

DIRECT DEMOCRACY, CORPORATE POWER AND JUDICIAL REVIEW OF POPULARLY-ENACTED CAMPAIGN FINANCE REFORM

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There is a raging debate about which kind of decision-making better serves libertarian and egalitarian values—“direct democracy” through initiatives and referenda or representative democracy through legislative process.¹ I suspect this debate will go on because the issue is fundamentally indeterminate and it is easy enough to argue the question both ways. It is true, as skeptics of direct democracy remind us, that Colorado gave us the anti-gay state constitutional amendment struck down in *Evans v. Romer*,² but Congress gave us the anti-gay Defense of Marriage Act.³ In November 1996, voters passed meaningful state campaign finance reform measures from Maine to California,⁴ while Congress has been paralyzed for two decades on the subject. California just abolished affirmative action through the California Civil Rights Initiative (CCRI)⁵ while Congress has not done so

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1. See, e.g., DAVID MAGELBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 180-85* (1984) (arguing that initiatives favor single-issue organizations and fail to capture the depth and intensity of voter preferences the way that legislatures do); Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (contending that initiatives promote the white community’s racial bias more effectively than legislatures since legislators are inhibited from enacting racist policies but electoral majorities are not); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1364-66 (1985) (defending initiatives as an instrument of democratic participation and as no more likely to produce racially hostile results than legislatures, and countering Bell by invoking judicial review as a check against majoritarian tyranny through the ballot box). See generally, Symposium, *The Bill of Rights v. The Ballot Box: Constitutional Implications of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L. J. 491 (1994).

2. 882 P.2d 1335 (Colo. 1994), *aff’d*, 116 S. Ct. 1620 (1996).

3. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

4. See Judith Havermann, *Election 1996: The States and the Region*, WASH. POST, Nov. 7, 1996, at A41.

5. 1996 Cal. Legis. Serv. Prop. 209.

at the federal level—at least not yet.⁶ In the final analysis, this debate is like trying to compare the virtues of the different branches of government or the states versus the federal government; the controversy presupposes we can permanently identify different forms and processes of government with different *values*. But the genius of divided government is the implicit understanding that no particular form or process has a monopoly on public virtues or values and that power is best left fractured so that the rights of the people can always find a safe harbor.⁷

Beyond engendering this underlying conceptual error, framing the juxtaposition of representative and direct forms of democracy as opposing types misses the structural crisis of American politics and governance that afflict the two types equally. Here, I refer to the capacity of monied power to manipulate and control the outcome of popular elections—including not only initiatives and referenda, but also candidate elections—as well as governmental decision-making processes. Thus, whether our laws emerge from legislative process or plebiscite, far too many of them are being shaped and determined by the expenditure and contribution of huge sums of money by interested corporate factions. In the case of initiatives and referenda, this corporate takeover of the electoral process is deeply ironic and troubling because the referendum was a product of radical populism and progressivism “designed to circumvent the undue influence of large corporate interests on government decision making. It served, as President Wilson put it, as a ‘gun behind the door’ to keep political bosses and legislators honest.”⁸ The corporatization of direct democ-

6. See, e.g., Equal Opportunity Act of 1995, S. 1085, 104th Cong. § 2 (1995). [Editor’s note: After this symposium, but before publication of this article, anti-affirmative action legislation, The Civil Rights Act of 1997, was proposed at the federal level. S. 6195, 105th Cong. § 1 (1997). The proposal provides that “the Federal Government . . . shall [not] . . . grant a preference to, any person or group based in whole or in part on race, color, national origin, or sex, in connection with— (A) a Federal contract or subcontract; (B) Federal employment; or (C) any other federally conducted program or activity.” *Id.* § 3.]

7. Having said that, the initiative process has been especially useful where legislatures have had an intrinsic and structural conflict of interest, such as in consideration of term limits or campaign finance reform. See generally, Ronald D. Rotunda, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 OR. L. REV. 561 (1994). But see *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995). Twenty-one states passed federal-level term limits by initiative before the laws were struck down by *Thornton*. Many of the same states also passed state legislative and gubernatorial term limits, which remain intact. Numerous campaign finance measures have also recently been passed by initiatives. See *infra* at Part V.

8. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 310 (1981) (White, J., dissenting).

racy reflects the continuing deradicalization of progressive political reform measures passed a century ago.

The political dominance of capital in the electoral sphere operates under the banner of the First Amendment. I want to make three critical contentions about this regime: first, the participatory, dialogic, and self-government values of the First Amendment are not vindicated at all by a “laissez-faire” election regime where ballot box victory usually goes to the highest bidder; second, because of the large amount of special interest money in initiative campaigns, it is time for direct-democracy jurisdictions to invoke the juridical safety valve that the Supreme Court created in *First National Bank of Boston v. Bellotti*,⁹ when it struck down restrictions on corporate spending as passed in initiatives, but suggested that a jurisdiction could ban such spending if it showed that “corporate advocacy threaten[s] imminently to undermine democratic processes”;¹⁰ and, finally, in judging the constitutionality of voter-approved initiatives to limit campaign contributions, the courts should give wide deference to the voters since the interests that can justify the restrictions—preserving public confidence in democratic elections and reducing the appearance of corruption—are best evaluated by the public itself.

