McGeorge Law Review

Volume 14 | Issue 2 Article 6

1-1-1983

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Recommended Citation

Fletcher N. Baldwin Jr. & Kenneth D. Karpay, *Corporate Political Free Speech: 2 U.S.C. 441b and the Superior Rights of Natural Persons*, 14 Pac. L. J. 209 (1983).
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Corporate Political Free Speech: 2 U.S.C. §441b and the Superior Rights of Natural Persons

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For decades, public attention has focused on the need to protect against corporate domination of American political structures.[1] In 1907, the United States Congress first passed legislation prohibiting corporations from making contributions to candidates for federal political office.[2] During the following seventy-five years, this statute, in its

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1. *See Hearings on Contributions to Political Committees in Presidential and Other Campaigns Before the House Committee on the Election of the President*, 59th Congress, 1st Sess. 56 (1906), *reprinted in* United States v. U.A.W., 352 U.S. 567, 571 (1957). This document provides the statement of Alton B. Parker, 1904 Democratic candidate for the Presidency. Parker told the Committee, "[t]he greatest moral question which now confronts us is, shall trusts and corporations be prevented from contributing money to control or aid in controlling elections." *See also* 1 LETTERS TO LOUIS D. BRANDEIS 2040-05, 268-69, 300 (M. Urofsky & D. Levy eds. 1971) (measuring public opinion on proposed legislation that would prohibit corporate contributions); Keysen, *The Corporation: How Much Power? What Scope*? in THE CORPORATION IN MODERN SOCIETY 85 (S. Mason ed. 1960) (there is a significant link between corporate economic power and its impact on the political system); 81 THE OUTLOOK 797-95 (1905) (the need for government controls of corporate political activity is demonstrated by recent disclosures of corporate corruption); N.Y. Times, Jan. 29, 1981, at A1, col. 1 (statement of retiring Admiral Hyman G. Rickover to the Congressional Joint Economic Committee, on the need to check the increasing power of corporations in American society).

2. Act of January 26, 1970, ch. 420, 34 Stat. 864 (1907) (current version of 2 U.S.C. §441b (1976 & Supp. IV 1980). Since 1907 the Congress has extended the statute to prohibit expenditures and contributions by national banks and corporations in any election and by labor unions in

amended form, has withstood most court challenges,[3] including the claim that the statute violates corporations' first amendment free speech rights.[4] Yet throughout this period the United States Supreme Court has failed to address the major constitutional issue underlying the statute: whether corporate political speech is entitled to the protection of the free speech clause of the first amendment[5] equivalent to that of natural persons.[6] Recent Court decisions[7] have raised questions[8] concerning the constitutionality of the current statute.[9]

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any federal election. *See infra* notes 14 & 17. The statute affects both tax exempt and non-exempt corporations, *infra* note 12.

3. *See* United States v. Chestnut, 533 F.2d 40, 50 (2d Cir.), *cert. denied* 429 U.S. 829 (1976) (18 U.S.C. §610 (currently codified at 2 U.S.C. §441b (1976)) is neither overbroad nor void for vagueness); Federal Election Comm'n v. Weinsten, 462 F. Supp. 243, 249 (S.D.N.Y. 1978) (2 U.S.C. §441b encourages rather than discourages free speech and is constitutional). For a further discussion of the court's decision in *Weinsten*, see *infra* text accompanying notes 170-176. *But see, e.g.*, Newberry v. United States, 256 U.S. 232, 249, 258 (1921) (federal law prohibiting contributions or expenditures for U.S. Congressional seats violates U.S. CONST. art. I, §4, cl. 1). The *Newberry* decision was construed to have invalidated all federal corporate campaign prohibitions. Subsequently, Congress passed the "Corrupt Practices Act of 1925." Act of February 28, 1925, ch. 368, 43 Stat. 1070 (1925) (current version at 2 U.S.C. §441b (1976 & Supp. IV 1980)).

4. The first amendment to the United States Constitution reads: "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; of *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added to free speech clause).

5. *Id.*

6. The few opinions in which the Supreme Court has even considered examining the constitutionality of 2 U.S.C. §441b were in cases concerning labor unions. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972) (reversal of erroneous jury instructions precludes consideration of the constitutional issue); United States v. U.A.W., 352 U.S. 567 (1957) (disposition of the constitutionality of the statute is not absolutely necessary and therefore inappropriate); United States v. C.I.O., 335 U.S. 106 (1948) (indictment of labor organization does not state an offense under the statute, so the Court need not consider the constitutional issue).

7. *See generally* Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) (New York State's ban on public utility company advertising violates the first and fourteenth amendments); Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n of New York, 447 U.S. 530 (1980) (New York's prohibition of electric company inserting material in customer's monthly utility statement directly infringes first and fourteenth amendment rights); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (Massachusetts statute prohibiting corporations from making campaign contributions or expenditures in state elections infringes on constitutionally protected speech). See *infra* text accompanying notes 83-99.

8. *See* Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 965-975 (1980); Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494, 495-502, 509-13 [hereinafter referred to as Patton]; Rather, *Corporations and the Constitution*, 15 U.S.F. L. REV. 11, 27-29 (1981).

9. 2 U.S.C. §441b (1976 & Supp. IV 1980) provides in part:

> Contributions or expenditures by national banks, corporations, or labor organizations
> (a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any

This article will examine the legislative rationale underlying 2 U.S.C., section 441b, as well as the framework established by the Supreme Court in *First National Bank of Boston v. Bellotti*[10] for analyzing the first amendment free speech rights of corporations. The resulting conflict between corporate and natural persons' free speech rights, will be studied in relation to policies operating within the conflict. In addition, the Supreme Court's application of other constitutional rights to corporations and the approach used by lower courts in determining corporate free speech rights will be considered. Further, the constitutional rights of natural persons will be weighed against those of corporations to show that the superiority of the former requires a reaffirmation of the constitutional validity of section 441b.

FEDERAL STATUTORY REGULATION 2 U.S.C., SECTION 441B

Federal statute 2 U.S.C., section 441b[11] forbids corporations[12] chartered by Congress[13] from making political contributions or expenditures[14] in an election, convention or caucus. State chartered cor-

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officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

Id; *see also infra* notes 14 & 208.

10. 435 U.S. 765 (1978).

11. *See supra* note 9.

12. The provisions of 2 U.S.C. §441b refer to all forms of federally and state chartered corporations, both tax exempt and non-exempt entities. *See* I.R.C. §501(c)(3) (Supp V 1981). *See generally* HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 154-57 (1977) (describes the scope and applicability of the Internal Revenue Code's provisions). Presumably, if §441b were held unconstitutional and corporations were permitted to make contributions or expenditures in political campaigns, exempt corporations would still refrain from these activities in order to maintain their tax exempt status. *Id.*

13. Congress has no explicit power to charter corporations. Rather its power in this area stems from the "necessary and proper" clause of the United States Constitution. U.S. CONST. art. I, §8, cl. 18. Congress has chartered corporations for the purpose of promoting transportation and other national concerns. *See* Luxton v. North River Bridge Co., 153 U.S. 525, 529 (1894) (Congressionally chartered corporation represents a valid exercise of the Congressional power). This implied power is also the source of nationally chartered banking corporations. *See* 12 U.S.C. §24 (1976 & Supp. IV 1980); *see also* Tarrant v. Bessemer National Bank, 7 Ala. App. 285, 61 So. 47 (1912) (national banks are an appropriate exercise of Congress's power). Congress has also used this power to incorporate numerous patriotic and civic organizations. *See, e.g.*, 36 U.S.C. §2 (1976) (national corporation, The American National Red Cross, has full corporate privileges and powers); American Nat'l Red Cross v. Felzner Post, 86 Ind. App. 709, 159 N.E. 771 (1928) (National corporation has powers to defend claims in court).

14. 2 U.S.C. §441b(b)(2) defines "contribution or expenditure" to include

> any direct or indirect payment, distribution, loan, advance, deposit or gift of money, or any services, or anything of value (except a loan of money by a national bank or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section. . . .

2 U.S.C. §441(b)(2). As originally enacted in 1907 the statute only prohibited corporations from making "a money contribution." *See* Act of January 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. §441b (1976 & Supp. IV 1980). *See supra* note 2. In 1908, Congress defeated a measure which would have altered the prohibition to include "any contribution of money or other

porations[15] fall within the purview of the statute[16] in connection with campaigns for federal office.[17] Additionally, several states[18] and municipalities[19] have extended similar restrictions to campaigns for state

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things of value." 42 CONG. REC. 696-98 (1908). Thus a large loophole existed in the law until 1925 when the Federal Corrupt Practices Act was passed. Ch. 368, tit. III, 43 Stat. 1070 (1925). Section 302 of the Act expanded the "contribution" prohibition to include "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." *Id.*, tit. III, §302(d). *See generally* Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 376-81 (1980) (discussion of Congressional debate on these provisions).

15. Most business corporations are chartered under state, rather than federal law. *See* H. HENN, LAW OF CORPORATIONS 25 (1970). However, proposals have been offered for enacting a mandatory federal incorporation statute. For background on this proposal see R. NADER, M. GREEN & J. SELIGMAN, FEDERAL CHARTERING OF CORPORATIONS (1976) [hereinafter referred to as NADER]; *see also* Schwartz, *Federal Chartering of Corporations*, 61 GEO. L.J. 71 (1972); Rubin, *Corporations and Society: The Remedy of Federal and International Incorporation*, 23 AM. U. L. REV. 263 (1973).

16. *See, e.g.*, Federal Election Commission v. Weinsten, 462 F. Supp. 243, 246 (S.D.N.Y. 1978) (New York corporation guilty of violating 2 U.S.C. §441b).

17. *See, e.g.*, United States v. Chestnut, 394 F. Supp. 581 (S.D.N.Y. 1975), *aff'd* 533 F.2d 40 (2d Cir.), *cert. denied* 429 U.S. 829 (1976) (violation of statute by accepting state chartered corporate campaign contribution to a United Staes Senate campaign). The statute also prohibits national banks from participating in any federal or state election, convention or caucus; unions are prohibited from such federal political activities. 2 U.S.C. §441b(a) (1976). Although much of the litigation in this area deals with national banks and labor unions, the focus of this article will be primarily on corporations. *See, e.g.*, United States v. Boyle, 482 F.2d 755 (D.C. Cir.), *cert. denied* 414 U.S. 1076 (1973) (former union president found in violation of 18 U.S.C. §610 (current version 2 U.S.C. §441b (1976)).

18. Approximately thirty states have statutes that in some way regulate corporate campaign spending. *See* Brief for Appellee at 32-33 n.19, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); *see also* LA. REV. STAT. ANN. §§18-1482, 18-1488 (West. 1979 & Supp. 1982). Some provide strict corporate restrictions. *See, e.g.*, MINN. STAT. ANN. §210A.34 (1980). Others regulate natural persons and corporate political activities in a similar fashion but provide for more stringent penalties for campaign practice violations by corporations. *See, e.g.*, FLA. STAT. §§106.08(1), 775.082, 775.083 (1981). At least one general election statute has been judicially narrowed to avoid constitutional infirmities. N.Y. Election Law §14-116 (Consol. 1977). *See* Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974) (referendum's contribution prohibitions construed narrowly). Other statutes that impact more stringently on corporations have been held unconstitutional. *See, e.g.*, MONTANA CODE ANN. §23-4744 (1977); C & C Plywood Corp. v. Hanson, 420 F. Supp. 1254 (D. Mont.), *aff'd*, 583 F.2d 421 (9th Cir. 1978). However generally, state statutes similar to §441b remain in effect in full force in a majority of the states. *See, e.g.*, IOWA CODE ANN. §56.29 (West 1981). *See generally* Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending* in THE CORPORATION IN POLITICS 1980 309, 320-21 (1980) (provides background and additional state statutory information).

It is interesting to note that state legislatures were the original stimulus to the enactment of the federal regulatory scheme to prohibit corporate campaign contributions. By 1907, the date of the enactment of the original federal act, eight states had already passed some type of statute regulating corporate contributions in state elections. By 1915 this number had increased to twenty-nine, and by 1925, the date of the federal act with some real impact, thirty-seven states had already acted. *See* E. SIKES, CORRUPT PRACTICES LEGISLATION 279-83, table five, column 1 (1928). However the focus and strength of these state provisions varied. *Compare* KAN. GEN. STAT. §4350-ch. 33-Art. 15 (1915) (current version at KAN. STAT. ANN. §25-1709 (1981)) (prohibits contribution by corporations that have the power of eminent domain, or by persons in control of a majority of stock of a corporation) *with* MO. REV. STAT. §§5022-5027-ch. 30-Art. 13 (1919) (repealed 1977 and replaced by MO. ANN. STAT. §130.029 (Vernon 1980)) (prohibitions apply to any corporation; violation of statute could result in forfeiture of corporate charter). *See generally* BROOKS, CORRUPTION IN AMERICAN POLITICS AND LIFE 244-48 (1910) (concerning corruption on different governmental levels).

19. *See, e.g.*, BERKELEY, CA., ELECTION REFORM ACT, ORDINANCE No. 4700-N.S. (1974). The Berkeley ordinance placed a $250 contribution limitation on donations made to political com-

and local offices.

