CONSTITUTIONAL LIMITATIONS ON RESTRICTING CORPORATE AND UNION POLITICAL SPEECH

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Few constitutional issues have been so extensively debated without a resolution by the Supreme Court as the validity of federal restrictions on corporate and union political activity. Commentators have exhaustively discussed the pertinent congressional enactments and their legislative histories, the relatively few judicial decisions, and the practical political consequences of federal intervention.[1]

Rather than repeat these numerous analyses, this Article will attempt to place the issue of restrictions on corporate and union political activity in a more general context, and to examine some aspects of the continuing debate that have not received adequate attention. By so doing, we find—perhaps paradoxically—that the issues, with one important exception,[2] are much simpler than they seem to be at first. The thesis can be readily stated: Corporations and unions, like all other interest groups, have important political goals which they seek to implement through diverse means. Despite numerous legislative efforts to prohibit corporate and union political activity, the courts have repeatedly "amended" such statutes in order to avoid considering difficult constitutional issues. The result is a statutory framework that cannot be rationally justified on the basis of the original prohibitionist impulses. We are therefore left with a haphazard structure that satisfies no one. The solution is plain. Regulation of corporate and union political activity should be assimilated into the overall scheme for regulat-

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1. *See generally* Smith, *Business, Bucks & Bull: The Corporation, The First Amendment & The Corrupt Practices Law*, 4 DEL. J. CORP. L. 39 (1978).

2. The one exception is the problem of how to treat the "dissident" union member who disapproves of his union's political activities, which activities are funded, at least in part by the member's dues. See text & notes 158-90 *infra*.

ing campaign finance.[3]

I. UNION AND CORPORATE POLITICAL ACTIVITY IN CONGRESS AND THE COURTS

In recent years, a once-respectable political theory has found itself, not for the first time, in danger of drowning in rhetoric. Interest-group theory was once viewed as a way to explain, at least in part, events in the political process.[4] It was not intended to justify or condemn particular actions or results. Within the past few years, however, the neutral term "interests" has acquired a coterie of adjectives, among them "special" and "public." Although much has been said and written about what, if anything, these adjectives mean, one thing is clear: Self-styled "public" interest groups characterize economic interests, like corporations and unions, as clearly "special," in the sense of being distinctly disfavored. Only noneconomic interest groups, like Congress Watch or Common Cause, are entitled to appropriate for their own use the word "public."

With the interests thus divided in this Cromwellian fashion, appropriate regulatory prescriptions can be readily concocted, often based on exaggerated rhetoric.[5] The activities in which "special" interests should be allowed to engage must be narrowly circumscribed. Having reached this conclusion, "public" interest forces are able to align themselves with whatever "special" interests are available in order to reduce the freedom of other "special" interests. Now joining with the unions, now with the corporations, the "public" interest groups have been successful in suppressing substantial amounts of political activity, as events in Congress in 1974 and 1976 demonstrate.[6]

Although their rhetoric is newly revised, the political activists seeking to limit corporate and union election activity claim descent

3. I largely leave aside, for purposes of this Article, the issue whether there should be any regulation of money in politics other than disclosure. So that there is full "disclosure" here, however, I want to note my complete agreement with Professor Ralph K. Winter's remark to the Supreme Court that "[t]he greatest campaign reform law ever enacted was the First Amendment. . . ." Tr. of Oral Arg. at 31, Buckley v. Valeo, 424 U.S. 1 (1976).

4. H. ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY iv (1964).

5. One Common Cause officer has been quoted as saying: "What we're facing . . . is a total domination of the political financing system by corporate PACs. . . . We're headed for a government of, by and for the corporate PACs of America." Glen, *At the Wire, Corporate PACs Come Through for the GOP*, NAT'L J. 174, 174 (Feb. 3, 1979). Equally extravagant claims have been made about unions, as in the Connecticut district court's opinion in United States v. Painters Local No. 481, 79 F. Supp. 516 (D. Conn. 1948), *rev'd*, 172 F.2d 854 (2d Cir. 1949), characterizing unions as "these goliaths, already vested with economic power to strangle the nation." 79 F. Supp. at 525.

For a discussion of the political beliefs and constituencies of contemporary "public interest" groups, see A. MCFARLAND, PUBLIC INTEREST LOBBIES: DECISION MAKING ON ENERGY 8-24 (1976).

6. See text & notes 210, 230-41 *infra*.

from those who had the same goals in earlier generations.[7] These claims warrant considerable scrutiny. To accomplish that scrutiny, the following historical review is divided into four time periods. While hardly analytically airtight, the four periods provide some helpful distinctions.

A. *The Early Years: The First Legislative Efforts*

Virtually every recitation of the history of limiting corporate and union political activity relies heavily upon two annual messages by President Theodore Roosevelt.[8] Although often cited, these presidential messages appear to be less often read. In 1905, Roosevelt repeated a recommendation from his 1904 annual message that Congress enact disclosure and anti-bribery statutes.[9] Then, in a passage which seems to have been lost to recent history, he said:

> In political campaigns in a country as large and populous as ours it is inevitable that there should be much expense of an entirely legitimate kind. This, of course, means that many contributions, and some of them of large size, must be made, and, as a matter of fact, in any big political contest such contributions are always made to both sides. It is entirely proper both to give and receive them, unless there is an improper motive connected with either gift or reception.[10]

Roosevelt is thus, at this point, proposing a limited scheme directed at prohibiting bribery and at providing publication of contributions or expenditures.

Moreover, the kind of corruption that concerned Roosevelt was not corruption of candidates, but rather corruption of the voters. In 1905, Roosevelt said that "[t]here is no enemy of free government more dangerous and none so insidious as the corruption of the *electorate*."[11] Congress, Roosevelt added, should enact a statute that would "include

7. During the Progressive Era, nearly the same characterizations were employed. In struggling against "political machines," various "counter-organizations" were formed by groups of "civic-minded" citizens. These groups viewed themselves as "private organizations based upon high principles rather than group interests." R. HOFSTADTER, THE AGE OF REFORM 257 (1955). Moreover, the same Puritan strain that presently divides "public" interests from "special" interests also emerged. In the Progressive Era, "[b]ad people had pressure groups; the Man of Good Will had only his civic organizations." *Id.* at 259.

The cast of characters, of course, has changed from time to time. The Attorney General of North Dakota, discussing the extent of violations of his state's Corrupt Practices Act in 1921, referred to "the bitterness of the fight between 'special privilege' on the one side and honest and progressive government on the other, with the towns and cities generally supporting the former and the organized farmer and laborer the latter. . . ." E. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 146 (1928).

8. *See, e.g.*, Note, *Corporate Democracy and the Corporate Political Contribution*, 61 IOWA L. REV. 545, 547 (1975).

9. 40 CONG. REC. 96 (1905).

10. *Id.* In his 1906 annual message, Roosevelt made the point even more explicitly: "Let individuals contribute as they desire. . . ." 41 CONG. REC. 22 (1906).

11. 40 CONG. REC. 96 (1905) (emphasis added).

severe penalties against him who gives or receives a bribe intended to influence his act or opinion *as an elector*."[12] In addition, Roosevelt stressed disclosure of expenditures by political committees.[13] Roosevelt's focus, therefore, was not on "undue influence" over candidates, but "undue influence" over voters.[14] The appropriate remedial steps to be taken in such circumstances are obviously very different. In the former case, restraints on citizen contributions to candidates would arguably be required; in the latter case, by contrast, restraints on candidate activity might be thought appropriate.

Had Roosevelt's 1905 message stopped at this point, it would be interesting but not seminal. Roosevelt, however, went on to call for the prohibition of all corporate contributions "to any political committee or for any political purpose."[15] Two reasons were advanced for the prohibition: (1) "directors should not be permitted to use stockholders' money for such purposes"; and (2) "a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts."[16] Not content to rest there, Roosevelt also proposed state and federal statutes that would forbid corporations from using money "in connection with any legislation save by the employment of counsel in public manner for distinctly legal services."[17]

As many times as one reads these passages, the inescapable conclusion is that the reference to corporate political and lobbying activity is a *non sequitur*. It is advanced almost half-heartedly, and without justification. No reason is given why large corporate contributions are not as "entirely proper" as contributions from other sources. Nor is there any explanation why disclosure of corporate contributions would be inadequate. If President Roosevelt's remarks are indeed the corner-

12. *Id.* (emphasis added).

13. *Id.*

14. John Morton Blum, in his perceptive analysis of Theodore Roosevelt's career, provides important corroboration for the view that the President, in 1905 and 1906, was reflecting his pre-1904 election concerns. As Professor Blum put it, "the President feared that Wall Street might buy the election for his opponents. He also feared that Tammany Hall and its lesser Democratic equivalents would bully successfully where they could not buy." J. BLUM, THE REPUBLICAN ROOSEVELT 63 (2d ed. 1962).

15. 40 CONG. REC. 96 (1905).

16. *Id.* The order in which the two reasons are set forth in the text is the same order as that used by Roosevelt in his annual message. Interestingly, in Justice Reed's majority opinion in United States v. CIO, 335 U.S. 106, 113 (1948), the order is reversed. This order follows the pattern advanced in Solicitor General Perlman's Brief for the United States (at 14-19), as does much of the Court's recitation of the legislative history of the challenged statute, Act of January 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979)). The United States rested this ordering on the priorities it perceived in legislative hearings and debates. By contrast, the CIO's brief barely mentions the 1907 statute. It would be a mistake to overrate the Court's re-ordering of President Roosevelt's priorities, but it does provide at least some indication of shifting values.

17. 40 CONG. REC. 96 (1905).

stone of the policy and constitutional defenses of restricting corporate and union political activity, then the entire edifice is shaky.

Moreover, in light of the inadequate reasoning underlying the calls for prohibiting corporate contributions, it is important to appreciate the extent of moralizing that permeated the consideration of these proposals. President Roosevelt's 1904 Democratic opponent, Alton B. Parker, asserted that "[t]he greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections."[18] Similarly, one Congressman stated:

> [N]o corporation has the right and no board of directors of a corporation and no manager of a corporation has the right, to *embezzle* the money belonging to the stockholders of the corporation and to divert it from its legitimate use to a purpose for which the company was not chartered by appropriating it to Democratic, Republican, Populist, Socialist, or any other campaign fund. *The thing is dishonest in its every element.*[19]

What emerged, of course, was a flat prohibition on corporate money contributions, and no limitations on contributions by any other entities or individuals. There appears to have been no legislative consideration

18. *Hearings on Contributions to Political Committtees in Presidential and Other Campaigns before the House Committee on the Election of the President*, 59th Cong., 1st Sess. 56 (1906) [hereinafter cited as *1906 Hearings*].

Late in the 1904 campaign, Parker had attempted to make an issue of the corporate campaign contributions raised by the Republicans. Basing his accusations on newspaper accounts, Parker charged that the Republicans were using tactics akin to blackmail to extract corporate contributions. "Cortelyouism" (named after George B. Cortelyou, Chairman of the Republican National Committee and later Secretary of the Treasury), however, failed to catch on. Roosevelt characteristically responded to the statements by calling them "unqualifiedly and atrociously false." G. MOWRY, THE ERA OF THEODORE ROOSEVELT 1900-1912 178-79 (1958).

Comparing the attitudes of Roosevelt and Parker leaves the distinct impression that each thought the other had benefitted the most from corporate political contributons. Their solution, of course, was to eliminate that resource from subsequent campaigns. Undercutting the moral tone of their statements, however, is the strong feeling that what they actually sought was greater political leverage. This impression is corroborated by the remarks of Congressman Williams during debate in 1908 over codification of the 1907 statute. See text & notes 21-31 *infra*. Referring to the Democratic Senator from South Carolina (Senator Tillman) after whom the Act of 1907 is often called, Congressman Williams observed that "[h]e merely got out of the Republican Senate committee the very nearest approximation to a Democratic idea that he could. . . ." 42 CONG. REC. 698 (1908). Needless to say, this is hardly a model of even-handed regulation of the political process. Although the respective motives of Roosevelt and Parker (and other participants in the debate) can probably not now be proven, it should at least caution the political observer to be aware of unspoken attitudes during "reform" debates.

19. Remarks of Congressman Williams, *1906 Hearings, supra* note 18 at 76 (emphasis added). Interestingly, Williams believed that "if corporations did not contribute there could not be any great campaign funds." *Id.* Apart from quite obviously being wrong, Williams' remarks demonstrate that the idea of using contribution limtations as surrogates for expenditure limitations has been around for some time. The basic notion underlying this tactic is that if certain contributions can be prevented, necessary "seed money" for at least some candidates will be eliminated. Without these critical early contributions, many campaigns will never be viable, and will therefore be just as ineffectual as campaigns hobbled by low expenditure limits. Williams' formulation of these issues is thus the legislative precursor of the Obey-Railsback bill now under consideration in Congress. H.R. 4970, 96th Cong., 1st Sess., 125 CONG. REC. H9261 (daily ed. Oct. 17, 1979).

of this unequal treatment of corporations.[20]

In 1907, Congress appeared to agree with Roosevelt by making it unlawful for any corporation organized pursuant to a federal statute to make money contributions in connection with federal, state, or local elections; in addition, all corporations were prohibited from making money contributions in connection with federal elections.[21] Shortly after the 1907 statute was enacted, Congress again considered the permissible limits of corporate political activity in connection with a general revision of federal criminal law. Although the 1907 legislation was left unchanged,[22] Congress did debate the advisability of expanding the prohibited donation from "money contribution" to "any contribution of money or other thing of value."[23] These debates, which have been largely ignored, are similar to the legislative history of the 1907 statute in three respects: (1) the need to prevent the use of shareholders' assets for political purposes received equal weight with the fear of corruption; (2) the corruption sought to be avoided was, by and large, not only corruption of candidates but also, quite importantly, corruption of the electorate;[24] and (3) the rhetoric of the prohibitionists was insistently moralistic.

Congressman Kimball, who introduced the amendment to expand the definition of "contribution," made the first two of these points explicitly. He observed that "[t]he House, I assume, is sincerely in favor of protecting the assets of corporations from being dissipated in this way. It is certainly our intention that they should not be allowed to spend money or any of their assets for the purpose of corrupting elections . . . ."[25] Representative De Armond elaborated that the Kimball

20. In part, the lack of discussion may have assumed that direct corporate contributions would simply be replaced by contributions from corporate officers and directors.

21. Act of January 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979)).

22. Act of March 4, 1909, ch. 321, § 85, 35 Stat. 1103-04 (current version at 2 U.S.C. § 441b (1976 & Supp. 1979)), was a codification of federal criminal laws. Technically, the Act of 1907 was repealed and reenacted without change. In addition to the proposal discussed in the text, one suggested amendment would have extended the prohibition against corporate money contributions to elections of state legislators (who, at that time, still elected United States Senators). That amendment was rejected after doubts were raised as to its constitutionality, as to the propriety of its codification, and as to its efficacy in achieving the result desired. 42 CONG. REC. 696 (1908).

23. 42 CONG. REC. 696-97 (1908).

24. *See, e.g., id.* at 702 (remarks of Congressman Cox).

25. *Id.* at 696. Congressman Kimball did refer to "the revelations of the investigation of the great insurance companies in the State of New York" which influenced the 1907 debates. *Id.* These "revelations" referred to investigations concerning activities during the 1904 presidential elections conducted by the Joint Committee of the New York Legislature (the Armstrong Committee). One insurance company apparently contributed nearly $50,000 to a national political committee. Perhaps this and other contributions were made "upon the expectation that candidates thus aided in their election would support the interests of the companies. . . ." United States v. UAW, 352 U.S. 567, 573-74 (1957) (quoting Armstrong Committee Report).

Although the Armstrong Committee Report thus directly supports the argument that corruption of candidates was at issue, reliance on the Report, in light of subsequent constitutional devel-

amendment was intended to prevent "this corrupt process of debauching American citizenship, polluting American manhood at the fountain head. . . ."[26]

Following the defeat of the Kimball amendment, by a teller vote of 77 to 91,[27] Congressman Cockran introduced an amendment to increase the maximum penalties imposed on corporate officers and directors for violating the statute.[28] In support of his proposal, Congressman Cockran referred to the officer or director "misappropriating funds in his custody" and to the use of those funds to "debauch or corrupt the franchise."[29] Congressman Gaines joined in with an assault on "the rottenness of the banks in Wall Street that we all know," criticizing them as "street gamblers," "microbes," and "Wall Street bacteria."[30] Following more such vigorous debate, the Cockran amendment was rejected.[31]

On the judicial front, the only reported decision prior to the Taft-

opments, is highly suspect. The Report states quite explicitly that: "Whether made for *the purpose of supporting political views* or with the desire to obtain protection for the corporation, these contributions have been wholly unjustifiable." *Id.* (emphasis added). Contributions for "the purpose of supporting political views" are now very clearly protected by the first amendment, as the Supreme Court made clear in Buckley v. Valeo, 424 U.S. 1, 14 (1976) (FECA's "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities"). At best, therefore, the Armstrong Committee's conclusions could constitutionally sustain only an anti-bribery statute, not a flat prohibition on corporate political activity.

Moreover, the Armstrong Committee itself appears to have been at least as concerned with use of shareholders' funds as with corruption. The Committee said "[n]either executive officers nor directors should be allowed to use the moneys paid for purposes of insurance in support of political candidates or platforms. . . ." United States v. UAW, 352 U.S. 567, 572 (1957) (quoting Armstrong Committee Report). Continuing, and adding the Cromwellian theme, the Committee said: "In the one case [supporting political views] executive officers have sought to impose their political views upon a constituency of divergent convictions, and in the other [obtaining protection for the corporation] they have been guilty of a serious offense against public morals." *Id.* at 573.

26. 42 CONG. REC. 698 (1908).

27. *Id.* at 697.

