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BASIC PRINCIPLES OR THEORETICAL TANGLES: ANALYZING THE CONSTITUTIONALITY OF GOVERNMENT REGULATION OF CAMPAIGN FINANCE

Marlene Arnold Nicholson*

I. INTRODUCTION

IN THE EPILOGUE to his book, The System of Freedom of Expression, Professor Thomas Emerson poses the question whether "the system of freedom of expression [can] survive the shift from the liberal laissez-faire to the mass technological society." His described the modern system as

choked with communications based upon the conventional wisdom and . . . incapable of performing its basic function. Search for the truth is handicapped because much of the argument is never heard or heard only weakly. Political decisions are distorted because the views of some citizens never reach other citizens, and feedback to the government is feeble. The possibility of orderly social change is greatly diminished because those persons with the most urgent grievances come to believe the system is unworkable . . . .

Although these words were written with reference to the broader issue of ailments in the entire system, campaign financing is clearly an important aspect of this reality. Indeed, because of its close proximity to political governance, it may be one of the more important aspects of the system of freedom of expression. Furthermore, the explosion in campaign costs during the 1970's and 1980's makes Emerson's description even more apt today than in 1969 when it

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2. Id. at 628-29.
Certainly, neither the framers of the first amendment nor those of the fourteenth amendment could have foreseen the changes wrought by the technological revolution upon our political processes and the concomitant importance of the role of money in those processes. Consequently, one of the crucial constitutional issues of our time is the extent to which the first amendment will permit government to regulate campaign financing in an attempt to deal with this problem. Professor Emerson identifies two general categories of legislative attempts to "purify" the system: regulation of "expression that is thought to harm other social interests... [and regulations] imposed solely to 'promote the goals of the system.'" To the latter reforms Emerson would apply a different and presumably more tolerant test of constitutionality. He would ask "whether there has been an 'abridgment' of freedom of expression," and the answer would "be framed in terms of accommodation of interests within the system, ... promotion rather than deterrence of expression." While Professor Emerson would tolerate some form of limited controls, he would not permit extensive legislative tinkering even though it is rationalized as an attempted improvement of the system. Imposing extensive controls, Professor Emerson admonishes, will "destroy the system altogether." Even "purification controls... can be tolerated in the system only under the most exceptional circumstances" he asserts.


5. It is estimated that in 1884 each presidential candidate spent between $1.3 million and $1.4 million during the general campaign. U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, at 1081 (1975). In the 1984 presidential campaign, the two party nominees were each given $40.4 million to spend during the general campaign. U.S. Bureau of the Census, Statistical Abstract of the United States: 1987, at 245 (1986). The Supreme Court has noted the role of money in the political process. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." Buckley v. Valeo, 424 U.S. 1, 19 (1976).

6. T. Emerson, supra note 1, at 633 (goals of the system include improvement in "quality and meaningfulness of expression" through the introduction of honesty, decency and openness).

7. Id. at 629.

8. Id. at 633-34. Professor Emerson explained:

On the basis of these considerations the controlling principles can be stated:
(1) In general, purification controls constitute an "abridgement" of expression and hence are invalid. They may not be an "abridgement," however, in exceptional situations in which the regulation in light of its impact on the whole system, operates to expand rather than contract freedom of expression.
(2) In applying this rule the burden of proof is on the proponents of the
Although Professor Emerson applies his principles in some detail to a variety of first amendment issues, he expresses little concern that the application of his principles by others to specific situations might differ from his own applications commenting that "at least this kind of approach would be based upon the functions and requirements of the system of freedom of expression." Unlike regulation to establish (a) that the control is clearly necessary to correct a grave abuse in the operation of the system and is narrowly limited to that end, and that this objective cannot be achieved by other means, (b) that the regulation does not limit the content of expression; (c) that the regulation operates equitably and with no undue advantages to any group or point of view; (d) that the control is in the nature of a regulation, not a prohibition, and does not substantially impair the area of expression controlled; and (e) that the regulation can be specifically formulated in objective terms and is reasonably free of the possibility of administrative abuse.

Id. at 634.

9. Professor Emerson commented specifically on the constitutionality of several "corrupt practices" measures. Id. at 639. He indicated that restrictions applicable to persons other than the candidate should be invalid. Id. This concept is consistent with the distinction the Court has drawn between limitations applicable to independent expenditures and those applicable to contributions to candidates. See infra notes 39-42 and accompanying text. The Court has, however, upheld disclosure requirements applicable to those who make such independent expenditures. Buckley v. Valeo, 424 U.S. 1, 75-84 (1976).

