Cornell Law Review

Volume 72
Issue 1 *November 1986*

Article 6

Intergrating the Right of Association with the Bellotti Right to Hear Federal Election Commission v. Massachusetts Citizens for Life Inc.

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NOTES

INTEGRATING THE RIGHT OF ASSOCIATION WITH THE *BELLOTTI* RIGHT TO HEAR—*FEDERAL ELECTION COMMISSION v. MASSACHUSETTS CITIZENS FOR LIFE, INC.**

This Term, the United States Supreme Court will review a decision by the First Circuit Court of Appeals holding that the federal corporate campaign financing statute violates the first amendment. The statute, codified at section 441b of title two,[1] prohibits all corporate contributions and expenditures in connection with federal elections.[2] The First Circuit in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*MCFL*)[3] held section 441b unconstitutional as applied to prohibit a nonprofit, ideological corporation's publication of a newsletter advocating the election of specific pro-life candidates to federal office.

This Note argues that the First Circuit properly decided the case, but that the statute withstands first amendment scrutiny when applied to commercial corporations. These divergent results reflect the different first amendment interests protecting political expression by nonprofit, ideological corporations and by commercial corporations. Expenditures by Massachusetts Citizens for Life, Inc. (MCFL) reflect the political interests of its contributors, who support the corporation's ideological advocacy purpose. Consequently, the right of association protects the corporation's expression. Direct restraints on this core first amendment right require strict judicial scrutiny. For first amendment purposes, an ideological

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* As this issue went to press, the Supreme Court affirmed the First Circuit. FEC v. Massachusetts Citizens for Life, Inc., 55 U.S.L.W. 4067 (U.S. Dec. 15, 1986).

1 2 U.S.C. § 441b (1982).

2 Section 441b(a) provides:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . .

Id. § 441b(a).

3 769 F.2d 13 (1st Cir. 1985), *prob. juris. noted*, 106 S. Ct. 783 (1986).

organization's corporate status is virtually irrelevant. A commercial corporation, on the other hand, derives protection for its political expression from a different first amendment interest—the electorate's right to hear diverse political views. This right to hear provides less comprehensive protection than the right of association.

This Note also balances the governmental interest in regulating corporate political expression through section 441b, first against the right of association protecting a nonprofit, ideological corporation's expression, and then against the right to hear protecting a commercial corporation's expression. Such a balancing of interests demonstrates that section 441b unconstitutionally burdens protected expression of ideological corporations like MCFL, but withstands first amendment scrutiny if construed to apply only to expenditures by commercial corporations.

I
BACKGROUND

A. Types of First Amendment Protection

The Supreme Court has yet to develop a coherent theory[4] of the first amendment's prohibition[5] of restraints on freedom of expression.[6] Rather, the Court has drawn on various functional first amendment theories[7] to explain its decisions within discrete areas of the law. These theories include the views that the first amendment protects individual expression in the interest of self-realization;[8]

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4 *See* M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9 (1984) ("[T]he Supreme Court has failed in its attempts to devise a coherent theory of free expression."); Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment,* 78 Nw. U.L. REV. 1212, 1252 (1983) ("[T]he Court has been unwilling to confine the first amendment to a single value or even to a few values."); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?,* 82 COLUM. L. REV. 609, 633 n.144 (1982) ("The Court has never developed a comprehensive theory of the meaning of the first amendment; it has used a hodge-podge of different doctrines at various times and in various contexts.").

5 "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. 1.

6 This Note does not address the first amendment's separate protections of press and assembly. Consequently, the term "freedom of expression" as used in this Note refers only to speech and nonverbal advocacy by speakers other than the institutional press.

7 All of the major first amendment theories are more or less "functional" because "the inquiry [into the content of the first amendment] is not a matter of classification but of reasoning. It does not turn on the abstract properties of something called 'speech' but on the rationale for protecting the 'freedom of speech' against majoritarian regulation." Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment,* 65 VA. L. REV. 1, 9 (1979); *see also* J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 8-9 (1979) ("[T]he functions and purposes of the First Amendment dominate . . . the doctrinal law of free speech and free press.").

8 *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7

that it protects all expression in the interest of a free marketplace of ideas, where truth ultimately prevails through competition;[9] and that it safeguards democratic self-government by protecting political dissent and fostering electoral accountability.[10] By applying these theories in specific cases, the Court has recognized that freedom of expression encompasses three distinct rights: the right to speak, the right of association, and the right to hear.

1. *The Right to Speak*

The first amendment unquestionably protects an individual's right of advocacy.[11] The Court sometimes grounds this right in a

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(1966) (affirmation of self); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.03 (1984) (self-fulfillment function); M. REDISH, *supra* note 4, at 11 ("[T]he constitutional guarantee of free speech ultimately serves only one true value, . . . 'individual self-realization.' "); Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982) (self-realization function of first amendment precludes first amendment protection for either commercial or corporate political speech). For opinions recognizing the self-realization function of the first amendment, see Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 n.2 (1980); First National Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978); *id.* at 804-06 (White, J., dissenting); Procunier v. Martinez, 416 U.S. 396, 427-28 (1974) (Marshall, J., concurring); Cohen v. California, 403 U.S. 15, 24 (1971).

9 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 31, 137-38 (1941); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 576-77 (1978) ("marketplace of ideas" is one of three major first amendment theories). For the Court's recognition of this theory, see Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("The relationship of [commercial] speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . .").

10 "[T]he political speech rationale does not protect a right of individual expression for its own sake but rather seeks to preserve the systemic integrity of our constitutional scheme of self-government." Jackson & Jeffries, *supra* note 7, at 11. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-27 (1948).

Justice Harlan applied this rationale in Cohen v. California, 403 U.S. 15, 24 (1971):

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

See also Mills v. Alabama, 384 U.S. 214, 218 (1966) (protection of "free discussion of governmental affairs" was a major purpose of first amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964) (democratic self-government requires protection of free expression); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

11 *See, e.g.*, Cohen v. California, 403 U.S. 15, 18-19 (1971) (first amendment protects individual's right to express opposition to draft); Thomas v. Collins, 323 U.S. 516,

self-realization theory,[12] but usually explains it as a prerequisite of democratic government.[13] In any event, it is a right of natural persons only[14] and encompasses the right to persuade as well as to inform.[15] Restrictions on the right to speak, particularly those burdening political expression, require exacting scrutiny;[16] courts will sustain such restrictions only if narrowly drawn and supported by a compelling government interest.[17]

2. *The Right of Association*

The Supreme Court has extended the individual's right of political expression to ideological organizations by recognizing a derivative right of association.[18] The Court first acknowledged this right

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537 (1945) (first amendment protects "the opportunity to persuade to action, not merely to describe facts").

12 *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (compulsory flag salute regulation "invades the sphere of intellect and spirit which it is the purpose of the First Amendment" to protect); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (first amendment rights to be protected in part so "that men may speak as they think on matters vital to them"); *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he final end of the State [and of the first amendment] was to make men free to develop their faculties . . . ."); *Bellotti*, 435 U.S. at 804-06 (White, J., dissenting) (self-realization function not furthered by commercial corporate speech). The Court has also recognized that the individual's interest in self-expression may support a right not to speak or to associate with the speech of others. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 106 S. Ct. 903, 920-21 (1986) (Rehnquist, J., dissenting) (discussing cases recognizing "negative free speech rights").

13 *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) (protecting individual expression in interest of self-government).

14 The Supreme Court has never recoguized a corporation's right to speak. *Bellotti* provides the strongest support for the proposition that the Court does not recognize a corporate right to speak. The *Bellotti* Court criticized the Massachusetts Supreme Judicial Court for too narrowly framing the issue in the case as "whether and to what extent corporations have First Amendment rights." 435 U.S. at 775-76. The Court proceeded to find the challenged statute an unconstitutional abridgement of *listeners'* right to hear as opposed to corporations' right to speak. *Id.* at 776; *see infra* note 92 and accompanying text. Had the *Bellotti* Court recoguized a corporate right to speak, it would have avoided such a novel and controversial approach. Chief Justice Burger, in a separate concurrence, accorded corporations the same first amendment rights as individuals. *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring).

One commentator has interpreted Hague v. ClO, 307 U.S. 496, 514 (opinion of Roberts, J.), 527 (opinion of Stone, J.) (1939) as rnling that corporations are not entitled to free speech. Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833, 1836 n.17 (1981) (*Bellotti* Court seemed to overlook *Hague*, where "a majority of Justices, on differing grounds, held that corporate persons were not entitled to freedom of speech"); *see also* Hallmark Prods., Inc. v. Mosley, 190 F.2d 904, 909 (8th Cir. 1951) (citing *Hague*, court noted that "the right of free speech . . . is a right guaranteed to natural persons only").

15 *See* Buckley v. Valeo, 424 U.S. 1, 48 (1976) (per curiam); NAACP v. Button, 371 U.S. 415, 429 (1963); Thomas v. Collins, 323 U.S. 516, 537 (1945).

16 *Buckley*, 424 U.S. at 44-45.

17 *Id.*

18 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (first amendment "has been constrned to include certain" rights of association). The right of association

in *NAACP v. Alabama ex rel. Patterson,*[19] decided in 1958. In *Patterson,* the Court held that an Alabama court's contempt order against the NAACP for refusing to disclose its membership lists abridged the NAACP members' right "to engage in lawful association in support of their common beliefs."[20] The Court found that the freedoms of speech and assembly implicitly encompassed the right of association because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[21] Four years later, in *NAACP v. Button,*[22] the Court extended *Patterson* by recognizing a first amendment right in association itself. The Court found unconstitutional Virginia's prosecution of the NAACP for soliciting plaintiffs to litigate the constitutionality of that state's public school segregation laws.[23] The Court noted that "[i]n the context of NAACP objectives [securing equality for blacks], litigation is . . . a form of political expression"[24] protected by the right of association.[25]

Because the right of association derives from individuals' freedom of expression, it attaches only to expression that truly reflects the association members' interests.[26] Expression that reflects an ideological organization's explicit goals and purposes receives right

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encompasses both the individual's right to associate and expression by the association reflecting its members' interests. *See infra* notes 19-27 and accompanying text.

19 357 U.S. 449 (1958); *see* Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1, 1 (1964) (Court's recognition of new right of association in *Patterson* is "striking development").

20 357 U.S. at 460. The Alabama Attorney General brought an action to enjoin the NAACP, a New York corporation, from operating within the state for failure to comply with Alabama's foreign corporation registration statute. *Id.* at 451-52. The trial court found the NAACP in contempt for failure to turn its membership lists over to the state. The state claimed it needed the lists to prepare for a preliminary hearing. *Id.* at 452-54.

21 *Id.* at 460. The right belonged to the association's members, but the Court granted the NAACP standing to assert it on their behalf because denying such standing would have forced the members to assert the right themselves, thereby revealing the very affiliation they sought to shield. *Id.* at 459.

22 371 U.S. 415 (1963).

23 *Id.* at 437. The NAACP had offered the support of its staff attorneys to blacks willing to challenge Virginia's school segregation laws in the courts. *Id.*

24 *Id.* at 429.

25 *Id.* at 428-29.