The federal statute has undergone numerous changes since its enactment in 1907,[20] but the supporting legislative rationales remain constant.[21] First, Congress intends the statute to negate the direct influence of large accumulations of power in the electoral process.[22] Following the Civil War the American economy expanded, but also became increasingly centralized.[23] As a result, many corporations with

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mittees. The ordinance was held unconstitutional by the United States Supreme Court. Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434 (1982). The Court found the statute violated the first amendment because it imposed limitations on committees but not on individuals. *Id.* at 437-39.

20. For a discussion concerning some of the changes through 1925 see *supra* notes 3 & 14. Subsequent amendments to the entire statute made significant changes in the overall election scheme, but still left the prohibition concerning corporate political activity intact. *See* Smith-Connally Act, ch. 144, 57 Stat. 168 (1943) (extended campaign prohibitions to labor unions); Taft-Hartley Act, ch. 120, 61 Stat. 159 (1947) (reinforced union campaign prohibitions); Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (allowed both union and corporate funds to be used to set up political action committees (PACs)); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-433, 88 Stat. 1263 (1974) (imposed significant restrictions and prohibitions on natural citizens); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (clarified questions concerning corporate and union activities concerning political action committees).

21. *Compare* 120 CONG. REC. 8209-11 (1974) (statement of Sen. Kennedy discussing S.3044 and the necessity of removing corporate influence from American politics) *with* 42 CONG. REC. 696-702 (1908) (floor debate on amendment to 1907 bill). *See generally* Comment, *From Dartmouth College to Bellotti: The Political Career of the American Business Corporation*, 6 OHIO N.U. L. REV. 392, 396-98 (1979) (Congressional actions from 1907 through 1976 demonstrate consistent goal.)

22. Congressional debates on federal election laws provide numerous examples of this legislative intent. *See, e.g.*, 65 CONG. REC. 9507-08 (1925) (statement by Sen. Robinson in support of 1925 Corrupt Practices Act); *see also* 120 CONG. RECORD 9552-55 (1974) (the Senate rejected Senator Baker's amendment to the Federal Election Campaign Act Amendment (FECA of 1974)). Baker's amendment to Senate Bill 3044 would have eliminated a provision allowing indirect but legitimate corporate and labor political contributions through the formation of "political action committees" (PACs). During floor debate on the amendment, concern was expressed on the need to eliminate political influence by all except natural individuals. 120 CONG. REC. 9552-53 (1974). The amendment was rejected. Corporations and unions still have indirect but tremendous access to the political system through use of political action committees. 2 U.S.C. §441b(b) (1976 & Supp. IV 1980). By forming a PAC, a corporation can solicit voluntary contributions from employees and shareholders and then control where the money goes by directing operations of the committee. Although corporate assets are not directly contributed to political campaigns, PACs do dilute the impact of §441b by allowing indirect corporate input. *See infra* note 208. The continued existence of this PAC provision in 2 U.S.C. §441b indicates Congress does not wish to totally eliminate corporate political influence. *See* Bolton, *supra* note 14, at 411-13; Note, *Political Speech, Inc. The Bellotti Decision and Corporate Political Spending*, 13 SUFFOLK U. L. REV. 10-23, 1049 (1979). The Courts have consistently interpreted §441b as manifesting Congress's intent to keep corporate influence out of elections. *See, e.g.*, United States v. C.I.O., 335 U.S. 106, 113-14 (1948).

23. For background on this general economic development, see S. BRUCHEY, GROWTH OF THE MODERN AMERICAN ECONOMY (1975); D.H. Donald, *Uniting the Republic: 1860-1890*, in THE GREAT REPUBLIC 777-87 (1977); J.L. Thomas, *Nationalizing the Republic: 1890-1920* in *id.* at 830-48; S. MORISON, H. COMARAGER, & W. LEUCHTENBURG, 2 GROWTH OF THE AMERICAN REPUBLIC 355 (4th ed. 1950); Nader, *supra* note 15, at 38-49. A major factor contributing to this development was the tremendous growth of the railroads throughout the continent, following the Civil War. This promoted centralization of the means of production, while affording entrepreneurs access to distant markets. *See* S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE, 743-50, 761-64, 789-95, 811-23 (1965); Nader, *supra* note 15, at 38-39. For specific examples of this economic growth see A. BURNS, PRODUCTION TRENDS IN THE UNITED STATES SINCE 1870, 253-81 (1934) (describes the tremendous transformation of the American economy following

tremendous wealth at their disposal were able to exercise a significant control over the legislative process by the simultaneous use of financial support and *quid pro quos*.[24] Disclosure of these corrupt practices following the turn of the century stimulated public concern for the health of the American electoral system.[25] The Congressional goal has been to eradicate both perceived and actual corruption in government. Second, the original statute and its successors reflect a belief that use of corporate funds for political purposes by corporate executives is immoral.[26] In most cases, corporate funds would be expended without the actual permission of stockholders.[27] Since "corporate views" are determined by corporate executives, these campaign contributions actually would subsidize the promotion of the political beliefs of these

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the Civil War); G. EVANS, BUSINESS INCORPORATION IN THE UNITED STATES 1800-1943, 3, 31-41 (1948) (details the use of incorporated organizations following the Civil War); S. FABRICANT, THE OUTPUT OF MANUFACTURING INDUSTRIES 1899-1937, 3-22 (1940) (details growth by industry); J. GOULD, OUTPUT AND PRODUCTIVITY IN THE ELECTRIC AND GAS UTILITIES 1899-1942, 6-30 (1946) (study of these industries' growth).

24. For evidence of this phenomenon see E. SIKES, CORRUPT PRACTICES LEGISLATION 104-13 (1928). In 1905 the New York State Legislature investigated the campaign practices of large life insurance corporations. Their investigation details the frequency with which large corporations sustained political influence through campaign contributions. G. THAYER, WHO SHAKES THE MONEY TREE 53 (1973). Testifying before the New York State Legislature Investigating Committee, United States Senator T.C. Platt admitted that campaign contributions put political office-holders under a virtual obligation not to attack their supporters. *Id.* For evidence of this practice more recently, see THE FINAL REPORT ON THE SENATE COMMITTEE ON THE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. No. 981, 93rd Cong., 2d Sess. 445-92 (1974) [hereinafter cited as FINAL REPORT]. *See infra* notes 160-162.

25. *See supra* note 24. America's increasing sensitivity to corporate political influence during this period was due in part to journalists and writers like Lincoln Steffens, Ida Tarbell and Alfred Henry Lewis. *See* C. REGIER, THE ERA OF THE MUCKRACKERS (1957); R. Barker, *Ray Stannard Baker Holds on to His Muckrake* in THE PROGRESSIVE 157-80 (C. Resek ed. 1967); *see also* 3 THE LETTERS OF THEODORE ROOSEVELT 635-36 (E. Morison ed. 1951) (letter of Roosevelt arguing for corporate political prohibitions, based on recent disclosures). For examples of other disclosures, see R. BROOKS, CORRUPTION IN AMERICAN POLITICS AND LIFE 273-76 (1910); GEORGE WASHINGTON PLUNKITT, VERY PLAIN TALKS ON VERY PRACTICAL POLITICS (1905), *reprinted in* W. RIORDON, PLUNKITT OF TAMMANY HALL 73-76 (1963). *See generally* Thomas, *supra* note 23, at 903-06 (Progressive Era and political disclosures).

26. *See Hearings Before the House Committee on the Election of the President*, 59th Cong., 1st Sess. 76 (1906) *noted in*, United States v. C.I.O., 335 U.S. 106, 113 n.9 (1948) (corporate officials had no moral right to use corporate funds without stockholders' approval); *see also* 81 THE OUTLOOK 248-49 (1905) (corporate political practices require moral reform).

27. *See* FINAL REPORT, *supra* note 24. Report demonstrates that illegal corporate contributions to Richard Nixon's re-election campaign were made in secret and without shareholders' approval. The Court has recognized the value of having any corporate or union political activity be specifically endorsed by shareholders or union members. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414-15 (1972) (goal of Congress was to guarantee that corporate and union political action committees solicit funds solely on voluntary basis); *see also Id.* at 442-50 (Powell, J., dissenting) (Court's opinion provides insufficient protection); *cf.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792-95 (1978) (Powell, J., majority opinion). In *Bellotti* the Court found the goal of protecting corporate shareholders was not sufficient to uphold the Massachusetts statute due to both the under- and overinclusiveness of the provision. *Id.* However the Court avoided the opportunity to assert that protection of shareholder's interest was a compelling government interest. *Id.* at 795. Justice Powell in *Bellotti* seems to have ignored his own statements made in *Pipefitters* when he urged a different course by the Court in order to protect shareholder and union members. 407 U.S. at 441-50.

men and women.[28] Thus, section 441b aims to severely limit corporate access to the political arena.

These two legislative rationales, however, reflect a broader and more subtle policy concern tied directly to the strength of the federal government itself. Support for section 441b stems from the idea that when government is perceived as unresponsive to the needs of individuals, public support for government is diminished.[29] By the turn of the century, the public's perception of inordinate corporate influence in American politics[30] began to erode the traditional belief in individual efficacy within the political system.[31] Enactment of the statute reflects a desire to sustain individual citizens' interest, involvement and support for their national government.

THE FIRST AMENDMENT: AN INITIAL INQUIRY

The most potent challenges to section 441b and similar statutes have been based on the idea that the statutes abridge corporations' first amendment rights of freedom of speech.[32] Numerous theories are said

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28. *See* Cammarano v. U.S., 358 U.S. 498, (1959). In *Cammarano*, the Court refused to allow petitioners an income tax deduction for expenditures claimed as an "ordinary and necessary" business expense. Petitioners had made a contribution to a partnership trust which in turn expended money in attempting to defeat a statewise referendum. If passed, the referendum would have been detrimental to petitioners' partnership. The Court denied petitioner's tax deduction pursuant to Treasury Regulation §29.23(o)-1 (current version at I.R.C. §162(e)(2)(B) (Supp. V 1981)) noting the deduction was used to defeat a legislative proposal and thus non-deductible. 358 U.S. at 499-500 & n.2. The Court observed that denying petitioners' claim simply forced these taxpayers to be treated like other taxpayers, and thus pay the full amount for their political expression without government subsidization. *Id.* at 512-13.

29. United States v. C.I.O., 352 U.S. 567, 575 (1957). Interpreting the goal of the statute the Court stated that

> its aim was not merely to prevent the subversion of the integrity of the political process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.

Id. See generally Brief of Appellees at 7, Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434 (1982). Appellees provide evidence of decreased political activism by individual natural citizens in California, as corporations become increasingly involved in state political campaigns. The Court in *Citizens* did not find such evidence relevant to the case at hand. *See* 102 S. Ct. at 437-38. *But see id.* at 441-45 (White, J., dissenting).

30. *See* E. ROOT, *The Political Use of Money*, in ADDRESSES OF GOVERNMENT AND CITIZENSHIP 141 (1943) (classic speech calling for control of the influence of large corporations); *see also supra* notes 24-25.

31. Congress's passage of legislation limiting corporate political influence usually is premised on this concern. *See supra* notes 21-22. The Court has consistently noted this was an interest of "the highest importance." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978). *See generally* H. ALEXANDER, MONEY IN POLITICS (1972) (impact on citizens of large campaign expenditures in political campaigns).

32. Although most challenges have not succeeded, the first amendment argument has often been very persuasive. *See* Let's Help Florida v. McCrary, 621 F.2d 195, (5th Cir. 1980), *aff'd sub nom.* Firestone v. Let's Help Florida, 50 U.S.L.W. 3546 (U.S. Jan. 11, 1982) (No. 80-970) (Florida statute restricting referendum contributions violated individual's first amendment rights); Federal Election Comm'n v. National Right to Work Committee, 501 F. Supp. 422, 436-38 (D.D.C. 1980), *rev'd on other grounds* 665 F.2d 371 (1981) (§441b's restrictions on union campaign solitications met the compelling interest test); United States v. Chestnut, 394 F. Supp. 581, 587-91 (S.D.N.Y. 1975), *aff'd* 533 F.2d 40 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976) (state's interests serve to

to underlie this constitutional protection for natural persons.[33] A brief overview of two of these theories and their application by the Supreme Court provides a basis for examining the constitutional question posed by the statute.

The purpose of the first amendment freedom of speech clause, according to the late Professor Meiklejohn,[34] is the protection of both the speaker's right of free speech and the public's right to listen.[35] Political expression receives constitutional protection in order to maximize political participation and the consideration of diverse views within the political marketplace.[36] At the core of the Meiklejohn theory is the belief that a diversity of political expression results in high levels of political participation.[37] In contrast another theory supports first amendment protection for natural persons by arguing that the principal function of the free speech clause is promoting individual "self-expression, self-realization and self-fulfillment."[38] Freedom of speech is pro-

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uphold §441b as applied to campaign manager soliciting illegal contributions); Louchheim, Eng & People Inc. v. Carson, 241 S.E.2d 401, 404-06 (N.C. App. 1978) (North Carolina statute similar to 2 U.S.C. §441b is constitutional).

