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Constitutional Law: A Price Tag on Expression: The Constitutional Infirmities of Oklahoma's Ballot Measure Contribution Limitations

This is true liberty, when free-born men,
 Having to advise the public, may speak free,
 Which he who can and will, deserves high praise;
 Who neither can nor will, may hold his peace;
 What can be juster in a State than this?

Euripides, *The Suppliants*

Introduction: Campaign Phobia

The shock of the Watergate scandal thrust America into a new era of political philosophy. Because citizens could no longer lodge a naive faith in the democratic process, they demanded knowledge of the use of funds by political endorsing committees.¹ As an unfortunate result of the zealous pursuit of campaign reforms, legislative limitations were placed upon the amount individuals could contribute to public ballot measures. The enactment of such laws has raised serious first amendment reservations. The United States Supreme Court has recently determined that the enforcement of these laws impermissibly infringes on the freedoms of speech and association. This note will analyze the Court's decisions in terms of Oklahoma's election code. If the Oklahoma statutes in this area are unconstitutional, they should be repealed or significantly amended.

Oklahoma joined the national crusade against election corruption in 1974 by adopting the Campaign Contributions and Expenditures Act, an omnibus piece of legislation that placed stringent controls on state election procedures.² To date, it has been interpreted only by two Attorney General Opinions.³ Even though no Oklahoma court has had the opportunity to consider its constitutional ramifications,⁴ it appears that a successful first amendment challenge to the provisions of the Act that limit contributions to ballot measure campaigns⁵ is inevitable. Recent United States Supreme Court decisions have struck down very similar laws from other jurisdictions,⁶ ruling that no sufficiently compelling state interest can justify the resulting encroachment on first amendment liberties.⁷ It is important for Oklahoma's legislature, then, to

1. In 1974, Congress enacted restrictions on campaign finances. Federal Election Campaign Act, Pub. L. No. 93-444, 88 Stat. 1268 (1974), *codified at* 2 U.S.C. § 431 (Supp. 1982).

2. 26 OKLA. STAT. §§ 15-101 through 15-112 (1981).

3. Okla. Op. Att'y Gen. 77-193 (1977); Okla. Op. Att'y Gen. 78-188 (1978).

4. The Act was, however, the subject of an *Oklahoma Law Review* note in 1976. Note, *Constitutional Law: Political Campaign Regulation and the Constitution: Oklahoma's Campaign Contributions and Expenditures Act*, 29 OKLA. L. REV. 684 (1976).

5. 26 OKLA. STAT. § 15-108 (1981), which sets contribution limitations. This section should be read in light of the definitions provided in § 15-102.

6. *Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982), *aff'g mem.*, *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

7. The standard is "exacting scrutiny." See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 16 (1976),

consider how the state's ballot measure contribution limits might fare if challenged in the courts.

*The Reaction: Oklahoma's Campaign Contributions
and Expenditures Act*

The Act

The relevant section of the Campaign Contributions and Expenditures Act of Oklahoma provides:

No person or family may contribute more than Five Thousand Dollars (\$5,000.00) to a political party or organization. No person or family may contribute more than Five Thousand Dollars (\$5,000.00) to a candidate for a state office, nor more than One Thousand Dollars (\$1,000.00) to a candidate for local office. No political party, organization, or candidate shall receive contributions in excess of the amounts provided herein.⁸

Note that the Oklahoma legislature listed candidates and organizations separately and placed the same monetary restrictions on each. The language of the statute suggests that the Oklahoma legislature intended to place limits on ballot measure contributions because support of ballot measure campaigns is the purpose of many political "organizations." This section of the Act is demonstrably unconstitutional in light of current Supreme Court opinions.

An earlier section of the Act defines important terms.⁹ A "contribution" means "any . . . thing of value whatsoever which is given or loaned to be used in a campaign for or against a state question."¹⁰ A "campaign" includes "all activities for or against the election of a candidate or state question."¹¹ The definition of "organization" is especially significant: "'Organization' includes a corporation, governmental subdivision or agency, business trust, estate, trust, partnership or association, union, political education or action groups, and political entities with two or more persons having a joint or common interest."¹² Thus, any gathering of Oklahomans who advocate a particular political view is prohibited from making contributions in excess of the statutory amount.

The Attorney General Opinions

The Attorney General of Oklahoma has twice reviewed provisions of the Campaign Contributions and Expenditures Act.¹³ The first, a 1977 opinion,

citing Bigelow v. Virginia, 421 U.S. 809, 820 (1975); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964), upheld in First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978).

