COMMENTS

The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures

On July 7, 1973, American Airlines President George Spater became the first corporate executive to admit that he had authorized a contribution from corporate funds to the reelection campaign of President Nixon.¹ This and several other subsequently revealed corporate contributions² were made in violation of section 610 of title 18 of the United States Code,³ the Federal Corrupt Practices Act's prohibition against political contributions⁴ by corporations or labor unions to candidates for federal office.⁵ Most of the corporations and corporate executives responsible for the contributions pleaded guilty to violating the Act.⁶

No reported convictions for illegal contributions had been obtained from the time the first ban on corporate contributions was enacted in 1907⁷ until the recent guilty pleas. The Supreme Court has always construed the statute to avoid the constitutional questions it raises,⁸ but a reexamination of the constitutionality of the

1. N.Y. Times, July 8, 1973, at 1, col. 7 (city ed.).

2. See, e.g., *id.*, Aug. 11, 1973, at 10, col. 5 (city ed.).

3. The relevant provisions of section 610 are set out in text at note 18 *infra*.

4. Throughout this comment, textual discussion will refer primarily to corporate and union contributions rather than contributions and expenditures. The analysis applies to expenditures as well. *But cf.* text and notes at notes 28-29 *infra*.

5. Throughout this comment, "the Act" will be used interchangeably with "section 610" to refer to the prohibition against contributions and expenditures by corporations and unions in federal elections.

6. N.Y. Times, Oct. 18, 1973, at 1, col. 1 (city ed.). Sixteen corporations eventually pleaded guilty to making illegal contributions. TIME, Oct. 14, 1974, at 16. In addition, a former president of the United Mine Workers was recently convicted under the Act. *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1972), *cert. denied*, 414 U.S. 1076 (1973).

7. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864.

8. The Supreme Court first considered the Federal Corrupt Practices Act in *United States v. CIO*, 335 U.S. 106 (1948), one year after the Act had been amended by the Labor Management Relations Act (Taft-Hartley Act), ch. 120 § 304, 61 Stat. 159 (1947), *as amended*, 18 U.S.C. § 610 (Supp. II, 1972), to cover unions as well as corporations. The union had, in open defiance of the Act, expended funds from its treasury to publish an issue of its periodical featuring a front page editorial urging members to vote for a particular candidate. The Court avoided the constitutional issue by ruling that there was no violation of the Act since Congress could not have intended to prohibit such activity. 335 U.S. at 122-24.

Act⁹ is appropriate in light of these convictions.

This comment first examines the framework and legislative purpose of section 610. It then evaluates the Act under the first amendment and the equal protection guarantee of the fifth amendment,¹⁰ and concludes that section 610 is unconstitutional under both amendments.

I. STATUTORY FRAMEWORK

In 1907, in response to claims that corporations were able to exert excessive political influence by contributing large sums to political parties and individual candidates, Congress enacted a statute prohibiting any corporation from making "a money contribution in connection with any election at which Presidential or Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator."¹¹ Congress sought primarily to curb the undue influence of corporations in the electoral process, and secondarily to protect shareholders who disagreed with corporate policy on political expenditures.¹² The statute was strengthened in 1925 with the

In the second case to reach the Supreme Court, *United States v. UAW*, 352 U.S. 567 (1957), the government alleged that funds derived from union dues had been used to pay for television broadcasts supporting certain congressional candidates—precisely the type of activity the Act sought to eliminate. The Court held that the allegations stated an offense under the Act but declined to rule on the constitutional questions until the case was tried on its merits. *Id.* at 591-92. The union was acquitted after remand. See Lane, *Analysis of the Federal Law Governing Political Expenditures by Labor Unions*, 9 LAB. L.J. 725, 732-35 (1958). Finally, in *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972), the Court acknowledged the presence of the constitutional issues, but expressly declined to decide them, and instead based its decision on statutory construction. *Id.* at 400. The constitutional questions have again been presented in *Ash v. Cort*, 471 F.2d 811 (3d Cir. 1973), *cert. granted*, 95 S. Ct. 302 (1974). See Brief for Petitioners at 61-74. The case also presents the question whether a private right of action is implied by section 610. *Id.* at 20-45.

9. For earlier commentary on the Act, see Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U.L. REV. 1033 (1965); Redish, *Reflections on Federal Regulation of Corporate Political Activity*, 21 J. PUB. L. 339 (1972); Comment, *Of Politics, Pipefitters and Section 610: Union Political Contributions in Modern Context*, 51 TEXAS L. REV. 935 (1973). See also Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N. CAR. L. REV. 389 (1973); King, *Corporate Political Spending and the First Amendment*, 23 U. PITT. L. REV. 847 (1962); Comment, *First Amendment—Corporate Freedom of Speech*, 7 SUFFOLK U.L. REV. 1117 (1973).

10. The equal protection clause of the fourteenth amendment applies only to the states, but the Supreme Court has held that the same standard of equal protection is required of the federal government under the due process clause of the fifth amendment. *Frontiero v. Richardson*, 411 U.S. 677, 680 & n.5 (1973); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

11. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. For a discussion of the historical background to the 1907 Act see Lambert, *supra* note 9, at 1035-37.