33. For a discussion of two of these theories as described by Professors Meiklejohn and Emerson, see *supra* notes 34-39 and accompanying text. Two other theories have developed in the case law. One is the "clear and present danger" test. Speech may be immune to proposed restrictions, according to this view, so long as a compelling governmental interest does not require its suppression. For an overview of this test see Schenck v. United States, 249 U.S. 47, 52 (1918) (inquiry centers on whether words create such a danger); Abrams v. United States, 250 U.S. 616, 627-31 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372, 376-79 (1926) (Brandeis, J., concurring); Brandenburg v. Ohio, 395 U.S. 444, 450-57 (1969) (Douglas, J., concurring); *see also* Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 575 (1980) (Blackmun, J., concurring). *See generally* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962). Another view of first amendment rights is the absolutist's view, espoused primarily by Justices Black and Douglas. *See* Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1960) (Black, J., dissenting); Barenblatt v. United Staes, 360 U.S. 109, 140 (1958), (Black, J., dissenting); Roth v. United States, 354 U.S. 476, 511-12 (1956) (Douglas, J., dissenting). This standard finds prohibitions against speech absolutely unacceptable. Thus, courts and legislative bodies are to be precluded from weighing the values of speech against silence. 354 U.S. at 514. *See generally* T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 43-45 (1976).

34. *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1965); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948) [hereinafter referred to as FREE SPEECH]; Meiklejohn, *What Does the First Amendment Mean*? 20 U. OF CHI. L. REV. 461 (1953).

35. FREE SPEECH, *supra* note 34, at 25-26. The purpose of the free speech clause is not to provide for "unregulated talkativeness. It does not require that on every occasion, every citizen take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said." *Id.* at 25. For an extremely thorough discussion on the history behind the "right to listen," see Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

36. *See* Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748, 770 (1975) (commercial speech protected because of the goal of maximizing the public's explosure to information); Cohen v. California, 403 U.S. 15, 24-25 (1971) ("[t]hat the air may at times seem filled with verbal cacophony is . . . not a sign of weakness, but of strength"); Thornhill v. Alabama, 310 U.S. 8, 101-06 (1939) (loitering statute invalid).

37. *See generally* Meiklejohn, *supra* note 34, at 92-107.

38. First National Bank of Boston v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting). *See generally* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1970); EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) [hereinafter referred to as THE SYSTEM].

moted in order to encourage the development of individuals in society and the general well-being of the nation.[39]

Two levels of first amendment analysis have developed as a result of these theories. First, the Supreme Court generally restricts governmental intrusions on the exercise of political expression by natural persons.[40] These abridgements are examined with strict scrutiny, and are only upheld when governmental interests are sufficiently compelling to deprive a citizen of her right to political self-expression.[41] This is no less true when the restrictions infringe on natural citizens' participation in the electoral process, a form of political speech, either by restricting actual political speech[42] or political speech conveyed through contributions and expenditures of money.[43] Restriction of political expression has been upheld when the prevention of corruption and its appearance were the governmental interests.[44] Alternatively, these abridgements have been invalidated when based upon the government's desire to equalize participation by natural persons in the electoral process[45] and to decelerate increasing campaign costs.[46]

Second, the Court developed a subordinate level of first amendment protection for commercial communications.[47] Unlike the right accorded natural persons, commercial speech does not receive protection because of an independent right of free speech.[48] Instead protection results from the right of listeners to receive an abundance of commercial communications within the marketplace of ideas.[49] So long as commercial speech contains sufficient valuable information to listen-

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39. *See* THE SYSTEM, *supra* note 38, at 43-53.

40. *See* Stanely v. Georgia, 394 U.S. 557, 564-68 (1968); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 507-514 (1968); Brown v. Louisiana, 383 U.S. 131, 141-43 (1965).

41. *See* Gregory v. Chicago, 394 U.S. 111, 111-113 (1968) (government restrictions invalid); United States v. O'Brien, 391 U.S. 367, 375-377 (1967) (government interests are compelling and the restrictions are no greater than are essential); Konigsberg v. State Bar, 353 U.S. 252, 271-74 (1956) (evidence does not support rejecting petitioner's Bar Application).

42. *See, e.g.*, United States Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 551, 553-56 (1972) (Congress can restrict federal employees' political activities).

43. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (decision upholding and invalidating portions of federal election scheme); United States v. Boyle, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied* 414 U.S. 1076 (violation of campaign law by union president upheld).

44. *See* Buckley v. Valeo, 424 U.S. 1, 26-30 (1976). *But see* Common Cause v. Schmitt, 512 F. Supp. 489, 498-500 (D.C. Cir. 1980) *aff'd by an equally divided Court* 50 U.S.L.W. 4168 (1982).

45. 435 U.S. 765, 790-91 (1978); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

46. 424 U.S. at 57.

47. *See* Meiklejohn, *Commercial Speech and the First Amendment*, 13 CAL. W.L. REV. 430 (1977).

48. Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc., 425 U.S. 748, 756-57 (1975); *see* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

49. *Virginia State Bd. of Pharmacy*, 425 U.S. at 761-65. In *Virginia*, the Court found that consumers had a true interest in receiving information concerning the price of prescription drugs. *Id.* at 763-65. The Court's opinion here claims that the theoretical basis of its decision is Meiklejohn's marketplace of ideas. *Id.* at 765 n.19. *See supra* notes 34-39 and accompanying text.

ers,[50] it flows freely, with minimal restriction.[51] When, however, commercial speech conflicts with the interests of the listeners, it must be restrained.[52] Thus, although the Court established a new and significant level of protected speech, it is speech subordinate to the listener's informational interests, and the level of first amendment protection afforded natural persons.

The result is differing levels of constitutional protection depending upon the nature of the speech involved.[53] The Court has avoided resolving similar schemes for corporate entities.[54] An examination of decisions applying other constitutional protections to corporate entities, however, provides insight as to how the Court may ultimately resolve this issue.

CORPORATIONS AND OTHER CONSTITUTIONAL PROTECTIONS

In defining the parameters of corporate speech, it is useful to consider the varying rationales underlying the Supreme Court's decisions extending other constitutional rights to these entities. The Court's decisions consistently demonstrate a desire to achieve the proper balance between the conflicting economic and political implications of corporate constitutional protections.[55] The decisions often reflect the goal of maximizing the well-being of natural citizens.[56] The same goal should

50. *See* 425 U.S. at 764-65 (drug prices are important information); Comment, *First Amendment Protection for Commercial Speech: An Optical Illusion*, 31 U. FLA. L. REV. 799 (1979). *But see*, Friedman v. Rogers, 440 U.S. 1, 11-16 (1979) (optometrist's use of a trade contains no information about price and may be misleading.

51. *See* 425 U.S. at 770-71. The Court in *Virginia* noted that time, place and manner restrictions on commercial speech would likely be upheld. The only conditions on such restrictions are that they are "without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication." *Id.* at 771; *see* Metpath, Inc. v. Myers, 462 F. Supp. 1104, 1108-11 (N.D. Calif. 1978) (state interests in advertising ban on laboratory cannot withstand judicial scrutiny). *But see* American Future Systems, Inc. v. Pennsylvania State University, 464 F. Supp. 1252, 1262-65 (N.D. Pa. 1979), *aff'd* 618 F.2d 252 (3d Cir. 1980) (University's restrictions on campus dormitory solitication upheld).

52. For example in Friedman v. Rogers, 440 U.S. 1, 13-16 (1978), the Court upheld section 5.13(d) of the Texas Optometry Act. One provision of the Act prohibited the operation of an optometric practice under a trade name. 440 U.S. at 5 n.6. The concern for protecting the public from deceptive and misleading optometric practices provided the basis for upholding the statute. *Id.* at 13-16. The Court found that the interests of the listening public were better promoted by upholding the statute. *Id.* at 16.

53. *Compare* Friedman v. Rogers, 440 U.S. 1, 15-16 (1976) (state interest in protecting consumers is sufficient to uphold statute regulating optometrists' form of advertising) *and* Ohralik v. State Bar Association, 436 U.S. 447, 462-68 (1978) (Bar may discipline lawyer for soliciting clients under certain circumstances) *with* Wooley v. Maynard, 430 U.S. 705, 714-15 (state's interests are not sufficiently compelling to require display on non-commercial vehicles of state motto "Live Free or Die") *and* Cohen v. California, 403 U.S. 15, 22-26 (1970) (state interest in making public display of statement "Fuck the Draft" a criminal offense is not sufficiently compelling).

54. *See supra* text accompanying notes 100-101.

55. *See supra* notes 77-80 and accompanying text.

56. *See, e.g.*, United States v. Morton Salt Co., 338 U.S. 632, 652 (1949) (corporation must comply with government disclosure requests). Unlike natural persons, the United States Constitu-

be pursued when the Court seeks resolution of the constitutional conflict between corporate and natural persons' first amendment free speech rights.

Denying corporations the fifth amendment privilege against self-incrimination,[57] for example, balances these significant concerns. The Court first withheld this privilege from a corporate litigant in *Hale v. Henkel*.[58] Petitioner Hale, secretary and treasurer of a U.S. corporation,[59] sought to invoke the fifth amendment privilege in a grand jury investigation. By refusing to testify,[60] he hoped to bar access to his employer's business practices during grand jury investigation of possible Sherman Anti-trust violations.[61] Denying corporations this privilege facilitates successful corporate criminal prosecution,[62] which detrimentally affects assets and shareholders' interests.[63]

Despite this impact, the *Hale* Court was more concerned with the other likely effect of granting the privilege.[64] Since successful antitrust prosecutions usually require testimony of corporate agents,[65] extension of the privilege would seriously frustrate enforcement of the Sherman Act.[66] This decision thus found that the interests of the political and legal system in protecting natural persons' rights were superior to the economic interests of the corporation.[67]

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tion has not been held to automatically apply to all natural persons who are found to be United States citizens. *See* The Bank of the United States v. Deveaux, 9 U.S. 61, 83, 88-90 (1809) (corporation's right to sue depends on natural persons' rights). Thus the Court has over time both extended and denied certain constitutional protections to corporations. *See supra* notes 77-80 and accompanying text.

57. This protection stems from the language that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend V.

58. 201 U.S. 43 (1906).

59. Hale was officer of the MacAndrews & Forbes Company.

60. 201 U.S. at 58. In *Hale* the Court considered two constitutional issues: first, whether Hale could claim the fifth amendment privilege; second, whether he could bar the grand jury's access to his employer's records, by claiming the fourth amendment right against unreasonable searches and seizures. The Court held that he could. *Id.* at 70-77.

61. Sherman Anti-trust Act, ch. 647, §1, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§1-7 (1976).

62. 201 U.S. at 70.

63. Successful prosecutions usually result in heavy fines, which are paid from corporate assets. *See generally* E. MANSFIELD, MONOPOLY POWER AND ECONOMIC PERFORMANCE 135-96 (1974).

64. 201 U.S. at 69-70. In addition, the Court noted that federal law did immunize Hale from personal liability. *Id.* at 66-67, 69-70; *see* Act of February 25, 1930, ch. 755, 32 Stat. at L. 854, 904, U.S. Comp. Stat. Supp. 1905, p. 602, *cited in* 201 U.S. at 66.

65. *Id.* at 70.

66. *Id.*

67. This would appear to be the major rationale for the Court's decision. The Court also supported its position, denying corporate entities the fifth amendment privilege, by interpreting the constitutional protection as a "purely personal privilege." *Id.* at 69. However, the Court's former concern, the likely impact of such constitutional protections on anti-trust violations, seems to have been a stronger rationale. In *Hale*, petitioner also sought corporate access to the fourth amendment to preclude investigation of company records. *See supra* note 60. In that portion of the opinion the Court noted such protection was necessary to protect the individual shareholder's interests. "Corporations are a necessary feature of modern business activity, and their aggregated

Since *Hale*, the Court has reaffirmed its concern with preventing corporations from foiling enforcement of federal and state laws.[68] Consistently, the fifth amendment privilege has been only available to natural persons.[69]

In other instances, however, the Court has found economic impacts that have dictated extension of constitutional protections to corporations. Two lower court opinions, both written by Supreme Court Justice Field as a circuit judge in the 1880s, provide the rationale for corporate protection under the equal protection clause.[70] Both of these decisions involve the validity of a California tax statute.[71] The corporate litigant successfully argued that the statute unconstitutionally denied them equal protection by providing natural persons, but not railroads and corporations, a deduction for the amount of any mortgage attached to taxable property.[72] Both decisions reflect a concern that denying corporations equal protection would detrimentally affect

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capital has become the source of nearly all great enterprises." 201 U.S. at 76. There is, however, no discussion by the Court stating why the fifth amendment privilege was "purely personal" and the fourth amendment was not. Rather the tremendously negative impact on the public interest that would likely result from extending corporations the fifth amendment privilege as compared to the minimal impact by similarly extending the fourth amendment privilege, seems to be the major source for the decision. *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (discredits idea that extending corporation first amendment rights in the past was based on finding whether an individual or association was involved).

