



Case Western Reserve Law Review

Volume 39 | Issue 4

1989

Regulating Corporate "Speech" in Public Elections

Adam P. Hall

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Adam P. Hall, *Regulating Corporate "Speech" in Public Elections*, 39 Case W. Res. L. Rev. 1313 (1988-1989)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol39/iss4/5>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

REGULATING CORPORATE "SPEECH" IN PUBLIC ELECTIONS

CONGRESS has attempted to regulate the effect of corporate spending on the democratic electoral process since the first part of the twentieth century, when the Tillman Act of 1907 was enacted.¹ Since that time, Congress has continually acted to control the deleterious effect of corporate spending in connection with federal elections.² The current limitations are embodied in section 441b of the Federal Election Campaigns Act,³ which prohibits corporations and labor unions from making contributions or expenditures in connection with any federal election or primary.⁴ However, there are two exceptions to this general prohibition. First, the Act allows these organizations to make expenditures for political communications addressed solely to their members and their members' families.⁵ Second, and more importantly, it allows these organizations to make expenditures for the establishment and administration of a separate fund, segregated from their general treasuries, through which the organizations can direct their political messages to the public.⁶ In establishing this fund, the organization is restricted in its solicitation of contributions to its

1. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. The Act prohibited all corporations from making money contributions in connection with elections to federal offices, and prohibited federal banks and corporations organized under federal law from making money contributions in connection with elections to any political office.

2. For a history of Congress' efforts, see *Federal Elections Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 208-09 (1982); *United States v. International Union United Auto. Workers*, 352 U.S. 567, 570-84 (1957).

3. 2 U.S.C. § 441b (1986).

4. *Id.* § 441b(a). Section 441b(a) also prohibits national banks and corporations organized under the laws of Congress from making contributions or expenditures in connection with elections to any political office. "Contributions" or "expenditures" are defined by 2 U.S.C. § 441b(b)(2) as including "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election."

5. *Id.* § 441b(b)(2)(A)&(B). The "members" of capital stock corporations who are eligible to receive such communications are limited to stockholders and the executive or administrative personnel of such corporation. "Executive" and "administrative personnel" are defined as employees paid on a salary basis who have "policymaking, managerial, professional, or supervisory responsibilities." *Id.* § 441b(b)(7).

6. *Id.* § 441b(b)(2)(C).

members and their families,⁷ and no form of coercion may be applied to their members in seeking these contributions.⁸ The soliciting organization must also inform its members of the political purposes of the fund at the time of the solicitation.⁹ Once these segregated funds are established, they are considered to be "political committees" under the Federal Election Campaigns Act¹⁰ and are subject to organizational, registration, and recording requirements.¹¹

The Supreme Court has found a tension between Congress' attempts to regulate corporate election activity and the constitutional guarantees of the first amendment. Over thirty years ago, Justice Douglas, dissenting vigorously in *United States v. United Auto Workers*,¹² argued that the Federal Corrupt Practices Act,¹³ the predecessor of section 441b, placed unconstitutional restrictions on the first amendment rights of labor unions.¹⁴ Nearly twenty years later, in *First National Bank of Boston v. Bellotti*,¹⁵ a majority of the Court ruled that a Massachusetts statute, which prohibited corporations from making political expenditures in connection with state ballot issues, violated the first amendment.¹⁶ While the *Bellotti* Court did not deal directly with federal restrictions on corporate spending in connection with elections, Justice White, in his dissenting opinion, remarked grimly that the majority's decision had only "reserve[d] the formal interment of the Corrupt Practices Act and similar state statutes for another day."¹⁷ Justice White's dire prediction has not yet been fulfilled;

7. *Id.* § 441b(b)(4). In the solicitations context, "members" of a capital stock corporation may include the corporation's regular employees as well as its "executive and administrative personnel" for the purpose of two mail solicitations each year.

8. *Id.* § 441b(b)(3)(A)&(C).

9. *Id.* § 441b(b)(3)(B).

10. *Id.* § 431(4)(B).

11. *Id.* §§ 432-434 (detailing these requirements).

12. 352 U.S. 567 (1957).

13. Labor-Management Relations Act, ch. 120, § 304, 61 Stat. 136, 159 (1947)(amending 2 U.S.C. § 251 & 50 U.S.C. app. § 1509), *repealed by* Amendments to the Federal Election Campaign Act of 1971, Pub. L. No. 94-283, 90 Stat. 475, 490-92, 496 (1976). This Act was very similar to section 441b except that it lacked a provision for the establishment of a separate, segregated political fund.

14. *United States v. United Auto. Workers*, 352 U.S. at 593 (Douglas, J., dissenting).

15. 435 U.S. 765 (1978).

16. *Id.* at 795.

17. *Id.* at 821 (White, J., dissenting). A number of commentators have speculated on the future of section 441b following *Bellotti*. See, e.g., Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act after First National Bank of Boston v. Bellotti*, 28 AM.

the Court did, however, recently rule that section 441b is unconstitutional within the limited context of certain political expenditures made by the nonprofit corporation Massachusetts Citizens for Life.¹⁸ The impact of *Bellotti* as well as that of *Massachusetts Citizens for Life* on the constitutionality of section 441b remains a matter for speculation.¹⁹

This Note will seek to explore the appropriate balance between Congress' attempts to preserve the integrity of the electoral process by restricting corporate political activities and the Supreme Court's attempts to preserve first amendment guarantees which may become threatened when Congress regulates such activities.

I. CONGRESSIONAL INTERESTS IN LIMITING CORPORATE POLITICAL SPENDING

A. Limiting the Effect of Aggregate Wealth on the Political Process

One of Congress' primary concerns in regulating corporate political activity is to prevent the undue influence of aggregated capital on politics.²⁰ Congress feared three ways that corporate funds could adversely affect the political process. The first effect, and the most direct, was that large political contributions by corporations would place the elected officials, whose campaigns were

U.L. REV. 149 (1979); O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 67 GEO. L.J. 1347 (1979); Note, *Political Speech, Inc.: The Bellotti Decision and Corporate Political Spending*, 13 SUFFOLK U.L. REV. 1023 (1979); Note, *Prohibition of Corporate Political Expenditures: The Effects of First National Bank v. Bellotti*, 1979 UTAH L. REV. 95.

18. *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

19. For commentaries on the constitutionality of section 441b following *Massachusetts Citizens for Life*, see Note, *Non-profit Corporate Political Speech: Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 63 CHI. KENT L. REV. 159 (1987); Note, *Integrating the Right of Association with the Bellotti Right to Hear — Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 72 CORNELL L. REV. 159 (1986) [hereinafter Note, *Right of Association*]; Comment, *Federal Election Law — Federal Election Commission v. Massachusetts Citizens For Life: Non-Profit Corporation Expenditures in Federal Elections*, 60 NOTRE DAME L. REV. 138 (1984); *The Supreme Court, 1986 Term — Leading Cases*, 101 HARV. L. REV. 119, 199-219 (1987).