With respect to "[m]easures to assure equality of access to the marketplace by candidates," Emerson concluded that they "could be drawn equitably, since each candidate has an equal interest." T. Emerson, supra note 1, at 639. Therefore, it seems that he might favor limitations on contributions, of the type that were upheld in Buckley, 424 U.S. at 24-29, 38, and limitations on the use of personal wealth by candidates and limitations on the total amounts spent by candidates in an election. These latter two restrictions were found to be unconstitutional in Buckley, Id. at 51-54. But the restriction on total funds spent in a campaign applicable only to candidates accepting public subsidies has been upheld in a summary affirmance without opinion. Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280, 282-83 (S.D.N.Y. 1980), aff'd 445 U.S. 955 (1980). In a more recent article, Professor Emerson has expressed doubt regarding the constitutionality of making public subsidies depend upon the candidate's agreeing to refuse private contributions. Emerson, First Amendment Doctrine and the Burger Court, 68 Calif. L. Rev. 422, 463-64 (1980).

Because of his position that outright bans, rather than regulations, are unconstitutional, Emerson would have invalidated bans on corporate and union contributions and independent expenditures in candidate elections. T. Emerson, supra note 1, at 639-40. However, it has become clear that the use of the PAC by corporations and unions has made what was originally thought of as a ban, into a regulation. See infra notes 77-82 and accompanying text.

Although PACs have been used extensively by unions for many years, there was some doubt about the legality of their use until the mid 1970s. In 1975, the Federal Election Commission issued the Sun Oil Advisory opinion which made it clear that general treasury funds of unions and corporations could be used to administer and solicit for PACs. Federal Election Comm'n Advisory Op. 1975-23, 40 Fed. Reg. 56, 584 (1975). From that time on the growth of corporate PACs has taken on enormous proportions, dwarfing the resources of union PACs. See e.g., Jacobson, Money in the 1980 and 1982 Congressional Elections, in Money and Politics in the United States 42-45 (M. Malbin ed. 1984). Professor Emerson has also suggested that corporate bans could be justified if corporations are considered to be "part of the commercial sector and thus outside the regular system of freedom of expression." T. Emerson, supra note 1, at 640.

10. T. Emerson, supra note 1, at 640.
more dogmatic and simplistic scholars, Emerson does not offer sacrosanct answers; his contribution is much more valuable. Answers may change depending on the current dynamics of the system, but the principles Emerson highlights as basic to the system of freedom of expression will never change; they should continue to serve as touchstones as long as the first amendment exists.

According to Professor Emerson, the system of freedom of expression rests on four main premises. These are: the assurance of individual self-fulfillment; the advancement of knowledge and truth; the facilitation of the participation of all members of society in decision making; and the maintenance of a balance between stability and change.11

Professor Emerson's steady eye on the basic principles of the system of freedom of expression, and his careful application of these principles to legislative attempts to "purify" the system contrast starkly with the approach of the Supreme Court in campaign finance regulation cases. Starting in 1976 with the seminal case Buckley v. Valeo,12 in which the constitutionality of the post Watergate reforms was considered, the Court has veered wildly between extreme deference to Congress and extreme interventionism, sometimes in the same case.13 Broad pronouncements of supposed principles have been articulated, only to be ignored in favor of equally broad pronouncements of inconsistent principles in the next case.14

Although a careful analysis of the precise effects of the various statutes on the system of freedom of expression could have justified the results in most of the cases, the Court has instead created such a doctrinal tangle for itself that it cannot deal with any campaign finance issue without implicitly rejecting important dicta and sometimes even the actual holdings of previous cases.15 The doctrinal inconsistencies have led commentators to suspect that political compromise, rather than first amendment principles, is playing a dominant role. Indeed Buckley has been described as "a King Solo-

11. Id. at 6-7.
13. In Buckley the Court seemed to apply strict scrutiny to some aspects of the statute and almost no scrutiny at all to other aspects. See Nicholson, Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974, 1977 Wis. L. REV. 323.
15. See infra notes 46-74 and accompanying text.
mon's policy compromise."^{16}

Given this history, the most recent campaign finance case decided by the Supreme Court, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,^{17} was a pleasant surprise. Certainly the opinion can be faulted as inconsistent with some other cases,^{18} but the mixed signals in previous cases made that inevitable. Justice Brennan's analysis for the majority makes much more sense from the standpoint of protection of the principles which are basic to the system of freedom of expression than the analyses found in earlier campaign finance cases.