II

THE NATURE OF THE PROBLEM

The contamination of political campaigns by monied power is well-traveled ground, and after the scandals and outrages of the 1996 election campaigns in which approximately \$2.7 billion from all over the world were spent,¹¹ I assume that I do not need to rehearse the problem for a mature audience. In prior works, I have argued with my co-author, John Bonifaz, that the current regime of money politics has created a new stage of the electoral process that we call “the wealth primary,” in which wealthy interests essentially pre-select the field of candidates—increasingly millionaires themselves—and then, far more often than not, determine the outcome of the party nomination processes, the election, and the course of public policy.¹² This process

9. 435 U.S. 765 (1978).

10. *Id.* at 788.

11. See Ruth Marcus and Charles R. Babcock, *The System Cracks Under the Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record \$2.7 Billion*, WASH. POST, Feb. 9, 1997, at A1.

12. See Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993).

is quite universally and explicitly recognized by candidates, campaign managers, political consultants, pundits, and the media. But if it is generally accepted that money rules in candidate elections and governs in legislatures, our consciousness of this process has not completely caught up with the analogous financial domination of ballot issue campaigns.

The empirical underpinning of my previous article was captured nicely by a *Nation* columnist's pithy summary of the 1996 elections: "Money won."¹³ Consider some of the hotly contested initiatives:

- In California, record sums were spent on Proposition 211, which would have expanded the grounds to sue corporations over securities fraud. According to the *Los Angeles Times*, "[c]orporations, ranging from Intel to Coca Cola, and even the New York stock exchanges, funded one of the most costly political advertising campaigns ever,"¹⁴ with the measure's corporate opponents spending more than \$38 million, compared to the \$12 million spent by the advocates of the initiative, principally the trial lawyers.¹⁵ Proposition 211, as the *Wall Street Journal* put it, "was voted down by the same 3-1 margin by which opponents of the measure outspent backers."¹⁶

- In Florida, voters narrowly rejected Amendment 4, which would have placed a penny-a-pound tax on raw Florida sugar over the next 25 years to raise nearly \$1 billion to restore the Everglades, a key source of drinking water in South Florida. According to the *Ft. Lauderdale Sun-Sentinel*: "Florida's sugar industry rode an unprecedented wave of campaign spending . . . and beat back an attempt by environmentalists to tax sugar to help clean up the Everglades."¹⁷ The sugar industry spent a cool \$22.7 million on a "blitzkrieg of ads, roadside signs and door-to-door appeals" to saturate the public.¹⁸ The environmental coalition, Save Our Everglades, was able to raise \$13 million, but could not keep up with the corporate spending.¹⁹ As the vice-

13. Alexander Cockburn, *Dope, Not Hope*, THE NATION, NOV. 25, 1996, at 9.

14. Bill Stall & Dan Morain, *Prop. 209 Wins, Bars Affirmative Action Initiatives: Wilson says It Will Undo a 'Terrible Unfairness,'* L.A. TIMES, NOV. 6, 1996, at A1.

15. See *Money Talks, Louder Than Ever*, S.F. CHRON., NOV. 7, 1996, at A24.

16. Bob Davis and G. Paschal Zachary, *Election '96: Affirmative Action, Shareholder Lawsuits and Tax Increases Are Rejected By Voters*, WALL ST. J., NOV. 7, 1996, at A17.

17. David Beard and Neal Santaniello, *Florida Voters Reject Sugar Tax: Industry's Ad Blitz Pays Off At the Polls*, FT. LAUDERDALE SUN-SENTINEL, NOV. 6, 1996, at 1A.

18. *Id.*

19. See *id.* Save Our Everglades, however, "sought solace in the victory of two related ballot initiatives." Amendment 5 holds Everglades polluters primarily responsible for repairing their damage to the marsh, and Amendment 6 set up a fund for clean-up monies. Both issues won by solid margins." *Id.*

president of the Wilderness Society put it, “[a]dvertising determined the outcome, persuading voters to go in and vote against the initiative. If we had been able to match the industry dollar for dollar, the outcome would have been different.”²⁰

Last year’s huge contributions and radical spending imbalances repeated a pattern that has been observed consistently over time. Robyn Polashuk noted in 1993 that “[i]n the increasingly typical proposition campaign, one side of the measure is a poorly-funded grass roots coalition, and the opposing side is a corporate-backed organization with significant financial resources.”²¹ She cited many examples, including the 1988 California initiative on no-fault insurance where the corporate proponents of the measure spent a massive \$55,492,876 on the campaign while opponents spent \$23,766.²² As long ago as 1985, John Shockley wrote that the passage of disclosure laws “revealed that American political interests are spending considerable, and to many observers shocking amounts of money on ballot proposals.”²³ He cited a number of cases, including the corporate-engineered defeat of a mandatory deposit bottle bill in Oregon, which led the Governor to remark that the beverage industry simply “bought . . . the elections by flooding the mass media with a mess of lies and distortions of the truth. . . . [I]f limits aren’t placed on industry’s spending, they will continue to buy out the minds of voters”²⁴ Shockley pointed to another case involving a ballot measure in Santa Cruz, California that would have banned the production or testing of nuclear weapons in the city. The Lockheed Corporation quickly mobilized its financial resources to outspend the proponents by a margin of 5-1 and succeeded

20. Robert Pear, *The 1996 Elections: The States-The Initiatives; In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES, NOV. 7, 1996, at B7.