8. 26 OKLA. STAT. § 15-108 (1981).

9. 26 OKLA. STAT. § 15-102 (1981).

10. *Id.* at (3).

11. *Id.* at (2).

12. *Id.* at (5).

13. Okla. Op. Att'y Gen. 77-193 (1977) and 78-188 (1978).

declared that no organization "established to wage a campaign for or against a state question" may receive a contribution in excess of \$5,000.¹⁴ The opinion leaves open the applicability of the Act to organizations not "established" for a political purpose, but that become active in a ballot measure campaign subsequent to their establishment. The phrase "established to wage a campaign" does not appear in the definition of "organization" provided by the Act;¹⁵ thus the Attorney General Opinion could arguably be limited to those groups created for the specific purpose of campaigning. Such a reading, however, would create a meaningless distinction between the two classifications. The criterion should be whether the organization is presently campaigning for a ballot measure, rather than its original purpose. Despite this ambiguity, it is clear that the Attorney General viewed the Act as affecting ballot measure organizations. No cases were cited in the opinion. Although written four years before the United States Supreme Court declared ballot measure contribution limits unconstitutional,¹⁶ the opinion is the most thorough discussion in Oklahoma on the subject.

A 1978 Oklahoma Attorney General Opinion concerning the Act was more in keeping with recent contribution limitation theory.¹⁷ Applying the Supreme Court's decision in *First National Bank of Boston v. Bellotti*,¹⁸ the opinion suggested that the section of the Oklahoma Campaign Contributions and Expenditures Act¹⁹ forbidding corporations from contributing to any campaign was an unconstitutional violation of first amendment rights.²⁰ Most important, the Attorney General followed *Bellotti* in recognizing the vital link between campaign contributions and political speech: the privilege of a free society to discuss matters that affect it without fear of penalty or abridgement.²¹ This determination, which brings contributions into the realm of the first

14. Okla. Op. Att'y Gen. 77-193 (1977), which construed the references to "contributions" in 26 OKLA. STAT. § 15-108 in light of the definition of "contribution" contained in § 15-102. This opinion was reaffirmed in 1980. Okla. Op. Att'y Gen. 80-68 (1980). The 1980 opinion limited the amount a corporation can contribute to a ballot measure organization.

15. 26 OKLA. STAT. § 15-102(5) (1981).

16. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). See also *Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982), *aff'g mem.*, *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980).

17. Okla. Op. Att'y Gen. 78-188 (1978).

18. 435 U.S. 765 (1978).

19. 26 OKLA. STAT. § 15-110 (1981). This section forbids corporations from contributing to political campaigns of any kind.

20. Okla. Op. Att'y Gen. 78-188 (1978).

21. *Id.*, citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Section 15-110 prohibited contributions of any amount of money to a state campaign, whether for a candidate or a ballot measure. In deciding that the statute was unconstitutional, the Attorney General left open the question of whether a limit may now be placed on the amount of corporate contributions, similar to the limit on individual contributions in § 15-108. The opinion also does not distinguish between candidate campaigns and ballot measure campaigns. If the Attorney General's opinion were followed, it seems that corporations could contribute unlimited amounts of money, subject to no state recording or disclosure requirements, to any campaign they chose. The danger of a corrupt "purchase" of a candidate is obvious.

amendment, has been essential to Supreme Court decisions within the past two years.²² Though Oklahoma's Attorney General realized that contributions were a form of protected speech in 1978, the state has not yet applied the concept in its courtrooms or legislative halls. While an Attorney General Opinion may have persuasive influence, it is neither conclusive nor binding.²³ Any binding precedent, then, must be provided by the courts.

The Foundation of Reform: Buckley and Bellotti

The Framers designed the first amendment to the United States Constitution to promote "uninhibited, robust, and wide open debate" on public issues.²⁴ It fosters freedom in the "marketplace of ideas,"²⁵ bolstering "the premise of individual dignity and choice upon which our political system rests."²⁶ The Supreme Court has declared that political expression lies at "the very core of the First Amendment."²⁷ It is considered the foundation of our democratic government.²⁸

Although the concept is as old as democracy itself,²⁹ ballot measure enabling legislation began to emerge around the country as a result of twentieth-century populism.³⁰ In the early 1970s ballot measures were increasingly used as an alternative to legislative action.³¹ In Oklahoma, they have served as a means of gauging public mores on such issues as liquor by the drink and parimutuel betting. It is certain that ballot measures will "increase in number and importance in the years ahead."³²

As popular interest in ballot measures increases, so will questions regarding the validity of restrictions on their use. Do monetary contributions to a ballot measure campaign constitute political "speech," thus falling within first amendment protection, or are they political "conduct," which may be more closely

22. *Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982), *aff'g mem.*, *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

23. *Goodin v. Board of Educ.*, 601 P.2d 88, 91 (Okla. 1979).

24. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

25. Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 2 (1980).

26. *Cohen v. California*, 403 U.S. 15, 24 (1971).

27. *Buckley v. Valeo*, 424 U.S. 1, 39 (1976), *quoting Williams v. Rhodes*, 393 U.S. 23, 32 (1968). See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

28. See BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance of Limits of Principle*, 30 STAN. L. REV. 299 (1978); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court said: "For speech concerning public affairs is more than self-expression, it is the essence of self-government." *Id.* at 74-75.

29. REFERENDUMS, A COMPARATIVE STUDY OF PRACTICE AND THEORY 3 (D. Butler & A. Ranney eds. 1978).

30. *Id.*

31. *Id.*

32. *Id.* at 226.

regulated?³³ What governmental interests may be advanced to support campaign contribution limitations, and what level of scrutiny should the Supreme Court use in examining them? Two cases within the last decade, *Buckley v. Valeo*³⁴ and *First National Bank of Boston v. Bellotti*,³⁵ have laid the modern framework for answers to these questions.

Buckley v. Valeo

Although it dealt exclusively with candidate (as opposed to ballot measure) campaigns, *Buckley* is the watershed case on contribution limitations.³⁶ The Court borrowed dicta from *Buckley* to justify later decisions on ballot measure issues. In *Buckley* the Court scrutinized important provisions of the 1974 amendments to the Federal Election Campaign Act of 1971³⁷ and held per curiam that contribution limitations and disclosure requirements in candidate campaigns are constitutional.³⁸ However, the Court ruled that limits on the independent expenditures of candidates violated free speech guarantees.³⁹

The Court initially recognized that the first amendment provides broad protection to political speech and political association in order to protect the "unfettered exchange of ideas" which is "integral to the operation of the system of government established by our Constitution."⁴⁰ Further, the Court reasoned that because "virtually every means of communicating ideas in today's mass society requires the expenditure of money,"⁴¹ political expenditures fall within the first amendment protection of speech: "a restriction on [campaign expenditures] . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."⁴² This characterization of campaign expenditures

33. See *United States v. O'Brien*, 391 U.S. 367 (1968). The Court in *O'Brien* rejected a draft-card burner's claim that his activity was protected by the first amendment.

34. 424 U.S. 1 (1976).

35. 435 U.S. 765 (1978). See generally, Note, *State and Local Limitations on Ballot Measure Contributions*, 79 MICH. L. REV. 1421 (1981).

36. *Buckley v. Valeo*, 424 U.S. 1 (1976). The case has generated extensive commentary. See, e.g., Clagett & Bolten, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327 (1976); Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323; Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1; Comment, *Buckley v. Valeo: The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976).

37. Pub. L. No. 93-444, 88 Stat. 1268, 1269 (1974), codified at 2 U.S.C. § 431 (Supp. 1982). The amendments, together with the original FECA, limited contributions to candidates for federal office from an individual or group to \$1,000. Restrictions were also placed on the amount a candidate could spend. The Act contained a detailed disclosure and reporting plan.

38. 424 U.S. 1, 23-38, 60-84 (1976).

39. *Id.* at 39-59.

40. *Id.* at 14.

41. *Id.* at 19.

42. *Id.* As the Court put it: "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gas." *Id.* at 19 n.18.

as speech rather than conduct justified a higher standard of scrutiny⁴³ and was essential to later determination of ballot measure issues.

The standard invoked was strict scrutiny,⁴⁴ the most exacting tier in judicial analysis. First amendment restrictions must meet two tests in order to survive strict scrutiny: first, a compelling governmental interest must justify the restriction, and, second, the restriction must be narrowly drawn in order to prevent unnecessary infringement.⁴⁵

In applying this test, the *Buckley* Court distinguished between contributions to a candidate's campaign and individual expenditures by or on behalf of a candidate. Even under strict scrutiny, contribution limitations were justified by the compelling governmental interest of preventing corruption.⁴⁶ The Court found no state interest sufficient to justify individual expenditure limitations.⁴⁷ The danger of corruption in expenditures was deemed to be remote at best because independent advocacy involves less danger of a quid pro quo arrangement due to lack of coordination with the candidate's organization. The chance of corruption is much greater when contributions are made to the political fund of a candidate. Although an illicit bargain may result in an individual expenditure for a candidate outside of his central organization, the Court did not perceive this danger as significant enough to justify curtailing independent advocacy.⁴⁸