12. See 40 CONG. REC. 96 (1905); 41 CONG. REC. 1451-55 (1907). See also *United States v. CIO*, 335 U.S. 106, 113 (1948).

enactment of the Federal Corrupt Practices Act,¹³ which, among other changes,¹⁴ broadened the scope of prohibited behavior.¹⁵ In 1947, the Taft-Hartley Act extended the coverage of the Federal Corrupt Practices Act to contributions by labor unions.¹⁶ Congress's intention again was to curb undue influence and to protect dissenting union members.¹⁷

Thus, after these various amendments, section 610 made it unlawful

For any corporation . . . 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 . . . Congress are to be voted for . . . or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.¹⁸

Beginning with *United States v. UAW*¹⁹ in 1957, judicial interpretation of the purpose of the Act began to shift from primary concern for undue influence to primary concern for dissenting minorities. In that case, the Supreme Court thought it necessary to remand for trial rather than decide the case, even though the union had indisputably made expenditures for campaign purposes. The

13. Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070, *as amended*, Pub. L. No. 92-225, §§ 201-406, 86 Stat. 3 (1971) (codified in scattered sections of 2, 18 U.S.C.). There had been several unsuccessful attempts in 1909 to extend coverage of the Act by broadening the definition of contribution and by including election of state legislators. See Lambert, *supra* note 9, at 1037 n.20.

14. The 1925 Act also extended the ban on contributions to the election of Delegates and Resident Commissioners to Congress and prohibited candidates and political committees from accepting contributions proscribed by the Act. Federal Corrupt Practices Act of 1925, ch. 368, § 313, 43 Stat. 1074, *as amended*, 18 U.S.C. § 610 (1972). See Lambert, *supra* note 9, at 1037 n. 21; Comment, *Control of Corporate and Union Political Expenditures: A Constitutional Analysis*, 27 FORDHAM L. REV. 599, 602 (1959) [hereinafter cited as FORDHAM COMMENT].

15. The 1925 Act changed the prohibition from "money contribution" to "contribution," which it defined to include "a gift, subscription, loan, advance, or deposit of money, or anything of value, and . . . a contract, promise, or agreement, whether or not legally enforceable, to make a contribution." Federal Corrupt Practices Act of 1925, ch. 368, § 302(d), 43 Stat. 1071.

16. Labor Management Relations Act (Taft-Hartley Act), ch. 120, § 304, 61 Stat. 159 (1947), *as amended*, 18 U.S.C. § 610 (Supp. II, 1972). Coverage was also extended to expenditures as well as contributions. *Id.* The Act's coverage had been temporarily extended to unions in 1943 by the War Labor Disputes Act (Smith-Connally Act), 57 Stat. 163, 167-68 (1943), which by its terms expired six months after cessation of hostilities.

17. 93 CONG. REC. 3425, 6436-41, 6446-48, 6522-24, 7492 (1947).

18. 18 U.S.C. § 610 (1970), *as amended*, 18 U.S.C. § 610 (Supp. II 1972).

19. 352 U.S. 567 (1957). *But see* *United States v. CIO*, 335 U.S. 106 (1948) (Rutledge, Black, Douglas, and Murphy, JJ., concurring), which emphasized protection of dissenting union members as the primary purpose of the 1947 amendments. *Id.* at 137-39.

Court directed the trial court to determine, among other things, whether the contributed funds had been raised through voluntary donations.²⁰

Prior to the Supreme Court's next encounter with section 610, Congress amended the Act explicitly to allow the use of contributions from a separate, segregated, and voluntarily raised fund. The amendment excluded from the definition of "contribution"²¹

communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or a labor organization . . .²²

In *Pipefitters Local 562 v. United States*,²³ the Court noted that the sponsors of the 1972 amendment had viewed their proposal as merely codifying and clarifying the Court's earlier interpretation of the Act.²⁴ Quoting extensively from the congressional debate of the Taft-Hartley Act,²⁵ the Court concluded that the primary purpose of section 610 as amended was protection of minority interests.²⁶ In fact, after the 1972 amendment, protection

20. Justice Frankfurter, writing for the Court, listed four factual questions that needed to be answered before the constitutional questions could be considered:

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

Did the union sponsor the broadcast with the intent to affect the results of the election? 352 U.S. at 592. The Court's emphasis, however, was not explicit enough to assure a consistent interpretation of the Act by the lower courts. In 1966, the Court of Appeals for the Ninth Circuit rejected the contention that there would be no section 610 violation if the shareholders had consented to the contribution. *United States v. Lewis Food Co.*, 366 F.2d 710, 713 (9th Cir. 1966).

21. The general definition is found in 18 U.S.C. § 591(e) (1970), *as amended*, Pub. L. No. 93-443, § 102(c) (Oct. 15, 1974), 43 U.S.L.W. 81 (Nov. 19, 1974).

22. Federal Election Campaign Act § 205, 18 U.S.C. § 610 (Supp. II, 1972), *amending* 18 U.S.C. § 610 (1970). The amendment includes the proviso

That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

23. 407 U.S. 385 (1972).

24. *Id.* at 410-11; *see* 117 CONG. REC. 43379 (1971); *cf. id.* at 43388-89.

25. 407 U.S. at 401-09.