21. Robyn R. Polashuk, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 UCLA L. REV. 391, 404-05 (1993). Polashuk further notes:

Disparity in funding between sides is commonplace in ballot initiative campaigns. In the increasingly typical proposition campaign, one side of the measure is a poorly-funded grass roots coalition, and the opposing side is a corporate-backed organization with significant financial resources. . . . The disparity in wealth is often extreme, with the well-endowed side having as much as 230 times the resources as the grass-roots organization.

Id.

22. *Id.* at 405.

23. John Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 380 (1985).

24. *Id.* at 384 (quoting Robert Cahn, *Buying the Voters' Minds*, AUDUBON 105, 112 (Jan. 1980)).

in defeating the measure.²⁵ In total, Shockley looked at twelve environmental and energy-related initiatives and found that in every case industry opponents of the measures outspent proponents by a margin of 3-1 or 4-1.²⁶

In *Citizens Against Rent Control v. City of Berkeley*²⁷ in 1981, Justice White noted that “[s]taggering disparities have developed between spending for and against various ballot measures.”²⁸ He cited several dramatic cases. In one instance, Standard Oil of Ohio contributed the entire \$864,568 that proponents of a measure spent to pass an initiative permitting construction of an oil storage terminal, while opponents of the initiative spent \$17,721.²⁹ In a 1980 California initiative to limit smoking in public places, the proponents spent \$676,216 and raised most of it from contributions of \$100 or less, while the pro-smoking forces raised \$2,750,987, with four tobacco companies making contributions of between \$300,000 and \$1 million each.³⁰ That same year, another California initiative on whether large energy companies should be taxed to provide funding for mass transportation and alternative energy, the forces opposed raised nearly \$6 million, the vast majority of which came from large corporations, while the advocates raised only \$464,000.³¹

Of course, the continuing pattern of well-funded corporate interests spending to the heavens as pitted against the meagerly-financed public interest side would not be a problem of great social significance if the amount of spending made no difference in the outcomes of campaigns. However, we have every reason to believe that such spending is critical to the results, even beyond the common-sense law-and-economics observations that all of these corporations would not be wasting their money on initiative after initiative if the money had no effect.

The academic literature reveals that the money spent on these state and local campaigns are actually excellent business investments. Robyn Polashuk sums up the consensus quite nicely: “Money is an overwhelming factor in defeating ballot initiatives” and a “notable” factor in passing them.³² Betty Zisk conducted a study of 72 ballot issues in four states from 1976 to 1982 and found that the high spend-

25. *Id.* at 413.

26. *See generally id.*

27. 454 U.S. 290 (1981).

28. *Id.* at 307.

29. *See id.* at 32 n.3.

30. *See id.*

31. *See id.*

32. Polashuk, *supra* note 21, at 405.

ing side won the election 56 times, or 78% of the time.³³ When the high spending side lost, it was more often than not supporting rather than opposing the measure because it is much harder to convince voters to vote for a measure than to vote against it.³⁴ But big money can usually kill an even presumptively popular initiative. In John Schockley's study of twelve environmental-type ballot issues, initial strong support evaporated in every case in the face of lopsided corporate spending, and environmental proponents lost nine of these twelve initiatives.³⁵

In a study David Magelby conducted on California elections between 1954 and 1982, he further confirmed the powerful impact of initiative spending. When spending between the two sides was roughly the same, ballot measures passed 23% of the time and lost 77% of the time. However, when opponents outspent proponents 2-1, 87% of the measures failed. When the proponents outspent the opponents 2-1, they were able to lessen the baseline instinctive public resistance to ballot measures and increased the passage rate from 23% to 48%.³⁶

At any rate, whether spending is always and completely controlling of ballot measure results or just often and mostly controlling is probably uncertain in the final analysis, especially since it is difficult to say precisely why a voter has voted a particular way. However, an attitude of agnosticism or resignation in the face of these vagaries strikes me as antidemocratic and even cynical. Someone will point out a case where a badly underfinanced public interest cause defeats a high-rolling corporate force and then argue that this shows that money has little or no effect on initiatives. The problems with this reasoning are many: it wrongly suggests that this is the common pattern when it is clearly the exception; it wrongly assumes that where the poorer side wins, the campaign and election results were not influenced by money; it implies that initiative backers and opponents are somehow just throwing their money away since money has no impact on election results; and, finally, it asserts the self-contradicting hypothesis that political contributions have little impact but nonetheless are so important that they require constitutional protection.

In truth, we know that money counts in crucial ways in direct democracy as in representative democracy, and the real issue is how

33. See *id.* (citing BETTY ZISK, MONEY, MEDIA AND THE GRASSROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 245 (1987)).

34. Cf. *id.*

35. See generally Schockley, *supra* note 23.

36. Magelby, *supra* note 1, at 148.

we should treat that problem constitutionally in the late twentieth century when the general problem of money corruption of American politics has recaptured center-stage.

III

DOES A FREE MARKET IN CONTRIBUTIONS TO, AND EXPENDITURES ON, INITIATIVE CAMPAIGNS SERVE FIRST AMENDMENT INTERESTS?