In *Massachusetts Citizens for Life*, the Court invalidated long standing federal bans on corporate independent spending in federal elections as applied to ideological organizations.^{19} The case itself will probably have little effect on the political system, because, as the Court explained, the "class of organizations affected by our holding today [may] be small."^{20} It is nevertheless a case of major importance because in strong dicta it apparently settles the question of the constitutionality of a major provision of the Federal Corrupt Practices Act that has been considered of doubtful constitutionality for a number of years.^{21} Furthermore, it gives valuable clues to legislatures attempting to draft future reforms that will survive constitutional challenges. The primary caveat must be that it was a five to four decision,^{22} and that one member of the majority is no longer on the Court.^{23}

II. *FEDERAL ELECTION COMMISSION V. MASSACHUSETTS CITIZENS FOR LIFE, INC.*

The stated purpose of Massachusetts Citizens for Life, Inc.

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18. See infra notes 47-89 and accompanying text.
20. 107 S. Ct. at 631. Also, depending on how other statutory provisions are interpreted, ideological corporations may find it more desirable to form a PAC to make independent expenditures even though they cannot be required to do so. *See* Oldaker, *Ideological Expenditures, CAMPAIGNS & ELECTIONS*, March-April, 1987, at 57-58.
22. Part of the decision was agreed to by only a plurality. *See infra*, notes 36-37 and accompanying text.
23. Justice Powell was a member of the majority. However, because the dissent was willing to go even further than the majority in upholding campaign finance reform, a change in the makeup of the Court should not be a threat to most reform measures. 107 S. Ct. at 632-35 (Rehnquist, J., dissenting, joined by White, Blackmun, and Stevens, JJ.).
(MCFL), a nonprofit, nonstock, Massachusetts corporation, was purely ideological. The corporation spent $9,800 from its general treasury funds to publish and circulate a “Special Election Edition” of its regular newsletter. This edition contained the voting records of incumbent legislators on abortion related issues, answers to questionnaires sent by MCFL to non-incumbents, and the pictures of “pro life” candidates. The statute in question prohibited the use of corporate general treasury funds for expenditures made “for the purpose of influencing any election for Federal office.” The district court interpreted the statute narrowly and thus concluded that the alleged conduct did not satisfy the statutory definition of “expenditure,” and that, in any event, MCFL’s action came within an exemption for news commentary. The Court of Appeals for the First Circuit and the Supreme Court disagreed with the district court’s conclusion that the statute was not applicable to MCFL’s actions, but all three courts agreed that, as applied to MCFL, the

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24. MCFL’s articles of incorporation provided that it was formed to:
foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized. . . .

107 S. Ct. at 619 (quoting from MCFL articles of incorporation, app. 84). The Court stressed that MCFL did not accept contributions from unions or corporations. Id. at 619.


28. Id. at 650. The exemption applied to “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. § 431(9)(B)(i) (1982).

29. 107 S. Ct. at 621-24; 769 F.2d 13, 21-22 (1985). The Supreme Court with respect to the news commentary exemption, commented:

[W]e need not decide whether the regular MCFL newsletter is exempt under this provision, because, even assuming that it is, the “Special Edition” cannot be considered comparable to any single issue of the newsletter. It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletter. It was not distributed to the newsletter's regular audience, but to a group twenty times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal MCFL publication.

107 S. Ct. at 624. The issue of whether the conduct came within the definition of “expenditure” under the act arose because there were two definitions of the word in the statute. One definition appeared to require that a thing of value be given to the candidate. Id. at 621; 2 U.S.C. § 441b. The other definition required only that the transfer of a thing of value be "made 'for the purpose of influencing any election for federal office.' " 107 S. Ct. at 621 (quoting in part from 2 U.S.C. § 431(9)(A)(i)). The Court resolved the conflict by looking to the legislative history which indicated that the latter broader definition was intended. Id. at 621-23.
statute would be unconstitutional.\textsuperscript{30}

It was clear from the inception of the controversy, which culminated in the litigation, that there were three basic facts which would be pivotal in determining the constitutionality of the statute as applied. First, the action at issue was an expenditure made by MCFL on behalf of certain candidates, not a contribution to those candidates. Second, MCFL was a corporation, not an individual or even an unincorporated association. Third, MCFL was not a business corporation, rather it was a corporation formed purely for ideological expression. The first and third elements pointed in the direction of finding the statute unconstitutional as applied to MCFL. Only the second offered the government hope for a finding of constitutionality.