26. *Id.* at 414-15. The Court indicated that its reasoning would be applicable to corporate as well as union contributions. *Id.* at 415 n.28.

against undue influence could not be considered even a secondary purpose of section 610, since the amendment permitted both unlimited political campaigning directed at members or shareholders when funded out of the organizations' general treasuries and unlimited political campaigning directed at the public if the source of the funds was voluntary.

The Federal Election Campaign Act Amendments of 1974²⁷ reinforce this conclusion. Those Amendments limit the amounts that may be contributed in federal elections by any person, including legal contributions by corporations and unions,²⁸ and thus operate specifically and comprehensively to prevent excessive influence. The attempt to do so through section 610's partial prohibition is effectively preempted by these Amendments. Although this prohibition limits voluntary fund contributions to the same degree as those made by any other political committee, it specifically exempts the expenditures by unions that were permitted by the 1972 amendment to section 610.²⁹ Thus, unions and corporations may still spend large sums of money on campaigning aimed at their own members or shareholders. The sole remaining purpose of section 610, then, is to protect dissenting union members and shareholders from forced contributions to candidates other than those they voluntarily choose to support.³⁰

The constitutionality of section 610, in light of this legislative background, may be considered in three separate aspects: first, whether section 610's regulation of campaign finance to protect dissenting members, or "captive speakers," abridges first amendment freedoms of unions and corporations; second, whether its protection only of captive political speakers and not of other captive speakers burdens the political speech of corporations and unions selectively, and thus involves content regulation in violation of the first and fifth amendments; and third, whether the protection only of corporate and union captive political speakers rather than captive political speakers in all economic associations violates the fifth amendment. Part II of this comment addresses

27. Pub. L. No. 93-443 (Oct. 15, 1974), 43 U.S.L.W. 79 (Nov. 19, 1974).

28. 18 U.S.C. § 608(b)(1), *as amended by* Pub. L. No. 93-443, § 101(a) (Oct. 15, 1974), 43 U.S.L.W. 79 (Nov. 19, 1974) (contributions limited to \$1,000 per candidate per year). *See* 18 U.S.C. § 591 (1970) (definition of "person").

29. 18 U.S.C. § 608(e)(2)(B), *as amended by* Pub. L. No. 93-443, § 101(a) (Oct. 15, 1974), 43 U.S.L.W. 80 (Nov. 19, 1974).

30. *See* *United States v. Boyle*, 482 F.2d 755, 761, 762 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973). *But see* *Ash v. Cort*, 350 F. Supp. 227, 231 (E.D. Pa. 1972), *aff'd*, 471 F.2d 811 (3d Cir. 1973), *cert. granted*, 95 S. Ct. 302 (1974).

the first issue, which involves the validity of the general regulation of contributions to protect captive speakers. Part III addresses the second and third, which involve the validity of selective regulation of classes of speech and classes of speakers.

II. REGULATION OF CONTRIBUTIONS TO PROTECT CAPTIVE POLITICAL SPEAKERS

All campaign finance regulations³¹ "impinge upon freedom of expression; the issue is whether they 'abridge' it."³² These regulations may be upheld only if the legislation furthers a substantial governmental interest that outweighs the incidental interference with first amendment freedoms, and no less restrictive alternative exists.³³ Section 610's constitutionality is thus a function of the nature of the first amendment interests of corporations and unions, the availability of less restrictive alternatives that achieve the legislative purpose of the Act to the same extent, and a balancing of the impingement of first amendment freedoms against the government's interest in protecting captive speakers.

A. First Amendment Interests of Unions and Corporations in Making Campaign Contributions

Political expression is foremost among the activities protected by the first amendment.³⁴ Any prohibition of political expenditures made by or on behalf of candidates would at least raise the question of an unconstitutional infringement of protected speech activity, since such expenditures are necessary if a candidate is to speak to the electorate.³⁵ Similarly, a prohibition of contributions

31. Regulation of campaign finance may be of five types: limitation of total expenditures; limitation of the amount contributed by any one source; disclosure of the source of campaign funds; limitation on expenditures for particular types of media; and prohibitions of contributions by certain groups. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 635 (1970).

32. *Id.* See also *United States v. Boyle*, 482 F.2d 755, 763 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

33. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49-51 (1961); *Barenblatt v. United States*, 360 U.S. 109, 126-27, 134 (1959); T. EMERSON, *supra* note 31, at 634; *cf.* *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

34. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). See Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191.

35. See Ferman, *Congressional Controls on Campaign Financing: An Expansion or Contraction of the First Amendment?* 22 AM. U.L. REV. 1, 12 (1972); *cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *United States v. UAW*, 353 U.S. 367, 394 (1957) (Douglas, J., dissenting).

to candidates impinges upon protected speech activity,³⁶ since contributions and expenditures are the primary means by which individuals can effectuate their support of political candidates and political positions. It would be anomalous to maintain that parading in support of a candidate constitutes activity protected by the first amendment³⁷ but that making contributions in support of a candidate does not. Moreover, a prohibition on contributions by groups would interfere with the right of political contributors to associate with each other in support of particular candidates.³⁸

The courts have long recognized that union activity and public discussion of labor disputes are protected by the first amendment,³⁹ and this protection extends to union organizing, even though it occurs in a business or economic context.⁴⁰ A union's political speech activity in the form of campaign contributions should thus receive even stronger first amendment protection.⁴¹

Union speech is protected not only because of the first amendment rights of unions *qua* unions, but also because of the associational rights of the union members. The Supreme Court first articulated the concept of a constitutional "right of association" in *NAACP v. Alabama ex rel. Patterson*,⁴² deriving it from the enumerated first amendment freedoms of speech and assembly.⁴³ In the political context, this guarantee of freedom of association protects the right of union members both to express their point of view and to support their position financially.⁴⁴ Since union support of platforms and candidates favorable to labor is a natural adjunct of

36. See *Ex parte Curtis*, 106 U.S. 371, 376-77 (1882) (Bradley, J., dissenting); Ferman, *supra* note 35; Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U. PA. L. REV. 1609, 1629-32 (1974).

37. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969).

38. Constitutional protection of freedom of association for individual union members is discussed in the text and notes at notes 42-45 *infra*.

39. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 531-32 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940); *Senn v. Tile Layers*, 301 U.S. 468, 478 (1937).

40. In *Thomas v. Collins*, 323 U.S. 516, 531 (1945), the Supreme Court ruled that the organizing activities of a union and its president, even though aimed at the economic advancement of workers and not at the electoral process, were protected speech activity.

41. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); Kalven, *supra* note 34.

42. 357 U.S. 449 (1958). The concept was foreshadowed in *De Jonge v. Oregon*, 299 U.S. 353, 364-66 (1937). See T. EMERSON, *supra* note 31, at 425.

43. T. EMERSON, *supra* note 31, at 430.

44. The concept of freedom of association was used to protect union activity in *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964). See also *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

other union activities,⁴⁵ the ban on union political contributions and expenditures conflicts with the associational rights of union members by preventing them from supporting candidates collectively through the union.

Although section 610 does allow union members to promote common political interests by voluntarily contributing to a separate segregated fund,⁴⁶ the Act creates a free rider situation by preventing union members from spreading campaign contributions among all members who benefit from it. A union member may rationally decline to contribute even if he agrees that the election of a particular candidate is in his interest, because he may be convinced that others will contribute an amount sufficient to assure both the candidate's election and appropriate behavior by the candidate once in office.⁴⁷ This disincentive inhibits the ability of union members to associate in the expression of their political preferences through financial support.⁴⁸

Although not all constitutional guarantees of liberty apply to corporations,⁴⁹ the first amendment protection of freedom of speech extends to corporations as well as to natural persons.⁵⁰ A corporation may also assert the first amendment rights of its mem-

45. See, e.g., Address by Floyd E. Smith, President of the Machinists Union, *quoted in* 31 CONG. Q. REP. 644 (1973).

46. See Federal Election Campaign Act § 205, 18 U.S.C. § 610 (Supp. II, 1972), *amending* 18 U.S.C. § 610 (1970).

47. There are other factors that operate against the free rider disincentive, one of which is probably peer pressure or covert coercion. *Cf.* Pipefitters Local 562 v. United States, 407 U.S. 385, 392-93 (1972). Another may be that many union members do not view their union in strictly economic terms; a member's contribution to a union fund would yield the same type of altruistic return received by general contributors to political campaigns. In a recent article, George Stigler analyzes the circumstances favorable to collective action in an attempt to explain "why there are innumerable operating and presumably not wholly ineffective collective bodies" Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL J. ECON. MGMT. SCI. 359 (1974).

The absence of a significant free rider problem in collecting regular union dues can be attributed to the fact that that activity is not subject to restrictions like those in the final proviso of section 610. See note 22 *supra*. The payment of union dues is often a condition of employment under union security agreements, and in the absence of a union security agreement, the union may induce the payment of dues through attractive benefit plans and other incentives.

48. This interference with associational rights is an indirect effect of the free rider problem rather than a necessary effect of the statute itself; but the statute in conjunction with the disincentive produces an interference with free expression in the nature of a "chilling effect."

49. See, e.g., *Western Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907).

50. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Lambert*, *supra* note 9, at 1060-63; *King*, *supra* note 9, at 854-61; FORDHAM COMMENT, *supra* note 14, at 604-06; Comment, *Problems in Corporate and Union Spending in Federal Elections*, 31 ROCKY MT. L. REV.

bers in their corporate activity.⁵¹ The interests of corporations in engaging in political speech through campaign contributions, like the interest of unions, may be grounded in purely economic purposes; contributions to candidates who support policies beneficial to the corporation may well be a legitimate expenditure promoting corporate goals.⁵²

B. Alternative Legislative Means

The next step in the first amendment analysis is to determine whether other legislation could have been enacted that would equally advance the government's purpose—the protection of dissenting union members and shareholders from forced contribution—while interfering with first amendment interests to a lesser extent.⁵³ This “less drastic means” approach would require invalidation of the challenged statute without necessitating a reexamination of Congress's conclusion that a particular governmental interest is more important than the first amendment interest with which the statute interferes.⁵⁴ Consideration of alternative, less restrictive legislation achieving the same ends is particularly ap-

370, 378-79 (1959). *Contra*, Rauh, *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152, 162 n.49 (1961). See also Hague v. CIO, 307 U.S. 496, 514 (1939); Hemphill v. Orloff, 277 U.S. 537, 548-50 (1928).

