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THE CONSTITUTIONALITY OF THE FEDERAL RESTRICTIONS ON CORPORATE AND UNION CAMPAIGN CONTRIBUTIONS AND EXPENDITURES

Marlene Arnold Nicholson†

For many years legislators in the United States have been concerned about the role played by corporations and unions in the political process. As early as 1894, Elihu Root urged the enactment of legislation restricting corporate contributions. He argued that such legislation would prevent

the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature ... to vote for their protection and the advancement of their interests as against those of the public.

It strikes ... at a constantly growing evil in our political affairs, which has ... done more to shake the confidence of the plain people of small means in our political institutions, than any other practice which has ever obtained since the foundation of our government.1

In 1907, Congress prohibited corporations from contributing to federal candidates.2 In 1947, it extended this restriction on con-

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1 E. ROOT, ADDRESSES ON GOVERNMENT & CITIZENSHIP 143–44 (1916).


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
tributions to unions and added a prohibition against expenditures on behalf of candidates.\(^3\) These corporate and union restrictions were recodified as part of the Federal Election Campaign Act of 1971.\(^4\) Most states today also prohibit or in some way restrict corporate contributions to candidates for state offices, and several states similarly restrict unions.\(^5\) Although the Supreme Court has had the opportunity to rule on the constitutionality of the federal restrictions, it has avoided doing so by narrowly interpreting them.\(^6\) Several recent Supreme Court cases involving analogous questions, however, cast serious doubt upon the constitutionality of the statute.

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\(^3\) Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120b, § 304, 61 Stat. 136, 159 (current version at 2 U.S.C. § 441b (1976)). The present restriction states that "it is unlawful for any national bank, or any corporation . . . or any labor organization, to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. § 441b(a) (1976). The statute does permit "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." Id. § 441b(b)(2)(C). See text accompanying notes 34-37 infra.

A "labor organization" is defined as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 2 U.S.C. § 441b(b)(1) (1976). Throughout this Article, the terms "union" or "labor union" are used as synonyms for labor organizations covered under the Act.

\(^4\) Pub. L. No. 92-225, 86 Stat. 3 (1972); see notes 2-3 supra.


\(^6\) See Pipefitters Local 562 v. United States, 407 U.S. 385 (1972) (statute does not prohibit expenditures from separate segregated account funded by voluntary contributions); United States v. CIO, 335 U.S. 1061 (1948) (statute does not prevent internal union communications).

In United States v. UAW, 352 U.S. 567 (1957), the Court reversed a judgment that had dismissed an indictment against the union under the predecessor statute of the Federal Election Campaign Act of 1971. In that case, the Court refused to "anticipate [the] constitutional questions," stating:

[O]nly an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision. . . . By remanding the case for trial it may well be that the Court will not be called upon to pass on the questions now raised. Id. at 591-92. Allegations that the Court indicated might "not survive the test of proof" concerned the voluntariness of the contributions by union members, whether the audience included only persons affiliated with the union, whether the activity included "active electioneering," and whether there was an "intent to affect the results." Id. at 592. Justice Douglas, who was joined in dissent by Chief Justice Warren and Justice Black, would have
In *Buckley v. Valeo*, the Supreme Court considered the constitutionality of the 1974 amendments to the Federal Election Campaign Act—the congressional response to Watergate. Plaintiffs claimed that the limitations upon contributions to and expenditures for federal candidates violated their constitutionally protected freedoms of speech and association. The defendants asserted that limitations upon the amounts of contributions and expenditures should not be subjected to first amend-

invalidated the statute as an overbroad attempt to protect the views of dissenting union members by silencing the majority.


Amounts that candidates could expend from personal or family funds were limited to $50,000 for presidential candidates, $35,000 for senatorial candidates, and $25,000 for House candidates. 18 U.S.C. § 608(a)(1) (Supp. IV 1974) (repealed 1976). Overall presidential campaign expenditures were limited to $10,000,000 in the primaries and $20,000,000 in the general election. 18 U.S.C. §§ 608(c)(1)(A)-(B) (Supp. IV 1974) (revised in 2 U.S.C. § 441a(b) (1976)). Limitations on expenditures in Senate elections were based upon the voting-age population of the state, with minimum amounts for states with small populations. 18 U.S.C. §§ 608(c)(1)(C)-(D) (Supp. IV 1974) (repealed 1976). Candidates for the House were limited to expenditures of $70,000 in both the primary and general election, with the Senate ceilings applying to states with only one representative. 18 U.S.C. §§ 608(c)(1)(C)-(E) (Supp. IV 1974) (repealed 1976).

Public subsidies for presidential candidates in the primaries were provided on the basis of matching grants. I.R.C. §§ 9033(b)(3)-(4), 9034(a). In the general election, "major" parties were entitled to approximately $20,000,000 each. See 18 U.S.C. § 608(c)(1) (Supp. IV 1974). "Minor" parties (defined as those polling at least 5% in the last presidential election) were entitled to a smaller amount based upon the ratio of their votes to the average of the votes obtained by the major party candidates. See I.R.C. §§ 9002(7), 9004(a)(2)(B). The Federal Election Campaign Act Amendments of 1974 also provided for extensive disclosure of contributions and expenditures. 2 U.S.C. §§ 431-437b (Supp. IV 1974) (modified 1976). In 1980, approximately $29,400,000 has been allocated for each major party candidate. 7 CAMPAIGN PRAC. REP., July 7, 1980, at 1-2.

ment strict scrutiny because the giving or spending of money was not "pure speech." A majority of the justices rejected that assertion; they equated money with speech, purporting to apply strict scrutiny to the limitations. The governmental interest in equalizing political influence in the electoral process had been asserted in previous cases as a rationale supporting both the bans upon corporate and union political spending and the limitations placed upon contributions and expenditures by individuals and other groups. That rationale, however, was rejected in Buckley as a basis upon which to uphold the limitations in the 1974 amendments. Preventing the "reality and appearance" of corruption and undue influence was the only rationale accepted as an appropriate governmental interest; the Court upheld contribution limitations as necessary to attain that goal. The Court concluded, however, that independent expenditures on behalf of candidates, unlike contributions, did not create sufficient danger of corruption to justify limitation. The Court may make a similar distinction in a case challenging the corporate and union restrictions by upholding contribution restrictions and invalidating those upon independent expenditures. Thus, although their contributions may remain restricted, corporations and unions, like other groups and individuals, would be entitled to spend unlimited sums to express support for or opposition to a federal candidate.

First National Bank v. Bellotti, decided in 1978, casts further doubt upon the constitutionality of the federal restrictions on corporate and union campaign spending. In a five-to-four decision,

10 These limitations were intended to prevent the disproportionate impact upon the electorate that results from huge corporate and union contributions. See United States v. CIO, 335 U.S. 106, 134, 142-43 (1947) (concurring opinion, Rutledge, J.). See also United States v. UAW, 352 U.S. 567, 570-83 (1956).
11 See Buckley v. Valeo, 519 F.2d 817, 841 (D.C. Cir. 1975) (upholding the limitations); See also Nicholson, Campaign Financing and Equal Protection, 26 STAN. L. REV. 815 (1974).
12 424 U.S. at 48-49. See text accompanying notes 208-11 infra.
13 Id. at 25-29. See text accompanying notes 186-88 infra. The Court used the terms "undue influence" and "corruption" interchangeably but never defined them.
14 Id. at 44-48. See text accompanying notes 193-95 infra.
15 The limitations that apply to individuals and groups other than corporations and unions, see note 8 supra, define contribution as including expenditures coordinated with the campaign. 2 U.S.C. § 441a(7)(B)(ii) (1976). Presumably, such expenditures can be constitutionally limited due to the increased danger of corruption arising from the act of coordination.
the Court held that the Massachusetts ban on corporate contributions and expenditures supporting or opposing referenda questions "not materially affecting" the corporation violated the first amendment.\textsuperscript{17} Justice Powell, writing for the majority, did not accept the argument that the corporate identity of the speaker should prevent application of the strict scrutiny standard to the restrictions.\textsuperscript{18} The majority also held that the equalization of political influence was not an appropriate governmental purpose for this statute,\textsuperscript{19} thus demonstrating that not even the corporate identity of the speaker could convert this rationale into a compelling government interest. Finally, the Court implied in dicta that protecting the political views of minority shareholders was not an important government interest,\textsuperscript{20} thus casting doubt upon another rationale for upholding corporate campaign finance restrictions. In 1977, the Court, in \textit{Abood v. Detroit Board of Education},\textsuperscript{21} recognized a constitutional right protecting the political views of dissenting public employees who were compelled to contribute fees to a union. Based upon the holding in \textit{Abood}, the Court could sustain the restrictions on union campaign contributions and expenditures. Thus, the possibility exists that the Court may invalidate corporate restrictions but uphold those applied to unions, thereby upsetting the balance struck by Congress between these two politically powerful groups.

One recent case has created another obstacle for upholding the federal restrictions. In \textit{ Consolidated Edison Co. v. Public Service Commission},\textsuperscript{22} decided in June of 1980, the Court went further than it did in \textit{Bellotti} by protecting corporate expression from restrictions that were not complete bans on speech. Although the New York Public Service Commission's regulation prevented

\footnotesize{\textsuperscript{17} 435 U.S. at 776. The Massachusetts statute further provided:
No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.
MASS. ANN. LAWS ch. 55, § 8 (Michie/Law. Co-op 1978). In \textit{Bellotti} appellants challenging the restriction wanted to spend corporate funds to oppose a referendum authorizing a graduated personal income tax.
\textsuperscript{18} 435 U.S. at 786.
\textsuperscript{19} Id. at 789-92. See text accompanying notes 212-22 infra.
\textsuperscript{20} 435 U.S. at 794 n.34. See text accompanying notes 253-56 infra.

The \textit{Abood} Court held that public employees who were required to pay agency shop fees to a union to keep their jobs had a constitutional right to a rebate of funds spent by the union for political purposes. An agency fee is a service charge paid by nonunion members equivalent to dues paid by union members.
\textsuperscript{22} 100 S. Ct. 2326 (1980).}
utilities from discussing "controversial issues of public policy" with
inserts placed in billing envelopes, they remained free to discuss
these issues in any other manner. The federal restrictions upon
corporate and union contributions and expenditures similarly do
not ban speech completely but allow political expression through
corporate and union committees that collect funds voluntarily
provided by shareholders, employees and members.\footnote{23} The holding in \textit{Consolidated} makes it less likely that the federal restrictions
will be upheld because of their incomplete nature. In both \textit{Bellotti}
and \textit{Consolidated}, the Court stressed that because the restrictions in
question involved the subject matter of expression, strict scrutiny
analysis was necessary.\footnote{24} Because the federal restrictions also are
based on the subject matter of the corporate and union expres-
sion, the statute probably will be subjected to the very difficult
obstacle of first amendment strict scrutiny review.

A constitutional challenge could also be based on first
amendment overbreadth because the governmental interests al-
legedly served could be achieved by narrower means.\footnote{25} An equal
protection challenge based upon the overinclusiveness and under-
inclusiveness of the statutory burden is also likely.\footnote{26} Although
the statute may not be overinclusive for achieving the govern-
ment's purposes, the statute may be invalidated because of its un-
derinclusive burden on speakers and subject matter. \textit{Carey v. Brown},\footnote{27} decided on the same day as \textit{Consolidated}, and \textit{Police De-
partment of Chicago v. Mosley},\footnote{28} support this thesis. In those cases
the Court invalidated bans on picketing that excluded some forms
of labor picketing.

Not all indicators, however, point to invalidating the federal
restrictions on corporate and union political spending. In \textit{Bellotti}
the Court stated that "our consideration of a corporation's right to
speak on issues of general public interest implies no comparable

\footnote{23} See text accompanying notes 93-96 infra.
\footnote{24} See \textit{Consolidated}, 100 S. Ct. at 2331; \textit{Bellotti}, 435 U.S. at 784-85.
\footnote{26} Another issue, not discussed in this Article, is whether the federal restrictions are
\footnote{27} The equal protection requirement applicable to the federal government is implicit in
the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497, 499
(1954).
\footnote{28} 100 S. Ct. 2286 (1980).
\footnote{28} 408 U.S. 92 (1971).
right in the quite different context of participation in a political campaign for election to public office." The Bellotti opinion suggests that Congress might be able to show that independent expenditures by corporations in campaigns for public office pose a serious danger of corruption. Because the Court in Buckley rejected the corruption rationale in the context of limitations on independent expenditures, the Court clearly implied that corporate political spending is more corrupting than similar activity by individuals and other organizations. Furthermore, despite frequent assertions to the contrary, a majority of the justices in Bellotti has also spawned litigation regarding state restrictions on corporate political contributions to candidates. Kentucky's ban on corporate contributions to candidates was upheld unconstitutional as applied to a bar association that published the results of a judicial qualification poll. Kentucky Registry of Election Fin. v. Louisville Bar Ass'n, 579 S.W.2d 622, 626-28 (Ky. App. 1978).


Two cases invalidating state limitations on contributions in referendum campaigns specifically distinguished in dicta candidate from referenda elections, commenting that there is a stronger first amendment interest in referenda as opposed to candidate elections. See Let's Help Fla. v. Smathers, 453 F. Supp. 1003, 1011 (N.D. Fla. 1978); Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 99 Cal. App. 3d 736, 160 Cal. Rptr. 448, 453 (1979). One court explained that "[t]here is a tighter nexus between a contributor and a one-issue organization, and a greater likelihood that the contribution will be used as the contributor wishes than is the case with the attenuated relationship between a contributor and a political candidate who is obliged to take a position on more than one issue." Berkeley, 99 Cal. App. 3d at 745, 160 Cal. Rptr. at 453.

As of September 1980, all post-Bellotti decisions have upheld the constitutionality of various provisions in the federal restrictions. In Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. 1102, 1110 (1978), the court interpreted the restrictions as requiring an affirmative act to join a labor PAC and rejected an allegation that such an interpretation violated the associational rights of a majority of the union members. See notes 237-45 infra. Restrictions on persons or groups who may be solicited by corporate PACs was upheld in Federal Election Comm'n v. National Right to Work Comm., No. 77-2175 (D.D.C. filed Apr. 24, 1980). This issue is also being addressed in Bread Political Action Comm. v. Federal Election Comm'n, No. 80-1146 (7th Cir. 1980). For a summary of cases challenging provisions of the federal campaign finance laws, see 7 CAMPAIGN PRAC. REP., July 7, 1980, at 4-5.

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lotti did not hold that corporations have first amendment rights. The focus throughout that opinion was upon the interests of the hearer. The Court also hinted that if corporations had actually dominated the state electoral process, a different analysis would have been made. Moreover, the federal statute differs from the Massachusetts ban in one very important aspect. The federal statute allows unlimited political expenditures and limited contributions from funds collected voluntarily from employees and shareholders; the Massachusetts statute did not provide any alternative means of corporate expression on referenda questions.

This Article analyzes the various arguments that support upholding the federal restrictions and the recent cases that either undermine or support these arguments.

I

THE PAC AND THE FIRST AMENDMENT RIGHTS OF HEARERS

Federal law allows corporations to use their treasury funds to organize, administer and, with some restrictions, solicit voluntary contributions to political action committees (PACs). The PACs may use these funds to make contributions to candidates, subject to certain regulations.

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32 435 U.S. at 789. See text accompanying notes 216-17 infra.

33 The statute challenged in Bellotti specifically prohibited the use of such committees: "[N]o political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose." Mass. Laws. Ann., ch. 55, § 8 (Michie/Law. Co-op 1978).

34 2 U.S.C. § 441b(b)(2)(C) (1976). The statute permits corporate committees to seek contributions only from their stockholders, executives, administrative personnel or the families of these individuals. Id. § 441b(b)(4)(A)(i). Union committees may solicit only from union members and their families. Id. § 441b(b)(4)(A)(ii). However, corporate committees are permitted to seek contributions from all other employees twice per year by mail. 2 U.S.C. § 441b(b)(4)(B) (Supp. III 1979). The same two-per-year limit on mail solicitations also applies to solicitation of stockholders, executives and administrative personnel by unions. Id. Contributions under $50 that may be solicited only by mail must be received by an independent third party; the contributions must be collected in a manner that prevents the corporation or union from determining "who makes a contribution of $50.00 or less ... and who does not make such a contribution." Id. Corporations without shareholders may solicit contributions from their members. 2 U.S.C. § 441b(b)(4)(D) (1976). Contributors may give only $5,000 to a PAC, 2 U.S.C. § 441a(a)(1)(C) (1976). This provision is being challenged in California Medical Ass'n v. Federal Election Comm'n, No. 79-442b (9th Cir. May 23, 1980), appeal docketed, No. 79-1952 (U.S. June 12, 1980).
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A PAC can also make unlimited "independent" expenditures on behalf of candidates. Corporate and union leaders generally determine the beneficiaries of the contributions and expenditures; contributors to the PACs ordinarily do not know which candidates will receive the PACs' funds at the time they contribute, and they are not consulted when allocation decisions are made.

The availability of the PAC as an alternative outlet for corporate and union expression must be factored into any discussion of the constitutionality of the restrictions. The role of these committees bolsters some arguments and undermines others supporting the constitutionality of the statute. Arguably, the protection afforded corporate speech in *Bellotti* and *Consolidated* was intended to vindicate the interests of hearers. Because the PAC device is an effective way of preserving those interests no first amendment violation can be found in the federal restrictions. There are, of course, substantial counter arguments that also will be examined.