28. The Cockran amendment would have increased the maximum jail sentence from one year to ten years. *Id.*

Congressman Cockran's amendment was vigorously opposed, in large part on the Republican side because of a desire to prevent amendment to the codification bill. *See id.* at 695-701. Significantly, in recent House debates on proposed campaign-finance bills, the Democratic majority has had these bills debated under closed (or modified closed) rules that strictly limited debate. The Republicans have vigorously objected, typically unsuccessfully. *See, e.g.*, 121 CONG. REC. 27209-19 (1974). The historical comparison is of more than passing interest. It suggests that partisan opportunism in the consideration of election-law matters is widespread and probably inevitable. It also suggests that the typical judicial deference to legislative enactments is wholly inappropriate in this context.

29. 42 CONG. REC. 697 (1908). The Record notes that, at the conclusion of Congressman Cockran's remarks, he received "applause on the Democratic side." *Id.*

30. *Id.* at 698. Congressman Gaines concluded his remarks by expressing his concern that banks not be allowed "to corrupt the people's right of suffrage," *id.* at 699, once again reiterating the importance of voter (rather than candidate) corruption. Congressman Gaines also received "applause on the Democratic side." *Id.*

31. *Id.* at 702 (1908). One of the Republican responses to the Cockran amendment was to accuse Democratic members of electioneering. Congressman Payne noted that "every time there is a chance to set up a bogey man about the rights of labor, why, gentlemen from close districts have jumped in here with amendments . . . and made stump speeches. . . ." *Id.* at 6799. As noted above, the debate was highly partisan in nature.

Hartley Act of 1947 dealing with the 1907 statute reflected concerns similar to those expressed in the debates prior to the 1907 and 1909 legislation. In *United States v. United States Brewers' Association*,[32] the district court overruled motions to quash various criminal indictments and also overruled accompanying demurrers.[33] The indictments charged violations of the 1907 statute, and the defendants raised, among other defenses, a first amendment challenge to the statute.[34]

Rejecting the first amendment arguments, the court held that "[t]he section itself neither prevents, nor purports to prohibit, the freedom of speech or of the press. Its purpose is to guard elections from corruption, and the electorate from corrupting influences in arriving at their choice."[35] The court also concluded that "the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election. . . ."[36] The *Brewers' Association* decision thus reiterated two themes from the 1907 and 1909 debates: an insistently moralistic tone, and concern for corruption of the electorate. A third theme in the opinion was the denigration of the corporate speaker. By characterizing corporations as "artificial beings who are merely the creatures of the law," the court found it easy to hold them "subservient and subordinate" to the government and the citizenry.[37]

The *Brewers' Association* decision is a natural coda to the early years of federal regulation of corporate political activity. Legislative and judicial pronouncements on the subject were in close harmony, both with respect to the aims of the 1907 statute and the moral stance assumed by the prohibitionists.[38] Although it puts us ahead of the story, reflecting on this political moralizing brings to mind Justice Brandeis' warning that

[e]xperience should teach us to be most on our guard to protect lib-

32. 239 F.163 (W.D. Pa. 1916).

33. *Id.* at 170-71.

34. *Id.* at 169.

35. *Id.* The court, referring to the Pennsylvania Corrupt Practices Act, noted that "[s]o far as I am aware, it has never been claimed that this general restriction upon political contributions was an infringement of the freedom of speech or of the press." *Id.* It is apparent that the *Brewers' Association* opinion is now completely inadequate in its first amendment analysis. See text & notes 224-29 and 242-53 *infra*.

36. 239 F. at 169. The court buttressed this conclusion by reasoning that "any interference with the right of the elector to make up his mind how he will vote is as much an interference with his right to vote as if prevented from depositing his ballot. . . ." *Id.* at 168-69.

37. *Id.* at 168.

38. In 1910, Congress enacted the first disclosure statute requiring reporting, *inter alia*, by "political committees" operating in two or more states, and which attempted to influence the results of congressional elections. Act of June 25, 1910, ch. 392, §§ 5-6, 36 Stat. 823 (1910) (now codified after numerous revisions at 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979)). The 1910 statute was amended in 1911, expanding the disclosure requirements and also imposing expenditure limits on campaigns for the House and Senate. Act of August 19, 1911, ch. 33, § 2, 37 Stat. 26 (1911) (subsequently codified at 18 U.S.C. § 608, and later repealed by Pub. L. No. 94-283, § 201(a), 90 Stat. 496 (1976)).

> erty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[39]

The intentions of those seeking "reform" are inevitably characterized as "worthy"; what is always at issue, however, is not the praiseworthiness of the goals but the constitutionality of the resulting legislation.

B. *The Middle Years: The Second Wave of Legislative Activity*

Between 1925 and 1947, four important campaign-finance statutes were passed. They were the Federal Corrupt Practices Act of 1925,[40] amendments to the Hatch Act in 1940,[41] the Smith-Connally Act of 1943,[42] and the Taft-Hartley Act of 1947.[43] The first two expanded the federal regulatory framework without devoting much attention to the prohibition on corporate political activity.[44] The second two dealt with political activity almost incidentally to their main purposes, and dealt exclusively with the issue of union political activity.[45] Although it is easy to overstate the point, legislative activity during this period foreshadowed subsequent congressional deliberations in several important respects. Not the least of these similarities was the inconsistency of legislative treatment of corporate and union activity. At times, labor and corporate concerns were central, nearly to the exclusion of other issues; at other times, possible revisions of the corporate and union provisions were largely ignored. Congress has repeatedly failed to consider the relationship between the regulation of corporations and unions (on the one hand) and general regulation of politics (on the other).

The 1925 Corrupt Practices Act was "a comprehensive revision of existing legislation."[46] Only one significant amendment concerning

39. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Justice Black has similarly cautioned that "[h]istory indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'" Beauharnais v. Illinois, 343 U.S. 250, 274 (1952) (Black, J., dissenting).

40. Ch. 368, tit. III, 43 Stat. 1070 (1925) (current version of the corporate-union provision at 2 U.S.C. § 441b (1976 & Supp. III 1979)). Title III was actually a party of postal-pay increase legislation.

41. Act of July 19, 1940, ch. 640, 54 Stat. 767 (1940) (codified in scattered sections of 1, 5, 18 U.S.C., to the extent not repealed by subsequent legislation).

42. Also known as the War Labor Disputes Act, ch. 144, § 9, 57 Stat. 167 (1943) (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979)).

43. Also known as the Labor Management Relations Act, ch. 120, tit. III, § 304, 61 Stat. 159 (1947) (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979) and 29 U.S.C. §§ 141-88 (1976)).

44. *See, e.g.*, provisions subsequently codified at 2 U.S.C. § 241(c) (1976) and 18 U.S.C. § 608 (repealed 1976).

45. *See* § 9 of the Smith-Connally Act of 1943, *supra* note 42. The Taft-Hartley Act of 1947, *supra* note 43, in § 304, amended § 313 of the Federal Corrupt Practices Act of 1925, *supra* note 40 (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979)).

46. United States v. UAW, 352 U.S. 567, 576 (1957). The 1925 legislation was in large meas-

corporate and union activity was made to the 1907 statute, which was reenacted as section 313 of the Corrupt Practices Act.[47] Seventeen years after the unsuccessful 1908 efforts, the term "money contribution" was replaced with the term "contribution," defined as including "a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution."[48] Although closing a large loophole, this amendment introduced a substantial element of vagueness into the statute that plagues the provision to the present day.[49]

In 1940, amendments to the Hatch Act, which made a substantial addition to the regulatory framework, limited contributions to candidates or certain political committees to $5,000 per person per calendar year.[50] The term "person," defined to include any association, organization, or group of persons, included labor unions.[51] The flat prohibition on corporate contributions, however, was left untouched. The Hatch Act amendments raised (or should have raised) for the first time the issue of different contribution limits for different groups. As with the 1907 statute, there appears to have been no comprehensive consideration of the differential treatment of corporations and other entities and individuals.

The Smith-Connally Act was principally designed to deal with labor strife during World War II. The provision dealing with union contributions was introduced as an amendment on the House floor, after the Senate had already passed one version of the bill with no reference

ure a response to Newberry v. United States, 256 U.S. 232 (1921), which invalidated expenditure limits in Senate primary elections. United States v. CIO, 335 U.S. 106, 114 (1948).

47. Ch. 368, tit. III, § 313, 43 Stat. 1074 (1925) (current version at 2 U.S.C. § 441b (1976 & Supp. III 1979)).

48. *Id.* at 43 Stat. 1071. This definition (with certain important exceptions discussed at text & notes 200-09 *infra*), is essentially the same general definition still contained in 2 U.S.C. § 441b (1976 & Supp. III. 1979).

49. See text & notes 200-09 *infra*. The legislative history shows that Congress was, during the 1924 and 1925 debates, still concerned with corruption of the electorate as well as the corruption of candidates. *See, e.g.*, H.R. Rep. No. 721 to Accompany H.R. 8956, 68th Cong., 1st Sess. 4 (1924) ("The purchase of power and influence either by a candidate, by means of large expenditures, or by individuals or interests, by means of great contributions, reflects both upon our Government and on those from whom the power is derived."). The main source of the corruption of candidates was apparently thought to be the contributor who gave to both major parties or their candidates, not large contributions as such. *Id.*

50. Act of July 19, 1940, ch. 640, § 13(a), 54 Stat. 770 (1940) (current version at 2 U.S.C. § 441a (1976)). It has been frequently pointed out that both the expenditure and contribution limits were largely ineffective until the 1974 amendments to the Federal Election Campaign Act because political committees could be created without limitation, and because of the exception for committees operating only within one state. Overacker, *American Government and Politics: Presidential Campaign Funds, 1944*, 39 AM. POL. SCI. REV. 899, 901-05 (1945). While each committee was required to adhere to the applicable limits, as a practical matter the limits were meaningless. *Id.*

51. Act of July 19, 1940, ch. 640, § 13(b), 54 Stat. 770 (1940) (current version at 2 U.S.C. § 431 (Supp. III 1979)).

to union political activity.[52] The amendment (actually part of a substitute), offered by Congressman Harness of Indiana,[53] immediately ran into opposition. Congressman Hancock of New York raised the question whether the Hatch Act's $5,000 contribution limit (applicable to unions) had been considered in drafting the amendment. Harness replied "[n]o, frankly, I did not have it in mind."[54]

Congressman Hancock then spoke of an amendment to strike the union-contribution provision from the Harness substitute.[55] Hancock advanced two reasons for deleting the prohibition. First, he argued that it discriminated against labor unions by barring their contributions, while leaving other unincorporated associations free to make them.[56] Second, the $5,000 limitation in the Hatch Act made further restrictions unnecessary.[57] In support of the Harness amendment's prohibition against union contributions, Congressman Halleck of Indiana said:

> That is no more than the prohibition against corporations and banks, and so forth. It is simply an amendment to the Corrupt Practices Act. If a union member wants to contribute, he has the same privilege as any other individual. His money could not be used politically as he would not want it used.[58]

This concern for the dissident union member was repeated, although not frequently.[59] The Hancock amendment failed by an 83 to 156 vote.[60]

During Senate consideration of the conference committee report (which accepted the House-passed prohibition against union contribu-

52. *See* Kallenbach, *The Taft-Hartley Act and Union Political Contributions and Expenditures*, 33 MINN. L. REV. 1, 4-5 (1948). In both the *CIO* and *UAW* decisions, the Supreme Court stressed hearings in 1943 on a bill introduced by Representative Landis to extend the prohibition on corporate contributions to unions. *See* United States v. UAW, 352 U.S. 567, 578-79 (1957); United states v. CIO, 335 U.S. 106, 114-15 (1948). Almost no mention is made of the floor debates on the Smith-Connally Act. Moreover, during those debates, Congressman Landis took no substantial part.

Thus, as with its treatment of the deliberations preceding the 1907 and 1909 statutes, the Court relied more on hearings than on floor debate. In large measure, these omissions may be due to the pattern first followed in the Government's brief in the *CIO* case. *See* Brief for the United States at 13-19, 23-26. Nonetheless, these gaps in the Court's analysis are of considerable interest. As explained at text & notes 71-78, *infra*, the debates give a very different view of congressional priorities. Rather than the fear of aggregate wealth as the primary concern, debates tended to stress the role of the dissenting stockholder or union member. These differences have significant implications for first amendment analysis, where the compelling governmental interests advanced to support a restriction on political activity are of critical importance in assessing the restriction's constitutionality.

53. 89 CONG. REC. 5328 (1943).
54. *Id.* at 5329.
55. *Id.* at 5341.
56. *Id.*
57. *Id.*
58. *Id.* at 5334.
59. *Id.* at 5792.
60. *Id.* at 5390. Final passage of the House bill was by a vote of 238-115. *Id.* at 5391.

tions), many of the same points raised on the floor of the House were raised again. Senator Danaher, for example, speaking for several Senators, commented on the absence of a similar prohibition against management associations.[61] Senator Hatch noted that he was planning to introduce an amendment that would apply the contribution prohibition to such employer organizations as the Chamber of Commerce and the National Association of Manufacturers.[62] Senator Tunnell raised the issue of for-profit institutions, not incorporated, which would not be covered either by existing law or by the union language.[63] Although proponents of the contribution prohibition did not respond directly to the claims of discrimination, neither did they attack the "undue influence" of union money in federal elections. In one of the few comments specifically addressed to the merits by a supporter, Senator Revercomb said "I do not think the miner will object very gravely to a law that protects him by putting safeguards around the funds that are taken from him as dues."[64] The bill containing the Harness provision was finally enacted after a veto by President Roosevelt.[65] Most observers felt that the statute, because it barred only "contributions" and not "expenditures," had little or no impact on union activity in the 1944 election: "The clumsily drawn legislation presented no barrier to trade unions bent upon throwing their full weight on the side of their chosen candidate."[66]

Debate on the Smith-Connally Act for the first time focused on the merits of differential treatment of various interest groups. Although the focus was limited, there was at least some consideration of the equities of varying political limitations.[67] In addition, during the congres-

61. *Id.* at 5629; *see id.* at 5778. Senator Thomas made a similar complaint. *Id.* at 5754. In support of his view that the provision was anti-union, Senator Guffey introduced numerous charts and commentaries showing large individual contributions to the Republicans. *Id.* at 5755-60.

62. *Id.* at 5721. Senator Hatch did introduce such a proposal, which the Senate passed without debate in 1944. 90 CONG. REC. 1643 (1944). The measure died when the House did not consider it.

63. 89 CONG. REC. 5782 (1943).

64. *Id.* at 5792.

65. Kallenbach, *supra* note 52, at 5. Interestingly, the Roosevelt veto message observed that "[i]f there be merit in the [union-contribution] prohibition, it should not be confined to wartime, and careful consideration should be given to the appropriateness of extending the prohibition to other nonprofit organizations." S. DOC. No. 75, 78th Cong., 1st Sess. 3 (1943).

66. Overacker, *supra* note 50, at 919.

67. In congressional hearings on his bill, Representative Landis stated:

> The public thinks, and has a right to think, that labor unions, as public institutions should be granted the same rights and no greater rights than any other public group. My bill seeks to put labor unions on exactly the same basis, insofar as their financial activities are concerned, as corporations have been on for many years.

Hearings on H.R. 804 and H.R. 1483 Before a Subcommittee of the House Committee on Labor, 78th Cong., 1st Sess. 1 (1943).

By focusing on unions and corporations, however, Congressman Landis was obviously quite limited in his definition of what "public institutions" were to be "put . . . on exactly the same basis." *Id.*

sional debates, concern for the dissenting union member was clearly the most important interest for proponents of the prohibition on union contributions.

The Smith-Connally Act of 1943, by its terms, terminated six months after the close of World War II.[68] The Taft-Hartley Act of 1947 made the coverage of unions for federal elections permanent.[69] Moreover, political "expenditures" by unions in federal elections and corporations in any election, as well as "contributions," were now prohibited.[70] Three key points about Taft-Hartley are worth emphasizing.

First, principal congressional consideration of the union contribution and expenditure provision took place during Senate debate of the conference committee report.[71] Although the Supreme Court, in its discussions of the legislative history of Taft-Hartley in *UAW*, emphasizes various hearings that were held prior to 1947,[72] the Hartley proposal was not itself the subject of congressional hearings.[73] Accordingly, congressional debate is once again the main, albeit not the only, source of information concerning legislative intent.

Second, the main focus of attention during the Senate debate was the dissenting union member.[74] Senator Taft repeatedly expressed his

68. Ch. 144, § 10, 57 Stat. 168 (1943).

69. Ch. 120, tit. III, 61 Stat. 159 (1947) (current version at 2 U.S.C. § 441b (1970 & Supp. III 1979)).

70. *Id.* In addition, in light of the decision in United States v. Classic, 313 U.S. 299 (1941) (which overruled *sub silentio* Newberry v. United States, 256 U.S. 232 (1921)), Congress extended the prohibition to nominating primaries, caucuses and conventions.

71. Congressman Hartley had included such a section in the labor bill he introduced in the House, but the "Report of the House Committee on Education and Labor, which considered and approved the Hartley bill, merely summarized [the provision] . . . , and this section gave rise to little debate in the House." United States v. UAW, 352 U.S. 567, 583 (1957).

72. *See id.* at 579-82.

73. Moreover, the hearings that were held (*e.g.*, in 1947 by the Special Committee to Investigate Senatorial Campaign Expenditures) focused on events in earlier elections. There was little or no consideration of the future effects of the legislation recommended. *See id.*

Indeed, the Senate committee which investigated the 1944 elections concluded that prohibiting union contributions and expenditures was inconsistent with its other recommendations for the "free and prompt publicity as to campaign contributions and expenses." S. REP. No. 101, 79th Cong., 1st Sess. 83 (1945). The committee majority was also concerned that the effects of such legislation "would tend to limit the rights of freedom of speech, freedom of the press, and freedom of assembly as guaranteed by the Federal Constitution." *Id.*

74. The extensive quotations from these debates in the Court's opinion in United States v. CIO, 335 U.S. 106 (1948), provide ample corroboration of this view. In *CIO*, Justice Rutledge's concurring opinion explicitly stated that "it was the 'minority protection' idea which became the dominantly stressed one in the Senate debates. . . ." *Id.* at 146 (Rutledge, J., concurring). *See* Comment, *Regulation of Labor's Political Contributions and Expenditures: The British and American Experience*, 19 U. CHI. L. REV. 371, 371 (1952).