Predictably, the Court began its constitutional analysis by stressing that the political expression of MCFL was in the form of an independent expenditure.\textsuperscript{31} The government argued that the ban actually involved minimal burdens on independent expression because a corporation could form a political action committee (PAC) with a separate segregated fund which could be used for unlimited independent expression on behalf of federal candidates.\textsuperscript{32} Furthermore, unlimited corporate funds could be used for administration of, and solicitation for, such a fund.\textsuperscript{33}

A majority of the Court responded that the requirement of a formalized organization might deter ideological groups from engaging in political expression\textsuperscript{34} and that statutory limitations on PAC solicitation could result in much less money being available for independent expenditures than if general treasury funds could be used.\textsuperscript{35} Justice O'Connor, concurring in part, rejected the additional argument adopted by the other four justices in the majority, that the reporting requirements applicable to PACs were too heavy

\begin{itemize}
\item 30. 107 S. Ct. at 624-31; 769 F.2d at 23 (1983); 589 F. Supp. at 649.
\item 31. 107 S. Ct. at 624.
\item 32. Id. at 624-25.
\item 33. 2 U.S.C. § 441b(b)(2)(C) (1982).
\item 34. 107 S. Ct. at 626; id. at 631-32 (O'Connor, J., concurring in part).
\item 35. Id. In Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 206 (1982), the Court had upheld very stringent limitations on who could be solicited by corporate PACs for contributions to the PACs' separate segregated funds. Ideological corporations without stockholders or members would only be permitted to solicit their employees. The unanimous opinion, written by Justice Rehnquist, stressed the broad deference given Congress in regulating the political expression of corporations. Id. at 209-10.
\item It should be noted that this case also involved an ideological corporation, yet the opinion, which was couched in broad generalities, gave little attention to this fact.
\end{itemize}
a burden on MCFL.\textsuperscript{36} She apparently was concerned that the plurality's focus on that factor could cast doubt on the holding in \textit{Buckley} that disclosure requirements are constitutional.\textsuperscript{37} The majority concluded that "while [the statute] does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses."\textsuperscript{38}

The Court cited \textit{Buckley} for the proposition that independent expenditures are "'at the core of our electoral process and of the First Amendment freedoms.'"\textsuperscript{39} Therefore, the majority concluded that the restriction could only be sustained upon a finding that it was justified by a compelling state interest.\textsuperscript{40} The Court could have resolved the case very quickly at this point by reiterating statements in earlier cases that preventing corruption is the only interest compelling enough to sustain such restrictions\textsuperscript{41} and that independent expenditures, unlike contributions, do not cause significant corruption.\textsuperscript{42} Instead, the Court chose to formulate a novel definition of corruption and wrote an opinion that says as much about why the political expression of business corporations may be regulated as it says about why the expression of MCFL may not.

Looking at the purported compelling interests behind the statute, the Court explained why these interests are important in the context of business corporations and how irrelevant they are to ideological corporations like MCFL. According to the Court, there

\noindent 36. 107 S. Ct. at 631-32 (O'Connor, J., concurring in part) (the burden to MCFL came from the requirement that it assume a more formalized organizational form and not from the disclosure requirements placed on it). More limited, and thus less burdensome, reporting requirements were applicable to the independent expenditures of non-PAC organizations. \textit{Id.}\textsuperscript{37}


38. \textit{Id.} at 626.


40. 107 S. Ct. at 624.


42. In \textit{Buckley}, the Court upheld limitations on contributions but invalidated limitations on independent expenditures made without coordination with the campaign. According to the majority, "'[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a \textit{quid pro quo} for improper commitments from the candidate.'" 424 U.S. at 47. \textit{See also} Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 498 (exchange of official favors hypothetically possible but unlikely without cooperation or prearrangement). For a critique of this position see Nicholson, \textit{supra} note 13, at 340-42.
were two justifications behind the statute. The first was to protect the marketplace of political ideas from the "corrosive influence of concentrated corporate wealth." The second was to prevent "an organization from using an individual's money for purposes that the individual may not support."

A. "The Corrosive Influence of Concentrated Corporate Wealth"

Concern over the political power of concentrated corporate wealth has been articulated in other cases involving restrictions on corporate and union political expression. Even so, there was a great deal of confusion regarding the breadth of the interest, in part due to statements in a number of cases that purported to interpret legitimate rationales for campaign finance restrictions very narrowly.