A majority of the Court never has explicitly held that commercial, nonmedia corporations have first amendment rights. In *Bellotti*, the Court criticized the appellate court for "fram[ing] the principal question . . . as whether and to what extent corporations have First Amendment rights." Pointing out that "[t]he Constitution often protects interests broader than those of the party seeking their vindication," the Court asserted that the proper question was not "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons" but "whether [the statute] abridges expression that the First Amendment was meant to protect."

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35 2 U.S.C. § 441a(a)(2)(A) (1976). To qualify as a multicandidate committee, the group must receive contributions from more than 50 persons and, except for state political party committees, must contribute to five or more federal candidates. Id. §441a(a)(4). Groups not qualifying as multicandidate committees are subject to the $1,000 contribution limitation that applies to individuals. Id. § 441a(a)(1)(A).

36 In *Buckley*, the Court invalidated limitations on independent expenditures made on behalf of candidates for federal office. 424 U.S. at 51.


38 435 U.S. at 775-76.

39 Id. at 776.
opinion, the Court rephrased "[t]he question [as] whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." 40 The Court based its analysis in part upon recent "commercial speech" cases protecting commercial advertisements "because [they further] the societal interests in the 'free flow of commercial information.'" 41

If Bellotti may be fairly interpreted to protect corporate speech because of the interests of the hearers and not because of a constitutional right of the corporation, a case involving the federal statute could be distinguished from Bellotti because the interests of hearers are protected through the authorization of PAC expression. Under this view, so long as the PAC device permits corporate and union expression to reach the hearers, the federal statute would not violate the first amendment. It is possible, however, that PACs in some way alter corporate and union speech, and to the extent they do, the first amendment interests of hearers are affected. The content of political expression will probably not be altered if it is funneled through a PAC, however, because top corporate and union management generally control PAC contributions and expenditures.

In Buckley the Court purported to strictly scrutinize restrictions aimed at curbing not only the content but also the quantity of political expression. 42 It is unclear whether the federal restrictions now act as a restraint on the quantity of corporate and union expression. Because there is no contemporary experience with the legal use of union and corporate funds in federal elections other than through PACs, the level of current expenditures cannot be compared to the level that would be achieved without the restrictions. 43 Certainly, it is possible that without the PAC re-

40 Id. at 778.
42 424 U.S. at 18-23.
43 Unions have used PACs from the inception of the union contribution ban even though their validity was uncertain. The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 10 (1972), provided for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." This language was considered ambiguous and corporations were reluctant to set up PACs until the Federal Election Commission issued the Sun Oil advisory opinion, Federal Election Comm'n Advisory Op. 1975-23, 40 Fed. Reg. 56, 584 (1975), which clearly stated that general treasury funds could be used to establish and administer segregated funds for political solicitation. The Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, further delineated the proper scope of PAC activities. See generally, Comment, supra note 37, at 760-64.
quirement even more corporate and union money would be used for expression in political campaigns. It is clear, on the other hand, that since the specific authorization of PACs in the 1971 legislation, contributions and expenditures by these entities have reached vast proportions. Indeed, many commentators believe that this is an era of "PAC democracy." Special interest money in congressional campaigns has reached all-time highs. It seems unlikely that the huge volume of funds generated by PACs today would be exceeded by direct corporate and union giving. In 1978, Missouri repealed a statute that had banned corporate and union contributions except through a separate political committee, apparently upon the assumption that corporations would be reluctant to upset their stockholders by expending the amount of treasury funds now given through the political committees.

44 In the last four years the number of corporate PACs mushroomed from approximately 100 to 700. Wall St. J., Sept. 11, 1978, at 1, col. 6. Contributions from business and professional groups to congressional candidates increased from $2.5 million in 1974 to $7.1 million in 1976. N.Y. Times, Feb. 15, 1977, § 1, at 1, col. 4. One commentator predicts that by 1982, 1000 corporate PACs will spend an average of $50,000 each for political campaigns. Approximately 3700 businesses with assets over $1 billion are potential PAC sponsors. Antitrust & Trade Reg. Rep. (BNA), § AA, at 23 (July 17, 1980).

45 "...heading toward a new political system of PAC democracy ... with Congress representing the political action committees of America instead of its citizens." 5 Campaign Prac. Rep., Sept. 18, 1978, at 6. He has also claimed that "the PAC system paralyzes the political process .... Officials will wind up representing PACs, and the system will become tighter and tighter in terms of its capacity to build choices." Wall St. J., Sept. 11, 1978, at 19, col. 1.

46 Special interest group contributions have been estimated at $35 million in the 1978 congressional races. This includes contributions by corporate, labor, trade association and health groups. 6 Campaign Prac. Rep., May 28, 1979, at 8-9.

The number of business PACs has grown at a much faster rate than the number of labor PACs, probably because "all of the political committees set up by a single national or international union and/or its local unions ... are treated as a single ... committee." 11 C.F.R. § 110.3(a)(1)(ii)(B) (1980). See also 2 U.S.C. § 441a(a)(5) (1976). Fred Wertheimer explained that "[t]here are only so many international labor unions, but there are tens of thousands of corporations ...." Wall St. J., Sept. 11, 1978, at 1, col. 6. The PACs of corporate subsidiaries are also treated as part of the parent company's PAC, 11 C.F.R. § 110.3(a)(1)(ii)(A) (1980), thus reducing slightly the disparity between the numbers of union and corporate PACs.

47 See 1978 Mo. Laws, P. 416, § A (repealing old statute and enacting new law codified at Mo. Ann. Stat. § 130.029 (Vernon 1980)). Legislative sources explained that [t]he rationale behind the change ... was organized labor's inability to keep up with corporations in raising funds through political action committees (PAC's). Labor is gambling ... that use of its treasury money to fund in-kind contributions of workers, pamphlets and telephones for registration and get-out-the-vote drives will exceed the willingness of corporations to use their assets to fund political candidates—not all of whom will be popular with stockholders. Corporations will continue to rely on PAC's, the theory goes, but their monetary impact will be diluted by the union's treasury-financed, in-kind support.

though forcing corporations and unions to use PACs might result in less expression, contemporary experience suggests that this is unlikely. In the rare instance where a corporation or union would be likely to expend treasury funds in an amount not available through a PAC, the high probability of gaining undue influence over an officeholder would justify a de facto quantity restriction.48

In the Bellotti case, Massachusetts made an argument similar to that outlined above that was apparently rejected by the majority without comment. Massachusetts argued that the views of persons affiliated with a corporation would still enter the "marketplace of ideas" despite the bans.49 This argument was reflected in the dissenting opinions. Justice Rehnquist commented:

The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity.50

Justice White observed:

These individuals would remain perfectly free to communicate any ideas which could be conveyed by means of the corporate form. Indeed, such individuals could even form associations for the very purpose of promoting political or ideological causes.51

Justice White's conclusion that it would be "unlikely that any significant communication would be lost by such a prohibition" is not entirely convincing. It is doubtful that individual shareholders or officers are able to spend enough money to influence public opinion. Forming an organization through which they might pool their resources for greater impact takes time and money. Thus, some reduction in the overall quantity of corporate views in the marketplace probably did occur in Massachusetts. On the other hand, because corporate or union funds, staff and other resources can be used to organize and administer a PAC, the federal scheme may actually facilitate such expression.

There are two serious obstacles to the Court's acceptance of this analysis in a challenge to the federal restrictions. First, it is unclear whether Bellotti and Consolidated can be fairly read to pro-

48 See text accompanying notes 86-89 infra.
50 435 U.S. at 828.
51 Id. at 807 (dissenting opinion) (footnote omitted).
tect only the first amendment interests of hearers. The second obstacle, discussed in the next section, is that the federal restrictions place a burden upon the subject matter of expression.

Justices Powell, Stewart, Blackmun and Stevens did not clearly state in their majority opinion in Bellotti whether corporations are entitled to the same first amendment protection as individuals. Chief Justice Burger, who joined in the majority opinion, wrote a separate concurring opinion in which he clearly asserted that corporate speakers should have the same first amendment rights as individuals.\(^52\) Despite its emphasis on the rights of the audience and its failure to assert specifically that nonmedia commercial corporations have first amendment rights, the majority's opinion could be interpreted as consistent with Burger's view. It clearly rejects the argument of dissenting Justices White and Rehnquist that corporations have only those rights granted them by the states,\(^53\) and also rejects the appellate court's assertion that "a corporation's First Amendment rights must derive from its property rights under the Fourteenth [Amendment]."\(^54\) The Court noted that "[i]n cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved."\(^55\)

Nonetheless, the majority's failure to take the next step and explicitly hold that corporations have first amendment rights is perhaps more significant. Responding to the assertion that prior cases granting first amendment protection to corporations involved media or other corporations "through which individuals express themselves,"\(^56\) the majority again stressed the interests of hearers. They stated that "the press does not have a monopoly on either the First Amendment or the ability to enlighten."\(^57\) The majority also criticized the appellate court's view that "the institutional press is entitled to greater constitutional protection than [nonmedia corporations]" on the ground that it was not "responsive to the informational purpose of the First Amendment."\(^58\)

\(^{52}\) Id. at 796-802.

\(^{53}\) Id. at 778. See the dissenting opinions of Justices White, id. at 809-10, and Rehnquist, id. at 823-24. See also Brief for Appellees at 4, 23-25.

\(^{54}\) 435 U.S. at 778 (footnote omitted).

\(^{55}\) Id. at 779 n.14.

\(^{56}\) Id. at 781.

\(^{57}\) Id. at 782 (footnote omitted).

\(^{58}\) Id. at 783 n.18. The majority suggested that on certain issues, voters may wish to hear the views of nonmedia corporations because of their particular expertise.
The Court's response to another of Justice White's arguments buttresses the conclusion that it focused primarily on the interests of hearers. Justice White argued that corporate expression deserves less protection because "the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech." In response, the majority did not purport to emphasize any interest in corporate self-expression. Instead, it again noted the informational role of the first amendment. "[T]he 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. Chief Justice Burger's Concurring Opinion in Bellotti

Chief Justice Burger was the only member of the Bellotti Court who explicitly argued that the Constitution gives first amendment rights not only to media corporations but also to any other corporate speaker. Although he joined the majority opinion, he wrote a separate concurrence "to raise some questions likely to arise in this area in the future." His concern was that granting less than full first amendment protection to nonmedia corporations would eventually endanger the first amendment rights of media corporations. He asserted that to the extent that there are rationales for restricting the political speech of nonmedia corporations, these same rationales would support restrictions upon media corporations. He also contended that it is simply too difficult "as a matter of fact" to distinguish media from nonmedia corporations—a difficulty due, in part, to the diversification of media corporations into nonmedia businesses and vice-versa.

1. Distinguishing media from nonmedia corporations. The Chief Justice's second criticism of the distinction between media and

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59 Id. at 804-05 (dissenting opinion).
60 Id. at 783.
61 Id. at 795.
62 Id. at 796-97.
63 Id. The majority opinion did note a similar concern:
   The suggestion in Mr. Justice White's dissent ... that the First Amendment affords less protection to ideas that are not the product of "individual choice" would seem to apply to newspaper editorials and every other form of speech created under the auspices of a corporate body. No decision of this Court lends support to such a restrictive notion.

Id. at 783 n.19.
nonmedia corporations for first amendment purposes was grounded in the practical difficulty of clearly delineating these two groups. His concern is easily illustrated by several examples. Is an oil company a media corporation if it buys advertising space to comment on social issues? Does it become a media corporation if it acquires a newspaper? Is a newspaper publishing company still a media corporation after it purchases a pulp mill? A solution may be to focus on the distinction between media activities and other activities. A diversified corporation, partially involved in the media, would be entitled to full first amendment protection for its media-related operations. Under this approach, a newspaper would not lose its first amendment rights because it purchased a pulp mill, but it could not extend these rights to its pulp mill operations. An oil company that purchased a newspaper would not gain first amendment rights for its oil operations, but it would be able to assert these first amendment rights in the operation of its newspaper.

The problem is not, to paraphrase Chief Justice Burger, the impracticability of making a distinction, but rather the difficulty of finding a theory that will justify a distinction. A theory may be devised by stressing the first amendment goals of "self-expression, self-realization and self-fulfillment" that all the Justices in Bellotti recognized, at least implicitly, as irrelevant to corporate speech. In his dissent, Justice White made a similar argument for such a distinction to support his view favoring the validation of the corporate bans in Bellotti. Although rejected by the majority in dicta, the argument could be effectively used to rebut a challenge to the federal statute which is less burdensome to first amendment interests. Justice White asserted:

[W]hat some have considered to be the principal function of the first amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the af-

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64 The majority asserted that "[t]he individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion ...." 435 U.S. at 777 n.12. The rights of hearers were stressed throughout the majority and concurring opinions. The Court never asserted that self-expression was involved in the corporate speech in Bellotti. See Birnbaum, The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston v. Bellotti, 28 AM. U. L. REV. 149, 170 (1979).

65 435 U.S. at 807.

66 435 U.S. at 783 n.19. See note 68 supra.
firmation of self." They do not represent a manifestation of individual freedom of choice.  

If this distinction is valid, it could be held that corporate activities involving this element of self-expression by individuals would be entitled to direct first amendment protection, whereas all other corporate expression would derive first amendment protection from the rights of hearers. The problem, then, is distinguishing corporate activities that involve such self-expression from those that do not. Publishing and broadcasting clearly involve the self-expression of individuals, and these corporate activities would be entitled to direct first amendment protection. The activities of corporations organized for the purpose of expression, such as the NAACP, would also be entitled to direct protection; thus, this analysis would not be appropriate in considering the constitutionality of the federal restrictions as applied to such entities, even though they are covered by the statute. What of the oil company that spends funds for "public interest ads" chastizing fuzzy-thinking liberals for their anti-business biases, or the situation in Bellotti itself where funds were spent to influence an election? Arguably such activities should not be viewed as the "self-expression" of any person or group; their first amendment protection would derive from the interests of hearers.

An argument surprisingly ignored by both the majority and Chief Justice Burger in Bellotti is that corporate expression merits first amendment protection because it reflects the self-expression of at least a majority of shareholders. It is not clear, however, that a majority of shareholders or union members actually view corporate or union speech as a means to their own self-expression and

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67 435 U.S. at 804-05.
68 Justice White noted:
Undoubtedly ... there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression.
Id. at 805 (dissenting opinion).
69 The Massachusetts statute invalidated in Bellotti did not restrict nonprofit corporations. The appellant business corporations and banks argued that this exclusion violated the equal protection clause. See Brief of Appellants at 67-82.

The application of the federal statute to nonprofit organizations raises issues distinct from those relevant to the application of the restrictions to profit-making corporations. For example, the interest in protecting dissenting shareholders is inappropriate for nonprofit corporations because desirable investments are not forfeited as the price of retaining "stock" in such corporations. See note 234 infra.
self-fulfillment. People often espouse political beliefs that are inconsistent with their economic interests.\textsuperscript{70} The most accurate characterization of corporate expression is probably that it reflects the self-expression of corporate management. It would be improper, however, to protect corporate speech as a means of protecting the self-expression of management because managers are charged with the responsibility of governing for the benefit of their shareholders.\textsuperscript{71} Indeed, the majority in \textit{Bellotti} suggested that a derivative suit would be an appropriate remedy for "disbursements \ldots made \ldots merely to further the personal interests of management."\textsuperscript{72} Certainly a derivative suit would be inappropriate if corporate management were merely exercising a constitutional right.

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. The expression of a voluntary PAC, on the other hand, may accurately be characterized as the self-expression of individuals entitled to

\textsuperscript{70} Justice White stated in \textit{Bellotti} that "[s]hareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion." 435 U.S. at 805 (dissenting opinion).

\textsuperscript{71} Although this traditional view of corporate governance is being challenged in some quarters today, see generally Cary and Goldschmid, \textit{Corporate Social Responsibility Symposium—Forward: Reflections and Directions}, 30 \textit{Hast. L. J.} 1247 (1979), it is still widely accepted. One commentator has pointed out that the debate is largely academic so long as directors are elected by shareholders. Conard, \textit{Response: The Meaning of Corporate Social Responsibility: Variations on a Theme of Edwin M. Epstein}, \textit{Id.} at 1321, 1325. In any event, even reformers who would alter the responsibilities of corporate managers are concerned with redirecting that responsibility toward employees, consumers and society generally. \textit{Id.} at 1324. It has not been suggested that managers be permitted to use corporate assets to proliferate their own political views.