51. In NAACP v. Button, 371 U.S. 415 (1963), the Supreme Court upheld the right of the NAACP, a membership corporation, to raise first amendment claims both on its own behalf and on behalf of its members. See also NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 548-59 (1958). Although the NAACP is a special type of corporation, the for-profit corporation's political contribution can also be conceptualized as associational activity in the form of a joint political contribution by shareholders who are foregoing dividends. By requiring that the contribution be made out of a separate, segregated fund, the Act creates a free rider situation similar to the one discouraging union contributions. This interpretation of corporate contributions would add additional weight to the established first amendment interests of the corporation *qua* corporation, but its acceptance is not essential to the analysis in this comment.

52. The contribution's purpose must be within the limits of corporate powers. If it is merely an expression of the personal preferences of the corporation's management, the donation would be ultra vires, and stockholder remedies for corporate waste would be available. Whether a donation serves a legitimate corporate purpose should, as in the case of charitable contributions, be broadly construed. See A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 98 A.2d 581, *appeal dismissed*, 346 U.S. 861 (1953); Annot., 39 A.L.R.2d 1192 (1955).

53. United States v. Robel, 389 U.S. 158, 264-68 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). See Lamont v. Postmaster Gen., 381 U.S. 301, 310 (1965) (Brennan, J., concurring); United States v. Boyle, 482 F.2d 755, 763 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973). See generally Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969) [hereinafter cited as *Less Drastic Means*].

54. The court need not specify alternative legislation that would serve the government's purpose in order to invalidate a statute. United States v. Robel, 389 U.S. 258 (1967). See Gunther, *Reflections on Robel: It's Not What the Court Did, But the Way That It Did It*, 20 STAN. L. REV. 1140 (1968), for a critique of this approach.

propriate in this situation because the primary purpose originally served by the Act, curbing undue influence, has been eliminated by judicial interpretation and legislative amendment.⁵⁵ Since only one of two very different original interests remains, new and potentially less restrictive alternatives become available.

1. *Notice of Political Activity.* Dissenting shareholders could be protected by a system requiring notice to potential investors of a corporation's policy on political contributions. This could be accomplished by including past and projected contribution policies in prospectuses and annual reports,⁵⁶ thus allowing individuals to consider those policies in making investment decisions. If an investor objected to a particular corporation's policy, he could simply invest in another corporation.

Even though making political contributions is apparently important to many corporations,⁵⁷ market forces would cause some nonpolitical investments to be maintained. If investors were to seek more nonpolitical investments than were available, some corporations would alter their policies to tap this unexhausted source of capital. The decision to shift would be based on a determination that the net benefit to be derived from this additional capital exceeds the net benefit of political participation.⁵⁸

But a notice system fails to qualify as a less drastic means of protecting the dissenting stockholders for two reasons. First, it might reduce the number of investments acceptable to an investor. Although corporate securities are somewhat interchangeable, they are not fungible. The notice system could force the investor to choose between an otherwise optimal investment and his political principles, a dilemma the Act seeks to prevent. The second problem would arise in the transition from the current system to a notice system. Rather than merely choosing among new investment opportunities, current shareholders who object to political contributions made subsequent to the adoption of this alternative scheme would have to sell their investments, subjecting their appreciated value to capital gains taxes.

Although the notice system provides corporations with the op-

55. See text and notes at notes 11-30 *supra*.

56. The corporation could be required to indicate whether it makes political contributions and to whom it had contributed in recent years.

57. This is evidenced by the willingness of corporations to risk criminal penalties, see text and notes at notes 1-6 *supra*; H. ALEXANDER, *POLITICAL FINANCING* 25 (1972); cf. 117 CONG. REC. 29327 (1971) (remarks of Senator Gravel).

58. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 4-6 (1973).

portunity to contribute free of the burdens inherent in the voluntary contribution system, it may cause some corporations to forego all contributions to attract needed capital. It may therefore be more restrictive of first amendment rights than a voluntary contribution system, which would allow continued contributions in reduced amounts. But even if it were less restrictive of the corporation's first amendment rights, the notice scheme is not a comparable alternative to section 610, because it would fail to provide investors who object to political contributions with an equal choice of investment opportunities, and would thus not protect minority interests to the same extent as section 610. Therefore, it cannot be considered a less restrictive alternative to the voluntary contribution system.

Moreover, the notice alternative is completely inadequate in the case of unions. Although an investor can choose among at least substantially similar alternatives, a worker entering the labor force faces a more restricted choice. There are relatively few suitable employment opportunities open to a worker, since there may be wide variation in wages and benefits among the available opportunities. Thus, the notice scheme offers little relief from pressure either to contribute or to switch to a less attractive position, and is not a less restrictive alternative to section 610.

2. *Rebates to Objecting Members or Shareholders. Machinists v. Street*⁵⁹ suggests a second alternative reconciliation of the competing interests.⁶⁰ In that case, the Supreme Court ruled that the voluntariness interest of union members was adequately protected by a system that permitted a dissenting union member to request a pro rata rebate for his share of political contributions while reducing the union's contribution by the amount of the rebate.⁶¹ A similar rebate scheme could be designed for corporations; stockholders who do not wish to participate in corporate political contributions could request a pro rata rebate in the form of a special dividend.