26 "Association is an extension of individual freedom. It is a method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties." Emerson, *supra* note 19, at 4; *see* FEC v. National Conservative Political Action Comm., 470 U.S. 480, 494 (1985) (*NCPAC*) (protection available to organizations that serve to amplify expression of large numbers of individuals); Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 294 (1981) (right of association protects "the practice of persons sharing common views banding together' "); *In re* Primus, 436 U.S. 412, 438 n.32 (1978) ("purpose or motive of the speaker" is important consideration when evaluating right of association protection); *Buckley,* 424 U.S. at 15 (right of association protects " 'the common advancement of political beliefs and ideas' " (quoting Kusper v. Pontikes, 414 U.S. 51, 56 (1973))).

of association protection because the members and supporters of such an organization presumably contribute funds to further such expression.[27] Within its sphere, the right of association affords an ideological organization's expression the same protection that the right to speak affords an individual's expression.[28] Moreover, if unity of ideological purpose suggests that the right of association should attach to an organization's political expression, a corporate form of organization should not prevent such attachment.[29] Political expression by a purely commercial corporation, on the other hand, does not implicate the right of association because no unity of ideo-

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27 *See, e.g., NCPAC,* 470 U.S. at 495 (PAC expenditures derive first amendment protection from contributors who contribute in order to further PAC political positions); *MCFL,* 769 F.2d at 23 ("Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditures for a publication that informs contributors and others of the position of various candidates on the abortion issue.").

28 *See NCPAC,* 470 U.S. at 496 (statute restricting PAC expenditures protected by right of association must be narrowly tailored in advancing compelling governmental interest); *In re* Primus, 436 U.S. at 432 (requiring compelling governmental interest and narrowly drawn means where right of association is implicated); *Buckley,* 424 U.S. at 25 ("[T]he right of association . . . 'like free speech, lies at the foundation of a free society.' In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' " (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960) (citations omitted)) (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958))).

Professor Emerson considers this identical protection necessary:

> [A]ssociational expression should be entitled to the same complete protection as individual expression. Associational expression is of the same nature as individual expression. Organization primarily supplies the mechanism for reaching a wider audience; it does not change the character of expression as the communication of beliefs, opinions, information and ideas, or its content.

Emerson, *supra* note 19, at 22.

29 *See Bellotti,* 435 U.S. at 784 (expression otherwise protected by first amendment does not lose protection because its source is corporation). Justice White made the point explicitly:

> [T]here are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members . . . . Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits.

Id. at 805 (White, J., dissenting). The *Button* Court noted the NAACP's corporate status but deemed it insignificant in allowing the NAACP to assert its own first amendment rights. 371 U.S. at 428. In *NCPAC,* both defendants were incorporated as well. Nevertheless, their ideological function controlled their first amendment treatment:

> We . . . reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in this case. NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to "amplify[] the voice of their adherents."

470 U.S. at 494 (quoting *Buckley,* 424 U.S. at 22).

logical purpose exists.[30]

3. *The Right to Hear*

Listeners, as well as speakers, have a first amendment interest in free expression.[31] The Court has drawn primarily on the "marketplace of ideas" theory of the first amendment to support a general right to hear.[32] As with the right of association, the right to hear protects expression in the interests of natural individuals. Unlike the right of association, however, the right to hear derives not from the interests of proponents of the expression but rather from the interests of its recipients.[33] The right to hear attaches to any public expression, regardless of its purpose, source, or protection by a correlative right of speech or association.[34] Accordingly, the right to hear protects the expression of corporations as well as that of natural persons.[35]

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30 A commercial corporation's political expression typically reflects the views of top management, rather than of the shareholders. *See* Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures,* 65 CORNELL L. REV. 945, 960-61 (1980); 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, 1363 (1979). According to another view, "[T]he market mechanism . . . dictates the content of the [commercial] enterprise's speech, and thus separates the decision concerning speech content from the value decisions of either the employees or the owners of the enterprise." Baker, *supra* note 8, at 653. A commercial corporation's shareholders may invest in it for a wide range of reasons, but economic enrichment likely outweighs political expression. Ideological unity among shareholders is even less likely. The "corporation sole" presents a narrow exception. *See infra* note 205 and accompanying text. *But see The Supreme Court, 1977 Term,* 92 HARV. L. REV. 1, 165 (1978) (arguing that "corporate political expression should be protected as the speech and associational activity of the individual owners").

31 *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) ("presupposing" willing speaker, consumers of prescription drugs can assert right to receive advertising). Within the unique field of broadcast media, as a result of the "frequency scarcity" phenomenon, the Court has found the rights of viewers and listeners superior to the speech rights of the broadcasters. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (sustaining FCC regulation requiring provision of equal time for reply to editorials); *see also Bellotti,* 435 U.S. at 777-83 (with respect to issues in a referendum campaign, relying on commercial speech and press precedents to find corporate political expression protected in interests of public right to hear); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (upholding individual's right to possess obscene materials on ground that "right to receive information and ideas, regardless of their social worth, is fundamental to our free society" (citation omitted)).

32 *See* cases cited *supra* notes 9 & 31.

33 *See* Baldwin & Karpay, *Corporate Political Free Speech: 2 U.S.C. § 441b and the Superior Rights of Natural Persons,* 14 PAC. L.J. 209, 217-18 (1983).

34 *See* L. TRIBE, *supra* note 9, § 12-19, at 674-76 ("right to know" may simply be "mirror" of right to speak, or it may provide sole protection of expression); *infra* notes 39-40 and accompanying text.

35 *See Bellotti,* 435 U.S. at 777 ("The inherent worth of the speech in terms of its

The source of the right to hear protection, however, suggests its limitation. The right to hear protects expression in order to provide unidentified listeners with full information and a diversity of views.[36] As a consequence, this objective may occasionally demand restrictions on expression.[37] For example, the right to hear does not protect speech that itself frustrates the public's right to full information and access to a diversity of views.[38]

The Court has yet to define the scope and degree of protection that the right to hear affords. The Court frequently describes the right to hear as a corollary to the other first amendment protections[39] and has only recently given the right independent prominence.[40] The right to hear has provided only limited first amendment protection in the commercial speech area, where it surfaces most frequently.[41] For example, the first amendment "over-

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capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

36 *See id.* at 783 ("[T]he Court's decisions involving corporations in the business of communication or entertainment are based not only on . . . fostering individual self-expression but also on . . . affording the public access to discussion, debate, and the dissemination of information and ideas.").

37 *See* L. TRIBE, *supra* note 9, § 12-19, at 676 (right to know "carries the implication that government, while it may not close the market[place of ideas], may move to correct its defects and regulate its incidental consequences").

38 The "frequency scarcity" justification for FCC regulation of broadcast media provides an example. The Court has upheld "equal time" regulation, admittedly a restriction on broadcasters' choice, in the interests of ensuring listeners and viewers access to a diversity of views. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). Similarly, the protection the right to hear provides commercial speech is "subordinate to the listener's informational interests." Baldwin & Karpay, *supra* note 33, at 218.

39 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (right to hear and right of association as "peripheral" to specific first amendment guarantees); Thomas v. Collins, 323 U.S. 516, 534 (1945) (labor organizer's address at mass meeting of workers protected by organizer's right to speak and by workers' right to hear what he has to say); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press . . . embraces the right to distribute literature and necessarily protects the right to receive it." (citation omitted)).

40 Several commentators suggest that *Bellotti* represents the Court's first unequivocal statement that the first amendment protects speech in the interests of listeners, even absent speaker interests. *See* L. TRIBE, *supra* note 9, at 57 (Supp. 1979); Kiley, *PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear After* First National Bank v. Bellotti, 22 ARIZ. L. REV. 427, 429 (1980).

For a thorough exposition of the Court's early treatment of the right to hear, see Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311, 332-41 (1971).

41 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2945 n.5 (1985) (plurality opinion) (commercial speech only accorded qualified first amendment protection); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("[W]e . . . have afforded commercial speech a limited measure of protection . . . while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."); J. BARRON & C. DIENES, *supra* note 7, § 4.5, at 172 ("Commercial speech is still [after *Virginia Pharmacy*, 425 U.S. 748 (1976)] subject to state regulation more extensive than that tolerated for ideological speech.").

breadth" doctrine does not necessarily apply in commercial speech cases.[42] Further, the Supreme Court more readily tolerates prophylactic regulation and prior restraint of commercial speech than of traditional political speech.[43] In short, although the Court recognizes the right to hear, this right affords only reduced protection, and its precise limits remain uncertain.

B. Federal Campaign Finance Law

Campaign finance regulation has generated an extensive body of first amendment case law. The Supreme Court has established general principles respecting contribution and expenditure restrictions[44] and has addressed corporate campaign spending.[45] The Court has not, however, confronted the constitutionality of statutes, such as the one challenged in *MCFL,* that restrict corporate expenditures in candidate elections.[46]

Two distinct strands of federal election reform legislation converge in the *MCFL* problem. The first strand originated in the wake of the Watergate scandal. The Watergate investigations highlighted the influence that large contributors to political campaigns wielded over elected officials.[47] With the 1974 amendments[48] to the Federal

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42 Bates v. State Bar of Ariz., 433 U.S. 350, 380-81 (1977).

43 *See Ohralik,* 436 U.S. at 464-68 (finding attorney's public reprimand and suspension for violation of admittedly "prophylactic" professional solicitation rule did not violate his first amendment rights, despite no evidence of actual harm); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 571 n.13 (1980) ("traditional prior restraint doctrine may not apply" to commercial speech).

44 *See infra* notes 63-83 and accompanying text.

45 *See infra* notes 86-108 and accompanying text.

46 Although § 441b(a) and earlier statutes limiting corporate expenditures in candidate elections have faced first amendment challenges before the Supreme Court, the Court has not reached the constitutional issue. *See* Cort v. Ash, 422 U.S. 66, 68-70 (1975) (Court need not address constitutionality of statute forbidding corporate expenditures in connection with federal election in shareholder's derivative suit where statute held not to create shareholder right of action); Pipefitters Local Union 562 v. United States, 407 U.S. 385, 399-400 (1972) (consideration of constitutional challenge to statute premature where case remanded because of erroneous jury instructions); United States v. UAW, 352 U.S. 567, 589-93 (1957) (unnecessary to decide on statute's constitutionality where district court incorrectly dismissed indictment); United States v. CIO, 335 U.S. 106, 124 (1948) (unnecessary to consider constitutional cballenge where indictment failed to state offense under the statute); Athens Lumber Co. v. FEC, 718 F.2d 363 (11th Cir. 1983) (en banc) (per curiam) (§ 441b(a) valid as applied to prohibit independent expenditures by commercial corporation in support of election of candidate to federal office), *appeal dismissed, cert. denied,* 465 U.S. 1092 (1984); United States v. Chestnut, 533 F.2d 40, 50 (2d Cir.) (statute neither overbroad nor void for vagueness), *cert. denied,* 429 U.S. 829 (1976); *see also Bellotti,* 435 U.S. at 788 n.26 (explicitly reserving issue of constitutionality of restrictions, including § 441(b), on corporate expenditures in candidate elections).