\textsuperscript{72} 435 U.S. at 795. A derivative suit would not protect the interests of minority shareholders. Because of the broad interpretation that courts currently give to the concept of corporate benefit, it is unlikely that a derivative suit would be successful in protecting the interests of even a majority of shareholders who objected to a political expenditure. See Comment, 6 U. Mich. J.L. Ref. 781, 791-94 (1973). There are many legal and practical obstacles discouraging the use of derivative suits even for ultra vires corporate actions. See J.A. Livingston, \textit{The American Stockholder} 49 (1958); Dent, \textit{The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?}, 75 Nw. U.L. Rev. 96 (1980); Note, \textit{The Business Judgment Rule in Derivative Suits Against Directors}, 65 Cornell L. Rev. 600 (1980). The \textit{Bellotti} Court also suggested that corporate democracy might provide a remedy for shareholders. 435 U.S. at 794. It may be very difficult, however, to vote out corporate management as the Court suggests. See J.A. Livingston, \textit{supra} at 99.
direct first amendment protection.\textsuperscript{73} The interests of hearers would provide additional support for first amendment protection of PAC expression.

This analysis would not necessarily compel validating restrictions upon corporate speech; often, the speech would be protected because of the interests of hearers. In most instances this analysis would render the same result as if the corporation could claim its own first amendment rights. If it could be shown, however, that corporate communication would enter the marketplace of ideas with virtually the same content and quantity despite the restriction, the application of first amendment strict scrutiny would not be required. An intermediate standard, or even a mere rational basis standard, might be appropriate in reviewing such restrictions. The assertion that strict scrutiny should not be applied in reviewing the federal restrictions is based in part upon the availability of ample alternatives for expression. This approach is analogous to the "time, place and manner" cases\textsuperscript{74} in which the availability of such alternatives was an important factor in the Court's application of an intermediate standard of review.\textsuperscript{75} An even lower standard might be appropriate, however,

\textsuperscript{73} It is questionable whether funds contributed to political action committees are truly voluntary. Unions may subtly pressure their members to include a contribution with their dues. The more obvious problem, however, involves middle- and lower-level corporate management. The federal statute does not solve the problem by permitting non-anonymous solicitation of management personnel but denying the right to solicit non-administrative employees. 2 U.S.C. § 441b(4)(A)(i) (1976). Although it is unlikely that an assembly line worker would be penalized for not contributing $5.00 to the company PAC, the visible junior executive who can afford a large contribution and who is seeking advancement will think twice before refusing to contribute. See Note, Corporate Political Programs, 70 YALE L. REV. 821, 862 (1961).


\textsuperscript{75} In Consolidated Edison Co. v. Public Serv. Comm'n, the Court stated in dicta that "a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers . . . ." 100 S. Ct. 2326, 2335 n.10 (1980).

In Buckley, the Court described the time, place and manner cases as permitting a reasonable regulation of speech to "further an important governmental interest." 424 U.S. at 18. The Buckley opinion also notes that time, place and manner regulations must "not discriminate among speakers or ideas." Id. See text accompanying notes 125-32 infra. In California Medical Ass'n v. Federal Election Comm'n, No. 79-4426 (9th Cir. May 23, 1980), the Ninth Circuit refused to apply strict scrutiny to a federal campaign finance restriction in part because the association retained "potent alternative means of expression." Slip. op. at 11. The court upheld a provision of the federal campaign finance laws allowing corporations and labor organizations, but not other groups, to make unlimited contributions to their PACs for administrative costs. Referring to the deference given by the Court in Buckley regarding the overbreadth of contribution limitations, the court commented that
when considering the federal restrictions because the time, place and manner cases involved not only the interests of hearers but also the interests of speakers who possessed first amendment rights. Although there may have been no burden on hearers in such cases because alternative avenues for the communication to reach them existed, the speakers' own first amendment rights were burdened because they could not express themselves at the time, in the place or by the manner that they chose. On the other hand, when the corporation speaks, arguably only the first amendment interests of hearers are involved; therefore, a mere rational basis test may be appropriate if hearers are unaffected by the restrictions.\(^7\)

The analysis suggested in this section should not result in severe incursions into protected speech. It would be appropriate only in a very limited category of cases involving restrictions

"[t]he scrutiny given to a classification affecting a constitutional right is not ... entirely a mechanical inquiry, determined in the abstract simply by reference to which constitutional amendment is being considered." Buckley establishes that the constitutional justification required depends in part upon the degree to which the essentials of a constitutional right are exposed to regulation in the particular case. Slip op. at 12-13 (footnote omitted). The court concluded: "The minimal nature of the statutory constraints, taken together with the importance of the governmental interest to be served by the regulation, operate to sustain the constitutionality of the provision in question." Slip. op. at 13.

\(^7\) In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion), the Court found that a city did not create a first amendment forum by accepting commercial advertising on its buses. Thus, the city's refusal to accept political advertisements on its buses was not reviewed under first amendment strict scrutiny. See id. at 303. The Court did note, however, that "[b]ecause state action exists ... the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious or invidious." Id. The Court found "reasonable legislative objectives" were advanced by the restrictions. Id. at 304.

In cases involving economic regulation, the Court has articulated the following standard of review:

It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.


The Lehman analysis does not seem to differ significantly from that in Williamson. The Court's acceptance of the weak rationales proffered by the city in Lehman implies that the Court did not even engage in some form of intermediate scrutiny, such as balancing, which is frequently utilized in speech cases not involving content regulation. See Stone, Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. CHI. L. REV. 81, 81 (1978). For an excellent critique of Lehman, see Karst, Equality as a Central Principle of the First Amendment, 43 U. CHI. L. REV. 20, 34-35 (1975).
that do not alter the content or quantity of expression and speakers whose expression does not involve the self-fulfillment of individuals.

2. The Rationales for Restrictions. Chief Justice Burger viewed the interests of dissenting shareholders as equally strong in media and nonmedia corporations; therefore, a rationale based on protecting their interests would pose dangers for the expression of media corporations. The shareholders of a media corporation, however, realize when they invest that their returns will be paid by a business that publishes or broadcasts the personal political expression of others. It cannot be assumed that the ordinary shareholder of other commercial corporations invests with a similar understanding. Thus, their need for protection is stronger.

The Chief Justice also observed that if preventing corporate domination of the marketplace of ideas is the rationale for the restrictions, it would apply with even greater force to sustain restrictions upon media corporations. The majority commented that the potential impact of this argument on the news media is "unsettling." Previously, in Miami Herald Publishing Co. v. Tornillo, the Court specifically acknowledged the monopoly position of newspapers, but found the dangers of government regulation to be more serious. Because of the strong precedent forbidding government regulation of newspapers, it seems unlikely that applying the improper dominance rationale to justify restrictions upon nonmedia corporations would endanger the expression of newspapers. However, the Court's more equivocal stance on the rights of broadcasters and the extensive regulation already in effect makes it plausible that the dominance theory could be used to further restrict broadcasters. Indeed, the Federal Communication Commission's "fairness doctrine" was upheld upon a

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77 435 U.S. at 797 (concurring opinion).
78 Id. at 796 (concurring opinion).
79 Id. at 791 n.30.

In Red Lion, the Court stated that there was no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. at 388.
similar rationale. Perhaps the Court should be required to acknowledge that the media has a more vital first amendment role than commercial corporations in order to prevent the dominance theory from providing a constitutional basis for sustaining restrictions upon the broadcast media. Such a conclusion would be consistent with history and tradition and the absence of individual self-expression in the speech of nonmedia corporations would provide a basis for such a conclusion. The Court's dicta in Bellotti, however, apparently rejected this view. If the dominance rationale is rejected because of the fear that it might be extended to cases involving regulation of the media, the statute could be upheld on other grounds. The government interests allegedly promoted by the federal restrictions are discussed in Section III.

B. Consolidated Edison Co. v. Public Service Commission

One of the most recent cases creating obstacles for the constitutionality of the federal restrictions upon corporate and union contributions and expenditures is Consolidated Edison Co. v. Public Service Commission. In that case, a private utility enclosed inserts advocating nuclear energy with its billing statements. The New York Public Service Commission (Commission) responded by promulgating a regulation prohibiting utilities from sending bill inserts discussing "controversial issues of public policy." The Commission argued that the restriction was necessary to "avoid forcing Consolidated Edison's views on a captive audience." 83 84

83 395 U.S. at 375. The fairness doctrine is a general requirement that broadcasters "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 C.F.R. § 73.1910 (1980). The doctrine requires broadcasters to give individuals or groups the right to respond to attacks on their integrity, character or honesty. See Barrow, The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 37 U. CIN. L. REV. 447, 472 (1968). Red Lion specifically upheld this aspect of the fairness doctrine.

Using a similar theory, the Court has upheld a requirement that broadcasters divest themselves of newspapers as a condition for licensing. FCC v. National Comm. for Broadcasting, 436 U.S. 775 (1978).

84 For a discussion of the vital role that the press has played in the history of the United States, see Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 162 (1973) (concurring opinion, Douglas, J.)

85 See note 63 supra. See also text accompanying notes 57-58 supra (institutional corporate press not entitled to greater first amendment protection).

86 The prevention of corruption and the protection of dissenters who object to the use of funds for political purposes have been asserted as rationales for the restrictions. See discussion in text accompanying notes 186-207, 233-67 infra.

87 100 S. Ct. 2326 (1980).

88 Id. at 2330.

89 Id. at 2335.
The Supreme Court invalidated the regulation on first amendment grounds. It concluded that consumers could avoid the objectionable speech simply by averting their eyes.

Consolidated is not entirely inconsistent with the thesis that the expression of commercial corporations deserves protection only so that the first amendment interests of hearers may be preserved. Like the majority opinion in Bellotti, the opinion in Consolidated appears to be grounded upon the interests of hearers. The Consolidated Court applied strict scrutiny because "[a] less stringent analysis would permit a government to slight the First Amendment's role in 'affording the public access to discussion, debate and the dissemination of information and ideas.'" Consolidated may also be factually distinguished from a case involving the federal restrictions. Unlike the federal statute, which authorizes an alternative outlet for expression—PACs, the Commission's regulation in Consolidated probably reduced the quantity of the utility's speech on controversial issues. The utility asserted in Consolidated that it "ha[d] no adequate alternatives to the use of bill inserts for communicating to [its] customers [its] views on controversial matters of public policy." The Consolidated Court, however, did not address the issue of whether comparable alternative avenues for expression were actually available. Instead, the Court noted that it had "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." For this reason, Consolidated

90 Id. at 2335-36.
91 Id. at 2335.
92 Id. at 2335 (quoting Bellotti, 435 U.S. at 783).
93 Appendix to Brief for Appellant at 15, Consolidated Edison Co. v. Public Serv. Comm'n, 100 S. Ct. 2326 (1980) (affidavit of Robert O. Lehman, Vice President for Public Affairs, Consolidated Edison Co.). The company presented this evidence to the Commission. Mr. Lehman's affidavit discussed in detail the relative cost efficiency of various methods for communicating to the public:

- A separate mailing would be prohibitively expensive. We have a monthly basic bill run of 2.8 million. Postage alone, at first class mail rates, would cost in excess of $350,000. Even at bulk mail rates, postage would cost $210,000....

- Television is not an adequate or effective medium for communicating lengthy messages on complicated subjects to a mass audience....

- Newspaper advertising is more expensive in reaching as wide an audience among our customers as bill inserts.

Appendix to Brief for Appellant at 15-17. See generally Reply Brief of Appellant at 12.
94 100 S. Ct. at 2335 n.10. The Court cited three cases for this proposition. Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976), was a commercial speech case in which the Court invalidated a ban on advertising of prescription drug prices. The Court rejected the assertion that consumers could seek out the informa-
dated is particularly troublesome for the theory that an intermediate standard of review is appropriate because the federal restrictions provide the alternative outlet of PAC expression. Clearly the crucial factor for the majority in Consolidated was that the restriction was placed upon the subject matter of speech. Because the corporate and union restrictions are also based on the subject matter of speech, Consolidated poses very serious problems for any theory that might sustain the federal restrictions. The significance of subject matter restrictions is examined in the next section.

II

SUBJECT MATTER REGULATION AND THE FEDERAL RESTRICTIONS ON CORPORATE AND UNION POLITICAL SPENDING

The subject matter restriction issue arises in the context of both equal protection and first amendment analyses. These two approaches differ slightly, and this difference has important ramifications because the equal protection requirement creates additional constitutional difficulties for the federal statute.

There is, however, much overlap between the two analyses. The Court frequently relies upon equal protection cases in its first amendment analysis and first amendment cases in its equal protection analysis. Each approach is separately examined in the following sub-sections.

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96 The statute refers to expenditures or contributions made “in connection with” a federal election. 2 U.S.C. § 441b(a) (1976).

97 Even if the Court rejects the proposition that a standard of review less stringent than strict scrutiny should apply to the federal statute, the restrictions might still be upheld as necessary to a compelling state interest. The government interests asserted in support of the restrictions are examined in section III infra.

98 See text accompanying notes 135-138 infra.

99 See, e.g., the Court’s reliance on Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972), in Consolidated, 100 S. Ct. at 2392-33, and Bellotti, 435 U.S. at 785, Mosley was an equal protection case, even though its analysis rested primarily upon first amendment theory and cases. See Karst, supra note 76, at 27.
A. The First Amendment Challenge to Subject Matter Restrictions

In the Consolidated opinion, the Court cited Police Department of Chicago v. Mosley\(^{100}\) for the proposition that “[a]s a general matter ‘the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”\(^{101}\) Justice Stevens’ concurring opinion described this quoted dicta from Mosley as “hyperbole,”\(^{102}\) arguing that the majority’s analysis refuted this statement because the Court did inquire whether the first amendment burden was justified by a compelling state interest.\(^{103}\) Such an inquiry would have been irrelevant had the government actually “lacked power to restrict expression because of its ... subject matter.”\(^{104}\) Stevens also cited numerous Supreme Court cases upholding subject matter restrictions using less than a strict scrutiny standard of review.\(^{105}\)

Other commentators have noted the Court’s confusion regarding the proper standard of review for subject matter restrictions.\(^{106}\) In some cases, such as Consolidated and Bellotti, the Court has applied strict scrutiny ostensibly because of the subject matter distinction. In other cases, it has ignored obvious subject matter burdens and treated such statutes as content-neutral. Although the precise standard of review is seldom articulated, the tests applied in cases treating such restrictions as content neutral seem to require some form of intermediate scrutiny,\(^{107}\) or even a mere rational basis.\(^{108}\)

The numerous recent cases in which subject matter restrictions were upheld had one factor in common; the restrictions were viewpoint neutral.\(^{109}\) The Court specifically referred to this

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\(^{100}\) 408 U.S. 92 (1971).

\(^{101}\) 100 S. Ct. at 2333 (quoting Mosley, 408 U.S. at 95).

\(^{102}\) 100 S. Ct. at 2337, 2337.

\(^{103}\) Id. at 2338.

\(^{104}\) Id. at 2337.

\(^{105}\) Id. at 2337 n.2.


\(^{107}\) See, e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Rowan v. United States Post Office Dep’t, 397 U.S. 728 (1970); Farber, supra note 106 at 749-62; Stone, supra note 106, at 84-100.

\(^{108}\) See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion); Farber, supra note 106, at 761-62; Stone, supra note 106, at 90-92. For a discussion of the standard of review used in Lehman, see note 76 supra.

neutrality in upholding subject matter restrictions in several of these cases.110 The holdings of these cases, together with the Court's various comments, have led some commentators to suggest that a lesser degree of scrutiny might be appropriate for viewpoint-neutral subject matter restrictions. Professor Farber has proposed an intermediate standard of review similar to that used in equal protection challenges of sex and illegitimacy classifications.111 He further asserts that this standard "closely fits the results in the content regulation cases."112 Professor Stone takes a somewhat more modest position, suggesting that at least some viewpoint-neutral subject matter restrictions might appropriately be subject to less than the strictest form of first amendment review. He explains that content discrimination is particularly disfavored for two reasons. Focusing on these reasons aids in determining which viewpoint-neutral subject matter restrictions should be reviewed with the strictest of scrutiny.

First, Stone argues that content discrimination not only limits access to information but also distorts decisionmaking processes by

(zoning ordinance prohibiting clustering of adult movie theaters); Buckley v. Valeo, 424 U.S. 1 (1976) (limitations on political contributions to federal candidates and disclosure requirements); Greer v. Spock, 424 U.S. 828 (1976) (ban on distribution of partisan political literature on military base); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (ban on political advertisements on city busses); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (restrictions on political expression by state civil service employees); Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (restrictions on political expression by federal civil service employees); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (postal regulation allowing recipients of obscene mailings to request postmaster to refrain from further mailings).

Stone has argued that it is somewhat misleading to characterize expression concerned with sex as viewpoint-neutral, as Justice Stevens did in American Mini-Theaters, 427 U.S. at 70. Stone points out that such expressions “almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores.” Stone, supra note 106, at 111-12.


111 He would also apply a second test referred to as “balancing” in cases in which there is a substantial—as opposed to a de minimis—burden on speech. Farber, supra note 106, at 748. Most viewpoint-neutral subject matter restrictions would, therefore, be subjected to both tests under his theory. He only cites Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion), as an example of a case in which there was a de minimis burden upon speech. Farber, supra note 106, at 748. Although Farber apparently sees the de minimis category as very narrow, the danger that a court would use such a theory for intrusions into first amendment rights seems ominous. Farber would apply strict scrutiny to restrictions based on viewpoint. Id. at 729.