20. E. EPSTEIN, *CORPORATIONS, CONTRIBUTIONS, AND POLITICAL CAMPAIGNS: FEDERAL REGULATION IN PERSPECTIVE 2* (1968)(One of the two aims of the Tillman Act and its successors was to destroy the influence over elections that corporations exercised through financial contributions.).

aided by such contributions, in the debt of those corporations.²¹ The Supreme Court has consistently recognized the prevention of this danger to be a legitimate governmental interest.²² The Court has, however, accorded this concern less deference when Congress attempts to regulate independent political expenditures rather than direct campaign contributions.²³

Second, restricting the mere appearance of political corruption, created by large corporate contributions in election campaigns, is itself viewed as a legitimate governmental interest because of its effect on the public confidence in the electoral process.²⁴ Even if there is no proof that elected officials are actually compelled to act for the special interests of their large campaign contributors, the *mere appearance* of such corruption is likely to destroy the electorate's faith in the democratic process and to discourage participation by individuals in that system.

21. *United States v. United Auto. Workers*, 352 U.S. 567, 571 (1957).

The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to . . . vote for their protection and the advancement of their interests as against those of the public.

Id. (quoting *Hearings Before House Comm. on Elections*, 59th Cong., 1st Sess. 12 (1906)).

22. In upholding the \$1,000 contribution limit in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court stated as follows:

To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Id. at 26-27; *see also* *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982)(acknowledging as an important state interest the desire to prevent substantial aggregations of wealth, amassed through the advantages of the corporate form of organization, from being converted into political "war chests" which can be used to incur political debts from legislators).

23. *Buckley*, 424 U.S. at 45-47; *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-98 (1985)(The lack of pre-arrangement and coordination of independent expenditures with the candidate's personal campaign reduces the danger of corruption which is involved in direct campaign contributions.).

24. In upholding the \$1,000 contribution limitation in *Buckley v. Valeo*, the Court stated, "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Buckley*, 424 U.S. at 30. *See also* *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. at 496-97 (recognizing that preventing the appearance of corruption in the electoral process is a compelling governmental interest).

Since Congress has an interest in encouraging the participation of citizens in the political process, it has an interest in avoiding even the appearance of political corruption.²⁵

Finally, a separate concern of Congress in regulating corporate political spending is that heavy corporate donations in connection with federal campaigns will dominate the political marketplace of ideas, "drowning out" the ideas of individuals that lack the capital to make them widely known.²⁶ Congressional desire to equalize the relative ability of voters to make their ideas known and thereby affect elections, regardless of their wealth, has generally been perceived by the Court as an impermissible end.²⁷ There are some indications, however, that the Court would look more favorably on such an end if Congress were able to establish that unbalanced corporate spending has an actual impact on the outcome of elections.²⁸ However, such a causal connection may prove to be difficult to establish, since the Court assumes that voters are generally able to form independent opinions on issues and candidates regardless of the extent to which they are subjected to one-sided advertising.²⁹

25. *Buckley*, 424 U.S. at 27. The Court recognized that avoiding the appearance of corruption is critical "if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* (citing *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

26. *United States v. United Auto. Workers*, 352 U.S. 567, 575 (1957). Congress' aim in limiting corporate expenditures was not only to "prevent the subversion of the integrity of the electoral process," but also to sustain an active individual citizenry in the functioning of a democracy free from the power of money. *Id.*

27. *Buckley*, 424 U.S. at 48-49 (arguing that the first amendment's protection of political expression cannot be varied according to a person's financial ability to engage in it).

28. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978) (If the argument that corporate spending places an undue influence on elections had been supported by the record or legislative findings then the Court would have had to consider whether or not corporate spending subverted the democratic process.). Nevertheless, the Court rejected just such an argument, as presented by Justice White, in *Bellotti*, 435 U.S. at 810-11 (White, J., dissenting) and in *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley*, 454 U.S. 290, 306-08 (1981) (White, J., dissenting).

29. *Bellotti*, 435 U.S. at 791-92. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments, [and] any danger that the people cannot evaluate the information and arguments advanced by [a corporation] is a danger contemplated by the Framers of the First Amendment." *Id.*

B. Protecting Corporate Shareholders and Members of Non-Stock Organizations

Congress also has an interest in protecting individuals who have paid money into a corporation or labor union from having that money used to support political ideas or candidates to whom they may be opposed.³⁰ The Supreme Court has shown this interest a varying amount of deference. The desire to protect "members" of a corporation without capital stock was held to justify the regulations of section 441b in a case where those "members" contributed money to the corporation but had no position within the corporate decision-making structure.³¹ In another case, the Court almost denied that there is any legitimate state interest in restricting corporate political spending to protect shareholders when the shareholders are able to pursue their own remedies within the corporate structure or through derivative shareholder suits.³² The Court in several recent cases, while not denying the legitimacy of Congress' interest in protecting shareholders, has downplayed its significance when the political nature of the corporation itself makes it likely that its members will support the focus of that corporation's political expenditures.³³ These cases suggest that Congress' interest in protecting the members of organizations regulated under section 441b is less compelling when mechanisms outside of federal election campaign law act to ensure that the political views supported by a corporation's expenditures will match the views of its members. Such mechanisms include the structure of corporate decision-making and the dependence of such organizations on the popularity of their political ideas for the source of their funds.

30. *Id.* at 787 (recognizing the interest in "protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation").

31. *FEC v. National Right to Work Comm.*, 459 U.S. 197, 206-08 (1982).

32. *Bellotti*, 435 U.S. at 794-95. "Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues." *Id.* at 794.

33. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985)(Contributors to politically oriented organizations "obviously like the message they are hearing from these organizations . . . otherwise they would not part with their money."); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986)("The resources [MCFL] has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.").

II. FIRST AMENDMENT INTERESTS INFRINGED BY LIMITATIONS ON CORPORATE SPENDING IN CONNECTION WITH FEDERAL ELECTIONS

A. Freedom of Expression

The first amendment's protection of expression is broadest when Congress attempts to restrict political expression.³⁴ A threshold question must be considered, however, before Congress' regulation of corporate political spending can be said to infringe on political expression. Section 441b restricts the manner in which corporations and labor unions are able to spend money to express their political views in candidate elections.³⁵ It does not directly restrict the subject matter which may be expressed, but only the source of the money which may be used to express it. "Subject matter" restrictions are the type of regulation which are most offensive to the first amendment.³⁶ Regulations that only restrict the manner of expression or acts linked to expression, on the other hand, usually raise a lower level of first amendment scrutiny than do those restrictions based on content.³⁷ The Supreme Court, however, has held that the expenditure of funds in political campaigns is so integrally linked to the communication of ideas in a modern society that restricting expenditures necessarily restricts expression and brings the full protection of the first amendment into effect.³⁸

The Court has not, however, equated political spending with political expression in every situation. In upholding a \$1,000 limit

34. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Cf. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (arguing that the first amendment protects "those activities of thought and communication by which we 'govern' rather than a general 'freedom to speak'").

35. 2 U.S.C. § 441b (1986).

