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Non-Profit Corporate Political Speech - Federal Election Commission v. Massachusetts Citizens for Life, Inc.

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NON-PROFIT CORPORATE POLITICAL SPEECH

Federal Election Commission v. Massachusetts Citizens for Life, Inc., 769 F.2d 13 (1st Cir. 1985), *aff'd*, 107 S. Ct. 616 (1986)

INTRODUCTION

The first amendment[1] has historically protected political speech.[2] The Supreme Court of the United States recently extended this first amendment protection to cover corporate[3] political speech on issues that have no immediate connection to the corporation's profit-making goals.[4] This decision illustrated the concern underlying two very different areas of corporate political speech: speech concerning candidates and speech concerning ballot issues.[5] The threat of corporations using money to influence candidates has prompted federal and state legislatures to prohibit corporations from engaging in this area of political speech.[6] The possi-

1. U.S. CONST. amend. I. provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

2. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 39-59 (1976) (the restriction on political speech that results from election expenditure ceilings is intolerable under the first amendment). *See also* Note, *Corporate Speech On Political Issues: The First Amendment in Conflict with Democratic Ideals?*, 1985 U. ILL. L. REV. 445, 450 n.41.

3. Corporations are considered "persons" for constitutional purposes. Santa Clara County v. Southern P. Ry., 118 U.S. 394, 395-96 (1889). As such, corporations have been deemed "citizens" protected by the due process clauses of the fifth and fourteenth amendment's of the U.S. Constitution. Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925); Smyth v. Ames, 169 U.S. 466, 522 (1898); Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26, 28 (1889). Corporations are also protected by the fourteenth amendment's equal protection clause. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 80-81 (1938). Additionally, corporations have constitutional protection from double jeopardy, United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), and unreasonable searches and seizures, Marshall v. Barlow's Inc., 436 U.S. 307, 311-13 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 353-54 (1977).

However, the Supreme Court has denied that corporations are persons for purposes of the privileges and immunities clause of the Constitution, and has held that the "liberty" referred to in and protected by the fourteenth amendment applies to natural persons only. Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11 (1945); Hague v. CIO, 307 U.S. 496, 527 (1939); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906). Moreover, the Supreme Court has denied corporations a constitutional right to privacy, United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950), and has denied them a right against self-incrimination, California Bankers Ass'n v. Schultz, 416 U.S. 21, 55 (1974).

4. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978). The Supreme Court has stated that campaign activity, including contributions and expenditures, is political speech under the first amendment. *Buckley*, 424 U.S. 1, 14 (1976).

5. *Bellotti*, 435 U.S. at 789 (risk of corruption perceived in corporate cases involving corporate expenditures and political candidates did not exist in a vote on a public issue).

6. *See, e.g.*, 2 U.S.C. § 441b (1982); MASS. ANN. LAWS ch. 55, § 8 (Law. Co-op. 1984 Supp.) (held unconstitutional in First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)).

bility of corruption resulting from corporate spending on ballot issues, however, is considered more remote.[7]

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,[8] the United States Court of Appeals for the First Circuit held that a non-profit corporation's printing and distribution of newsletters urging voters to vote for pro-life candidates and listing the various candidates' positions on abortion issues were not prohibited expenditures under section 441b of the Federal Election Campaign Act.[9] The First Circuit addressed two issues in reaching this holding. The court found that the expenditures by the non-profit corporation on its newsletter were encompassed by the provisions of section 441b.[10] This section precluded corporate expenditures in connection with federal elections.[11] However, the court held that application of the act would impermissibly restrict the corporations' right to free speech in violation of the first amendment.[12]

This case comment will focus on the First Circuit's opinion in *MCFL*. It will first examine the statutes and litigation generated by the corporate political speech issue. The *MCFL* decision will then be discussed. Finally, this comment will establish that the First Circuit was correct in finding that section 441b encompasses expenditures in connec-

7. C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir. 1978) ("When corporations seek to influence the electorate and not an individual candidate or party, no such state interest [in preventing corruption] exists because corporate activities cannot create political debts. . . ."). The Ninth Circuit went further and held that even if a corporation's involvement in a referendum influenced voting, that is not sufficient reason to restrict corporate speech. *Id.*

8. 769 F.2d 13 (1st Cir. 1985), *aff'd*, 107 S. Ct. 616 (1986) [hereinafter *MCFL*].

9. 2 U.S.C. § 441b (1982).

Section 441b reads, in pertinent part:

> (a) It is unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with any election at which . . . 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. . . . (b)(2) For purposes of this section . . . the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . 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, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families . . . (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families . . . and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

Id., *quoted in MCFL*, 769 F.2d at 15-16.

10. *MCFL*, 769 F.2d 13, 20. This portion of the First Circuit's holding reversed the lower court's ruling on the same issue. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 589 F. Supp. 646, 650 (D. Mass. 1984).

11. 769 F.2d at 15.

12. *Id.* at 23.

tion with federal elections, and that the *MCFL* case is consistent with both section 441b and with previous caselaw.