112 Farber, supra note 106, at 739. Professor Farber did not discuss the Bellotti opinion, and Consolidated was decided after his article was published.
leaving "the public with only an incomplete—and perhaps inaccurate—perception of their social and political universe." 113 His second reason focuses upon the motive behind the restriction: "it is per se impermissible for government to restrict speech because it disapproves of the message conveyed." 114 The Bellotti opinion reflects both of these concerns. It states that "channel[ing] the expression of views is unacceptable...[e]specially where, as here, the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people...." 115 By contrast, the federal restrictions on corporate and union political expression do not prevent the public from hearing a particular side of an issue. PACs may actually facilitate the publicizing of corporate and union views. 116

According to Stone, one way to determine which subject matter restrictions should be reviewed under a strict scrutiny analysis is to ascertain whether "governmental opposition to the speech...played any appreciable role" in the enactment of the restriction. 117 Although the Bellotti Court apparently attempted this inquiry, Professor Stone believes that it is probably too cumbersome to carry out effectively. 118 As an alternative, he offers an objective criterion. Claiming that the breadth of the subject matter re-

113 Stone, supra note 106, at 101.
114 Id. at 103 (citing Bellotti, 435 U.S. at 791 n.31; Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97 (1977)).
115 435 U.S. at 785.
116 Even if restrictions do limit expression, distortion of the marketplace of ideas is diminished because corporations and unions, which often promote opposing positions or candidates, are limited in the same manner. Corporations and unions may at times, however, exert political pressure on the same side of a controversy. See, e.g., COMMON CAUSE, HOW MONEY TALKS IN CONGRESS 10-12 (1979) (maritime unions and the shipping industry). Thus, muting the voices of both corporations and unions could distort the marketplace of ideas on some issues.

When the restrictions were initially enacted, they were apparently designed in part to eliminate the influence of corporations and unions on the electoral process. See, e.g., United States v. CIO, 335 U.S. 106, 113 (1948). The emphasis, however, appears to have shifted to the protection of dissenters—particularly for the union restrictions. See text accompanying notes 246-53 infra. In Bellotti the Court stressed in dicta that the purpose for the corporate restrictions was the prevention of corruption. 435 U.S. at 788 n.26. Although the initial purpose of the restrictions might have been inconsistent with the view that government cannot restrict speech because of its content, this no longer appears to be the legislative motive. The specific authorization of PACs in the 1971 legislation and the present high level of PAC expression supports this conclusion because the statutory scheme assures that corporations and unions will have ample opportunities to influence the electorate. See text accompanying notes 44-46 supra.
117 Stone, supra note 106, at 105.
118 Id. at 105-07.
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striction often provides the key to ascertaining the motive behind it, Stone suggests that broad subject matter restrictions might be treated as content-neutral while narrow restrictions should be subjected to the strictest scrutiny. 119

Unlike the class of narrowly defined restrictions, [broad statutory restrictions] possess what may be the most important attribute of content-neutral restrictions. That is, although such a statute may at times have de facto, viewpoint-differential effects, those effects are likely to be spread over a fairly wide range of issues, thus mitigating the risk that the restriction is tainted by an improper legislative motivation directed against a particular viewpoint. 120

The Bellotti majority implicitly recognized this distinction. The Massachusetts statute banning contributions or expenditures not "materially affecting ... the corporation" contained the caveat that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect ... the corporation." 121 The Court commented:

The fact that a particular kind of ballot question 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. Indeed, appellee has conceded that "the legislative and judicial history of the statute indicates ... that the second crime was 'tailormade' to prohibit corporate campaign contributions to oppose a graduated income tax amendment." 122

119 Id. at 109-11. He acknowledged the possible ambiguity in this distinction. Id. at 112 n.137. The distinction between broad and narrow subject matter discrimination was also suggested by a student author who noted that "[t]he cases ... indicate that the standard of review employed in analyzing the competing interests will vary according to the specificity of the challenged regulation." Comment, Corporate and Union Political Contributions and Expenditures under 2 U.S.C. § 441b: A Constitutional Analysis, 1977 Utah L. Rev. 291, 307. The author did not suggest a rationale for this distinction.

120 Stone, supra note 106, at 112. Stone believes that broad subject matter discrimination, although potentially serious, poses problems "virtually indistinguishable from those posed by content-neutral restrictions." Id. at 113. Therefore, he suggests that the balancing test used in content-neutral cases may be more appropriate than the strict scrutiny test used in viewpoint-neutral content restriction cases. Id. at 113-14. The discriminatory restriction should still be justified by "some substantial governmental purpose." Id. at 114.


122 435 U.S. at 793 (quoting Brief for Appellees at 6). Professor Stone has not attempted to categorize the Bellotti statute as either narrow or broad. He mentions the case only in a
Using Stone's analysis, *Bellotti* can be explained as a case in which the legislative motive of preventing corporations from expressing their views on a particular subject was properly implied from the narrowness of restriction. Thus, the Court's application of strict scrutiny was appropriate. *Bellotti*, then, may not require that the broad federal restrictions on corporate and union expression in connection with elections for federal office be subjected to strict scrutiny.

Stone's thesis is particularly appealing when considering a statute that leaves ample alternative avenues for communicating about a restricted subject matter. Indeed, in almost all of the cases in which subject matter restrictions were upheld, expression on a particular subject was not completely banned. Stone's analysis is more difficult to accept in the context of absolute bans, such as the prohibitions upon certain kinds of political expression by civil service employees that have been upheld by the Court. Limited to cases involving time, place and manner restrictions of speech, such a doctrine would involve a minimal and easily con-

footnote to support the proposition that "the Court itself has recognized in passing that these seemingly viewpoint-neutral restrictions may have viewpoint-differential effects." Stone, *supra* note 106, at 110 & n.132. *Bellotti* is difficult to categorize because the statute contained restrictions that were both broad (the proscription against expending funds on referenda not materially affecting the corporation) and narrow (the caveat that questions concerning the taxation of individuals did not materially affect the corporation). Because the issue in *Bellotti* dealt with the narrow restriction, the case fits nicely into Stone's theory. It can be presumed, however, that the broader restriction was also invalidated. The Court's expansive language indicates that the result would have been the same if the referendum involved an issue other than taxation. See 435 U.S. at 788-95. The *Buckley* case, which dealt with a broad limitation upon all contributions to federal elections, also supports Stone's thesis. The subject matter restriction was ignored in that case and strict scrutiny was applied because of the "direct quantity restrictions." 424 U.S. at 18. The Court described the limitations in *Buckley* as "not [focusing] on the ideas expressed by persons or groups subjected to its regulations." *Id.* at 17.

123 The Ninth Circuit, in California Medical Ass'n v. Federal Election Comm'n, No. 79-4426 (9th Cir. May 23, 1980), applied intermediate scrutiny to uphold provisions of the federal campaign finance laws, partially because of the availability of alternative avenues for expression. See *supra* note 75.


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tained incursion into first amendment interests. Although it has in the past asserted that time, place and manner analysis is inappropriate when regulations discriminate against speakers or ideas,\(^{126}\) the Court prior to *Consolidated* failed to apply this analysis only in cases in which the content discrimination actually involved viewpoint bias.\(^{127}\) Thus, there seemed a fair chance that the federal restrictions would be reviewed using the time, place and manner analysis. If the restrictions were "reasonable" and served an "important" interest,\(^{128}\) they would be constitutionally valid.

*Consolidated* is clearly the most serious obstacle to the application of an intermediate form of review to the federal restrictions. The Court in *Consolidated* specifically rejected the argument that the time, place and manner approach would be appropriate when a statute restricted subject matter, as opposed to viewpoint. The Court stated:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. . . . To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.\(^{129}\)

Even though *Consolidated* seems inconsistent with the numerous cases upholding viewpoint-neutral subject matter restrictions, the clear and unequivocal language in that case would make it

\(^{126}\) Buckley v. Valeo, 424 U.S. at 18.


\(^{128}\) Buckley v. Valeo, 424 U.S. at 18.

\(^{129}\) 100 S. Ct. at 2333.
very difficult for the Court to apply less than strict scrutiny to the federal campaign restrictions. If the Court, however, ignores its own broad language, which seems unlikely, Consolidated, like Bel-lotti, could fit into the analytical framework suggested by Professor Stone. The regulation in Consolidated, which applied to "controversial issues of public policy," appears to create a broad subject matter category that under Stone's analysis would be treated as viewpoint-neutral. Because it applied only to public utilities, however, it is more appropriate to characterize the restriction as applying to the views of public utilities upon controversial issues of public importance. The motive to suppress a point of view seems just as obvious when the narrowness of the restriction applies to the category of speakers as when it applies to the subject matter.130 Justice Stevens in his concurring opinion describes the regulation in Consolidated as "nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest [, amounting to] the purest example of a 'law abridging the freedom of speech.'"131

Although Stone's analysis offers some hope that the Court could apply less than strict scrutiny to the federal restrictions upon corporate and union political expression, such a result seems highly unlikely. The Court would be forced to either ignore or repudiate the unequivocal language in Consolidated; therefore, it would probably apply strict scrutiny to the restrictions. In the

130 The utility in Consolidated argued that the restriction was not viewpoint-neutral: "Contrary to the Court of Appeals conclusion, the Commission's ban does prohibit the expression of one position on hotly debated issues." Brief for Appellants at 16. See also Reply Brief for Appellants at 3.

131 Id. at 2338 (quoting U.S. Const. amend. 1). Justice Stevens observed in a footnote:

Even viewing the restriction as merely a neutral subject matter regulation (controversial issues generally) as may have been intended initially by the Commission, rather than a restriction of a particular viewpoint (the utilities' opinions on those issues), I still believe it to be unconstitutional. For the use of the "controversial" nature of speech as the touchstone for its regulation threatens a value at the very core of the First Amendment, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Id. at 2339 n.9 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Justice Stevens' initial interpretation of the Commission's motives is probably correct. The Commission commented that the ban was for the purpose of eliminating "an unreasonable advantage ... that unduly discriminates against others who ... oppose the company's views." Order of the New York State Public Service Comm'n, Feb. 25, 1977, Slip op. at 7, 17 N.Y. Pub. Serv. Comm'n Rep. (reprinted in Appendix G to Jurisdictional Statement of Appellants, Consolidated Edison Co. v. Public Serv. Comm'n, 100 S. Ct. 2326 (1980)).
Burger Court, although such an approach no longer spells certain doom for a statute, it does make affirmance unlikely.\textsuperscript{132}

\textbf{B. The Equal Protection Analysis}

Equal protection analysis requires a focus not only upon ends but also upon means. To this extent, it overlaps with cases in which speech burdens are analyzed under the first amendment without reference to equal protection. In both equal protection and first amendment analyses, even a compelling state interest cannot be pursued by means that are unnecessarily broad.\textsuperscript{133} Thus, either equal protection or straight first amendment analysis would produce the same result in overinclusiveness cases.\textsuperscript{134} Equal protection analysis, at least in cases in which fundamental rights such as speech are involved,\textsuperscript{135} also requires that the restrictions not be underinclusive.\textsuperscript{136} The underinclusiveness issue is confusing; every content regulation by definition is underinclusive. For instance, a burden placed upon persons who advocate the overthrow of the government is underinclusive because it does not also place a burden upon persons who advocate patriotism. Why then would such a case be analyzed as strictly a first amendment rather than an equal protection problem? The answer is found in basic equal protection theory. The distinction in this hypothetical is related to the purpose of the statute.\textsuperscript{137} It would make no

\textsuperscript{132} The Court upheld contribution limitations in \textit{Buckley} even though it purported to apply strict scrutiny. 424 U.S. at 27-29. The limitations in that case, like the restrictions on corporate and union political spending, were based on subject matter. The \textit{Buckley} Court, however, ignored that aspect of the case.

A burden upon the right to vote, like a burden upon speech, triggers strict scrutiny review. In \textit{Storer v. Brown}, 415 U.S. 724, 735-36 (1973), and \textit{American Party of Tex. v. White}, 415 U.S. 767, 780-83 (1973), the Court purported to apply strict scrutiny to ballot qualification statutes and upheld their constitutionality. Although the Court used the language of strict scrutiny in \textit{Buckley}, \textit{Storer} and \textit{American Party}, it is unclear whether their methodology was consistent with strict scrutiny review. See Nicholson, \textit{supra} note 8, at 346-47, 347 n.105, 357, 365. \textit{Storer} and \textit{American} were the first cases since \textit{Korematsu v. United States}, 323 U.S. 214 (1944) (upholding the wartime internment of Japanese-Americans), in which the Court sustained the validity of legislation under strict scrutiny equal protection analysis.


\textsuperscript{134} The federal restrictions' potential overbreadth is discussed in section III.

\textsuperscript{135} In business regulation cases not involving fundamental rights, the underinclusive nature of the regulation has not invalidated discriminatory statutes. See, e.g., \textit{Railway Express Agency, Inc. v. New York}, 336 U.S. 106 (1949).

\textsuperscript{136} See \textit{Police Dep't of Chicago v. Mosley}, 408 U.S. 92, 96 (1972).

sence to burden those espousing patriotism in order to enhance national security. Thus, the statute is not underinclusive with respect to its purpose. It may be overinclusive and although the Court ordinarily treats such cases under the rubric of first amendment overbreadth, an equal protection or first amendment analysis should lead to the same result and involve the same methodology. As a result, the first amendment and equal protection analyses require in speech cases restrictions that are not overinclusive with respect to the purpose of the statute. An equal protection analysis adds one further requirement—the restrictions also must not be underinclusive with respect to their purpose.

Appellants argued in *Bellotti* that the Massachusetts statute was overinclusive to protect dissenting shareholders because it unnecessarily banned even those corporate contributions backed by unanimous shareholder approval, and underinclusive because it prohibited corporate expression only on certain subjects even though shareholders probably disapproved of other subjects as well. The appellants also pointed out that only corporations were subject to the Massachusetts statute; the rights of unions and other business entities, such as business trusts and real estate investment trusts, were unaffected.

The *Bellotti* court accepted appellant's characterization of the Massachusetts statute as both overinclusive and underinclusive. Using this characterization, the Court concluded that the purpose of protecting dissenting shareholders was "belied" and invalidated the bans using phraseology similar to that used in middle-tier equal protection analysis. Because the federal stat-

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140 Id. at 77-82.

141 435 U.S. at 793.

142 "Assuming, arguendo, that protection of shareholders is a 'compelling' interest under the circumstances of this case, we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking." 435 U.S. at 795 (quoting Shelton v. Tucker, 364 U.S. 479, 485 (1960)) (emphasis supplied). This language is similar to that used in gender-based discrimination cases. See, e.g., Craig v. Boren, 429 U.S. 190, 204 (1976); Reed v. Reed, 404 U.S. 71, 75 (1971).

It is unclear why the *Bellotti* Court did not invalidate the statute on its face for first amendment overbreadth. In *Broadrick* v. Oklahoma, 413 U.S. 601 (1973), the Court held that facial invalidation is not appropriate "particularly where conduct and not merely speech is involved" unless the overbreadth is "substantial ... in relation to [its] plainly legitimate sweep." *Id.* at 615. If the federal restrictions are overinclusive, facial invalidation may be appropriate because the court in *Buckley* rejected the argument that political contributions are not pure speech. 424 U.S. at 16-17.
ute authorizes PAC expression, it is substantially less overinclusive than the Massachusetts ban. The federal statute is arguably the least restrictive means for protecting minority shareholders and union members. Yet the underinclusive problem remains—although they burden both unions and corporations, the federal restrictions, like the statute in Bellotti, do not apply to other business entities. The federal statute may also be underinclusive because it applies only to political expression “in connection with” federal elections. Whether the federal restrictions survive on equal protection challenge may turn on the degree of scrutiny that the Court applies to these underinclusive classifications. This question is examined in the following subsections.

1. The Theoretical Justifications for Invalidating Underinclusive Legislation. Tussman and tenBroek state in their classic equal protection analysis that the courts have generally interpreted the equal protection clause to require a reasonable legislative classification—“one which includes all persons who are similarly situated with respect to the purpose of the law.” Common sense dictates that Courts would be more offended by overinclusive legislative burdens because “in the [underinclusive classification], all who are included in the class are at least tainted by the mischief at which the law aims; while overinclusive classifications reach out to the innocent bystander, the hapless victim of circumstance or association.” Indeed, the courts have given legislatures substantial discretion to create underinclusive classifications. Tussman and tenBroek explain:

[[the Court has defended under-inclusive classifications on such grounds as: the legislature may attack a general problem in a piecemeal fashion; “some play must be allowed for the joints of the machine”; “a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset...”; “the law does all that is needed when it does all that can....”; and—perhaps with some impatience—

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143 The federal statute is somewhat overinclusive for achieving the goals of preventing corruption and the domination of the electoral process. See text accompanying notes 190-92, 230 infra. Arguably, the overinclusiveness alone could cause invalidation. See note supra.