Even the minority of the committee investigating the 1944 elections, *see* note 67 *supra*, who favored prohibiting union contributions and expenditures, stressed their belief that "use of union funds to support a particular candidate or course of political action is wrong in that it opens the way for use of money paid in by individuals for political action which they, as a minority would oppose . . . ." S. REP. No. 101, 79th Cong., 1st Sess. 24 (1945).

We leave aside for now the issue whether the Supreme Court properly interpreted the Taft-Hartley Act in the *CIO* decision. See text & notes 292-317 *infra*. Whether or not its statutory construction was correct, the legislative history is otherwise clear.

intention that union treasury money—accumulated from union dues—ought not be used to fund political activity.[75]

Third, Senator Taft and others stressed the equivalency of treatment between unions and corporations. As Taft put it:

> [I]n each case the question is whether or not a union or a corporation is making a contribution or expenditure of funds to elect A as against B. Labor unions are supposed to keep out of politics in the same way that corporations are supposed to keep out of politics.[76]

Somewhat further on in the debate, Taft said:

> If the General Motors Corp. had a man speaking on the radio every week to advocate the election of a Republican or a Democratic Presidential candidate, the corporation ought to be punished, and it would be punished under the law. Labor organizations should be subject to the same rule.[77]

There appears to have been virtually no consideration of the rationale for this equivalency, or the rationale for excluding other groups from the statute.[78]

With the passage of the Taft-Hartley Act, the principal arena for debate shifted from Congress to the courts, where it remained for nearly a quarter of a century. In this different forum, of course, different arguments were stressed, and the overt politics of legislative debate gave way to the delineation of constitutional principles.

C. *The Middle Years: The Constitutional Onslaught*

1. By the Unions (Mostly)

Shortly after the enactment of Taft-Hartley, the union movement caused a test case by the Department of Justice[79] to be prosecuted in *United States v. CIO*.[80] Desiring to challenge the constitutionality of section 313 of the Corrupt Practicers Act,[81] the CIO distributed 1000 extra copies of its regular newspaper, *The CIO News*, (owned, funded, and published by the CIO) in Maryland's Third Congressional District shortly before a special election there to fill a vacant seat in the United States House of Representatives.[82] The newspaper contained a front-

75. United States v. UAW, 352 U.S. 567, 583, 586-88 (1957); United States v. CIO, 335 U.S. 106, 116-19 (1948). The CIO agreed that Taft's view as to what the statute proscribed turned on "the source of the outlay." Brief for Appellees at 56, United States v. CIO, 335 U.S. 106 (1948).

76. 93 CONG. REC. 6440 (1947).

77. *Id.* at 6447.

78. The legislative history tends to indicate that manufacturers' associations were covered by the statute if their funds were received from corporations. *Id.* at 6439.

79. Chang, *Labor Political Action and the Taft-Hartley Act*, 33 NEB. L. REV. 554, 563 n.45 (1954).

80. 335 U.S. 106 (1948).

81. The *CIO* opinion refers to the statute as § 304 of the Taft-Hartley Act. Section 304 amended § 313 of the Corrupt Practices Act, and this Article will use the § 313 designation.

82. 335 U.S. at 108.

page editorial endorsing the Democratic candidate in that election.[83] The CIO and its President were indicted for making an unlawful expenditure in connection with a federal election.[84]

Without extensively considering the legislative history of Taft-Hartley (perhaps because it believed such an exercise unnecessary), the district court held that the CIO's actions were clearly prohibited by the statute.[85] The district court dismissed the indictment, however, concluding that section 313 violated the first amendment; in so holding, the court rejected the principal contention of the government that section 313 was justified by its anti-corruption rationale:

> [T]he untrammeled right of free expression of views as to candidates for office, through newspapers or other means of conveying the written or spoken word, and of the public in general to have free access thereto, far from being a conceivable means of corrupting or interfering with free elections, is in fact one of the most valuable means of promoting purity and freedom in the electoral process.[86]

The district court also rejected the government's rationale based on protecting the dissenting union member: "Inherent in the idea of collective activity is the principle that it shall be exercised on behalf of the organization pursuant to the will of the majority of its membership."[87] Alternatively, the court noted that the statute prohibited all union political expenditures, whether or not there was minority opposition, and without regard to the size of the minority.[88] Moreover, the court noted that, in contrast with other congressional efforts to regulate political activity, section 313 was a flat prohibition on union contributions and expenditures.[89]

On direct appeal to the Supreme Court, both the government and the CIO urged a clear constitutional decision.[90] The Court, however, held that the indictment did not charge a violation of section 313, and it therefore affirmed the trial court's dismissal.[91] The Court's first questionable conclusion was that the indictment did *not* allege "an expenditure by the CIO in circulating free copies to nonsubscribers, nonpurchasers or among citizens not entitled to receive copies of '*The*

83. *Id.* Making it clear that the CIO was creating a test case, the editorial essentially admitted that it was in violation of § 313, and stressed the union's belief that the provision was unconstitutional. *Id.* at 108-09.

84. United States v. CIO, 77 F. Supp. 355, 356 (D.D.C.), *aff'd on other grounds*, 335 U.S. 106 (1948).

85. *Id.* at 357.

86. *Id.* at 357-58.

87. *Id.* at 358.

88. *Id.*

89. *Id.* at 359.

90. 352 U.S. at 110; *id.* at 129 (Frankfurter, J., concurring).

91. *Id.* at 123-24.

CIO News,' as members of the union."[92] Then, following a brief discussion of the history of federal regulation of politics, the Court turned to the legislative development of the Taft-Hartley Act's amendment to section 313. The Court spoke with a certainty belied by the actual congressional debates, finding that "in the Senate debates definite indication that Congress did not intend to include within the coverage of the section as an expenditure the costs of the publication described in the indictment."[93] Following a review of the legislative history and extensive quotation from the Senate debate (virtually all of which corroborates a conclusion contrary to the Court's), Justice Reed's opinion concluded that "the gravest doubt would arise in our minds" as to section 313's constitutionality if it

> were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures. . . .[94]

The Court largely ignored the dissenting-member argument by refusing to agree that members (or stockholders) were "unwilling participants in such normal organizational activities. . . ."[95]

The Court all but conceded that its construction of section 313 was unsupported by legislative history. In defense of its view, the Court relied upon (1) the statutory language itself, and (2) "the dangers of unconstitutionality."[96] The opinion later demonstrated the weakness of its statutory argument by providing an advisory opinion to Congress concerning the sort of language that would be needed to provoke a constitutional decision. As the Court said, "[i]t would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication."[97] This is a truly remarkable perform-

92. 335 U.S. at 111. This interpretation is challenged by one commentator in a position to know. Rauh, *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152, 156 n.19 (1961). Rauh asserts that copies of the newspaper "may well have been intended for others than the membership." *Id.* He also speculates that those persons "accustomed to receive copies of the periodical . . . undoubtedly included some non-members" of the union. *Id.*

Moreover, in the district court's opinion in United States v. UAW, 138 F. Supp. 53, 55 (E.D. Mich. 1956), the court noted that "this particular issue of the News went not alone to the C.I.O. membership but extra copies were run off and distributed to the public." *See also* Comment, *Corporate Campaign Funding*, 4 CUM.-SAM. L. REV. 544, 555 n.74 (1974).

93. 335 U.S. at 116.

94. *Id.* at 121. Interestingly, the Court included "customers" within the protected audience of potential recipients of corporate and union periodicals. *Id.* This possible audience has, however, been the target of virtually no corporate expenditures.

95. *Id.* at 123.

96. *Id.* at 122.

97. *Id.* at 123.

ance. The trial court had found the statutory language equally as clear, and directly contrary to the Court's interpretation.[98] Research has uncovered no commentary during the more than thirty years since *CIO* that supports the Court's interpretation, and history's verdict is that the Supreme Court was wholly mistaken.[99]

It also seems clear that "the dangers of unconstitutionality" standing alone cannot support judicial rewriting of statutes. The use of statutory interpretation to avoid constitutional issues may well be entitled to a place on the honor roll of the "passive virtues," but adherents of those virtues should (and generally do) recognize that judicial rewriting of federal statutes is hardly exemplary of passivity. To the contrary, the *CIO* decision represents "a slick but shallow performance. . . . ,"[100] and one that has not served either subsequent judicial or legislative developments.[101] Justice Rutledge's concurrence was equally biting, criticizing the majority for its "invasion of the legislative function by rewriting or emasculating the statute."[102]

Justice Rutledge's concurring opinion, rejecting as it does virtually every step of the majority's reasoning and all of its conclusions, warrants careful examination. It vigorously criticized the majority's exercise in statutory construction, and, in addition, examined in detail the constitutionality of section 313. Justice Rutledge concluded, as did the trial court, that the statute was invalid.[103] Much that Justice Rutledge

98. 77 F. Supp. at 357.

99. History's verdict was confirmed in Pipefitters Local No. 562 v. United States, 407 U.S. 385, 417 n.29 (1972) where the Court said that, in *CIO*, it had "of course [gone] further than Senator Taft's comments would allow. . . ." *See* Rauh, *supra* note 92, at 157-58.

At least one commentator speculated that the Court's decision in *CIO* was rendered with the upcoming 1948 election campaigns much in mind. Kallenbach, *supra* note 52, at 17-18.

100. Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 73. Dean Wellington wrote this phrase to describe another important Supreme Court decision, considered at text & notes 166-78 *infra*.

101. The one characterization of the legislative history that might have sustained the Court's position is found in the remark that "[a]pparently 'expenditure' was added to the statute to eradicate the doubt that had been raised as to the reach of 'contribution,' not to extend greatly the coverage of the section." 335 U.S. at 122. The Court may have been searching for a construction of § 313 that would have considered "expenditures" made in coordination with a candidate's campaign to be "contributions" regulated by the statute. *See* Comment, *Problems in Corporate and Union Spending in Federal Elections*, 31 ROCKY MTN. L. REV. 370, 374 (1959). Such a provision is now part of the FECA, 2 U.S.C. § 441a(1)(7)(B)(i) (1976). Under this view, a union's expenditures "independent" of the campaign would not fall under the statute's proscriptions.

One danger of such speculation is that present-day distinctions might be improperly read into the Court's opinion, which itself did not elaborate on the point. Moreover, in United States v. UAW, 352 U.S. 567, 582-83 (1957), the Court made it clear, at least by implication, that the Taft-Hartley Act's amendments had greatly extended the coverage of § 313. The section was clearly intended to cover expenditures " 'whether or not said expenditures are with or without the knowledge or consent of the candidates.' " *Id.* at 582 (quoting H.R. REP. No. 2739, 79th Cong., 2d Sess. 46 (1945)).

102. 335 U.S. at 130 (Rutledge, J., concurring).

103. *Id.* at 155 (Rutledge, J., concurring).

wrote remains valid today, and his opinion is worth careful reading.[104] In examining two of the grounds advanced to support the statute's constitutionality (prevention of corruption and the diminution of undue influence) Justice Rutledge observed that:

> '[U]ndue influence' in this connection may represent no more than convincing weight of argument fully presented, which is the very thing the [First] Amendment and the electoral process it protects were intended to bring out. And one may question how far legislators may go in accurately assessing undue or disproportionate weight as distinguished from making substantially accurate findings and conclusions concerning corruption.[105]

Rutledge's approach foreshadowed the Court's view in *Buckley v. Valeo*[106] that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."[107] This cautionary attitude is of considerable importance today, given the emphasis in campaign-finance debates on "undue influence" rather than corruption.

On the difficult "minority protection" issue, Justice Rutledge is less persuasive. Noting that section 313's effect "is not merely one of minority protection . . . [i]t is also one of majority prohibition,"[108] Rutledge attempted to use the statute's vagueness to resolve the problem. As a remedy, he proposed a "negative check-off" to those funds received by the union from its members that might properly be used for political purposes.[109]

Perhaps recognizing the insufficiency of his response to the issue posed by the dissenting union member, Justice Rutledge also addressed the important issue of "interest group" activity. Anchoring such activity firmly in history and in the Constitution he stated:

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104. For an early assessment of the statute's unconstitutionality, see Note, *Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity*, 57 YALE L.J. 806 (1948).

105. 335 U.S. at 145 (Rutledge, J., concurring). Lest undue influence be used as a synonym for corruption, it should not be forgotten that the government's brief in *CIO* used the phrase "disproportionate influence." Brief for the United States at 59.

106. 424 U.S. 1 (1976).

107. *Id.* at 48-49. In a different context the Court concluded that, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see* Bridges v. California, 314 U.S. 252, 269 (1941) ("No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.").

108. 335 U.S. at 147 (Rutledge, J., concurring).

109. *Id.* at 149. Justice Rutledge also suggested that neither minority protection nor the elimination of corruption or undue influence were the real reasons for the statute: "[the] object was rather to force unions as such entirely out of political life and activity." *Id.* at 150. If this passage reveals a certain skepticism of the motives of the congressional prohibitionists, it is certainly completely warranted. Precisely the same point could be made about those concerned with the dissenting shareholder.

> The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it. Moreover . . . that right is secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience.[110]

The Rutledge concurrence, here as elsewhere, echoed the views expressed in *Bowe v. Secretary of the Commonwealth*.[111] There, the Supreme Judicial Court of Massachusetts stated: "Individuals seldom impress their views upon the electorate without organization. They have a right to organize into parties, and even into what are called 'pressure groups,' for the purpose of advancing causes in which they believe."[112] Rejecting the "ostrichlike conception" that "labor unions as such have nothing of value to contribute" to the political process, Rutledge reasoned that a restriction on union expenditures required its proponents to demonstrate the "indubitable public advantage arising from the restriction outweighing all disadvantages. . . ."[113] Although referring only to unions, Rutledge's opinion and its logic apply with equal force to corporations. Enforced neutrality of the kind required by section 313 is simply inconsistent with an open political system.

Despite the unanswered thundering in the Rutledge opinion, *CIO* can be read quite narrowly, confined to its specific facts. To do so, however, would be to ignore the effect of the statutory construction imposed on section 313 by the majority—any other interpretation being deemed to raise "the gravest doubt . . . as to its constitutionality."[114] Such reasoning must mean that any statute that explicitly forbade the use of union or corporate treasury money to fund a regularly distributed periodical, and that endorsed or opposed federal candidates, would be unconstitutional. If such a statute were not constitutional, then the Court could have no justification for construing the statute as it did. Otherwise, the Court would be openly and explicitly legislating, *i.e.*, by not construing the law at the outermost boundary of its constitutionality. The proper reason for the Court to avoid directly passing on the constitutional issue in such situations is not that there is any doubt of the result, but because to do so would result in an advisory opinion about a statute never written. Although this analysis is not a terribly satisfactory solution, neither was the Court's reluctance in *CIO* to decide the constitutionality of section 313.

Three decisions shortly after *CIO* left further gaping holes in the

110. *Id.* at 143-44.
111. 320 Mass. 230, 69 N.E.2d 115 (1946).
112. *Id.* at 252, 69 N.E.2d at 130.
113. 335 U.S. at 144-45 (Rutledge, J., concurring).
114. *Id.* at 121.

statutory framework. In *United States v. Painters Local No. 481*,[115] a unanimous court of appeals reversed several convictions obtained under section 313 of the Corrupt Practices Act (then codified at, and referred to to hereafter, as by most courts and commentators, as 18 U.S.C. § 610). The union had purchased, using general treasury funds derived from union dues and fees, advertisements in newspapers and on radio stations (in neither of which the union had any financial interest) in its area.[116] The advertisements, "duly authorized by the Union at a special membershp meeting," urged the rejection of Senator Taft's candidacy for the Republican presidential nomination (and his defeat if he obtained the nomination) and the defeat (both for nomination and for election) of six incumbent Republican House members from Connecticut.[117] The total amount expended was $143.64.[118]

Judge Augustus Hand seized on an ambiguity in the *CIO* majority opinion to conclude that it seemed impossible to differentiate *CIO* from the case before the court of appeals.[119] As a practical matter, he added that "the situations are very similar, for in the case at bar this small union owned no newspaper and a publication in the daily press or by radio was as natural a way of communicating its views to its members as by a newspaper of its own."[120] The court was unable to find, in the language of the statute or the purposes for which it was passed, any reason to distinguish *CIO* from the case before it. Accordingly, the convictions were reversed with instructions to dismiss the indictments.[121]

In *United States v. Construction & General Laborers Local No. 264*,[122] the court acquitted various defendants of charges that they had violated section 610.[123] The Local's President, a candidate for Congress, had accepted services rendered by several union employees and made payments by union check to certain non-members for campaign-related matters.[124] Part of the court's decision rested on the *de minimis*

115. 172 F.2d 854 (2d Cir. 1949).
116. *Id.* at 855.
117. *Id.*
118. *Id.*
119. *Id.* at 856. The court of appeals said, with respect to *CIO*:
> While Mr. Justice Reed, who wrote the opinion in that case, laid some stress upon the fact that the publication was by the union itself and reached a somewhat limited class of readers, he nowhere said that a publication in an ordinary newspaper paid for out of the funds of a union would not also be outside of the coverage of the Act.