47 L. TRIBE, *supra* note 9, § 13-27, at 800 (1974 FECA amendments were response to improprieties of 1972 presidential campaigu); Leventhal, *Courts and Political Thickets,* 77 COLUM. L. REV. 345, 345 (1977) (same); Wright, *supra* note 4, at 610 ("the Watergate

Election Campaign Act of 1971 (FECA),[49] Congress attempted to counter the perceived corrupting influence of private money in politics by dramatically changing federal election financing.[50] One provision limited the amount of money that an individual, group, or political committee could contribute to, or independently expend in support of, a federal candidate's campaign.[51]

The second strand of legislation relates specifically to corporate political disbursements. Congress added section 441b,[52] the statute

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scandals gave impetus to popular demand for strong measures to purify the political process," which gave rise to 1974 amendments).

48 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-455 (1982 & Supp. III 1985) and in scattered sections of 5, 18, 26, and 47 U.S.C.).

49 Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (1982 & Supp. III 1985) and in scattered sections of 18 and 47 U.S.C.).

50 The Committee on House Administration noted:

> The unchecked rise in campaign expenditures, coupled with the absence of limitations on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors. Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign.

H.R. REP. No. 1239, 93d Cong., 2d Sess. 3 (1974) [hereinafter HOUSE REPORT], *reprinted in* FEC, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 635, 637 (1977); *see* S. REP. No. 689, 93d Cong., 2d Sess. 1 (1974) [hereinafter SENATE REPORT] ("This recommended legislation is a comprehensive and far-reaching measure . . . for the purpose of providing complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office . . . ."), *reprinted in* FEC, *supra*, at 97, 97.

51 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263, 1263-66 (repealed 1976). Section 101(a) prohibited individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate and from spending more than $1,000 a year "relative to a clearly identified candidate." *Id.*, 88 Stat. at 1265. Section 101(a) also restricted the amount a multicandidate political committee could contribute per candidate per election. *Id.*, 88 Stat. at 1263.

The difference between "contributions" and independent "expenditures" has played an important role in the constitutional challenge of FECA. *See infra* notes 71-83 and accompanying text. The Senate Committee on Rules and Administration discussed the distinction:

> "Independent expenditures" refer to sums expended on behalf of a candidate without his authorization, as distinct from contributions of money, goods or services put at the disposal of his campaign organization.
>
> For example, a person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's[,] that would constitute an "independent expenditure on behalf of a candidate" . . . .
>
> However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate—just as if there had been a direct contribution enabling the candidate to place the advertisement, himself. It would be so reported by both.

SENATE REPORT, *supra* note 50, at 18, *reprinted in* FEC, *supra* note 50, at 114.

52 2 U.S.C. § 441b (1982).

challenged in *MCFL,* to FECA in 1976,[53] but the section has deep-rooted origins. Congress first enacted a prohibition on any corporate "money contribution in connection with any [federal] election" in 1907.[54] The law grew out of "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption,"[55] and that "corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders."[56] The statute was not, however, aimed solely at preventing abuse. Rather, "[i]ts underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government."[57] Congress repeatedly amended the law, extending its coverage to non-monetary contributions,[58] to labor unions,[59] and to "expenditures" as well as to contributions.[60] Throughout this history, the legislative purposes remained remarkably consistent:[61] to prevent corruption of the political process by corporate wealth, to prevent erosion of public faith by the perception of inordinate corporate influence, to protect the interests of shareholders who might disagree with the political agenda of corporate managers, and to sustain voter confi-

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53 Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 321, 90 Stat. 475, 490-92 (amending and recodifying former 18 U.S.C. § 610) (current version at 2 U.S.C. § 441b (1982)).

54 Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1982)).

55 United States v. UAW, 352 U.S. 567, 570 (1957).

56 United States v. CIO, 335 U.S. 106, 113 (1948) (citing *Contributions to Political Committees in Presidential and Other Campaigns: Hearings on Various Bills Before the House Comm. on Election of President, Vice-President, and Representatives in Congress,* 59th Cong., 1st Sess. 76 (1906) (statement of Rep. Williams)).

57 *UAW,* 352 U.S. at 575.

58 Federal Corrupt Practices Act, Pub. L. No. 68-506, § 302, 43 Stat. 1070, 1070-71 (1925) (current version at 2 U.S.C. § 441b (1982)).

59 War Labor Disputes Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167-68 (1943) (initial extension to labor organizations) (current version at 2 U.S.C. § 441b (1982)); Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159-60 (1947) (broadening union prohibitions) (current version at 2 U.S.C. § 441b (1982)).

60 Taft-Hartley Act § 304. During investigations into the 1944 and 1946 campaigns, special congressional committees read the word "contributions" narrowly so as to confine the statute's prohibition to direct gifts or payments. Because contributors could easily circumvent the statute with indirect contributions, the Taft-Hartley Act extended the prohibitions to expenditures. United States v. CIO, 335 U.S. 106, 115 (1948).

61 Baldwin & Karpay, *supra* note 33, at 213 & n.21; Comment, *From* Dartmouth College *to* Bellotti: *The Political Career of the American Business Corporation,* 6 OHIO N.U.L. REV. 392, 396-98 (1979) (congressional actions from 1907 to 1976 demonstrate consistent goal); *see also* FEC v. National Right to Work Comm., 459 U.S. 197, 209 (1982) (*NRWC*) (§ 441b's legislative history illustrates gradual and cautious refinement to effect elimination of undue influence).

dence and individual participation in democratic government.[62]

1. Buckley v. Valeo

The 1974 amendments faced immediate challenge in *Buckley v. Valeo*.[63] In *Buckley*, the Supreme Court directly addressed the constitutionality of the newly amended statute and established a framework for subsequent constitutional analysis of campaign finance laws. The Court began its analysis by observing that political speech is one "of the most fundamental First Amendment activities."[64] Political expression, the Court stated, merits exceptional protection because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[65] The Court was similarly protective of the right of association when it served political ends.[66]

The FECA amendments did not directly restrict speech, but they did restrict the ability of individuals and groups to expend money in support of political candidates.[67] Finding that expenditures of money are essential to effective advocacy,[68] the *Buckley* Court concluded that the Act's contribution and expenditure limitations restricted protected expression and the right of association.[69] These limitations prevented political associations from aggregating individual contributions in order to amplify the voices of their adherents.[70]

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62 *See* Baldwin & Karpay, *supra* note 33, at 213-15; *see also NRWC*, 459 U.S. at 207-08.

63 424 U.S. 1 (1976) (per curiam).

64 *Id.* at 14.

65 *Id.*

66 *Id.* at 24-25; *see supra* note 28. Political associations' ability to amplify their adherents' voices by aggregating individual contributions provides the basis for recognizing first amendment protection of the freedom of association. *Buckley*, 424 U.S. at 22.

67 *See supra* note 51 and accompanying text. The D.C. Circuit had upheld the FECA contribution and expenditure limitations on the ground that they regnlated not speech but conduct. Buckley v. Valeo, 519 F.2d 821, 840-42 (D.C. Cir. 1975).

68 *Buckley*, 424 U.S. at 19. The Court's equation of money with speech reflects the importance of the mass media in modern politics:

> A restriction on the amount of money a person or group can spend on political communication during a campaign 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. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. (footnote omitted).

69 *Id.* at 19-23.

70 *Id.* at 22. Freedom of association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.' " *Id.* at 65-66; *see also NCPAC*, 470 U.S. at 495 (limits on expenditures by PACs "would subordinate the voices of those of modest means as op-

The Court drew a critical distinction between direct contributions to political campaigns and independent expenditures in support of a candidate. The Act's expenditure limits constituted "substantial" restraints on direct political speech.[71] The contribution limits, on the other hand, only entailed marginal restrictions on protected expression because contributions only convey a general message of support and because the limits did not "infringe the contributor's freedom to discuss candidates and issues."[72] Applying "rigorous" first amendment scrutiny, the Court sustained the contribution limits.[73] Congress's concern for corruption justified the limits because "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential officer holders, the integrity of our system of representative democracy is undermined."[74] The Court conceded that most contributors do not seek improper influence with candidates.[75] Nevertheless, it held that the restriction was not unconstitutionally overbroad because "[n]ot only is it difficult to isolate suspect contributions but, more importantly, 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."[76]

The FECA expenditure limitations failed the "exacting" scrutiny reserved for restrictions on "core" first amendment rights.[77] First, in response to a challenge of unconstitutional vagueness,[78] the Court construed the statute to apply only to expenditures expressly advocating the election or defeat of a "clearly identified candidate."[79] The Court then found that independent expenditures did not "presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contribu-

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posed to those sufficiently wealthy to be able to buy expensive media ads with their own resources").

71 *Buckley*, 424 U.S. at 19.

72 *Id.* at 21.

73 *Id.* at 29.

74 *Id.* at 26-27.

75 *Id.* at 29.

76 *Id.* at 30.

77 *Id.* at 44-45.

78 *Id.* at 40.

79 *Id.* at 44. The Court discussed two ways in which the statute might be vague. The first possibility was the lack of a definition for the term "relative to" in the FECA limitation on "any expenditure . . . relative to a clearly defined candidate." *Id.* at 41-42. The second concerned the difficulty when applying the statute of distinguishing "between discussion of issues and candidates and advocacy of election or defeat of candidates." *Id.* at 42. The Court concluded "that in order to preserve the provision against invalidation on vagueness grounds, [the expenditure ceilings] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44.

tions."[80] In addition, the Court rejected any governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections."[81] In the Court's view, "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."[82] Thus, while Congress could restrict political contributions, it could not limit an individual's or group's expenditures for independent advocacy.[83]

Although the *Buckley* Court did not address the provisions of FECA concerning political contributions and expenditures by corporations, its ruling that Congress may limit campaign contributions of individuals and associations undoubtedly extends to corporations.[84] Nevertheless, *Buckley* left unanswered the question whether the first amendment might permit prohibition of independent corporate expenditures, a distinct possibility if corporate political expression merits less protection than that of natural persons.[85]

2. First National Bank v. Bellotti

In *First National Bank v. Bellotti*,[86] the Supreme Court struck down a statute regnlating corporate political expenditures. Banking and business corporations[87] had challenged a Massachusetts criminal statute prohibiting expenditures by commercial corporations to influence referendum votes unless the question submitted "materially affect[ed] any of the property, business or assets of the corpora-

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80 *Id.* at 46. The Court concluded that "[t]he 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.

81 *Id.* at 48.

82 *Id.* at 48-49.

83 *Id.* at 143. Chief Justice Burger and Justice Blackmun would have struck down the contribution limits as well. *Id.* at 241 (Burger, C.J., concurring in part and dissenting in part), 290 (Blackmun, J., concurring in part and dissenting in part). Justice White would have permitted both contribution and expenditure limits. *Id.* at 259 (White, J., concurring in part and dissenting in part).

84 The Supreme Court must uphold limits on corporate campaign contributions unless it finds that corporations merit *more* first amendment protection than natural persons or that corporate contributions pose *less* potential for actual or apparent corruption than do noncorporate contributions.

85 *See supra* text accompanying notes 36-43; *infra* notes 180-202 and accompanying text. Furthermore, even if corporate speech is theoretically protected to the same extent as that of natural persons, it might be disproportionately restricted in light of a sufficiently compelling interest specific to corporate speech. *See infra* notes 203-15 and accompanying text.