36. *Buckley*, 424 U.S. at 16 (When the alleged governmental interest involves restricting a communication because its content is thought to be harmful, the Court will not reduce the exacting scrutiny required by the first amendment, regardless of whether or not the communication is dependent upon the expenditure of money.)

37. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Operating on the assumption that O'Brien's burning of his draft card brought the first amendment into play, the Court stated that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *Id.*

38. *Buckley*, 424 U.S. at 16, 19 (arguing that the expenditure of money does not inject a non-expression element into a political communication; restricting expenditures actually reduces the quantity of expression by limiting the number of issues capable of being discussed, the depth of their exploration, and the size of the audience the ideas reach).

on individual political contributions in *Buckley v. Valeo*, the Court held that political contributions are only symbolic expressions of support for a candidate which do not communicate the underlying basis for that support; therefore, they raise a lower level of first amendment protection than direct individual expenditures in support of the same candidate.³⁹ Section 441b restricts both contributions and expenditures, which, notably, may be subject to different levels of scrutiny.⁴⁰

In evaluating the appropriateness of restrictions on corporate political spending, it is not enough to understand how the Court relates political expenditures to pure expression or some less protected form of symbolic expression. The nature of the first amendment freedoms threatened must also be understood. When corporate political spending is restricted, two different first amendment freedoms are threatened. The first belongs to the corporation and is a right to self-expression, the second belongs to the public and is a right to hear the communications.⁴¹

The theory that corporations should have a constitutionally protected right to engage in self-expression has limited application. Self-expression is generally viewed as being deserving of protection because it enables individuals to achieve self-realization, while being an "integral part of the development of ideas, of mental exploration and of the affirmation of self."⁴² This type of first amendment protection does not seem appropriate for artificial persons such as corporations, unless the corporation is utilized as an associational mechanism through which its members can exercise their individual rights to self-expression.⁴³

39. *Id.* at 20-21. Commenting on the lower level of first amendment protection accorded to contributions, the Court stated that "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21.

40. 2 U.S.C. § 441b(a) (1986).

41. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). "[T]he Court's decisions involving corporations in the business of communication . . . are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." *Id.*

42. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1967).

43. *Bellotti*, 435 U.S. 765, 806 (1978) (White, J., dissenting) (Although certain corporations formed for ideological causes may be associational forms for achieving effective self-expression, business corporations are not associational mechanisms for the effective self-expression of its members except in limited business areas.); see also O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the*

The component of free expression that the Court concentrated on in *Bellotti*, which struck down a Massachusetts statute restricting corporate spending on state ballot issues, was the public's right to be exposed to the full extent of free political debate.⁴⁴ Generally, the value of communications that contribute to full and free political debate is unquestioned, and voters are entrusted to sort out the value of each idea placed in the political marketplace for themselves based on its content and its source.⁴⁵ Justice White, however, has questioned reliance on this policy when the Court is faced with political communications sponsored by corporations.⁴⁶ He has set forth two valid reasons for restricting corporate political spending even in light of the public's right to be exposed to vigorous political debate. The first is that voters may have greater difficulty in assessing the value of corporate political ideas than in determining the value of ideas espoused by individuals or readily identifiable groups of individuals.⁴⁷ This difficulty results from the fact that voters may be unable to determine the amount of support for a corporate-backed political view since the amount spent to support the view reflects the size of the corporate treasury rather than the number of people who support it.⁴⁸ Second, Justice White fears that the use of the aggregated wealth of corporations to dominate the political marketplace of ideas and "drown out" the voices of individuals will discourage individual participation in the political process, ultimately resulting in a less robust and diverse exchange of ideas.⁴⁹ Despite Justice White's arguments, however, the *Bellotti* Court held that ideas placed in the political marketplace deserve first amendment protection regardless of their source.⁵⁰

Corporation after First Nat'l Bank v. Bellotti, 67 GEO. L.J. 1347 (1979)(examining the difficulty in applying constitutional principles to corporations in light of cases in which the Supreme Court has either extended or denied constitutional protection to corporations). See *infra* notes 51-57 and accompanying text.

44. *Bellotti*, 435 U.S. at 775-83. The Court frames the question to be decided as whether protected speech, valuable to a public discussion of the issues, is inhibited, rather than whether or not the corporation's first amendment rights were violated. *Id.* at 776.

45. *Id.* at 783, 791-92.

46. *Id.* at 806-12 (White, J., dissenting).

47. *Id.* at 810 (White, J., dissenting).

48. *Id.*

49. *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley*, 454 U.S. 290, 306-08 (1981)(White, J., dissenting).

50. *Bellotti*, 435 U.S. at 784. The Court found "no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." *Id.*

B. Freedom of Association

A second conflict between Congress' restrictions on corporate political spending and the first amendment occurs when restrictions on corporate spending interfere with the right of association of the members of the corporation. While the Court seems to concentrate more on the public's right to hear corporate political communications than on the associational rights of a corporation's members in cases addressing the constitutionality of limits on corporate political spending,⁵¹ it has more fully developed those associational rights in cases dealing with limitations on political action committees.⁵² In cases that consider limitations on political action committees, the Court has recognized freedom of association as the right of individuals to make their views known by amplifying their voices in a collective effort where otherwise their individual voices would be faint or lost.⁵³ Several justices, however, have questioned whether PAC political expression equates to the amplification of contributors voices and is thereby entitled to the full protection of the first amendment. Justices Marshall, Brennan, White, and Stevens joined in the plurality opinion in *California Medical Association v. Federal Election Commission*,⁵⁴ which holds that just as the \$1,000 limit on campaign contributions was held to be constitutional in *Buckley v. Valeo*,⁵⁵ limits on the amount that may be contributed to PACs do not violate the rights of their contributors. This argument is based on the fact that such contributions constitute only symbolic speech since the end product of the PAC's expression does not reflect the reasons for the contributor's support.⁵⁶ Under this theory, when the organization receiving individual contributions is not an effective mechanism for amplifying the views of those individuals, the members' right to associate should not supply the organization with full first

51. See *infra* notes 70-74 and accompanying text.

52. Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985)(striking down a statutory limit on PAC expenditures in Presidential elections); California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182 (1981)(upholding a \$5,000 statutory limit on the amount that could be contributed to any multi-candidate PAC in a year).

53. Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. at 494 (PAC's are mechanisms by which large numbers with modest means can join together in organizations which serve to amplify the voices of their adherents).

54. 453 U.S. 182 (1981).

55. 424 U.S. 1 (1976).

