “limited matching fund”, also known as a “Campaign Reform Fund”, is a fund created by proposed § 18775 of the California Revenue and Taxation Code which is part of the Proposed Ballot Measure.

The Proposed Ballot Measure provides that candidates must meet certain requirements to qualify for limited matching funds:

(a) The candidate [must have] received contributions (other than contributions from the candidate or his or her immediate family) of at least twenty thousand dollars . . . in contributions of one thousand dollars . . . or less if running for the Assembly, or at least thirty thousand dollars . . . in contributions of one thousand dollars . . . or less if running for the Senate. . . .

(b) In the primary election, the candidate [must be] opposed by a candidate running for the same nomination who has qualified for payments from the Campaign Reform Fund or has raised, spent or has cash on hand of at least thirty-thousand dollars

(c) In the general election, the candidate [must be] opposed by a candidate who has qualified for payments from the Campaign Reform Fund or has raised, spent or has cash on hand of at least thirty-five thousand dollars

(d) The candidate [must contribute] no more than fifty thousand dollars . . . per election from his or her personal funds to the legislative campaign.

Proposed Ballot Measure, supra note 18, § 85501.

70. *Proposed Ballot Measure, supra* note 18, § 85400.

71. *Id.* § 85401.

72. *Id.* §§ 85402, 85403.

73. *Id.* § 85600.

74. *Id.* § 85601.

ages the giving of large sums of money to independent committees in order to circumvent the proposed contribution limitations. A person who contributes more than \$100 to a legislative candidate will be considered part of that candidate's controlled committee.⁷⁵

D. The Campaign Reform Fund

Each candidate may either accept or reject assistance from the matching fund. To accept fund money, the candidate must comply with the expenditure limitations defined in the Proposed Ballot Measure.⁷⁶ A statement of rejection or acceptance must be made before the candidate spends or accumulates more than \$35,000.⁷⁷ To qualify for assistance from the fund, the candidate must have received a minimum amount of contributions to insure the legitimacy of his or her participation in the race.⁷⁸ The maximum amount available to an Assembly candidate is \$75,000 in a primary and \$112,500 in a general election.⁷⁹ A Senate candidate has \$125,000 in matching funds available in the primary election and \$175,000 in the general election.⁸⁰

III. Constitutional Analysis of the Initiative

Although carefully drafted to avoid constitutional entanglements, the Proposed Ballot Measure contains provisions which violate first amendment rights of political expression.⁸¹ The Supreme Court has ruled that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities . . . [and that] the First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"⁸²

In *Buckley v. Valeo*,⁸³ the plaintiffs challenged many of the 1974 amendments to the Federal Election Campaign Act ("Federal Act").⁸⁴ The United States Supreme Court struck down the Federal Act's cam-

75. *Id.* § 85602.

76. *See supra* note 69.

77. *Proposed Ballot Measure, supra* note 18, § 85500.

78. *Id.* § 85501(a).

79. *Id.* § 85504(a).

80. *Id.* § 85504(b).

81. *See infra* notes 100-107 and accompanying text. Since 1925 the Supreme Court has held that first amendment freedoms apply through the Fourteenth Amendment to restrict state conduct. *Gitlow v. New York*, 268 U.S. 652 (1925). Some would say the first case so holding is *Fisk v. Kansas*, 274 U.S. 380 (1927) (no evidence to support criminal syndicalism conviction), even though no reference to the First Amendment appears in the opinion.

82. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

83. 424 U.S. 1 (1976).

84. 2 U.S.C. §§ 301-406 (1971), *as amended by* 2 U.S.C. §§ 431-455 (1976).

campaign expenditure limits⁸⁵ as violative of the First Amendment, but upheld contribution limits.⁸⁶ The Court held, per curiam, that campaign contributions and expenditures constituted political expression because of the importance of money in furthering the discussion of public issues and debate on the qualifications of candidates.⁸⁷

Because it viewed contribution and expenditure limits as restrictions on political expression, the Court reviewed the Federal Act with "exacting scrutiny."⁸⁸ Regulations must satisfy two requirements to withstand strict scrutiny: (1) they must serve a "compelling interest" of the govern-

85. The amendments limited any person to \$1,000 in independent expenditures on behalf of any clearly identified federal candidate. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(b)(1), 88 Stat. 1263, 1272, *repealed by* Pub. L. No. 94-283, 90 Stat. 475 (1976). As defined by the Federal Election Campaign Act, the term "persons" includes "an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons." 2 U.S.C. § 431(11) (1983).