A broad interpretation of the corrosive effect of concentrated wealth might justify measures to equalize the political influence of voters. Arguably, whether sizeable political contributions come from an organization or a wealthy individual, the use of concentrated wealth in the electoral process is unfair because it gives some a special advantage in influencing the outcome of elections. Affluent voters can back up their votes with substantial contributions that are used to persuade other voters. Dr. David Adamany calls this the "multiple vote" effect. Furthermore, the need for huge sums of money to compete with well financed candidates deters those without ties to wealthy interests from even entering the political fray. Concentrated wealth thus not only makes the electoral

43. 107 S. Ct. at 627.
44. Id. at 629.
45. Id. at 627.
46. The Court cited several such cases. Id. at 627-29. For instance, in Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972), the Court interpreted the Federal Corrupt Practices Act, then 18 U.S.C. § 610, to permit the use of a separate, segregated fund for political expenditures and contributions. Explaining the purpose of the statute, the Court stated that it was meant to "eliminate the 'effect of aggregated wealth on federal elections.'" 107 S. Ct. at 627 (quoting Pipefitters, 407 U.S. at 416).
47. See infra notes 49-58 and accompanying text.
system less democratic, it also reduces variety in the marketplace of political ideas.

In *Buckley*, the Court seemingly rejected the interest in equalizing the political power of the non-affluent as a basis for upholding limitations on independent expenditures, commenting:

> 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. . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.⁴⁹

In the next important campaign finance case, *First National Bank v. Bellotti*,⁵⁰ the Court again rejected the equalization rationale. The majority chastised the Massachusetts legislature for its paternalism in trying to shield voters from the influence of corporate wealth by enacting a statute banning corporations from expending funds in connection with ballot measure campaigns.⁵¹

With this background, it appeared that the equalization rationale was dead as a basis for limiting political funding. The only rationale sufficient to sustain such restrictions was the prevention of the reality and appearance of "corruption" and "improper influence," concerns the Court had found sufficient to uphold limitations on contributions in *Buckley*.⁵² But what did the Court mean by these terms? Certainly the "influence" to which the Court referred was influence on office holders, not on other voters or electoral outcomes. This was implicit in the Court's rejection of the equalization rationale and was made explicit in 1981 when the Court in *Citizens Against Rent Control v. City of Berkeley*⁵³ explained *Buckley* as identifying only the prevention of the appearance or the reality of undue influence on office holders as a sufficient rationale for cam-

⁴⁹. 424 U.S. at 48-49.
⁵¹. The *Bellotti* majority commented that

> [t]o be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment.


⁵². 424 U.S. at 25-29.
campaign funding restrictions.\textsuperscript{54}

Arguably, any additional weight given by office holders to the interests of contributors over the interests of others is "improper." This concept might even include access to the office holder, a commodity almost all politicians admit is for sale.\textsuperscript{55} At the very least it should include situations in which the office holder changes his or her position in order to attract a contribution, or out of a sense of obligation caused by a past contribution. Indeed, the Court impliedly rejected the position that only actual bribes should be considered corruption. Upholding limitations on contributions in \textit{Buckley}, the Court stated that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."\textsuperscript{56}

Nevertheless, in 1985, the Court indicated that its concept of corruption was a very narrow one, apparently limited to a pre-arranged bribe. In \textit{Federal Election Committee v. National Conservative Political Action Committee},\textsuperscript{57} the Court announced:

\begin{quote}
[c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.\textsuperscript{58}
\end{quote}

Less than two years later in \textit{Massachusetts Citizens for Life}, the Court not only expanded its definition of corruption, beyond that articulated in \textit{National Conservative Political Action Committee}, but in doing so it seemed to adopt a version of the much maligned equalization rationale as part of its new definition. In \textit{Massachusetts Citizens for Life} the "corrosive effect of concentrated wealth" to which the Court referred is the effect on the electoral process, not the effect on office holders. The Court explained that "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace," and that "these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."\textsuperscript{59} One might ask what happened

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\textsuperscript{54. Id. at 297.}
\textsuperscript{55. See H. ALEXANDER, \textsc{MONEY IN POLITICS} 181-86 (1972).}
\textsuperscript{56. 424 U.S. at 27-28.}
\textsuperscript{57. 470 U.S. 480 (1985) (invalidating limitations on independent expenditures by political committees on behalf of presidential candidates accepting public subsidies).}
\textsuperscript{58. Id. at 497.}
\textsuperscript{59. 107 S. Ct. at 628.}
\end{flushright}
to Bellotti's strong anti-paternalism dicta. The Court curtly distinguished Bellotti in a footnote as involving a complete ban on corporate expenditures rather than a limitation. Perhaps a little bit of paternalism is appropriate after all.