56. California Medical Ass'n v. Federal Election Comm'n, 453 U.S. at 197.

amendment protection. Justice White has argued that business corporations are just such an ineffective mechanism for amplifying the political views of their members and should not benefit from the protection of their members' right to political association.⁵⁷

III. THE SUPREME COURT'S TREATMENT OF LEGISLATIVE RESTRICTIONS ON CORPORATE POLITICAL SPENDING

While congressional limits on corporate spending in connection with federal elections have either avoided or withstood the Supreme Court's scrutiny since the enactment of the Tillman Act of 1907,⁵⁸ the Court's recent decisions in *Bellotti*⁵⁹ and in *Massachusetts Citizens for Life, Inc.*⁶⁰ cast doubt on the continued validity of such restrictions.⁶¹

A. *First National Bank of Boston v. Bellotti*

In an issue of first impression before the Supreme Court, the Court in *First National Bank of Boston v. Bellotti*⁶² considered the constitutionality of a Massachusetts statute which prohibited corporations from making contributions or expenditures for the purpose of influencing elections on state ballot issues.⁶³ An exception to this general prohibition allowed corporations to make contributions or expenditures in order to influence the vote on ballot issues that "materially affect" their "property, business or assets."⁶⁴ The statute also specifically stated that no issue "solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of [a] corporation."⁶⁵ The Supreme Judicial Court of Massachusetts upheld the statute when two national banking associations and three business corporations challenged its constitutionality in connection with their proposed expenditures to influence the adoption of an amendment to the Massachusetts Consti-

57. *Bellotti*, 435 U.S. at 806 (White, J., dissenting)(corporate political expressions are most likely to represent the views of management rather than the amalgamated views of shareholders).

58. See *supra* note 1 and accompanying text.

59. 435 U.S. at 765.

60. 479 U.S. 238 (1986).

61. See *supra* notes 17 & 19 and accompanying text.

62. 435 U.S. at 767.

63. *Id.* at 768-69 n.2.

64. *Id.*

65. *Id.*

tution which would have allowed the state to impose a graduated income tax on individuals.⁶⁶ The court found that corporations, unlike natural persons, only have first amendment rights that arise from and are incidental to their fourteenth amendment "due process" rights in the corporation's property and business interests.⁶⁷ The court reasoned that because a corporation's first amendment rights only extend to protect speech related to its property or business interests, the statute's allowance of expenditures on issues "materially affecting" such interests placed its restrictions clearly within constitutional parameters.⁶⁸

The Supreme Court of the United States, in an opinion by Justice Powell, reversed the Massachusetts court's decision, holding that the statute was an unconstitutional violation of the first amendment when applied to restrict corporate expenditures aimed at influencing the vote on state ballot issues.⁶⁹ Justice Powell stated that the Supreme Judicial Court of Massachusetts had framed the wrong issue when it considered the source and extent of the first amendment rights which belong to corporations.⁷⁰ The Court held that the source of the expression, whether it be a corporation or a natural person, is not the critical issue; rather, the issue is whether some expression which the first amendment was meant to protect is being restricted.⁷¹ The Court then stated that the proposed corporate communication focusing on a state ballot issue was an expression "at the heart of the First Amendment's protection" since it involved the discussion of governmental affairs.⁷² Because the expression restricted by the Massachusetts statute was entitled to full first amendment protection, the Court

66. *First Nat'l Bank of Boston v. Attorney Gen.*, 371 Mass. 773, 359 N.E.2d 1262 (1977).

67. *Id.* at 783-84, 359 N.E.2d at 1269-70.

68. *Id.* at 785, 359 N.E.2d at 1270.

69. *Bellotti*, 435 U.S. at 795.

70. *Id.* at 776. The Court explained:

We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.

Id.

71. *Id.* at 776-77. "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source . . ." *Id.* at 777.

72. *Id.*

held that Massachusetts must show a "compelling" state interest to uphold its restrictions.⁷³

The *Bellotti* Court derived its first amendment protection from the public's right to hear the contested communications rather than from the corporation's right to self-expression or the associational rights of its members.⁷⁴ By concentrating on the "right to hear" and not the source of the expression, the Court gave corporate political expression essentially the same protection as individual expression. The breadth of this theory subjected the statute to the Court's strictest scrutiny.

Before attempting to find a compelling state interest for the statute's restrictions, the Court glossed over the fact that, on its face, the Massachusetts statute limited only corporate contributions and expenditures rather than supplying a "content" based restriction.⁷⁵ There was a strong theme in the Court's opinion that, because of the portion of the statute which prevented individual tax issues from ever being considered as materially affecting a corporation's business interests,⁷⁶ the Massachusetts legislature had actually tried to restrict the "content" of public debate.⁷⁷ This theme might have prevented a full examination of whether restrictions on corporate expenditures merit the same constitutional scrutiny as restrictions on the content of corporate expression.

The Court then examined the state interests behind the statute to determine if any of them met the compelling interest test. First, the state's interest in preventing the threat of corruption was held insufficient because the risk of corruption involved in candidate elections was not present "in a popular vote on a public issue."⁷⁸ Second, the interest in equalizing the voices of various elements of society, regardless of their wealth, was held an illegiti-

73. *Id.* at 786. The Court stated that "the State may prevail only upon showing a subordinating interest which is compelling." *Id.* (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960)).

74. *Id.* at 783. The Court stated that the "First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.*

75. *Id.* at 784-86.

76. See *supra* text accompanying note 65.

77. *Bellotti*, 435 U.S. at 785, 793. "[T]he legislative and judicial history of the statute indicates . . . that [the provision] was "tailor-made" to prohibit corporate campaign contributions to oppose a graduated income tax amendment." *Id.* (quoting Brief for Appellee at 6).

78. *Id.* at 790.

mate governmental goal.⁷⁹ Next, the interest in preventing excessive corporate spending from disturbing the political marketplace of ideas, while not completely discounted, was deemed insufficient to justify the statute's restrictions.⁸⁰ Finally, the interest in protecting shareholders from the use of corporate funds in furtherance of views with which they might disagree was likewise rejected.⁸¹ The Court argued that the statute was overbroad in this respect, since it prohibited corporate expenditures on a referendum proposal even if the shareholders unanimously authorized the expenditures.⁸² The Court also suggested that this state interest might not be compelling since shareholders were capable of protecting their own interests through internal corporate procedures⁸³ and derivative shareholder suits.⁸⁴ Finding no compelling state interest to justify the statute's restrictions on corporate political spending in connection with state ballot issues, the Court ruled that the statute was an unconstitutional violation of the first amendment.⁸⁵ This decision led to Justice White's prediction that federal restrictions on corporate spending in connection with candidate elections would fall next.⁸⁶

B. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,⁸⁷ the Supreme Court, for the first time, held that section 441b unconstitutionally restricts first amendment free-

79. *Id.* at 790-91. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1975)).

80. *Id.* at 789. The Court stated as follows:

According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.

Id.

81. *Id.* at 792-95.

82. *Id.* at 794.

83. *Id.* at 794-95. "Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests." *Id.*

84. *Id.* at 795.

85. *Id.*

86. See *supra* note 17 and accompanying text.

87. 479 U.S. 238 (1986).

doms. The Court, however, did not go so far as to declare section 441b unconstitutional in all of its many applications and thus cause Justice White's fears to be realized.