It is important that the Court rejected the asserted state interest in equalizing the ability of candidates or supporters to influence the outcome of an election.⁴⁹ It declared that "the First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."⁵⁰ It asserted that the people, not the government, must control political debate in a free society.⁵¹

First National Bank of Boston v. Bellotti

In 1977, two years after *Buckley*, the Supreme Court reached the next stage in the development of its political contribution theory.⁵² The *Bellotti* case

43. The speech/conduct distinction originated in Justice Douglas's concurring opinion on *Teamsters Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942). The distinction has been widely criticized but the Supreme Court is apparently unwilling to abandon it. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 598-601 (1978). For a criticism of the Court's characterization of campaign expenditures as speech, see Wright, *Politics and the Constitution*, 85 *YALE L.J.* 1001, 1005-21 (1976).

44. *Buckley*, 424 U.S. 25, 44-45 (1976).

45. *Id.* at 25.

46. *Id.* at 26-27.

47. *Id.* at 45.

48. *Id.* at 45-47. The Court's analysis ignores the fact that individuals could make a corrupt agreement with a candidate to spend money on his behalf.

49. *Id.* at 48-49.

50. *Id.* at 57.

51. *Id.* See *supra* text accompanying notes 63-70.

52. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court, citing *Buckley*, declared that a mere showing of a "legitimate" state interest was insufficient to justify first amendment abridgement: "The interest advanced must be para-

involved a Massachusetts statute⁵³ that prohibited corporations from making contributions to ballot measure campaigns.⁵⁴ Supporters of the law contended that corporate contributions would unduly influence the outcome of ballot measures and “destroy the confidence of the people in the democratic processes and the integrity of government.”⁵⁵ The Court flatly rejected this argument, stating that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁵⁶ Advocacy may not be suppressed simply because it affects the outcome of an election, the Court asserted, for “the Constitution ‘protects expression which is eloquent no less than that which is unconvincing.’”⁵⁷

According to the *Bellotti* Court, the only sufficiently compelling state interest was the prevention of corruption.⁵⁸ The Court then made a key distinction between candidate and ballot measure campaigns, stating: “The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.”⁵⁹ It is not difficult to understand why the Court reached this conclusion. In ballot measure campaigns, there is no danger of “purchasing” a candidate who will vote favorably on proposed legislation. Once the tally of ballot measure votes is complete, contributions to the campaign cease to have significance. The measure either passes or it fails. The effect of contributions on a ballot measure is success or failure at the polls, not a corrupt quid pro quo bargain whose fulfillment must wait for a future decision. For lack of a compelling state interest, therefore, the Massachusetts statute was invalidated.⁶⁰

Justice White, joined by Justices Brennan and Marshall, dissented on the ground that the Court had not properly balanced the first amendment considerations and the state interest in preventing strong corporate influence on the political process.⁶¹ Such a balancing approach is foreign to the exacting scrutiny tests employed by the Court in the past when viewing first amendment infringements. The dissent did not contend that the interest was compelling, nor did it assert that the statute was narrowly drawn to prevent unnecessary

mount, one of vital importance, and the burden is upon the government to show the existence of such an interest.” *Id.* at 362. Although *Elrod* is a plurality opinion, even the dissenting Justices agreed on the strict scrutiny standard. *Id.* at 381 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.).

53. MASS. ANN. LAWS ch. 55 § 8 (Michie/Law. Coop. 1978).

54. 435 U.S. 765 (1978). Oklahoma has a similar statute forbidding all corporate contributions. See *supra* note 19. It was viewed as unconstitutional by Oklahoma’s Attorney General. Okla. Op. Att’y Gen. 78-188 (1978).

55. 435 U.S. 765, 790-91 (1978).

56. *Id.*, quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

57. *Id.*, quoting *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959).

58. *Id.* at 789-91. This is the same interest asserted in *Buckley v. Valeo*, 424 U.S. 1, 46 (1976). See also *Common Cause v. Harrison Schmitt*, 512 F. Supp. 489, 494-95 (D.D.C. 1980).

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

60. *Id.* at 795.