86 435 U.S. 765 (1978).

87 The appellants were the First National Bank of Boston, New England Merchants National Bank, the Gillette Co., Digital Equipment Corp., and Wyman-Gordon Co. *Id.* at 768 n.1.

tion."[88] The statute established a conclusive presumption that questions involving income, property, and sales taxes did not.[89] The *Bellotti* plaintiffs wanted to expend money to voice their opposition to a proposed state constitutional amendment allowing the legislature to impose a graduated income tax.[90] The Court found that the statute violated the first amendment.[91] The decision did not, however, establish a corporate right to political speech; rather, it turned on the public's right to hear competing views on issues of public concern.[92]

The Court had long recognized that effective self-government demanded that the electorate have access to full information and

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88 MASS. ANN. LAWS ch. 55, § 8 (Law. Co-op. 1978).

89 *Id.*

90 *Bellotti*, 435 U.S. at 769.

91 *Id.* at 776.

92 The Court criticized the Massachusetts Supreme Judicial Court's formulation of the issue: "The proper question . . . 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 Massachusetts statute] abridges expression that the First Amendment was meant to protect." *Id.* By shifting its focus from the source to the content of the speech, the Court glossed over the question of exactly whose first amendment rights were at issue. The Court's heavy reliance on press and commercial speech precedents, however, indicates that it was expounding a societal right to know:

> [O]ur recent commercial speech cases . . . illustrate 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. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information."

Id. at 783 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976)); *see also* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 106 S. Ct. 903, 907 (1986) (plurality opinion) (citing *Bellotti* for proposition that privately owned companies should not be prohibited from discussing controversial political issues because "such prohibitions limit[] the range of information and ideas to which the public is exposed").

The view that *Bellotti* turns not on a corporate right to speak, but rather on a public right to hear, has wide support among commentators. *See* L. TRIBE, *supra* note 9, at 57-58 (Supp. 1979) (decision turned on rights of Massachusetts voters to information); Baker, *supra* note 8, at 657 (criticizing *Bellotti* Court's protection of corporate speech in interests of listeners and marketplace of ideas); Baldwin & Karpay, *supra* note 33, at 223 (*Bellotti* "established that any 'right' that corporate entities might have to freedom of speech derives solely from the public's 'right to listen.' "); Gray, *Corporate Identity and Corporate Political Activities*, 21 AM. BUS. L.J. 439, 442 (1984) (*Bellotti* majority stressed "societal right to know" rather than right to self-expression); Kiley, *supra* note 40, at 429 (*Bellotti* "was logically premised upon the identification of the public's right to receive information as a fundamental, underlying value of the first amendment."); Nicholson, *supra* note 30, at 952 (majority did not recognize corporate first amendment rights). *But see* Miller, *On Politics, Democracy, and the First Amendment: A Commentary on* First National Bank v. Bellotti, 38 WASH. & LEE L. REV. 21, 22 (1981) ("[T]he Court reasoned that the corporation is a constitutional person and, accordingly, it is to be treated as any other person . . . when first amendment issues are raised.").

competing views.[93] Typically, this reasoning only buttressed decisions also implicating speakers' rights.[94] Relying on precedents from press and commercial speech cases,[95] the Court in *Bellotti* for the first time relied solely on the listener's right to hear to protect *political* expression.[96] The question remained whether the speaker's corporate status justified state regulation burdening this right.[97]

The Court deemed the three governmental interests forwarded to justify the statute either inapplicable or insufficiently compelling to justify the restriction.[98] First, the Court acknowledged that prevention of "corruption of elected representatives through the creation of political debts," or the appearance of such corruption, was the most important justification for restrictions on corporate expenditures in *candidate* elections.[99] This interest, however, was inapplicable to a referendum on a public issue.[100] Second, the state suggested that corporate expression in a referendum debate would so dominate campaigns that it would drown out competing points of view, thereby impeding the listeners' right to hear.[101] In contrast to *Buckley,* where the Court flatly rejected a similar argument,[102] the *Bellotti* Court implied that it considered this argument theoretically valid.[103] The Court nevertheless rejected the state's contention in the instant case because "there ha[d] been no showing that the relative voice of corporations ha[d] been overwhelming or even significant in influencing referenda in Massachusetts, or that there ha[d] been any threat to the confidence of the citizenry in govern-

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93 *See supra* notes 10 & 13 and accompanying text.

94 *See supra* note 39 and accompanying text.

95 *See Bellotti,* 435 U.S. at 782-83; *see also* Baldwin & Karpay, *supra* note 33, at 224 (*Bellotti* involved extension of rationale of commercial speech cases).

96 *See supra* notes 40 & 91-92 and accompanying text.

97 *Bellotti,* 435 U.S. at 786.

98 *Id.* at 787-88. The Court professed to subject the challenged Massachusetts statute to "exacting" scrutiny, *id.* at 786, declaring that "where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling.' " *Id.* ((footnote omitted) (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960))). However, the Court never balanced the governmental interests against the first amendment right involved. Instead, it dismissed the Massachusetts statute's principal justifications as "either . . . not implicated in this case or . . . not served at all, or in other than a random manner, by the prohibition in" the statute. *Id.* at 788; *see* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 106 S. Ct. 903, 913 (1986) (plurality opinion) (citing *Bellotti* as requiring compelling interest); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 533-34 (1980) (same).

99 *Bellotti,* 435 U.S. at 788 n.26.

100 *Id.* at 790.

101 *Id.* at 789.

102 *See supra* notes 81-82 and accompanying text.

103 *Bellotti,* 435 U.S. at 789 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)).

ment."[104] Finally, the Court rejected the argument that the legislature intended the statute to protect shareholders by preventing use of corporate funds to further political views with which the shareholders might disagree, finding the statute both underinclusive and overinclusive as to that purpose.[105]

The Supreme Court explicitly limited *Bellotti* to referendum elections and stressed that "under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities."[106] In particular, the Court suggested that the governmental interests forwarded—"sustaining the active role of the individual citizen" and "protecting the rights of shareholders"—might receive greater weight in the candidate election context.[107] The Court also noted that the importance of section 441b's primary justification—the prevention of corruption of elected officials—"has never been doubted" in the context of candidate elections.[108]

Buckley and *Bellotti* delimit an area of unsettled law. In general terms, *Buckley* permits governmental restrictions on political contri-

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104 *Id.* at 789-90 (footnote omitted). Justice White, on the other hand, thought "that Massachusetts' most recent experience with unrestrained corporate expenditures in connection with ballot questions establishes precisely the contrary." *Id.* at 810-11 (White, J., dissenting).

105 *Id.* at 792-95 (majority). The statute was deemed underinclusive because it failed to prohibit corporate lobbying of legislators or corporate expenditures for advocacy on public issues which were not the subject of a referendum. *Id.* at 793. The statute was overinclusive because it "would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure." *Id.* at 794.

In fact, the Court's suspicion of the Massachusetts legislators' sincerity may have influenced its rejection of the state's argument that the statute was intended to protect shareholders. The Court observed that "[t]he fact that a particular kind of ballot question [those relating to a state income tax] has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject." *Id.* at 793.

106 *Id.* at 777 n.13. The reference to unions suggests Court concern with *Bellotti*'s impact on § 441b. That section, in contrast to the Massachusetts statute, applies to unions as well as to corporations. The Court also emphasized that it was not addressing "the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Id.* at 777.

107 *Id.* at 787-88 & 788 n.26.

108 *Id.* at 788 n.26. The Court continued:

> [O]ur consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

Id.

butions, but prohibits similar restrictions on independent expenditures in support of a candidate, at least when made by individuals and unincorporated associations. *Bellotti* prohibits restrictions on independent corporate expenditures in connection with referendum campaigns.[109] Neither of these cases nor subsequent Supreme Court decisions have addressed whether the first amendment protects independent corporate expenditures in support of political candidates.[110]

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109 Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981), supports *Bellotti* dictum that the *Bellotti* holding did not predetermine the Court's position with respect to corporate expenditures in a candidate election. In *Citizens Against Rent Control,* an unincorporated association, formed to oppose a rent control measure, challenged a city ordinance's $250 limit on contributions to committees created to support or oppose ballot measures. The Supreme Court concluded that a referendum lacked the danger of candidate corruption; thus, even a contribution limit similar to the one sustained in Buckley unconstitutionally impaired the organization's right of association. *Id.* at 297-99. The Court believed that the statute's public filing and disclosure requirements adequately protected the "integrity of the political system." *Id.* at 299-300.

110 Two recent cases, FEC v. National Right to Work Comm., 459 U.S. 197 (1982) (*NRWC*), and FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (*NCPAC*), deserve special mention. *NRWC* examined § 441b(b) and suggests that the Court may approach this section with considerably more deference than it did the FECA amendments involved in *Buckley* and the Massachusetts statute challenged in *Bellotti.* Although § 441b(a) flatly prohibits corporate political contributions and expenditures, § 441b(b) permits corporations to establish and administer a "separate segregated fund" to be financed by voluntary contributions from corporate employees and shareholders. 2 U.S.C. § 441b(b)(2)(C) (1982). These segregated funds may be "utilized for political purposes," *id.*, subject to reporting and disclosure requirements. *See* 2 U.S.C. §§ 432-434 (1982).

In *NRWC,* the FEC determined that a nonprofit ideological corporation had violated 2 U.S.C. § 441b(b)(4) (1982), which prohibits corporations without capital stock from soliciting, except from "members," contributions to separate segregated funds. 459 U.S. at 200. The Court concluded that the statute prophylactically regulated NRWC's protected expression, yet sustained the statute in light of Congress's judgment that the corporate form posed a unique threat of actual and apparent corruption. Referring to § 441b's history, the court said "[t]his careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' . . . warrants considerable deference." *Id.* at 209 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937)).

Arguably, *NRWC* turns on the kind of expression involved: the solicitations in question resembled contributions more than expenditures and as such merited less first amendment protection under the *Buckley* rule. *See NCPAC,* 470 U.S. at 495 (*NRWC* decided "in view of the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office"); FEC v. Massachusetts Citizens for Life, Inc., 589 F. Supp. 646, 648 n.4 (D. Mass. 1984) (*NRWC* not controlling on issue of corporate expenditures because it only addressed legality of solicitation of contributions); *see also* California Medical Ass'n v. FEC, 453 U.S. 182, 196 (1981) (plurality opinion) (medical association's contributions to PAC are "speech by proxy" rather than direct political advocacy, so not entitled to full first amendment protection). Nevertheless, the Court's cautious approach to the federal statute in *NRWC* stands in marked contrast to the Court's treatment of the Massachusetts statute involved in *Bellotti.*

The second case, *NCPAC,* involved an enforcement action against two nonprofit ideological corporations for violation of a federal statute that restricts PAC expenditures in

II

FEC v. Massachusetts Citizens for Life, Inc.