144 See text accompanying notes 234-42 infra.


146 Tussman & tenBroek, supra note 137, at 346.

147 Id. at 351.
the equal protection clause is not "a pedagogic requirement of the impractical." 148

These expressions of judicial tolerance, Tussman and tenBroek conclude, "are not ... very helpful [because t]hey do not constitute a clear statement of the circumstances and conditions which justify such tolerance—which justify a departure from the strict requirements of the principle of equality." 149

In his concurring opinion in *Railway Express Agency, Inc. v. New York*, 150 Justice Jackson discussed the judicial policy towards underinclusive classifications:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. 151

Eliminating underinclusive coverage of similarly-situated individuals guards against the danger that the politically powerless will bear the brunt of governmental burdens while the powerful will be excluded. Cases in which the Court has invalidated underinclusive statutes that burden fundamental rights illustrate this concern. In *Skinner v. Oklahoma* 152 the Court invalidated a statute requiring the sterilization of all habitual criminals except those convicted of white collar crimes. Certainly the white collar legis-

148 Id. at 348 (footnotes omitted) (quoting respectively Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904); Keokee Consol. Coke Co. v. Taylor, 234 U.S. 224, 227 (1914); Buick v. Bell, 274 U.S. 200, 208 (1927)).

149 Tussman & tenBroek, *supra* note 137, at 348.

150 336 U.S. 106, 111-17 (1949). In *Railway Express*, the Court held that an ordinance prohibiting the operation of any advertising vehicles on city streets, except those carrying advertisements of products made by the owner of the vehicle, did not violate the due process, equal protection, or commerce clauses. *Id.* at 108-11. The majority dismissed the equal protection claim, stating:

> [T]he fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.

*Id.* at 110.

151 *Id.* at 112-13.

152 316 U.S. 535 (1942).
lators in *Skinner* needed little prompting to exclude white collar criminals from sterilization.

The first case to use the equal protection analysis in a first amendment context was *Niemotko v. Maryland*. The Court held that a group of Jehovah's Witnesses were denied equal protection of the laws when a city council failed to grant them the right to use a public park while permitting other religious and civic organizations to use it. Treating Jehovah's Witnesses differently than more popular religious groups also accords with Justice Jackson's analysis. The Court invalidated a statute prohibiting all picketing other than peaceful labor picketing near schools in *Police Department of Chicago v. Mosley*. In *Carey v. Brown*, decided in 1980, the court invalidated a similar statute prohibiting picketing in residential areas. Creating an exception for labor picketing may have reflected both the strong political influence of labor and the legislators' disdain for politically less powerful groups such as anti-war demonstrators and civil rights workers.

There is perhaps no better example of a statute that does not represent the problem referred to by Justice Jackson than the federal bans on corporate and union political expression. The burdens placed upon corporations and unions certainly are not attributable to a lack of political power. The exclusion of business trusts and partnerships has nothing to do with political power. On the contrary, such entities were probably excluded because historically they have not been significantly involved in the political process on the federal level.

2. The Appropriate Standard of Review in Cases Involving Underinclusive Burdens on Fundamental Rights. Neither Tussman and

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154 Id. at 272-73. The Court held that the selective application of the permit requirement violated the appellant's rights under the equal protection clause. An alternative ground for the decision was the "limitless discretion" possessed by the park commissioner and the city council in granting park use permits. Id.
156 100 S. Ct. 2286 (1980).
157 The original plaintiffs in both *Mosley* and *Carey* were civil rights demonstrators.
158 In a colloquy between Senators Taft and Magnuson during the debate over the Taft-Hartley Act (which enacted the first set of restrictions on political spending by labor unions, see note 3 supra), it was recognized that all other organizations except labor unions and corporations would not be restricted from raising and spending money for political purposes. 93 Cong. Rec. 6440-41 (1947). Responding to Senator Magnuson's concern that leaving other organizations unrestricted under the Act might not control the abuses targeted by the Act, Senator Taft also noted that: "If any abuses arise with respect to other organizations we can extend the provision of law to the other groups." Id. at 6441.
Does this mean that an otherwise valid regulation must fall if it leaves out a few entities or subjects that potentially involve the same problems? Would the Court require a compelling state interest for any exclusion? Closer examination of the Court's rhetoric and methodology in the cases invalidating underinclusive burdens upon fundamental rights may be helpful in answering this question.

In *Skinner*, the first case reviewing an underinclusive burden upon a fundamental right, the Court commented that the state "is [not] prevented by the equal protection clause from confining 'its restrictions to those classes of cases where the need is deemed to be clearest.'" It is obvious in *Skinner* that there was not even a rational basis for excluding white collar criminals from the law requiring the sterilization of all hereditary criminals. Referring to Oklahoma's distinction between larceny by fraud or embezzlement and larceny by trespass, the Court stated that it "ha[d] not the slightest basis for inferring that that line has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses." At the time *Skinner* was decided, the requirement of a mere rational basis to uphold a classification meant that no scrutiny at all would be applied. It seems clear that in *Skinner* the application of a test which actually required the state to present even a plausible rationale for excluding some groups from the legislative burdens would have also resulted in invalidation.

The equal protection cases involving underinclusive burdens upon expression involve subject matter discrimination; therefore, it may be helpful to recall the suggestions of Professors Farber and Stone that an intermediate standard of review might be appropriate for viewpoint-neutral subject matter restrictions. Farber suggests that this level of scrutiny is similar to that employed in sex and illegitimacy cases: "[A] classification must substantially
further an important government interest . . . [A] mere recitation of a benign purpose as the justification for a classification is not enough. The asserted purpose must be plausible in light of the legislative history and circumstances surrounding the enactment of the legislation."

Neither Farber nor Stone suggest that underinclusive classifications should be treated differently than overinclusive classifications. Intermediate or middle-tier scrutiny, however, seems much more appealing for underinclusive classifications because the effect of sustaining such statutes is merely to burden fewer persons or subjects. Intermediate or middle-tier scrutiny of overinclusive classifications could result in sustaining unnecessary burdens upon first amendment interests. The Court appeared to use the language of middle-tier analysis rather than strict scrutiny in Mosley. It stated that "discriminations among pickets must be tailored to serve a substantial governmental interest." In Carey, the Court found the "Illinois Residential Picketing Statute . . . constitutionally indistinguishable from the ordinance invalidated in Mosley." The language used in Carey, however, was slightly more restrictive than that of Mosley: "[T]he Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."

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163 Farber, supra note 106, at 738 (footnotes omitted). Professor Stone would require that the state explain "why it failed to restrict the speech it exempted from the restriction. It must, in other words, justify the content-based distinction." Stone, supra note 106, at 114. He concludes that such a showing is necessary, not so much because the distinction may pose a threat to the interests underlying the special treatment of content-based restrictions, but rather because the very existence of the content-based distinction tends to undercut the state's showing, required even in the context of content-neutral balancing, that the restriction is designed to serve some substantial governmental purpose.


164 408 U.S. at 99.

165 Id. Earlier in the opinion the Court phrased the issue as "whether there is an appropriate governmental interest suitably furthered by the differential treatment." Id. at 95.

166 100 S. Ct. at 2289.

167 Id. at 2290 (emphasis added).
The Court in *Carey* appears to require a stricter degree of scrutiny than it used in *Mosley*. A higher degree of scrutiny was probably required to invalidate the statute in *Mosley* as opposed to the statute in *Carey* because the Court found the classification in *Carey* totally unrelated to the asserted rationale of protecting the privacy of residential neighborhoods. Justice Brennan writing for the majority stated that "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellants can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern." 168 The Court had little difficulty rejecting the second objective asserted by the state, that of "providing special protection for labor protests." 169 It saw "the central difficulty" with that objective as "presuppos[ing] that labor picketing is more deserving of First Amendment protections than are public protests over other issues." 170 The Court implied, however, that labor picketing was actually entitled to less protection because "[p]ublic issue picketing ... has always rested on the highest rung of the hierarchy of First Amendment values." 171

The *Mosley* opinion was described in *Carey* as based upon the city's failure to show that picketing on nonlabor subjects was "'clearly more disruptive' than [labor picketing]." 172 The Court appeared, however, to apply an even more stringent test in *Mosley*. It strongly implied that in determining whether nonlabor picket-

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168 Id. at 2293.
169 Id. at 2293-94.
170 Id. at 2293.
171 The *Carey* Court cited T. Emerson, *The System of Freedom of Expression* 444-49 (1970), for the proposition that "nonlabor picketing is more akin to pure expression than labor picketing and thus should be subject to fewer restrictions." 100 S. Ct. at 2293. The Court's statement in *Consolidated* that even viewpoint-neutral subject matter discrimination must be strictly scrutinized, see 100 S. Ct. at 2333-34, is inconsistent with the assertion that public issue speech is *more* deserving of protection than other subjects. This assertion has been similarly utilized in other cases. See, e.g., *Bellotti*, 435 U.S. at 786.

The categorization approach, which places certain kinds of speech—e.g., obscenity and libel—outside first amendment protection, also seems inconsistent with the assertion that viewpoint-neutral subject matter discrimination requires the application of strict scrutiny. See Karst, *supra* note 77, at 30-32. Compare the plurality opinion in *Young v. American Mini-Theaters*, 427 U.S. 50, 70 (1976) (nonobscene sexually explicit expression entitled to "lesser" first amendment protection) with the concurring opinion of Justice Powell, *id.* at 73 n.1, in the same case, rejecting this view.

172 100 S. Ct. at 2289 (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100 (1972)).
ing is clearly more disruptive than labor picketing, the government simply cannot resort to generalizations:

Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.\(^{173}\)

The question that remains unanswered by Mosley, Carey and the analyses of Professors Farber and Stone is how close a fit there must be when an underinclusive classification burdens expression. Is it enough if the danger at which the statute is aimed is significantly greater with respect to those burdened than those excluded from the burden? If it could be shown that nonlabor picketing was twice as likely to be disruptive, could it alone be banned? The language of Mosley suggests that it could not.\(^{174}\)

However, it appears that the Court in Mosley was influenced by the overinclusiveness of the statute even though its holding was seemingly based upon equal protection underinclusiveness. The Court suggested that Chicago could have focused on the abuses themselves, rather than upon subject matter, by simply banning

\(^{173}\) 408 U.S. at 100-01.

\(^{174}\) "The language used by the Court in Mosley indicates that an actual showing that labor picketing was less disruptive would have been fruitless. Indeed, the city argued rather persuasively that labor picketing is more peaceful than other types of picketing: "As we all know, student demonstrations at schools—and even such demonstrations by parents and 'concerned citizens'—are utterly different. Mass picketing, sit-ins, smashed windows have been the order of the day. The very purpose of such demonstrations often is to bring the educational process to a halt." Brief for petitioners at 29-30. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). In its reply brief, the city further stated:

The city council without doubt has some reason to conclude that labor picketing is now usually more orderly than "public issue" picketing. Employees have a very palpable economic stake in their employer's business and their jobs there. Labor picketing is usually directed by experienced professionals and under the much more detailed guidelines laid down by the National Labor Relations Board, which is empowered to issue unfair practice charges against unions as well as employers. Labor picketing is now usually token picketing .... The distinction between labor picketing and "public issue" picketing is reasonably related to the requirements of assuring orderly conditions for the conduct of public education, certainly a legitimate state end.

Reply Brief for Petitioners at 7-8.

Professor Farber concludes that Mosley fit "neatly into [his] proposed approach [because] the city presented no factual basis for believing that nonlabor picketing was mark-
all disruptive picketing. An alternative that would be neither underinclusive nor overinclusive therefore was available. Furthermore, Mosley was not just a case involving a subject matter restriction; the statutes in both Mosley and Carey favored the views of labor, a preference that may well have reflected the political clout of labor upon the legislature.

The fate of the federal restrictions if challenged on equal protection grounds may well depend upon the level of scrutiny employed. An intermediate level might be appropriate because the burdens are underinclusive rather than overinclusive, and because the discrimination in the statute clearly was not caused by a legislative bias in favor of those entities and subjects not burdened by the restrictions. Nevertheless, the language of Mosley purporting to require a high degree of precision in avoiding underinclusive classifications clearly will create serious problems. If a compelling state interest for omitting certain entities and subjects is required, then the federal statute seems constitutionally flawed. On the other hand, if the application of elevated scrutiny means that there must be a plausible reason for excluding certain groups from the reach of the burden and that the legislative motive must


This approach could create a vagueness problem. In Grayned v. City of Rockford, 408 U.S. 104 (1971), however, the following ordinance, survived a vagueness challenge:

[No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

Id. at 107-08 (quoting ROCKFORD, ILL., CODE OF ORDINANCES ch. 28, § 18.1(i) (1969)).

176 Farber, supra note 106, at 735. Under Professor Stone's analysis, the restriction in Mosley would be a narrow subject matter restriction subject to the same strict degree of scrutiny applied to viewpoint restrictions. Stone, supra note 106, at 109 n.129. See text accompanying notes 129-130 supra.
not involve a preference for a particular group or point of view, then the statute could be upheld.

The Massachusetts statute involved in *Bellotti* may not have passed the test suggested above. Because both unions and corporations spend large sums to influence elections and both require protection of dissenting members and shareholders, there appears to be little justification for excluding unions from the regulation. The legislative history of the Massachusetts statute indicated that the disparate treatment of corporations and unions was motivated by a concern with the probable content of corporate expression.\(^7\) Thus, the inclusion of corporations and exclusion of unions seems to have reflected a legislative preference for the views of one group over another.

Neither the federal statute nor the invalidated Massachusetts statute applied to partnerships or business trusts. Is there reason for this exclusion? Business entities are profit motivated enterprises. They are likely to have substantial economic interests and, consequently, may seek to exert undue influence.\(^7\) In addition, there are minority investors who may disagree with the expression of the majority. Historically, however, the political involvement of these organizations on the federal level has been de minimis.\(^7\) Requiring expression through PACs may discourage even the minimal political expression in which they now engage. Thus, there may be reason for excluding these entities from the federal restrictions.

The next discrimination problem involves not discrimination among persons or entities but discrimination on the basis of subject-matter. Why should expression regarding the electoral process be forced through voluntary committees, while other expression is left unencumbered? Why is a corporation free to speak out on political questions not related to a particular candidate's campaign or to lobby on issues before Congress? To the extent that the concern with corruption is a basis for the statutory scheme, expression directly related to a candidate's election poses the most serious danger. It is here that the quid pro quo is most likely. From the standpoint of the protection of dissenting shareholders, it is this type of speech that presents the greatest dilemma—primarily because it is so closely associated with the fundamental right to vote.\(^8\) Shareholders can vote for

\(^7\) See *Bellotti*, 435 U.S. at 793.
\(^8\) See text accompanying notes 201-05 infra.
whomever they please, but a corporation can use their assets to attempt to convince others to vote against their political preferences. The corporation may also, by its expression of financial support, improperly induce a legislator to approve legislation of which the shareholders may disapprove. A corporation's statement on public policies unrelated to a political campaign does not affect to the same extent a shareholder's representation or vote.

In *Bellotti* the Court was troubled by the fact that legislation prohibited electoral contributions and expenditures but left lobbying unrestricted. Arguably, lobbying involves the similar problem of utilizing dissenting shareholders' funds to procure legislation disagreeable to them. Is there a reason for forcing contributions and expenditures in connection with an election through a PAC when funds may be spent directly in lobbying efforts? Certainly both situations are connected to the dissenters' right to representation. There are, however, important differences. First, legal lobbying involves supplying officeholders with information supporting or opposing legislation; it does not involve the election of specific individuals to public office. Thus, the danger of undue influence presented by lobbying is slight. Obviously, this is not true of illegal lobbying, in the form of bribes. A ban or restriction on lobbying generally, however, would have little effect upon that practice. Second, with all its faults, lobbying plays a vital informational role in legislative decisionmaking; therefore, the government's interest in having this information must also be weighed in the balance.

Forcing corporations and unions to spend only voluntarily-collected funds for lobbying might result in inadequate funding, because people are unaccustomed to contributing for such purposes and may not participate as actively as they would in the electoral context. Recent history demonstrates that the marketplace of ideas will not suffer by requiring that corporate and union electoral contributions and expenditures be made from PACs.

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181 See 435 U.S. at 792 n.31. The Court characterized this as paternalistic because it implies that legislators are sophisticated enough to deal with the influence of lobbyists, whereas voters are unable to evaluate the arguments of corporations made in connection with elections.

182 "It is recognized that in the argument and counter arguments of the process as a whole, pressure groups and lobby organizations sometimes provide considerable technical information and original research on legislation which helps give Congress and the public a far clearer picture of problems and of the true meaning of certain proposals." *Congressional Quarterly, Legislators and the Lobbyists* I (1965).

183 See text accompanying notes 45-47 supra.
ence, however, from which to judge the effect of such a restriction on lobbying funds. Thus, there seem to be plausible reasons for excluding funds spent for lobbying from the PAC requirement.

Because the federal restrictions on corporate and union contributions and expenditures burden the fundamental interest of freedom of expression, it will be argued that elevated scrutiny must be applied in an equal protection underinclusiveness challenge. In determining the applicable level of scrutiny, the Court should consider the fact that a fundamental right is involved, which may require that if there is a reason for excluding particular groups or subjects from a burden, they must be excluded; otherwise, the prohibition on overinclusive burdens would come into play. This is particularly important when first amendment rights are involved. Requiring a compelling state interest to exclude a particular group or subject from a burden upon speech creates the possibility of unnecessarily interfering with expression and unnecessarily restricting the marketplace of ideas. The result would be an insoluble dilemma between the admonitions that a statute burdening speech cannot be too broad or too narrow.