68. *See* Andresen v. Maryland, 427 U.S. 463 (1976) (inapplicability of fifth amendment to corporate records); Bellis v. United States, 417 U.S. 85 (1974) (natural persons, not artificial entities or organizations, may claim fifth amendment privilege); United States v. White, 322 U.S. 694 (1944) (individual in his representative capacity for a union cannot claim fifth amendment privilege).

69. *See* O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1356-59 (1979). Examining *Henkel* and other cases, O'Kelley argues that the Court extends corporationk's constitutional protections when individual shareholders would have enjoyed such rights if they had acted in a non-corporate form. *Id.* at 1356, 1359. This is a valid conclusion. However this Article proposes an alternative theory for both explaining the Court's decision in *Hale* and providing a stronger basis for upholding §441b. *See infra* text accompanying notes 73-81, 223-25. *See generally* Ratner, *supra* note 8 (corporations entitled to fifth amendment protection).

70. County of Santa Clara v. Southern Pacific R. Co., 18 F. 385, 402-04 (C.C.D. Cal. 1883), *aff'd* 118 U.S. 394 (1886); County of San Mateo v. Southern Pacific R. Co., 13 F. 722, 740-44 (C.C.D. Cal. 1882), *dismissed* 116 U.S. 138 (1885).

71. Section 3664 of the Political Code of California directed the State Board of Equalization to make assessments of "the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county." Assessments were to be made at "its actual value." *See* Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394, 405-06 (1885). In addition, the 1879 California state constitution directed that

> "[e]xcept as to railroad and other quasi-public corporations, in case of debts . . . the value of the property affected by . . . [a] . . . mortgage, deed or trust, contract, or obligation, less the value of that security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner therof. . . ."

Id. at 404 (quoting fourth section of California Constitution of 1879).

72. *Id.* at 404, 409-410. Under the California constitution, railroads were not allowed a deduction for mortgages on their property. Consequently the State Board of Equalization made assessments on railroad property, owned by corporations, differently than on property owned by natural persons. *See Id.* at 404-10; County of Santa Clara v. Southern Pac. R.R., 18 F. at 390; County of San Mateo v. Southern Pac. R.R., 13 F. at 726.

individual shareholders, as well as the growth of the American economy.[73] The courts feared that a refusal to extend equal protection to corporations would lessen the security of land possession in the corporate form and establish disincentives to further growth.[74] These opinions were briefly and conclusorily affirmed by the Supreme Court in 1886.[75] The Court's decision demonstrates a desire to accommodate continued growth of the post-Civil War economy,[76] and foremost, to benefit natural persons who would reap the advantages of a strong economy.

In other areas, the Supreme Court has both denied[77] and extended[78] constitutional protection to corporations. Although there is no consistent rationale underlying a majority of these opinions, the cases do reflect a similar balancing between the interests of corporations and natural persons.[79] Consistently, the Court has established corporate

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73. *See* County of Santa Clara v. Southern Pac. R.R., 18 F. at 405; County of San Mateo v. Southern Pac. R.R., 13 F. at 744.

74. *See* 18 F. at 435-37. It should be emphasized that the Court's concern for corporate constitutional protections may have been particularly acute at this time since railroad corporations were involved in these cases. This was an important time for railroad expansion, and it would be reasonable to see the Court's opinion evidencing some spirit of protectionalism. For a discussion on the importance of the growth of the railroads in the American economy, *see* MORISON, *supra* note 23; NADER, *supra* note 15.

75. 118 U.S. 394 (1886). The Court's decision, considering whether the equal protection provision of the fourteenth amendment applied to corporations, simply stated, "We are all of opinion that it does." *Id.* at 394.

76. The Court decision here reflects a balancing of first, the goal of corporations' and the nation's economic growth, with second, the costs accruing to natural citizens in extending this constitutional protection. *See supra* note 73. Unlike the Court's decision in *Hale*, the former was more persuasive here. *See supra* text and accompanying notes 57-69. For another interpretation of the Court's approach, see O'Kelley, *supra* note 68, at 1353-56 (constitutional protections extended because of coextensive shareholder rights). *See generally* Miller, *On Politics, Democracy, and the First Amendment: A Commentary on First National Bank v. Bellotti*, 38 WASH. & LEE L. REV. 21, 24-26, 28-31 (1981) (Court's approach in Santa Clara, and in other areas, stem from Court's pro-corporate biases).

77. Some of the other constitutional protections that have not been extended to corporations include: the privileges and immunities clause as applied by the fourteenth amendment, U.S. CONST. art. IV, §2; *see, e.g.*, Asbury Hospital v. Cass County, 326 U.S. 207, 210-11 (1945); the right of privacy, *see* United States v. Morton Salt Co., 338 U.S. 632, 652 (1949) (corporations have no equality with individuals in the enjoyment of a right to carry on commercial operations in private); the due process protections of the fourteenth amendment, U.S. CONST., amend. XIV, §1, *see, e.g.*, Northwestern National Life Insurance Co. v. Riggs, 203 U.S. 243, 255 (1906). *But see* Grosjean v. American Press Co., 297 U.S. 233 (1936) (statute depriving a newspaper of "property" is invalid); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (corporation's property is too important to allow deprivation). *See generally* Comment, *Freedom of Speech and the Corporation*, 4 VILL. L. REV. 377, 378 & nn.4, 6 & 7 (1959).

78. Some of the other constitutional protections that have been extended to corporations include: the right not to be deprived of property without due process of law, U.S. CONST. amend. XIV, §1; *see, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1924); see also *supra* note 79 for a discussion on the Court's underlying rationale in this area. *But see, e.g.*, Northwestern National Life Insurance Co. v. Riggs, 203 U.S. 243, 255 (1906); freedom of the press, U.S. CONST. amend. I, cl. 2; *see, e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936); the right against unreasonable search and seizures, U.S. CONST. amend. IV. *See supra* notes 60 & 67.

79. In some cases, the Court has denied and then later granted the same constitutional protection to different corporations. For example, in Northwestern National Life Insurance Co. v. Riggs, the Court upheld a Missouri statute against the corporate appellant's claim that the statute denied the corporation due process of law. 203 U.S. 243, 243-50 (1906). The Court noted that "liberty" in the fourteenth amendment referred to that "of natural not artificial persons." *Id.* at

rights only where the interests of natural citizens would not be detrimentally affected.[80]

Resolution of the constitutional issue implicit in section 441b would require a similar balancing of interests between corporations and natural persons. This balance, however, must follow a judicial determination of the level of judicial scrutiny to be accorded corporate entities.[81] Though this question was clearly presented in *First National Bank of Boston v. Bellotti*,[82] the Supreme Court failed to directly address that issue.

FIRST NATIONAL BANK OF BOSTON V. BELLOTTI

In *Bellotti*,[83] the Supreme Court considered the constitutionality of a Massachusetts election statute.[84] Section 8[85] prohibited most[86] corporations from participating in any campaign activity in a state referendum or election, including the making of financial expenditures and contributions. The corporate litigants[87] in *Bellotti*, while planning to

255. Therefore appellant's claims were unsuccessful. *Id.* However in Pierce v. Society of Sisters, 268 U.S. 510 (1924) the Court granted a corporate school the protection against being deprived property without the due process afforded by the fourteenth amendment. *Id.* at 535-36. The Court noted that corporations generally could not make such claims. *Id.* at 535. However, here appellees' business was threatened. The Court granted them injunctive relief, after describing the positive force of the school in the community. *Id. See supra* note 80.

80. *Compare* Pierce v. Society of Sisters, 268 U.S. 510 (1924) *with* Northwestern National Life Insurance Co. v. Riggs, 203 U.S. 243 (1960). The different ruling on these due process claims is a function of the type of corporate entities involved. In *Pierce*, the corporation was an established school for secular and religious education; in *Northwestern*, appellant was a large life insurance company. The Courts' opinions demonstrate a significant difference in concern for these litigants and their value to natural citizens within their communities. *See* 268 U.S. at 531, 535-36; 203 U.S. at 251-55.

81. *See supra* notes 47-54 and accompanying text.

82. 435 U.S. 765 (1978).

83. *Id.*

84. MASS. GEN. LAWS ANN. ch. 55, §8 (Law. Coop. 1981). For a discussion concerning the constitutional history of the Massachusetts statute see opinion of the Massachusetts Supreme Judicial Court, 371 Mass. 773, 778-80, 359 N.E.2d 1262, 1266-68 (1977). For a discussion of similar state statutes *see supra* note 18.

85. Section 8 states in part:

> No corporation carrying on the business of a bank, . . . no company having the right to take land by eminent domain . . . , no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. . . .

MASS. GEN. LAWS ANN. ch. 55, §8 (Law. Coop. 1981).

86. *See supra* note 85.

87. The suit was brought by the First National Bank of Boston, New England Merchants National Bank, The Gilette Company, Digital Equipment Corporation, and the Wyman-Gordon Company against the State of Massachusetts. 371 Mass. 773, 773 n.1, 359 N.E.2d 1262, 1262 (1977).

advertise their opposition[88] to a proposed graduated income tax referendum,[89] had been threatened with criminal prosecutions by the Massachusetts Attorney General. Subsequently, they brought suit challenging the constitutionality of the statute.[90] In a unanimous decision the Supreme Judicial Court of Massachusetts held that the statute did not violate the free speech rights of the corporate litigants.[91] First, the court noted that corporations were not entitled to the same degree of first amendment protection as natural persons;[92] their rights only extended to areas materially affecting their business or property assets.[93] Second, agreeing that a graduated income tax did not so affect a corporation,[94] the court upheld the statute as it applied to the plaintiffs.[95]

In a five to four decision the United States Supreme Court reversed the decision of the Massachusetts court.[96] Writing for the majority, Justice Powell explained that the focus of the lower court should not have been whether corporations have first amendment rights coexistent with those of natural persons.[97] Instead, the proper question was whether section 8 abridged the kind of expression that the first amendment was designed to protect.[98] The *Bellotti* majority found that it did.[99]

The *Bellotti* decision does not establish an independently protected right of corporations to speak,[100] for the Court did not define the constitutional status of corporations' first amendment rights.[101] Consequently, the Court avoided tackling the major constitutional controversy underlying the case. Instead the decision established that any "right" that corporate entities might have to freedom of speech derives solely from the public's "right to listen."[102]

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88. 371 Mass. at 774-76, 359 N.E.2d at 1265-66.

89. The proposal would have permitted the legislature to have established a graduated income tax on individuals. 371 Mass. at 774 n.3, 359 N.E.2d at 1265.

90. *Id.* at 776, 359 N.E.2d at 1265.

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

92. *Id.* at 783-85, 359 N.E.2d at 1269-70.

93. *Id.* at 784-87, 359 N.E.2d at 1270-72.

94. *Id.* Section 8 explicitly states that no referenda dealing solely with a question of taxation "shall be deemed materially to affect the property, business or assets of the corporation." MASS. GEN. LAW ANN. ch. 55, §8. The Court found this provision of §8 neither overbroad nor void for vagueness. 371 Mass. at 787-91, 359 N.E.2d at 1272-74.

95. 371 Mass. 773, 359 N.E.2d 1262.

96. 435 U.S. 765 (1978).

97. *Id.* at 777-78.

98. *Id.* at 778. The Court found the former question to be only an "abstract question." *Id.*

99. *Id.* at 795.

100. *See id.* at 777, 776-780.

101. *See supra* note 98; Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 438 (1982) (city election ordinance violated individual's freedom of association); Federal Election Commission v. Weinsten, 462 F. Supp. 243, 247 (S.D.N.Y. 1978) (violation of 2 U.S.C. §441b by corporate officer); Nicholson, *supra* note 8, at 953-58. *But see* Miller, *supra* note 76, at 22; Patton, *supra* note 8, at 495.

102. *See* 435 U.S. at 777-86. By tying corporate speech to the constitutionally protected rights

The Court based its opinion on Meiklejohn's theory of the first amendment.[103] Any political expression worth hearing should receive first amendment protection since its primary function is to provide the listening public with a multitude of diverse views.[104] Thus a court should not ask whether corporate speech *per se* is protected, but whether that speech receives protection because of the public's right to listen.[105] Under *Bellotti*, the sources of the speech is irrelevant[106] since corporate political speech receives protection through its reliance on the rights of listeners.[107]

This rationale is similar to that employed in the commercial speech cases.[108] The *Bellotti* Court completely rejected the lower court's decision providing protection only to corporations materially affected by the referendum.[109] The Court also rejected the argument that only media corporations, such as an incorporated television station or newspaper, could claim first amendment protection.[110] Instead, the constitutional protections cover corporate communications containing useful information to listeners.[111] Only the presence of a strong risk of corruption would have been a sufficient governmental interest to uphold the statute.[112] According to Justice Powell, such a risk is not present in a referendum campaign.[113]

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of listeners, the Court established corporate speech as dependent, but not necessarily subordinate to another protected right. For a discussion on this right to listen see *supra* notes 34-37 and accompanying text. *See* Note, *The Right to Know and the School Board Censorship of High School Book Acquisition*, 34 WASH. & LEE L. REV. 1115, 1124-31 (1977).

103. *See* 435 U.S. at 776-78, 777 & n.11. *See supra* text and accompanying notes 34-37.