In *Massachusetts Citizens for Life*, the Court held that the publication of a "Special Election Edition" newsletter by that corporation violated the prohibitions of section 441b, but that section 441b was unconstitutional as applied to the publication of such a newsletter.⁸⁸ Massachusetts Citizens for Life (MCFL) was a non-profit, nonstock corporation whose purpose, as stated in its articles of incorporation, was "[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities."⁸⁹ The corporation published a regular newsletter which never had a total distribution for any one issue above six thousand copies.⁹⁰ By contrast, 100,000 copies of the "Special Election Edition" were distributed to the general public and the corporation's "members."⁹¹ The newsletter exhorted voters to "VOTE PRO-LIFE" and identified candidates as either supporting or opposing MCFL on three pro-life issues.⁹² The newsletter also contained the photographs of thirteen candidates with exceptional pro-life records.⁹³ The "Special Election Edition" was financed by the corporation's general treasury funds.⁹⁴ On the above facts, the Court concluded that the publication of the "Special Election Edition" violated the section 441b prohibition of the expenditure of corporate funds for the purpose of influencing federal elections.⁹⁵

The Court then examined the constitutionality of section 441b as applied to the publication of the "Special Election Edition."⁹⁶ As in *Bellotti*, the Court defined the first amendment value being threatened by Congress' regulation of corporate political spending as the public's right to be exposed to vigorous political debate,⁹⁷ thereby avoiding the special considerations limiting

88. *Id.* at 241.

89. *Id.*

90. *Id.* at 242.

91. *Id.* at 243.

92. *Id.*

93. *Id.* at 244.

94. *Id.*

95. *Id.* at 251.

96. *Id.* at 251-65.

97. *Id.* at 251-52. "Independent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedoms.' We must therefore determine whether the prohibition of [section] 441b burdens political speech, and, if so, whether such

first amendment protection when a corporation rather than an individual is the speaker.⁹⁸ Unlike the Massachusetts statute in *Bellotti*,⁹⁹ however, section 441b does not bar corporate political expression, since it allows corporate political expenditures to be made through separate, segregated funds.¹⁰⁰ The Court in *Massachusetts Citizens for Life* acknowledged that the section 441b restriction of corporate political expenditures was not absolute, but held that it was substantial because it was capable of discouraging protected political speech.¹⁰¹ This chilling effect on protected speech was held to be sufficient to "characterize section 441b as an infringement on First Amendment activities,"¹⁰² an infringement which must be justified by "a compelling state interest" in order to withstand a constitutional challenge.¹⁰³

The Court found no compelling state interest to justify prohibiting MCFL's publication of their "Special Election Edition." The Court held that the desire to eliminate the effect of aggregated wealth on federal elections was not compelling in that instance. It reasoned that the use of corporate wealth in politics must usually be protected against because that wealth does not reflect public support for the corporation's political ideas. Instead, it reflects the economic motivations of its investors and customers.¹⁰⁴ This kind of aggregated wealth, which does not reflect public support, is capable of destroying the integrity of the political marketplace of ideas.¹⁰⁵ The Court held that since the funds avail-

a burden is justified by a compelling state interest." *Id.* (citations omitted).

98. See *supra* notes 42-43, 51-57 and accompanying text (detailing the limitations on first amendment protection for corporate self-expression and associational freedom of a corporation's members).

99. See *supra* text accompanying notes 63-65.

100. 2 U.S.C. § 441b(b)(2)(C) (1986).

101. 479 U.S. at 255. "[W]hile [section] 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses." *Id.* The Court argued that smaller corporations such as MCFL cannot easily meet the organizational and recording requirements imposed by section 441b on separate, segregated funds. Faced with these requirements, the Court believed some organizations would decide that contemplated political activity was "simply not worth it." *Id.* The Court also argued that the section's "[r]estriction of solicitation of contributions to 'members' vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech." *Id.*

102. *Id.*

103. *Id.* at 256.

104. *Id.* at 258.

105. *Id.* at 257-58. "The concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the mar-

able to politically oriented nonprofit corporations, like MCFL, reflect those corporations' popularity in the political rather than the economic marketplace, no such threat to the integrity of the marketplace of ideas was imposed by the use of corporate funds to engage in political expression.¹⁰⁶

The Court also held that Congress' interest in preventing organizations from using an individual's money for purposes that the individual may not support could not justify the section 441b prohibition of MCFL's "Special Election Edition." The Court found that while this may constitute a compelling interest when business corporations engage in political activity it does not do so in the case of nonstock corporations such as MCFL.¹⁰⁷ Contributors to business corporations invest their funds for economic gain and do not necessarily authorize their use for political ends.¹⁰⁸ Contributors to politically-oriented corporations such as MCFL, however, fully expect their funds to be used for political purposes and therefore do not require Congress' protection.¹⁰⁹ In addition, if stockholders object to the manner in which the corporation uses their funds to engage in political expression, they will be less likely to disassociate themselves because they have an economic stake in the corporation.¹¹⁰ Contributors to nonstock corporations, on the other hand, have no economic stake in the corporation and may simply stop contributing to it if they become dissatisfied with its political statements.¹¹¹ Thus, Congress has a lesser interest in protecting the contributors in this latter category.¹¹² Since the Court found no compelling governmental interest behind section 441b's restriction on MCFL's publication of their "Special Election Edition," it held that section 441b was an unconstitutional restriction of first amendment protected expression.¹¹³

ketplace of political ideas." *Id.* at 257.

106. *Id.* at 259. "Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *Id.*

107. *Id.* at 260.

108. *Id.*

109. *Id.* "Individuals who contribute to [MCFL] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *Id.* at 260-61.

110. *Id.* at 260. "[S]uch individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union." *Id.*

111. *Id.* at 260-61.

112. *Id.* at 260.

113. *Id.* at 262.

IV. ANALYSIS

After *Bellotti* and *Massachusetts Citizens for Life*, the future effectiveness of section 441b is in jeopardy.¹¹⁴ In both cases, the Supreme Court found the source of first amendment protection for corporate political expenditures in the public's "right to hear."¹¹⁵ The Court held that the public's right to be exposed to open political debate protects all political communications, regardless of their source.¹¹⁶ Ignoring the source of the communications gives equal protection to the political expressions of both individuals and corporations. The Court has already held that there is no compelling governmental interest in limiting the independent political expenditures of individuals.¹¹⁷ If corporate political expression is entitled to the same level of first amendment protection as individual expression, then section 441b could be declared unconstitutional, at least with respect to its restrictions on independent expenditures, if not to direct campaign contributions.

There are two approaches the Court could take which would avoid this result. The first is that the Court could find a compelling governmental interest in restricting corporate expenditures.¹¹⁸ Second, the Court could deem corporate political expenditures less deserving of first amendment protection than political expenditures by individuals, despite the public's "right to hear."¹¹⁹ The following analysis recommends an approach to constitutional challenges of section 441b in the future.