86. The amendments imposed a \$1,000 limit per election on individual contributions by persons to a single candidate and a \$25,000 ceiling on total contributions by an individual to all candidates in any year. 2 U.S.C. § 441a(a)(3) (1976). *Buckley* also upheld the provisions requiring disclosure and recordkeeping, 424 U.S. at 66-68, and the scheme for public funding of presidential campaigns. *Id.* at 107-09.

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

Justice White disagreed with the plurality's equation of money with speech, and would have upheld both the federal contribution and expenditure limitations. 424 U.S. at 259 (J. White, concurring and dissenting). *See also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 803-05 (1978). Indeed, Congress could justifiably have believed that large-scale campaign advertising, funded by large contributions, actually drowns out certain viewpoints, and that the limits may help to remedy this problem of stifled speech and therefore increase political debate.

88. In determining the proper standard of analysis, the Court distinguished the Federal Act from the prohibition against draft card burning upheld in *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the defendant had burned his draft card in public to protest the Vietnam war, violating a statute that prohibited the knowing destruction or mutilation of a draft card. The Court upheld the convictions. *Id.* at 380. The *O'Brien* Court noted a difference between regulation of speech-related conduct to prevent harm unrelated to the message (the *O'Brien* situation) and regulation that suppresses speech when a particular form of expression is perceived as harmful (such as campaign spending limitations). *Id.* at 376-77. In *O'Brien* situations, speech can be regulated if four elements are met: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of the governmental interest. *Id.* at 368.

In *Buckley*, the Court distinguished *O'Brien* and concluded that the federal government's interest in regulating contribution and expenditure limitations "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 424 U.S. at 17 (citing *O'Brien*, 391 U.S. at 382). For a contrary view, see Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001, 1007-08 (1976); L. TRIBE, *supra* note 87, at 803-05.

Professor Laurence Tribe has argued that the Federal Act's provisions were content-neutral since they did not represent an attempt to favor a particular message or class of messages. Thus, he feels the Court's decision to apply the strict scrutiny test reserved for non-content-neutral regulations is questionable. L. TRIBE, *supra* note 87, at 800-01. However, despite the scarcity of evidence before the Court that the limitations favored messages by incumbents, the

ment; and (2) they must be narrowly drawn to achieve that objective without unnecessary interference with first amendment rights.⁸⁹

A. Contribution Limitations

Contributions to candidates or political committees involve two first amendment rights. Freedom of speech is involved because a contributor's donation of money represents a symbolic expression as well as actual support for a particular view, candidate, or organization. Contributions also involve the freedom of association⁹⁰ because contributions affiliate donors with candidates and enable "like-minded persons to pool their resources in furtherance of common political goals."⁹¹

Buckley held that the Federal Act's contribution limits do not violate the First Amendment.⁹² The Court found that contribution limits do not improperly abridge associational freedoms, since the contributor is still free under the Federal Act to join any political association and to assist personally in an association's efforts on behalf of candidates.⁹³ Ad-

possibility that the limitations would have this effect could support the Court's decision to apply strict scrutiny. *Id.* at 802 nn.8 & 10.

The Court carefully noted a distinction between the speech interests involved in direct expenditures by a candidate or independent entity and those involved in contributions. Despite this distinction, the Court applied the same strict scrutiny standard to both types of speech. *Buckley*, 424 U.S. at 21.

89. *Buckley*, 424 U.S. at 44.

90. Although not expressly guaranteed by the First Amendment, the right to free association has been considered a major first amendment guarantee since *NAACP v. Alabama*, 357 U.S. 449 (1958). There, the Court held that the First Amendment barred Alabama from compelling production of NAACP membership lists. The opinion used the phrase "freedom of association" repeatedly, and elevated freedom of association to "an independent right, possessing an equal status with the other rights specifically enumerated in the First Amendment." Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964). See Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 22 (1976); cf. Note, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 178-79 (1976).

91. *Buckley*, 424 U.S. at 22.

92. *Id.* at 38. Deferring to legislative intent, the Court found it within Congress' province to conclude that contribution ceilings were necessary and proper. *Id.* at 28.

93. *Id.* at 22. The Court stated that limitations on the size of contributions

[entail] only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying bases for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication. . . .

Id. at 20-21.