HISTORICAL BACKGROUND

The Election Laws

In 1905 President Roosevelt called for a law forbidding corporations from contributing to political committees.[13] Congress responded to this call in 1907 by passing the Tillman Act.[14] This act made it unlawful "for any national bank or any corporation . . . to make a money contribution in connection with any election to any political office."[15] In 1916, this prohibition on political speech was upheld in *United States v. U.S. Brewers Association*.[16] The two major issues before the court were whether Congress had authority to enact the Tillman Act and whether the Act violated the first amendment's guarantee of free speech.[17] The court held that Congress did have the authority to pass the statute as a regulation of federal elections.[18] The court then rejected the defendants' contention that the statute abridged their right to free speech and press.[19]

Nine years later, Congress passed the first version of the Federal Corrupt Practices Act (FCPA).[20] The FCPA extended the Tillman Act to prohibit any kind of contribution by a corporation in connection with federal elections.[21] This act was in turn amended by the Taft-Hartley Act.[22] The Taft-Hartley Act extended the statutory prohibitions to include expenditures as well as contributions.[23]

13. 40 CONG. REC. 96 (1905).

14. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907) (later codified at 18 U.S.C. § 610).

15. *Id.* at ch. 420, 34 Stat. 864, 865.

16. 239 F. 163 (W.D. Pa. 1916). This was the only case to arise under the Tillman Act prior to amendments.

17. *Id.* at 167-69.

18. *Id.* at 167-68.

19. *Id.* at 169.

20. Federal Corrupt Practices Act of 1925, ch. 368, §§ 301-19, 43 Stat. 1070 (1925) (current version at 2 U.S.C. § 441b).

21. *Id.* § 313, 43 Stat. at 1074. Specifically, the FCPA revised the amounts candidates could spend for House and Senate elections to $2,500 and $10,000, respectively. The FCPA also expanded the definition of "money" used in the Tillman Act to include "in kind" contributions. *Id.* § 302, 43 Stat. at 1070-71. This legislation contained many loopholes, however. For example, this first version of the FCPA did not require candidates to report contributions or expenditures in federal elections. Additionally, candidates were able to circumvent spending ceilings by diverting contributions into separate committees. Federal law did not require these separate committees (or "PACs") to report. Note, *Political Action Committees and the Supreme Court*, 12 W. ST. U.L. REV. 281, 283 (1984). For a further discussion of PACs, see *infra* note 26 and accompanying text.

22. Taft-Hartley Act, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159 (1947).

23. *Id.* The legislative history of the Taft-Hartley Act reflects Congress' desire to regulate both money contributions and "in kind" expenditures:

These prohibitions on expenditures and contributions were further clarified by the enactment of the Federal Election Campaign Act (FECA) in 1971.[24] FECA combined two approaches to election reform. First, FECA set a ceiling on the amount a federal candidate could spend on media. Second, FECA required full disclosure of campaign contributions and expenditures.[25] This act also exempted certain types of spending.[26] FECA was further amended in 1976. At that time the anti-corporate contribution section of the FCPA[27] was repealed and incorporated into FECA, where it became section 441b.[28] This section of FECA was drafted for two purposes. The first purpose was to prevent corporations from securing political debts from politicians through contributions. The second purpose of section 441b was to protect corporate shareholders from having their funds contributed by the corporation to candidates that the shareholders did not support.[29]

> The intent and purpose of the provision of the act prohibiting any corporation . . . [from] making any contribution in connection with any election would be wholly defeated if it were assumed that the term "making any contribution" related only to the donating of money directly to a candidate and excluded the vast expenditures of money in . . . his behalf . . . .

H.R. REP. No. 2739, 79th Cong., 2d Sess. 36-37 (1947), *quoted in MCFL*, 769 F.2d at 18. During further debate on the Taft-Hartley Act, Senator Taft observed that the term "expenditure" would include "any advertisement or newspaper published for political purposes by a union or corporation." *Id.*

24. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 3 (1971) (current version at 2 U.S.C. § 431 (1982)).

25. *See* 2 U.S.C. §§ 431-55 (1982).

26. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 3, 9-10 (1971). The most important exemption to be encompassed in FECA was the exemption for segregated funds (also known as political action committees or PACs). The 1971 FECA allowed the use of corporate monies for the establishment of a separate fund to be used for political purposes.

The legality of these segregated funds was upheld by the Supreme Court of the United States in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972). In this case the Court held that corporations could make unlimited contributions to a separate fund if the contributions were made voluntarily and if the political purpose of the fund was made clear to the contributors. 407 U.S. at 427.

The number of PACs now exceeds more than 3,500. The amount of money which is handled by these PACs has risen from $12.5 million in 1974 to approximately $83.6 million in 1982. Among the largest PACs in existence are United Auto Workers ($1,628,347 in funds) and the National Association of Realtors ($2,115,135 in funds). *See generally* Note, *supra* note 21, at 285, 87.

27. *See supra* note 20.

28. Federal Election Campaign Act of 1971, § 316 (codified as amended at 2 U.S.C. § 441b (1982)).

29. Democratic Party v. National Conservative Political Action Comm., 578 F. Supp. 797, 821 (E.D. Pa. 1983), *aff'd in part, rev'd in part sub nom.* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985). The court in *National Conservative PAC* described the purpose of § 441b as follows:

> The first purpose of § 441b . . . is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions. . . . The second purpose of the provisions . . . is to protect the individuals who have paid money into a corporation . . . for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.