A. Governmental Interests

1. Preventing Aggregated Wealth From Corrupting the Political Process

The Court has refused to recognize Congress' desire to regulate political expenditures in a manner which would equalize the relative ability of all members of the electorate to make them-

114. See *supra* notes 17-19 and accompanying text.

115. See *supra* notes 70-74, 97 and accompanying text.

116. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . ." *Id.*

117. *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1975). "[T]he independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process." *Id.*

118. See *infra* notes 120-36 and accompanying text.

119. See *infra* notes 141-60 and accompanying text.

selves heard, regardless of their wealth, as a legitimate governmental interest.¹²⁰ On the other hand, the Court has consistently recognized the desire to limit political expenditures in order to prevent corruption or the appearance of corruption in the political process as an important governmental interest.¹²¹ The Supreme Court stopped short of finding this interest to be a compelling one, however, when it was used to justify limitations on the independent political expenditures of individuals rather than on their direct campaign contributions.¹²² In the view of the Court, the risk that elected officials would be unduly influenced by large amounts of money spent in their support is less, when such sums are spent independently of the personal campaigns of the candidates.¹²³

Congress' position that restricting independent political expenditures by business corporations will prevent corruption is reinforced by two factors. These factors may lead the Court to show additional deference to Congress' interests. First, several members of the Court have questioned their assumption in *Buckley v. Valeo*¹²⁴ that independent expenditures by a candidate's supporters involve less threat of corruption than direct campaign contributions.¹²⁵ Second, corporations and labor unions, unlike individuals, have special legal advantages with which to aggregate the

120. See *supra* notes 26-29 and accompanying text.

121. See *supra* notes 21-25 and accompanying text.

122. *Buckley v. Valeo*, 424 U.S. 1, 45-48 (1975).

123. *Id.* The Court has reached this conclusion because:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 47.

124. 424 U.S. 1 (1975).

125. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 510-11 (1985) (White, J., dissenting). "In general . . . the reasons underlying limits on contributions equally underly limits on . . . 'independent' expenditures. . . . In this realm of possible tacit understandings and implied agreements, I see no reason not to accept the congressional judgment that so-called independent expenditures must be closely regulated." *Id.*

Justice Marshall, in his dissenting opinion, stated, "Although I joined the portion of the *Buckley per curiam* that distinguished contributions from independent expenditures for First Amendment purposes, I now believe that the distinction has no constitutional significance." *Id.* at 519. See also *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 270 (1986) (Rehnquist, J., dissenting). "The distinction between contributions and independent expenditures is not a line separating black from white." *Id.*

wealth they will use to make their political expenditures.¹²⁶ These advantages include the fact that the shareholders of corporations and the members of labor unions contribute portions of their wealth to these organizations so that they can effectuate their business or representative purposes.¹²⁷ These unique means by which such organizations are able to aggregate great wealth increases their ability to make expenditures and buy influence with elected officials. Because of their special ability to aggregate wealth, such organizations should be restricted in their political contributions.¹²⁸ Congress seems to have provided an ideally tailored restriction on the manner in which these organizations collect funds for political purposes through section 441b's requirement that a segregated fund be used to collect money used for corporate political expenditures.¹²⁹

Neither *Bellotti* nor *Massachusetts Citizens for Life* provides a conclusive answer as to how much deference the Court will show Congress. In *Bellotti*, the Court found that corporate expenditures in connection with a ballot issue did not involve a risk of corruption.¹³⁰ The Court held that the risk involved in candidate elections was not present in votes on state ballot issues and therefore it did not decide what level of deference was due to the governmental interest in preventing such corruption.¹³¹ In *Massachusetts Citizens for Life*, the Court found that Congress' interest in protecting against corruption in the political process was less than compelling because the resources available to MCFL for making

126. Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 207 (1982). The purpose of section 441b is to protect against the influence of aggregated wealth "amassed by the special advantages which go with the corporate form of organization." *Id.*

127. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 260 (1986). Members of the typical corporation or labor union "contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends." *Id.*

128. In *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209-10 (1982), the Court stated:

In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. [Section 441b] reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. . . . [W]e accept Congress' judgment that it is the potential for such influence that demands regulation.

Id.

129. 2 U.S.C. § 441(b)(2)(C) (1986).

130. See *supra* notes 62-66 and accompanying text.

131. See *supra* note 78 and accompanying text.

political expenditures were a reflection of MCFL's popularity in the "political marketplace."¹³²

Underlying the holding in *Massachusetts Citizens for Life* was the idea that when elected officials are responsive to the needs of corporate supporters who are able to accurately reflect the political views of their members, the officials are actually responding to the needs of the public who support the political stance of that corporation.¹³³ This kind of responsiveness among elected officials is more a part of a representative democracy than when officials are responsive to the raw economic power of corporations which do not reflect the views of their members.¹³⁴ Therefore, the Court should recognize that the governmental interest in preventing corruption grows in importance as the organization making the political expenditures decreasingly expresses the views of its members.¹³⁵

If the Court continues to require a compelling governmental interest to overcome the public's "right to hear," Congress' interest in preventing corruption should meet this burden in cases where elected officials are likely to be influenced by the raw economic power of corporate supporters rather than by the desires of the individuals who contribute to the corporate treasury. While this did not appear to be the case with the nonprofit, politically-oriented MCFL, it would appear to be the case with most business oriented corporations.¹³⁶ Therefore, section 441b should continue to effectively guard the political process against the corrupting influence of large expenditures by business corporations.

132. See *supra* notes 104-06 and accompanying text.

133. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259 (1986)(Groups such as MCFL do not pose the same threat of corruption as business corporations because the funds they use to make political expenditures are the result of the popularity of their political ideas among the public.).

134. United States v. United Auto. Workers, 352 U.S. 567, 571 (1957)(The fear of political corruption is the fear that corporations will use their raw economic power to buy influence with elected officials to advance their interests over those of the public.).

135. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 260-61 (1986). MCFL's political expenditures were constitutionally protected because they were likely to express the views of its contributors, whose sole reason for contributing was "because they support [the political] purposes [of MCFL]." *Id.*

136. See *supra* notes 56-57 and accompanying text; see also *Massachusetts Citizens for Life*, 479 U.S. at 258 n.11. "While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth." *Id.*

2. Protecting Corporate Shareholders and Members of Non-Stock Organizations

It appears from the holdings in *Bellotti* and *Massachusetts Citizens for Life* that Congress does not have a compelling interest in protecting shareholders from the use of corporate treasury funds in political activities which the corporation's shareholders do not support. In *Bellotti*, the Court argued that the interest in protecting shareholders could not justify restrictions on corporate political expenditures as long as the shareholders were able to protect their own interests through the instruments of corporate democracy and derivative shareholder suits.¹³⁷ In *Massachusetts Citizens for Life*, where contributors to the non-profit corporation had no such remedies,¹³⁸ the Court held that protection of contributors was, nevertheless, not a compelling interest because contributors to MCFL had no economic disincentive to simply disassociate themselves from the corporation.¹³⁹ The combined effect of these decisions leaves very little room for an argument that protecting shareholders can be viewed as a compelling governmental interest which justifies restrictions on corporate political expenditures.