If the administrative costs of this system are less than those involved in a system of voluntary individual contributions, the burden upon the exercise of the corporation's or union's first amendment rights would be partially alleviated. Strong disincentives to

59. 367 U.S. 740 (1961).

60. The case did not arise under the Federal Corrupt Practices Act, because the contributions were not to federal candidates. See also *Railway Clerks v. Allen*, 373 U.S. 113 (1963).

61. But see *United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir.), cert. denied, 414 U.S. 1076 (1973) (similar scheme found not to be a less restrictive alternative).

potential contributors, however, would still exist because of the free rider problem.⁶² Consequently, the rebate system would not be a less restrictive alternative.⁶³

C. Balancing the Interests

Because section 610 serves a legitimate legislative purpose, and because any alternative form of legislation that would further that interest to an equal extent is no less restrictive of first amendment activities, the constitutionality of section 610 can only be determined by weighing the governmental interests served by the statute against the first amendment interests it infringes.⁶⁴ This balancing process is highly subjective, and the outcome is rarely obvious. But careful identification of the interests at stake and their social importance can at least clarify the analysis.

1. *The First Amendment Interests.* On the first amendment side of the balance are the interests of unions in making political contributions and expenditures, both in their own right and as an expression of the association of their members,⁶⁵ and the interests of corporations in making political contributions in their own right.⁶⁶ Their interests under the first amendment are in making contributions to the maximum extent allowed by a majority of their members, and at least to the extent of the amounts that would have been contributed by that majority,⁶⁷ undiminished by the free rider effect. Since these contributions enable corporations and unions to express individual political views, any restriction of them must be justified by a heavy governmental interest.

62. It is possible, however, that fewer members and shareholders would request rebates than would have refrained from contributing under a voluntary fund system, because an affirmative act is required to obtain a rebate while mere acquiescence is sufficient to refrain under the present system. It is difficult to predict whether this additional affirmative act would result in significantly fewer free riders. *But cf.* Comment, *Regulation of Labor's Political Contributions and Expenditures: The British and American Experience*, 19 U. CHI. L. REV. 371, 382-84 (1952).

63. A modified version of the rebate scheme may already be legal under section 610. Arguably, a corporation is free to set up a separate account for political contributions, notify shareholders of a dividend, and give shareholders the option to have their dividend checks paid directly to that account. A union could set up a similar rebate scheme. If legal under the statute, these schemes could not be considered less restrictive alternatives.

64. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

65. See text and notes at notes 39-45 *supra*.

66. There may also be a first amendment interest based on the association of their stockholders. See text and notes at notes 49-52 *supra*.

67. The 1974 Amendments to the Federal Election Campaign Act, Pub. L. No. 93-433, §§ 101 *et seq.* (Oct. 15, 1974), 43 U.S.L.W. 79 (Nov. 19, 1974), place restrictions on annual

The interest of society in facilitating and maximizing the dissemination of political information is also on the first amendment side of the balance.⁶⁸ Above all else, the first amendment was meant to protect open and untrammelled political expression.⁶⁹ To the extent that a campaign fails to generate sufficient information for the voters to make informed judgments, the effectiveness of the self-government process is diminished.⁷⁰ This public interest in receiving the information must be weighed in addition to the interests of the speakers in communicating.

2. *The Governmental Interest.* Section 610 was intended to protect shareholders and union members from being compelled to choose between supporting a candidate whom they do not favor and relinquishing a preferred investment or job. This captive speaker interest,⁷¹ although not strictly a constitutional interest,⁷² nevertheless is reinforced by the policies protecting free expression.

Determining the numbers of union members and shareholders who are captive speakers would help in defining the scope of the interest, since all members and shareholders who choose not to donate to voluntary funds are not captive speakers within the objectives of the Act. Those opposing political contributions comprise three subgroups: persons who believe that the contribution will not benefit the organization; persons who choose to be free riders; and persons who object as a matter of principle to the contribution. Section 610 was not intended to protect members of the first subgroup. Corporations and unions operate under the principle that the majority has the power to make binding decisions and that the expense of these decisions is shared by all members of the group. A shareholder or member who believes that a political expenditure is a misallocation of funds is in the same position as one

levels of corporate and union voluntary fund expenditures and contributions. Therefore, although the Amendments also restrict the level of individual contributions and expenditures, shareholders and members will not be able to route their customary contributions through the voluntary funds, thereby inflating the amounts contributed by such funds to artificial levels. See text and notes at notes 28-29 *supra*.

68. *Barenblatt v. United States*, 360 U.S. 109, 144 (1959) (Black, J., dissenting); Brennan, *The Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18 (1965).

69. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); Kalven, *supra* note 34.

70. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257.

71. Cf. *Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

72. The parties compelling the captive speaker are unions and corporations, not the government; compulsion without state action is not covered by the first amendment. Cf. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Amalgamated Food Empl. Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).

who objects to any other expenditure. Nor did Congress intend that section 610 should protect an individual in the second subgroup, namely one who agrees with the judgment of the majority, approves of the selected candidate, and benefits from the expenditure.⁷³ The number of individuals who fall into the third group, true dissenters, may in fact be fairly small. If so, the weight of this interest of the state in the balancing process may be considerably diminished.⁷⁴

The existence of alternative forms of legislation that would infringe the first amendment interests of unions and corporations and their consenting members to a lesser degree but protect the interests of the dissenting members and shareholders to almost as great a degree also weighs in the balance. The courts may determine that the extra increment of protection provided by the existing statute over that available under an alternative method is outweighed by its concomitantly greater interference with first amendment interests.⁷⁵ Thus the notice and rebate alternatives, though flawed, should also be considered in the balancing.