III
THE GOVERNMENT INTERESTS ALLEGEDLY SERVED BY THE FEDERAL RESTRICTIONS UPON POLITICAL CONTRIBUTIONS AND EXPENDITURES

Whether the Court applies strict scrutiny, some intermediate form of review, or even a mere rational basis test to the federal restrictions, the government interests allegedly served by the restrictions will have to be examined. The following three subsec-

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184 There is some experience with a requirement that funds used for lobbying must be voluntarily provided. In Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), the Court suggested that a rebate to dissenters of union dues used for noncollective bargaining purposes would remedy the first amendment violations. Although the opinion is less than explicit, its holding seems to apply to funds used for lobbying. Id. at 235. There is some uncertainty, however, whether Abood is applicable to private sector unions. See note 241 infra. The requirement of an affirmative contribution to a PAC for lobbying would probably reduce the funds available for lobbying more so than a rebate remedy.

185 Justice Rhenquist made a similar point in his dissenting opinion in Carey. He asserted that the majority's holding, when considered with previous cases requiring that the "least restrictive" means be used in laws regulating speech, had created a "Catch-22" because "the state is damned if it does and damned if it doesn't." 100 S.Ct. 2286, 2298 (1980). Rhenquist justified the exemption for labor picketing by relying on the state's argument that when a home is also a place of employment, the resident's "privacy interests are reduced." Id. at 2301. The majority in Carey rejected this "waiver" argument, viewing the preference for labor picketing as totally unrelated to the interest in privacy. Id. at 2294-95.
tions examine the rationales of preventing corruption, equalizing political influence and protecting the views of dissenting shareholders and union members.

A. Preventing Corruption

In *Buckley*, the Court held that preventing the reality and appearance of corruption and undue influence is a compelling state interest sufficient to validate federal limitations on political contributions.\(^{186}\) Although the Court used the terms "corruption" and "undue influence" interchangeably without defining them,\(^{187}\) it seemed to include more than the quid pro quo or prearranged bribe:

Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected quid pro quo arrangements." But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.\(^{188}\)


\(^{187}\) Corruption has been defined as "[i]nducement (as of a political official) by means of improper consideration (as bribery) to commit a violation of duty." *Webster's Third New International Dictionary* 512 (1976).

The Court implied in *Buckley* that preventing the appearance of corruption, even when no actual corruption was likely to occur, would establish a compelling government interest. In upholding limits on political contributions, the *Buckley* Court stated:

> Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunity for abuses inherent in a regime of large individual financial contributions ... Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical ... if the confidence in the representative system of Government is not to be eroded to a disastrous extent."

\(^{424}\) U.S. at 27 (quoting Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 565 (1973)). Because the "appearance" of corruption will probably accompany a situation in which actual corruption is likely, the Court should not have to rely solely on the appearance to establish a compelling state interest. In *Buckley*, the Court responded to the argument that "most large contributions do not seek improper influence," id. at 29, by asserting that "it is 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." Id. at 30.

The first case that utilized the "appearance of impropriety" rationale to restrict speech upheld federal restrictions on the political activities of civil service employees. Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973). Although first amendment rights were involved, the Court did not use the language of strict scrutiny analysis in discussing the standard of review. Both actual and apparent impropriety also were evident in this case as they were in *Buckley*.

\(^{188}\) 424 U.S. at 27-28.
A reasonable definition of undue influence or corruption should include acts of an officeholder that are designed to attract or repay a financial supporter. Additionally, even if the officeholder ultimately acts against the interests of a financial supporter, undue influence arises if greater weight is given to the interests of the contributor than to the interests of other constituents.\textsuperscript{189}

The most obvious weakness in the argument that the statute is justified as a means of preventing corruption and undue influence is that it is overinclusive.\textsuperscript{190} Under the statute, a corporation cannot directly spend fifty cents to buy a political bumper sticker even though such a small expenditure would generate no corruption or undue influence. Because an expenditure for political expression is equivalent to speech protected by the first amendment,\textsuperscript{191} the PAC requirement seems to be a clear example of unconstitutional overbreadth. It is not necessary to prohibit a corporation or union from contributing or expending funds except through a PAC in order to prevent corruption. Indeed, there is seemingly no relation between the PAC requirement and the goal of preventing the actuality or appearance of corruption and undue influence.\textsuperscript{192}

In addition to the overbreadth problem, the corruption rationale presents other serious difficulties. The \textit{Buckley} Court

\textsuperscript{189} See Nicholson, \textit{supra} note 8, at 341.
\textsuperscript{190} See Redish, \textit{supra} note 25, at 356-57. The statute may also be overbroad because it might limit certain forms of nonpartisan expression that have no corrupting effect. The statute specifically permits "nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families." 2 U.S.C. § 442b(b)(2)(B) (1976). This limited exception may imply that other nonpartisan activities are improper under the statute. The Commission, however, has promulgated a regulation that permits profit corporations to engage in voter registration drives in conjunction with a nonprofit, nonpartisan organization. See 11 C.F.R. § 114.4(d) (1980). Federal courts have interpreted the Act to exclude nonpartisan expression. See Redish, \textit{supra} note 25, at 348-49.

\textsuperscript{191} See text accompanying note 9 \textit{supra}.

The appellate court in \textit{Buckley} analogized the case before it to United States v. O'Brien, 391 U.S. 367 (1969), which applied a less stringent standard of review to sustain a prosecution for draft card burning. The court argued that the expenditure of money, like burning a draft card, was not pure speech and thus did not deserve the most stringent standard of protection. 519 F.2d 821, 840 (D.C. Cir. 1975). The Supreme Court rejected this argument: "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or reduce the exacting scrutiny required by the First Amendment." 424 U.S. at 16.

\textsuperscript{192} See text accompanying note 205 \textit{infra}.
held that the goal of preventing corruption did not justify limiting independent expenditures made on behalf of candidates but did justify limitations on contributions. Under the Buckley holding, the Court may sustain the restrictions on direct corporate and union contributions under the undue influence and corruption rationale, while invalidating the restrictions on independent corporate and union expenditures. Even assuming the validity of Buckley's dubious distinction between contributions and expenditures, there is a possibility that restrictions on independent corporate and union expenditures could still be limited or banned on the ground that they have more potential for corruption than expenditures made by individuals and other groups. The Court appeared to reserve this question in Bellotti when it noted that "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." 

As a starting point for developing a theory justifying a restriction on independent corporate and union expenditures, it is pro-

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194 Id. at 25-30.
195 See Birnbaum, supra note 64, at 172.
196 For a critique of this distinction see Nicholson, supra note 8, at 340-44; Rosenthal, The Constitution and Campaign Finance Regulation after Buckley v. Valeo, 425 ANNALS 124, 130-31 (1976); Comment, supra note 8, at 873-74. Chief Justice Burger and Justices Blackmun and White, in separate opinions concurring in part and dissenting in part, stated that they were unconvinced by this distinction. Buckley v. Valeo, 424 U.S. at 241-46 (Burger, C.J.), 259 (White, J.), 290 (Blackmun, J.). Chief Justice Burger and Justice Blackmun concluded that contribution limitations also were unconstitutional. Justice White, on the other hand, concluded that limitations on both expenditures and contributions were constitutional. Id. at 259.
197 435 U.S. 788 n.26. The Court found the corruption rationale irrelevant in Bellotti because that case involved referenda questions that did not pose a danger of the corruption of public officials. Id. The Court apparently intended to distinguish the case before it from a case involving candidate elections, implying that corporate independent expenditures involved a greater danger of corruption than expenditures from noncorporate sources. As authority for this proposition, the Court cited a student comment asserting that a greater danger does exist in the corporate and union context. See Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U. PA. L. REV. 386, 409-10 (1977). The student author's conclusion, however, is questionable. The comment cites only the "pernicious practices ... that surfaced in the 1972 presidential election," and the "questionable, if not illegal, contribution procedures used by many corporations," to support its broad conclusion. Id. at 409 n.131. The practices referred to by the student author included laundering campaign funds, illegal use of corporate funds, undisclosed earmarking, innuendos of quid pro quos and accepting contributions from foreign sources. The existence of such "pernicious practices" in 1972 would only be relevant if the statutory scheme could be expected to reduce or prevent these practices. The corporate restrictions were in place in 1972, however, and the increased use of corporate PACs that has occurred in recent years seems to create more potential for pernicious practices. See text accompanying notes 44-46 supra.
fitable to analyze why the Buckley Court rejected the corruption rationale as applied to independent expenditures. In Buckley, the Court assumed that independent expenditures, unlike contributions, provide little or no "assistance" to the candidate and, therefore, posed little danger of a quid pro quo arrangement. The slight danger of corruption from such expenditures was outweighed by burdens it placed on the first amendment interests. Assistance, however, is a relative term. If direct contributions are limited or banned, the only way a wealthy individual or group can aid a candidate is with a large independent expenditure. It is naive to believe that candidates will not rely on this source of assistance in the future and that it will not become a breeding ground for undue influence. This argument—not considered in Buckley—takes on added importance in the context of corporate and union expenditures because the potential for corruption is greater with these large economic entities than with individuals and other groups. Even if independent expenditures generally create less potential for undue influence than contributions, this does not preclude a finding that independent expenditures by corporations and unions may create enough undue influence to justify restrictions burdening first amendment interests. This argument rests on the assumption, by no means self-evident, that corporate and union expenditures are more corrupting than others. The underlying purpose for the existence of corporations and unions may, however, justify this assumption. The Federal Election Commission's amicus brief in Bellotti noted that

198 424 U.S. at 47.
199 Id. at 47-48. The Court in Buckley also found a greater first amendment interest in independent expenditures than in contributions. 424 U.S. at 19-23, 39. In addition, the Court stated that the definition of independent expenditures created a vagueness problem that could be resolved only by reading the restriction so narrowly that it would be very easy to circumvent. Id. at 40-47. Both arguments could support the invalidation of the restrictions on expenditures by corporations and unions. The statute may create other vagueness problems. See Redish, supra note 25 at 345-46.
200 See Nicholson, supra note 8, at 341-42.

"Independent" committees could be a major factor in the 1980 elections. By August, 1980, approximately $524,769 had already been spent on behalf of presidential candidate Ronald Reagan by groups allegedly acting independently from his regular campaign committee. These groups plan to spend between 30 and 50 million dollars in their independent efforts to boost his campaign. 7 CAMPAIGN PRAC. REP., July 7, 1980, at 2; N.Y. Times, August 8, 1980, § A, at 15, col. 5. Other independent committees also have been very active. For example, the National Conservative Political Action Committee has spent $870,000 in its independent effort to defeat six liberal Democratic senators in the 1980 election. Id. Independent supporters of presidential candidate John Anderson also have spent substantial amounts of money. Id.
business corporations are organized for the purposes of increasing financial gain and furthering the economic interests of their stockholders; attempts to influence the political process are prima facie for the purpose of furthering the financial return from their investments and the dangers of quid pro quo arrangement between elected public officials and corporate contributors can be seen as even more compelling than the dangers of the same arrangement between such an official and a private individual. 201

Unlike the corporation, which ordinarily is pursuing direct economic rewards, the individual contributor may frequently choose the recipient of his or her political bounty based on a broad spectrum of concerns which are unrelated to economic interests. 202 Thus, the development of quid pro quo and other forms of undue influence is less likely.

Even if one assumes that corporations and unions are more likely to have tangible economic interests more likely to result in undue influence, this approach may take an overly narrow view of corruption. An offer by a "fat cat" to make a huge expenditure on behalf of a candidate if the candidate agrees to a particular position, dear to the "fat cat" but not involving his or her economic gain, involves corruption and quid pro quo. Indeed, the effect upon the electorate may be greater if a candidate is convinced to change his or her views on war, peace, welfare reform or health care than if a candidate agrees to drop an antitrust prosecution. Nevertheless, this should not undermine the general proposition that political expenditures by corporations and unions will much more frequently involve the possibility of a direct benefit received in return for the expenditure.

Arguably, the danger of corruption is greater merely because of the vast resources available to corporations and unions. These entities usually can outspend wealthy individuals, thus obtaining more undue influence from sheer volume. Although this argument ignores the fact that there are many very wealthy individuals who could match corporate or union expenditures, corporations

202 This argument is less applicable to unions because they frequently are interested not only in issues that directly affect them economically but also in broader issues. There are also many other organizations concerned primarily with one issue. Although the possibility of a quid pro quo is just as great with these one issue organizations, they are not subject to the federal restrictions unless they are incorporated.
and unions would more often than not have greater assets to draw upon for this purpose.

A narrow interpretation of *Buckley* is that the Court merely rejected the limits upon independent expenditures because it determined that the danger of corruption was small compared to the burden on first amendment interests. The Court may conclude that the greater danger posed by corporate and union expenditures tips the balance towards finding a compelling interest for restrictions upon these entities.

There are several very serious obstacles, however, to the Court's acceptance of the foregoing arguments. First, the bans on independent expenditures by corporations and unions are overbroad if their purpose is to prevent corruption. Second, the argument that corporations and unions pose a greater danger of corruption than individuals and other organizations rests on a question of degree. If the Court takes seriously its language in *Mosley*, it may well conclude that the generalizations about propensities for undue influence necessary for this argument cannot justify such a distinction.

An even more fundamental problem with the corruption rationale is that it ignores the role of PACs. As long as the PAC is allowed to make unlimited independent expenditures, corruption will not be reduced. The possibility of quid pro quos and improper favors are virtually identical with or without the restrictions because the same individuals manage both the corporation and the PAC. Thus, the restrictions cannot be upheld on the rationale that they prevent corruption.

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203 See text accompanying notes 139-45 *supra*.
204 See text accompanying notes 66-74 *supra*.
205 See note 37 *supra*. In the 1972 election, some public officials coerced corporate officers to make contributions. See Ervin, *Campaign Practices and the Law: Watergate and Beyond*, 23 Emory L.J. 1,4 (1974) (citing the "rampant violations of federal election laws by the solicitation of coerced contributions from corporations"); N.Y. Times, July 7, 1973, at 1 (quoting George A. Spater: "Under existing laws, a large part of the money raised from the business community for political purposes is given in fear of what would happen if it were not given . . ."). Many of these illegal contributions did not come from PACs. The restrictions, therefore, did not wipe out this practice. It is arguable that the restrictions are still useful, however, because they make it easier for a corporation to resist such threats. On the other hand, corporate officers may respond to these threats by using PAC funds for expenditures and contributions. The extent to which this will occur depends upon the internal decisionmaking apparatus of the PACs. The more participants involved in PAC allocation decisions, the less likely it is that public officials would attempt to use duress to secure contributions or expenditures. Manipulation of several persons increases the danger of disclosure and publicity.
If preventing corruption or the appearance of corruption is the goal, the present scheme is ill suited for achieving it. A better approach would be simply to place limitations upon corporate and union contributions and independent expenditures regardless of whether they are made directly or through a PAC. This would avoid the over-breadth problem created by the ban on direct contributions and expenditures. Because the Court upheld contribution limitations in *Buckley*, substituting the bans for limitations on contributions should be constitutional.\textsuperscript{206} If the Court is to uphold expenditure limitations, however, it must accept the argument that corporate and union independent expenditures are more "corrupting" than such expenditures by individuals and groups. The Court might look more favorably upon such limits if they are set at a level that would still allow the ideas of corporations and unions to enter the marketplace of ideas.\textsuperscript{207}

B. Equalization Rationale

Proponents of campaign finance regulation argue that equalizing political influence is a compelling governmental interest sufficient to sustain restrictions upon large campaign contributions and expenditures. They claim that equalization of influence promotes diversity in the marketplace of ideas, thus ultimately advancing rather than hindering first amendment values.\textsuperscript{208} The equalization goal is also related to the equal protection interest in the right to equal representation.\textsuperscript{209} In *Buckley*, however, the Court flatly rejected these theories: "[T]he concept

\textsuperscript{206} The statute currently limits contributions from a PAC to an individual candidate to $5,000. 2 U.S.C. § 441a(a)(2)(A) (1976).

\textsuperscript{207} The majority pointed out in *Buckley* that the $1,000 independent expenditure limitation, which it held invalid, could not buy "a single one-quarter page advertisement . . . in a major metropolitan newspaper." 424 U.S. at 40 (footnote omitted).

\textsuperscript{208} The appellate court's opinion in *Buckley* noted:

There is a positive offset to plaintiffs' invocation of the First Amendment in the presentation by intervening defendants that the statute taken as a whole affirmatively enhances First Amendment values. By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office. This broadens the choice of candidates and the opportunity to hear a variety of views.


\textsuperscript{209} Nicholson, *supra* note 8, at 328-31.
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 ...."  

Therefore, if corporations have the same first amendment rights as individuals, there is no compelling government interest in preventing speech by wealthy corporations and unions from exerting excessive influence in the marketplace of ideas. Such a purpose would be improper or, at least, impermissibly served by restrictions on speech.