Protection of Corporate Political Speech

Corporate political speech in the United States commenced in the early 1800's.[30] Until recently, however, there was no clear rule that corporate political speech was protected by the first amendment.[31] In the interim, the closest that the Supreme Court came to a rule on corporate political speech was its holding in *Grosjean v. American Press Co.*[32] In *Grosjean*, the Supreme Court invalidated a state licensing tax on publishers of newspapers.[33] This case was not a clear ruling on corporate political speech rights, however. The Court did not base its holding on a recognition of free speech rights held by corporations. Instead, the Supreme Court based its decision on the fourteenth amendment and due process.[34] Additionally, *Grosjean* involved the rights of newspapers. Newspapers are considered media corporations which are more deserving of first amendment protection than ordinary business corporations.[35] Although this absence of conclusive Supreme Court holdings[36] on the issue of corporate political speech continued, some lower courts in the 1970's did recognize first amendment protection for corporate speech.[37]

The first Supreme Court recognition of first amendment protection for corporate political speech came in *First National Bank of Boston v. Bellotti*.[38] In *Bellotti*, several corporations challenged the constitutionality of a Massachusetts statute which prohibited expenditures by business

578 F. Supp. at 821.

30. Prentice, Consolidated Edison *and* Bellotti*: First Amendment Protection of Corporate Speech*, 16 TULSA L.J. 599, 603 (1981). In the early 1800's the Supreme Court expressed its views on the nature of corporations in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being . . . existing only in contemplation of the law.").

31. *See* Prentice, *supra* note 30, at 603.

32. 297 U.S. 233 (1936).

33. *Id.* at 250-51.

34. *Id.* at 251.

35. *See* Prentice, *supra* note 30, at 603. Three years later in Hague v. CIO, 307 U.S. 496 (1939), Justice Stone stated that corporations do not enjoy a right to first amendment protection of their political speech. 307 U.S. at 527 (Stone, J., concurring). Read together, the opinions in *CIO* and *Grosjean* seem to indicate that only corporations possessing free press rights would be accorded free speech rights. *See* Prentice, *supra* note 30, at 603-04.

36. As early as 1965, at least one commentator stated that corporate political speech was protected by the first amendment. Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1193 (1965). This conclusion stemmed from various Supreme Court holdings that extended protection of corporate political activities. *See, e.g.*, Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961) (Court established a political activity exception to Sherman Act); United States v. Harriss, 347 U.S. 612, 621-24 (1954) (Supreme Court limited application of the Federal Regulation of Lobbying Act to direct communications with members of Congress).

37. *See* Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1334 (W.D. Pa. 1974); Borough of Collingswood v. Ringgold, 66 N.J. 350, 362-64, 331 A.2d 262, 270 (1975).

38. 435 U.S. 765 (1978).

corporations in state referendum proposals.[39] The state court had focused on whether the corporation had first amendment protection for its political speech.[40] That court upheld the statute.[41] The Supreme Court shifted this focus to the content of the speech rather than the identity of the speaker.[42] The Court concluded that the content of the speech at issue merited first amendment protection.[43] The corporations were allowed to make expenditures in connection with the referendum.[44]

A more recent Supreme Court recognition of first amendment protection for corporate political speech came in *Consolidated Edison Co. v. Public Service Commission*.[45] This case involved a challenge to a New York regulatory commission's restriction on the mailing by public utilities of bill inserts which discussed issues such as nuclear energy.[46] The Supreme Court again struck down the ban as an impermissible restriction of free speech.[47] The Court indicated, as it did in *Bellotti*,[48] that first amendment protection of corporate political speech continued to be based upon the rights of the receiver of the speech rather than on a corporation's right to speak.[49]

39. *Id.* at 768-69.

40. First Nat'l Bank of Boston v. Attorney Gen., 371 Mass. 773, 783, 359 N.E.2d 1262, 1269 (1977), *rev'd sub nom.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

41. *Id.* at 784, 359 N.E.2d at 1270.

42. *Bellotti*, 435 U.S. at 777. The Supreme Court analogized to the "right to receive" doctrine that it established in its commercial speech cases. *See* Note, *supra* note 2, at 447-50. In *Bellotti*, the Court established a basis for protecting corporate political speech upon this doctrine. Because the message itself merited first amendment protection, the Court felt that the source of the speech was irrelevant. *Bellotti*, 435 U.S. at 777.

43. *Bellotti*, 435 U.S. at 784. The Court, however, did not address the question of whether different circumstances would justify a restriction on the political speech of a corporation which would be impermissible if applied to an individual. *Id.* at 777-78.