104. 435 U.S. at 776-78.

105. *Id.* at 783.

106. *Id.* at 777.

107. *Id.* at 775-86. *See* Nicholson, *supra* note 8 at 952-58.

108. *See supra* notes 47-54.

109. 435 U.S. at 781-85.

110. *Id.* The Court noted that the institutional press does not "have a monopoly on either the First Amendment or the ability to enlighten." *Id.* at 782. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972) (newsmen have no special privilege allowing them to avoid testifying before a grand jury); *see* Buckley v. Valeo, 424 U.S. 1, 51 n.56 (1976). Chief Justice Burger expressed concern that imposing serious restrictions on corporations' first amendment rights may serious undermine freedom of the institutional press. 435 U.S. at 796-802. Burger noted that many newspapers now exist as part of large congomerates. In his concurring opinion, the Chief Justice suggests the Court should clearly provide first amendment protection to all who engage in speech, not just corporate entities. *Id.* at 802 (Burger, C.J., concurring). *See generally* Comment, *Freedom of Speech: First National Bank of Boston v. Bellotti*, 48 U.M.K.C. L. REV. 96, 103 (1979) (Massachusetts statute posed special problems for media corporations). Justice Rehnquist in his concurring opinion responded. He noted that corporations chartered for the purpose of carrying on the business of a newspaper cannot be deprived of liberty of the free press. 435 U.S. at 824 (Rehnquist, J., concurring). *See* Grosjean v. American Press Co., 297 U.S. 233 (1936) (newspaper corporations' requisite first amendment protection violated by state statute). *See generally* Miller, *supra* note 76, at 38 (communication is the reason newspaper corporations exist).

111. 435 U.S. at 783.

112. *Id.* at 788-93. *See generally* Wood v. Georgia, 370 U.S. 375 (1962) (speech will not be restricted absent a clear and present danger to political system).

113. 435 U.S. at 780 n.26, 789. The Court has recently found unconstitutional other election laws restricting campaign contributions made to referendum campaigns. Citizens Against Rent

Yet, it would be unwise to infer from the *Bellotti* opinion that corporate political speech is necessarily either subordinate or equivalent to the rights of the listeners. The Court explicitly stated that commercial speech could exist only so long as it benefited society.[114] If the rights of the public were infringed by the rights of speakers, the former would prevail. The *Bellotti* Court, however, failed to explain how such a conflict would be resolved within the arena of corporate political speech.

Two Possibilities of Reaching the Constitutional Issue

By defining corporate political speech as dependent on the rights of listeners, the *Bellotti* Court failed to indicate the relative degree of protection afforded each. Consequently, the Court delayed resolving the major constitutional question at hand. In addition, by failing to find the possibility of either perceived or actual corruption in referendum campaigns, the Court gave no indication whether the corruption rationale could aid in supporting the constitutional validity of section 441b. Focusing on these two issues in future decisions may prompt the Court to reach the constitutional issue underlying the statute and thus define the degree of protection owing to corporate entities.

A. Freedom of Speech: Rights of Listeners v. Rights of Corporations

The appellees in *Bellotti* argued that the Massachusetts statute was a necessary government tool for restraining corporations from inordinately influencing the electoral system.[115] The Court strongly rejected that argument.[116]

The majority did note, however, that if appellees had provided sufficient documentary evidence of corporate involvement "undermining the democratic processes . . . [and] . . . denigrating . . . First Amendment interests," the Court would have examined their argument.[117] Thus, evidence that corporate speech interferes and conflicts with the

Control v. City of Berkeley, 102 S. Ct. 434 (1982). In doing so the Court noted that the corruption rational is not a compalling governmental interest in referendum campaigns. *Id.* at 439. This approach provides little hope for municipalities wishing to impose such restrictions in their referendum campaigns. However the concurring statement of four justices indicate the Court may be willing to uphold a less restrictive statutory scheme. *See Id.* at 439-41. *See generally* Note, *Preventing Corruption in the Electoral Process: The California Supreme Court Expands the Buckley v. Valeo Analysis of Campaign Finance Regulation to Non-Candidate Elections*, 3 WHITTIER L. REV. 431 (1981) (develops an expansionist definition of "corruption").

114. *See* Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc., 425 U.S. 748, 764-771 (1975).

115. Brief for Appellee at 32-41, First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

116. 435 U.S. at 788-92.

117. 435 U.S. at 788-92; *cf.* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), *as cited* in 435 U.S. at 791 (interests were sufficient to uphold regulation). In *Bellotti*, Appellee's corporation domination argument was supported by inconclusive statistics that were easily refuted by

rights of the public to listen would enable the Court to consider restriction of that right.[118] This evidence would negate the *Bellotti* premise that increased speech from all sources results in a more vibrant political debate.[119] Moreover, resolving this conflict would require the Court to establish the parameters of the right of corporate speech.

Evidence of this conflict, now available, demonstrates that as corporate interests achieve increased access to the political marketplace, the listening public has an inversely proportionate opportunity to listen to diverse viewpoints.[120] Studies show that as this causal relationship develops, the political power of corporations increases, thus negating the *Bellotti* premise.[121] As corporations achieve greater access to the political marketplace, through campaign contributions and independent expenditures, there is a tendency for noncorporate individuals to be increasingly limited in their relative political speech. Consequently, accessibility of the listening public to diverse political views is significantly eroded.[122]

Clear examples of corporate domination of the political marketplace can be found in studies of select 1976 Colorado referenda campaigns.[123] In that year Colorado citizens voted in state and federal candidate elections,[124] as well as on ten state referenda questions.[125] Four

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Justice Powell. *Compare* 435 U.S. at 810-12 *with id.* at 789 n.28 (interpretation of statistics by majority and the dissent).

118. 435 U.S. at 789.

119. This premise stems from the theoretical genesis of the Court's opinion — Meiklejohn's "marketplace of ideas" theory. *See supra* text accompanying notes 34-37 & 103-107.

120. *See* Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 443-44, 443 nn.3-4 (1982) (White, J., dissenting); *Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 95th Congr., 1st Sess. 172 (1977) (statement of J. Shockley, Ph.D) [hereinafter cited as Shockley]; Mastro, Costlow & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process through Media Spending and What To Do About It*, 32 FED. COM. L.J. 315 (1980) [hereinafter cited as Mastro]. *See generally* Note, *supra* note 113, at 454-59 (evidence available for proving deleterious corporate impact).

121. *See, e.g.*, *supra* notes 123-149 and accompanying text.

122. *Id.*

123. *See generally* Mastro, *supra* note 120; Shockley, *supra* note 120. The Colorado referenda are highlighted in this article because of the extensive material available on these campaigns. Other studies are also available that support a similar hypothesis. *See* S. LYDENBERG, BANKROLLING BALLOTS: THE ROLE OF BUSINESS IN FINANCING STATE BALLOT QUESTION CAMPAIGNS 37 (1979), *discussed in Citizens Against Rent Control*, 102 S. Ct. at 434, n.3. Lydenberg provides three California examples where "corporate" contributions far exceeded "non-corporate" interests. *Id.*; Address by D. Lowenstein, American Political Science Association, Annual Convention, Campaign Spending and Ballot Propositions (Sept. 5, 1981), *discussed in* 102 S. Ct. at 434 n.4. Lowenstein demonstrates impact of negative one-sided spending. *Id.*

124. *See* Shockley, *supra* note 120, at 175, 177. Colorado citizens participated in the selection of the President, numerous United States Congressional seats, eighteen State Senate positions and sixty-five spots in the State House. *Id.*

125. *Id.* at 178. Briefly, the referenda dealt with (1) a proposed state sweepstakes, (2) a mobile home tax, (3) increased regulation of nuclear power development, (4) altering the Governor's appointment powers, (5) power of county commissioners to set salaries, (6) repeal of the state

of these referenda are particularly useful in demonstrating the conflict between the first amendment rights of corporations and natural persons.[126] Each referendum focused upon controversial subjects, and was

E.R.A., (7) repeal of a food sales tax, (8) bottle deposit and recycling system, (9) establishing a consumer advocate for public utilities, (10) voter approval of tax increases. Referenda number (1) and (2) created little voter interest. *See id.*

126. These are referenda numbers three, seven, eight and nine. For a discussion of referendum number three, calling for nuclear power regulation, see *infra* note 128. Referendum number seven would have repealed the state tax on food and provided for a replacement of this revenue by a corporate income tax. *See* Shockley, *supra* note 120, at 181-85. Not surprisingly corporate interests mounted a strong campaign against this proposal. For an excellent discussion on the tactics used by the tremendously well-financed corporate opposition, see *id.* In this referendum campaign, proponents of the measure had available a total of $22,484 in financial contributions, or approximately six percent of the total. Opponents had available $361,000, or approximately ninety-four percent of the total. See chart below. Although polls taken in September showed proponents of the measure favored to win by a wide margin, by election day opponents reversed this prediction and soundly defeated the measure. *Id.* For a discussion on referendum number eight, a bottle deposit proposal, *see infra* text and accompanying notes 134-141. Referendum number nine would have altered the public utility system's operation. *See supra* notes 143-144 and accompanying text.

CHART: *1976 Selected Colorado Referenda*

REFERENDUM		TOTAL[a] CAMPAIGN EXPENDITURES[b] [I] *Actual*	[II] *As % of all Expenditures*	PUBLIC OPINION [III] *Poll[c](%)*	[IV] *Actual vote[d](%)*	[V] *Change from III to IV*
#3 NUCLEAR	*Proponents*	$119,158	16.82	58[e]	30	−28%
POWER	*Opponents*	589,310	83.18	32	70	+38%
		$708,468	100.00	10 (undecided)		
#7 STATE FOOD	*Proponents*	22,484	05.86	55[f]	39	−16%
TAX	*Opponents*	361,000	94.14	27	61	+34%
		383,484	100.00	18 (undecided)		
#8 BOTTLE	*Proponents*	19,000	03.58	74[g]	33	−41%
DEPOSITS	*Opponents*	511,198	96.42	17	67	+50%
		530,198	100.00	9 (undecided)		
#9 PUBLIC	*Proponents*	17,500	06.02	55[i]	30	−25%
UTILITIES	*Opponents*	273,000[h]	93.98	19	70	+51%
		290,500	100.00	26 (undecided)		

(a) This includes media and other expenditures. For a breakdown of media expenditures, *see* Mastro, *supra* note 120.
(b) Based on figures from the Colorado Secretary of State's Office, as reported in Shockley at 178.
(c) Reflects voters' attitudes prior to campaigns.
(d) Excluding referendum number nine, these figures are from Shockley at 179, Table IV. For referendum number nine see "i" below.
(e) Poll for referendum number three was taken in July. *See* Shockley, *supra* note 120 at 179, Table IV.
(f) Poll for referendum number seven was taken in late September. *Id.*
(g) Poll for referendum number eight was taken in late May. *Id.*
(h) Rocky Mountain News reporter claimed figure was higher, $343,000. *Id.* at 178, Table III, n.1.
(i) Poll for referendum number nine was taken in late September. *See* Mastro, *supra* note 120 at 360, Appendix Table I.

expected to have negative impact on incorporated organizations.[127] This triggered a high degree of corporate political activity,[128] including strong corporate opposition.[129] Corporate money flowed freely and openly in the state referenda debates. Although section 441b precluded corporate involvement in the federal election campaigns,[130] Colorado law did not establish similar restrictions in any of the state campaigns.[131]

An examination of the four referenda demonstrate that corporate speakers participated without limit in making campaign contributions and expenditures.[132] Yet, in opposition to the referenda, proponents neither represented nor supported by vested economic interests were unable to expend relatively significant funds in support of their position.[133] Consequently, the public's access to alternative views was extremely limited. One referendum, for example, would have instituted a mandatory refundable bottle deposit and a recycling system on all beverage containers sold in the state.[134] Large bottling companies, fearing

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127. *See, e.g.*, *infra* notes 133-140 and accompanying text.

128. For example, referendum number three would have required a two-thirds majority vote of the state legislature before additional nuclear building or modification could be made. It also could have required extensive public hearings before the legislature could vote on the construction. Finally the referendum would have required the waiver of federally imposed liability limits for damages resulting from any plant's operation. Not surprisingly nuclear corporate interests wanted this measure defeated. They outspent proponents by more than four-to-one. Corporate financial support of $500 or more provided two-thirds of this side's total campaign funds. *See* Mastro, *supra* note 1220, at 321.

129. *See* Mastro, *supra* note 120, at 320-23. One indication of the high degree of corporate activity is demonstrated by the opponents political contributions, relative to proponents. *See* chart, *supra* note 126. The intensity of the issues involved in the referenda themselves is demonstrated by a comparison between the total amount of financial contributions made to the referenda and the state candidate elections. Total expenditures for the state House and Senate seats was about $750,000. Total expenditures for all ten referenda campaigns was approximately $2,250,000. *See* Shockley, *supra* note 120, at 177.

130. 2 U.S.C. §441b (1976). *See supra* note 9. *See* Shockley, *supra* note 120, at 172.