Chief Justice Burger dissented, arguing that contributions are simply a way of "pooling" money, and are thus associational activities comparable, for example, to volunteer work. Freedom of association, as well as freedom of speech, in Burger's view, requires that campaign contributions be free from restrictions if there is a satisfactory, less-restrictive alternative. Antibribery laws and disclosure requirements would be sufficient, according to Burger, to address

ditionally, the Court ruled that contribution limits do not unconstitutionally interfere with freedom of speech. The Court found that contributions to candidates are an "attenuated form of speech" or "speech by proxy" because "the transformation of contributions into political debate involves speech by someone other than the contributor."⁹⁴ The Court reasoned that speech interests embodied in monetary contributions are relatively weak compared to the direct speech interests furthered by candidate or independent expenditures.⁹⁵

The Court also found that the state has a strong governmental interest in regulating campaign contributions, thereby decreasing corruption and the appearance of corruption in actual or apparent *quid pro quo* arrangements.⁹⁶ The Court identified public confidence in representational government as a crucial element at the heart of America's political system, and ruled that protecting this interest was sufficiently compelling to warrant limiting the speech interest inherent in campaign contributions.⁹⁷ Furthermore, less restrictive alternatives, including anti-bribery and disclosure laws, would not be sufficient to root out the appearance of corruption and actual opportunities for corruption.⁹⁸ Therefore, the

the corruption problems inherent in large contributions. *Id.* at 246 (Burger, C.J., dissenting) (disclosure requirements are "the simple and wholly efficacious answer" to flushing out corrupt contribution practices).

94. *Id.* at 21.

95. *Id.*

96. *Id.* at 29. The Court treated the appearance of corruption as an evil as great as actual corruption. *Id.* at 27. *See also* United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973).

97. 424 U.S. at 26-27. Chief Justice Burger's dissent in *Buckley* rejected the Court's view that there was a compelling interest. *Id.* at 241-46 (Burger, C.J., dissenting).

98. *Id.* at 27-28. The Court's more recent ruling in *Citizens Against Rent Control (CARC) v. Berkeley*, 454 U.S. 290 (1981), suggests the Court's reasoning on this point may have shifted since *Buckley*. Chief Justice Burger authored the majority opinion in *CARC*, expressing many of the views promoted in his *Buckley* dissent. In *Buckley*, he argued that limitations on political speech were unconstitutional even if justified by concern with the appearance of corruption. In *CARC*, the Supreme Court struck down a municipal ordinance which placed a \$250 limit on contributions to committees formed to support or oppose ballot measures. *Id.* at 292. Thus, there was no state interest to outweigh the interference with protected first amendment rights.

CARC suggests that a majority of the Court may have shifted away from the *Buckley* per curiam view that contribution limits are constitutionally distinguishable from expenditure limits. *See Note, The Supreme Court, 1981 Term*, 96 HARV. L. REV. 165 (1982). In *CARC*, Chief Justice Burger emphasized that "placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression." 454 U.S. at 297. Furthermore, in omitting mention of the contribution-expenditure distinction, the Court called into question the validity of all campaign finance limitations, including contribution limitations.

Speculation concerning the significance of *CARC* should be qualified, however, in two ways. First, Chief Justice Burger, who authored *CARC* and strongly argued that first amendment rights override any rationale for restricting political speech, no longer sits on the court. Second, *CARC* involved ballot measure campaigns, which do not have the same possibility of *quid pro quo* arrangements as candidate campaigns. Thus, the governmental interest found

Federal Act's contribution limits withstood the Court's strict scrutiny.

The California Proposed Ballot Measure's contribution limits are similar to those of the Federal Act in that they limit campaign contributions of individuals, organizations, and PAC's to \$1000, \$2500, and \$5000, respectively, for primary and general elections.⁹⁹ Since the Supreme Court upheld similar Federal Act contribution limits in *Buckley*, many of the Proposed Ballot Measure limitations appear to be constitutionally sound.

The Proposed Ballot Measure goes further than the Federal Act, however, and would impose an aggregate cap on the contributions a candidate may receive from non-individuals in all elections.¹⁰⁰ No court has yet reviewed aggregate contribution limits. The constitutionality of this type of limit is suspect on two grounds.