61. *Id.* at 804-06.

speech curtailment. At any rate, the majority found "no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts."⁶²

Paternalism Renounced

Central to both *Buckley* and *Bellotti* is the concern that large contributors can dominate the political process. Because the power of mass media is available only to the wealthy, several commentators have feared "gross inequalities in the meaning of a vote."⁶³ Theoretically, the "marketplace of ideas" concept is only effective when "all people are equally able to participate in making or influencing the choice."⁶⁴ This "equalizing of voices" principle has received the attention of some constitutional scholars.⁶⁵

The Supreme Court, however, explicitly rejected this approach in both *Buckley*⁶⁶ and *Bellotti*.⁶⁷ The Court has never permitted an attempt to equalize political expression by restricting the relative influence of some,⁶⁸ but it has always held that unrestricted speech is essential to self-government, a core value of the first amendment.⁶⁹ Ballot measures, in particular, require "the widest possible dissemination of information from diverse and antagonistic forces."⁷⁰

There is another frailty in the application of an equalization argument to ballot measure contributions. Limitations cannot affect direct expenditures by individuals because they are protected under *Buckley*.⁷¹ *Buckley* only permits the limitation of contributions to a political action group.⁷² Thus, the wealthy may continue to use the mass media to communicate, while ordinary citizens

62. *Id.* at 789.

63. Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 571 (1980). See Mastro, Costlow & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What To Do About It*, 32 FED. COMMUNICATIONS B.J. 315, 319-20 (1980).

64. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 629 (1970).

65. See Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 368-75 (1977) (equal protection and first amendment analysis); Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 821-42 (1974) (equal protection analysis); Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1017-21 (1976) (equal access of *ideus* to the marketplace).

66. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

67. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978).

68. See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 421 U.S. 241 (1974), which invalidated a statute requiring newspapers to provide space at no cost for candidates to reply to critical editorials. *But see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-91 (1969) (no constitutional barrier to FCC regulation requiring radio and television broadcasters to set aside airtime for reply to personal attacks and political editorials). *Red Lion* has been limited to its facts. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978).

69. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) and cases cited therein.

70. *Bellotti*, 435 U.S. at 790 n.29, quoting *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

71. *Buckley v. Valeo*, 424 U.S. 1, 48-51 (1976).

72. The Oklahoma statute limits the amount a person or a family may contribute "to a political party or organization." There is no limitation on individual expenditures for or against a ballot measure issue. 26 OKLA. STAT. § 15-108 (1981).

are restricted in their ability to join in groups to express themselves. Such an "equalization" plan, therefore, has a reverse effect. It works to the detriment of those of modest means who were intended to be assisted by the plan. Two recent cases, *Let's Help Florida v. McCrary*⁷³ and *Citizens Against Rent Control v. City of Berkeley (CARC)*,⁷⁴ expose the constitutional difficulties with the imposition of contribution limitations on ballot measure campaigns.

Current Solutions: The Let's Help Florida and CARC Cases

Let's Help Florida v. McCrary

*Let's Help Florida v. McCrary*⁷⁵ was one of the first federal cases to consider limitations on ballot measure contributions.⁷⁶ The Court of Appeals for the Fifth Circuit held that a Florida election code remarkably similar to Oklahoma's impermissibly infringed on first amendment rights.⁷⁷ The Florida statute prohibited individual contributions in excess of \$3,000 "to any political committee in support of, or in opposition to, an issue voted on in a statewide election."⁷⁸ This is clearly comparable to Oklahoma's \$5,000 limit on contributions to a "political party or organization."⁷⁹

Let's Help Florida was a political committee organized to campaign for the passage of a ballot measure to legalize casino gambling in southern Florida.⁸⁰ Arguing that their group effort could not continue unless the state contribution limitations were lifted, Let's Help Florida sought declaratory and injunctive relief against the Florida Secretary of State. Upon a finding of unconstitutionality, the district court granted the request.⁸¹

A comparison between Florida and Oklahoma election laws is illuminating. In Florida, a "political committee" means, among other things, "a combination of two or more individuals, the purpose of which is to support or oppose any issue."⁸² In Oklahoma, a political "organization" may mean "political entities with two or more persons having a joint or common interest."⁸³ Florida

73. 621 F.2d 195 (5th Cir. 1980), *aff'd mem., sub nom.* Firestone v. Let's Help Florida, 454 U.S. 1130 (1982).

74. 454 U.S. 290 (1981). See generally Nicholson, *The Constitutionality of Contribution Limitations in Ballot-Measure Elections*, 9 *ECOLOGICAL L.Q.* 683 (1981).

75. 621 F.2d 195 (5th Cir. 1980), *aff'd mem., sub nom.* Firestone v. Let's Help Florida, 454 U.S. 1130 (1982).