By its decisions in *Bellotti* and *Citizens Against Rent Control*, the Supreme Court established a free market in campaign contributions and independent expenditures related to public initiatives and referenda. The theory propounded in *Bellotti* was that corporations could not be kept from spending money on ballot questions—even questions that do not relate to the corporations' own material interests—because the First Amendment generally protects initiative-related speech and the “corporate identity” of the speaker is a contingent and irrelevant fact which does not lessen the public's interest in its views.³⁷ *Citizens Against Rent Control*, meanwhile, struck down a \$250 cap on contributions to initiative committees on the ground that this limit restricted the rights of expression and association and, in the field of ballot issues, there is no countervailing threat of *quid pro quo* corruption equivalent to that which justified contribution limits in *Buckley v. Valeo*.³⁸

The Supreme Court's free market regime can be said to further First Amendment values only to the extent that we accept that the only way—and a fair way—to create and ensure a market in political speech is through market distribution of income and wealth. Obviously, however, this regime is false because many people who would like to give money and to speak in initiative campaigns simply cannot; thus, the speech market fails immediately. Moreover, certain groups and individuals have the power to give far more money than others even if the opposing sides hold equally passionate and persuasive positions. This regime's inequality produces demoralizing effects on less affluent citizens and allows certain voices to drown out others. Thus, permitting the market's distribution of wealth to shape the market for political speech in initiative campaigns can do nothing at all to

37. See *Bellotti*, 435 U.S. at 766.

38. See *Citizens Against Rent Control* 454 U.S. at 296-97 (1981) (discussing, among other issues, *Buckley v. Valeo*, 424 U.S. 1 (1976)).

guarantee that there will be meaningful dialogue and debate that will enable the public to arrive at the best answers.

A society that places its faith in free speech and expression, rather than in religious or ideological orthodoxy, believes in the strength and utility of *markets of ideas*. That is, if we cast our lot with libertarian free speech rather than authoritarian thought control, we are essentially declaring our faith in the marketplace of ideas where multiple perspectives and plans clash and the collision produces, if not truth, then at least the most well-developed and most reasonable syntheses of public debates.

In democratic society, electoral regimes structure the purest and, in a sense the most important, contests of ideas. Elections generate and facilitate the overarching political debates among competing tendencies that in turn structure and, indeed, make possible all other debates in society.

To promote the free market of ideas, therefore, democratic elections in the U.S. must be based on “evenhanded restrictions,”³⁹ chief among them the rule that the side with the most number of votes wins. This is the principle of majority rule that many people identify with democracy itself.⁴⁰ But why should the side with the most votes win? The presumptive answer is that in democracy we have established the central principle of one person—one vote.⁴¹

Nevertheless, while the idea of one person—one vote explains why each person, and every person, should be able to cast a single vote and no more, it does not completely explain why the candidate or

39. The First Amendment requires that government passes “generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (striking down ballot access restrictions that differentially effect third parties).

40. I hasten to add that, in presidential politics, this is not the system. The electoral college provides for the possibility that the popular vote winner will not be the electoral college winner or winner of a contingent election in the House of Representatives. *See* U.S. CONST. art. II, § 1, cl. 3. It is also the case that the Constitution would allow for election to the House by proportional representation schemes rather than the pervasive winner-take-all single member districts now in place, but it would take the repeal of a congressional statute to liberate the states in order to adopt such plans. *See id.*, art. I, § 2, cl. 3. At any rate, winner-take-all majority rule continues to be the rule at the federal, state, and local levels, although there are important exceptions.

41. *See, e.g., Wisconsin v. City of New York*, 116 S. Ct. 1091, 1092 (1996); *Shaw v. Reno*, 509 U.S. 630, 636 (1993); *Reynolds v. Sims*, 377 U.S. 533, 558 (1964); *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing—one person, one vote.”).

side which collects the most number of votes should “win” the election or initiative or referendum.⁴²

The underlying rationale for majority rule is not so much “one person—one vote” as it is “one person—one mind.” In other words, in democratic politics, we seek to create conditions of public debate and discourse that ultimately allow for the most compelling and reasonable public policies to prevail. Since the overthrow of monarchy, we have not trusted one individual to choose the wisest course for all of us, but rather have structured a mixture of republican and democratic institutions to provide for the triumph of best reasons in the political and governmental processes. The democratic faith, in its purest form as expressed in initiatives, consists of the assumption that through the marketplace of ideas the greatest number of minds will settle on the most compelling rationales for picking one course of public policy over another.

In this sense, democracy is an experiment in political consciousness that bets on the enlightenment of the majority of people. But once we place the question of consciousness at the center of our analysis, then the role of money can no longer be dismissed cavalierly. For, of course, it is money that buys the means of communication, education, and persuasion. Today, in states such as California and Florida, that means principally television, but it also includes radio, door-to-door canvassing, and direct mail. What we find in initiatives and referenda is a pure struggle over the political consciousness of popular majorities, and it makes sense that lopsided spending patterns will largely prefigure the outcomes. Most citizens are presumptively cautious about supporting new laws, and if the negative side can drown out the positive with messages of doubt and suspicion, the initiative will be doomed. Conversely, huge margins of spending by the “pro” side will be required to overcome such a presumption and leave a positive and compelling image in the minds of voters.