44. *Id.* at 795. Two justices filed dissenting opinions. Justice White disagreed with the majority's rejection of the government interests underlying the Massachusetts statute. Justice White found sufficient evidence in the record to support the state's interest in restricting corporate domination of the electoral process. *Id.* at 810-12 (White, J., dissenting). He also agreed with the state's desire to protect minority shareholders from forced support of political views which they did not share. *Id.* at 812-18. Justice White made three major points with respect to corporate political speech. First, he argued that corporate speech does not merit the same protection as individual speech because it cannot be considered self-expression. *Id.* at 807. Second, Justice White stated that corporations should be subject to the regulations of the state that created them. These regulations could include restrictions on speech. *Id.* at 809. Finally, he criticized the majority for substituting its judgement for that of the Massachusetts legislature. *Id.* at 804.

Justice Rehnquist also dissented. He argued that corporations are only entitled to protection of commercial speech incidental to the business of the commercial corporation. *Id.* at 822-28 (Rehnquist, J., dissenting). Rehnquist argued that corporate political speech that did not pertain to matters having a material effect on its business should not be protected. *Id.*

45. 447 U.S. 530 (1980).

46. *Id.* at 532-33.

47. *Id.* at 544.

48. 435 U.S. 765, 777 (1978).

49. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. at 533-34. In this case as in *Bellotti*, the Supreme Court established the rights of corporations under the first amendment. The

Recently, in *MCFL*,[50] the United States Court of Appeals for the First Circuit addressed issues underlying restrictions on the political speech of a non-profit corporation. The *MCFL* court focused on two of these issues. First, the First Circuit considered whether expenditures by a non-profit corporation on a newsletter which urged readers to vote for pro-life candidates were encompassed by section 441b. Second, the *MCFL* court considered whether application of section 441b to the non-profit corporation's expenditures would infringe on the corporation's first amendment rights.

STATEMENT OF THE CASE

Massachusetts Citizens for Life, Inc. (MCFL) is a non-profit corporation organized "to foster respect for human life and to defend the right to life to all human beings, born and unborn, through education, political and other forms of activities."[51] MCFL had been publishing a newsletter expressing its views for several years.[52] In 1978, MCFL published a "Special Election Edition" newsletter to coincide with a primary election involving candidates for the House and Senate.[53] This "Special Election Edition" listed all of the candidates in the election as well as their positions on three pro-life issues.[54] The special edition also urged readers to vote consistently with MCFL's pro-life views, and it carried only the pictures of those candidates who supported this pro-life position.[55]

The Federal Election Commission (FEC) brought suit against MCFL for violating section 441b.[56] The complaint sought a civil penalty of $5,000.[57] The parties filed cross-motions for summary judgement.[58]

Court, however, has clearly established two caveats to these rights. First, the first amendment rights of corporations are based upon the rights of the receivers to hear the speech. The Court has not yet recognized a right to political speech residing in the corporate speaker. Second, the Court has not said that a government could never show a state interest sufficient to overcome this protection of corporate political speech. *See* Prentice, *supra* note 30, at 620.

50. 769 F.2d 13 (1985).

51. *Id.* at 15.

52. *Id.* The newsletter was published three times in 1973, five times in 1974, eight times in 1975 and in 1976, five times in 1977, and four times in 1978. *Id.* at 15 n.1.

53. MCFL had published these "special election editions" for previous elections. *Id.* at 15.

54. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 589 F. Supp. 646, 648 (D. Mass. 1984). The three issues were a constitutional human life amendment, legislation to prohibit the use of tax funds for abortions, and legislation to provide positive alternatives to abortions. *Id.*

55. *Id.* The special edition did carry a disclaimer stating that it did not "represent an endorsement of any particular candidate." *Id.*

56. 2 U.S.C. § 441b (1982); *see also supra* note 9 and accompanying text.

57. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 589 F. Supp. 646, 647 n.1 (D. Mass. 1984). After the FEC brought this suit, MCFL established a segregated fund or PAC pursuant to 2 U.S.C. § 441b(b)(2)(c), which exempts such segregated funds from prohibition under

The United States District Court for the District of Massachusetts granted MCFL's motion on three grounds. First, the court held that the special election edition did not constitute an "expenditure" within the meaning of 2 U.S.C. § 441b(b)(2) (1982).[59] The court also held that the editions were exempted from the prohibition against expenditures under a provision of the act which exempts "any news story, commentary or editorial distributed through . . . any . . . newspaper, magazine, or other periodical."[60] Finally, the court ruled that applying section 441b to prohibit MCFL's expenditures for the special election edition would constitute a violation of the non-profit corporation's rights to free speech, press, and association.[61]

In 1985 the United States Court of Appeals for the First Circuit heard *MCFL*.[62] The First Circuit focused on two issues. The first issue the *MCFL* court focused on was whether expenditures by MCFL on a newsletter urging readers to vote for pro-life candidates in a federal election were encompassed by section 441b of FECA. The second issue was whether application of the prohibitions found in section 441b would violate the non-profit corporation's first amendment rights.

Reasoning of the Court

The First Circuit began its opinion by examining the issue of whether expenditures by MCFL on a special election newsletter were encompassed by section 441b.[63] The United States District Court for the District of Massachusetts had maintained that MCFL's expenditures on the newsletter were not intended by Congress to be covered by section 441b.[64] The district court supported this contention by noting that the special election edition was exempted from the act's prohibition against expenditures.[65] The First Circuit, however, in a three part analysis rejected the district court's holding that section 441b did not encompass the special election edition.[66]

The first part of the *MCFL* court's analysis focused on the language

the act. The action was not thereby rendered moot, however, because the FEC sought the civil penalty of $5,000. 589 F. Supp. 646, 647 n.1.