It is important to note, however, that the governmental interest in protecting shareholders "grows" as the effectiveness of the corporation in representing the views of its shareholders declines. When the corporation is a perfect mechanism for the political expression of the views of its shareholders there are no dissenting shareholders to protect. When the corporation proves to be a less effective means for expressing the views of its shareholders, however, an important governmental interest is involved.¹⁴⁰ While this interest may not be as compelling as the interest in preventing corruption, it may still serve to justify the restrictions of section 441b if the Court determines that corporate political expenditures are not entitled to the full protection of the first amendment.

137. See *supra* notes 83-84 and accompanying text.

138. *Massachusetts Citizens for Life*, 479 U.S. at 241.

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

140. *Massachusetts Citizens for Life*, 479 U.S. at 260-61 (There was no compelling state interest in protecting shareholders because the political nature of MCFL made it likely that the contributors views would match the views expressed in any political expenditures made by MCFL.).

B. Level of First Amendment Protection

1. The Public's "Right to Hear"

Section 441b may also withstand a constitutional challenge, even without a justifying, compelling interest, if the Court can be convinced that independent political expenditures merit less first amendment protection when a corporation is the speaker. Justice White has suggested two reasons why corporate political expressions should not receive full first amendment protection even when such protection finds its source in the public's "right to hear."¹⁴¹

The first reason is that the public is less capable of evaluating the worth of ideas placed in the political marketplace by corporations than those placed there by individuals.¹⁴² Ideas placed in the public forum by corporations may be financially backed by corporate treasuries. The amount of money spent on conveying those ideas to the public also may have no connection to the number of people subscribing to those ideas or to the fervency with which they are held.¹⁴³ Corporations also may mask their identity behind committee names, resulting in public confusion as to the source of the ideas.¹⁴⁴ Consequently, the public may find corporate communications less valuable than individual expression placed in the public forum. The most important reason for this is that the public is less able to discern the source of such communications, a factor each person must consider in formulating his own opinion.¹⁴⁵ This argument, however, seems more suited to support stringent disclosure requirements for corporate political messages, allowing the public to identify precisely the source of these messages, rather than to justify a complete restriction on corporate political expenditures from their general treasuries.¹⁴⁶

141. See *supra* notes 46-49 and accompanying text.

142. *Id.*

143. *Id.*

144. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298 (1981). "It is true that when . . . corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." *Id.*

145. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978). In evaluating the merits of ideas the public must consider "the source and [the] credibility of the advocate." *Id.*

146. *Citizens Against Rent Control/Coalition for Fair Housing*, 454 U.S. at 298 (ceiling on contributions to political committees not justified by the need to protect voters from political messages whose source they could not identify if disclosure requirements suffice to protect against such danger).

Second, restrictions on corporate political spending may be upheld even in the face of the first amendment's protection of the public's "right to hear" since the restrictions advance the purpose behind providing such protection.¹⁴⁷ The public's "right to hear" all debates on political questions was constitutionally protected "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹⁴⁸ A well-informed public is considered essential to effect these changes,¹⁴⁹ and the public will become well-informed only through its exposure to many diverse opinions and ideas rather than any one authoritative presentation of selected ideas.¹⁵⁰ At this point it is important to remember that section 441b does not restrict or select which ideas or categories of ideas may be presented to the public. It only restricts the source of money which can be used to convey these ideas.¹⁵¹ It prohibits the use of the general treasuries of corporations and labor unions for such purposes.¹⁵² The members and management of such organizations, however, remain perfectly free to spend their own funds to help express whatever ideas they may hold.¹⁵³

While section 441b does not directly restrict ideas from entering the public forum, the Court seems to believe that the *effect* of the section's restriction on corporate political spending is to restrict the number of ideas circulating in the political marketplace.¹⁵⁴ Congress, on the other hand, operates under the belief that restricting corporate spending will have the *effect* of increasing the amount and diversity of political debate.¹⁵⁵ This effect is accomplished in two ways. First, the members of the corporation, who may have been content to let the generic expression of the corporation represent them, now will be encouraged to express

147. *Bellotti*, 435 U.S. at 789. Restrictions on corporate political spending may be justified if "corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." *Id.*

148. *Roth v. United States*, 354 U.S. 476, 484 (1957).

149. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

150. *Id.* at 270.

151. 2 U.S.C. §§ 441b(a) & (b)(2)(C) (1986).

152. *Id.* § 441b(a).

153. *Bellotti*, 435 U.S. at 807 (White, J., dissenting).

154. *See supra* notes 71-73 and accompanying text.

155. *United States v. International Union United Auto. Workers*, 352 U.S. 567, 575 (1957). An important interest of Congress in restricting corporate spending is "sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Id.*

their own opinions individually.¹⁵⁶ Congress believes that the injection of numerous individual expressions into the political marketplace of ideas, each with its own separate nuances and insights, rather than one large generic expression, will increase the diversity and complexity of political debate and therefore enhance the value of the public's "right to hear."¹⁵⁷ Second, a large section of the public which had been discouraged from participating in the political process may be encouraged to become involved again if convinced that elected officials are responsive to their desires and not just the desires of those with large corporate treasuries.¹⁵⁸ If this occurs, an additional influx of diverse political views will be injected into the system and the value of the public's "right to hear" will be further enhanced.

Section 441b does not restrict the content of speech; rather, it restricts the source of money used to engage in political expression. The Court should be cautious of replacing Congress' conception of the *effect* of such restrictions on the public debate of political issues with its own conception. The Court has displayed some willingness to accept Congress' conception of the effect of section 441b if a case arose in which the record or legislative findings supported the existence of such an effect.¹⁵⁹ The Court should use this opening to retreat from the position that the source of political expression is irrelevant to the amount of first amendment protection it merits under the theory of the public's "right to hear." Since restrictions on corporate political spending may actually enhance the public's "right to hear," the first amendment should not prevent such restrictions.¹⁶⁰ If corporate spending is likely to in-

156. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 308 (1981) (White, J., dissenting). Restricting amalgamated political expression has the "ultimate impact" of "assur[ing] that a diversity of views will be presented to the voters." *Id.*

157. *Id.* Introducing a diversity of views into the public forum "facilitate[s] and enlarge[s] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976)).

158. *Id.* "Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns and undermined public confidence in the referendum process." *Id.* (footnote omitted).

159. *Bellotti*, 435 U.S. at 789.

160. Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 636 (1982).

[T]he truth-producing capacity of the marketplace of ideas is not enhanced if some are allowed to monopolize the marketplace by wielding excessive financial resources. Just as proponents of the free market system generally recognize the

crease the diversity and amount of political debate, however, it should continue to receive first amendment protection. This seems most likely to occur when the corporation involves its individual members in the formulation of its political expression. When this occurs, Congress' goal of increasing the diversity of ideas in the political marketplace by encouraging individual participation is accomplished through the corporation's involvement in the political process. In these cases the corporation acts as a mechanism to enhance public debate and increases the value of the public's "right to hear" rather than detracting from it. Restrictions on corporate speech in this context should be declared unconstitutional on the grounds that they violate the "freedom of association" of the corporation's members.