The tightly closed channels between money, communication, persuasion, and victory might lead us to the ACLU’s position that groups need to have the freedom to raise and spend as much as they want so that each group might have an equal opportunity to capture the public

42. To be sure, proponents of proportional representation have made strong arguments that the majority should not always win, or at least should not always win everything, but rather that in a democracy all groups should be proportionately represented. But even this challenge is premised on the idea that groups should be represented in legislatures proportionately according to their numerical strength, so that majority factions will have a majority of seats and minority factions will have a minority of seats.

mind. From this viewpoint, the idea of a “wealth primary” is positively embraced since political forces are invited to compete first for the money to spend on public communication, then on fashioning and delivering the winning message. Everyone has an equal opportunity to spend as much money as they can raise, advertise as much as they can afford, and win.

But this system of operation has much less to do with democracy than it has to do with markets in political capital and the modern advertising industry. Time and again, we see these initiatives and referenda won by huge corporate industry forces that perform a cost-benefit analysis as to how much a particular new law would cost (or benefit) them, determine how much it would cost to develop and deliver a winning one-sided mass media message, and then choose to invest an appropriate sum of money to drown out the opposition and defeat the measure. Sometimes the spending in one local race is extremely out of proportion—as in the case of California’s securities fraud liability bill—because capital forces mobilized nationally to head a new movement off at the pass. Even when the ballot issues do not neatly stage a confrontation between forces of political capital and underfunded or unfunded public interest groups—say, for example, with respect to non-economic issues like gay and lesbian rights—the same capital-intensive process is triggered, requiring the contending sides to go to the market to find the capital to pay for campaigns to change or affect political consciousness.

In one sense, this process is the paradigm expression of the nature of politics in a market economy. It is analogous to the process surrounding the passage of legislation but stripped bare of the individual lawmakers’ own fundraising and political campaigns, as well as the money-backed lobbying directed at the legislators’, rather than citizens’, consciousness. Reduced to its essentials, the money politics surrounding initiatives capture the essential nature of the Supreme Court’s free market regime in electoral spending.

Nevertheless, does this regime truly reflect the values of democratic self-government contained in the First Amendment? This process has a profoundly arbitrary character because the sides which can mobilize the resources to provide the margin of victory are the ones which have, by definition, amassed market power under current arrangements. Why is there any reason to assume that their side of the issue is the right or rational side? Why should the wealthier side have the presumptive opportunity to dominate public consciousness over the subject matter of the ballot issue? Are we not, in effect, allowing groups to convert *status quo* economic power into political power for

future economic benefit? Even when we are dealing with a non-economic ballot issue such as gay and lesbian rights it is difficult to see how the interests of debate, dialogue, and enlightenment are served by a nationalized contest to raise the most money.

The more coherent and democratic First Amendment paradigm would be a fair fight and a clash of ideas, a political marketplace where both the “yes” and “no” parties, as well as voters, enjoy access to a substantive debate governed by fair rules, meaningful information, and the opportunity to join the dialogue. Leaving aside the question of implementation, the three values we should be seeking to promote in yes-no initiative campaigns are: (1) equal access by both sides to the means of influencing public consciousness; (2) meaningful, structured *debates* over the policy question by the interested parties; and (3) the opportunity for voters to pose questions to the contending forces and actively participate in the debate themselves. A system far superior to the present one in terms of values would give the opposing parties in an initiative campaign equal resources for their campaigns and require them to participate in a series of public debates which the voters themselves could observe and join.

Two background constitutional visions which rarely intersect converge to agree on this alternative paradigm’s set of constitutive values. The first is republican theory, which insists on the dialogic, participatory, and civic educational functions of politics. Cass Sunstein has identified four governing principles to which “liberal republicanism” is committed: deliberation in politics, equality of political actors, universalism and commitment to the common good, and “broadly guaranteed” rights of citizen participation.⁴³ All four of these principles—deliberation, equality, common good, and broad participation—are clearly advanced by an initiative regime which places emphasis on parity of resources between contending sides, meaningful debate and discussion, and active citizen involvement. Conversely, republican principles are offended by the current regime in which campaigns consist not of public deliberation, but of narrow special interests releasing superficial and negative broadsides that do not engage the arguments of opponents but simply attempt to saturate and confuse the public audience.

If republican theory justifies a less commercial approach to initiative spending, so does a law-and-economics approach concerned with maximizing efficiency. The thrust of an economic analysis of legisla-

43. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1541 (1988).

tion, whether passed by legislatures or citizens, is to reduce as much as possible rent-seeking by economic groups and to promote legislation for the common good. Yet the political control exercised by economic actors over public policy perpetuates such rent-seeking behavior. For example, in the legislative field, the money-based influence of the sugar or oil industries leads to government subsidies and tax loopholes which in turn enrich these groups further, providing them with the surplus capital they need to pay for more lobbyists and buy more political influence to procure more rent-seeking legislation. Similarly, in initiatives, corporate forces deploy wealth to increase or defend their wealth, although they are more likely to be in a defensive posture since they are more apt to try to enact tax loopholes and government subsidies through legislation than by popular vote. Thus, groups with greater wealth and property do not hesitate to advance their economic interests by spending money on initiatives. An economic and libertarian approach to law would try to break the cash nexus between for-profit economic actors and law-making processes, whether in legislatures or at the ballot box. Privately financed election and initiative campaigns invite rent-seeking activities by politically organized entities, while public financing attempts to build a wall between the economy and polity, assuring both that rent-seeking corporations do not gain unfair advantages over their competitors and that the public is not taxed for selective “corporate welfare” policies engineered by the careful expenditure of interested money.