76. *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978) struck down a Montana statute prohibiting corporate contributions for ballot measures.

77. *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), *aff'd mem., sub nom.*, Firestone v. Let's Help Florida, 454 U.S. 1130 (1982).

78. FLA. STAT. ANN. § 106.08(1)(d) (West 1982).

79. 26 OKLA. STAT. § 15-108 (1981).

80. The organization is comparable to recent Oklahoma groups organized to urge passage of, for example, parimutuel betting.

81. *Let's Help Florida v. Smathers*, 453 F. Supp. 1003, 1014 (N.D. Fla. 1978), *aff'd sub nom.* Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980).

82. FLA. STAT. ANN. § 106.011(1) (West 1982).

83. 26 OKLA. STAT. § 15-102(5) (1981).

requires less information about a donor when the contribution is less than \$100.⁸⁴ The same is true in Oklahoma for contributions less than \$200.⁸⁵ Florida requires the approval of a political candidate before an expenditure can be made in his name,⁸⁶ as does Oklahoma.⁸⁷ Neither state limits the amount of expenditures that may be made by a candidate. Though not all of these similarities are particularly relevant to ballot measures, they do indicate that the election codes of these states were modeled after the same pattern. The federal court's ruling on Florida's contribution limitations, therefore, should be persuasive authority for Oklahoma.

Recognizing that the constitutional issue presented by *Let's Help Florida* was one of first impression,⁸⁸ the district court made four initial observations regarding the first amendment:

1. The First Amendment occupies a preferred position among the guarantees of the Constitution.
2. Governmental activity having the effect of curtailing First Amendment freedoms is subject to strict judicial scrutiny.
3. Intrusions on the First Amendment are permitted only when the state demonstrates a sufficiently compelling interest in regulation and the means employed to promote the interest are closely drawn to avoid unnecessary interference with protected freedoms.
4. First Amendment freedoms need breathing space to survive.⁸⁹

United States Supreme Court cases were cited as authority for each proposition.⁹⁰

The court recognized that the Florida statute did not prohibit or limit the content of political speech, and only indirectly limited the quantity of such speech.⁹¹ Nevertheless, the statute constituted a substantial interference with first amendment freedoms. Such an infringement, under strict scrutiny, can only be justified by a compelling governmental interest. The court recognized that the prevention of corruption was the only possible state interest that could be so described.⁹² But the court properly distinguished *Buckley*, which dealt solely with candidate campaigns, by declaring that there can be no threat of corruption in ballot measure campaigns.⁹³ Because the government interest was not sufficiently compelling, the court ruled the statutory first amend-

84. FLA. STAT. ANN. § 106.07(4)(a) (West 1982).

85. 26 OKLA. STAT. § 15-103(1) (1981).

86. FLA. STAT. ANN. § 106.011(5) (West 1982).

87. 26 OKLA. STAT. § 15-105(d) (1982).

88. *Let's Help Florida v. Smathers*, 453 F. Supp. 1003, 1009 (N.D. Fla. 1978), *aff'd sub nom.* *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980).

89. *Id.*

90. *Id.* For the first proposition, the court cited: *Marsh v. Alabama*, 326 U.S. 501 (1946); for the second proposition: *NAACP v. Alabama*, 357 U.S. 449 (1958); for the third proposition: *Buckley v. Valeo*, 424 U.S. 1 (1976); and for the fourth proposition: *NAACP v. Button*, 371 U.S. 415 (1963).

91. 453 F. Supp. 1003, 1008 (N.D. Fla. 1978).

92. *Id.* at 1013.

93. *Id.*

ment infringement unconstitutional. The state of Florida was permanently enjoined from enforcing it against the plaintiff in the context of a ballot measure election.⁹⁴

The Fifth Circuit affirmed the district court's decision, consolidating *Let's Help Florida* with *Dade Voters for a Free Choice v. Firestone*.⁹⁵ As a further explanation of the candidate/ballot measure distinction, the court stated:

The state's interest in preventing the actual or apparent corruption of candidates, which the Supreme Court found so compelling in *Buckley*, does not justify restrictions upon political contributions in referendum elections. When people elect a candidate, they choose someone to whom they can delegate their political decision making. The people's need to prevent large contributors from improperly influencing this representative decision maker is critical. In contrast, when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers—in this case, the voters themselves—except in a manner protected by the first amendment.⁹⁶

The appellate court also referred to *Bellotti*⁹⁷ to support the proposition that the expression of some should not be diminished by government in order to uplift the relative influence of others.⁹⁸