Id.
120. *Id.*
121. *Id.* The district court had overruled defense motions to dismiss the indictments, holding that it was "abundantly plain" that the allegedly unlawful acts were within the statute's scope. United States v. Painters Local No. 481, 79 F. Supp. 516, 519 (D. Conn. 1948).
122. 101 F. Supp. 869 (W.D. Mo. 1951).
123. *Id.* at 877.
124. *Id.* at 871-73.

nature of the payments, with which, it reasoned, Congress could not have been concerned.[125] Attempting to follow the Supreme Court's lead in *CIO*, however, the district court construed section 610 to exclude from its coverage at least some incidental political activity of employees on the corporate or union payrolls.[126] Moreover, the court also concluded that union efforts to register citizens and to persuade them to vote were not proscribed by the statute, in part because "such registration is beneficial to all candidates for office . . . and to all political parties."[127]

In *De Mille v. American Federation of Radio Artists*, the Supreme Court of California, held that section 610 did not cover "state legislative matters appearing on the ballot,"[129] *i.e.*, referenda. Accordingly, the court did not address the statute's constitutionality. In many respects, however, *De Mille* was a harbinger of later developments in the federal courts.

Thus within four years of its amendment to include labor unions, section 610 was beginning to look like Swiss cheese.[130] Internal com-

125. *Id.* at 873. By agreement among the parties, trial by jury was waived, and the court sat as the trier of the fact. *Id.* at 870.

126. *Id.* at 876. If any other construction were applied, the court warned:

> [T]hen any political activity of any person on the payroll of a labor organization, from its president to its janitor, would render that Union and its principal officers liable, if such persons devoted any appreciable time in support of, or in opposition to any candidate for President, Vice President, Senator or Representative in Congress. . . . The same would be true of any corporation which permitted one of its employees while on its payroll to spend a few hours hauling voters to a place of registering to vote, or to engage in any other type of political activity.

Id.

127. *Id.* at 875. The court's conclusions about the effects of union registration and "get-out-the-vote" drives would certainly come as a surprise to many experienced politicians, not the least of whom would be the leaders of organized labor. *See* Singer, *Labor Is Pulling Out All the Stops for November*, NAT'L J. 28, 31 (Oct. 9, 1976).

128. 31 Cal. 2d 139, 187 P.2d 769 (1947).

129. *Id.* at 156, 187 P.2d at 780.

130. Similar efforts at the state level had also fared poorly. In AFL v. Reilly, 113 Colo. 90, 100, 155 P.2d 145, 150 (1944), the Supreme Court of Colorado declared unconstitutonal a statute requiring unions to incorporate. As a result, a clause in the statute relating to the use of union funds for political purposes was invalidated as not severable. Kallenbach, *supra* note 52, at 10. In Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 18 So.2d 810 (1944), the Alabama Supreme Court declared unconstitutional a state statute which prohibited any labor organization or any organization of employers of labor from making political contributions. *Id.* at 24, 18 So.2d at 830. The provision concerning employers was declared invalid because, contrary to the requirements of the state constitution, it bore no relationship to the rest of the Act under consideration. *Id.* Reasoning that the legislative intent had been to "put organizations of employees and employers on the same basis," the court concluded, in light of its decision concerning employer organizations, that the entire provision must fall. *Id.* at 25, 18 So.2d at 830.

In AFL v. Bain, 165 Or. 183, 213-14, 106 P.2d 544, 557-58 (1940), the Oregon Supreme Court declined to rule on a challenge to that state's law that prohibited unions from maintaining funds in excess of their "legitimate requirements," finding no justiciable controversy. As of 1961, there had apparently "been no reported application of this rather nebulous section to union political expenditures." Woll, *Unions in Politics: A Study in Law and the Workers' Needs*, 34 S. CAL. L. REV. 130, 135 n.25 (1961).

In contrast, the Texas Court of Civil Appeals, in AFL v. Mann, 188 S.W.2d 276 (Tex. Civ. App. 1945), upheld a Texas statute that forbade union "financial contributions" to political parties or candidates. *Id.* at 283. The statute did not purport to regulate union expenditures, and it was

munications to members, voluntary contributions by union members to a fund other than a dues fund,[131] at least some communications to the general public, communications on state referenda questions, at least some political activities by union members, and registration and get-out-the-vote drives, had all been declared outside of the statutory coverage. One pro-union commentator called section 610 "a virtual nullity," since the cases discussed above "would seem to have effectively emasculated that statute."[132] There was, however, to be some retrenchment.[133]

The next major case, and the first case to reach the Supreme Court after *CIO*, did not at first glance appear to be particularly noteworthy. In fact, the district court judge (Judge Picard) in *United States v. UAW*[134] might be forgiven if he thought his task had been made somewhat easier by the decisions just discussed. His facts looked very much like those presented in *Painters Local No. 481*: a union was indicted for defraying, from union treasury funds, the costs of television advertisements endorsing candidates for the House and Senate.[135] Interpreting section 610 to exclude from its coverage the offenses alleged, the district court dismissed the indictment, holding that "the 'expenditures' charged in this indictment are not expenditures prohibited by the Act."[136] In methodical fashion, the district court examined the *CIO*, *Painters Local No. 481*, and *Construction & General Laborers* cases, and concluded that *Painters Local No. 481* and the case before it were "as alike as two peas in a pod."[137] The court also noted that, in *Painters Local No. 481*, "the government had a case made to order for appeal but no petition for certiorari was filed to the Supreme Court."[138] It

essentially upheld more on the basis of congressional enactment of the Smith-Connally Act than on its constitutional merits. *Id.* In addition, the court's measure of the prohibition's validity—that the union could be regulated because its members as individuals were not regulated—is now quite clearly improper in first amendment cases.

131. *See* United States v. Teamsters Local 688 [1940] 41 LAB. L. REP. (CCH), Lab. Cas. ¶ 16,601 (E.D. Mo. 1960).

132. Chang, *supra* note 80, at 565.

133. Egan v. United States, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943), might seem to foreshadow later developments and to refute, at least in part, the conclusion reached in the text. In that case, the court of appeals affirmed the convictions of a public utility holding company and its president for violations of § 12(h) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 791 (which forbade, *inter alia*, political contributions, but not expenditures). As described in the opinion, the indictment did charge unlawful contributions directly to political candidates and parties. 137 F.2d at 375-77.

Although the defendants did challenge the constitutionality of § 12(h), they did not do so on first amendment grounds. *Id.* at 373-75. As precedent for the validity of § 610, therefore, *Egan* is largely useless.

134. 138 F. Supp. 53 (E.D. Mich. 1956) *rev'd sub nom.* United States v. UAW, 352 U.S. 567 (1957).

135. 138 F. Supp. at 54.

136. *Id.* at 59.

137. *Id.* at 57.

138. *Id.*

must have come as some surprise to Judge Picard when the Supreme Court decided to consider the *UAW* case.

Justice Frankfurter, writing for the Court in *UAW*, had concurred separately in *CIO*. Although he joined the majority opinion in *CIO*, with its lengthy discussion of the precursors of section 610, Justice Frankfurter again traversed the legislative history in *UAW* at even greater length.[139] This time, the Court concluded emphatically that the actions alleged in the indictment did indeed fall within the coverage of section 610.[140] The Court distinguished *UAW* from *CIO* by stating:

> [U]nlike the union-sponsored political broadcast alleged in this case, the communication for which the defendants were indicated in *C.I.O.* was neither directed nor delivered to the public at large. The organization merely distributed its house organ to its own people. The evil at which Congress has struck in [section 610] is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party.[141]

Once again avoiding a decision on the constitutional merits, the case was reversed and remanded for further proceedings.[142] The Court posed four questions to be answered on remand:

> [W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee [union]? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election?[143]

On remand, a jury acquitted the union.[144]

In dissent, Justice Douglas reiterated his position in *CIO* that the statute was unconstitutional. He foreshadowed the *Buckley* decision by asserting "[n]or can the fact that it costs money to make a speech . . . make the speech any the less an exercise of First Amendment rights."[145] He also provided first amendment responses to each of the

139. 352 U.S. at 570-88. Justice Frankfurter explicitly placed greater reliance on committee reports (even those reports on proposed legislation that was never enacted) than on floor debates. *Id.* at 585-86. Although committee reports should, in appropriate circumstances, be given greater weight than individual remarks on the floor, it seems clear that Justice Frankfurter went out of his way to minimize the importance of the debates.

This lack of emphasis was at least in part corrected in Pipefitters Local No. 562 v. United States, 407 U.S. 385 (1972), where the Court, referring to Senator Taft's floor remarks during the Taft-Hartley debate, said "his view of the limited reach of § 610, entitled in any event to great weight, is in this instance controlling." *Id.* at 409.

140. 352 U.S. at 585.

141. *Id.* at 589.

142. *Id.* at 592-93.

143. *Id.* at 592.

144. Lane, *Analysis of the Federal Law Governing Political Expenditures by Labor Unions*, 9 LAB. L.J. 725, 732 (1958).

145. 352 U.S. at 594 (Douglas, J., dissenting).

Court's four questions.[146] Justice Douglas' points simply went unanswered by the majority.[147]

Another troubling aspect of *UAW* is the disjunction between its two principal parts: the discussion of legislative history, and its application of section 610. The two parts are almost completely unrelated. When the majority reaches its central conclusion—that the indictment does state an offense under section 610—there is no reference to the extensive canvass of the statute's background. As with *CIO*, the Court's decision is virtually fiat. While section 610 is undeniably vague, the Court in *CIO* and *UAW* did nothing that a legislature could not also have done. Unions (and, to a lesser degree of certainty, corporations) might understand the results in the two cases, but there is little in the reasoning to answer the other questions that arise as to what section 610 permits and what it does not.

Illustration of how substantially the *UAW* decision left constitutional theory unsettled is found in *United States v. Anchorage Central Labor Council*,[148] which involved facts similar to those in *Painters Local No. 481* and *UAW*. The defendant (an association of twenty-six local unions) had spent $244 to purchase television broadcasting time, during which there were "expressions of political advocacy . . . intended to influence the general electorate," including persons other than union members.[149] In attempting to answer the four questions posed by Justice Frankfurter in *UAW*,[150] the trial court demonstrated convincingly that avoiding the constitutional issues in *CIO* and *UAW* may not have been worth the effort.

The district judge found that the contributions to the "television fund" were voluntary because each member union voted on whether and to what extent it would contribute to the fund.[151] This response

146. As Justice Douglas said:

> [1] The size of the audience has heretofore been deemed wholly irrelevant to First Amendment issues. . . . [2] What possible difference can it make under the First Amendment whether [the broadcast constituted 'active electioneering' or simply stated 'the record of the candidate on economic issues'] . . . . [3] The purpose of speech is not only to inform but to incite to action . . . . To draw a constitutional line between informing the people and inciting or persuading them and to suggest that one is protected and the other not by the First Amendment is to give constitutional dignity to an irrelevance. . . . [4] To date, unions have operated under a rule of the majority. Perhaps minority rights need protection. But this way of doing it is, indeed, burning down the house to roast the pig.

Id. at 595-96, cited with approval in Buckley v. Valeo, 424 U.S. 1, 43 (1976).

147. As an afterthought, Justice Douglas added that Congress could prohibit union contributions if it believed that such contributions had an "undue influence" on elections. *Id.* at 598 n.2 (Douglas, J., dissenting). Justice Douglas is clearly incorrect; any flat prohibition on contributions is necessarily unconstitutional. *Cf.* Buckley v. Valeo, 424 U.S. 1, 30 (1976); note 25 *supra*.

148. 193 F. Supp. 504 (D. Alaska 1961).

149. *Id.* at 504-05.

150. See text & note 143 *supra*.

151. 193 F. Supp. at 506-07.

may be satisfactory at one level of union organization, but it clearly does not solve the problem of the *individual* union dissenter. The court next concluded that even though the television broadcasts reached (and had been intended to reach) the general public, there was no statutory violation.[152] The court reasoned that, since the union had no newspaper, it was less expensive to purchase television time than to print a newspaper, and television broadcasts were ordinarily used "in the regular course of the union activities."[153] Conceding that the broadcasts were active electioneering, the court nonetheless held that even such advertisements were not prohibited by section 610.[154] Finally, the court concluded, in response to Justice Frankfurter's fourth question, that the broadcasts were not acts "to control an election."[155]

Thus, at the close of this cycle of judicial consideration of section 610, and despite the decision in *UAW*, the statute was still riddled by judicially fabricated loopholes. One commentator called section 610 a "dismal failure."[156] His observation finds support in the enforcement record of the Department of Justice during the years 1956-61. Of 121 complaints received during that period (seventy-seven of which were investigated), only eight cases were presented to a grand jury, and in only four were indictments returned.[157] Because of judicial decisions, considerable amounts of general union and corporate treasury funds were available for political expenditures, without regard to the opposition of dissenting union members or corporate stockholders, and with-

152. *Id.* at 507.

153. *Id.*

154. *Id.* at 508.

155. *Id.* at 506-08. A case factually similar to *Anchorage Central* but involving a corporation, was United States v. Lewis Food Co., 236 F. Supp. 849 (S.D. Cal. 1964), *rev'd* 366 F.2d 710 (9th Cir. 1966). There, the district court dismissed an indictment against the defendant corporation (which had purchased newspaper advertisements rating several incumbents' "votes cast in favor of constitutional principles") for failure to state an offense under § 610. 236 F. Supp. at 854. Answering Justice Frankfurter's third question, the court concluded that "an expenditure . . . does not come within the purview of the statute if it is not for an activity which constitutes active electioneering but is merely for a publication which simply states the record of particular candidates on economic issues." *Id.* at 853. The Court explicitly equated corporations and unions for purposes of construing § 610. *Id.* at 853 n.4.

Moreover, the indictment did not allege "whether the advertisement was contrary to the wishes of any stockholder"; the court considered that voluntary consent to the use of general corporate funds would vitiate an alleged violation. *Id.* at 853-54.

Although the Ninth Circuit Court of Appeals reversed the trial court and upheld the indictment, it did not decide the constitutional issues. 366 F.2d at 714. Rather, its principal focus was on the indictment's failure to allege that the corporate expenditure had been made against stockholders' wishes. *Id.* at 713-14. Moreover, the issue raised in *Lewis Food* concerning what expenditures are "in connection with an election" was not resolved by the court of appeals. Indeed, it is still with us. In Pipefitters Local No. 562 v. United States, 407 U.S. 385, 416 n.28 (1972), the Court dealt at length with the Ninth Circuit decision. On the issue of stockholder consent, the Court said: "The unanimous vote of the union member or stockholders may at most (but we need not now decide) be a defense." *Id.*

156. Rauh, *supra* note 92, at 152.

157. Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U. L. REV. 1033, 1041 n.38 (1965).

out regard to the possible "undue influence" of such expenditures on election results. At the same time, however, due to the ineffectiveness of the limitations contained in the Corrupt Practices and Hatch Acts, few other political actors were nearly as restrained as corporations and unions.

2. Against the Unions

In addition to the cases just discussed, there exists another line of constitutional precedent which, although developed independently of *CIO* and *UAW*, involves many of the same principles and same subjects. *Railway Employes' Department v. Hanson*[158] and *International Association of Machinists v. Street*[159] arose under section 2, Eleventh of the Railway Labor Act,[160] and considered the permissible uses of union dues compulsorily paid under union-shop agreements. Section 2, Eleventh of the Act explicitly provides that, notwithstanding any contrary state law, agreements between unions and carriers requiring union membership as a condition of employment are lawful.[161]

In *Hanson*, dissident employees who did not wish to join a union sued to enjoin enforcement of just such a union-shop agreement.[162] Reversing the Nebraska courts, the Supreme Court held that the contract violated neither the first nor the fifth amendments of the Constitution.[163] On the record before it, the Court found no first amendment violation in union-shop agreements made pursuant to the permissive provisions of section 2, Eleventh.[164] Should other conditions for membership be imposed, or if dues were "used as a cover for forcing ideological conformity . . . in contravention of the First Amendment," the Court made it plain that it would consider the issue anew.[165] *Hanson* omitted any reference to the previously decided *CIO* case.

The issue reserved in *Hanson* was explicitly raised by the plaintiffs

158. 351 U.S. 225 (1956).

159. 367 U.S. 740 (1961).

160. Act of Jan. 10, 1951, ch. 1220, 64 Stat. 1238, 45 U.S.C. § 152, Eleventh (1976).

161. *Id.* Section 2, Eleventh also forbids discrimination against any employee. *Id.* Moreover, union membership may not be denied or terminated for any reason other than the employee's failure to pay uniform dues (not including fines and penalties) required for membership. *Id.*

162. 351 U.S. at 227.

163. *Id.* at 236-38. The Court stressed that "[t]he union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements." *Id.* at 231. Since the only condition that a union could impose as a requirement for membership was the payment of dues, "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary." *Id.* at 235.

164. *Id.* at 238.

165. *Id.* There is, however, surprising unanimity of agreement that the *Hanson* plaintiffs had alleged that their dues were being used for clearly "political" purposes. Justice Frankfurter so stated in his dissent in *Street*. 367 U.S. at 804-05 (Frankfurter, J., dissenting). *See* Wellington, *supra* note 100, at 52-53; Woll, *supra* note 130, at 137.

in *Street*, who claimed that their union dues money, compulsorily paid under a union-shop agreement, was being used to support state and federal candidates with whom (and ideological causes with which) they disagreed.[166] After a lengthy analysis of *Hanson* and the legislative history of section 2, Eleventh, the *Street* Court construed the statute in a manner that avoided the first amendment issue.[167] Therefore, the Court interpreted the statute "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[168]

In fashioning its remedy, the majority sought to avoid "a restraint on the [majority's] expression of political ideas which might be offensive to the First Amendment," by proposing two possible solutions.[169] It was not until *Brotherhood of Railway and Steamship Clerks v. Allen*,[170] however, that the Court formulated a practical decree for the benefit of the dissenting union member.[171]

The majority opinion in *Street* provoked vigorous dissents from Justices Black and Frankfurter. Both Justices thought that the Court's exercise in statutory construction was wholly inappropriate.[172] On the constitutional merits, by contrast, Justice Black would have held section 2, Eleventh violative of the first amendment, while Justice Frankfurter would have upheld the statute.[173]

Justice Black's dissent focused on a critical issue: the extent to which government intervention effectively transformed the union from a voluntary organization into an arm of the government. He argued that Congress had sanctioned union shops by enacting section 2, Eleventh, overturning as it did state laws and constitutions that prohibited

166. 367 U.S. at 744. Plaintiffs did not allege that any union expenditures violated § 610 or any state corrupt practices acts. *Id.* at 773 n.21.