First, an aggregate contribution limit is tantamount to a flat ban on contributions from late-paying organizations. Once a candidate has received the maximum in contributions from non-individuals, other organizations would be barred from contributing at all. In effect, late-paying organizations would be completely prohibited from what the Supreme Court has labeled "speech by proxy,"¹⁰¹ and thus would be deprived of their first amendment right to make contributions. In addition, the aggregate limits would interfere with the political process by pressuring organizations to contribute early in the campaign. Contributors might prefer to wait until late in the campaign, timing their contributions in accord with their own strategic goals. If these contributors were precluded from donating because of the aggregate contribution limits, their free speech rights would be completely abridged under the Proposed Ballot Measure.¹⁰² The Supreme Court has determined that the interest in protecting speech by proxy is less strong than the interest in protecting more direct forms of speech.¹⁰³ The Court also has upheld flat prohibitions on contributions by corporations and labor unions.¹⁰⁴ The Court

inapplicable in *CARC*—the concern to prevent impropriety and the appearance of impropriety in political campaigns—may still be compelling in the context of candidate campaigns.

99. See 2 U.S.C. § 441a(3) (1985); see also *supra* notes 54-68 and accompanying text.

100. See *supra* note 60 and accompanying text.

101. *Buckley*, 424 U.S. at 21. See *supra* text accompanying note 94.

102. Aggregate contribution limits might be treated as a time restriction which would be valid if the state could meet the lower standard applicable to content-neutral time, place, and manner restrictions. For a discussion of this lower standard, see *infra* note 116.

103. See *supra* note 94 and accompanying text.

104. In *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981), the court stated:

The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.

Id. at 201.

has not yet decided, however, whether speech by proxy could be prohibited completely for all other types of organizations.

Second, if contributions are characterized as speech by proxy, aggregate limits on contributions must serve a compelling state interest to withstand the strict scrutiny test.¹⁰⁵ The Court has refused to find interests such as equalizing candidates' ability to spend and decreasing overall spending sufficiently compelling to justify contribution regulations.¹⁰⁶ Furthermore, the interest in preventing corruption arguably is not applicable to aggregate limitations. Non-individuals already would be limited to contributions of \$2500 under the proposed initiative using the same rationale of preventing corruption or the appearance of impropriety. Logically, if corruption would not result from seventy organizations each contributing \$1000 to a candidate, the seventy-first \$1000 contribution should not trigger a presumption of corruption. Hence, the interest in suppressing corruption and the appearance of corruption would not apply to this type of contribution limitation. Without other compelling interests, this limit would not meet the strict scrutiny test.¹⁰⁷

The California Proposed Ballot Measure also limits the total aggregate amount a person, organization, or PAC may contribute per election.¹⁰⁸ This limit resembles the ceiling on individual contributions contained in the Federal Act¹⁰⁹ and probably would be upheld as constitutional. In *Buckley*, the Court approved the federal total contribution limit, concluding it was necessary to prevent individuals from evading the basic contribution limit.¹¹⁰ The Federal Act limits contributions to \$25,000 a year; the Proposed Ballot Measure limits persons to \$25,000 over a two-year period because of the ban on off-year fundraising. This timing distinction, however, would not be important to the Supreme Court, which focused on the type of limitation, rather than the amount. The same reasoning would apply to organizations and PAC's and thus total aggregate contribution limits would be upheld for them as well.

The California Proposed Ballot Measure treats gifts and honoraria as contributions.¹¹¹ Although the Supreme Court has not addressed the constitutionality of this type of provision, a limitation on gifts would not be held unconstitutional under the majority's reasoning in *Buckley*. Gifts are things of value and therefore would fall under the definition of contributions. Gifts can be used improperly or can create the appearance of

105. See *supra* note 89 and accompanying text.

106. See *supra* note 97 and accompanying text.

107. See *supra* note 89 and accompanying text.

108. See *supra* notes 58-62 and accompanying text.

109. See 2 U.S.C. § 441a(3) (1985).

110. *Buckley v. Valeo*, 424 U.S. 1, 38 (1976). Without the total limit, persons could make many contributions to political committees which could then rechannel those contributions back to the candidate.

111. See *supra* note 63 and accompanying text.

impropriety. Gift contributions, moreover, may be accorded a lower level of protection than monetary contributions, since gifts are less likely to buy speech than is money. Finally, the ability to give gifts is arguably less like speech than is the ability to contribute money. For example, a candidate receiving a gift horse is unable to buy a television advertisement until the horse is sold. Gifts are one step removed from the speech process. Thus, allowing a limit on gifts may be justified by the relatively strong governmental interest in combatting corruption.