131. *See* Shockley, *supra* note 120, at 172. *See* COLORADO REV. STAT. §1-45-101-121 (1977). The emphasis in the Colorado "Campaign Reform Act of 1974" is on disclosure. *Id.* §101. For a comparison of the amount of money expended by "corporate" interests, as opposed to "non-corporate" interests, see chart, *supra* note 126. In the four referenda referred to in this text, proponents, generally corporations, outspent opponents by a ratio of approximately ten-to-one, $1,735,000 to $178,000. For comparisons of other referenda, see Shockley, *supra* note 120, at 177.

132. *See* Shockley, *supra* note 120, at 177-89.

133. *See id.* One could argue that although the statistics demonstrate that the opponents had significantly greater financial resources, their impact is negated by other statistics showing that both sides were accorded almost equivalent access to the major media sources, the key measure of communicating with the public. For example, in the nuclear referendum, number three, "proponents" total television air time was 130 thirty-second advertisements; "opponents" had 145. *See* Mastro, *supra* note 120, at 325. However "opponents" were able to purchase 113 advertisements during "prime time," the period with the highest viewing audience. "Proponents" could only afford to purchase thirty-four such advertisements. *See id.* at 325, 361-62, Tables IIa, IIb. It is generally conceded that "prime time" is more valuable to the advertiser due to the greater number of people watching television during that time period. Thus a comparison of the number of advertisements, *broken down* by their approximate viewing audience only serves to support the argument that "opponents" were afforded tremendous advantages in reaching potential voters due to their superior financial resources. *Id.* at 325-27.

134. This referendum, number eight, appeared on the ballot as: "An Act to require a mini-

a decline in a demand for their products,[135] collected campaign contributions exceeding by twenty-seven to one those of the referendum's proponents.[136] The other three referenda demonstrated similar imbalances.[137] Large shifts in opinion resulted from such unbalanced spending.[138] Polls conducted prior to the campaign[139] predicted passage of each referendum by significant margins.[140] However, following four heavily financed, one-sided campaigns, just the opposite occurred.[141] Another of the referenda would have established significant burdens on the public utility systems in Colorado.[142] In late September a poll showed only nineteen percent of the public in opposition to the proposal.[143] Approval therefore seems likely; however, the opponents were victorious on election day, garnering seventy percent of the votes.[144]

Thus, as corporate speech entered the political marketplace, public access to diverse views on the referenda declined.[145] Subsequently, in all four cases, public support for the referenda shifted significantly.[146] Though there may be numerous and contradictory explanations for

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mum deposit refund value for beverage containers for malt liquor, including beer, and carbonated soft drinks manufactured, distributed, or sold for use in this state; to require recycling or reuse of returned beverage containers and to provide civil penalties for violations." *See* Mastro, *supra* note 120, at 322 n.22.

135. Opponents of the referendum (and their financial support) included the Can Manufacturers Institute, ($65,971), the American Iron & Steel Institute ($23,438), Coca-Cola Company ($25,000), Owens-Illinois ($33,200), the Aluminum Association, Inc. ($26,910) and Anheuser-Busch, Inc. ($33,000). These six contributors alone outspent all proponents combined. *See* Mastro, *supra* note 120, at 321-22. They claimed the proposal was an inadequate remedy for a serious state problem. The opposition then claimed that the goal of the referendum, eradicating litter in the state, could be better accomplished by passage of a "model litter law." *See* Shockley, *supra* note 120, at 185-86.

136. *Id.* at 185.

137. The approximate ratios in the other four referenda were (#3) 5:1, (#7) 16:1, (#8) 26:1 and (#9) 16:1. *See* Shockley, *supra* note 120, at 178, Table III; Chart, *supra* note 126. For a breakdown of media expenditures by referenda, *see* Matro, *supra* note 120, at 325-26.

138. *See* chart, *supra* note 126.

139. Polls were conducted in May, July, September, and October by both hired consultants and neutral observers. *See* Shockley, *supra* note 120, at 179.

140. For exact indications of the public's support for the referendum early in the campaign, see chart, *supra* note 126, Column III.

141. For referenda results, see *id*, Column IV. For a measure of the change in public support from the beginning of the campaign to the day of the election, *see* Column V.

142. This referendum, number nine, appeared on the ballot as: "An Act to protect and represent consumers of public utilities services by creating a Department of Public Counselor, and concerning financial disclosures by Public Utilities Commissioners and the Public Counselor, approval of the issuance of telephone and telegraph company securities, the burden of proof for utility companies seeking rate increases, criminal and civil remedies for violations of this Act, judicial review of Public Utilities Commission decisions, and purposes and procedures of the Public Utilities Commission." Mastro, *supra* note 120, at 322 n.23.

143. Mastro, *supra* note 120, at 360; Denver Post, October 31, 1976 at 13, *as cited in* Mastro at 360, Table I, column three. *See* chart, *supra* note 126, Columns III-V.

144. *Id.*

145. This proposition is supported by the statistics discussed above. *See* chart, *supra* note 126, Columns III-V. As corporate speech became more pervasive, the relative presence of non-corporate speech became insignificant.

146. *See* chart, *supra* note 126, Column V.

these shifts,[147] existence of highly financed, generally one-sided campaigns, followed by significant shifts in public opinion is only now relevant. These statistics alone indicate that in the conflict between the public's right to listen and first amendment expression, it is the public who suffers.

According to the *Bellotti* Court, corporate speech receives protection so long as it contributes to the diversity of views received by the listening public.[148] The imbalanced impact of corporate speech in Colorado demonstrates that this type of expression, in some cases, may conflict with the protected constitutional rights of the public to hear and to be heard. Thus, when faced with a challenge to section 441b, and presented with this type of evidence, the Court will determine the corporate right of free speech by determining the validity of the statute.[149]

B. Corruption in the Political Arena

A second method exists for determining the degree of constitutional protection to be afforded a corporation. It focuses on the need to eradicate corruption from the political process. In 1976, the Supreme Court

147. For example, the referenda's opponents, when presented with this evidence, reject the argument that their superior financial resources allowed them to "buy" the elections. Shockley, *supra* note 120, at 178. They argue that these significant changes in public opinion reflect the public's valid assessment of the issues involved. The Denver Post criticized the charge that disparate financial resources influenced the outcomes. Such criticisms were an " 'insult to the voter's intelligence.' . . . 'To tell him after the results are in that he was manipulated — because he voted "wrong" — is the ultimate in contempt.' " Shockley, *supra* note 120, at 179.

148. *See* 435 U.S. at 776-78, 782-84. The Court noted that, in part, communication corporations received constitutional protection because of their role in "affording the public access to discussion, debate and the dissemination of information and ideas." *Id.* at 783.

149. *See infra* notes 202-203 and accompanying text. Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 440 (1982). In *Rent Control*, an eight-to-one decision, the Court held unconstitutional a Berkeley municipal election ordinance limiting all contributions to any political committee to $250 for city-wide referenda. *Id.* at 435-36. Dissenting in *Rent Control*, Justice White argued that the contribution limitations should have been upheld. *Id.* at 441-45 (White, J., dissenting). Citing to numerous studies, including those by Drs. Shockley & Mastro, described earlier, Justice White noted that it is not possible to show that heavy spending "buys" a campaign victory. However, "[T]here is increasing evidence" of large contributors' significant influence in the electoral process. *Id.* at 443. See also notes 120-149 and accompanying text (Shockley & Mastro studies). The Court ignored Justice White's evidence. Three concurring judges note that the record before the Court with this evidence still failed to demonstrate that as a result of corporate domination of the electoral process, there was a "genuine threat" to the City's interest in maintaining voter confidence in government." *Id.* at 440 (Blackmun and O'Connor, J.J., concurring). *See also id.* (Marshall, J., concurring). However, from the statements made in these concurring opinions, it appears such evidence may likely receive greater credibility, in defending statutory prohibitions of corporate political behavior. This would result only if the evidence was (1) a specific study focusing on the jurisdiction enacting the statute, or (2) a study specifically relied on by a legislative body in enacting the corporate restrictions. *See id.* at 441. It appears that five members of the present Court may countenance use of this evidence in one of the above prescribed manners to uphold corporate campaign restrictions and prohibitions similar to §441b. *See id.* at 439-40 (Marshall, J.); 440-41 (Blackmun and O'Connor, J.J.), 441-45 (White, J.). Justice Rehnquist has noted his favorable predisposition towards narrowly drawn corporate prohibitions. *See id.* at 439; 435 U.S. at 822-28. *See also infra* note 202.

in *Buckley v. Valeo*[150] held constitutional the 1974 amendment to section 608(b) of the Federal Election Campaign Act.[151] The section was found to effectively deter corruption in the electoral process—a "sufficiently important" governmental interest.[152] This provision established a $1,000 limitation on campaign contributions made by individuals and noncorporate entities, to political candidates in federal elections.[153]

In *Bellotti*, appellees similarly tried to support the Massachusetts statute's corporate prohibitions by arguing the applicability of the corruption rationale.[154] The *Bellotti* Court noted that corruption often occurs in elections when large contributions are given to political candidates by individual citizens in order to secure a *quid pro quo*.[155] Referenda, however, do not involve candidates and therefore, according to the Court, the possibility of *quid pro quos* and their resulting corruption was not present in the case before it.[156]

Unfortunately, this approach precluded the Court from examining whether the corruption rationale would be applicable to corporate contributions in candidate elections.[157] Consideration of this question in

150. 424 U.S. 1 (1976).

151. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §608b, 88 Stat. 1263 (current version at 2 U.S.C. §441a (1976 & Supp. IV 1980)). For a thorough discussion of the Act's provisions as enacted, and as effected by the Buckley litigation, see Nicholson, *supra* note 8, at 947 n.8. The Federal Election Act's 1974 amendments were passed as a response to the abuses of power demonstrated by the Nixon Administration during Watergate. *See generally* Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WISC. L. REV. 323. *See generally* FEDERAL ELECTION COMMISSION, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974 (1977) (includes all proposed amendments, floor debates and other statements).

152. 424 U.S. at 25. Appellees argued that the statutory restrictions were supported by three government interests: (1) preventing corruption and the appearance of corruption; (2) equalizing all voices in the political process by limiting "affluent persons' " ability to make contributions; (3) establishing a ceiling on skyrocketing campaign costs. *Id.* at 25-26. In this portion of the opinion, the Court here found the first interest valid. *Id.* at 26-29. Later, the second and third interests were held insufficient to uphold the Amendment's $1,000 expenditure limitations by individuals on behalf of a "clearly identifiable" candidate. *Id.* at 39-51. The Court found the statute ineffective in reaching its goal, because "resourceful" persons seeking influence could easily devise ways of avoiding the restrictions. *Id.* at 45. Also, the Court found less likelihood of corruption in the area of independent expenditures. *Id.* at 46-47. Finally, the idea of equalizing natural persons influence in elections was described as "wholly foreign" to the first amendment. *Id.* at 48-50. Thus only the first governmental interest seems to have survived *Buckley*. *See* Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 434-35 (1928); Common Cause v. Schmitt, 512 F. Supp. 489, 494 (1980), *aff'd* 101 S. Ct. 3140 (1981).

153. 18 U.S.C. §608(b)(1) (Supp. IV 1974) (current version at 2 U.S.C. §441a(a)(1)(A) (1976)).

154. *See* 435 U.S. at 790.

155. *Id.*

156. *Id.*; *cf.* 424 U.S. at 26-30. In *Buckley* the statute only affected candidate elections since there are no referenda held on the federal level. *See generally Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 95th Cong., 1st Sess. (1977) (proposal for national referendum). For a discussion concerning a new conception of "corruption," see Note, *supra* note 113, at 450-54.

157. Had the Court found the corruption rationale applicable to referendum campaigns, the level of scrutiny afforded corporate political speech would most likely have been articulated. Once the Court acknowledged the possibility of corruption in referenda, the next step would have been to determine whether corporations' constitutional rights had been violated by the Massachusetts statute.

the future would have significant implications. In determining the sufficiency of the governmental interest in upholding the statute, the Court would likely indicate the level of scrutiny to be accorded corporate political speech, thereby delineating the potential bounds of corporate political speech.

Furthermore, a substantive analysis of the corruption rationale demonstrates a valid compelling governmental interest in upholding section 441b. The published report of the United States Senate's Watergate Committee[158] and findings by the lower court in *Buckley*,[159] for example, provide extensive details of illegal corporate campaign contributions made to the 1972 re-election campaigns of President Nixon[160] and members of the United States Congress.[161] Corporate managers making contributions assumed that corporate financial support for these campaigns was a necessary prerequisite to obtaining government contracts, and to insuring favorable legislative considerations.[162] Strict enforcement of section 441b then precludes direct corporate political participation and insulates the political process from corruption.

THE LOWER COURTS AND CORPORATE POLITICAL FREE SPEECH RIGHTS

Although the United States Supreme Court has failed to address directly the constitutional issue implicit in a challenge to section 441b,[163] several lower courts have done so.[164] An examination of these deci-

158. FINAL REPORT, *supra* note 24. The Select Committee on Presidential Activities was formed pursuant to S.J. Res. 60 in the ninety-third Congress. Its function was to investigate the extent to which " 'illegal, improper, or unethical activities' " occured in the 1972 Presidential election. *Id.* at V, "Letter of Transmittal."