167. "One looks in vain for any suggestion that Congress . . . meant in § 2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." *Id.* at 764.

168. *Id.* at 768-69 (footnote omitted).

169. *Id.* at 774-75. The proposed solutions were (1) enjoining the union from expending for political causes the pro rata share of total political expenses represented by the dues of the "dissident" member, and (2) restitution to each "dissident" member of a pro rata share of his dues based on total union political expenditures.

170. 373 U.S. 113 (1963).

171. *Id.* at 122. In *Allen*, the Court stated that "[s]uch a decree would order (1) the refund to him of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion." *Id.* The Court referred approvingly to the British system, while noting that not all aspects of that system were "essential." *Id.* at 123 n.8. As one example of a non-essential element, the Court offered "the actual segregation of political funds" from other union funds. *Id.* *See* Note, *Union Political Expenditures Under Taft-Hartley Section 304*, 48 NW. U. L. REV. 64, 73-74 (1953).

In Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), the Court noted that "*Allen* can be viewed as a relaxation of the conditions established in *Street* governing eligibility for relief." *Id.* at 239 n.39.

172. 367 U.S. at 784-86 (Black, J., dissenting); *id.* at 800-04 (Frankfurter, J., dissenting).

173. *Id.* at 788-91 (Black, J., disssenting); *id.* at 806-19 (Frankfurter, J., dissenting).

such arrangements.[174] By so intervening, "to force people to help espouse the particular causes of a group," Congress had caused that group to lose its voluntary status, and the full force of the first amendment applied.[175] "The stark fact," Justice Black said, is that the statute "is being used as a means to exact money from these employees to help get votes to win elections for parties and candidates and to support doctrines they are against."[176] Accordingly, Black reasoned, the statute violated the Constitution.

Justice Black's views (and Justice Douglas' as well), compared to his positions in *CIO* and *UAW*[177] are most peculiar; they are especially illustrative of the tensions between the section 610 cases and the *Hanson-Street* precedents.[178] Justice Black's positions in *CIO* and *UAW* would provide constitutional protection to union political activity, without regard to the dissident union member; his opinions in *Hanson* and *Street*, by contrast, *preclude* union political activity. Although the Court's opinions in *CIO* and *UAW* do not reveal whether the unions involved had negotiated union-shop contracts, the reasoning of the opinions in which Black joined in those cases does not depend on closed- or open-shop provisions. The union-shop provisions of the Railway Labor Act and Taft-Hartley are essentially the same; the principal difference is that section 2, Eleventh overrides contrary state laws, whereas Taft-Hartley permits states to forbid union-shop contracts.[179] The role of the states, however, does not alter the constitutional analysis, the focus of which must be whether the government has intervened sufficiently to transform a voluntary group into an arm of the government for first amendment purposes. The issue is, therefore, in the present context, the same under both the Taft-Hartley and Railway Labor Acts.

Stressing Justice Black's inconsistencies, however, does not resolve the larger differences between *CIO-UAW* and *Hanson-Street*. In the former cases, whether by agile statutory construction or otherwise, the Court was willing to allow at least some clearly political expenditures to be funded by union dues. By equally light-footed statutory construction in *Street*, however, the Court seemed to require protection for dissenting union members. Yet the majority opinion in *Street* never

174. *Id.* at 790 (Black, J., dissenting). *But cf.* American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950) ("We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such.").

175. 367 U.S. at 790 (Black, J., dissenting).

176. *Id.*

177. See text & notes 90-113, 140-47 *supra*.

178. *See generally* UMW v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia Bar Ass'n, 377 U.S. 1 (1964).

179. 29 U.S.C. §§ 158(a)(3), 164(b) (1976). *See* Wellington, *supra* note 100, at 57-59 (describing the pertinent union-shop provisions in the Railway Labor and Taft-Hartley Acts as "twins").

mentions, let alone distinguishes, *CIO* or *UAW*.[180]

One possible explanation for the apparent inconsistency may be found in the rationale for the statutory construction in *Street*. Unlike *CIO*, the Court in *Street* did not hold that a contrary interpretation of the statute would raise "the gravest doubts" about section 2, Eleventh's constitutionality. Even though the record in *Street* raised the constitutional questions left unanswered in *Hanson*, *Street* held only that its construction of the Railway Labor Act was "entirely reasonable."[181] *Street* merely stands for the proposition that section 2, Eleventh does not vest "the unions with unlimited power to spend exacted money."[182] The Court was "not called upon to delineate the precise limits of that power. . . ."[183] In short, for all its appearances, *Street* is not the same kind of constitutional decision as *CIO*.[184] The statutory construction actually adopted in *Street* was not the only constitutionally permissible interpretation. Therefore, *Street* is not inconsistent with *CIO* or *UAW*.

This analysis may seem somewhat disingenuous, but no more so than *Street* itself, which has been characterized as "judicial legislation about collective bargaining."[185] Dean Wellington would have preferred that the *Street* Court face the constitutional issue and uphold the validity of the statute, thus adopting Justice Frankfurter's dissent.[186] Either Wellington's analysis, or the one advanced in this Article, would make *Street* consistent with *CIO* and *UAW*. Although these analyses may not be completely satisfactory to those concerned with totally protecting the dissident union member, there are really only two principled constitutional alternatives. The first is a reversal of *Hanson* and a consequent constitutionalization of much of the private sector of American life. The second alternative is to accept *Hanson* as good constitutional law, but to reject the Wagner Act[187] and most subsequent congressional labor-law efforts, that is, to reject the collectivization of the employment relationship. In particular, that section of the National Labor Relations Act providing that a union selected by the majority of employees in a bargaining unit will be the exclusive bargaining representative for that unit[188] would have to be repealed. It is, of course,

180. Lower court decisions subsequent to *Street* are discussed in Cohan, *Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context*, 51 TEX. L. REV. 936, 957-960 (1973).

181. 367 U.S. at 750.

182. *Id.* at 768.

183. *Id.*

184. See text & note 89 *supra*. Indeed, *Street* has been vigorously criticized as ambiguous because the Court did not "undertake the task—perhaps because it is impossible—of distinguishing between political and collective bargaining activities." Wellington, *supra* note 100, at 69.

185. Wellington, *supra* note 100, at 73.

186. *Id.*

187. 29 U.S.C. § 151 (1976).

188. 29 U.S.C. § 159(a) (1976). The Supreme Court has called that provision "a central ele-

precisely because of the requirements of collective bargaining (and its attendant costs) that the dissident union member is required to pay dues against his will. Whatever the merits of a retreat from collectivization in the employment sphere, it is completely clear that it will not occur overnight, or even soon.

The consequences of this analysis for corporate and union political activity are important. If, as previously indicated, minority protection was a stronger theme in the first half century of congressional debate and legislation than the Supreme Court has been willing to indicate, then there is substantial doubt that section 610 can be upheld on that basis. As a compelling governmental interest, protection of the dissident union member or stockholder has never been sufficient alone.[189] It is also important to recognize that the dissenter-protection argument had fallen on hard constitutional times well before the Federal Election Campaign Act of 1971 [FECA][190] and subsequent legislative and judicial developments. In light of repeatedly shifting concerns, this historical progression indicates that only the corruption and undue influence arguments have real constitutional significance.

D. *The Recent Years: The Watergate Era*

After several years of relative quiescence in both Congress and the courts, the 1970's brought extensive legislative activity, and a comparable amount of judicial reaction.[191] The FECA of 1971 made several important changes in federal election law, including expanded disclosure provisions,[192] a media-expenditure limit,[193] an effort to control independent political spending,[194] and a substantial revision of section 610.[195]

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ment in the congressional structuring of industrial relations." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220 (1977).

189. *See* Note, *Corporate Democracy and the Corporate Political Contribution*, 61 IOWA L. REV. 545, 556-57 (1975).

190. Pub. L. No. 92-225, 86 Stat. 3 (codified at 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979)).

191. In United States v. First Nat'l Bank, 329 F. Supp. 1251 (S.D. Ohio 1971), the court held § 610 unconstitutional to the extent that it precluded a national bank from making loans to state candidates, at least if the loans were fully secured, and made at normal bank rates in the ordinary course of business. *Id.* at 1254. The court stressed § 610's "unreasonable restraint on the first amendment rights of individuals" rather than its effect on banks. *Id.* Subsequently, an exception for loans in the normal course of business was written into FECA. *See* 2 U.S.C. §§ 431(e)(5)(G), (f)(4)(K) (1976) (amended 1979).

192. Current versions codified at 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979).

193. § 104(a)(1) of FECA, subsequently repealed.

194. § 104(b) of FECA, subsequently repealed.

195. Substantial constitutional holes were shot through the FECA almost immediately. Demonstrating the virtually universal temptation to use election laws against political opponents, the Nixon Administration brought the first case under FECA against a group that had been critical of the administration. United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972).

In both the *Impeachment Committee* case and in ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975), the courts consid-

While Congress was considering the proposed FECA, yet another union was indicted for violating section 610. In *Pipefitters Local No. 562 v. United States*,[196] the indictment charged that a Pipefitters local had established a political fund apparently, but not really, "separate" from the union, and funded by "systematic payments" from the local's members and others.[197] Evidence at trial indicated that the political fund was kept separate from union dues and assessments, that contributions to the fund were not a condition to union membership, but that disposition of money in the fund was controlled by the local's leadership.[198] A jury conviction was affirmed by the Eighth Circuit Court of Appeals, but reversed by the Supreme Court.[199]

The parties and the Court agreed that section 610 permitted labor organizations to establish political funds so long as money in the fund was "in some sense volunteered by those asked to contribute."[200] The Court relied on FECA as confirming its construction of section 610, and also on the remarks of Congressman Hansen (the author of the revision to section 610). In offering the amendment, Hansen stated that "the purpose of my amendment is to codify the court decisions interpreting [Section 610] . . . and to spell out in more detail what a labor union or corporation can or cannot do in connection with a Federal election."[201] Hansen added that the effect of his proposed amendment

> is to carry out the basic intent of section 610, which is to prohibit the use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election. . . .
>
> [T]he amendment, in further defining the phrase 'contribution or expenditure,' draws a distinction between activities directed at the general public, which are prohibited, and communications by a corporation to its stockholders and their families, and by a labor organization to its members and their families, on any subject, which the courts have held is permitted.[202]

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ered whether certain clearly "political" activities fell under the coverage of FECA. In both instances, the courts found FECA inapplicable. These decisions have considerable importance in assessing the validity of § 610 restrictions on various forms of corporate and union political speech. Moreover, in *Jennings*, the district court also invalidated a provision of the media expenditure limit which attempted to ensure a "candidate veto" over independent spending. 366 F. Supp. at 1054.

196. 407 U.S. 385 (1972).

197. *Id.* at 388.

198. *Id.* at 393-94.

199. *Id.* at 385. After oral argument in the Court, but prior to decision, FECA was signed into law.

200. *Id.* at 401; *see id.* at 402-03, 409.

201. 117 CONG. REC. 43379 (1971).

202. *Id.* Congressman Hansen was nearly as Cromwellian as his predecessor statutory authors, noting as he did that his proposal "represents a complete victory for those who believe that corporations and unions have no moral right to utilize their organizations' general funds for active public partisan politicking." *Id.* at 43380.

Several provisions of the revised section 610 do follow this pattern. The union and corporate political fund provisions, however, obviously have political effects well beyond the union membership or the corporation's shareholders.

The most difficult issue for the Court in *Pipefitters* was the extent to which a union fund had to be separate from the union. The Court held that section 610 required only limited separation, stating that

> such a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments. . . . Nowhere . . . has Congress required that the political organization be formally or functionally independent of union control or that union officials be barred from soliciting contributions or even precluded from determining how the monies raised will be spent.[203]

The Hansen amendment, moreover, went one important step farther by providing that general union or corporate treasury funds could lawfully be used for the "establishment, administration and solicitation of contributions" to a political fund.

This exception to the general prohibition against union and corporate contributions and expenditures (together with two other statutory exemptions identified by the Court)[204] clearly contemplated the use of general treasury funds over the objections of dissident members or stockholders. The Court justified the exceptions by stating that "each . . . was an activity where group interests predominated and 'the interest of the minority [was] weakest. . . .' "[205] In *Pipefitters*, the Court did not address the issue further.

In his *Pipefitters* dissent, Justice Powell warned that "[t]he opinion of the Court provides a blueprint for compliance with [section] 610, as now construed, which will be welcomed by every corporation and union which wishes to take advantage of a heretofore unrecognized opportunity to influence elections in this country."[206] Moreover, he predicted that the *Pipefitters* decision "goes a long way toward returning unions and corporations to an unregulated status with respect to political contributions. This opening of the door to extensive corporate and union influence on the elective and legislative processes must be viewed with genuine concern."[207] Justice Powell was only slightly off the mark; despite the *Pipefitters* result, there was little corporate activity

203. 407 U.S. at 414-15 (footnote omitted).
204. "[C]ommunications to, and nonpartisan registration and get-out-the-vote campaigns aimed at, stockholders or union members and their families" were also excepted from the general prohibition. *Id.* at 430.
205. *Id.* at 430-31 (quoting 117 CONG. REC. 43380 (1971)) (footnote omitted).
206. *Id.* at 448-49 (Powell, J., dissenting).
207. *Id.* at 450 (Powell, J., dissenting).

until after the FECA Amendments of 1974.[208] Union activity continued essentially as it had before, *Pipefitters* having generally confirmed the unions' own analysis.[209]

The 1974 FECA amendments made massive alterations in federal election laws. Most significant for present purposes were the changes that, for the first time, imposed truly effective limitations on contributions to and expenditures by political candidates, parties, and committees.[210] Prior to the 1974 FECA amendments, only corporations and unions faced significant constraints on their political activity; after the amendments, all political activity was heavily regulated.[211]

Despite the comprehensiveness of the 1974 amendments, section 610 itself was left largely untouched. Fines for violations were increased, however, and many of the terms used in the provision were redefined.[212] The main impact on corporations and unions of the 1974 revision came, however, from provisions applicable across the political spectrum. Contributions to candidates for federal office were limited to $1,000 per person per candidate per election,[213] $5,000 per candidate per election for qualified "multicandidate" political committees,[214] and

208. Pub. L. No. 93-443, § 101, 88 Stat. 1263 (1974), amending various sections of 2, 18, 29 U.S.C. One reason for the absence of corporate activity may have been that FECA did not amend 18 U.S.C. § 611, regulating political activity by government contractors (including unions and unincorporated businesses). *See* Epstein, *Corporations and Labor Unions in Electoral Politics*, 425 ANNALS 33, 41 (1976). That deficiency was cured by the FECA Amendments of 1974.

This Article has not treated § 611 in any detail because the constitutional considerations applicable to it are precisely the same as those applicable to corporations and unions generally. For a brief description of the legislative history of § 611, and the differences between that provision and § 610, see Lambert, *supra* note 157, at 1058 n.103.

209. At least some unions, however, had not been so prudent. In United States v. Boyle, 482 F.2d 755, 762, 768 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973), the District of Columbia Circuit Court of Appeals affirmed the conviction of W.A. "Tony" Boyle, a union president, for violating § 610 by having the union make contributions from the union's general treasury funds. Although Boyle challenged the constitutionality of the statute on appeal, he made only a very limited attack. Essentially arguing that § 610 was overbroad, Boyle contended only that Congress had failed, in enacting the provision, to utilize means which were least intrusive on protected first amendment freedoms. 482 F.2d at 763-64. The court of appeals upheld the constitutionality of § 610, but the decision is neither a broad nor a persuasive precedent on the larger constitutional issues. In Barber v. Gibbons, 367 F. Supp. 1102 (E.D. Mo. 1973), a union member obtained a declaratory judgment that his local's political fund violated § 610 because it was "financed by money secured through union dues." *Id.* at 1103. No constitutional issues were decided.

210. *Compare* Act of Feb. 7, 1972, Pub. L. No. 92-225, § 203, 86 Stat. 8-10 *with* FECA Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263-67 (current version at 2 U.S.C. § 441a (1976)).

211. *Compare* 18 U.S.C. § 610 (now codified at 2 U.S.C. § 441b (1976 & Supp. III 1979)) *with* 18 U.S.C. § 608 (codified as amended at 2 U.S.C. § 441a (1976)).

212. *See* Cort v. Ash, 422 U.S. 66, 68 n.1 (1975).

213. 2 U.S.C. § 441a(a)(1)(A) (1976). "Person" is expansively defined to include an "individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons." *Id.* § 431(11) (Supp. III 1979).

214. *Id.* § 441a(6)(2)(A) (1976) (former version at 18 U.S.C. § 608b(1970)). A "multicandidate political committee" is a political committee registered with the Federal Election Commission [FEC] "for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any state political party organization, has made contributions to 5 or more candidates for federal office." *Id.* § 441a(a)(4) (1976) (former version at 18 U.S.C. § 608(b)(2) (1970)).

an annual aggregate ceiling of $25,000 for contributions by an individual.[215] There was no annual aggregate contribution ceiling for any category of contributors other than individuals.

A dramatic effect of these limitations was the immense increase in importance of political action committees, particularly qualified multicandidate committees. With individuals now strictly limited in their abilities to make contributions to federal candidates, finding other sources of campaign funds became a critical political priority. Corporations and unions not only had the capability to organize such committees, they could use general treasury funds to defray the oftentimes high expenses of soliciting contributions. The growth of PAC's (a nonstatutory term), especially business PAC's, was on. So too, was the growth, in number and size, of issue-oriented, ideological political committees, financed in large part through extensive direct-mail campaigns.