A. Facts Leading to the Controversy

Massachusetts Citizens for Life, Inc., a nonprofit ideological corporation, was established "[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn, through education, political and other forms of activities."[111] The organization mailed a newsletter published at irregular intervals[112] to "[d]ues-paying and contributing members" and, subject to available funds, to "non-contributing members."[113] In 1978, MCFL distributed newsletters to approximately 2,000 to 3,000 people.[114]

MCFL also published special edition newsletters prior to elections. In September 1978, it printed 100,000 copies of a "Special Election Edition" urging readers to vote for pro-life candidates.[115] This edition included state and federal incumbents' voting records on abortion-related issues, challengers' answers to MCFL questionnaires,[116] and photographs of pro-life candidates.[117] MCFL subsequently printed 20,000 copies of a "Complimentary Partial Special Election Edition" containing minor changes.[118] MCFL distributed copies of the special election editions to 5,985 contributors, to 50,674 noncontributors, and to local chapters.[119] It may have distributed free copies to the general public.[120] Funds from MCFL's

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support of presidential candidates who elect to receive public financing. The Court held the statute unconstitutional, but distinguished the case from its "corporate" precedents, emphasizing that the statute in question also applied to unincorporated associations. 470 U.S. at 496.

111 FEC v. Massachusetts Citizens for Life, Inc., 769 F.2d 13, 15 (1st Cir. 1985), *prob. juris. noted,* 106 S. Ct. 783 (1986). The court derived this formulation from MCFL's "Statement of Purpose":

> In recognition of the fact that each human life is a continuum from conception to natural death, the objective of this organization is to 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 activity.

Brief for Appellee at 2-3, *MCFL,* 769 F.2d 13 (1st Cir. 1985) (No. 84-1719) (on file at *Cornell Law Review*).

112 MCFL published the newsletter from three to eight times a year between 1973 and 1978 inclusive. *MCFL,* 769 F.2d at 15 n.1.

113 *Id.* at 15. MCFL, legally a "non-membership corporation," nevertheless recognized categories of "members." *Id.*

114 *Id.*

115 *Id.*

116 Brief for Appellee, *supra* note 111, at 5.

117 769 F.2d at 15.

118 *Id.*

119 *Id.*

120 The FEC alleged that the remainder of the newsletters were "left in public areas for general distribution." *Id.* at 15-16.

general treasury covered all publishing and distribution costs.[121]

The Federal Election Commission brought a civil enforcement action against MCFL for violation of section 441b. The FEC alleged that MCFL's use of corporate funds to finance the special election editions, combined with their public distribution, constituted a prohibited expenditure in support of federal candidates.[122]

B. The District Court's Grant of Summary Judgment

The district court granted MCFL's motion for summary judgment,[123] concluding on two grounds that section 441b did not prohibit the expenditure at issue. First, by narrowly defining "contribution or expenditure,"[124] the court held that section 441b prohibited only direct or indirect payments or gifts *to* a candidate, campaign committee, political party, or organization.[125] Thus, the statute failed to reach the MCFL newsletter, for it was "uninvited by any candidate and uncoordinated with any campaign."[126] Second, the newsletter qualified for section 441b's exception for a " 'news story, commentary, or editorial distributed through the facilities of any . . . periodical publication.' "[127]

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121 *Id.* at 16.

122 *Id.* at 15-16.

123 *MCFL*, 589 F. Supp. at 653.

124 Section 441b(b)(2) states that

> the term "contribution or expenditure" *shall include* 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 to any of the offices referred to in this section, but shall not include . . . (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

2 U.S.C. § 441b(b)(2) (1982) (emphasis added). In addition, the general definitions section of FECA defines "expenditure": "The term 'expenditure' includes—any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person *for the purpose of* influencing any election for Federal office . . . ." 2 U.S.C. § 431(9)(A)(i) (1982) (emphasis added). The district court chose the § 441b(b)(2) definition and, despite the statute's phrase "shall include," concluded that the statute only prohibited payments or gifts "*to* any candidate, campaign committee or political party or organization." *MCFL*, 589 F. Supp. at 649.

125 *Id.*

126 *Id.*

127 *Id.* at 650 (quoting 2 U.S.C. § 431(9)(B)(i) (1982)). Section 431 contains the "periodical publication" exception:

> (B) The term "expenditure" does not include—
>
> (i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate[.]

2 U.S.C. § 431(9)(B)(i) (1982).

The court ruled "[a]lternatively, and conditionally,"[128] that "[i]f § 441b were intended by Congress to prohibit MCFL's expenditures of printing and distributing the newsletters in question, it would be unconstitutional . . . as applied to MCFL because violative of MCFL's freedoms of speech, press and association."[129] According to the district court, only the prevention of real or apparent corruption could justify prohibition of MCFL's special editions, and MCFL's expenditures posed no such danger.[130]

C. The Court of Appeals' Affirmance

On appeal, the First Circuit affirmed the district court's grant of summary judgment.[131] Although the court held that the special election editions fell within section 441b's scope,[132] it agreed with the district court that the statute was unconstitutional as applied.[133] After an extensive discussion of section 441b's legislative history, the court concluded that section 441b prohibited expenditures "in connection with federal elections as well as expenditures made to candidates for federal office."[134] The court found that the MCFL newsletters "expressly advocated the election of clearly identified candidates" and thus qualified as expenditures under the *Buckley* standard.[135] The court also concluded that MCFL's expenditures fell outside the exception for periodical publications because the special election editions (1) did not qualify as newspapers, magazines, or periodical publications,[136] (2) were not "news

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128 *MCFL*, 589 F. Supp. at 653.

129 *Id.* at 651.

130 *Id.* at 651-52.

131 *MCFL*, 769 F.2d at 15, 20-23.

132 *Id.* at 20-22.

133 *Id.* at 22-23.

134 *Id.* at 20. The First Circuit preferred § 431's broader definition of "expenditure," *see supra* note 124, but also noted that the word "include," present in both definitions, " 'is usually a term of enlargement, and not of limitation.' " *MCFL*, 769 F.2d at 17 (quoting United States v. Gertz, 249 F.2d 662, 666 (9th Cir. 1957)). "Therefore, the plain language of the statute suggests that 'expenditure' in both contexts includes *but is not limited to* contributions *to* candidates, campaign committees, or political organizations." *Id.*

135 *Id.* at 20; *see supra* text accompanying note 79. By finding express advocacy, the First Circuit had no need to decide whether § 441b actually contained an express advocacy requirement. *MCFL*, 769 F.2d at 20. The district court in *MCFL* bad noted, without reference to *Buckley*, that the MCFL special edition newsletters were "without express advocacy of the election of a particular candidate." 589 F. Supp. at 651.

136 The court based its conclusion on the following observation:

> MCFL published these editions not periodically, but sporadically, and only during federal election campaigns. Moreover, at least 50,000 copies of the special editions were distributed at no cost to a large number of people; and the editions contained no printed volume or issue number nor [sic] any masthead designating them as newspapers or periodicals.

MCFL, 769 F.2d at 21.

stor[ies], commentar[ies], or editorial[s] distributed through the facilities of any . . . newspaper, magazine, or other periodical publication,"[137] and (3) were not "one of the 'normal functions of a press entity.' "[138]

The First Circuit never addressed the source or nature of MCFL's first amendment rights; rather, it assumed their existence.[139] The court first classified section 441b as a content-based restriction, rather than a time, place, or manner restriction. As such, only a showing of a substantial governmental interest, the court stated, could justify the statute.[140] The court then concluded that the legislative purposes underlying section 441b were insufficiently compelling to justify the burden on MCFL's first amendment rights.

The FEC argued first that section 441b did not affect MCFL's first amendment rights at all because the statute permitted the use of corporate funds to establish and administer a separate, segregated fund for political purposes.[141] The court, however, rejected the notion "that the availability of alternative methods of funding speech justifies eliminating the simplest method."[142]

The court then evaluated two governmental interests: that Congress intended section 441b to prevent the use of corporate political "war chests" to corrupt elected officials, and to protect persons paying money into a corporation or union from having the money contributed to candidates they oppose.[143] The court found the first rationale inapplicable because MCFL did not contribute di-

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137 2 U.S.C. § 431(9)(B)(i) (1982). For purposes of argument, the court assumed that the regular MCFL newsletters qualified as periodical publications. *MCFL*, 769 F.2d at 21. Nevertheless, it concluded that the special election editions did not qualify for the exception because (1) their circulation far exceeded that of the regular newsletter, (2) they did not contain the regular newsletter masthead or printed volume or issue numbers, and (3) they were not compiled and published by the regular newsletter's staff. *Id.*

138 *Id.* (quoting FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308, 1313 (D.D.C. 1981)).

139 The court noted that the district court had conditionally found the statute " 'violative of MCFL's freedoms of speech, press[] and association,' " *id.* at 22 (quoting *MCFL*, 589 F. Supp. at 651), but itself spoke generically of MCFL's "First Amendment rights." *Id.* at 22-23. One cannot interpret the First Circuit's decision as an affirmance of the district court's specific characterization of those rights because the appellate court's treatment of the periodical publication exception, *see supra* notes 136-38 and accompanying text, clearly indicates that it would not have found a freedom of the press violation.

140 *MCFL*, 769 F.2d at 22.

141 *Id. See* 2 U.S.C. § 441b(b)(2)(C) (1982) (authorizing separate segregated fund for political purposes); *supra* note 124. After the FEC brought suit, MCFL did establish a statutory political fund. *MCFL*, 589 F. Supp. at 647 n.1. For discussion of the significance of the separate segregated fund alternative to this Note's analysis, see *infra* notes 190-93 and accompanying text.

142 *MCFL*, 769 F.2d at 22.

143 *Id.* at 22-23.

rectly to any political campaigns and therefore incurred no political debts.[144] The second rationale failed because MCFL's contributors presumably concurred with the corporation's political agenda.[145] Consequently, the court held "that the application of section 441b to indirect, uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates violates the organization's First Amendment rights."[146]

III
ANALYSIS

The Supreme Court should affirm the First Circuit's holding in light of MCFL's ideological purpose.[147] A prohibition of candidate election expenditures by commercial corporations, on the other hand, should survive first amendment scrutiny. The difference in result for ideological and commercial corporations turns principally on the difference in first amendment interests involved: whereas an ideological corporation's political expression implicates both *Buckley*'s right of association and *Bellotti*'s right to hear, a commercial corporation's political expression implicates only the latter.

Only a compelling governmental interest can justify a restriction on direct political expression.[148] In addition, the Court demands a high degree of precision when the restriction burdens the right of association.[149] Section 441b fails this second standard. The right to hear, on the other hand, provides more qualified first amendment protection than does the right of association.[150] As a consequence, the Court should defer more readily to prophylactic regulations of expression that burden only the right to hear.[151]

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144 *Id.* at 23. The court apparently applied the *Buckley* standard, *see supra* note 80 and accompanying text, as a per se rule.

145 *MCFL*, 769 F.2d at 23. The court also rejected the FEC argument that *NRWC* controlled the case, distinguishing *NRWC* as essentially a contribution case, rather than an expenditure case. *Id.*; *see supra* note 110.

146 *MCFL*, 769 F.2d at 23.

147 This Note focuses on the first amendment protection afforded corporate political expression by using the *MCFL* case as a vehicle for exploring the first amendment significance of ideological or commercial purpose. The following analysis accepts the First Circuit's statutory analysis as substantially correct.

148 *See supra* note 98 and accompanying text.

149 *See supra* note 28, *infra* note 156 and accompanying text.