This sudden concern over the effect of unequal wealth in the political process is puzzling, but the Court's concept of equality in the electoral context was a qualified one. Inequality of funds was appropriate as long as it represented a "rough barometer of public support." However, the funds available to a business corporation have nothing to do with support for political ideas. Rather they "reflect . . . the economically motivated decisions of investors and customers."

The Court's approach in Massachusetts Citizens for Life offered an excellent method of both supporting the application of the statute to business corporations and finding the statute unconstitutional as applied to MCFL. The Court explained that MCFL and other ideological corporations do not obtain their resources in the economic marketplace. Rather, their resources are a function of their political popularity. Thus, "[g]roups such as MCFL . . . do not pose that danger of corruption."

B. "Preventing an Organization From Using an Individual's Money for Purposes that the Individual May Not Support"

This rationale had been referred to in several earlier union cases, but until Federal Election Commission v. National Right to

60. See supra note 51 and accompanying text.
61. 107 S. Ct. at 628 n.12.
62. Id. at 628. This approach was also referred to briefly in Buckley when the Court invalidated limitations on total campaign spending. The Court stated that
   [g]iven the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is noth-
   ing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.
424 U.S. at 56 (footnote omitted). Professor Daniel Lowenstein has posited two standards of fairness in electoral campaigns — the equality standard and the intensity standard. Lowen-
63. 107 S. Ct. at 628.
64. Id. (emphasis added).
65. Id. at 629.
Work Committee, it had never been explicitly relied upon as a basis for a finding of constitutionality of corporate or union funding restrictions. Indeed, the Court had scoffed at the concern for dissenting shareholders in dicta in *Bellotti*.

In *National Right to Work*, the Court upheld very stringent restrictions on who could be solicited by the PACs of some ideologically corporations. Because all money obtained by the National Right to Work Committee (NRWC) and its PAC came from persons who shared the ideological views of the organization, it is difficult to see how minority interests were a factor in that case. Indeed the reference to those interests in the opinion looks like dicta. In *Massachusetts Citizens for Life*, however, the Court stated that minority protection had been held to justify the solicitation restrictions in *National Right to Work*. This interpretation created a problem for the Court in *Massachusetts Citizens for Life*, because the ideological organizations in the two cases were so similar. The Court rather abruptly resolved the contradiction by asserting that "the government enjoys greater latitude in limiting contributions than in regulating independent expenditures."

Using arguments nearly identical to those made in Justice White's dissent in *Bellotti*, Justice Brennan's majority opinion in *Massachusetts Citizens for Life* explained why the interest in protecting minority shareholders was important.

[B]ecause such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union. It was thus wholly reasonable for Congress to require the establishment of a separate polit-

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68. Appellee does not explain why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders. . . .

   . . .

   The critical distinction here is that no shareholder has been 'compelled' to contribute anything . . . the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason. . . .

435 U.S. at 794 n.34.

69. The statute permitted the PACs of nonstock corporations to solicit only members and employees, but the Court found it unnecessary to adopt a broad definition of "members," thus limiting the ideological PAC in that case to solicitation of its employees. The narrow definition asserted by the government was found to be constitutional. 459 U.S. at 211.

70. 107 S. Ct. at 630.

71. *id.* at 630.

72. 435 U.S. at 812-20 (White, J., dissenting).
ical fund to which persons can make voluntary contributions.\textsuperscript{73} Again the Court was able to use the government interest to support the application of the statute to business corporations while showing its irrelevance to MCFL. The Court concluded that because the contributors are aware of the political activity of MCFL, and can merely refuse further contributions if they object to the expression, there was insufficient reason to require organizations like MCFL to form PACs for independent expression.\textsuperscript{74}

III. THE SIGNIFICANCE OF MASSACHUSETTS CITIZENS FOR LIFE

Massachusetts Citizens for Life is a significant step toward clearing the confusion created by the Court in the previous 14 years of campaign finance litigation. The narrow holding in the case—that an ideological corporation making independent expenditures cannot be required to act through a PAC\textsuperscript{75}—is clearly correct, but will have a minimal effect on the system of freedom of expression.\textsuperscript{76} More important than the holding is the strong dicta indicating that the application of the PAC requirement to business corporations is constitutional.

The case has even greater ramifications, however. It is quite clear that the PAC requirement has not been a serious impediment to extensive involvement by business corporations and unions in the political process.\textsuperscript{77} Massachusetts Citizens for Life presents the possibility that more meaningful regulation of these entities would be constitutional.