Another provision of the Proposed Ballot Measure would ban transfers between candidates by completely eliminating contributions from one candidate to another.¹¹² No court has addressed this specific type of limitation. The speech interests associated with transfers are minimal. Transfers do not affect the transferor's own speech rights, since the transfer only involves a relay of another contributor's money. Nor does the ban affect the original contributor's speech rights since that contributor is still able to give to any candidate. In addition, transfers have a great potential for corrupt *quid pro quo* arrangements. In transfer situations, political favors are likely to be expected in return for brokering contributions by incumbents to candidates. Given the minimal speech interests involved in transfers and their potential corrupting influence, the Court would uphold this limitation.

The Proposed Ballot Measure also prevents candidates or incumbents from receiving contributions during non-election years.¹¹³ This provision is constitutional for two reasons: (1) even if considered a restraint on the content of speech, the provision is justified by a compelling state interest; and (2) the provision is only a time, place, and manner restriction and hence does not require a compelling state interest to be constitutional.

First, off-year contributions are likely to be significantly more corrupting of the legislative process than contributions made at any other time.¹¹⁴ A prohibition on off-year contributions, therefore, would decrease both the opportunity for improper conduct and the appearance of impropriety. These state interests have proved sufficiently compelling to outweigh the burden on free speech accompanying a complete ban on contributions in non-election years.¹¹⁵ Moreover, a prohibition on off-year fundraising would not deprive contributors of the opportunity to make contributions, nor would it necessarily deprive candidates of contributions. California would be limiting only the time when contributions or speech by proxy could be made. Similar time, place, and manner restrictions on speech which preserve some opportunities for expression

112. See *supra* note 64 and accompanying text.

113. See *supra* notes 65-66 and accompanying text.

114. See *supra* notes 33-35 and accompanying text.

115. See *supra* notes 96-97 and accompanying text.

have consistently been upheld by the Court.¹¹⁶

Finally, the Proposed Ballot Measure places a limit on loans, treating loans as contributions when made by an entity other than a commercial lending institution.¹¹⁷ This regulation would be upheld for several of the reasons stated above. The loan would not be considered direct speech and thus the speech interests involved would be no greater than for contributions. Further, loans could elicit a *quid pro quo* arrangement just as do contributions. Thus, there would be a compelling state interest to decrease actual corruption and the appearance of corruption.

The Proposed Ballot Measure's contribution limitations should easily meet the second prong of the strict scrutiny test. In *Buckley*, the Court found that since antibribery and disclosure laws could not root out corruption or the appearance of corruption, contribution limitations constitute the government's least restrictive alternative for furthering its compelling interest.¹¹⁸ The Supreme Court, therefore, likely would find that the Proposed Ballot Measure's contribution limitations are the state's least restrictive alternative for enforcing legitimate government interests.

B. Expenditure Limitations

1. Candidate Expenditures

In *Buckley*, the Court perceived expenditure limitations as a more direct and substantial restraint on free speech than contribution limitations.¹¹⁹ The Court found expenditure limitations constitutionally invalid,¹²⁰ after determining that there was no sufficiently compelling governmental interest to justify this burden on speech.

The strongest state interest proposed to support expenditure limits was the same interest in preventing corruption and the appearance of impropriety.¹²¹ However, the Court decided that expenditures do not involve the same corrupting tendencies as contributions¹²² because the

116. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (zoning of protected speech into late evening broadcast hours is permissible); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (zoning of adult movie theatres is permissible). Generally, the Court will apply a three-part test to determine whether time, place, and manner restriction are valid: (1) the restriction must be justified without reference to the content of the regulated speech; (2) the restriction must be narrowly tailored to serve a significant governmental interest; (3) the restriction must leave open alternative channels for communication of information. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

117. *Proposed Ballot Measure*, *supra* note 18, § 85313(c). See *supra* notes 67-68 and accompanying text.

118. See *supra* notes 94-98 and accompanying text.

119. *Buckley v. Valeo*, 424 U.S. 1, 52 (1976).

120. *Id.* at 57-58.

121. *Id.* at 53.