159. 519 F.2d 821, 839-40 & nn. 36-38 (D.C. Cir. 1975), *aff'd* 424 U.S. 1 (1976).

160. *See, e.g.*, FINAL REPORT, *supra* note 24, at 579-867. This chapter of the report deals with illegal milk-price supports arranged for leading dairy cooperatives by President Nixon and his campaign associates. The document demonstrates a series of "corrupt" acts by government officials and the dairy industry. In exchange for the approximately $2 million in campaign pledges made to the Nixon 1972 re-election campaign, the milk producers received benefits worth "tens of millions of dollars." *Id.* at 579 *passim*.

161. 519 F.2d at 839 n.37.

162. *Id.* The court found the record replete with examples of political contributions motivated (1) "by the perception that this was necessary as a 'calling card, something that would get us in the door and make our point of view heard,' " and (2) by "improper attempts to obtain government favors in return for large campaign contributions." *Id.* The "Watergate Committee's" *Report* abounds with examples of either illegal or unethical solitication by Nixon associates of the leaders of at least sixty different American industries for campaign contributions to the Nixon re-election fund. FINAL REPORT, *supra* note 24, at 446-92, 548-50. The report details the "sale" of ambassadorships by the Nixon Administration in a level unprecedented in U.S. electoral history. *Id.* at 492-505.

163. *See supra* note 6.

164. Federal Election Comm'n v. Lance, 635 F.2d 1132, 1139-42 (5th Cir. 1981), *cert. denied* 101 S. Ct. 3151 (1981) (bank overdrafts do not constitute political speech, therefore there was no first amendment abridgement by the statute); Federal Election Comm'n v. Weinsten, 462 F. Supp. 243, 246-49 (S.D.N.Y. 1978) (corporate expenditures are less protected than those of natural persons'); United States v. Chestnut, 394 F. Supp. 581, 587-91 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 40 (2d

sions demonstrates the need for a careful balance of corporate and individual rights. In *United States v. Chestnut*,[165] for example, the federal district court refused to dismiss an indictment which charged Chestnut, manager of a United States Senate campaign, with violating section 441b by accepting a corporate campaign contribution.[166] Upon balancing the first amendment interests of corporations against the substantial governmental interests of maintaining the legitimacy of the electoral process, the Court upheld the constitutionality of the statute.[167] This balancing facilitates identification of the relevant interests involved.

Similarly, the majority of other lower court opinions have upheld related provisions of section 441b.[168] They have failed, however, to resolve conflicting first amendment interests,[169] and have neither used nor provided a theoretical basis for their decisions.

In *Federal Election Commission v. Weinsten*,[170] for instance, the Southern District of New York upheld the constitutionality of a subsec-

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Cir. 1976) (statute is least drastic means to accomplish Congress's purpose); United States v. Clifford, 409 F. Supp. 1070, 1072-73 (E.D.N.Y. 1976) (statute is neither vague nor an abuse of Congressional power considering Congress's regulation of national banks); United States v. First National Bank of Cincinnati, 329 F. Supp. 1251, 1254 (S.D. Ohio 1971), *aff'd* 533 F.2d 40 (2d Cir. 1976) (prohibitions on fully secured loans violate first amendment). *But see* United States v. Lewis Food Company, 366 F.2d 710 (9th Cir. 1966) (Court refuses to reach constitutional issue); Ash v. Cort, 350 F. Supp. 227, 232 (E.D. Pa. 1972) *aff'd* 471 F.2d 811 (3d Cir. 1973), *rev'd on rehearing* 496 F.2d 416 (3d Cir.), *rev'd* 422 U.S. 66 (1975) (court's construction of "expenditure" precludes reading the constitutional issue); United States v. Anchorage Central Labor Council, 193 F. Supp. 504, 508 (D. Alaska 1961) (voluntary contributions to television fund do not raise constitutional issue).

165. 394 F. Supp. 581 (S.D.N.Y. 1975), *aff'd*, 553 F.2d 40 (2d Cir. 1976).

166. Chestnut, a campaign aide of Hubert Humphrey, arranged for the American Milk Producers, Inc. to pay Humphrey's senate election campaign advertising fees for one month. *Id.* at 583. Defendant was charged with violating 18 U.S.C. §610 (1970) (current version at 2 U.S.C. §441b (1976). 394 F. Supp. at 538.

167. 394 F. Supp. at 587-91. The court felt it important to weigh corporate first amendment rights with the interests of both preserving the electoral process and protecting stockholders and union members who may not wish to contribute to a campaign. *Id.* at 590. *See* Abood v. Detroit Board of Education, 431 U.S. 209 (1977); Ratner, *supra* note 8, at 24-26.

168. *See supra* note 164.

169. Of those courts that have reached the constitutional issue, most did so on very narrow grounds. As a result few of the lower court opinions are very helpful in resolving the constitutional issue implicit in §441b. *See, e.g.*, Federal Election Comm'n v. Lance, 635 F.2d 1132, 1139-42 (5th Cir. 1981) *cert. denied* 101 S. Ct. 3151 (1981). In *Lance*, defendant-appellant, T. Bertram Lance, former candidate for governor of the State of Georgia, challenged the validity of §441b in its entirety. 2 U.S.C. §441b (1976). Lance sought to challenge the Act in order to resist enforcement of an administrative subpoena requiring him to appear with certain documents before the Federal Election Commission. The subpoena was filed in conjunction with an investigation of possible illegal overdrafts made to the 1974 Lance campaign. 635 F.2d at 1133-35. The court rejected his broad-based challenge, and narowed his appeal solely to a challenge of §441b's prohibition on bank loans and overdrafts. *Id.* at 1139-41. *See* 2 U.S.C. §441b(a), (b)(2) (1976 & Supp. IV 1980). Reaching the issue of bank overdrafts, the court found that such non-public support contained "no speech elements at all." 635 F.2d at 1141. Therefore there could be no first amendment violation. The Court noted its opinion was limited only to the specific provision concerning banking activities. *Id.* at 1142 n.7. The Court also rejected Lance's equal protection claims, finding the statute passed the lower "rationality" standard, triggered by this alleged "non speech" action. *Id.* at 1142. A more successful equal protection challenge to §441b might emerge in the future, if it is based on a more overt form of speech.

170. 462 F. Supp. 243 (S.D.N.Y. 1978).

tion of section 441b as it was applied against a corporate campaign contributor.[171] Contrary to the Supreme Court's approach in *Bellotti*,[172] the *Weinsten* opinion focused on the perceived uselessness of corporate speech. No consideration was given to the interests of the listening public in receiving corporate speech.[173] This court's analysis is flawed, for it fails to grasp the immutable conflict between the free speech rights of corporations and natural persons.[174] In finding corporate rights subordinate to personal rights, the court granted relief solely on the deleterious impact of corporate speech on the political process, rather than resolving the inherent conflicting interests.[175] Future consideration of the constitutionality of section 441b requires a balancing process that will consider the corporate free speech interests which were neglected by the *Weinsten* Court.[176]

As the foregoing discussion demonstrates, a framework for establishing the bounds of corporate political speech is available. First, the Court must acknowledge the necessity of resolving the constitutional issue underlying section 441b: whether corporate entities are entitled to first amendment protections equivalent to that of natural persons. Two rationales are available to resolve the question. The Court could note the conflict of free speech rights established in *Bellotti*[177] and evidenced

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171. In *Weinsten*, a corporate executive tried to avoid the Act's prohibition. To accomplish this, he distributed corporate funds to employees who then wrote personal checks to the presidential campaign of Governor Milton Shapp. *Id.* at 245-46.

172. 435 U.S. at 788-96. *See supra* notes 100-102 and accompanying text.

173. 462 F. Supp. at 249. The court focused primarily on the theoretical basis articulated in Justice White's opinion in *Bellotti*. *Id. See* 435 U.S. at 802-23. White's opinion was based on the second first amendment theory discussed earlier: promoting individual self-expression, self-realization and self-fulfillment. *See supra* note 38 and accompanying text. In this way, the *Weinsten* Court ignored Justice Powell's first amendment premise that speech is protected in order to provide for a wealth of information in the political marketplace. *See* Note, *Municipal Free Speech: Banned in Boston*, 47 FORDHAM L. REV. 1111, 1114-17 (1979). *See supra* notes 103-107 and accompanying text.

174. *See supra* notes 145-49 and accompanying text.

175. 462 F. Supp. at 249-50. Focusing on the speaker, rather than the listeners, as the Supreme Court requires, the *Weinsten* court found the corporate prohibitions constitutional. Although the court's conclusion may be valid, its arguments are somewhat conclusory and vague. For example, the *Weinsten* court argues that corporate "contributions by themselves say little. . . ." *Id.* at 249. The court does not explicitly explain why corporate contributions "say little," except notes that "given the realities and expense of modern communications . . . [corporate contributions] . . . may permit the indirect purchase of votes." *Id.* Thus the court means not that corporate speech has little impact, but that its value to society is minimal. Although the court's concern for the power of corporate entities is relevant, its failure to provide the political marketplace access to corporate views is contrary to the framework established by the Court in *Bellotti*. *Id.*; 435 U.S. at 777-79. *See infra* note 181.

176. For an example of this approach, see Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 100 S. Ct. 2343, 2358-60 (1980) (Stevens, J., concurring). Stevens' opinion balanced the States' interest in suppression of corporate commercial speech with a corporation's goal in speaking. In that particular instance, the latter was viewed as superior. *Id.* at 59. For an example of this balancing within another context, see Brown v. Glines, 100 S. Ct. 594 (1980) (Air Force regulation restricting individual's communication did not violate first amendment).

177. *See supra* text accompanying notes 115-122.

by the Colorado referenda[178] and similar studies,[179] or the Court could recognize the applicability of the *Buckley* corruption rationale to all elections for public office.[180] Prior to adopting either rationale, however, the Court must balance the interests of corporations and natural persons in corporate political free speech.[181] Protection would be extended to corporations on the basis of this balancing, but only so long as the general interests of natural citizens would not be hampered.[182]

Policy Issues and Balancing the Free Speech Rights of Corporate and Natural Persons

A final determination of the bounds of corporate political free speech will affect the continued viability of section 441b. If corporations are afforded the full free speech rights available to natural persons, then section 441b would likely be invalid, for the statute clearly restrains corporate speech.[183] However, granting such protections may pose significant dangers to natural persons' first amendment rights.[184] The Court in *Bellotti* established that any protected corporate political free speech rights must derive from the rights of the listening public to be exposed to a diversity of views.[185] The Colorado studies established that unlimited corporate political speech is likely to conflict with and subordinate the free speech right of natural persons.[186] These studies and policy re-evaluations as discussed above, demonstrate the necessity of establishing a hierarchy of free speech rights between corporate and natural persons.

Determining the constitutionality of section 441b necessitates consideration of two conflicting concerns. Corporate access to the political process assists in the security and continuity of corporate growth and investment;[187] however, unlimited access may lead to corporate domi-

178. *See supra* text accompanying notes 123-49.
179. *See supra* notes 115-22 and accompanying text; *infra* note 202 and accompanying text.
180. *See supra* text accompanying notes 150-56.
181. Applying either rationale would prompt resolution of a conflict between corporate and natural persons' free speech rights. Such a resolution involves subordinating the interests of one to the other by establishing a hierarchical valuation of corporate and natural persons' speech interests. However unlike the court's approach in *Weinsten*, this valuing, based on current public policy concerns, should be rooted in the framework established by the Court in *Bellotti*. 462 F. Supp. at 249-50; 435 U.S. at 776-80.
182. *See supra* notes 70-80 and accompanying text.
183. *See supra* text accompanying notes 2-4.
184. *See supra* text accompanying notes 145-48.
185. *See supra* notes 103-07 and accompanying text.
186. *See supra* notes 123-49 and accompanying text. *See also supra* note 120.
187. This proposition seems to be the premise for a number of the Court's decisions where constitutional protections were extended to corporations. *See supra* notes 77-80 and accompanying text. For example, depriving corporations access to the federal courts provides a vehicle for maintaining strength in corporate investments and promotes their growth. *See* Hessen, In Defense of the Corporation 110-11 (1979). In a more general vein, Hessen explains that corpo-

nation of the political process and the consequential decline in governmental effectiveness and legitimacy.[188]

The major reason asserted for providing full first amendment protection to corporate political speech is the need to sustain corporate input into matters of public concern.[189] As the American economy continues to become centralized,[190] an increasing number of economic, political and social decisions are made in state and federal legislative forums and by public elections and referenda.[191] These decisions often have a significant impact on the activities of large corporate enterprises.[192] Consistent with numerous court opinions, it is only equitable that persons making decisions affecting corporate revenues should be exposed to information supplied from persons with a corporate perspective. Thus, a total ban on direct corporate political contributions and expenditures seems unjust.[193] However, opposing considerations dilute the impact of this argument.