Business was also relieved of another nagging worry by the unanimous decision in *Cort v. Ash*.[216] The Supreme Court held that no private right of action for damages existed under section 610 for corporate shareholders.[217] Relying in part on the existence of the newly created enforcement agency, the Federal Election Commission (FEC), the Court held that dissenting shareholders were relegated to whatever state-law remedies existed.[218] By eliminating the possibility of private injunctive actions[219] and by eliminating private damages suits under federal law entirely, the Court released one of the most important remaining restraints on corporate political action.[220]

Cort also represented another setback in constitutional theory for the minority protection argument as a compelling governmental interest justifying section 610's prohibitions.[221] In attempting to discern whether Congress intended to imply a private remedy under that provision, the Court noted that the protection of corporate shareholders "was at best a subsidiary purpose" and "at best a secondary concern"

215. *Id.* § 441a(a)(3) (1976) (former version at 18 U.S.C. § 608(b)(3) (1970)).
216. 422 U.S. 66 (1975).
217. *Id.* at 77-85.
218. *Id.* at 84-85.
219. The enforcement procedure for private complainants before the FEC is set forth in 2 U.S.C. § 437g (Supp. III 1979).
220. Corporate officers and directors should be adequately protected against shareholder suits by liberal application of the business-judgment rule, assuming, of course, that the corporation's actions are otherwise lawful. *See, e.g.*, Miller v. AT&T, 507 F.2d 759 (3d Cir. 1974). *See generally* Note, *Civil Responsibility for Corporate Political Expenditures*, 20 U.C.L.A. L. REV. 1327 (1973).
Although some have questioned the capacity of corporate management to make political judgments more expertly than judgments by the shareholders, Note, *supra* note 189, at 568-69, these questions have no real basis. In a highly politicized environment, corporations and trade associations are increasingly sophisticated politically, as they must be to survive and flourish.
221. See text & notes 92-99 *supra*.

in writing section 610.[222] The unions must have been stunned by this turn of events.[223] Having been exempt from the prohibitions of section 610's predecessors for forty years, and then for nearly thirty years having been the principal constitutional theorists in opposition to section 610's union provisions, they could now envision the possibility of corporations slipping out from under its restraints while they were still covered. *Buckley v. Valeo*,[224] however, provided the opportunity (albeit not the reason) for at least one more bit of anticorporate legislation.

Following the enactment of the FECA Amendments of 1974, a diverse coalition of plaintiffs brought a suit challenging almost every major provision of those amendments. Although the plaintiffs in *Buckley* did not challenge the constitutionality of section 610, the rationale (if not the precise result) of *Buckley* is important. *Buckley* established that political contributions and expenditures were protected by the first amendment—in shorthand, that "money is speech."[225] Although upholding contribution limits against the plaintiffs' facial attack, the Court declared unconstitutional the limits on independent expenditures,[226] expenditures from a candidate's personal funds,[227] and overall limits on campaign expenditures.[228] Broadly speaking, therefore, limits

222. 422 U.S. at 80, 81. In a footnote that may become famous, Justice Brennan observed that Congress "did show concern" during the Taft-Hartley debates for dissenting unionists. He speculated:

> This difference in emphasis may reflect a recognition that, while a stockholder acquires his stock voluntarily and is free to dispose of it, union membership and the payment of union dues is often involuntary because of union security and check-off provisions. *Cf. Machinists* v. *Street*, 367 U.S. 740 (1961). It is therefore arguable that the federal interest in the relationship between members and their unions is much greater than the parallel interest in the relationship between stockholders and state-created corporations.

Id. at 81 n.13. *See also* Lambert, *supra* note 157, at 1049-51.

The reference to "state-created corporations" may be important; the Court is still free to conclude that the federal interest in national banks and in corporations "organized by authority of any law of Congress," 2 U.S.C. § 441b(a) (1976), is stronger than where only "state-created" corporations are involved. Even though the distinction exists, however, it should not rise to the level of constitutional significance. Whatever the validity of the minority protection, corruption and undue-influence arguments, they are precisely the same no matter what level of government is the forum for incorporation.

223. The unions may have been somewhat comforted by the decision in McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975), which refused to find in § 610 an implied private right of action against a labor union. *Id.* at 1167.

224. 424 U.S. 1 (1976).

225. *Id.* at 12-23.

226. *Id.* at 39-51.

227. *Id.* at 51-54.

228. *Id.* at 54-59. The Court was careful to note that future challenges to the validity of the contribution limits would still be possible should the limits prove to be discriminatory in practice. *Id.* at 33-34. The Court, virtually without explanation, left in place expenditure limits for presidential candidates and party nominating conventions accepting federal subsidies pursuant to subtitle H of the Internal Revenue Code of 1954. I.R.C. §§ 9001-9042. This result was recently relitigated in Republican Nat'l Comm. v. FEC, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9101 (S.D.N.Y. 1979), after the district court had certified constitutional questions and findings of fact. A three-judge district court and the court of appeals upheld the limitations. *Id.* ¶¶ 9112, 9113 (1980). The Supreme Court affirmed without opinion. *Id.* ¶¶ 9114, 9115.

on political expenditures of whatever sort were constitutionally suspect, and quite likely deficient. Even as to contribution limitations, while the Court eschewed second-guessing Congress on the precise limits enacted, it at least implied that outright prohibitions might be different. "Such distinctions in degree," it stated, "become significant only when they can be said to amount to differences in kind."[229]

The *Buckley* Court also held that the FEC, as it was then constituted, was constitutionally precluded from exercising any rule-making or enforcement powers.[230] Although the Court gave the FEC a brief stay of execution,[231] Congress and the electoral process faced the possibility in early 1976 of mass confusion. Subsidies to candidates for the Democratic and Republican presidential nominations would be cut off, the FECA's enforcement agency would be largely inoperative, and everyone in politics would be left highly uncertain of the operative rules. The quick and easy solution was to reconstitute the FEC in a constitutional fashion.[232]

Even in the midst of potential chaos, however, the temptation to tinker with the election laws for partisan advantage was well-nigh irresistible. Although many possible changes to the FECA were discussed in the aftermath of *Buckley*, the unions and their supporters had one main target: the FEC's *Sun PAC* advisory opinion.[233] In response to a request from the Sun Oil Company, and by a four-to-two vote, the FEC basically, and by no means unexpectedly, approved the operation of Sun PAC, Sun Oil's "separate, segregated fund."[234] Most irritating to the unions, however, among many irritating conclusions, was the FEC's conclusion that corporations could solicit contributions from both stockholders and employees.[235] Labor determined that the FEC would not be reconstituted as an enforcement agency until *Sun PAC* was gutted.[236] While one can quarrel about the extent of the revisions

229. 424 U.S. at 30.

230. *Id.* at 137-41. The FECA Amendments provided that two members of the FEC were to be appointed by the President, two by the President pro tempore of the Senate (upon the recommendations of the majority and minority leaders), and two by the Speaker of the House (upon the recommendations of the majority and minority leaders). Both the House and the Senate were to confirm all six nominees. Pub. L. No. 93-443, § 310, 88 Stat. 1280-81 (current version at 2 U.S.C. § 437C(a)(1) (Supp. III 1979)). The Clerk of the House and the Secretary of the Senate are *ex officio* members without votes. *Id.*

231. 424 U.S. at 142-43.

232. Congress ultimately amended the statute to provide for presidential appointment of six voting members, with confirmation by the Senate. *See* 2 U.S.C. § 437c(a)(1) (Supp. III 1979).

233. FEC Advisory Opinion 1975-23 (Nov. 24, 1975). The FEC was formerly required by 2 U.S.C. § 437f to render advisory opinions upon request by incumbent federal office holders, political committees, or the national committee of any political party.

234. FEC Advisory Opinion 1975-23 (Nov. 24, 1975). The Advisory Opinion also discussed the operation of Sun EPA, a payroll-deduction plan of much less concern here.

235. *Id.*

236. Epstein, *Labor and Federal Elections: The New Legal Framework*, 15 INDUS. REL. 257, 264 n.14 (1976).

and their impact, labor received most of what it sought in the FECA Amendments of 1976.[237]

As now rewritten, the corporate-union provision[238] permits corporations to solicit for contributions among shareholders and their "executive or administrative personnel" and their families.[239] Twice yearly, corporations are permitted to solicit all other employees and their families.[240] Unions are still permitted to solicit members and their families, and twice yearly they are permitted to solicit stockholders and executive or administrative personnel and their families.[241]

Major legislative and judicial activity concerning the FECA has slowed recently, but potentially the most important constitutonal decision directly affecting corporate and union political speech came in another context in *First National Bank v. Bellotti*.[242] There, the Court struck down a Massachusetts statute that forbade corporations from making expenditures to influence votes on referendum issues, other than those "materially affecting any of [their] property, business or assets."[243] Justice Powell's majority opinion not only resulted in a victory for the corporations, it changed the focus of debate on corporate and union political speech. He stated that "[t]he proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the Massachusetts statute] abridges expression that the First Amendment was meant to protect. We hold that it does."[244] The Court also rejected the validity of the statute's "materially affecting" requirement as "an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement

237. Pub. L. No. 94-283, 90 Stat. 475 (1976) (amending scattered sections of 2, 18, 29 U.S.C.). If this conclusion was not clear from the text of the statute, the *AFL-CIO News* called the statute an "AFL-CIO backed . . . measure"; the NAM called it "objectionable to business." Epstein, *supra* note 236, at 268, (quoting *AFL-CIO News*).

238. 2 U.S.C. § 441b(b)(2) (1976).

239. *Id.* "Executive or administrative personnel" are defined as "individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities." *Id.* § 441b(b)(7).

240. *Id.* § 441b(b)(4)(B) (1976 & Supp. III 1979).

241. *Id.* This provision also requires that any such solicitation must not reveal the names of noncontributors or those who contribute less than $50. *Id.*

The statute also now provides that any solicitation methods permitted to be used by corporations are also permitted to unions. *Id.* § 441b(b)(5). Methods actually used by corporations must be made available to labor unions at actual cost. *Id.* § 441b(b)(6).

242. 435 U.S. 765 (1978).

243. *Id.* at 768.

244. *Id.* at 776. The Court specifically stated that it was not going to "address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment," *id.* at 777; nor would it consider "whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." *Id.* at 777 n.13.

that the speaker have a sufficiently great interest in the subject to justify communication."[245] Moreover, the Court added, "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[246]

Massachusetts relied on the two governmental interests identified in *CIO* and *UAW*: undue influence and minority protection.[247] Justice Powell dismissed the undue-influence argument because there had been "no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts. . . ."[248] Besides, he concluded, "the fact that advocacy may persuade the electorate is hardly a reason to suppress it."[249] The minority protection argument received an equally inhospitable reception. The Court found the statute both underinclusive because it permitted corporate expenditures regarding legislation while forbidding expenditures in referenda, and over-inclusive because it prohibited corporate expenditures in referenda even if the shareholders unanimously approved the expenditure.[250]

While the *Bellotti* opinion makes the expected reservation about its effects on FECA,[251] most observers would be surprised if *Bellotti*'s impact on section 441b were not potent indeed.[252] *Bellotti* provides a significant departure point, one perhaps marking the beginning of the end of the corporate and union regulatory framework first constructed

245. *Id.* at 784.
246. *Id.* at 784-85 (citing Police Dep't v. Mosley, 408 U.S. 92, 96 (1972)).
247. *Id.* at 787.
248. 435 U.S. at 789. The corruption issue, the Court noted, is simply not present in referenda campaigns where no candidates are elected. *Id.* at 790.
249. *Id.* at 790.
250. *Id.* at 793-95.
251. *Id.* at 788 n.26.
252. Shortly after *Bellotti*, the district court in FEC v. Weinstein, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9067 (S.D.N.Y. 1978), rejected a first amendment challenge to § 441b by apparently ignoring *Bellotti*. The court concluded that permitting even small corporate contributions "would alter the structure and presentation of political issues" and would "obscure" individual free speech. *Id.* at 50,562. Although the first of the court's statements quoted above may well be true, it is, to say the least, no justification for suppressing speech. The court nowhere explains how individual speech would be "obscured." The *Weinstein* opinion's constitutional analysis is brief and of little precedential value.

An earlier opinion, United States v. Chestnut, 394 F. Supp. 581 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 40 (2d Cir. 1976), is equally unhelpful. The court there rejected a constitutional challenge to § 610 based on the provision's vagueness and overbreadth. 394 F. Supp. at 587-91. Relying on the Hatch Act cases, and the premise that § 610 regulated conduct and not just speech, the court concluded that the statute was valid. *Id.* at 588-91. The Second Circuit affirmed on the constitutional issues with only minor elaboration on the lower court opinion. 533 F.2d at 50-51. The court of appeals noted the intervening Supreme Court decision in *Buckley*, but concluded that the result there was not "contrary" to the district court's opinion. *Id.* at 51 n.12. *Buckley*, however, made it clear that political contributions and expenditures were fully protected by the first amendment. Moreover, the *Buckley* court carefully distinguished the Hatch Act cases. 424 U.S. at 27 n.29, 48 n.54. The Second Circuit's view of *Buckley* is therefore clearly wrong, and the district court's opinion, decided before both *Buckley* and *Bellotti*, can no longer be considered good law.

in 1907.[253]

Although one hesitates to draw conclusions from so much conflicting legislative and judicial history, several points do emerge clearly. First, legislative regulation of political speech by unions and corporations may not ignore legitimate first amendment values. Contrary to what was long assumed, regulation of political contributions and expenditures will be subjected to the closest constitutional scrutiny. Second, and based on the foregoing, the validity of the entire structure of regulation of corporate and union political activity is now open to considerable question. As the following sections demonstrate, the attack on that structure is already well underway.

II. THE REMAINING CONSTITUTIONAL ISSUES

Although often presented in a framework of historical inevitability, federal regulation of corporate and union political contributions and expenditures has in fact been a kaleidoscope of shifting intentions and schemes. At the outset, the prohibitions were couched in moralistic tones and aimed at corruption of the electorate rather than candidates.[254] While some legislative prohibitionists feared the effects of aggregate wealth on the electoral process, others were definitely more concerned with the dissenting shareholder (and later the dissenting unionist). Additional statutory regulation of political activity has been periodically enacted, often with little attention given to the rationality of the restrictions on corporations and unions. The courts, through constitutional adjudication and statutory construction, have fundamentally altered the once flat prohibitions of federal laws. Together with congressional responses, judicial opinions have transformed the once-simple statute into a confused and complex regulatory landscape. Through all of these developments has run the consistent theme of one or another group of political actors seeking advantage over their competitors.

General treasury money from corporations and unions now legally influences the course of federal elections in numerous ways: (1) through communications to stockholders and administrative or executive personnel and their families (by corporations) and to members and

253. *Bellotti* has already generated a significant progeny. In Let's Help Florida v. Smathers, 453 F. Supp. 1003 (N.D. Fla. 1978), the court declared invalid a Florida statute which limited contributions to political committees involved in referenda campaigns. *Id.* at 1014. Also relying heavily on *Buckley*, the court noted that constitutionally protected freedom of association "encompasses the right to gather in groups to effectively advocate one's point of view." *Id.* at 1011. The case is now on appeal, awaiting decision by the Fifth Circuit. For further discussion of *Bellotti*, see Note, *First National Bank of Boston* v. *Bellotti: The Reopening of the Corporate Mouth—The Corporation's Right to Free Speech*, 21 ARIZ. L. REV. 841 (1979).

254. *See* text & notes 18-31 *supra*.

their families (by unions), which can be coordinated with a candidate's campaign;[255] (2) by "nonpartisan" registration and get-out-the-vote drives;[256] (3) through the establishment, administration, and solicitation of contributions to a separate segregated union or corporate fund;[257] and (4) through contributions to a party's national committee for the purchase or construction of office facilities.[258] In these and many other less direct ways, such as general issue-oriented communications, corporations and unions can advance their views.[259]

Together with these opportunities, however, go certain disadvantages. Corporate and union PACs, unlike non-affiliated political committees, have strict rules limiting the categories of individuals who may be solicited for contributions.[260] Direct contributions to federal candidates and independent expenditures from general treasury funds are still forbidden.[261] Moreover, corporate and union political action committees were the special targets of the anti-proliferation provisions of the FECA Amendments of 1976. These provisions require that, with certain exceptions not pertinent here,

> all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee.[262]

255. 2 U.S.C. § 441b(b)(2)(A) (1976). The record in *Republican Nat'l Comm.* v. *FEC* fully confirms the view that unions engage in coordinated expenditures. FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9101 (S.D.N.Y. 1979).

256. 2 U.S.C. § 441b(b)(2)(B) (1976). Although experienced politicians have long regarded the "nonpartisan" requirements as practically meaningless, the FEC has gone one step further. Registration and voting drives directed by corporations at their shareholders and administrative or executive personnel and their families, and by unions at their members and families *may* be partisan, so long as assistance or services are not withheld on a purely partisan basis. 11 C.F.R. § 114.3(c)(4) (1980).

257. 2 U.S.C. § 441b(b)(2)(c) (1976). See FEC v. National Educ. Ass'n, FED. ELEC. CAMP. FIN GUIDE (CCH) ¶ 9061 (D.D.C. 1978) (holding unlawful a union PAC's solicitation of contributions through the "reverse check-off" method of payroll deductions).

258. 2 U.S.C. § 431(e)(5)(H) (1976) (amended 1979).

259. If not prohibited by state law, unions and corporations can make contributions and expenditures in elections for state and local offices and in referenda campaigns. Such contributions and expenditures may well have spillover effects benefiting candidates for federal office.