Rejecting a state argument that restrictions on the size of contributions are necessary to promote adequate disclosure about campaign financing, the court found that “these statutes that restrict the amount a person may contribute to a single committee do little to promote disclosure.”⁹⁹ The court explained:

The primary effect of the statutes is to compel large contributors who support or oppose a referendum issue to form multiple partisan committees, each of which can receive the maximum amount from a single contributor under the statute. These multiple partisan committees provide no additional disclosure; the public still sees only the innocuous names of the different committees, and not the identities of the underlying contributors.¹⁰⁰

Interestingly enough, the Oklahoma statutes contain precisely the same legal loophole.¹⁰¹ If a state law can be circumvented this easily, then it is without value regardless of its purpose.

94. *Id.* at 1014.

95. 621 F.2d 195 (5th Cir. 1980).

96. *Let's Help Florida v. McCrary*, 621 F.2d 195, 199-200 (1980), *aff'g* *Let's Help Florida v. Smathers*, 453 F. Supp. 1003 (N.D. Fla. 1978).

97. See *supra* text accompanying note 56.

98. 621 F.2d 195, 200 (5th Cir. 1980).

99. *Id.*

100. *Id.*

101. Note, *Constitutional Law: Political Campaign Regulation and the Constitution: Oklahoma's Campaign Contributions and Expenditures Act*, 29 OKLA. L. REV. 684, 695 (1976).

Let's Help Florida was appealed to the Supreme Court and was affirmed in a memorandum decision on January 11, 1982.¹⁰² The case had been cited with approval in *CARC*,¹⁰³ decided less than one month earlier, for the proposition that *Buckley*¹⁰⁴ does not support ballot measure contribution limitations.¹⁰⁵ An examination of *CARC*, the most recent Supreme Court opinion, and a comparison with *Buckley* highlight the evolution of the Court's thought during the last five years.

*Citizens Against Rent Control/Coalition for Fair
Housing v. City of Berkeley*

The Opinion

In *CARC* the Supreme Court reversed a 1980 California Supreme Court decision permitting ballot measure contribution limitations.¹⁰⁶ A Berkeley city ordinance had placed a restriction on the amount that could be contributed to any committee that supported or opposed a ballot measure. In declaring the ordinance to be unconstitutional, the Court made several vital first amendment conclusions. Only Justice White dissented to the judgment.¹⁰⁷

Chief Justice Burger, writing for the majority, observed initially that the Berkeley ordinance did not limit the amount an affluent person could spend, acting alone, to express his views. "It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted"¹⁰⁸ The ordinance, then, constituted a significant infringement on the first amendment freedoms of association and speech.¹⁰⁹

Such infringements, Justice Burger stated, have always been subjected to exacting judicial scrutiny.¹¹⁰ The opinion noted that *Buckley* permitted a "single, narrow exception" to the general rule that limits on political expression are unconstitutional: limits on contributions are justified by "the perception of undue influence of large contributors to a *candidate*."¹¹¹ Because this danger is not present in ballot measures, no legitimate state interest remained to justify

102. *Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982), *aff'g* *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980).

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

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

105. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1981).

106. 26 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980).

107. 454 U.S. 290, 303 (1981). Justice White also dissented in *Buckley* and *Bellotti*, the two cases used as principal authority in *CARC*.

108. *Id.* at 296. The same statement may be made regarding 26 OKLA. STAT. § 15-108 (1981) because it only limits contributions to political organizations. An individual acting on his own may spend as much as he desires.

109. *Id.* at 299.

110. *Id.* at 294, 298. Note that Justices Blackmun and O'Connor concurred in the standard of review. *Id.* at 302.

111. *Id.* at 296-97.

“curtailing debate.”¹¹² Disclosure requirements were sufficient to protect the city of Berkeley’s asserted desire to preserve the integrity of the political system.¹¹³

Thus, *CARC* significantly weakened the “equalization” rationale. The majority asserted that “*Buckley*. . . made clear that contributors cannot be protected from the possibility that others will make larger contributions.”¹¹⁴ The concept of a free marketplace of ideas emerged triumphant despite the objection of three members of the Court. Although concurring in the judgment, Justices Marshall, Blackmun, and O’Connor asserted that, with satisfactory evidence, the goal of preserving the integrity of the democratic process may be sufficient to justify contribution limitations.¹¹⁵ Five Justices in the majority summarily rejected this concept, declaring that the purpose of the first amendment is to “secure the widest possible dissemination of information from diverse and antagonistic forces.”¹¹⁶ The Court’s upholding of “the unfettered exchange of ideas” struck a blow against those who would “restrict the speech of some elements of society in order to enhance the relative voice of others.”¹¹⁷