58. 589 F. Supp. 647-48.
59. *Id.* at 649-50.
60. 2 U.S.C. § 441b(9)(B)(i) (1982), *quoted in* 589 F. Supp. 646, 650 (1984).
61. *MCFL*, 769 F.2d at 16.
62. 769 F.2d 13 (1st Cir. 1985), *aff'd*, 107 S. Ct. 616 (1986).
63. *Id.* at 17.
64. 589 F. Supp. at 649.
65. *Id.* at 650.
66. *MCFL*, 769 F.2d at 16-22.

of section 441b.[67] The *MCFL* court concluded that this language indicated a congressional intent that activities, other than direct payments to candidates, can also be considered contributions or expenditures under section 441b(2).[68] Accordingly, the *MCFL* court rejected the district court's holding that MCFL's special edition was not an expenditure prohibited by section 441b.[69] The second section of the *MCFL* court's analysis focused on the issue of whether the legislative history of section 441b and its predecessors supported an interpretation of "expenditure" that could include the special edition.[70] The court found that the legislative history reflected Congress' early decision to include indirect expenditures in the Taft-Hartley Act's prohibitions.[71] Furthermore, the legislative history revealed Congress' intent to include special election editions of union or corporate newsletters in the Taft-Hartley Act's prohibited expenditures provision.[72] The *MCFL* court also noted that this intent of Congress had been substantiated in case law.[73] Thus, the *MCFL* court held that MCFL's expenditures in connection with its special election edition were intended by Congress to be included in section 441b.[74]

67. *Id.* at 16-17.

68. *Id.* at 17. The *MCFL* court first noted that the language of § 441b included direct or indirect payments of various types to "any candidate, campaign committee, or political party . . . in connection with any election" in the term "contribution or expenditure." 2 U.S.C. § 441b(b)(2), *quoted in MCFL*, 769 F.2d at 16. The court then observed that the general definitions section of the act gave a broader interpretation to the term "expenditure" than the one found in § 441b(b)(2): "any purchase, payment, . . . or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i) (1982), *quoted in MCFL*, 769 F.2d at 16. The FEC contended that the broader § 431 definition of expenditure should apply. 769 F.2d at 16-17. The First Circuit focused on the effect of the word "includes" in the act and concluded that "expenditures" under the act include but are not limited to payments to candidates, campaign committees or political organizations. 769 F.2d at 17.

69. 769 F.2d at 21-22.

70. *Id.* at 17-20.

71. *Id.* at 18. The court examined a report by a House Committee which concluded that expenditures besides direct contributions to candidates should be included in the Taft-Hartley Act. The committee stated that this was necessary to avoid "wholly defeat[ing]" the purpose of the Act. *Id.* (citing H.R. REP. No. 2739, 79th Cong., 2d Sess. 36-37 (1947)).

72. *Id.* at 18-19. The *MCFL* court focused on statements of Senator Taft, a co-sponsor of the Taft-Hartley Act, in reaching this conclusion. *Id.* at 18 (quoting 93 CONG. REC. 6436-37 (1947)).

73. 769 F.2d at 19. In United States v. UAW, 352 U.S. 567, 585 (1957), the Supreme Court held that a union's expenditures for televised political advertisements violated the Taft-Hartley Act's prohibition against corporate or labor expenditures in connection with a federal election. *UAW*, 352 U.S. at 592. The Court ruled that Congress added the term "expenditure" to the Act in order to embrace indirect campaign contributions. The *UAW* Court also noted that Congress' intent was to prohibit the use of corporate or union funds to influence the public to vote for a particular candidate or party. 352 U.S. at 585-87.

74. *MCFL*, 769 F.2d at 20. The court noted that § 441b would encompass the special edition even if § 441b required "express advocacy" as defined in Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1972) (express words of advocacy include terms such as "vote for," "defeat," "support," "elect," etc.). 769 F.2d at 20. The *MCFL* court stated that the special election edition expressly advocated the election of pro-life candidates only and it reminded readers that "your vote in the primary will

In the final section of the *MCFL* court's analysis, the court considered the issue of whether the special edition fell within the act's exemption for periodical publications.[75] Rejecting the district court's holding that the special election edition was exempt,[76] the *MCFL* court held that the characteristics of the special election edition were not such as would constitute newspapers, magazines, or periodical publications within the meaning of the statutory exemption.[77] The *MCFL* court therefore concluded that the special election editions were encompassed by the section 441b definition of expenditure.[78]

The second issue addressed by the First Circuit was whether section 441b, as applied to the special election edition, amounted to an infringement on MCFL's freedom of speech.[79] The *MCFL* court observed that section 441b was a "content-based restriction" of expression[80] and, as such, the application of the act could only be justified by a substantial government interest.[81] The court noted that the government interest in preventing corruption through the creation of political debt was not present in the instant case.[82] Because MCFL's expenditures were indirect and uncoordinated with the federal election or with the candidates, the *MCFL* court held that the FEC could not show any compelling government interest in prohibiting the expenditures.[83] The *MCFL* court therefore concluded that the application of section 441b to MCFL's

make the critical difference in electing pro-life candidates." 769 F.2d at 20. This constituted express advocacy of identified candidates.