The final balancing of interests is difficult, even when the interests have been carefully identified. But consideration of the competing interests suggests that section 610 violates the first amendment; given the special role that political expression plays within the scope of the first amendment, section 610's infringement of the interests of corporations and unions cannot be justified by its sole remaining purpose.

III. SELECTIVE REGULATION OF CLASSES OF SPEECH AND CLASSES OF SPEAKERS

A. Content Regulation: Selective Regulation of Speech

Section 610 is designed to protect only a limited class of captive speakers, namely those who object to a corporation's or union's political contributions.⁷⁶ The phenomenon of principled objection

73. See 93 CONG. REC. 6440 (1947).

74. It can be argued, to the contrary, that a group of true dissenters needs greater protection as the relative size of the group decreases. Below some threshold level of relative size, however, the ability of a group to protect its interests will not be a function of the actual level of the relative size of the group—dissenting shareholders holding one percent of the outstanding shares, for example, are generally as unable to protect themselves as a group holding two percent of the outstanding shares. If the number of true dissenters is always below the threshold level, the need for protection will not increase as the size of the group decreases.

75. See *Less Drastic Means*, *supra* note 53, at 466-68, 473-74.

76. Moreover, section 610 was not intended to protect captive political speakers regard-

to organizational policy, however, is not limited to political contributions. Shareholders, for example, might object to a contribution made by their corporation to a sectarian college that promotes religious views contrary to their own. Such a contribution would be within the corporation's powers,⁷⁷ and the objecting stockholders are made captive speakers in the same way that objectors to particular political contributions out of general corporate funds are.⁷⁸

Section 610 thus involves content regulation. The statute places restrictions on union and corporate political contributions and expenditures to protect captive political speakers but fails to place similar restrictions on other contributions and expenditures to protect other captive speakers. This content regulation must be examined under a standard of careful scrutiny because of its interference with first amendment interests. In *Police Department v. Mosley*,⁷⁹ the Supreme Court dealt with the analogous problem of selective exclusion of particular speech from a public forum in reviewing a city ordinance that prohibited picketing within 150 feet of a school building but specifically exempted peaceful picketing of a school involved in a labor dispute.⁸⁰ The Court found the "central problem" with the ordinance to be its description of permissible picketing in terms of its subject matter, and held that such differentiation, if based on content alone, would be invalid under the first and fourteenth amendments.⁸¹ In order to be upheld, the

less of the basis for their objection. See text at pp. 160-61 and note 73 *supra*. Captive speakers who object on the ground that the contribution is not an "optimal investment" for the organization, for example, are not within the Act's intended scope, although its ban on corporate and union political contributions protects them in practice.

77. See *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 98 A.2d 581, *appeal dismissed*, 346 U.S. 861 (1953).

78. Union activities may create an identical situation. In *McNamara v. Johnston*, 360 F. Supp. 517 (N.D. Ill. 1973), the court held that a union's contributions to political groups were not ultra vires if authorized by the union's rules. The court relied on its conclusion that the statutory duty to hold union funds "solely for the benefit of the organization and its members," 29 U.S.C. § 501(a) (1970), was not intended to bar such contributions, although it could have relied instead on the availability of the right of dissenting members to receive pro rata refunds for objectionable political contributions. 360 F. Supp. at 523-24, 527. Other charitable contributions, for which no refund right would exist, would similarly be within the authority of unions, thus raising the captive speaker problem.

79. 408 U.S. 92 (1972).

80. *Id.* at 92-93.

81. *Id.* at 95-96. Although the Court explicitly rested its holding on the equal protection clause, *id.* at 94-95, 102, it also expressly noted that the equal protection claim was "closely intertwined" with first amendment interests. *Id.* at 95 & n.3. Moreover, the Court accepted the language of Justice Black's concurring opinion in *Cox v. Louisiana*, 379 U.S. 536, 581 (1965), that state attempts to "prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss" involve "censorship in its most odious form, unconstitutional under the First and Fourteenth Amendments." 408 U.S. at

regulation must be shown to be "narrowly tailored to serve a substantial governmental interest."⁸²

The differentiation may not be justified on the ground that the harm to captive political speakers is greater than that to any other captive speakers and that the government therefore has a substantial interest in protecting the former and not the latter. The preferences of a captive religious speaker, for example, are of equal stature with political preferences and are equally deserving of protection. Nor may it be justified on the ground that political contributions are more likely to involve principled objectors than "charitable" or other contributions. In *Mosley*, the Court rejected the city's attempt to establish broad categories of activity on the theory that peaceful labor picketing was less prone to violence than nonlabor picketing, because the city could have focused its legislation on the abuse (disruption of school activities) without regard to subject matter. Similarly, concern over captive speakers must be reflected in legislation tailored more narrowly to that problem. Thus, unless some other significant governmental interest in protecting only captive political speakers and not other principled objectors to corporate and union contributions and expenditures may be shown, section 610's selective regulation of speech would appear to be unconstitutional under the first and fifth amendments.