150 *See supra* notes 36-43, *infra* notes 181-93 and accompanying text.

151 Commentators divide sharply on the degree of deference the Court should accord congressional determinations of the corrupting potential and anti-democratic effect of campaigu spending and of the need for prophylactic regnlation. *Compare* Wright, *supra* note 4, at 636 (calling for Supreme Court to overrule *Buckley* and *Bellotti* as inconsistent with first amendment goal of diversity and as barriers to attempts to counter "the stifling influence of money in politics"); Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 69-70 (1980) (Court has substituted its judgment for that of legislature as to "the extent and seriousness of the danger" of

When evaluated under this deferential approach, the governmental interests supporting section 441b justify the section's application to commercial corporations.

A. Ideological Corporations

1. *First Amendment Protection*

A nonprofit ideological corporation's expenditures in support of like-minded political candidates fall squarely within the first amendment's protection of the right of association.[152] A distinct ideological focus and an explicit advocacy purpose ensure that such organizations amplify the voice of their adherents.[153] For example, MCFL's anti-abortion election newsletters represented expression consistent with the organization's basic ideological purpose: to advocate pro-life positions.[154] The newsletter therefore fell within the scope of the right of association. Moreover, such independent expenditures, as direct expression of a political nature, merit excep-

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independent political expenditures) *with* BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform,* 73 CALIF. L. REV. 1045, 1082-90 (1985) (calling for intense judicial scrutiny of legislative ends and means in campaign finance area).

This Note argues that the Court has adopted strict scrutiny of means when reviewing independent expenditures protected by the rights of speech and of association; that the Court has applied a more lenient standard to contributions; and that the Court is free to (and indeed should) adopt lenient review of means for *both* contributions and expenditures protected solely by the right to hear.

If the right to hear *does* provide the same order of protection as the traditional rights of speech and association, then political speech's source becomes irrelevant, with differences in first amendment protection deriving solely from content. *See* Kiley, *supra* note 40, at 442-43 (describing Court's "drift away from the doctrine of content neutrality and toward a sliding scale of first amendment protection based on the content of speech"). An unqualified right to hear would effectively grant corporations first amendment rights equivalent to those of natural persons. It would, in the absence of corporate-specific compelling governmental interests, preclude any restrictions on independent corporate political expenditures. Some commentators think that *Bellotti* compels this result. *See, e.g.,* Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech,* 22 ARIZ. L. REV. 373, 418 (1980) ("Although the validity of prohibiting corporate and union independent expenditures was highly dubious after *Buckley, Bellotti* appears to have ended any remaining doubt." (footnote omitted)).

Courts need not interpret *Bellotti*'s right to hear doctrine so broadly. By focusing on the inherent qualifications of a first amendment protection derived from the listeners' interests, this Note suggests a method of integrating right-to-hear analysis with the traditional source-oriented political expression case law, while retaining differential protection for the speech of natural and artificial persons. *See infra* notes 194-202 and accompanying text.

152 *See NCPAC,* 470 U.S. at 494 ("First Amendment freedom of association is squarely implicated" by conservative ideological corporation's expenditures in support of President Reagan's re-election); *supra* notes 26-28 and accompanying text.

153 *See Buckley,* 424 U.S. at 22 ("amplifying the voice of their adherents [is] the original basis for the recognition of First Amendment protection of the freedom of association"); *see also NCPAC,* 470 U.S. at 494 (quoting *Buckley*).

154 *MCFL,* 769 F.2d at 15.

tional first amendment protection.[155] Consequently, section 441b's prohibition can survive first amendment scrutiny only if it constitutes a narrowly tailored means of furthering a compelling governmental interest.[156] Broad legislative determinations regarding the threat posed by corporate campaign expenditures will not suffice. Instead, the statute must be tested as applied to ideological corporations and to the specific expenditure in question.[157]

2. *Governmental Interests*

Three governmental interests support section 441b's prohibitions: protecting shareholders, maintaining voter confidence and citizen participation, and preventing actual and apparent corruption.[158] Only the third interest is relevant to political expenditures by an ideological corporation. Nevertheless, the statute is an insufficiently precise response to the problem of corruption of elected officials. Furthermore, it is unconstitutional as applied because MCFL's special election newsletters posed no threat of quid pro quo.[159]

Section 441b reflects Congress's concern, first, that corporate

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155 *See supra* notes 64-66 and accompanying text.

156 *See supra* note 28 and accompanying text. This last point requires elaboration in light of the *NRWC* Court's treatment of section 441b(b). In *NRWC,* the Court deferred to Congress's judgment as to both the dangers inherent in corporate political activities and the need for prophylactic regulation. *See supra* note 110. In *MCFL,* the FEC argued that *NRWC* sustained the constitutionality of § 441b as a whole, Brief for Appellant at 33, *MCFL,* 769 F.2d 13 (1st Cir. 1985) (No. 84-1719) (on file at *Cornell Law Review*), and that the Court "has rejected the approach . . . of reassessing the applicability of the governmental interests in each specific instance." *Id.* at 36. *NRWC*'s deferential approach is inappropriate in the instant case. Even though the defendant in *NRWC* was an ideological corporation, the case did not involve direct political expenditures, which implicate "core First Amendment rights of political expression." *Buckley,* 424 U.S. at 45; *see supra* note 110.

The Court consistently conducts rigorous review in cases involving both direct expenditures and the right of association. In particular, the Court demands means "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley,* 424 U.S. at 25; *see NCPAC,* 470 U.S. at 498-501 (finding statute restricting independent expenditures of political action committees fatally overbroad); *supra* notes 71-83 and accompanying text; *see also In re* Primus, 436 U.S. 412, 432 (1978) (" 'Broad prophylactic rules in the area of free expression are suspect,' and . . . '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))).

157 *See In re* Primus, 436 U.S. at 434 (requiring case-specific evidence of adverse consequences when client-solicitation prohibition implicates ACLU attorney's political expression and association).

158 *See supra* notes 55-62 and accompanying text.

159 Except for MCFL's corporate form, *MCFL* is indistinguishable from *Buckley,* which held that restrictions on an unincorporated association's independent expenditures impermissibly burdened the right of association. *See Buckley,* 424 U.S. at 39-51. *NCPAC* held campaigu expenditure limitations unconstitutional as applied to *incorporated* political action committees. The *NCPAC* opinion, however, stressed that the statute involved applied to unincorporated associations; the statute's purpose was not, therefore, tied to the special characteristics of corporate form. 470 U.S. at 496.

managers should not be permitted to spend corporate funds to support candidates that shareholders might oppose.[160] In a case involving one of section 441b's predecessors, the Court referred to Congress's belief that "corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders."[161] Nevertheless, the shareholder protection interest cannot justify restrictions on a nonprofit ideological corporation's political expression. As the First Circuit recognized, MCFL's contributors need no such protection; they support MCFL precisely because they wish to amplify their political expression.[162] Generally, the shareholder protection interest does not apply to any corporate expression implicating the right of association because that right attaches only to expression reflecting the interests of the association's members.[163]

The Court has indicated that the second governmental interest, sustaining the active participation of the individual citizen in the electoral process, might justify restrictions on corporate expenditures if supported by a record or legislative finding of corporate domination of political discussion.[164] This interest would not, how-

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160 *See supra* notes 56 & 62 and accompanying text.

161 United States v. CIO, 335 U.S. 106, 113 (1948). Similarly, the extension of the prohibition to union expenditures, War Labor Disputes Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167-68 (1943) (codified as amended at 2 U.S.C. § 441b (1982)), in part reflected a legislative judgment that allowing the union to make contributions from general union funds to a political party which the individual member might oppose was unfair to the individual union member. 335 U.S. at 115.

The weight the Court actually accords this interest is uncertain. Justice Powell's majority opinion in *Bellotti* casts serious doubt on the utility of the shareholder protection interest. *See supra* note 105 and accompanying text. In contrast, the *NRWC* Court relied on this interest, in combination with concern for the prevention of corruption, to justify a statute restricting corporate solicitation of contributions to a separate segregated fund. 459 U.S. at 207-08.

162 The First Circuit stated:

> Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditures for a publication that informs contributors and others of the position of various candidates on the abortion issue. That would appear to be the very purpose of the organization and the contributions to it.

MCFL, 769 F.2d at 23; *see also supra* notes 27 & 70 and accompanying text (ideological corporations generally).

163 *See supra* note 26 and accompanying text.

164 *Bellotti*, 435 U.S. at 788-89; *see supra* notes 101-04 and accompanying text; *see also* Note, *Independent Expenditures: Can Survey Research Establish a Link to Declining Citizen Confidence in Government?*, 10 HASTINGS CONST. L.Q. 763, 764-65, 783 (1983) (Court is apparently willing to consider empirical data of declining voter confidence). One commentator who thought *Bellotti* a decision of major theoretical importance admitted that one could read the case narrowly as holding "that the Commonwealth simply failed to meet its burden of demonstrating that corporate financial participation in a political campaign would unduly influence the electoral process." Kiley, *supra* note 40, at 429 n.11.

ever, justify restrictions on expenditures by nonprofit ideological corporations because of the advocacy nature of such organizations. Rather than alienating the electorate, political expenditures by ideological corporations facilitate citizen involvement in politics.[165] Indeed, by allowing contributors to pool their resources and amplify their voices, ideological corporations empower "those of modest means . . . to be able to buy expensive media ads with their own resources."[166] The corporate form in no way alters this facilitative function.

Congress's third concern—preventing real and apparent political corruption—provided the driving force behind section 441b,[167] and the Court has readily deferred to this governmental interest.[168] Admittedly, the *Buckley* Court thought that independent expenditures posed only a minimal threat of corruption, regardless of the circumstances.[169] Nevertheless, in a legal regime that substantially restricts contributions, uncoordinated expenditures may pose a significant potential for abuse.[170] Ideological corporations could con-

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165 *See* Emerson, *supra* note 19, at 4, 22.

166 *NCPAC,* 470 U.S. at 495.

167 *See Bellotti,* 435 U.S. at 788 n.26.

168 The *NRWC* Court exemplified this deference, stating that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." 459 U.S. at 210; *see supra* note 110. In *NCPAC,* the Court stated that "[w]e held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaigu finances." 470 U.S. at 496-97. However, neither *Buckley* nor *Citizens Against Rent Control* involved *corporate* campaigu financing, and the Court apparently fears a greater potential for corruption in the corporate form itself. *See supra* note 108 and accompanying text.

169 *Buckley,* 424 U.S. at 46-47; *see supra* note 80 and accompanying text; *see also NCPAC,* 470 U.S. at 497-98 (quid pro quo arrangements unlikely where expenditures are uncoordinated with campaigu and no prearrangement with candidate). The First Circuit apparently viewed this conclusion as a formal rule, as evidenced by its statement that "[b]ecause MCFL did not contribute directly to a political campaign, MCFL's expenditures did not incur any political debts from legislators." *MCFL,* 769 F.2d at 23. The First Circuit's view is, however, unwarranted; the *Buckley* Court recoguized that even independent expenditures that do not expressly advocate the election or defeat of a candidate pose *some* threat of corruption. 424 U.S. at 45.