In *Bellotti*, the state perhaps attempted to disguise the equalization rationale to avoid these implications from *Buckley*. Instead of directly emphasizing inequality of influence, Massachusetts emphasized the voters' perceived reaction to inequality of influence. The state argued that corporate "participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government." The *Bellotti* Court virtually ignored this twist and reached the same conclusion it had in *Buckley*, albeit with some equivocation. Eschewing the equalization rationale's paternalistic approach to the first amendment, the Court observed that "if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment." The Court also asserted that "the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" Justice Powell, however, commented:

> If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration .... [B]ut there has been no showing

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210 424 U.S. at 48-49.
211 The *Buckley* court did not clarify whether means other than restrictions on contributions and expenditures could be used to equalize the effect of large contributions on the marketplace of ideas. Interestingly, the Court ignored the equalization rationale when it reviewed subsidies for candidates, relying instead on the rationale of "eliminating the improper influence of large private contributions." *Id.* at 96.
212 435 U.S. at 789.
213 See text accompanying note 216 infra.
214 435 U.S. at 792.
215 *Id.* at 790 (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959)).
that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.\textsuperscript{216}

Justice Powell's equivocation is puzzling. It suggests that there may be a discernable line between the improper goal of equalizing political influence and the proper goal of preventing the electorate from being overwhelmed. Justice White in dissent suggested that "[t]he Court's opinion appears to recognize at least the possibility that fear of corporate domination of the electoral process would justify restrictions upon corporate expenditures and contributions in connection with referenda . . . ."\textsuperscript{217} Unlike the majority, he found ample evidence of corporate domination in Massachusetts based upon a similar unsuccessful 1972 referendum in which opponents, financed largely by corporate treasuries, spent $120,000 while proponents spent $7,000.\textsuperscript{218} On the other hand, the majority commented that "[e]ven if viewed as material,"\textsuperscript{219} the fact that the referendum at issue was rejected in the 1976 election, without the aid of corporate contributions,\textsuperscript{220} demonstrated that there had been no corporate "dominance" of the election.\textsuperscript{221} It remains unclear whether evidence that a corporation dominated or overwhelmed the electoral process would convince the majority that corporate advocacy denigrated first amendment interests.\textsuperscript{222} It is also unclear what the Court really means by the terms "dominate" and "overwhelm." If evidence could be presented demonstrating gross inequality of expenditures, would that establish dominance?

\begin{itemize}
\item \textsuperscript{216} Id. at 789-90 (footnote omitted).
\item \textsuperscript{217} Id. at 810.
\item \textsuperscript{218} Id. at 810-11. The majority opinion implies that Justice White's comparison is misleading because "amounts of money expended independently of organized committees need not be reported under Massachusetts law, and therefore remain[ed] unknown." Id. at 789-90 n.28. It seems likely, however, that such expenditures would reflect a similar proportion between corporate and noncorporate money.
\item \textsuperscript{219} Id. at 790 n.28.
\item \textsuperscript{220} Corporate contributions were prohibited because the Massachusetts Supreme Judicial Court's decision upholding the statute (First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 359 N.E.2d 1262 (1977)) was then pending before the Supreme Court.
\item \textsuperscript{221} 435 U.S. at 790 n.28.
\item \textsuperscript{222} The briefs offered very little statistical evidence about corporate involvement in political campaigns. Montana's amicus brief, however, referred to an unsuccessful 1976 California referendum that would have required legislative approval of cites for nuclear generators. Supporters of the referendum, who received no corporate contributions, raised only 68% of the amount raised by opponents of the referendum. Almost all of the opponents' funds came from corporate contributions. See Amicus Brief of Montana at 9, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).
\end{itemize}
In one of the few cases to consider the constitutionality of the federal restrictions since *Bellotti*, a federal district court upheld the statute as "the least drastic means to achieve the congressional goal of protecting the integrity of the political process." The need for this protection was based upon the "excesses of the corporate manipulation of the political process demonstrated in the late nineteenth century and early twentieth century ...." Certainly there is ample evidence of corporate domination of the political process in candidate elections during the period preceding the enactment of federal corporate bans. If the Court, however, were to uphold the federal legislation based upon such evidence after having invalidated the Massachusetts bans, it could create massive confusion regarding the validity of restrictions in other states. Presumably, any state that could demonstrate a history of corporate involvement similar to that experienced on the federal level prior to the enactment of the federal corporate bans in 1907 would be free to restrict corporate contributions.

As a practical matter, it is inconceivable that the Court would approach this question on a state-by-state basis. The endless litigation and the fine distinctions that would have to be drawn between permissible persuasion and improper dominance are hardly suited to a Supreme Court which purports to be concerned about conserving judicial resources and which dislikes meddling in the details of legislative judgments. The more likely approach would be for the Court to distinguish between ballot measure campaigns and elections for public office. The evidence of domination on the

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223 Several unreported cases since *Bellotti* have upheld various aspects of the federal restrictions. See note 29 supra.

224 Federal Election Comm'n v. Weinste, 462 F. Supp. 243, 249 (S.D.N.Y. 1978). It is unclear whether the *Weinstein* court relied on the corruption or the dominance rationale to sustain the statute. The court's decision that the restrictions were overbroad supports the conclusion that it was concerned with influence upon the electorate rather than with corruption of public officials. The court argued that "[t]o permit even small political contributions by corporations would alter the structure and presentation of political issues. Instead of encouraging individual free speech, the allowance of corporate contributions would obscure it." *Id.* Yet the court also relied upon a footnote in *Bellotti* suggesting in dicta that the federal restrictions may be a constitutional means of preventing corruption. *Id.* at 247-48. There is a serious overbreadth issue, however, concerning both the corruption and dominance rationale. See text accompanying notes 190-92 supra, note 230 infra.


federal level prior to the enactment of the corporate and union bans, and evidence of dominance in some state elections, might be sufficient to sustain restrictions in campaigns for public office in state or federal elections. This would, of course, imply that the Court could reconsider the constitutionality of such restrictions in ballot measure campaigns if evidence of domination could be produced.

Even if the Court were to accept the dominance rationale, there are serious difficulties with using it to uphold the federal restrictions. The role of corporate and union PACs must again be considered. The expression of a PAC is just as likely to dominate the electoral process as the direct expression of unions and corporations. Therefore, the present federal statutory scheme does little to prevent domination of the electoral process. Furthermore, limitations, as opposed to absolute bans, may be a less restrictive means of preventing domination because it is unlikely that numerous small contributions by corporations and unions could dominate an election.

The primary problem with the domination rationale for upholding bans or limitations is again one of line drawing. Can the Court really distinguish between "effective persuasion" and "domination"? Is not Congress, by attempting to prevent domination of the political process, restricting "the speech of some elements of our society in order to enhance the relative voice of others," which the Court in Buckley described as "wholly foreign to the First Amendment"? In Bellotti the Court rejected, as contrary to the first amendment, the "highly paternalistic" approach of the Massachusetts statute. Attempting to protect voters from an imbalance of persuasion implies a lack of confidence in their inherent ability to govern themselves, thus treating them like children. At some point, however, corporate or union expression may so dominate the electoral process that even an intelligent voter could not consider all opinions and make a reasoned deci-

228 See Epstein, supra note 226, at 24-26.
229 Dr. John Shockley has done extensive research on the effect of corporate influence in ballot measure campaigns. His statistics reveal numerous instances in which the total funds spent by corporate-backed groups far exceeded those spent by noncorporate groups. Although it cannot be established conclusively that inequality or dominance was a causal factor for the defeat or passage of a ballot measure, Shockley's evidence tends to show a causal link. IRS Administration of Tax Laws Relating to Lobbying (Part 1): Hearings Before the Subcomm. of the Comm. on Government Operations, 95th Cong., 2d Sess. 256-73 (1978) (statement of John Shockley).
230 Overbreadth may also exist because the statute could be interpreted as restricting nonpartisan expression that does not raise the domination problem. See note 190 supra.
231 424 U.S. at 48-49.
232 435 U.S. at 791 n.31.
sion. Perhaps it is not overly paternalistic for government to act to prevent such an occurrence. However, the question remains whether the Court would ever conclude that the line between effective persuasion and dominance had been crossed.

C. Protecting Dissenting Shareholders and Union Members

When a corporation or union spends funds for political purposes it is using the assets of shareholders or union members, some of whom will ordinarily disagree with the political expression resulting from the expenditure. The federal restrictions have been, at least in the past, aimed at protecting such dissenters from having their funds used to support political causes with which they do not agree.233 This rationale probably fits the present federal regulatory scheme better than any other. Perhaps the Supreme Court could conclude that the combination of the bans on direct corporate and union political spending and the authorization of PACs234 may be the least restrictive means of dealing with the problem. Another possible solution is the use of rebates to dissenters.235 This alternative provides less protection, however, because it requires dissenters to inform the organization's leadership of their opposition.236 In Abood v. Detroit Board of Education,237 the Court held that a state statute forcing public school teachers to pay the equivalent of union dues which would

234 As applied to nonprofit corporations, however, the statute may be overbroad, because no one need forego investment employment opportunities if they choose either to leave the organization or remove their investment. Nonprofit corporations may not desire to make political contributions or expenditures, however, because this would deprive them of the tax advantages secured by their nonprofit status. See I.R.C. § 501. The statute also seems overbroad as applied to single shareholder corporations because of the lack of dissenting shareholders. The burden is more apparent than real, however, because the shareholder could merely pay a dividend that could be paid for political purposes. See Broadrick v. Oklahoma, 413 U.S. 601, 630 (1971) (Brennan, J., dissenting); see note 142 supra.
235 See Comment, supra note 25, at 158-59.
236 The PAC requirement for corporations with few shareholders is the functional equivalent of a rebate procedure. The federal restrictions will not, therefore, reduce political expression by these corporations more than a rebate procedure would. The only burden imposed by the restrictions is the PAC reporting requirements codified in 2 U.S.C. § 434 (1976). In Buckley, the Court upheld other reporting requirements despite strong evidence of a serious and unnecessary chill on expression by supporters of non-major party candidates. 424 U.S. at 66-74; see Nicholson, supra note 8, at 357-59. Justice White argued that rebates were not an appropriate solution for corporate dissenters because "[t]here is no apparent way of segregating one shareholder's ownership interest in a corporation from another's." First Nat'l Bank v. Bellotti, 435 U.S. 765, 818 (1978) (dissenting opinion).
be used for political expression rather than for collective bargain-
ing violated the first amendment. The Court noted that a re-
bate of the portion of the service charges used for political and ideological purposes was an appropriate remedy. To obtain the rebate teachers would need only to notify the union of their gen-
eral opposition to the use of funds for nonbargaining purposes; notice of opposition to specific expenditures was not necessary. The Court explained: "To require greater specificity would con-
front an individual employee with the dilemma of relinquishing either his right to withhold his support for ideological causes to which he objects or his freedom to maintain his own beliefs with-
out public disclosure." The rebate remedy requires an affirmative act by the dis-
senter making known his or her general opposition to the political use of union funds. Conversely, the federal restrictions have been interpreted as requiring an affirmative act expressing a desire to donate to a PAC; passive acquiescence is insufficient. The va-

238 Id. at 232-37. A similar issue was raised in International Ass’n of Mach. v. Street, 367 U.S. 740 (1961), but the Court avoided the constitutional issue by interpreting the Railway Labor Act to preclude the use of union dues for political activities without a remedy for dissenting union members. Id. at 749-50. The Court further refined this remedy in Railway Clerks v. Allen, 373 U.S. 113 (1963), when it held that a general notice of opposition, rather than notice of opposition about each expenditure, was sufficient. 373 U.S. at 129-31. See discussion in Abood, 431 U.S. at 239 n.39.

Employees subject to the NLRA have been able to attack the use of funds by a union that does not provide a rebate remedy under § 301(a) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185(a) (1976), by alleging that the union breached its duty of fair representation. See, e.g., Seay v. McDonnell Douglas Corp., 583 F.2d 1126, 1130 (9th Cir. 1976). One court has rejected the assertion that the use of such funds without a rebate violates the first amendment. Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410-11 (10th Cir. 1971); see discussion in note 241 infra.

In Lathrop v. Donohue, 367 U.S. 820, 843, 847-48 (1961) decided the same day as Street, the Court affirmed a state court decision holding that compulsory enrollment in the state’s integrated bar did not violate an attorney's freedom of association. A majority of the Court apparently did not reach the question whether a state may, consistent with the first amendment, compel an attorney to contribute financial support to political activities of the bar.

239 431 U.S. at 241.

240 Some labor PACs in the past automatically added contributions into the normal dues that are withheld, forcing the individual to specifically request a rebate. A federal district court has held that this “reverse checkoff” violated section 321(b)(3)(A) of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441b(b)(3)(A) (1976). The Court required the National Education Association to return all contributions collected by this withholding device unless notified that the member wishes the funds to be used for a political donation. Federal Election Comm’n v. National Educ. Ass’n, 457 F. Supp. 1102, 1106-07, 1112 (D.D.C. 1978). The district court stated that “‘knowing free choice’, means an act intentionally taken and not the result of inaction when confronted with an obstacle.” Id. at 1109 (quoting Pipefitters Local 562 v. United States, 407 U.S. 385, 439 (1972)).
lidity of the federal restrictions on unions may turn on whether this distinction has constitutional dimensions. After *Abood*, a union member should not be able to successfully maintain that the constitution requires unions to make political contributions and expenditures only through PACs because the constitution apparently only requires a rebate upon general notice of dissent.\(^{241}\)

\(^{241}\) The sufficiency of the rebate remedy is, however, unclear. The *Abood* Court declined to rule on the constitutionality of an internal union remedy for refunding to the employee that portion of his dues used for noncollective bargaining purposes. 431 U.S. at 240 n.41. The definition of political expenditures is also unclear. In particular, it is uncertain how to deal with expenditures that are neither political nor collective bargaining related. In *Beck v. Communications Workers of America*, 468 F. Supp. 87, 89 n.3 (D. Md. 1979), the court reserved[d] for decision at a later date the question whether the Union may spend the plaintiffs' fees for any or all of the noncollective bargaining purposes complained of [e.g., union social functions]. [T]here does appear to be, in the decisions of the Supreme Court on the subject, a gray area between expenditures for "political purposes" which are clearly impermissible and expenditures for "collective bargaining, contract administration, and grievance adjustment," which are, of course, permissible.

*Cf.* Ellis v. Railway Clerks, 91 L.R.R.M. 2339 (S.D. Cal. 1976) (union violated duty of fair representation by spending dues for recreational, social and entertainment activities, death benefit program, medical and legal insurance, union conventions, and publications).

The *Abood* holding would apply to private sector union shops if governmental action is found. The court did not specify in *Abood* whether the state action in *Abood* was based upon the existence of public employment or the authorization of an agency shop by state statute. The Court has held that "governmental action" exists under the Railway Labor Act (RLA) because it authorizes union shops and invalidates state right to work laws. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 231-32 (1956). Arguably, the authorization of union shops by section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3) (1976), would also establish governmental action so that the use of union dues for political purposes without a rebate to dissenters by organizations covered under either the NLRA or the RLA would violate the first amendment.

This issue has not been conclusively settled. The First Circuit has held that governmental action does exist under § 8(a)(3) for asserting first amendment claims. Linscott v. Millers Falls Co., 440 F.2d 14, 16-17, cert. denied, 404 U.S. 872 (1971); *Cf.* Buckley v. AFTRA, 496 F.2d 305, 309-10 (2d Cir.), cert. denied, 419 U.S. 1093 (1974) (concluding, without reaching governmental action question, that court had jurisdiction over first amendment claims). The Ninth and Tenth Circuits, however, have noted that there is no governmental action under § 8(a)(3). Reid v. McDonnell Douglas Corp., 433 F.2d 408, 409-11 (10th Cir. 1971) (dicta); Mendoza v. United Farm Workers Organizing Comm., 84 L.R.R.M. 2404 (9th Cir. 1973) (per curiam); *cf.* Colorado Labor Council v. AFL-CIO, 349 F. Supp. 37, 43 (D. Colo. 1972) (claims of governmental action against union under *Reid* are "tenuous"), vacated and remanded on other grounds, 481 F.2d 396 (10th Cir. 1973). The *Reid* court argued that *Hanson* could not apply to the NLRA because the latter statute, unlike the RLA, allows states to prohibit union shops under 29 U.S.C. § 164(b) (1976), 443 F.2d at 410. Thus, "[i]n NLRA matters, the federal government does not appear ... to have so far insinuated itself into the decision of a union and employer to agree to a union security clause so as to make that choice governmental action for purposes of the first and fifth amendments." *Id.* at 410-11 (footnote omitted).

The constitutional claim is probably not necessary, however, because employees covered by the NLRA have been able to obtain a rebate remedy by alleging a breach of the duty of fair representation. *See* note 238 *supra*.
Nevertheless, it does not follow that the Constitution forbids Congress from going one step further in protecting dissenting union members by prohibiting the use of their dues for political purposes unless they choose to contribute to a PAC. Whether out of fear of reprisal, peer pressure, or mere inertia, many dissenters may be reluctant to express even general opposition to the political expenditures of the union.\textsuperscript{242}

Even if the federal restrictions are constitutionally applied to unions, the question remains whether they are validly applied to corporations. The constitutional argument used in \textit{Abood} to protect dissenting union members who were required by state law to pay union agency fees to keep their jobs is not applicable to corporations because of the lack of state action.\textsuperscript{243} Justice White pointed out in his dissenting opinion in \textit{Bellotti}, however, that “the Court [in \textit{Abood}] did not purport to hold that all political or ideological expenditures not constitutionally prohibited were constitutionally protected.”\textsuperscript{244} Although such protection for dissenting shareholders is not required, providing that protection through PACs arguably then does not violate the first amendment rights of the majority. The strong policy interest in allowing the dissenter to “withhold ... support for ideological causes ... without public disclosures,”\textsuperscript{245} although not a constitutional right of shareholders, may nevertheless constitute a compelling state interest.