122. *Id.*

threat of political *quid pro quo* arrangements does not exist with candidate expenditures. Indeed, the Court stated that "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the [coercion] . . . [to which] the [Federal] Act's contribution limitations are directed."¹²³

The strongest justification for candidate expenditure limits centered on the argument that such limits are necessary to equalize candidates' relative financial resources.¹²⁴ The Court considered this interest "clearly not sufficient to justify the provision's infringement on fundamental First Amendment rights."¹²⁵ Expenditure limitations failed to promote financial equality for two reasons. First, a wealthy candidate who is forced to spend less of her personal resources may still outspend her rival as a result of superior fundraising efforts. Second, an unrestricted wealthy candidate's fundraising persuasion may be impeded, because his need for contributions is less.¹²⁶ More fundamentally, the First Amendment could not tolerate a restriction upon the candidate's right to speak on behalf of his own candidacy.¹²⁷

Accordingly, the Court ruled that spending limits placed a substantial burden on political expression while failing to advance any compelling governmental interest.¹²⁸ The Court, however, would allow Congress to create a scheme for publicly funding elections. Such a scheme could require a candidate to choose between respecting an aggregate spending limit or losing the public subsidy.¹²⁹ Simply placing limits on candidate expenditures, however, would violate the First Amendment.

The Proposed Ballot Measure includes a spending ceiling on campaigns in all races where candidates accept public matching funds.¹³⁰ *Buckley* indicates that candidate expenditures are entitled to greater protection under the First Amendment than contribution limitations.¹³¹ Moreover, the legitimate governmental interest in reducing corruption or the appearance of corruption is not served by expenditure limitations.¹³² The Court ruled in *Buckley*, however, that the Federal Act's provision allowing candidates to agree to comply with expenditure ceilings in exchange for matching funds did not violate the Constitution.¹³³ The Pro-

123. *Id.*

124. *Id.* at 54.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 107-08.

130. *See supra* notes 76-80 and accompanying text.

131. *Buckley*, 424 U.S. at 52, 53.

132. *Id.* at 53.

133. *Id.* at 107-08.

posed Ballot Measure's expenditure limits are similarly structured, requiring that candidates adhere to a spending ceiling as a condition for receiving limited public matching funds.¹³⁴ These limits, therefore, would be constitutional under *Buckley*.

2. *Independent Expenditures*

In *Buckley*, the Court treated independent expenditure limitations differently from candidates' expenditure limitations but also struck down independent expenditure limits as unconstitutional. The Court's reasoning may condemn even expenditure limitations that have been proven to stem corruption and the appearance of corruption. The Court viewed political expenditures as direct speech entitled to higher protection than contributor speech by proxy.¹³⁵ In addition, the Court reasoned that "independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."¹³⁶ The candidate's inability to prearrange and coordinate use of independent contributions reduces the value of these expenditures and alleviates the danger of *quid pro quo* arrangements.¹³⁷ Relying on this reasoning, the Court rejected the argument that statutory limits on independent expenditures prevent would-be contributors from circumventing contribution limitations. These expenditures, the Court concluded, are not susceptible to abuse to the same degree as contributions controlled by the candidate.¹³⁸ The independent expenditure ceilings thus failed to further an interest that would overcome the heavy burden the limitation put on protected expression.¹³⁹

The Court rejected as insufficiently compelling two additional governmental interests advanced in support of independent expenditure limits. First, the Court held invalid any governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.¹⁴⁰ The Court emphasized that restricting the voice of some ele-

134. *Proposed Ballot Measure*, *supra* note 18, § 85500.

135. *Buckley*, 424 U.S. at 19-20.

136. *Id.* at 46. *Quid pro quo* arrangements could arise in independent expenditure situations. A candidate would be more likely to cultivate the favor of those who organize and control helpful independent expenditures. See L. TRIBE, *supra* note 87, at 805.

137. *Buckley*, 424 U.S. at 47.

138. *Id.* at 47-48.

139. Professor Ray Forrester argues that contribution limitations may be circumvented by making independent expenditures. Candidates will feel the same gratitude towards entities who spend large amounts of money independently as they would feel toward those who donate money directly. Class Notes, Hastings College of the Law, Mar. 4, 1987 (lecture on Constitutional Law).

140. 424 U.S. at 48. Some commentators argue that it is not inconsistent with first amendment values to curb spending by the wealthy to preserve the integrity of the system. See, e.g., L. TRIBE, *CONSTITUTIONAL CHOICES* 193-94 (1985); Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV.

ments of society in order to enhance the voices of others is a practice repugnant to the First Amendment.¹⁴¹ Second, the Court considered the governmental interest in curbing the skyrocketing costs of political campaigns insufficient to outweigh the first amendment right to spend as much as one wished to express a viewpoint.¹⁴² The First Amendment, the Court stated, “denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.”¹⁴³