75. 769 F.2d at 21-22. 2 U.S.C. § 431(9)(B)(i) (1982) exempts from the act "any news story, commentary, or editorial distributed through the facilities of any . . . newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 769 F.2d at 20.

76. 769 F.2d at 21-22.

77. *Id.* The *MCFL* court noted that the special editions were printed sporadically and contained no masthead, printed volume number, or issue number.

78. *Id.* at 21-22.

79. *Id.* at 22. The district court had concluded that application of § 441b to the special edition violated MCFL's first amendment rights. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 589 F. Supp. 646, 651 (D. Mass. 1984).

80. *MCFL*, 769 F.2d at 22. The *MCFL* court defined a "content-based restriction" as a restriction on the "political content of the publications" as opposed to a restriction on the "time, place, or manner of expression." *Id.*

81. *Id.* Before ruling on the presence of a substantial government interest, the court, rejected the FEC's argument that § 441b did not absolutely prohibit corporations from engaging in political advocacy and thus did not affect MCFL's first amendment rights. *Id.* The court noted that the availability of alternate methods of funding speech (i.e., establish a PAC) did not justify the elimination of "the simplest method." *Id.*

82. 769 F.2d at 23. MCFL did not contribute directly to a political candidate. Furthermore, MCFL's contributors need not be protected from unwanted expenditures because those contributors support MCFL's anti-abortion position and would favor such expenditures as the special election edition. *Id.*

83. *Id.*

expenditures violated MCFL's first amendment rights.[84]

ANALYSIS

While the *MCFL* decision cannot be read as extending unlimited first amendment protection to non-profit corporations, the *MCFL* court did recognize a first amendment protection of corporate political speech.[85] The First Circuit, however, implicitly restricted this non-profit corporation's political speech by giving section 441b a broader interpretation.[86] The *MCFL* court correctly decided both of these issues.

The Scope of Section 441b

The first section of the *MCFL* court's analysis focused on the language of section 441b.[87] The court correctly observed that the language of section 441b encompassed more than direct payments to a candidate, campaign committee, or business organization.[88] This construction of section 441b is supported by the use in the act of the word "includes."[89] The presence of the word "includes" in a statute usually signifies a legislative intent to encompass other items not specifically listed in a statute.[90] According to their ordinary meaning, the words of section 441b do not limit the act to direct contributions only.[91] Rather, the words indicate that the statute encompasses any purchases, payments, gifts of money, or other allocations made "for the purpose of influencing" any federal election.[92]

Further evidence in support of the *MCFL* court's conclusion that section 441b encompasses such expenditures can be found in the legislative history of section 441b.[93] This legislative history illustrates Congress' recognition that the statutory term "expenditure" would include any political advertisement or newspaper published by a corporation.[94]

84. *Id.*
85. *See supra* notes 79-84 and accompanying text.
86. *See supra* notes 62-78 and accompanying text.
87. 769 F.2d at 16-17.
88. *Id.* at 17.
89. 2 U.S.C. § 431(9)(a)(i) (1982); 2 U.S.C. § 441b(b)(2) (1982).
90. 769 F.2d at 17 (quoting 2A N. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION 133 (4th ed. 1984)). *See also* United States v. Massachusetts Bay Transp. Auth., 614 F.2d 27, 28 (1st Cir. 1980).
91. 769 F.2d at 17.
92. *Id.* at 16.
93. *Id.* at 17-20.
94. *Id.* at 18. During congressional debates on the Taft-Hartley Act, Senator Taft stated: "we have long prohibited corporations from contributing money for political purposes, and it was always supposed that the law prevented a corporation from operating newspapers for that purpose or advertising in newspapers for that purpose." 93 CONG. REC. 6436 (1947).

Moreover, Congress intended this interpretation of "expenditure" to remain the same after the amendment of the statute in 1971.[95]

The *MCFL* court's interpretation of the scope of section 441b is also supported by relevant case law. For instance, in *United States v. UAW*,[96] the Supreme Court held that an expenditure of union dues for televised political advertisements violated the Taft-Hartley Act's prohibition against corporate or union expenditures.[97] The defendant union used its general treasury funds to pay for television broadcasts which endorsed selected candidates for Congress.[98] The Court examined the legislative history of the Taft-Hartley Act and concluded that the union's expenditure was exactly the type of "indirect contribution" that the act was meant to prohibit.[99] Moreover, in *Common Cause v. Schmitt*,[100] the United States District Court for the District of Columbia referred to section 441b in order to interpret the term "expenditure" as found in the Presidential Campaign Fund Act.[101] The Federal Election Commission had alleged that various groups of Ronald Reagan supporters had planned to exceed the expenditure limits of the statute.[102] Guided by section 441b, the court interpreted "expenditure" broadly to include indirect expenditures as well as expenditures authorized by the candidate.[103] The district court thereby found the groups' planned expenditures to be within the meaning of the statute.[104]