B. Equal Protection: Selective Regulation of Speakers

By limiting its prohibition to campaign contributions by unions and corporations and ignoring similar contributions by all other economic associations, section 610 also differentiates unconstitutionally between classes of speakers. First amendment interests are fundamental;⁸³ consequently, the differentiation in section 610's prohibitions would be unconstitutional under the strict scrutiny standard of the formulaic two tier equal protection analysis applied

97-98. In his dissenting opinion in *Lehman v. City of Shaker Heights*, 94 S. Ct. 2714 (1974), Justice Brennan cites *Mosley* for the proposition that "[o]nce a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content." *Id.* at 2723 (emphasis in original). The plurality opinion in *Lehman*, finding that no public forum was involved, applied a standard of "arbitrary and capricious" in reviewing a municipality's differentiation between political and commercial advertisements on its rapid transit vehicles. Section 610, since it infringes important first amendment interests, must be reviewed under *Mosley's* stricter standards. For a critical comparison of *Lehman* and *Mosley*, see Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 273-78.

82. 408 U.S. at 101.

83. *Id.* at 95-99.

by the courts until recent years.⁸⁴ Even if the application of equal protection analysis has become more substantive, no longer producing such automatic results,⁸⁵ section 610's interference with important first amendment interests requires application of a relatively high level of scrutiny.⁸⁶

One current formulation of the equal protection test would focus on the means adopted to accomplish the avowed legislative purpose,⁸⁷ and would strike down, for example, a statute that is underinclusive in light of that purpose. This approach is illustrated by *Eisenstadt v. Baird*,⁸⁸ in which the Supreme Court held that a statute preventing only unmarried persons from obtaining contraceptives was a denial of equal protection. Assuming the state had the power to ban contraceptives to protect the morality of its citizens, the Court said, it had no rational basis for distinguishing between married and unmarried individuals.⁸⁹ Similarly, section 610's prohibition of campaign contributions only by unions and corporations is underinclusive in light of its purpose and thus denies equal protection.

The legislative purpose underlying section 610 is to protect members of economic organizations from being forced to choose between contributing to candidates they do not support and sacrificing their investments or jobs.⁹⁰ There is no rational reason for singling unions and corporations out from among all economic associations whose dissenting members are forced to make this choice. The relationship of a large national accounting partnership to its partners, for example, is similar to the relationship of a union to its members. The partnership offers its partners financial op-

84. By the end of the 1960s, a relatively stable scheme of equal protection analysis had emerged. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1965). If a legislative classification was suspect, or affected fundamental rights, the classification would almost automatically be struck down under a strict scrutiny test. For other classifications, a showing of a rational relationship between the state's interest in the legislation and the means chosen to further that interest would be sufficient to prevent a finding of unconstitutionality. See *Developments in the Law—Equal Protection*, *supra*, at 1077-1132.

85. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

86. But cf. *United States v. First Nat'l Bank*, 329 F. Supp. 1251, 1252-53 (S.D. Ohio 1971), holding section 610 constitutional under an "invidious discrimination" standard without noting any first amendment interest.

87. See Gunther, *supra* note 84, at 20-24; cf. *Shapiro v. Thompson*, 394 U.S. 618, 637-38 (1969).

88. 405 U.S. 438 (1972).

89. *Id.* at 454.

90. See text and notes at notes 12-27 *supra*.

portunities and security that they deem preferable to the alternatives in the employment marketplace.⁹¹ Although the mechanism for decision making varies, no firm whose partners number in the hundreds could operate under a requirement of unanimous consent. As a result, the dissenting partner in a firm that makes political contributions must either accept the decision and be a captive speaker or resign from the firm. Likewise, a member of an investment group that deems a political contribution expedient must either shift his investment to his next best opportunity⁹² or resign himself to being a captive speaker.

Thus, section 610, by discriminating between unions and corporations on the one hand and all other economic associations on the other, denies equal protection to those groups it restricts. Even if Congress could restrict first amendment interests in order to protect captive political speakers of economic organizations, the Constitution requires it to extend the burden of providing that protection to all economic organizations.

CONCLUSION

In the more than sixty years since Congress first enacted a ban on corporate campaign contributions, the prohibition has been modified both to include contributions by unions and to permit contributions from voluntary funds. During that period, the purpose of the legislation has shifted from concern with the influence of powerful economic organizations to a primary concern with the protection of minority members of those organizations. The Supreme Court has thus far avoided the constitutional issues raised by this legislation.

This comment has suggested that section 610 of the Federal Corrupt Practices Act is unconstitutional because it restricts unions and corporations in the exercise of their first amendment rights without furthering a heavier governmental interest. Moreover, the statute unconstitutionally discriminates between classes of speech by protecting only political captive speakers and not others, and between classes of speakers by prohibiting political contributions only by corporations and unions and not by other economic associations.

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91. That a partner prefers the bundle of advantages offered by his position in the partnership to another position is evident from his failure to change jobs. See generally R. POSNER, *supra* note 58, at 4-6.

92. See text and notes at notes 12-27 *supra*.