More recent cases have upheld independent expenditure limits. For example, in *California Medical Association (CMA) v. Federal Election Commission*,¹⁴⁴ the Court upheld a federal regulation barring individuals and associations from contributing more than \$5,000 per year to any “multi-candidate political committee.” Such contributions were viewed by the Court as speech by someone other than the candidate; limitations on this type of independent contribution were thus valid as long as the government showed a compelling interest.¹⁴⁵ Furthermore, the Court reasoned that without limits on contributions to independent committees, limits on contributions to candidates could be easily circumvented, thus fostering actual or apparent corruption.¹⁴⁶ In rejecting the argument that antibribery and disclosure statutes eliminated the need for this type of contribution limitation, the Court stated:

Because we conclude that the challenged limitation does not restrict the ability of individuals to engage in protected political advocacy, Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme. Instead, Congress could reasonably have concluded [that the limit on contributions to multi-candidate committees] was a useful supplement to the other antifraud provisions of the Act.¹⁴⁷

Although this language indicates that the Court views these contributions as entitled to less first amendment protection, the Court explicitly found that the state has a compelling interest supporting limits on contributions to independent committees. Because contributions to multicandidate committees constitute only indirect speech for the Court, however,

323, 336; Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

141. *Buckley*, 424 U.S. at 48-49.

142. *Id.* at 48-49. Professor Tribe maintains that democratic ideals would not be ill served by a system which rewards candidates who can raise vast amounts of money through large numbers of “grass roots” contributors, while prohibiting millionaires from buying elections. L. TRIBE, *supra* note 87, at 807. Justice Marshall, in his dissent in *Buckley*, observed that “in the Nation’s seven largest States in 1970, 11 of 15 major senatorial candidates were millionaires. The four who were not millionaires lost their bid for election.” 424 U.S. at 288 n.1 (Marshall, J., dissenting). See also Wright, *supra* note 140, at 625-31.

143. *Buckley*, 424 U.S. at 57.

144. 453 U.S. 182 (1981).

145. *Id.* at 198.

146. *Id.*

147. *Id.* at 199 n.20.

the limitations need not be shown to be the least restrictive burden on first amendment rights.¹⁴⁸

The Supreme Court recently added a twist to campaign finance law. In *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*,¹⁴⁹ the Court held that the sections of the Federal Act prohibiting direct independent expenditure of corporate funds in connection with election to public office¹⁵⁰ were constitutional on their face, but violated the First Amendment as applied to the appellee corporation.¹⁵¹ This ruling suggests that when dealing with independent expenditure regulations, the Court may be willing to apply a case-by-case analysis. A restrictive provision would be analyzed on its face under the strict scrutiny test, while an application of the provision would be analyzed on the facts of the case. A compelling governmental interest must be demonstrated on the facts of each case to overcome the first amendment burden placed on the individual involved. *MCFL* also reaffirms that corporations may be more restricted constitutionally than individuals or PAC's in the area of campaign financing.¹⁵²

The independent expenditure limitations of the California Proposed Ballot Measure provide for disclosure by those making independent expenditures.¹⁵³ Moreover, the Proposed Ballot Measure imposes the previously discussed contribution limitations on supporters of those making independent expenditures on behalf of a candidate or in opposition to a candidate.¹⁵⁴

Although stricter and more sweeping than the provisions of the Federal Act, the independent expenditure limitations in the California Proposed Ballot Measure would be constitutional under the reasoning in *CMA*. There is no limit on the amount which can be spent individually in the Measure; it contains only a restriction on the amount which can be contributed to a political committee. This speech by proxy is not the sort of political advocacy that the Court in *Buckley* found entitled to the

148. *Cf. Buckley*, 424 U.S. at 27-28 (requiring a showing that effective bribery and disclosure statutes eliminated need for contribution limitations).

149. 107 S. Ct. 616 (1986).

150. 2 U.S.C. § 441b (1971).

151. 107 S. Ct. at 630-31.

152. *Id.* at 628. *See supra* notes 104 & 118 and accompanying text. *But see* Federal Election Comm'n v. National Conservative Political Action Comm'n (NCPAC), 470 U.S. 480 (1985). In *NCPAC*, the Court struck down a federal provision prohibiting a PAC from spending more than \$1,000 on behalf of a presidential candidate who has chosen to receive federal campaign financing. Relying heavily on the reasoning in *Buckley*, the Court invalidated expenditure limitations on individuals who act independently of candidates. The interest in preventing corruption or the appearance of impropriety was too attenuated for the Court to find the interest compelling. *Id.* at 501.

153. *See supra* note 73 and accompanying text.