Finally, the *MCFL* court's decision to look to the intent of Congress and to the facts of the case in defining the scope of section 441b is consistent with the approach other courts have taken. For example, in *United States v. Congress of Industrial Organizations*,[105] the defendant union published an in-house newsletter which urged union members to vote for a particular candidate.[106] The Supreme Court ruled that Congress did

95. *MCFL*, 769 F.2d at 20. In 1971, Congress enacted the Federal Election Campaign Act (FECA), Pub. L. No. 92-225, § 205, 86 Stat. 3, 10, to clarify the statutory prohibitions on contributions and expenditures. *See supra* notes 24-29 and accompanying text. The *MCFL* court observed that "nothing in the legislative history suggests that Congress meant to narrow the prohibition of expenditures 'in connection with' a federal election by the 1971 [amendment]." 769 F.2d at 20.

96. 352 U.S. 567 (1957).

97. *Id.* at 586-87.

98. *Id.* at 584.

99. *Id.* at 585.

100. 512 F. Supp. 489 (D.D.C. 1980), *aff'd*, 455 U.S. 129 (1982).

101. *See* Common Cause v. Schmitt, 512 F. Supp. 489, 492 (1980) (citing 26 U.S.C. § 9012(f)(1) (1976)).

102. *Schmitt*, 512 F. Supp. at 490.

103. *Id.* at 492-93.

104. *Id.* at 493.

105. 335 U.S. 106 (1948).

106. *Id.* at 108.

not intend to prohibit this type of publication.[107] The Court then held that the statute[108] did not reach such a use of corporate or union funds.[109]

Thus, the *MCFL* court properly included the special election edition in the meaning of the term "expenditure" found in section 441b. The language of the act, the act's legislative history, and relevant caselaw support the court's interpretation. Additionally, the First Circuit's use of the facts of the case and of legislative intent was consistent with the approaches other courts have taken in defining the scope of section 441b.

The First Amendment Issue

The second issue examined by the *MCFL* court was whether the application of section 441b of FECA to MCFL's special election edition constituted a violation of the non-profit corporation's first amendment rights.[110] The *MCFL* court correctly held that the corporation's indirect expenditures in connection with the special edition were protected under the first amendment and could not be prohibited under section 441b.[111] This interpretation of a non-profit corporation's right to political speech is correct because of three elements in the case.

First, the *MCFL* court's decision is correct because the government interest in preventing corrupt solicitation for contributions[112] does not apply to non-profit corporations. Non-profit corporations are organized by its members to express a particular ideology or to fulfill a function that all members agree upon.[113] Unlike for-profit corporations organized primarily to pursue direct economic gain, non-profit corporations would seem to have little purpose for coercing its members into making contributions to candidates or political campaigns that the non-profit corporations's members do not support.[114] Moreover, the risk that the money of contributors will go to support candidates they oppose is remote because the ideology of non-profit corporations is generally clear to all potential

107. *Id.* at 123-24.

108. The Court was construing the scope of the Federal Corrupt Practices Act of 1925, ch. 368, §§ 301-19, 43 Stat. 1070 (1925) (current version at 2 U.S.C. § 441b). *See Congress of Indus. Orgs.*, 335 U.S. at 112-24.

109. 335 U.S. at 123-24.

110. *MCFL*, 769 F.2d at 22-23.

111. *Id.* at 23.

112. *See supra* notes 24-29 and accompanying text.

113. For example, the founders of MCFL organized this non-profit corporation around a political ideology: the need to educate voters on the pro-life position. 769 F.2d at 15.

114. *See National Conservative PAC*, 578 F. Supp. 797, 821 n.34. *See also supra* note 29 and accompanying text.

contributors.[115] The protection of these potential contributors is one of the underlying purposes of section 441b.[116] Non-profit corporations don't have the same degree of economic interest in election of candidates that for-profit corporations have. Accordingly, non-profit corporations do not have the same potential for corruption and for nondisclosure that for-profit corporations have. Therefore, the government interest in preventing corruption does not apply, and the government would not be justified in restricting the non-profit corporation's political speech under section 441b.

The second element that justifies the *MCFL* court's conclusion is that the *MCFL* case involved indirect, uncoordinated expenditures.[117] These expenditures do not create the possibility of large corporate contributors securing a political debt from a candidate.[118] In fact, such expenditures provide little direct help to a political candidates' campaign and may even have adverse effects.[119] As a result, the primary effect of limiting indirect expenditures is to restrict the quantity of campaign speech by individuals, groups, and candidates.[120] The *MCFL* court also correctly recognized that the government has diminished interest in regulating indirect, uncoordinated expenditures.[121] The First Circuit thereby concluded that the government interest in the application of section 441b to MCFL's expenditures was insufficient to justify violation of the corporation's first amendment rights.[122]

Finally, *MCFL* involved a non-profit corporation's indirect expenditures in connection with one issue of a federal election, as opposed to a solicitation for direct contributions to candidates.[123] These indirect expenditures at issue in *MCFL* are analagous to expenditures in connection with ballot issues. The *MCFL* court implicitly observed that both indirect and issue-based expenditures do not involve direct contributions to a particular candidate.[124] Therefore, neither indirect nor issue-based ex-

115. *National Conservative PAC*, 578 F. Supp. at 821.