Although protecting the rights of dissenting shareholders may fit the present federal statutory scheme better than other rationales, this approach is not free from difficulty. In \textit{United States v. CIO},\textsuperscript{246} decided in 1948, the Court described two congressional purposes for the federal restrictions: protecting dissenting

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{242} In Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. 1102 (D.D.C. 1978), the district court upheld the PAC requirement as applied to a noncompulsory labor organization. The court was not clear whether the interests of dissenting union members were protected constitutional rights. Dissenting members should not have been able to successfully assert that the involuntary use of dues paid to the organization constituted a constitutional violation because governmental action and compulsion were absent in that case.

In further support of the constitutionality of the statute, the court commented that requiring “every dollar in [the] political action fund [be] knowingly and intentionally given” advances the interest in preventing corruption, \textit{Id.} at 1109. The court did not explain, however, the connection between voluntariness and preventing corruption. \textit{See} text accompanying note 192 supra.

\item \textsuperscript{243} \textit{See} note 241 supra.

\item \textsuperscript{244} 435 U.S. at 817; \textit{see} note 242 supra.

\item \textsuperscript{245} \textit{Abood} v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977).

\item \textsuperscript{246} 335 U.S. 106, 113 (1948).
\end{enumerate}
\end{footnotesize}
union members and corporate shareholders, and curbing the political power of aggregated wealth.\textsuperscript{247} This duality was seemingly cast aside in \textit{Pipefitters Local 562 v. United States},\textsuperscript{248} when the Court discarded the second justification by holding that Congress intended to ban only those union expenditures from the "general union treasury—not the funds donated by union members of their own free and knowing choice."\textsuperscript{249} \textit{Pipefitters} appeared to shift the rationale almost totally to the protection of dissenting union members. Three years later in \textit{Cort v. Ash},\textsuperscript{250} the Court addressed the same issue in the context of the corporate shareholder but it reached a different result. One of several reasons the Court gave for refusing to find an implied shareholder cause of action for violations of the corporate restrictions was that "the intent to protect corporate shareholders ... was at best a subsidiary purpose" for the restrictions on corporate political expenditures.\textsuperscript{251} Justice Brennan stated that "[w]hile a stockholder acquires his stock voluntarily and is free to dispose of it, union membership and the payment of union dues is often involuntary ...."\textsuperscript{252} If the Court continues this distinction between corporate and union dissenters, there is a real danger that it may upset the balance struck by Congress between these two powerful interest groups by invalidating only the corporate restrictions.

The distinction drawn in \textit{Cort} was the precursor of dicta in \textit{Bellotti} indicating the Court's unwillingness to hold that this rationale is a compelling government interest in the context of corporations. As in \textit{Cort}, the Court distinguished \textit{Abood} by noting the lack of compulsion in the corporate context: "The shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason."\textsuperscript{253} The

\textsuperscript{247} Id. at 113. The Court's reference to curbing the power of aggregated wealth seems to encompass the problems of both corruption and inequality of influence on the electorate.

\textsuperscript{248} 407 U.S. 385, 416 (1972).

\textsuperscript{249} Id. at 416.

\textsuperscript{250} 422 U.S. 66 (1975).

\textsuperscript{251} Id. at 80.

\textsuperscript{252} Id. at 81 n.13.

\textsuperscript{253} 435 U.S. at 794 n.34.

The Court stated:

A more relevant analogy ... is to the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue. The \textit{Street} and \textit{Abood} Courts did not address the question whether, in such a situation, the union or association must refund a portion of the dissenter's dues, or more drastically, refrain from expressing the majority's views.

\textit{Id. at} 794-95 n.34.
Court also observed: "Appellee does not explain why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders." The Court's disinclination to consider the interests of dissenting shareholders to be compelling apparently rests on two bases. First, it views shareholder investments as voluntary. Second, the Court suggests that corporate political expression is indistinguishable from other corporate actions with which shareholders may disagree. The following subsections examine these two explanations.

1. Voluntariness of Shareholder Investments. Justice White argued in his dissenting opinion in *Bellotti* that "the State has a strong interest in assuring that its citizens are not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities." There are two aspects to the voluntary investment argument: the interest in promoting increased societal welfare through the corporate structure and the dilemma faced by the dissenting shareholder. Justice White explained:

> [c]orporations ... are created by the State as a means of furthering the public welfare. One of their functions is to determine, by their success in obtaining funds, the uses to which society's resources are to be put. A State may legitimately conclude that corporations would not serve as economically efficient vehicles for such decisions if the investment preferences of the public were significantly affected by their ideological or political activities.

The majority ignored the state's interest in regulating the corporate structure for the benefit of society and focused only on the interests of dissenting shareholders. The Court indicated in dicta that it considered the shareholder's actions to be voluntary. Such a conclusion seems basically inconsistent with the view that there is compulsion in the union context. Although the prospect of selling stock is usually less burdensome to a shareholder than the loss of a job is to a union member, it cannot be denied that

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254 *Id.* at 794 n.34.
255 *Id.* at 818. See Comment, *supra* note 25, at 157.
256 435 U.S. at 818-19 (dissenting opinion).
both choices have economic costs. The investor presumably buys or holds stock believing that it is the optimum use of those particular assets. An investor who would otherwise buy or sell a corporation's stock but refrains because of the corporation's political activities has been forced to pay a price for his or her convictions. It is irrelevant that the shareholder's or worker's alternative investment or job may be more optimal in the long run. The point is that they are currently forced to balance their economic well-being against their political views. Furthermore, the alternative of selling stock is impractical for many small investors whose shares are held by pension funds, mutual funds or other institutional investors.\textsuperscript{257}

Many individuals faced with the loss of a favorable investment will choose to sacrifice their political ideals. Some will maintain their investments simply out of the inertia that may compromise even their most firmly-held convictions. Society does not benefit when dissenters are misrepresented as favoring a policy or candidate they actually oppose. Society and the marketplace of ideas are better served if a corporate contribution reflects the support of those shareholders who have voluntarily joined a political action committee which chooses to support a candidate. The willingness of a contributor to give financial support either to a candidate or to a political committee with a particular point of view accurately informs society of that contributor's political views. The involuntary allocation of one's resources to a candidate or committee, on the other hand, merely misleads society.\textsuperscript{258}

\textsuperscript{257} It is estimated that over 15\% of all New York Stock Exchange securities are currently held by pension funds and that 50\% of American corporate equity capital may be held by pension funds in 1985. \textit{Pensions \& Investments} May 10, 1976, at 32, col. 3.

\textsuperscript{258} Another commentator suggested a similar scenario:

The group voice, by its very nature, tends to drown out the individual voice, and to identify the dissenter, in the public eye, with the views of the group he opposes. The minority member enjoys no benefit from the dispensation of its funds by the organization; such expenditures serve only to decrease his income and savings and to limit the activities, political and non-political, in which he is economically capable of engaging. As a result of governmental action, his position become unenviable, fraught with hardship, both moral and economic.

The public that listens to and is influenced by the group voice is, in many ways, as poorly situated as the unwilling group member. First, the public is deceived by the force and frequency of the sound that it hears. The will of what may be a mere majority is expressed as the will of all. The public sees unanimity of purpose, never dissension and discord. Secondly, the voices of other associations competing with the forced membership group for public favor and legislative bounty are diminished.

2. Distinguishing Between Campaign Contributions or Expenditures and Other Corporate Expenditures. The Bellotti Court saw no distinction between the dissenting shareholders' interests concerning the corporation's political spending and other corporate decisions. The Court failed to perceive a key distinction—that political expression is so closely related to the rights to vote and to equal representation that it cannot be equated with a purely economic corporate decision. David Adamany has described the donation of large campaign contributions as "multiple voting" because the funds are used by candidates to influence the votes of others. "[B]y allocating some of their resources to politics [contributors] have weight beyond their votes in deciding elections and perhaps policy." Because these contributions do not involve state action, this multiplier effect creates no constitutional problem. Nevertheless, when a corporation's expenditure of dissenting shareholder assets is used to multiply the votes of a candidate he or she does not support, the interest in protecting the dissenter takes on an added dimension. Of course, in some instances the additional funds spent may have no impact on the election; thus, no multiple vote effect will occur. Even in these instances, however, the large contribution may create "multiple representation" because successful candidates are much more attentive to the views of large contributors than to the views of others. Through this form of undue influence, the dissenting shareholder's assets may cause an officeholder to promote policies opposed by the dissenter.

The close connection between corporate political contributions and expenditures and the fundamental rights of voting and representation readily distinguishes these expenditures from others that dissenting shareholders may oppose. The Supreme Court made a similar distinction concerning the interests of dis-

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259 435 U.S. at 794 n.34. See text accompanying note 254 supra.
261 Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). Even if state action were present, the Buckley Court appears to have eliminated the primary constitutional grounds for attacking this form of multiple voting when it rejected the equalization of political influence as a compelling state interest. See text accompanying notes 209-11 supra. Clearly the Court would not view the prevention of this multiple vote effect as a constitutional right if this is considered an improper purpose under the first amendment.
262 The degree of influence over public officials obtained by the large contributor probably ranges from increased access to the blatant purchase of favorable legislation. See Nicholson, supra note 8, at 820.
senters in *Abood*, when it upheld the constitutionality of an agency shop statute to the extent that the funds collected by the union were used for collective bargaining. Notwithstanding the burden the statute placed on the first amendment rights of employees who disapproved of the union's collective bargaining activities, the Court found sufficient interests justifying these burdens.\(^\text{263}\) Those interests, however, would not justify compulsory payments used for political purposes unrelated to collective bargaining.\(^\text{264}\) A similar analysis is applicable to corporations. A corporation would be unable to function economically if every business decision involving expression required a rebate to dissenting shareholders or an expenditure from voluntarily collected funds.\(^\text{265}\) This does not mean, however, that the interest in corporate efficiency must override decisions concerning political expenditures and contributions.

**D. The First Amendment Interests of Majority Shareholders**

The analysis is not complete without consideration of the first amendment rights of nondissenting union members and shareholders. Individuals have the right not only to associate for facilitating their expression but also to enhance that association by pooling their resources.\(^\text{266}\) The requirement that funds collected for political expression must come from voluntary sources seems to be an ideal way of protecting those rights.\(^\text{267}\) In *Buckley* the

\(^{263}\) 431 U.S. at 224-29. The Court found that the governmental interests promoted by the Michigan statute were similar to those promoted by the federal statute—reinforcing the union's status as the exclusive representative of all employees in the bargaining unit and preserving labor peace. *Id.* at 224-25.

\(^{264}\) *Id.* at 234-37. The Court found that political contributions did not promote the governmental interest in maintaining labor peace by preserving the union's status as the exclusive representative of employees.

\(^{265}\) For a discussion of the constitutionality of using union dues for lobbying, see note 184 *supra*.

\(^{266}\) The Court in *Buckley* invalidated restrictions on independent expenditures because the restrictions "preclude[d] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." 424 U.S. at 22.

\(^{267}\) One critic asserts that the free rider phenomenon interferes with the associational rights of the majority: Although section 610 (18 U.S.C. § 610 (Supp. IV 1974) (current version at 2 U.S.C. § 441b (1976)) does allow union members to promote common political interests by voluntarily contributing to a separate segregated fund, the Act creates a free rider situation by preventing union members from spreading [the cost of] campaign contributions among all members who benefit from [them]. A union member may rationally decline to contribute even if he agrees that the
Court refused to interfere with the individual's right to use his or her resources to express support for a candidate through independent expenditures. But this is very different from protecting an individual's right to use someone else's resources simply because that person has invested funds in a corporation or joined a union. Freedom of association presupposes that the member of the group voluntarily joined with others to amplify his or her point of view. Thus, the federal statutory scheme sufficiently protects the first amendment interests of majority shareholders.

**Conclusion**

The Supreme Court will undoubtedly soon consider the constitutionality of the federal restrictions on corporate and labor organization contributions and expenditures. The holdings and dicta in *Buckley, Bellotti, Mosley* and *Consolidated* will create formidable first amendment and equal protection obstacles to the constitutionality of these restrictions. The fate of the restrictions is likely to depend upon the degree of scrutiny that the Court applies in both its first amendment and its equal protection analyses.

There is case authority that supports the application of less than strict scrutiny to viewpoint-neutral subject matter burdens such as the federal restrictions. Furthermore, the policies behind the disfavor of content discrimination in first amendment analysis, and the reasons for invalidation on equal protection grounds because of underinclusive classifications, have little applicability to the federal restrictions. The Court's recent insistence upon first amendment strict scrutiny review in *Consolidated*, however, will be difficult to circumvent because the majority opinion unnecessarily characterized the regulation as viewpoint-neutral. Additionally, the Court's apparent refusal in *Mosley* to use generalizations to support underinclusive speech classifications will be very troublesome in the equal protection analysis.

The government rationales commonly asserted in support of the federal statute create other constitutional problems. The 

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Comment, *supra* note 25, at 155 (footnotes omitted). This “disincentive,” however, always exists when persons voluntarily express themselves, especially through financial contributions.

268 For discussion of cases pending in the federal courts, see note 29 *supra*. 
equalization rationale does not appear to have survived *Buckley*
even though the related rationale of preventing domination of the
electoral process may still be viable. A related rationale—
preventing corruption—was relied on in *Buckley* and used by
lower federal courts to uphold campaign finance regulations
against first amendment challenges. There is serious doubt, how-
ever, whether the present federal statute appreciably reduces
either corruption or domination. The rationale that best fits the
present statutory scheme is the protection of dissenting corporate
shareholders and union members. The Court’s dicta in *Bellotti*,
however, displayed extreme skepticism regarding the significance
of this interest in the corporate context.

Some of the arguments responding to the first amendment
challenges rest on the assumption that the restrictions have little
or no effect on the marketplace of ideas because corporations and
labor organizations are permitted to express themselves through
PACs. This assumption, however, also demonstrates the inade-
quacy of the statute from a policy standpoint. It would be naive to
contend that the vast sums of corporate and labor money poured
into congressional races through PACs does not result in undue
influence. The receipt by key legislators of contributions near the
$5,000 limitation, even if not outright bribes, can improperly in-
fluence the legislative process. Furthermore, as each corpora-
tion is able to form its own PAC, an industry-wide policy bias can
result in the accumulation of very large sums for receptive legis-
lators. These problems could be ameliorated, and a stronger
case for constitutionality could be made, if Congress amends the
statute, focusing on the original goal of the restrictions—
preventing undue influence. There is much that Congress can
still do within the constraints of *Buckley, Bellotti, Mosley* and *Con-
solidated*. Public funding of congressional campaigns is one possi-

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269 This important interest, however, would be better served if Congress amended the
federal laws to insure that contributions to PACs are voluntary. See note 73 supra.

270 See COMMON CAUSE, HOW MONEY TALKS IN CONGRESS 1-23 (1978).

271 Because each international union may have only one PAC, the undue influence gen-
erated from an accumulation of union contributions may not be as great as that generated
by corporate contributions. See note 46 supra. Even though a union may be able to collect
as much or more than the combined funds collected by numerous corporations, the union
will be limited to a $5,000 contribution to any individual candidate. Numerous corporate
PACs, however, can each give $5,000 to an individual candidate whereas unions must con-
tribute to several candidates, and, in some instances, this may prevent them from matching
business’ influence upon key legislators such as committee members and chairpersons.

Others include substantially lowering the present $5,000 contribution limitation, and limiting the amount candidates can receive from business and labor PACs. These solutions, however, will channel special interest funds into corruption-generating "independent expenditures." Such reforms, therefore, should be accompanied by limitations on independent expenditures set at a level that permits corporate and labor views to enter the marketplace of ideas without creating an incentive for corruption. A balance must be struck, albeit a precarious one, between the interests of hearers in having access to corporate and labor views and the interest of the electorate in being governed by representatives who are not indebted to special interests.


274 A bill was introduced in the 96th Congress that incorporates these reforms. H.R. 4970, 96th Cong., 1st Sess. (1979) would prohibit candidates for the House of Representatives from receiving more than $50,000 in contributions from all PACs during any two year election cycle. Limitations on contributions from PACs would be reduced from $5,000 to $2,500. See 37 CONG. Q. WEEKLY REP. 1955-56 (1979). Because PACs have been a major source of funding since the contribution limitations were enacted in 1974, the limitations in this bill could lead to insufficient financing for some candidates. Incumbents and others with name identification or personal wealth would ultimately benefit from intensified restrictions. Public funding may then be a necessary adjunct to these stricter limits.

The constitutionality of these limitations on the amount a candidate can receive from PACs may be challenged because it will effectively prevent some PACs from contributing any amount to a candidate who has already received $50,000 in PAC contributions. The burden on first amendment rights, however, should be outweighed by the interest in preventing undue influence.

275 See text accompanying notes 198-200 supra.

276 This conclusion is based upon the proposition that independent expenditures by corporations and unions are more likely to cause undue influence than independent expenditures by others; thus, these limitations would be constitutional because they serve the compelling state interest of preventing undue influence. See text accompanying notes 201-06 supra.