260. 2 U.S.C. § 441b(b)(4) (1976). Trade associations face even more arcane restrictions on what they may and may not do. *Id.* § 441b(b)(4)(D); *see* 11 C.F.R. § 114.8 (1980). This complex regulatory scheme for trade associations turns on its head the arguments in 1943 and 1947 of those who felt that prohibiting union contributions and expenditures discriminated in favor of the trade associations. See text & notes 52-59 *supra*. To the contrary, trade associations are now far more heavily burdened.

261. 2 U.S.C. § 441b(a) (1976).

262. 2 U.S.C. § 441a(a)(5) (1976). The section also provides:

> In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more

This provision was intended, in substantial measure, to overturn dicta in *Buckley* which said that neither section 610 nor the FECA placed any "limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union."[263]

The extent of lawful corporate and union political activity has thus largely undermined the "compelling governmental interests" thought to support a flat prohibition of such activity. After *Cort* and *Bellotti*, the minority-protection rationale is in tatters, particularly for corporate shareholders. The corruption rationale is now fully implemented by the FECA's comprehensive scheme of contribution limits;[264] the same is true of the "undue influence" argument. These alleged governmental interests cannot justify a statute that in so many ways is structured as if they did not exist. Moreover, many political issues confronting corporations and unions are so complex that addressing them intelligently requires some delegation of authority and division of labor. Barring the union or corporation itself from speaking thus precludes elucidation or implementation of expert political judgment, a result directly contrary to the basic theory underlying the first amendment.[265]

The experience of state political systems is also important. Some states have statutes similar to section 441b,[266] while others freely permit corporate and union contributions and expenditures. To date, there is no evidence that political life in the "open" states is more corrupt than life in the prohibitionist states. Nor is there any evidence that corporations and unions exert more (let alone "undue") influence in the former than in the latter. Since the burden of formulating a compelling governmental interest falls on the proponents of restricting political speech, it is especially important that data from the states provide no evidence

than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the [contribution] limitations.

Id. The congressional reports make it clear that the anti-proliferation provisions were intended to prevent evasion of the contribution limitations. H.R. REP. No. 94-1057, 94th Cong., 2d Sess. 58 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 929, 937-38.

263. Buckley v. Valeo, 424 U.S. 1, 28-29 n.31 (1976); *see* Walther v. FEC, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9076 (D.D.C. 1979).

264. *See* 2 U.S.C. § 441a(a) (1976). One commentator has gone so far as to observe that § 610's "partial prohibition is effectively preempted by [the FECA Amendments of 1974]." Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148, 152 (1974). *See also* King, *Corporate Political Spending and the First Amendment*, 23 U. PITT. L. REV. 847, 868-69 (1962).

265. The issue of corporate and union influence on federal elections under FECA as presently written is itself a matter of considerable dispute. *See* the two part symposium entitled *The Business PAC Phenomenon*, in REG. 35-43 (May/June 1979), with articles by Epstein, *An Irony of Electoral Reform*, and Malbin, *Neither a Mountain Nor a Molehill. See also* Boggs & Stevens, *Keeping Up With the PACs: The Frontrunners of Campaign Finance*, 4 DISTRICT LAW. 20 (December/January 1979).

266. *See generally,* CAMPAIGN MONEY: REFORM AND REALITY IN THE STATES (H. Alexander ed. 1976).

to support constraining corporate and union involvement in the political process.[267]

Section 441b also fails to take into account important differences among corporations and among unions. Elihu Root justified a proposed ban on political contributions by corporations in New York this way: "It is to prevent the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth, from using their corporate funds . . . to send members of the legislature to these halls. . . ."[268] What about the *small* aggregations of wealth—the used-car dealership, the clothing store, and the restaurant—which are incorporated? Can it possibly be argued that contributions, as limited by FECA, from small corporations will corrupt candidates or permit the exertion of undue influence? What if one of these small aggregations of corporate wealth has only three shareholders, all of whom are in firm agreement on an appropriate political strategy? Who can possibly advance a minority-protection argument in such a context? Justice Powell put it cogently when he said "[c]orporations, like individuals or groups, are not homogeneous. They range from great multi-national enterprises whose stock is publicly held and traded to medium-size public companies and to those that are closely held and controlled by an individual or family."[269] Analogous remarks could have been made about unions.[270]

To return to the interest-group analysis with which this Article began,[271] what is inherent in the corporate or union form of organization that justifies the special attentions of section 441b? Are they more suspect than pro-abortion groups? than anti-abortion groups? than feminist groups? than associations of gun owners? than Common Cause?[272] All "interest" groups have causes, programs or candidates to advance,

267. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (states serving as "laboratories" for experimentation).

268. E. ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143 (1916).

269. First Nat'l Bank v. Bellotti, 435 U.S. 765, 785-86 n.22 (1978).

270. For example, "the drive toward unionism has been hampered since its inception by a heterogeneous labor population." H. ZEIGLER, *supra* note 4, at 136.

271. *See* text & notes 4-7 *supra*.

272. Reflecting the moralistic tone of the time, not unlike the present, Wisconsin Governor Robert M. La Follette said in 1905:

> The participation in government of the corporation as a corporation is a menace. Its action is governed by no sense of individual or personal responsibility. It is controlled by no sentiment of patriotism. *Corporations are organized for profit and gain, and enter the field of politics solely in the interests of the business for which they are created.*

State v. Joe Must Go Club, 270 Wis. 108, 111, 70 N.W.2d 681, 682 (1955) (emphasis in original). Although one may question the accuracy of Governor La Follette's moral assessment, his conclusion that corporations in politics will likely seek to advance their own interests is unassailable. Advancing the group's interests, whether economic or ideological, is one of the principal motivating factors for involvement in politics. Singling out one set of interests as a "menace" is neither more nor less than attempted suppression of political speech for its content.

and the competition among such groups is healthy and desirable:[273] "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[274] Interest groups attempt to influence opinion during election campaigns, through legislative lobbying, and by general efforts to affect public opinion.[275] The influence of these groups can vary dramatically, and even determining what influence they actually possess is difficult.[276] To impose certain limits on corporations and unions in election campaigns, and different limits on other interest groups, serves no coherent social policy. In fact, given continually declining voter turnout, it verges on the irrational.

In addition, no matter how "even-handed" a statute may appear on its face, the practical political consequences may well be substantially disparate. For instance, section 441b permits communications by unions to their members and families and by corporations to their stockholders and executive or administrative personnel and their families; a similar provision permits registration and get-out-the-vote drives.[277] The first question, of course, is whether the targeted groups of internal communications and registration or get-out-the-vote activities are in fact "evenhandedly" defined. In any event, there is no practical political doubt that these provisions are of far greater assistance to union than to corporate political action. Corporate shareholders are widely dispersed geographically and are not, therefore, readily amenable to registration or election-day activites. Communications to shareholders and to executive or administrative personnel (as well as assistance in voting aimed at the latter group) are likely to be somewhat more effective. Even here, however, communications received by pension funds, employee stock-option plans and institutional investors (none of whom vote) are not likely to have much political impact. Union members, by contrast, are far more likely to be geographically situated so that registration and get-out-the-vote activities by union locals can be effectively implemented. Communications to members, all

273. Kallenbach, *supra* note 52 at 24-26; Kovarsky, *Unions and Federal Elections—A Social and Legal Analysis*, 12 ST. LOUIS U. L.J. 358 (1968); Overacker, *Labor's Political Contributions*, 54 POL. SCI. Q. 56 (1939).

274. Buckley v. Valeo, 424 U.S. at 14.

275. Epstein, *supra* note 208, at 35; *see* Chang, *supra* note 80, at 558-60; Kovarsky, *supra* note 273, at 358.

276. One scholar has proposed this formulation: "[T]o determine the political influence of an organization we must consider regional variations, differential access to key areas of decision, the nature of the particular issue in dispute, degree of control over members, and the image of the organization with the public." H. ZEIGLER, *supra* note 4, at 91. *See* A. HEARD, THE COSTS OF DEMOCRACY 426-27 (1960) ("An American election campaign is more than a contest between candidates. It is a forum for the respresentation of interests in which a signficant share of the citizenry feels involved.").

277. 2 U.S.C. § 441b(b)(2)(A), (B) (1976).

of whom are at least potential voters, is also far more likely to have demonstrable political consequences,[278] both for the unions and the candidates they support.

The Supreme Court has consistently viewed selective regulation of speakers as highly suspect, as demonstrated by *Buckley* and *Bellotti*. Such piecemeal regulation of political activity, which, by definition, involves content regulation, receives different constitutional treatment than selective economic regulation.[279] *Police Department v. Mosley*[280] is a good illustration of that difference. There, a Chicago ordinance forbade all picketing near public schools except for the picketing of any school involved in a labor dispute.[281] The Court noted that the equal-protection interests involved were "closely intertwined with First Amendment interests."[282] The ordinance was invalid, the Court held, because:

> [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.[283]

Chicago attempted to justify the ordinance on the ground that "nonlabor picketing is more prone to produce violence than labor picketing,"[284] but the Court rejected the notion that "government could distinguish among picketers on such a wholesale and categorical basis."[285] The " 'undifferentiated fear or apprehension of disturbance' "

278. *See* Rauh, *supra* note 78, at 154-55; Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. PA. L. REV. 386, 389 (1977).

279. Interesting questions arise under both the first and fifth amendments when political speech is discriminatorily regulated. In oral argument before the Supreme Court in Buckley v. Valeo, Professor Winter (co-counsel for Senator Buckley and other plaintiffs) and Justice Stewart engaged in the following colloquy about the relationship between the two amendments:

> [Mr. Justice Stewart]: [A]re you directing yourself to a Fifth Amendment attack or a First Amendment attack [on the FECA's candidate expenditure limits], or both?
>
> Mr. Winter: I think it's both, Justice Stewart. It seems to me that it's a Fifth Amendment attack, in that it's the statute an invidious discrimination. But it's also a First Amendment attack in that [the statute] clearly regulates content. . . .
>
> I think it is almost exactly the case that the Court decided in *Police Department* v. *Mosley*, involving a statute that prohibited all picketing, [except] picketing by a labor organization.
>
> [Mr. Justice Stewart]: But the First Amendment doesn't have much to do with discrimination as such, does it? . . . The Fifth Amendment does, of course.
>
> Mr. Winter: Yes, it does. I find it difficult, Justice Stewart, though, to see why a statute which prohibits the speech of some but not others in a discriminatory fashion does not violate the First Amendment. . . .

Tr. of Oral Arg. at 12-13, Buckley v. Valeo, 424 U.S. 1 (1976).

280. 408 U.S. 92 (1972).

281. *Id.* at 92-93.

282. *Id.* at 95.

283. *Id.* at 96.

284. *Id.* at 100.

285. *Id.* at 101.

was simply insufficient to permit restrictions on first amendment freedoms.[286] Much the same could be said of the complex regulatory maze in which potential corporate and union political speech finds itself.

Efforts to reduce "undue influence" in any event do not "restore" the political process to some balanced "state of nature." Restraining corporate and union speech does not, contrary to popular mythology, return power "to the people." Limiting the political influence of some groups simply enhances the relative power of other competing groups. No one has advanced a serious rationale to justify such a redistribution, nor does anyone even vaguely understand its actual effects. Yet, if no one comprehends the effects of the redistribution of political power, it is, to say the least, hardly logical to advocate it. Chief Justice Burger captured the illogic of the redistributionist argument in *Bellotti* when he compared the "ordinary" corporation to the "media" corporation: "In terms of 'unfair advantage in the political process,' and 'corporate domination of the electoral process,' . . . it could be argued that . . . media conglomerates . . . pose a much more realistic threat to valid interests than do appellants and similar entities not regularly concerned with shaping popular opinion on public issues."[287] The Chief Justice is, in effect, arguing that the size alone of *media* corporations would not justify restrictions on their speech, and that the same logic should apply to non-media corporations. Moreover, the mere fact that someone has even a financial interest in a given political outcome has never been sufficient to preclude participation in the decision-making process.[288]

All of these factors demonstrate that the constitutionality of section 441b is in considerable doubt. Indeed, Justice White's dissent in *Bellotti* predicted the imminent demise of section 441b.[289] Having concluded, however, that the statute is likely to be held invalid, does not settle the context in which the invalidation will occur. There are numerous possible approaches to challenging section 441b's validity. Depending on which issue reaches the Supreme Court first, and depending upon the breadth of the Court's constitutional analysis, the statute may be subject to greater or lesser judicial dismemberment. Moreover, if past patterns obtain, the congressional response will also vary.[290] The next section will consider several ways that a constitu-

286. *Id.* (quoting Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969)).
287. First Nat'l Bank v. Bellotti, 435 U.S. at 796-97 (Burger, C.J., concurring).
288. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 139 (1961).
289. First Nat'l Bank v. Bellotti, 435 U.S. at 820-21 (White, J., dissenting).
290. If § 441b were invalidated, the result would not necessarily be an overall increase in corporate and union influence in the political process. Corporate and union independent expenditures aimed at the general public would probably increase. Corporate and union PACs, however, might well become less important, at least for a time. If corporations and unions were limited to the same $5,000 per calendar year ceiling on contributions to political committees as other groups

tional challenge could develop.[291]

III. THE PENDING CONSTITUTIONAL AGENDA

A. *Corporate and Union Independent Expenditures*

Although the validity of prohibiting corporate and union independent expenditures was highly dubious after *Buckley*,[292] *Bellotti* appears to have ended any remaining doubt. While Justice Powell's opinion in *Bellotti* noted that the Court was not deciding the issue,[293] Justice White's conclusion to the contrary is rather more persuasive.

In *Buckley*, the Court provided extensive explanations demonstrating why independent expenditure limits were unconstitutional.[294] Basically, the Court held that (1) such independent expenditures did not pose the same dangers of real or apparent corruption as large contributions; and (2) independent expenditures were just as likely to harm as to aid the candidate the expenditures sought to assist.[295] The *Buckley* rationale for invalidating the low limit on independent expenditures in the 1974 Amendments to FECA rested on premises that cannot logically be altered merely because the independent speakers are un-

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or individuals, that might well result in less support for corporate and union PACs than is presently available under the "establishment, administration, and soliciation of contributions" exception to § 441b. 2 U.S.C. § 441b(b)(2)(C) (1976). Tax considerations would also likely be important.

It should also be noted, however, that the validity of limits on contributions to political committees (other than those authorized by federal candidates to support their campaigns) is highly dubious. Such limitations were contained for the first time in the FECA Amendments of 1976, and were not, therefore, addressed by the Supreme Court in *Buckley*. One commentator, in an excellent and unfortunately little noticed analysis, has concluded that limits on contributions to non-candidate political committees cannot be sustained. He argues that such limits are not justified by any anti-corruption rationale, which is embodied in the limits on contributions to candidates and their committees. Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 YALE L.J. 953 (1977).

Nor should it be assumed that minority interests in corporations and unions will be unprotected and unheeded. Legislation truly designed to prevent coercion can be readily fashioned and, if narrowly drawn, presumptively constitutional. *See, e.g.*, 2 U.S.C. § 441b(b)(3)(A) (1976) (making it unlawful for corporate or union PAC's to contribute or expend money "secured by physical force . . . job discrimination, financial reprisals" or the threats of such conduct). More attention should be paid to refining these anti-coercive devices rather than to repressing otherwise legitimate corporate and union speech. See Comment, *supra* note 278, at 410-23, for an extensive treatment of possible solutions to the minority-protection problem. *See also* Comment, *supra* note 74, at 385-88.

291. One important procedural point is that a corporate or union PAC raising a constitutional challenge would have standing to invoke the Buckley amendment, 2 U.S.C. § 437h (1976 & Supp. III 1979). *See* Bread PAC v. FEC, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9070 (7th Cir. 1979) (Bread PAC is challenging various regulations governing trade association political activities.) By contrast, corporations and unions themselves may lack such standing. *See* Martin Tractor Co. v. FEC, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9071 (D.D.C. 1978).

292. *See* Clagett & Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327, 1367-80 (1976).

293. 435 U.S. at 788 n.26.

294. 424 U.S. at 45-47.

295. *Id.*

ions or corporations.[296] First, unlimited expenditures which do not explicitly advocate the election or defeat of a clearly identified candidate can be as readily made by corporations and unions as by other organizations or individuals.[297] Indeed, much of the litigation previously discussed makes it clear that unions at least are fully able and prepared to make such independent expenditures.[298] Second, there is no greater danger of real or apparent corruption associated with corporate and union independent expenditures than with similar expenditures by others.[299] Third, corporate and union independent expenditures are no more likely to be particularly beneficial in their actual political effect than those made by others. To the contrary, some would argue that identification with corporate or union interests would be highly prejudicial to many candidates.[300] Finally, as *Bellotti* makes clear, corporate and union political speech does not present some sort of hypothetical special case where the government may legitimately attempt to equalize "the relative ability of individuals and groups to influence the outcome of elections."[301] In *Buckley*, the Court was explicit that "equalizing" speech by restricting some sources was "wholly foreign" to the first amendment.[302]

Precluding independent corporate and union speech rests on exceedingly weak foundations. It can be predicted almost with certainty that the constitutionality of the prohibition will be raised in the very near future. Only a complete repudiation of recent judicial pronouncements could result in the prohibition being upheld.

B. *Statutory Vagueness*

A related area of interest is the potential for what have been called "independent non-expenditures"—expenditures that are not coordinated with or controlled by any candidate for federal office and that do not explicitly advocate the election or defeat of any clearly identified candidates.[303] Under the *Buckley* rationale, these independent non-expenditures may not be regulated, not even by requiring disclosure

296. *Id.* at 39-51.

297. *See, e.g.*, FEC v. AFSCME, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9078 (D.D.C. 1979) (holding that a poster depicting President Ford, wearing a button saying "Pardon Me," embracing former President Nixon was not "express advocacy" and therefore not regulated by the FECA).