116. *See supra* note 29 and accompanying text.

117. *MCFL*, 769 F.2d at 23.

118. *See* Buckley v. Valeo, 424 U.S. 1, 26-29 (1976).

119. *Id.* at 47. This effect of expenditures was cited by the court in Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 589 F. Supp. 646, 649 (D. Mass. 1984) ("[the publication] probably lessened rather than enhanced the prospects of election of candidates subscribing to defendants' platform which, according to public opinion polls, is opposed by most citizens").

120. *Buckley*, 424 U.S. at 39.

121. *MCFL*, 769 F.2d at 23.

122. *Id.*

123. *Id.*

124. *Id.* This observation is supported by the language of Buckley v. Valeo, 424 U.S. at 47:

> The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also allevi-

penditures involves the risk of corruption perceived in cases involving for-profit corporations or direct contributions.[125] Consequently, the *MCFL* court correctly ruled that the right of the non-profit corporation to speak freely under the first amendment greatly outweighed the government's interest in preventing corruption in elections through the use of the prohibitions found in section 441b.

These three elements parallel the legal history leading up to the *MCFL* decision. First, non-profit corporations are not as susceptible to the risk of coercive contributions to undisclosed political candidates as are for-profit business corporations.[126] Second, indirect and uncoordinated expenditures in connection with distributions of material to the general public are permissible activities.[127] Finally, non-profit corporations should be able to engage in any form of protected political speech in connection with election issues because the compelling governmental interest in preventing corruption is not a factor.[128] These three elements also represent the *MCFL* fact pattern: a non-profit corporation makes indirect, uncoordinated expenditures in order to speak out on an election issue, albeit in the context of a federal election.[129] The *MCFL* decision thus embodies the development of law in this area.

The *MCFL* decision is not, however, likely to clarify this law or explain past interpretations courts have given to section 441b and first amendment rights of corporations.[130] First amendment protection of corporate speech will remain controversial.[131] However, the *MCFL* decision

ates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

125. *See, e.g.,* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978). An important distinction between *Bellotti* and *Buckley* revolved around the government interest in preventing corruption. The Court stated that the risk of corruption stemming from direct contributions to political candidates did not exist in a popular vote on a public issue. *Bellotti*, 435 U.S. at 790.

126. *National Conservative PAC*, 578 F. Supp. 797, 821 n.34. *See also supra* notes 112-16 and accompanying text.

127. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 788-92.

128. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

129. *See* Note, *Federal Election Law:* FEC v. Massachusetts Citizens for Life*: Non-Profit Corporation Expenditures in Federal Elections*, 60 NOTRE DAME L. REV. 138, 146 (1984).

130. One observer has labeled such decisions "anti-democratic" and "part of the backlash against the spread of the franchise and other aspects of mass democracy." Miller, *On Politics, Democracy, and the First Amendment: A Commentary on* First National Bank v. Bellotti, 38 WASH. & LEE L. REV. 21, 35 (1981). Another commentator has charged that decisions giving corporations protection under the first amendment create an artificial opposition between liberty and political equality. Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equity?*, 82 COLUM. L. REV. 609 (1982).

131. This controversy is evidenced by the positions taken by the justices of the Supreme Court. In *Bellotti*, 435 U.S. 765, the majority decision was five to four. Because Justice Blackmun was in the *Bellotti* majority but dissented in Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 548 (1980), five out of the nine Supreme Court justices have opposed first amendment protection of corporate speech.

establishes that section 441b language will allow a case-by-case interpretation of that section's application.[132] Indeed, a case-by-case application of section 441b is necessary because a literal reading of section 441b would probably result in the section's being struck down as unconstitutional. Flexibility in its application thus allows courts to avoid invalidation of section 441b.[133] (If such a literal reading of section 441b had been the correct approach, courts would have taken it by now.[134])

CONCLUSION

In *MCFL*, the United States Court of Appeals for the First Circuit addressed two issues regarding a non-profit corporation's expenditures in connection with a federal election: 1) whether the expenditures by the non-profit corporation for its special election edition newsletter were encompassed by the provisions of section 441b; and 2) whether application of section 441b to the expenditures would violate the corporation's first amendment rights. The *MCFL* court correctly held the section 441b did encompass the expenditures in question. The court reached this conclusion after an examination of section 441b's language and legislative history. Additionally, the *MCFL* court correctly held that the non-profit corporation's first amendment rights would be violated by an application of section 441b's prohibitions to MCFL's expenditures made in connection with the special election edition newsletter. The court properly ruled that there was no government interest sufficient to outweigh the corporation's first amendment rights.

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132. Section 441b prohibits "any corporation whatever" from making expenditures in connection with an election. *See supra* note 9.

133. Courts generally do not anticipate questions of constitutional law before it becomes necessary to decide them. Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 51 (2d Cir. 1980) (citing Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).

134. Note, *supra* note 129, at 147-48.