154. *See supra* note 74 and accompanying text.

highest first amendment protection.¹⁵⁵ Furthermore, the same compelling interest that the Court pointed to in *CMA* supports the Proposed Ballot Measure provision: without this provision, contribution limitations could be easily avoided, leading to possible *quid pro quo* arrangements and corruption or the appearance of corruption.¹⁵⁶ Since this limitation does not affect one's ability to engage in protected speech, it would not have to meet the second prong of the test.¹⁵⁷ *CMA* suggests that the Court would defer to the decision of the California voters if they conclude that the provision is a useful supplement to antifraud and antibribery statutes in California.

The greater breadth of the independent expenditure limitation in the proposed initiative arguably might lead to an overbroad¹⁵⁸ prohibition on speech. The Federal Act limits only individual contributions toward independent expenditures to \$5,000; the California Proposed Ballot Measure, on the other hand, limits individual independent expenditures to \$1000, organizations to \$2500, and PAC's to \$5000. The Supreme Court, however, has never viewed as determinative either the dollar amount of the limitation or the person or group on whom the limitation is placed. It is therefore reasonable to assume that the Court again would defer to the California voters, concluding that these limits are necessary to further their interests.

C. Campaign Reform Fund

The California initiative proposes that matching funds be made available to candidates on a limited basis.¹⁵⁹ In *Buckley*, the Supreme Court upheld a comparable system for presidential elections. The Court identified several advantages to a limited public financing plan that would match candidates' funds. First, it viewed limited public financing as a means of eliminating the improper influence of large private contributions.¹⁶⁰ Second, such funding "implicates the policies against fostering frivolous candidates, creating a system of splintered parties, and encouraging unrestrained factionalism."¹⁶¹ Finally, the Court concluded that public financing did not infringe on candidates' first amendment

155. See *supra* note 94 and accompanying text.

156. See *supra* note 146 and accompanying text.

157. *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 199 n.20 (1981).

158. "An overbroad statute is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 722 (1978). For examples of how the doctrine is applied, see *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

159. See *supra* notes 76-80 and accompanying text.

160. *Buckley v. Valeo*, 424 U.S. 1, 107-08 (1976).

161. *Id.* at 106.

rights since the candidate voluntarily could choose not to be limited.¹⁶²

The federal court for the Southern District of New York elaborated on the Supreme Court's reasoning in *Republican National Committee v. Federal Election Commission*.¹⁶³ In that case, the court explained that limited public financing furthered two important government concerns: (1) it enabled candidates to lessen the drain on their time and energies due to fundraising and provided more time for competitive debate on the issues for the electorate;¹⁶⁴ and (2) it eliminated reliance on large private contributions without decreasing the candidates' ability to get their message to the people.¹⁶⁵

Offering a candidate matching funds does not require the candidate to sacrifice constitutional rights, even when expenditure ceilings are a condition for receipt of public funds. Instead, matching funds offer the candidate a choice between two methods of exercising the same constitutional right. The Proposed Ballot Measure's matching fund provision thus would be constitutional.

Conclusion

Campaign finance regulations often pose first amendment considerations. The Supreme Court has held that restrictions on the flow of money into and out of political campaigns can affect the discussion of public issues and the debate on candidates' qualifications. These functions are integral to the operation of the democratic system of government established by the Constitution.¹⁶⁶ Hence, campaign finance reforms must be designed to further important governmental concerns and must be drafted as narrowly as possible to avoid infringing donors' and candidates' first amendment freedoms of speech and association.¹⁶⁷ California's proposed initiative contains several provisions for which constitutionality is in question under existing standards. Both limiting the amount of money a candidate can receive from aggregate contributions and banning candidate transfers provide new, unlitigated constitutional questions for the Court. Because the aggregate contribution limit completely bans late contributor speech and lacks a compelling justification, the Court may strike the limit down as unconstitutional. Banning candidate transfers, in contrast, decreases the appearance of impropriety and actual corruption; this provision is most likely constitutional. However, even if these specific provisions were removed or struck down, the bal-

162. *Id.* at 107 n.147.

163. 487 F. Supp. 280, 284 (S.D.N.Y. 1980).

164. *Id.* at 284-85.

165. *Id.*

166. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). *See also supra* note 136 and accompanying text.

167. *See supra* note 89 and accompanying text.

ance of the Proposed Ballot Measure would stand as good law under the Supreme Court's analysis in *Buckley*. The proposed law would immensely benefit political campaigning in California by increasing balance and fairness in the campaign spending process.

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