2. Freedom of Association

Applying the above analysis, the Court should turn away from analyzing the constitutionality of restrictions on corporate political spending by reference to the public's "right to hear" and, instead, focus on the associational rights of the corporations' members.¹⁶¹ Not every contribution of money to an organization, however, provides first amendment protection for that organization's political expenditures under the freedom of association theory. This protection should not arise unless the organization is actually involved in amplifying the voices of its contributors through its political expenditures.¹⁶² Absent a process by which effective amplification of its members' ideas can be achieved, political expenditures by corporations should not receive first amendment protection.¹⁶³ Section 441b's requirement that corporations set up a separate, segregated fund for their political expenditures seems to be an effort to enhance the value of the right of association rather than to restrict it. Since contributors to such a fund must be made aware of its political purpose before it can receive their

need for government policing of the competitive economic process by enforcement of antitrust laws, proponents of freedom of expression must recognize the need for government policing of the competitive electoral process by campaign finance laws.

Id. (footnotes omitted).

161. For the views of other commentators advocating a focus on the freedom of association when determining the constitutionality of restrictions on corporate political spending, see O'Kelley, *supra* note 17, at 1370-83; Note, *Right of Association*, *supra* note 19.

162. See *supra* notes 54-57 and accompanying text.

163. See *supra* note 53 and accompanying text.

contributions,¹⁶⁴ there is an increased likelihood that the ideas espoused through the use of such funds actually will amplify the ideas of the contributors. Such a regulation can be viewed only as a restriction on freedom of association when the nature of the corporation itself ensures that its political speech will be an accurate amplification of its members' views. In such a situation, an organization may be discouraged by the additional burdens of establishing such a fund from engaging in political spending which would express its members views just as accurately as if a separate, segregated fund had been established. It is only in these situations that the first amendment's protection of freedom of association should be sufficient to strike down section 441b as unconstitutional.

V. APPLICATION OF THE FREEDOM OF ASSOCIATION TEST TO *Bellotti* AND *Massachusetts Citizens for Life*

Examining how *Bellotti* and *Massachusetts Citizens for Life* may have been decided if the Court had looked to the freedom of association principle to provide protection for the corporate expenditures, instead of the public's "right to hear" principle, will help to define the constitutional limitations of section 441b. In *Bellotti*, the Court held that a Massachusetts statute could not prohibit the intended political expenditures of several national banks and business corporations to fund opposition to a state ballot issue, because such a restriction would violate the public's "right to hear."¹⁶⁵ Applying the freedom of association principle would seem to dictate the opposite result. Since banks and business corporations are ineffective mechanisms for the amplification of their members' voices on political issues,¹⁶⁶ section 441b's requirement of separate, segregated funds should withstand first amendment scrutiny. This requirement would enhance the value

164. 2 U.S.C. § 441b(b)(3)(B) (1986).

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

166. *Id.* at 806 (White, J., dissenting).

Although it is arguable that corporations make [political] expenditures because their managers believe that it is in the corporations' economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment.

of the members' right of association by ensuring that corporate expression corresponds to their views, and protect the government's important, although not compelling, interest in restricting corporate political expenditures.

The result in *Bellotti*, however, may still be defended on the case's facts. The *Bellotti* Court felt that the Massachusetts statute was intended to limit one side of the debate on the proposed individual income tax issue on the state ballot.¹⁶⁷ When the intention of a legislature is to restrict the "content" of political debate rather than to prescribe rules governing the manner in which money is spent to engage in such debate, the restriction will have a constant effect on ideas of all natures and the full protection of the first amendment should apply.¹⁶⁸ On these grounds the *Bellotti* decision still could stand. In the typical case of restrictions on the political expenditures of banks and business corporations, however, even on state ballot issues, the freedom of association principle will not cause such restrictions to be found unconstitutional.

In *Massachusetts Citizens for Life*, a nonprofit, politically oriented corporation was allowed to publish a "Special Election Edition" newsletter with funds from their general treasury, despite section 441b's prohibition, because the restriction violated the public's right to hear.¹⁶⁹ Applying the freedom of association principle to this case would result in the same holding, but perhaps, limit its scope. While politically oriented corporations are more likely to reflect accurately the views of their members when making political expenditures than are business corporations,¹⁷⁰ such corporations still are far from perfect mechanisms for the exercise of the right of association. The management of such corporations decide on political expenditures, while the contributors, who do not own stock in them, have little control over these decisions.¹⁷¹ The Court believed the political expressions of these corporations would be adequately linked to their members' political views because the members' sole reason for contributing to the corporation was that they supported the political view dissemi-

167. See *supra* notes 75-77 and accompanying text.

168. See *supra* notes 36-37 and accompanying text.

169. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 263-65 (1986).

170. *Id.* at 259-61.

171. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 806 (1978)(White, J., dissenting).

nated by that corporation's management.¹⁷² This is certainly a valid observation, but its value is limited by two factors which are reflected in the facts of *Massachusetts Citizens for Life*. First, prior to publication of the "Special Election Edition," MCFL restricted its efforts to gain support for its cause to lobbying, organizing marches, letter-writing campaigns, and other similar activities.¹⁷³ A contributor to MCFL at that point could have expected his funds to be used for any of those purposes and yet not authorize their use for the endorsement of political candidates. Second, a contributor may clearly support a cause and yet oppose a candidate who supports that cause. It is quite possible that an individual could support a candidate's stand on a particular issue and still oppose that candidate's election because of his or her overall platform. Political corporations that support a particular idea, therefore, are not reliable mechanisms for amplifying their members' views on a particular candidate for office, and section 441b's restriction on corporate political spending in such cases normally should be upheld. The *Massachusetts Citizens for Life* decision may still stand, however, in spite of these facts. The "Special Election Edition" clearly supported candidates because of the candidate's "pro-life" orientation only; it did not expressly support the candidates on their overall characters or platforms.¹⁷⁴ The contributor's to MCFL clearly would support the candidates on this issue even if they did not otherwise identify with the candidate. The first amendment's protection of the political expenditures of corporations such as MCFL, however, should not be expanded beyond situations in which the corporation's advocacy is based on the candidate's support for that corporation's theme. The inefficiency of such corporations as associational mechanisms justifies section 441b's requirement of separate, segregated funds in all other cases where such corporations seek to advocate the election of a candidate to a federal political office.

CONCLUSION

The Supreme Court should change its first amendment focus when examining legislative restrictions on corporate political

172. *Massachusetts Citizens for Life*, 479 U.S. at 260-61. "Individuals who contribute to [MCFL] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *Id.*

173. *Id.* at 242.

174. *Id.* at 243-44.

spending from the public's "right to hear" to "freedom of association." If this is accomplished, both the weight of the governmental interests involved and the amount of protection provided by the first amendment will vary according to the accuracy with which the corporate spending reflects the members' views. The greater the likelihood that a corporation's advocacy of a candidate's election to office will match its members' support of that candidate, the more likely congressional regulation will be found unconstitutional. Such instances, however, appear to be rare, especially when *Massachusetts Citizens for Life* is given its suggested, limited effect. Section 441b, therefore, should continue to be an effective tool for securing the integrity of the electoral process.

ADAM P. HALL