The Evolution: From Buckley to CARC

A careful reading of *Buckley* and *CARC* reveals two important changes in contribution limitation philosophy. First, the majority opinion of *CARC* completely ignored, thus impliedly rejected, the expenditure/contribution distinction so important in *Buckley*. *Buckley* had viewed independent expenditures as involving somewhat more important first amendment interests than contributions.¹¹⁸ Justices Marshall and White cited a recent plurality opinion involving a candidate campaign as support for their view.¹¹⁹ The majority, by its silence, indicated that the distinction, if valid at all, has no place in ballot measure considerations.¹²⁰

A second change was *CARC*’s increased awareness of the role of contributions as a means of political expression. *Buckley* regarded contribution

112. *Id.* at 297. Chief Justice Burger cited two lower court opinions for this proposition: *Let’s Help Florida v. McCrary*, 621 F.2d 195, 199 (5th Cir. 1980); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 425 (9th Cir. 1978).

113. *Id.* at 298-99.

114. *Id.* at 295.

115. 454 U.S. at 301 (Marshall, J., concurring in the judgment); 454 U.S. at 301 (Blackmun, J., and O’Connor, J., concurring in the judgment).

116. 454 U.S. at 295-96, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964).

117. *CARC*, 454 U.S. at 295, quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

118. *Buckley v. Valeo*, 424 U.S. 1, 22-23, 48 (1976).

119. *CARC*, 454 U.S. 290, 301, 305 (1981). The Justices cited *California Medical Association v. Federal Election Comm’n*, 453 U.S. 182 (1981) (upholding federal limitations upon contributions to multicandidate political committees).

120. It should be noted, however, that Chief Justice Burger, who wrote the *CARC* majority opinion, dissented to the contribution/expenditures distinction in *Buckley*. He stated that: “For me contributions and expenditures are two sides of the same First Amendment coin.” *Buckley v. Valeo*, 424 U.S. 1, 241 (1976) (Burger, C.J., dissenting).

limitations as a "marginal restriction upon the contributor's ability to engage in free communication," because a contribution was merely an "undifferentiated, symbolic act."¹²¹ By contrast, *CARC* ruled that contributions were a very significant form of political expression.¹²² This metamorphosis of attitude may also be traced to the difference between candidates' campaign and ballot measures. Unlike candidate contributors, supporters of ballot measures strive for advocacy of a particular issue. Their efforts may not be reduced to the category of symbolic gestures because they are real attempts to speak politically with others of like mind. Thus, the transition of the Court's values must stem from its recognition of the distinction between candidate and ballot measures. Ballot measure donations are political speech and as such are protected from limitation by the state.

Conclusion

The Oklahoma state legislature should acknowledge the Supreme Court's determination and amend the campaign contribution statute to remove all restrictions on contributions to ballot measure committees. Specifically, section 15-108 of Title 26 of the Oklahoma Statutes should be repealed. In its place, a new section may be written that places a reasonable restriction on contributions to a political candidate or his organization, a provision permitted under *Buckley* as an anticorruption device. Such changes would ensure that the fundamental rights inherent in ballot measure campaigns would be preserved.

At present, Oklahoma enshrouds freedom of speech and association within a poorly written, valueless state statute. Though the code may reduce the possibility of corruption, it sacrifices first amendment liberties in the process. If Oklahoma's legislature fails to implement reforms, the law should be formally called into question by a ballot measure organization. The *CARC* and *Let's Help Florida* decisions provide a predictable outcome to the action.

Addendum

On August 17, 1983, while this note was being prepared for publication, the Attorney General of Oklahoma issued an opinion directly addressing the issues presented herein.¹²³ The opinion used the *CARC* case as its principal authority and found the language of *Let's Help Florida* persuasive. The Attorney General concluded that Oklahoma's Campaign Contributions and Expenditures Act "as previously interpreted by this office would place an impermissible limitation on First Amendment rights. . . ."¹²⁴

The Attorney General therefore offered the following official opinion: "The provisions of the Oklahoma Campaign Contributions and Expenditures Act, 26 O.S. 1981, § 15-101 et seq., may not be read so as to place a limit on

121. *Buckley*, 424 U.S. at 20-21.

122. *CARC*, 454 U.S. 290, 296 (1981).

123. Okla. Op. Att'y Gen. 83-138 (1983).

124. *Id.*