IV

TAKING *BELLOTTI* SERIOUSLY

It would benefit both a meaningful political market and fair economic markets to end the tyranny of disparate private financing in initiative campaigns. Without challenging the unholy trinity of *Buckley*, *Bellotti*, and *Berkeley*, governmental jurisdictions could create voluntary systems for public financing of initiative campaigns by sponsoring televised debates for the initiative committees to participate in; by establishing websites and homepages for discussion of initiative issues; by distributing initiative booklets to voters with equal and free space devoted to all sides (as many now do); by promoting and paying for other community debates in public fora; and by conditioning access to the benefits of this public system on the initiative committees’ willingness to forswear corporate contributions and citi-

zen contributions beyond some reasonable maximum amount, such as \$100.⁴⁴

But it is also high time for direct-democracy jurisdictions to invoke the unused safety catch that the Supreme Court created in *Bellotti*, and to ban corporate expenditures and contributions outright.⁴⁵ In *Bellotti*, the Court noted Massachusetts's argument that "corporations are wealthy and powerful and their views may drown out other points of view."⁴⁶ If such arguments, the Court stated, "were supported by record or legislative findings that corporate advocacy threatened to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration."⁴⁷ In *Bellotti*, the Court found that Massachusetts had not shown "that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts."⁴⁸

To be sure, this line of reasoning is in tension with the Court's general holding that corporate speech in ballot measure campaigns has First Amendment protection. After all, as the Court states just a few paragraphs later, "corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it"⁴⁹ The Court did not seem to realize that this conclusion collides with its earlier suggestion that, at a certain point, corporate advocacy goes too far and swamps real democratic discussions.⁵⁰ After all, we would never say of an actual citizen's political participation that it is excessive or so vigorous that it runs the risk of undermining democratic processes. Perhaps the Court is struggling to define a standard whereby corporate advocacy is constitutionally permitted to "influence the outcome" of ballot measure campaigns as long as it does not do so in a way that undermines democratic process by overwhelming other voices and destroying the conditions necessary for authentic citizen debate. Reading between the lines, we might interpret the different strands of the Court's analysis as reflecting a constitutional vision of a fair fight between competing parties.

44. See *Buckley*, 424 U.S. at 94 n.129.

45. See *Bellotti*, 435 U.S. at 788.

46. *Id.* at 789.

47. *Id.*

48. *Id.*

49. *Id.* at 790.

50. See *id.*

But have we not arrived at the point where fair fights have been lost to one-sided massacres? Many jurisdictions have been experiencing massive and decisive political interventions by organized capital in initiative campaigns. They should document their experiences, write their conclusions about the way corporate interference is undermining First Amendment values into a legislative preamble, and then vote by initiative to ban all corporate contributions and expenditures in initiative and referendum campaigns. They should make clear that they have found corporate involvement in ballot issues to be inconsistent with the principle of one person—one vote, destructive of honest public debate, and deeply corrosive of public confidence in democratic elections and institutions. It should not be at all difficult to build appropriate factual records.

Indeed, in the 1996 election, voters in Montana approved an initiative banning all corporate contributions and expenditures in connection with ballot issues.⁵¹ Although the preamble of this initiative did not explicitly state that corporate spending was skewing democracy and undermining popular sovereignty, it came very close to doing so. It found that “corporations are now making direct corporate expenditures of overwhelming amounts of money in Montana initiatives,” that “participation in the political system needs to be kept fair to citizens of normal financial means,” and that “limitations on direct corporate contributions work toward that fairness.”⁵² It should not be hard for other jurisdictions to follow Montana’s example now, furnish even greater specificity about the damaging and distorting effects of corporate spending on initiative campaigns, and ban corporate expenditures and contributions outright.

This move also would be perfectly congruent with the Court’s new and far more nuanced conception of “corruption.” In 1990, in *Austin v. Michigan Chamber of Commerce*,⁵³ the Court upheld a Michigan law preventing corporations from spending general treasury funds as independent expenditures in state elections.⁵⁴ The Court stated that Michigan had a compelling interest in combating “a different type of corruption in the political arena: the corrosive and dis-

51. See MONT. CODE ANN. § 13-35-227 (1996) (“[A] corporation may not make a contribution or an expenditure in connection with a candidate, a ballot issue, or a political committee which supports or opposes a candidate, a ballot issue, or a political party.”); see, e.g., Havermann, *supra* note 4, at A41; Louis Jacobson and Jennifer C. Daskal, *Issues Galore*, NAT’L J. 2460, 2461 (1996).

52. Initiative Measure—Corporate Contribution Concerning Ballot Issues—Voluntary Spending Limits, 1996 Mont. Laws 125 (preamble).