Despite the present statutory requirement that PAC contributions must be voluntary,\textsuperscript{78} the statutory scheme is inadequate to achieve that goal. Corporate PACs are permitted unlimited solicitation of executive and administrative staff. Anonymity is required only when solicitations include nonexecutive or nonadministrative

\textsuperscript{73} 107 S. Ct. at 629.
\textsuperscript{74} Id. at 630.
\textsuperscript{75} The Court was very explicit regarding the scope of the holding. Aside from being a purely ideological corporation, the Court also stressed that MCFL had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings . . . [that it] was not established by a business corporation or labor union, and [that its] policy was not to accept contributions from such [sources]." 107 S. Ct. at 631.
\textsuperscript{76} See supra note 20 and accompanying text.
\textsuperscript{77} Total corporate PAC contributions to congressional candidates, for example, have risen from $9.5 million in 1977-1978 to $45.9 million in 1985-1986. \textit{Fed. Election Comm'n}, Press Release (May 21, 1987).
employees, and then only when the contributions are under $50.\textsuperscript{79} Certainly protection of rank and file employees is important, but the more visible and affluent administrative and executive staff are even more likely to feel career pressures to contribute.\textsuperscript{80} Thus, frequently these funds in fact represent the use of employees' money for purposes they may not support. Indeed this problem also implicates the other interest articulated in \textit{Massachusetts Citizens for Life}. Coerced contributions from employees are certainly not rough barometers of political support. Rather, they represent the economic power of the corporation over the lives of its employees, arguably another "corrosive influence of concentrated corporate wealth." \textit{Massachusetts Citizens for Life} lends constitutional support to reform measures which would go further in assuring the voluntariness of employee contributions to PACs. Anonymity, should be required for all employee PAC contributions regardless of the amount or the position held by the contributor.

Even though stockholders usually would not feel coerced to contribute to a PAC, the statute permits treasury funds to be used to administer and solicit for the PAC.\textsuperscript{81} Thus stockholders' assets supply the crucial seed money for PACs whose political expression they may abhor. Proposals to give stockholders more protection have been suggested by commentators\textsuperscript{82} and should be found constitutional on the authority of \textit{Massachusetts Citizens for Life}.

Another legislative approach would be to permit independent expenditures from business corporation or union treasury funds, but place limitations on their amounts. However, if \textit{Massachusetts Citizens for Life} is read narrowly, the Court may conclude that requiring expenditures through PACs is a less restrictive alternative to protect the interests articulated in that case. If PAC funds are truly voluntary, this might be an adequate answer. However, it could be argued that union and business corporation PACs can never achieve the kind of ideological cohesion between contributors and those who spend the funds that exists with issue oriented corpora-

\textsuperscript{79} Rank and file employees cannot be solicited more than twice per year. The solicitation must be in writing. 2 U.S.C. § 441b(b)(4)(B).


\textsuperscript{81} 2 U.S.C. § 441b.

tions such as MCFL.  

Although Massachusetts Citizens for Life made no reference to ballot measure elections, the rationales asserted have particular significance in those elections because corporations have played a large, and some believe, determinative role in many instances. Indeed, there is much stronger evidence of domination by corporations in ballot measure elections than in candidate elections. Given the ability of corporations to raise very large sums through PACs, it seems unlikely that a PAC requirement would solve the problem.

Because voters may be suspicious of billboards opposing anti-smoking ordinances which are identified as paid for by Philip Morris, corporations prefer to donate huge sums to committees with innocuous "good-government-sounding" names. Thus, the most effective reform would be limitations on contributions. Certainly such an approach is paternalistic; it assumes voters may be confused and misled by slick, expensive advertising and that they will not make the effort to find information on the poorly funded side of the controversy. Unfortunately, this seems a rather accurate description of reality. Despite the anti-paternalism language in Bellotti, the emphasis in Massachusetts Citizens for Life on preventing the effect of concentrated wealth in the electoral process lends constitutional support to statutory limitations on contributions from business corporations in ballot measure elections.

In Citizens Against Rent Control v. Berkeley, however, the

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86. See Lowenstein, supra note 62, at 517-67.


Court invalidated limitations on contributions applicable to individuals, corporations, and other organizations in ballot measure elections. The Court stressed that the only legitimate rationale was preventing improper influence on office holders and rejected the concept of improper influence on the election itself. Perhaps Massachusetts Citizens for Life requires that Berkeley be overruled. Also, Massachusetts Citizens for Life could be read to justify limitations on independent expenditures by individuals and the use of personal wealth by candidates, providing authority for future cases which would overrule parts of Buckley. These issues raise the question whether the effect upon the election of the concentrated wealth of individuals is encompassed by the newly formulated corruption rationale of Massachusetts Citizens for Life.