298. See text & notes 115-21 *supra*.

299. 424 U.S. at 45-46.

300. *See id.* at 45; text & notes 248-49 *supra*.

301. 424 U.S. at 48.

302. *Id.* at 48-49.

303. Clagett & Bolton, *supra* note 292, at 1378-80. The distinction between "independent non-expenditures" and "independent expenditures" is that the former do not contain words of express advocacy, such as those listed in *Buckley*. *See* Buckley v. Valeo, 424 U.S. at 44 n.52. Accordingly, independent non-expenditures are not "for the purpose of influencing" a federal election, 2 U.S.C. § 431(9)(B)(iii) (Supp. III 1979), and are therefore not constitutionally regulable.

(which is required for independent expenditures).[304] In the aftermath of *Buckley*, it was clearly arguable that one common form of independent non-expenditure—ratings of the voting records of incumbent Senators and Representatives—was clearly permissible.

The FEC, however, took a different view. In three separate statements,[305] the FEC or its staff ruled that distributions of voting records, together with indications that the votes were "correct" or "incorrect," and similar materials were covered by FECA. For non-corporate and non-union groups, the consequences, if the FEC is correct, would be required compliance with FECA's registration, recordkeeping and disclosure provisions and with FECA's contribution limits.[306] For corporations and unions, however, it would mean an outright ban on ratings.[307]

The question whether ratings constitute express advocacy (and are therefore regulated by FECA) was recently presented to the Second Circuit Court of Appeals via an FEC enforcement action in *FEC v. Central Long Island Tax Reform Immediately Committee [TRIM]*.[308] Prior to the court of appeals' decision, in an opinion certifying certain constitutional questions and findings of fact, the district court had "advised" the court of appeals that, in its view, the voting ratings at issue there did not expressly advocate election or defeat, and were not, therefore, covered by FECA.[309] There is ample precedent for such a view.[310]

The Second Circuit's unanimous result in *TRIM* that forms of public discussion that do not "expressly advocate" a candidate's election or defeat are not regulated by FECA should settle the matter of ratings. There is, however, based on past experience, some reason to believe that it will not, at least with respect to corporations and unions.[311] FECA's operative definitional language for contributions and

304. 2 U.S.C. § 434(c) (1976).

305. Staff Letter in response to Opinion Request 790; Staff Letter in Response to I/C 544; Advisory Opinion 1978-18 (1978), FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 5305.

306. 2 U.S.C. § 431(4)(A) (Supp. III 1979).

307. *Id.* § 441b (1976 & Supp. III 1979).

308. FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9107 (2d Cir. 1980).

309. *Id.* ¶ 9101 (S.D.N.Y. 1979).

310. *See* Buckley v. Valeo, 424 U.S. at 43-44. *See also id.* at 23 n.24, citing with approval United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972); ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom.*, Staats v. ACLU, 422 U.S. 1030 (1975); Rauh, *supra* note 92 at 155-56.

311. The FEC received a stinging admonition from Chief Judge Kaufman in a concurring opinion. The Chief Judge said that he found the FEC's enforcement action "somewhat perverse" and that the FEC had displayed "insensitivity to First Amendment values." He stated further that the FEC had "failed abysmally" in its responsibility "to exercise its powers in a manner harmonious with a system of free expression." FEC v. Central Long Island Tax Reform Immediately Committee, (Kaufman, C.J., concurring), FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9107 at 50, 900-01. It may be that the FEC will act more reasonably after such a chastisement. As noted in the text accompanying this note, however, that possibility is doubtful.

expenditures for all other groups is "for the purpose of influencing" federal elections.[312] For unions and corporations, the key phrase is "in connection with" elections.[313] In a number of FEC policy statements concerning the sponsorship of candidate debates, the Commission has indicated its view that the phrase "in connection with" is broader, and covers more kinds of activities, than the phrase "for the purpose of influencing."[314] It does not stretch the imagination to predict that the FEC, whatever the outcome of *TRIM*, will take the view that the difference in statutory language should be construed to deny corporations and unions the ability to publish voting ratings.

The reach of the phrase "in connection with" is, of course, important not only as to ratings but also as to a wide variety of other corporate and union activities. The validity of the FEC's construction, therefore, is of considerable interest. The FEC's general position that "in connection with" is more encompassing than "for the purpose of influencing" is contradicted by the government's position before the Supreme Court in the *CIO* case. The government's brief there flatly asserted that " '[i]n connection with any election' as used in Section 304 (*i.e.*, the predecessor of Section 441b) means for the purpose of influencing the result of an election."[315] The government argued that " 'expenditure in connection with' . . . can have only one meaning, *i.e.*, expenditure for the purpose of influencing the result of an election for the offices specified in the statute."[316] These representations by the government to the Court, especially in light of the CIO's vagueness challenge, may have been critical to the decision in *CIO*. Justice Rutledge's concurring opinion specifically focused on the statute's vague-

312. 2 U.S.C. §§ 431(e)(1), (f)(1) (1976) (amended 1979).

313. *Id.* § 441b(a) (1976) (amended 1979).

314. The early history of these tergiversations is recounted in Bolton, *The Federal Election Commission: Government Astride the Political Process*, REG. 46, 52 (July/Aug. 1978). *See also* Murphy, *The Federal Election Commission: A Rebuttal*, REG. 42, 46-47 (Sept./Oct. 1978).

The history of the FEC's attempts to regulate candidate debates is long and confused; it also provides an excellent example of the perverse effects of statutory vagueness. The League of Women Voters challenged the validity of the FEC's position on the funding of general-election debates in League of Women Voters v. FEC, No. 77-0235 (D.D.C., Feb. 9, 1977). Because of subsequent developments at the FEC, the case never reached judgment on the merits. H. ALEXANDER, FINANCING THE 1976 ELECTION 104 (1979).

Subsequently, the FEC attempted to codify its position on candidate debates in proposed regulations, 44 Fed. Reg. 39348 (June 28, 1979). For various reasons, largely unrelated to the issues discussed here, the Senate vetoed these proposals on September 17, 1979, pursuant to 2 U.S.C. § 438(c) (1976) (amended 1979). The FEC then sought further public comment, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9096 (Oct. 5, 1979), and transmitted revised regulations to Congress at the close of 1979. 44 Fed. Reg. 76734 (1979). The final regulations became effective in 1980, but only after the FEC's much-publicized interference in the New Hampshire debate between Ronald Reagan and George Bush.

315. Brief for the United States at 89, United States v. CIO, 335 U.S. 106 (1948).

316. *Id.* Although "in connection with" was retained even while other provisions of the Corrupt Practices Act used the phrase "for the purpose of influencing" (*i.e.*, the same phrase used in the FECA), the government argued that "in connection with" was "obviously . . . intended to serve the same purpose as the more artisitic phraseology in the [Corrupt Practices Act]." *Id.* at 90.

ness.[317] The majority have felt no need to confront the vagueness issue because the government was content with a narrowing construction. Had the government argued for the same broad construction as the FEC now takes, the concurrence's vagueness argument might have picked up one more vote, thus changing dramatically the subsequent history of federal regulation of politics.

In any event, the FEC is now defending a position abandoned by the government more than three decades ago. Should it continue to do so, there will almost certainly be litigation. The most likely result is a narrow construction of the phrase "in connection with," but it is at least possible that the vagueness of the phrase will result in a declaration of section 441b's invalidity.

C. *The IAM Complaint*

In late 1978, the International Association of Machinists [IAM] and others filed a lengthy complaint with the FEC,[318] alleging that both FECA and the Constitution were being violated by the operations of eleven named corporations' political action committees.[319] The IAM argument was in four parts. First, it contended that, because corporate PAC's are authorized, sanctioned, and regulated by congressional action, constitutional protections must be read directly into the statute's provisions. Relying on cases like *Elrod v. Burns*[320] and *Abood v. Detroit Board of Education*,[321] the complaint argued essentially that corporate PAC's should be treated as if they were arms of the government itself.[322]

Second, the IAM asserted that the pattern of solicitation by corporate PAC's is inherently coercive. Such coercion is allegedly attributable to four factors: (1) the solicited employees are unprotected by collective bargaining agreements or individual contracts; (2) the identities of noncontributors and the amounts of contributions are known to corporate management; (3) the principal "targets" for and sources of contributions to corporate PAC's are "midlevel managers and professionals;" and (4) there are no established protections against unwanted

317. United States v. CIO, 335 U.S. at 150-54 (Rutledge, J., concurring).

318. *See* 2 U.S.C. § 437g(a)(1) (1976) (amended 1979).

319. Matter Under Review [MUR] 1040, before the Federal Election Commission. Named as respondents were Dart Industries, Eaton Corporation, General Electric, General Motors, Grumman Corporation, International Paper, Standard Oil of Indiana, Union Camp, Union Oil, United Technologies, and Winn-Dixie.

320. 427 U.S. 347 (1976).

321. 431 U.S. 209 (1977).

322. IAM Complaint at 8-14. It is one of history's small ironies that it is the IAM making an argument that would virtually eliminate, for purposes of constitutional analysis at least, the distinction between governmental and private action. In International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), the same IAM resisted the precise argument it is now advancing before the FEC.

solicitations.[323] As evidence of the inherent coerciveness of PAC solicitations, the IAM proposed six major findings, such as, "[m]ost of the employees' donations are used for federal campaign contributions in other states," and "[e]mployees are not permitted to designate, either by party or candidate, the recipients of their PAC donations."[324] When these proposed findings are considered together with FECA's requirements (as interpreted by the IAM), the complaint argued, it is clear that the corprate PAC's are violating the statute.

Third, as an alternative to the foregoing statutory argument, the IAM contended that corporate PAC contributions are, in practical effect, corporate contributions; accordingly, with only union contributions prohibited, section 441b is unconstitutionally discriminatory.[325] Fourth, positing another constitutional argument, the complaint argued that corporate financing of PAC costs violates the constitutional rights of shareholders.[326]

After responses by the corporations, the FEC found "no reason to believe" that any of the corporate PAC's were violating FECA, and dismissed the complaint.[327] Consistent with its practice, the FEC refused to consider the IAM's constitutional arguments. The IAM then instituted a suit[328] seeking a judicial declaration "that the dismissal of the complaint . . . is contrary to law" and a direction to the FEC to proceed "in conformity with such declaration."[329] In addition, the IAM also sought adjudication of its constitutional theories, pursuant to the Buckley Amendment, seeking a declaration of section 441b's invalidity.[330] If need be, the IAM would be able to argue that its complaint to the FEC demonstrated that it had exhausted its administrative remedies before bringing a constitutional challenge.

323. IAM complaint at 15-19.

324. *Id.* at 19-35.

325. *Id.* at 36-38.

326. *Id.* at 39-42.

327. 7 Camp. Prac. Rep. No. 4, at 5 (March 7, 1980). The FEC's dismissal of the complaint is not officially reported. FECA's enforcement procedures require the FEC to find "reason to believe" that the statute has been violated before it can investigate a complaint such as the IAM's. 2 U.S.C. § 437g(a)(2) (1976) (amended 1979). The Commission can also find "reason to believe and commence an investigation" on the basis of information ascertained "in the normal course of carrying out its supervisory responsibilities." *Id.*

328. IAM v. FEC, No. 80-0354 (D.D.C., filed Feb. 4, 1980).

329. *See* 2 U.S.C. § 437g(a)(9) (1976) (amended 1979). Such a suit must be brought in the United States District Court for the District of Columbia, and must be made no later than sixty days after the FEC's dismissal of the complaint. *Id.* § 437g(a)(9)(A), (B). If the court in effect "remands" the case to the FEC, and if the FEC fails to act in conformity with the court's order within thirty days, then "the complainant may bring in his own name a civil action to remedy the violation involved in the original complaint." *Id.* § 437g(a)(9)(C).

330. *See id.* § 437h(a) (1976) (amended 1979). This provision requires that the district court in which the action is filed shall "immediately . . . certify all questions of constitutionality of [the FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." *Id.* Direct appeal to the Supreme Court, and a requirement that the courts expedite these cases "to the greatest possible extent," are also provided. *Id.* § 437h(c) (1976).

The IAM's FEC complaint was lengthy and exhaustively documented, and gave every appearance of being a prelude to litigation. In fact, the IAM's civil complaint incorporates by reference its complaint to the FEC.[331] The resolution of this litigation could have a profound effect on the operation of section 441b. It is difficult to believe that a court will find the methods of PAC solicitation inherently coercive. All of the solicitation methods about which the IAM complains are explicitly or implicitly sanctioned by the statute.[332] Only by "constitutionalizing" corporate activity could a court reach these issues. That result would be a two-edged sword, however, for the same principles would then apply directly to unions as well.

"Constitutionalization" appears unlikely and unwise. Both *Elrod* and *Abood*,[333] the two cases stressed by the IAM in its complaint, involved government employees, rather than employees in the private sector.[334] The corporations named as respondents before the FEC by the IAM are not agencies or instrumentalities of the government, nor are their PAC's.[335] The IAM's argument that PAC's are authorized, sanctioned, and regulated by congressional action does not alter this fundamental precept. Section 441b generally operates as a restraint on political activity, and the authorization of corporate PAC's serves as an exception to this restraint. Were it not for the prohibition, no occasion would arise for the exception. Given the multiplicity of government

331. It may be that the complaint is also intended for other purposes. One such purpose might be a public relations tactic, aimed at the general public, designed to engender antagonism toward corporate PAC's. Another purpose could be to influence subsequent legislative struggles in Congress toward the IAM position (and resulting in greater restrictions on corporate PAC activity).

There is no evidence that these motives played any role in the filing of the IAM Complaint. Their possible existence, however, suggests the potential for abuse of the FECA's complaint and compliance procedures. For political purposes or other reasons unrelated (or only tangentially related) to enforcement of the statute, complainants can put their targets to considerable expense, inconvenience, and possible embarrassment, at least. The only protections against such abuse are: (1) the requirement that a complaint must be in writing signed and sworn to by the complainant, and notarized, and that the FEC is precluded from taking any action "on the basis of a complaint of a person whose identity is not disclosed to the Commission," 2 U.S.C. § 437g(a)(1) (1976) (amended 1979); and (2) the requirement that the FEC conduct an investigation "of reports and statements filed by any complainant under this subchapter, if such complainant is a candidate." *Id.* § 437g(a)(3)(A). The second protection was repealed by the 1979 FECA amendments. The confidentiality provisions have been narrowly intepreted in Common Cause v. FEC, FED. ELEC. CAMP. FIN. GUIDE (CCH) ¶ 9089 (D.D.C. 1979).

Considerable thought should be given to what other protections against abuses of the complaint procedure ought to be enacted. Such additional protections might include an expansion of the provision for the investigation of complainants. Another possibility would be to augment the statute's confidentiality provisions to prevent complaints from being exploited for their harassment value.

332. *See* 2 U.S.C. § 441b (1976 & Supp. III 1979). Whether there are actual violations of section 441b by any of the respondents is beyond the scope of this Article. Any finding of a violation, though, could cause some corporations to alter their methods of solicitation.

333. Elrod v. Burns, 427 U.S. 347 (1976); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

334. See text & notes 320-21 *supra*.

335. The corporations were not named as defendants in the IAM's civil action. As of mid-February, the corporations had made no decision whether or not to participate in the litigation. Legal Times, Feb. 11, 1980, at 4, col. 3.

regulation in our society, this same argument would apply with nearly equal force to all existing social organizations in America. Adoption of the IAM argument in the corporate context would obliterate the distinction between the governmental and private sectors in America. That distinction may be hazy in certain cases, but it is by no means completely gone.[336] The IAM complaint will not finish that task.

The IAM's discrimination arguments are not likely to fare much better, at least as presently structured. By contending that corporations are unfairly advantaged vis-a-vis unions, the IAM is at least implicitly asserting that the Constitution requires parity of treatment. "Parity" among corporations and unions, of course, is, contrary to the IAM's view, a political and legislative compromise, not a constitutional mandate. At a minimum, the IAM would face a delicate task in explaining the validity, between 1907 and 1947, of the prohibition only of corporate contributions. Assuming the IAM could construct some argument to obviate this inconsistency in its reasoning, it would still have to elucidate, at least in broad outline, the degree of parity required by the Constitution. Only two types of "equality" in fact exist. One is the equality of a complete prohibition of corporate and union political activity—the equality of silence. This, in *CIO*, *Pipefitters*, *Buckley*, and *Bellotti*, the Supreme Court has emphatically rejected. The other equality is that of complete freedom or, stated somewhat less broadly, no restrictions on corporations and unions different than the restrictions on any other organizations or associations. By fashioning its discrimination arguments in this manner, the IAM would achieve much more than it intended. Nonetheless, even if the union did not intend this result, a court could still reach it.

CONCLUSION

Treating the political activity of corporations and unions the same as other "interest" groups for campaign-finance law purposes, returns this Article to its beginning.[337] Whether anyone will make this argu-

336. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972). *See generally*, Winter, *Poverty, Economic Inequality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 44-52.

337. As this Article went to press, the Ninth Circuit decided California Medical Ass'n v. FEC, FED. ELEC. CAMP. FIN. GUIDE ¶ 9127 (9th Cir. 1980). There, a divided court upheld the constitutionality of 2 U.S.C. § 441(a)(1)(C), thus precluding an unincorporated association from contributing more than $5,000 per year to its political committee. The plaintiffs had specifically challenged the allegedly discriminatory features of section 441b, permitting unions and corporations to defray the administrative expenses of their PAC's, while unincorporated associations were limited. The decision thus directly raises the differential treatment of corporations and unions as opposed to all other groups. On the merits, Judge Wallace's separate opinion in many respects follows the analysis suggested in this Article. An appeal is now pending before the Supreme Court. *Id.* ¶ 82.

ment, or whether a court will accept it, is speculation. But it does indicate that more political freedom, not less, is the answer to the conflicting demands and pressures of a heterogeneous and diverse society.