53. 494 U.S. 652 (1990).

54. See *id.* at 656.

torting 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."⁵⁵

The final piece of serious structural reform in this area of jurisprudence is to take on the Court's conclusion in *Citizens Against Rent Control* that there can be no limits on individual giving in ballot issue campaigns because such ballots do not present the possibility of the kind of *quid pro quo* corruption which justified the giving limits upheld in *Buckley*.⁵⁶ However, in reality, initiative spending is often used to aid particular candidates and elected officials by driving up voter turnout among particular communities. For example, Republican campaigns in California were very enthusiastic about the anti-affirmative action measure, CCRI, and obviously benefited from spending on it.⁵⁷ To take another example, Senator Alfonse D'Amato appeared in millions of dollars worth of television commercials purchased for an initiative campaign in New York, and thus won tremendous publicity and advantage from the money raised for the campaign.⁵⁸ In this sense, *quid pro quo* relationships are possible.

In a deeper sense, however, because the Court has evolved in its understanding of what "corruption" is, it should be willing to recognize that, when trained on elections, "immense aggregations of wealth," whether concentrated in corporate or personal hands, can threaten the political equality which lies at the heart of real democracy.

55. *Id.* at 660.

56. *See Citizens Against Rent Control*, 454 U.S. at 295-99.

57. Proposition 209, the California Civil Rights Initiative, won 54% of the votes. *See State Propositions*, S.F. CHRON., Nov. 7, 1996, at A9.

58. *See, e.g.*, Dan Fagin, *Election '96 Propositions*, NEWSDAY, Nov. 6, 1996, at A37 (suggesting that Senator D'Amato raised and spent more than \$1.6 million dollars on TV and radio advertisements in an effort to promote himself and the New York environmental bond initiative); Sarah Metzgar, *D'Amato Uses TV to Tout Bond Act*, TIMES UNION (ALBANY), Dec. 30, 1996, at B2 (discussing Democratic complaints that D'Amato used TV commercials touting the bond initiative to circumvent campaign finance restrictions and reach more votes); James M. Perry, *D'Amato, Facing Tough Re-Election, Recasts Himself as Supporter of Women*, WALL ST. J., Dec. 24, 1996, at A10 (suggesting that D'Amato raised money for the environmental bond initiative in order to broaden his appeal with voters).

V
HOW SHOULD COURTS TREAT POPULARLY-
IMPOSED LIMITS ON CAMPAIGN
CONTRIBUTIONS?

I want to close by making a point about the current political struggles over campaign finance taking place across the country. This last election produced notable victories for campaign finance reform initiatives in Arkansas, California, Colorado, Maine, and Nevada.⁵⁹ In California, voters approved a Common Cause-backed measure that would “limit contributions to state and local candidates, provide incentives for candidates to limit spending, prohibit non-election-year fund-raising by state legislative candidates . . . and ban lobbyists from making contributions.”⁶⁰ In Maine, voters passed a historic ballot measure that will provide total public financing to candidates who agree not to accept private contributions.⁶¹

Campaign finance reform laws have faced hostile audiences in the federal judiciary. In a 1995 case, *Carver v. Nixon*,⁶² the Eighth Circuit enjoined a Missouri law, passed by 74% of the state’s voters, that limited campaign contributions to state candidates to amounts ranging from \$100 to \$300.⁶³ The court held that these limits are too low under the *Buckley* regime and “amount to a difference in kind from the limits in *Buckley*.”⁶⁴ Similarly, in *National Black Police Association v. Board of Elections and Ethics*,⁶⁵ Federal District Judge Thomas Hogan permanently enjoined the popular Initiative 41 in the District of Columbia, which had limited campaign contributions to \$100 in city-wide races and \$50 in ward council races.⁶⁶ Judge Hogan found that these limits hampered the ability of candidates to amass sufficient funds to run and forced them to spend too much time raising money.⁶⁷

I do not view low contribution limits as an exhaustive agenda for campaign finance reform, which needs to focus on making a closed and unregulated private system into an open and regulated public system. I also take Judge Hogan’s point that if the limits go too low and the government has not provided for public funding or public-spon-

59. See Havermann, *supra* note 4, at A41.

60. Jacobson and Daskal, *supra* note 51, at 2460.

61. See *id.*

62. 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996).

63. See *id.* at 640.

64. *Id.* at 644.

65. 924 F. Supp. 270 (D.D.C. 1996).

66. See *id.* at 272.

67. *Id.* at 275, 277.

sored communications, candidates cannot actually raise enough money to run effective campaigns. But, generally speaking, contribution limits need to be defended vigorously in the courts since they express the essential democratic principle that, if we are going to depend on a private market for the financing of political campaigns, all citizens should be given rough parity in their ability and opportunity to give. Moreover, because legislatures are overwhelmingly made up of career politicians who thrive on the current “wealth primary” regime, initiative-backed campaign finance reform must be given the benefit of the doubt if there are ever going to be meaningful changes in the political economy of elections.