The Court in Massachusetts Citizens for Life, by stressing the concern over corporate wealth, implied that its analysis was not applicable to individuals. But the Court did not give an adequate reason for distinguishing these sources from individual wealth. It is not a satisfactory answer to assert that "the availability of . . . resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas." One could say the same of an expenditure by a very wealthy individual. The power of an individual's expression may depend on how large an inheritance was received from a parent, or luck in the stock market. Even if the wealth is earned through hard work, what does that have to do with the power of ideas? Furthermore, many business corporations do not have extensive resources available for political expression. The fact that it is more likely that a corporation would have greater resources than even a very wealthy individual should not be determinative; the PAC requirement can be seen as both overinclusive and underinclusive.

There seems to be a piece missing in the Court's newly formulated corruption theory.

89. Buckley v. Valeo, 424 U.S. 1, 39-54 (1976) (The Court stated: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups and candidates. These restrictions, while neutral as to ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" With respect to limits on the spending of personal or family resources, the Court concluded: "the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that § 608(a)'s restriction on a candidate's personal expenditures is unconstitutional.").

90. 107 S. Ct. 616, 628.

91. Bellotti, 435 U.S. at 792-95.
The most convincing way of finding that piece takes us back to Professor Emerson's first principle: self-realization. Corporate expression does not reflect the self-realization of actual people.\(^{92}\) Perhaps we must be willing to tolerate the possibility of a coercive influence of concentrated wealth when it represents someone's self-fulfillment, but we need not do so when that element is missing. Certainly this is a principled conclusion. It is one, however, that this author would reject. The self-realization interest should be considered in conjunction with Professor Emerson's other three interests: the search for truth, involvement by all in the political process, and facilitation of orderly social change.\(^{93}\) All four interests could be accommodated if very generous limitations were applied to independent expenditures, the use of candidate wealth and contributions in ballot measure elections.\(^{94}\)

**IV. CONCLUSION**

Although there is room for debate as to how far the *Massachusetts Citizens for Life* rationale can legitimately be taken, it is clear that all four of Professor Emerson's basic principles lend support to the distinction made by the Court between business and ideological corporations. Although some commentators may take the position that any restriction which affects the quantity of expression interferes with the search for truth, I do not read Professor Emerson's approach to purification of the system as that absolute. He has noted that when the system is "choked with communication" it may be "incapable of performing its basic function."\(^{95}\) If the concern is with variety of ideas rather than the absolute quantity of words, it makes greater sense to place limitations on business corporations, but not ideological groups. There seems to be little danger that the interests of business corporations will be neglected and that their views will be excluded from the marketplace of ideas. Those who control business corporations usually have access to personal wealth that can be used for expression, and they are ordinarily not

\(^{92}\) It probably reflects only someone's determination of what will be most profitable for the corporation, which may or may not correspond with anyone's view of good political policy.

\(^{93}\) T. Emerson, *supra* note 1, at 6-7.

\(^{94}\) Arguably, the $1,000 limitations on independent expenditures invalidated in *Buckley* and *National Conservative Political Action Comm.* and the $250 limitations on contributions in ballot measure campaigns invalidated in *Berkeley* were unnecessarily low. Although the broad language in the cases would be an obstacle, see, e.g., *supra* notes 47-58 and accompanying text, more generous limitations could be distinguished by the Court in a future case.

\(^{95}\) T. Emerson, *supra* note 1, at 628-29.
lacking in access to and close relationships with the political leaders of the country. Variety comes not from amplifying their voices further, but from facilitating the expression of the less affluent and less powerful.

These same considerations make *Massachusetts Citizens for Life* consistent with Professor Emerson's other two principles: participation in the political process by all members of the society and the facilitation of orderly social change. With respect to the latter interest, Professor Emerson comments that

> [t]he function of freedom of expression in promoting orderly social change has not been stressed in recent literature. Yet it surely remains at the heart of the system. The need for a system that will facilitate social change—change that will necessarily involve significant deprivations for some members of society and gains for others—has never been more pressing.

Certainly orderly social change can only be facilitated when political dialogue is no longer dominated by the wealthy and the powerful: those who have the greatest stake in the status quo. *Massachusetts Citizens for Life* is a small step in the direction of facilitating the basic principles of "the system of freedom of expression." Future interpretations of the case offer the promise of further steps.

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96. T. Emerson, *supra* note 1, at 6-7.