170 For example, one would expect that, after *Buckley,* large contributors would shift their financing strategies in favor of large independent expenditures. Even in the absence of prearrangement and coordination, political candidates likely would note this support, tempting them to reward it with political favors. *See NCPAC,* 470 U.S. at 510 (White, J., dissenting) ("The growth of independent PAC spending has been a direct and openly acknowledged response to the contribution limits in the FECA."); *id.* at 519-21 (Marshall, J., dissenting) (concluding that he was wrong to hold with *Buckley* majority on contribution/expenditure distinction because expenditures carry significant potential for corruption); SENATE REPORT, *supra* note 50, at 19 ("[T]o prohibit a $60,000 direct contribution to be used for a TV spot commercial but then to permit the would-be contributor to purchase the time himself, and place a commercial endorsing the candidate, would exalt constitutional form over substance."), *reprinted in* FEC, *supra* note 50, at 115; Nicholson, *supra* note 30, at 991 (if contributions may be restricted but expenditures

ceivably exact favors from elected officials who benefitted from such expenditures; so, however, could unincorporated associations and individuals. Unless corporate form itself increases the corrupting potential of an ideological corporation's expenditures, application of the *Buckley* rule would require finding that section 441b unconstitutionally burdens the right of association.[171]

The peculiar corrupting potential of corporate expenditures stems from the corporation's unique ability to aggregate wealth for political "war chests."[172] Assuming, however, that some ideological corporations may in fact accumulate substantial campaign "war chests," their ability to do so does not turn on their corporate form. Although sale of ownership shares provides a business corporation with a unique tool for accumulating capital, incorporation provides a purely nonprofit organization with no comparable financing advantage. Nonprofit organizations, corporate and noncorporate alike, depend primarily on membership dues to finance their activities.[173] Corporate form itself, therefore, does not increase an ideological corporation's potential for corrupting candidates. Furthermore, not all ideological corporations accumulate or spend corporate funds to influence elections.[174] Consequently, to the ex-

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may not, candidates will come to rely on large expenditures, increasing their corrupting potential).

171 *See supra* note 159.

172 *NRWC*, 459 U.S. at 207-08. In addition, a commercial corporation's political expenditures may appear particularly suspect because all of its expenditures are prima facie aimed at economic returns. Nicholson, *supra* note 30, at 991; *see* Baker, *supra* note 8, at 653-54 (market and profit-maximization dictate contents of corporation's political expression). In contrast, a nonprofit ideological corporation's political expenditures suggest no comparable pecuniary motive. Furthermore, an ideological corporation's expenditures would appear no more suspect than equivalent expenditures by an unincorporated ideological association.

The *NRWC* Court recognized that the potential size of corporations creates a special danger, noting that "[w]hile § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation." 459 U.S. at 210. Such deference to a legislative judgment may be appropriate for the solicitation of contributions or where the only first amendment right implicated is the right to hear. However, such regulation is clearly overbroad when applied to direct political expression implicating the freedom of association. In concluding that the statute challenged in *NCPAC* was hopelessly overbroad, the Court remarked that "[w]e are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." 470 U.S. at 501.

173 *See* H. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS § 45, at 90 (4th ed. 1980). Nonprofit membership organizations incorporate for reasons other than raising capital. *See id.* § 7, at 31 (advantages of corporate form include continuity of existence, limited liability, and more precise governing law than is available for unincorporated associations).

174 The Internal Revenue Code provides strong incentives for a nonprofit ideological corporation to refrain from political activity. I.R.C. § 501(c)(3) (1982) exempts from taxation "[c]orporations . . . organized and operated exclusively for . . . educational

tent that the corporate form's unique potential for amassing wealth justifies section 441b, the statute is overbroad and lacks the precision demanded by the right of association's protection of direct political expression.[175] In particular, MCFL's corporate form is irrelevant, and the *Buckley* rule prohibiting restrictions on independent expenditures should extend to the MCFL expenditures.[176] Even a generous expenditure limit, as opposed to section 441b's flat prohibition, would fail because an ideological corporation's large expenditures deserve as much first amendment protection as small ones.[177] More fundamentally, concentration of the resources of many individuals is the very basis for right of association protection.[178] Only a statute requiring specific proof of corruption would prove sufficiently precise.[179]

In sum, of the three governmental interests supporting section 441b's prohibition, only the concern for preventing corruption has any bearing on an ideological corporation's candidate election expenditures. The statute, however, proscribes both improper and innocent expenditures. It thus fails to provide narrowly tailored means and is therefore unconstitutional as applied.

B. Commercial Corporations

1. *First Amendment Protection*

The right to hear provides the sole first amendment protection for a commercial corporation's speech[180] and therefore defines the

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purposes," but only if they do not substantially "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Education is broadly defined to include instruction to the general public as well as to individuals. *See* Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (as amended in 1976); B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS § 7.3 (4th ed. 1983); *cf. id.* § 7.5 (on distinction between education and propaganda), §§ 14.3-.4 (distinguishing between educational or political activities and treatment of activist organizations). Similarly, but to a lesser degree, the Code discourages "social welfare" organizations, I.R.C. § 501(c)(4) (1982), from engaging in political activities. *See* B. HOPKINS, *supra*, §§ 15.4, 16.4.

175 *See NCPAC*, 470 U.S. at 501 (even if expenditures by large PACs pose danger of corruption, a prohibition extending to all PACs regardless of size is unconstitutionally overbroad); *In re* Primus, 436 U.S. 412, 434-38 (1978) (finding that right of association protects against imprecise prophylactic regnlation).

176 *See supra* note 159.

177 Indeed, the MCFL expenditure *was* a small one. The MCFL newsletters listed the abortion-related positions of nearly 500 candidates at a total cost of under $10,000, for an average expenditure of approximately $20 per candidate. *MCFL*, 589 F. Supp. at 649. Segregating the relative space allotted federal and state candidates, the district court attributed $4,000 of the cost of the newsletters to 50 federal candidates, an average expenditure of $80 per candidate. *Id.* at 650.

178 *See supra* notes 26 & 66.

179 *See supra* note 157.

180 *See supra* notes 14 & 92 and accompanying text; Nicholson, *supra* note 30, at 961

limits of constitutional protection for a commercial corporation's political expression. However, the degree to which the right to hear protects political expression remains uncertain.[181] In the area of commercial speech, upon which the *Bellotti* majority relied heavily to support its right to hear analysis, the right to hear provides only qualified protection.[182] The Court has never indicated whether these qualifications on the protection afforded commercial speech also apply to a commercial corporation's political speech. Nevertheless, because the right to hear protects expression in the interests of listeners and not speakers, it is necessarily subject to qualifications inapplicable to the rights of speech and association. The right to hear protects a commercial corporation's political expression only to the extent that it furthers the listener's access to full information and competing views.[183]

This listener orientation limits the right to hear in three ways. First, speech that drowns out competing views receives no protection because it reduces the listener's access to information. Second, the right to hear does not protect expression that attempts to persuade without serving any informational purpose. Third, because the protection extends to listeners rather than to the speaker, the right to hear does not bar regulating the manner of expression so long as content is unaffected. These qualifications affect the scope of the right to hear in the first instance; they should not be considered mere "compelling interests" to be balanced against the first amendment protection.

As to the first limitation, the *Bellotti* Court declined to consider, absent hard evidence, whether the possibility that corporate advocacy might "drown out other points of view" justified prohibiting expenditures by commercial corporations.[184] The Court treated this concern as a governmental interest to be balanced against protected expression.[185] If, however, commercial corporate political expression does in fact drown out other voices, it does not serve the interests that the right to hear seeks to protect and therefore merits no protection in the first place.[186]

("Because expression by commercial corporations cannot properly be viewed as either the self-expression of shareholders or of corporate management, its first amendment protection should derive solely from the first amendment interests of hearers."). Because the right to hear applies to political expression regardless of its source, it also reinforces the guarantees provided by the rights of speech and association. *See supra* notes 34-35 and accompanying text.

181 *See supra* notes 39-43 and accompanying text.

182 *See supra* notes 41-43 and accompanying text.

183 *See supra* notes 37-38 and accompanying text.

184 *Bellotti*, 435 U.S. at 789; *see supra* text accompanying notes 101-04.

185 *See Bellotti*, 435 U.S. at 786-89.

186 *See* Baldwin & Karpay, *supra* note 33, at 225-31 (corporate speech receives pro-

The second limitation on the right to hear—that the right to hear protects only expression that predominantly informs[187]—relates closely to the first. There is a thin line between informing and persuading. Frequently, full information is itself persuasive. But in political campaigns, proponents often cross that line when they advertise not information but images.[188] The *Buckley* Court, in holding that Congress could not limit independent expenditures in support of a candidate, stated that the constitutional right to " ' "speak one's mind . . . on all public institutions" ' [protects] ' "vigorous advocacy" ' no less than ' "abstract discussion." ' "[189] Nonetheless, the

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tection only to the extent that "it contributes to the diversity of views received by the listening public"); Miller, *supra* note 92, at 37-38 (corporate political expenditures are inconsistent with "robust debate in a marketplace of ideas" because "the informing function [of the first amendment] is based on the assumption that those who speak or would speak are roughly equal in lung power"); Wright, *supra* note 4, at 636 ("[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."). This reasoning supports *Buckley*'s rejection of the argument "that government may restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49; *see supra* notes 81-82 and accompanying text.

A plurality of the Court recently reaffirmed *Buckley*'s language in Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 106 S. Ct. 903, 911 (1986). The plurality concluded that a utility company cannot be compelled to provide space in its billing envelopes for statements by a utility consumer group. This case, however, is distinguishable from simple restraints on corporate expression because the challenged rule represented an extreme example of a content-based restriction—it only granted access to Pacific Gas's billing envelopes to an opponent of its positions. Furthermore, the restriction required that Pacific Gas affirmatively assist its opponents. Interestingly, the *Pacific Gas* plurality relied heavily, *id.* at 908-13, on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which the Court struck down a Florida statute granting candidates a right to reply to deprecatory newspaper editorials. The *Tornillo* result reflected the Court's conclusion that the statute would constrain newspaper editorializing and therefore dampen public debate and limit the variety of views expressed. *Tornillo*, 418 U.S. at 257-58. This same reasoning would support attempts to prevent the domination of public debate by a few powerful speakers.

187 *See* Farber, *Commercial Speech and First Amendment Theory*, 74 NW. L. REV. 372, 383 (1979) ("There may . . . be an argument for denying first amendment protection to certain types of commercial speech. Advertisements frequently contain little information and instead are intended to create irrational product preferences.").

188 *See* HOUSE REPORT, *supra* note 50, at 3 ("The electorate is entitled to base its judgment on a straightforward presentation of a candidate's qualifications for public office . . . rather than on a sophisticated advertising program which is encouraged by the infusion of vast amounts of money."), *reprinted in* FEC, *supra* note 50, at 637; Cox, *supra* note 151, at 70 (predicting that, as result of *Bellotti* and *Buckley*, "the skill with which the charismatic candidate is packaged and sold [will] become more and more important, and ideas and reasons [will] become less and less effective").