The Missouri and District of Columbia courts essentially found that the popularly approved limits presented a difference in *kind* from the \$1,000 limit upheld in *Buckley* rather than just a difference in *degree*.⁶⁸ And, obviously, at some point, everyone would agree that this is the proper analytic approach: if a state limited campaign contributions to one dollar without providing public financing or government-sponsored media time, we all would say that the law burdens the voters’ rights of political association and the candidates’ rights of political expression, constituting a different kind of restriction than the one upheld in *Buckley*.

But, short of palpably extreme cases, the courts should treat initiative-enacted experiments with new campaign contribution limits with real deference. I do not assert this as a categorical principle of statutory interpretation relating to initiatives, but rather as an elucidation of *Buckley*’s own analysis, which upheld contribution limits on the basis of the compelling public interest in limiting the “actuality and *appearance* of corruption resulting from large individual financial contributions”⁶⁹ Given that the public interest in limiting contributions relates partially to the “appearance” of corruption, the public itself should be given very broad deference in its judgment as to what kinds of financial arrangements in politics appear to be corrupt.

For example, in the Initiative 41 campaign in the District of Columbia, the majority of Washingtonians from every one of the city’s eight wards thought that contributions of more than \$100 to Mayor Barry and members of the District of Columbia Council create at least

68. For an interesting exploration of kind/degree analysis under *Buckley*, see William J. Connelly, *How Low Can You Go? State Campaign Contributions and the First Amendment*, 76 B.U. L. REV. 483 (1996).

69. *Buckley*, 424 U.S. at 26 (emphasis added).

the appearance, if not the reality, of *quid pro quo* corruption.⁷⁰ Should they not be trusted with this decision? I believe this deference is especially due since we are not talking about the majority tyrannizing the minority on a question of civil rights, as was the case in *Evans v. Romer*,⁷¹ but rather the majority defining universally applicable rules for fair participation in the political process for everyone. Even if these rules differentially affect the right of wealthier citizens to give million-dollar or thousand-dollar contributions, we are living in the post-*Rodriguez* era where wealth is not a suspect classification,⁷² at least not for the poor and, one hopes anyway, presumably not for the rich. Can we really equate gay and lesbian citizens in Colorado struggling for equal rights with real estate developers in Washington who want to maintain their access to local politicians?

Furthermore, the *Buckley* Court upheld federal contribution limits on the strength of the public's interest in reducing the appearance and reality of corruption, but left open the possibility that other interests could justify such limits as well. The additional interests brought forward in *Buckley* were to "equalize the relative ability of all citizens to affect the outcome of elections" and to "act as a brake on the skyrocketing cost of political campaigns" in order to open candidacies up to poorer candidates.⁷³ If these interests are to be validated as well, the voting public itself should be considered the presumptive expert on how much money average citizens could give to a campaign, such that all citizens would be equally well-situated to influence election outcomes. Similarly, the electorate should best be able to judge what maximum size contributions can be allowed in order to keep political candidacy within reach for citizens without independent wealth or wealthy backers. In short, the courts should give maximum latitude to popular majorities to work out the rules of financial engagement in public elections. This is a principle of judicial review that can be safely deduced from *Buckley* itself.

Similarly, the skepticism with which a court may approach campaign finance "reforms" enacted by incumbent legislators is not warranted where the reforms are passed by the people themselves.⁷⁴ True,

70. Cf. Jonetta Rose Barras, *Lightfoot May Expedite Will of Voters on Campaign Funds*, WASH. TIMES, NOV. 5, 1992, at B4.

71. 116 S. Ct. 1620 (1996).

72. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

73. *Buckley*, 424 U.S. at 26.

74. This skepticism was on view in *Buckley v. Valeo* when Chief Justice Burger wrote, "[i]n short, I see grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates. This Court has, until today, been particularly cautious when dealing with enact-

the courts should not always consider the incumbent-entrenching consequences of campaign finance regimes, but there is no reason to have presumptive suspicion of reforms enacted by the citizenry through initiative or referendum. While incumbents may be much better positioned to raise large money contributions than challengers, the people have no obvious reason to attempt to entrench such incumbents. On the contrary, the electorate has always seemed eager to pass term limits,⁷⁵ suggesting that there is no reason for such a presumption when the people have taken the law into their own hands.

ments that tend to perpetuate those who control legislative power.” 424 U.S. 1, 251 (1976) (Burger, C.J., concurring in part and dissenting in part).

75. Before the Supreme Court decision in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (holding that the Article I Qualification Clause is exclusive), 21 states passed term limits on their state legislators and 23 states passed term limits on their congressional delegations, 21 of which were passed by citizen initiative. See Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding*, 82 VA. L. REV. 493, 493 (1996) (discussing ruling in *U.S. Term Limits*); Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 109 (1995) (citing press reports on *U.S. Term Limits* decision); see also, e.g., ARIZ. CONST. art. VII, § 18; ARK. CONST. amend. LXXIII, § 3; MICH. CONST. art. II, § 10 (limiting state’s Representatives in U.S. Congress to three terms in House of Representatives and two terms in Senate). At the local level, almost exclusively by citizen initiative, nearly 3,000 cities have limited the terms of local elected officials by an average vote of 70%. See DANIELLE FAGRE, U.S. TERM LIMITS FOUNDATION, *MICROCOSM OF THE MOVEMENT: LOCAL TERM LIMITS IN THE UNITED STATES*, Vol. IV, No. 2, Cover Page (1995).