Corporate involvement in the electoral process frequently leads to

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rate economic development is often sustained by numerous types of government action. These include "subsidies, loan guarantees, protective tariffs, import quotas, and arbitrary licensing requirements." *Id.* He notes that "[t]hese restrictions can be created and sustained only by political power." *Id.* at 111. For one example of government support for corporate economic security, *see* 35 CONG. Q. ALMANAC 285-92 (1979), describing Congressional passage of a $3.5 billion aid package to the Chrysler Corporation.

188. *See supra* text accompanying notes 29-31, 145-49. Direct corporate access to the legislative political process now exists. Corporations are fee to "lobby" Congress in support or in opposition to any matter, within certain boundaries. 2 U.S.C. §§261-270 (1976). Commentators have claimed that such access often results in legislative decisions based solely on corporate goals. *See, e.g.*, Emerson, *The Petrodollar Connection*, THE NEW REPUBLIC, Feb. 17, 1982, at 18 (successful passage of A.W.A.C.s legislation resulted almost exclusively from corporate pressure on Congress).

189. For example, see Brief of Appellants at 42, *Bellotti*, 435 U.S. 765 (1978). Arguing that input by all corporations, not just media corporations, is essential to a democracy, the appellants noted: "A voter in Massachusetts, concerned with such economic issues as the tax rate, employment opportunities, and the ability to attract new business into the state, might be just as interested in hearing . . . [the banking corporation's] . . . views on a proposed . . . [tax] . . . as say the views of . . . the editorial staff of the *Boston Globe*." *Id.*

190. *See supra* note 23 and accompanying text; Samuelson, *Merger Mania*, NAT'L J., Nov. 28, 1981 at 2100, 2126.

191. *See* Clark, *The Public and the Private Sectors — The Old Distinctions Grow Fuzzy*, NAT'L J., Jan. 19, 1980 at 80, 98. Clark describes three "waves" of regulatory legislative periods in American history. By far the third era, from 1950 to the present, contributed the most to the wealth of current government regulations. Approximately twenty of the fifty-five current major regulatory agencies were born in the last twelve years. As a result of these three periods, government regulators increasingly make significant decisions impacting on business enterprises. *Id.* at 100. Regulatory-type decisions are also increasingly made in public referenda. *See* Shockley, *supra* note 120, at 173.

192. *See* Clark, *supra* note 191, at 99-100.

193. *See supra* note 189; Comment, *supra* note 110, at 106. This is the premise of the Meiklejohn theory as manifest in the commercial speech cases and in *Bellotti*. The public, to make a rational, fair and intelligent decision, must be exposed to all relevant views. See *supra* notes 34-37 & 103-107 and accompanying text. *See* Goss, *First National Bank of Boston v. Bellotti: The Reopening of the Corporate Mouth — The Corporation's Right to Speak*, 21 ARIZ. L. REV. 841, 49-54 (1979).

political corruption, a situation antithetical to a healthy government.[194] Section 441b was enacted to guarantee the responsiveness of elected officials to the public-at-large, and to protect the political system from corporate domination.[195] As mentioned earlier, if unrestrained, corporations have a tendency to make significant campaign contributions entailing *quid pro quos*. This is due in part to corporate access to large financial resources and the significant impact of government regulations on corporate operations.[196] Preferential treatment by government officials at the expense of individual natural citizens often results from unrestrained corporate participation.[197] The statute serves to curb this corrupting corporate influence in American politics.[198]

Equally necessary is the protection of the statute against perceived corporate domination of the legislative process. Congress and the courts have consistently recognized that the nation's strength stems from the public's belief in the legitimacy of its government.[199] As the Supreme Court has noted, disclosure of corporate domination of the political process seriously undermines the public's perception of governmental legitimacy.[200] Prohibiting corporate contributions thus enhances public faith in public officials, promotes the integrity of the electoral process, and sustains the interest of citizens in government.

Even legitimate corporate involvement tends to pollute the electoral system. The Colorado studies, discussed above, demonstrate that where corporate speech competes equally with the speech of natural persons, the corporate views will likely prevail.[201] This is but one example where unrestrained corporate involvement suffocates opposing views by effectively dominating the marketplace of political ideas.[202] Thus, where corporate and natural persons' right of speech conflict there is a tendency for corporations to emerge the victor.[203] The effect

194. *See supra* notes 24-31 & 150-162 and accompanying text.
195. *See supra* notes 21-31 and accompanying text.
196. *See supra* note 158 and accompanying text.
197. *Id.*
198. When enforced the statute prohibits direct corporate influence of elections, and negates this negative influence. See *supra* notes 186-190 and accompanying text.
199. *See supra* notes 29 & 31 and accompanying text.
200. *See supra* note 29 and accompanying text.
201. *See supra* notes 123-149 and accompanying text.
202. For additional evidence, see *supra* note 120. The Supreme Court was presented with such evidence in Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 441 (1982) (Marshall, J., concurring). *See supra* note 149. It is very possible that the Court would decide *Rent Control* or other cases concerning corporate campaign prohibitions differently if similar evidence was presented in an alternate fashion. *See id.* Justice Rehnquist appears to have voted against upholding the ordinance because it imposed restrictions on corporations as well as natural persons. 102 S. Ct. at 439 (Rehnquist, J., concurring); *see* 435 U.S. at 822-29.
Thus, the court seems willing to countenance statutes' prohibiting solely corporate campaign activities, if supported by a specific jurisdiction's evidence of corporate domination, or a similar legislative finding. *See* 102 S. Ct. 439-41; *supra* note 149.
203. *See supra* notes 123-149 and accompanying text.

of section 441b is to shield the public from this conflict and to promote the diversity of views available in election campaigns. Further, it protects against actual and perceived corruption, and guarantees the premier position of natural persons in society.

Other policy concerns may be considered in evaluating section 441b. The major argument supporting protected corporate political free speech rights is the necessity of providing access to corporate views.[204] However, this concern is met by the current law.[205] Although section 441b prohibits direct corporate political speech,[206] corporate employees and shareholders are not barred from making contributions or expenditures in any election.[207] Thus corporate views may still reach the political marketplace[208] and compete on a more equitable basis[209] with other natural persons.[210] Additionally, the status quo negates any possibility of subsidizing and amplifying the political views of corporate executives,[211] and prevents the use of corporate funds contrary to the wishes of shareholders.[212] Instead shareholder influence in political campaigns may be limited to private, personal contributions.[213]

These policies as well as contemporary legal literature reassert the

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204. *See supra* notes 189-193 and accompanying text.

205. 2 U.S.C. §441b (1976 & Supp. IV 1980).

206. *Id.* §441b(a).

207. *Id.* These individuals are free to contribute and make expenditures within the limits set by other campaign provisions. *See* 2 U.S.C. §441a (1976); 424 U.S. 1 (1976).

208. This is done by direct contributions from natural persons to political candidates representing "corporate" views, or by contributions from political action committees (PACs). *See supra* note 22. Clearly corporate influence in political elections is facilitated by PACs, a device provided for by current law. 2 U.S.C. §§441a, b(a)(4)-(7) (1976 & Supp. IV 1980). Individuals may be limited to $1,000 in direct political contributions to a particular candidate over the course of a primary, runoff and general election. 2 U.S.C. §441a (1976). However, PACs can contribute $5,000 to a candidate per election, or make unlimited independent expenditures in non-presidential elections so long as they remain independent and uncoordinated with the candidate's campaign staff. 2 U.S.C. §441a (1976 & Supp. IV, 1980). *See* Cohen, *Congressional Democrates Beware — Here Comes the Corporate Pacs*, NAT'L J., Aug. 9, 1980 at 1304, 1306-08. PACs are used not only by corporations but also by unions, trade associations and organizations. *See id.* at 1304-08.

209. Arguably, the higher contribution limitations from PACs seems to dilute the impact of individuals' direct contributions. *See* Cohen, *supra* note 208.

210. Dissenting in *Bellotti*, Justice Rehnquist noted that the effect of the Massachusetts statute should be put in its proper perspective: "All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity." 435 U.S. at 828.

211. *Cf.* Ash v. Cort, 350 F. Supp. 227, 231-33 (E.D. Pa. 1972), *aff'd* 471 F.2d 811 (3d Cir. 1973), *rev'd on rehearing* 496 F.2d 416 (3d Cir. 1974), *rev'd* 422 U.S. 66 (1975) (corporate executive's use of corporate funds to promote "non-partisan" political views). Section 441b prevents corporate executives from using corporate assets to promote their own political views. *See* Cammarano v. U.S. 358 U.S. 498, 499-500, 512-13 (1959).

212. *See* Nicholson, *supra* note 8, at 999-1008; Goss, *supra* note 193, at 859-61; 435 U.S. at 792-93; *supra* note 167.

213. Of course they may attempt to gain greater influence by contributing to political action committees. *See supra* notes 208-210. However corporate assets themselves are not permitted to be contributed to political elections. 2 U.S.C. §441a (1976 & Supp. IV 1980). *See generally* Patton, *supra* note 8, at 502-08.

theme of the superiority of natural persons' free speech rights.[214] For example, disagreement exists on the subject of the source of corporate power, and the propriety of governmental control of it.[215] Proponents of strong control[216] argue that incorporation is a privilege providing the recipient numerous benefits.[217] Yet the tremendous powers that result from these benefits demand strict government controls to insure the protection of the public.[218] Opponents argue that the general incorporation statutes of most states[219] virtually guarantee corporate status to any group or individual.[220] Consequently, incorporation is seen as a private event between individuals, with the proper state role being a very limited one.[221] Although these two views differ significantly in their conceptions of corporate power, they do agree on one proposition: the function of corporate entities is not to promote the corporation *per se*, but to enhance economic development and the well-being of natural persons in society.[222]

The supremacy of natural persons' well-being has been recognized, as well, whenever the Court has granted constitutional protection to corporate entities. Such rights have been extended when necessary to promote corporate health for the ultimate benefit of natural persons, the general citizenry.[223] Although different theories have been advanced for supporting first amendment rights,[224] they all stem from a common conception that any speech, to be protected, must promote the stability of the political system for the benefit of natural persons.[225]

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214. *See generally* Hessen, *supra* note 187; Nader, *supra* note 15.

215. This disagreement is manifest in the debate between Hessen and Nader on Nader's proposal for federal chartering of certain corporations. *Compare* Hessen, *supra* note 187, at 105-15 (this plan would result in subordination of all individuals to the statute), *with* Nader, *supra* note 15, at 75-197 (federally chartering would provide an equitable use of corporate power).

216. Nader's proposal for federal chartering, as well as some state incorporation statutes are a manifestation of this view. *See, e.g.*, CAL. CORP. CODE §2155 (imposes regulations on foreign corporations if at least fifty percent of corporation's business is transacted within California).

217. This has been called the "concession theory" of incorporation. *See* Hessen, *supra* note 187, at 1-11; Nader, *supra* note 15, at 67-71; Ratner, *supra* note 8, at 19-21. *See* Cook v. J.I. Case Plow Works Co., 85 Fla. 421, 96 So. 292 (1923).

218. Among others, these include the privilege of limited liability, perpetual existence, use of the corporate name to sue and be sued, and potential tax advantages for shareholders. *See* HAMILTON, CORPORATIONS 9-16 (1981); HENN, *supra* note 15, at 344-56.

219. A general incorporation statute requires the fulfillment of only a minimal number of steps as a condition precedent to incorporation. *See, e.g.*, FLA. STAT. §§607.161-167 (1981). *See* HENN, *supra* note 15, at 20-22 (development of general incorporation statutes by state).

220. Reported cases are both rare and unusual where incorporation has been denied, after following the required provisions of the incorporation statute. *See* State *ex rel.* Grant v. Brown, 39 Ohio St. 2d 112, 313 N.E.2d 847 (1974) (court upheld Secretary of State discretionary power to withhold incorporation from homosexual organization).

221. *See* Hessen, *supra* note 187, at 9-33.

222. *Compare* Hessen, *supra* note 187, at 111-51 *with* Nader, *supra* note 15, at 252-55.

223. See *supra* note 76-80 and accompanying text.

224. See *supra* notse 34-39 and accompanying text.

225. *Compare* MEIKLEJOHN, FREE SPEECH, *supra* note 34 at 92-107 *with supra* note 38. At the core of both theories is the view that the system of free speech is aimed at advancing society for the benefit of natural individuals.

CONCLUSION

Bellotti establishes the major focus for analyzing corporate political free speech. According to the Court, any protections corporations may receive flow directly from the right of the listening public to a wide diversity of political views. This approach, however, created a major problem—the ability of corporations to dominate political discussion. As well-financed corporate speech enters the political marketplace, the relative impact of natural persons' speech becomes *de minimis*. Resolution of this conflict, as well as the goal of sustaining a corruption-free political environment, can only be achieved by determining the level of constitutional protection to be afforded natural and corporate persons. The Supreme Court has not directly addressed this issue. However, corporate entities have been granted other constitutional rights only when it would benefit the interests of natural persons. A similar approach should be employed regarding corporate political free speech rights.

The ultimate issue is whether the political free speech rights of natural persons are superior to those of corporations. Upon balancing these competing interests, it becomes evident that natural persons would best benefit by the Court upholding the constitutionality of the statute. This decision would reassert natural persons' superior position in the legal system, and consequently strengthen the foundation of the political process.