189 *Buckley*, 424 U.S. at 48 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Bridges v. California, 314 U.S. 252, 270 (1941) and NAACP v. Button, 371 U.S. 415, 429 (1963))); *see also id.* at 19-21 (contrasting contributions and expenditures as means of conveying basis and intensity of speaker's commitment); Cohen v. California, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution, while solicitous of the coguitive content of individual speech, bas little or no regard for [its] emotive function . . . .").

right to convey the intensity of one's commitment through unlimited expenditures, although essential to freedom of personal expression, does not serve the listener's interests.

The third limitation on the right to hear is problematic, but particularly relevant to the federal statutory scheme. Because the right to hear only protects listeners' interests, it does not necessarily protect the speaker's preferred method of speech or, more important, of financing that speech.[190] Thus, Congress should be able to limit a commercial corporation's channels of political expression as long as the process does not impair the expression's effectiveness, a function of both content and volume.[191] For example, section 441b(b)'s provision for the establishment of "a separate segregated fund to be utilized for political purposes"[192] allows a commercial corporation to legally support federal candidates. Recipients of corporate political communications are unlikely to know or care about financing technicalities. Therefore, unless the channeling of commercial corporate expression through such funds significantly changes the expression's message or volume, section 441b(b) does not impair the right to hear.[193]

The three theoretical limitations on the right to hear, although difficult to apply in specific cases,[194] suggest that much political ex-

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190 Nicholson, *supra* note 30, at 953-57.

191 *Id.* The equivalence of expression through alternative channels poses a difficult empirical question. *See infra* note 193. Furthermore, the Court has refused to embrace this type of argument when presented in terms of a time, place, or manner restriction. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541 n.10 (1980) ("[W]e have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."). Professor Nicholson considers *Consolidated Edison* anomalous in light of "the numerous cases upholding viewpoint-neutral subject matter restrictions." Nicholson, *supra* note 30, at 973. The *Consolidated Edison* dictum, in any event, is inconsistent with an approach to the right to hear that looks solely to listeners' interests.

192 2 U.S.C. § 441b(b)(2)(C) (1982); *see supra* note 124.

193 The FEC made a similar argument in *MCFL*, and the First Circuit rejected it. 769 F.2d at 22. The court, however, never clearly identified the source of the first amendment protection accorded to MCFL's expenditures. This "alternative means" qualification does not apply to the right of association, which derives from the individual's right of self-expression. Because MCFL's newsletters implicated the right of association, the First Circuit reached the correct result.

Funneling speech through PACs probably does not change its content because PACs are typically controlled by top corporate or union management. Nicholson, *supra* note 30, at 954. The segregated fund mechanisms may, however, affect the volume of speech. These funds are subject to reporting, disclosure, and solicitation requirements, 2 U.S.C. §§ 432-434 (1982), that would not apply if corporations had an absolute speech right. Professor Nicholson has argued that the tremendous growth in the size and number of PACs since their statutory authorization in 1971 supports the view that constraints on PACs have had an insignificant effect on PAC use. She speculated further that "[i]t seems unlikely that the huge volume of funds generated by PACs today would be exceeded by direct corporate and union giving." Nicholson, *supra* note 30, at 955-56.

194 All three limitations suggest proof problems. Consider, for example, the *Bellotti*

pression by commercial corporations merits no first amendment protection. Yet the right to hear is ubiquitous: it prima facie attaches to every expression regardless of the source. This ubiquity magnifies the potential for overprotection.

The Court apparently requires a showing of a compelling governmental interest to sustain any restraint on political expression.[195] However, because of the possibility of overprotection, only a more lenient review of restraints on the right to hear can adequately account for the interests of listeners in *limiting* expression that either does not contribute to or works against their access to full information and competing views.[196] Therefore, when the right to hear is the only first amendment interest at stake, the Court should grant legislatures greater flexibility in fashioning means of protecting compelling interests. This kind of deference would permit Congress to address evils not susceptible to precise regulation, including campaign expenditures.[197]

Moreover, although the Court has long applied strict scrutiny to restraints on the right of association,[198] cases invoking the right to hear exhibit considerable tolerance toward prophylactic measures, particularly in the commercial speech area. For example, in *Ohralik v. Ohio State Bar Association,*[199] the Court rejected the argument that the first amendment interest in the free flow of information required "nothing less than actual proved harm" to justify disciplining an attorney for in-person solicitation of clients.[200] Instead, the Court sustained the challenged rule as a permissible prophylactic measure because of the difficulty of enforcing a rule requiring specific evidence of injury.[201] The Court has not yet adopted this approach for political expression, but neither has it granted corporations first amendment rights equivalent to those of

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Court's rejection of the argument, for lack of evidence, that Massachusetts could restrict corporate expression in order to protect against the drowning out of other voices. *See supra* notes 101-04 & 164 and accompanying text. Moreover, it would be difficult to prove the informational effectiveness of a particular corporate expression.

195 *See supra* notes 28 & 98 and accompanying text.

196 *See* Baldwin & Karpay, *supra* note 33, at 218-19 (in resolving "conflict between corporate and natural persons' . . . free speech rights," Court should pursue "goal of maximizing the well-being of natural citizens").

197 The *Buckley* rule that expenditures constitute speech has frustrated campaigu finance reform. The *Buckley* Court itself recoguized that, where corruption is the evil feared, it is "difficult to isolate suspect contributions." 424 U.S. at 30; *see supra* text accompanying note 76.

198 *See supra* notes 28 & 156-57 and accompanying text.

199 436 U.S. 447 (1978).

200 *Id.* at 464.

201 *Id.* at 466-68. The Supreme Court decided *Ohralik* on the same day as *In re* Primus, 436 U.S. 412 (1978), which rejected prophylactic regulation of legal solicitation that burdened an ACLU lawyer's right of political association. *Id.* at 434.

natural persons.[202]

2. *Governmental Interests*

The rationales that support section 441b—shareholder protection, voter confidence, and corruption prevention—all apply to a commercial corporation's candidate election expenditures. Of these, the Court has only recognized the corruption interest as "compelling." If the Court accepts intermediate scrutiny of legislative means, however, this interest alone could sustain the statute as applied to commercial corporations.

Section 441(b)'s first supporting rationale, shareholder protection, clearly applies to a commercial corporation's political expenditures. Such expenditures involve management use of shareholder assets to support candidates that shareholders might well oppose.[203] The *Bellotti* Court, however, substantially weakened this interest.[204] Furthermore, section 441b by its terms applies to small, closely held corporations where corporate political expenditures actually reflect the interests of the owners.[205] Such overinclusion would be intolerable under traditional first amendment overbreadth analysis.[206] The Court may choose to revive the shareholder protection interest.[207] Should it choose to do so, the Court could excuse this overinclusion if it found that, in light of the right to hear's diminished protection, the other governmental interests supporting the statute justified a degree of prophylactic regulation.

The second interest, "citizen participation,"[208] also poses problems. Although the *Bellotti* Court may have been generally receptive to an argument based on similar grounds,[209] it also ap-

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202 *See Bellotti,* 435 U.S. at 777 (explicitly reserving question of whether corporations have full measure of first amendment rights); *see also Pacific Gas,* 106 S. Ct. at 917 ("I do not mean to suggest that I would hold, contrary to our precedents, that the corporation's First Amendment rights are coextensive with those of individuals." (Marshall, J., concurring in judgment)).

203 *See supra* notes 160-61 and accompanying text.

204 *See supra* note 105 and accompanying text; *cf. supra* note 161 and accompanying text.

205 *See* O'Kelley, *supra* note 30, at 1369 (discussion of "corporation sole" in connection with shareholder interest overbreadth problem).

206 *See supra* notes 17, 28 & 156 and accompanying text.

207 The *NRWC* opinion may represent the beginning of such a revival. *See supra* note 161.

208 *See supra* notes 57 & 164 and accompanying text.

209 *Bellotti,* 435 U.S. at 789 (concern that undue influence of corporate expenditures might "destroy the confidence of the people in the democratic process and the integrity of government"); *see supra* notes 101-04 and accompanying text; *cf.* Cox, *supra* note 151, at 67, 70 ("[I]ncreasing the relative influence of organizations with large financial resources and shrinking the attention paid to truly individual voices means a net loss of human freedom."). The *Bellotti* concern resembles the "equalizing" argument flatly rejected in *Buckley. See* Nicholson, *supra* note 30, at 995-96 (drawing connection between

peared to require a high but uncertain quantum of empirical evidence to back the claim.[210] Evidence sufficient to convince the Court that corporate campaign expenditures are undermining our system of self-government may never exist.

Third, section 441b reflects Congress's concern for the corrupting potential of corporate expenditures.[211] The Court clearly accepts the importance of this interest[212] and has hinted that it would find the interest sufficient to uphold section 441b.[213] Furthermore, *Bellotti* does not compel otherwise.[214] The Court could sustain the federal statute as a reasonable prophylactic regnlation to prevent actual and apparent political corruption.[215] However, the Court would have to limit the prohibition to commercial corporations or to expenditures protected solely by the right to hear.

CONCLUSION

The Supreme Court should affirm the First Circuit's holding that section 441b(a) unconstitutionally burdens MCFL's first amendment rights, basing its decision on the right of association. Corporate form in no way lessens MCFL's first amendment protection; nor do any of the governmental interests underlying section 441b support its application to MCFL's expenditures. Sustaining section 441b as a prophylactic measure would conflict with the degree of precision of regulation required by the right of association.

By deciding this case on the basis of MCFL's ideological purpose, the Court may sustain prohibitions of candidate election ex-

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voter confidence theory of *Bellotti* and equalization theory of *Buckley*); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 598-99 (1980) (*Bellotti* "drowning out" reasoning was *Buckley* excessive power argument recast); *supra* notes 81-82 & 186 and accompanying text.

210 *Bellotti*, 435 U.S. at 789; *see supra* note 164.

211 *See supra* notes 55, 167 & 172 and accompanying text.

212 *See supra* note 168 and accompanying text.

213 *See NCPAC*, 470 U.S. at 500-01; *Bellotti*, 435 U.S. at 788 n.26; *supra* text accompanying note 107.

214 *See supra* notes 99-100, 106-08 and accompanying text.

215 One commentator calls for strict scrutiny of legislative means in campaign finance cases and sets up the following argument as a straw man:

> Genuine corruption, of course, undermines the integrity of any government. Moreover, it is difficult to detect and difficult to define precisely in a statute. Therefore it arguably is impossible to prevent with narrowly drawn prohibitions. Thus, the argument would go, the Court can reasonably permit the legislature to treat the problem with broad prophylactic rules and need not impose any requirement that the government demonstrate either the rules' necessity or their efficacy.

BeVier, *supra* note 151, at 1088 (footnotes omitted). The commentator does not, however, distinguish between the kind of protection afforded by the various first amendment rights. She focuses on speakers' rights and seems to question the independent existence of a right to hear. *See id.* at 1054 n.49.

penditures by commercial corporations. A commercial corporation's political expression implicates only the right to hear, which provides only limited first amendment protection. Because it is a qualified right, the Court should defer more readily to restrictions on expression protected solely by the right to hear. Furthermore, all of the governmental interests underlying section 441b apply, in varying degrees, to political expenditures by commercial corporations. In particular, the Court should defer to Congress's determination as expressed in section 441b of the need for prophylactic regulation to prevent corruption.

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