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-Footnotes-

n61 See, e.g., Robert C. Clark, *Contracts, Elites and Tradition in the Making of Corporate Law*, 89 Colum. L. Rev. 1703, 1712-47 (1989); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors*, 65 Chi.-Kent L. Rev. 23, 43-47 (1989); Mark Kelman, *On Democracy Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 Va. L. Rev. 199, 205-14 (1988); Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 Creighton L. Rev. 487, 487-99 (1979); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129, 1131-38 (1986). Quite apart from the problems that arise because individuals may lawfully exercise "coercive" power over other individuals in a "free" society, some sort of coercive state action--i.e., government intervention--is required to enable private ordering. If such "minimum" government intervention is necessary, to what extent do the considerations that justify intervention require, or at least permit, additional government intervention to restrain or prescribe some of the terms and consequences of the private ordering that is enabled by the underlying rules of contract, property, etc.?

n62 See, e.g., Robert C. Clark, *Agency Costs versus Fiduciary Duties, in Principals and Agents: The Structure of Business* 55 (John W. Pratt & Richard J. Zeckhauser eds., 1985); Victor Brudney, *Corporate Governance, Agency Costs and the Rhetoric of Contract*, 85 Colum. L. Rev. 1403, 1403-10 (1985). Even if preferences are exogenous, but cf. supra note 61, their exercise requires volition and cognition. The requisite volition is lacking if the associational arrangements are compelled, and is problematic if they are effected between one person or a coherent group, on one side, and a dispersed multitude of individuals, each with relatively trivial stakes, on the other. Resolution of the intractable problems encountered in attempting to define "volition" of an individual on the ambiguous assumptions of individual autonomy is not necessary for present purposes. It is sufficient to recognize that there are degrees or levels of volitional behavior, and to focus on the purpose for which definition is sought--e.g., what degree of individual volition should society protect by law, subsidy, or otherwise against impairment by others and for what purposes?

-End Footnotes-

The debate does not signal that government should never (or often) intervene to impede or restrain collective advocacy choices of members of multi-purpose associations. Even if those debating the issue suggest an a priori tilt against government-imposed restraints in general, the debate contemplates some sorts of intervention on some occasions, and leaves open many crucial questions--such as questions about the kinds of impediments (publicly or privately imposed) to individuals' free choice to contribute in support of a group's advocacy activities that government may counter, and by what mechanisms government may do so consistently with the commands of the First Amendment. Answers turn on [*24] more particularized examination of kinds of association and of intervention.

b. Restrictions on Uses of Wealth that Impede Individuals' Freedom of Choice

In the American vision of democratic society, the validity of collective political decisions or public choice generally turns on the number of individual human beings who signify that they favor (or oppose) a proposal or candidate.

The underlying assumptions are that such individuals choose knowledgeably and freely, and that all should be bound by the majority (or super-majority) choice thus made.

If the premise is added that it is proper to multiply each vote by some measure of the intensity with which each person seeks the decision, the wealth of individuals may be relevant to the validity of the decision. Expenditure of that wealth may be seen as an appropriate implementing measure of the intensity of the individual's preference. On that assumption, individuals are entitled to expend lawfully as much or as little of their wealth as they wish on expressive activities or to further political or advocacy results they seek. To be sure, the free-choice assumption and the wealth expenditure proposition are subject to considerable disagreement, n63 even if they are embodied in current constitutional doctrine. n64 The considerations that justify individuals' use of their wealth to power the intensity of their advocacy preferences and magnify their advocacy voices (in elections, referenda, public support of legislation, or otherwise) may appropriately justify the voice of an advocacy [*25] group organized and funded to act collectively to amplify the individual participants' voices. But the same considerations do not justify the advocacy voices of multi-purpose associations.

-Footnotes-

n63 The notions of "one human (citizen): one vote" and majority rule subtend an arc of possible operational rules that need not include wealth as a permissible measure of intensity. See, e.g., Baker, supra note 29, at 45-46; Sunstein, supra note 8, at 163; Bruce A. Ackerman, Crediting the Voters: A New Beginning for Campaign Finance, Am. Prospect 71 (Spring 1993); John Hart Ely, Democracy and Judicial Review, 17 Stan. L. Rev. 3, 7 (1982); Edward B. Foley, Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance, 94 Colum. L. Rev. 1204, 1206-13 (1994); Wright, Politics, supra note 27, at 1005-13. The impact of the use of wealth in advocacy activity by some individuals on the knowledge and freedom with which others are able to make choices has induced occasional discussion of a need for restrictions on such use or for subsidies of those who lack wealth. See supra note 28. The phenomenal expenditures by some individual candidates in the 1994 congressional elections suggest a certain grotesquerie in the notion that wealth may appropriately be a proxy for intensity in making public choices.

n64 The message of Buckley v. Valeo, 424 U.S. 1 (1976), is neither clear nor graven in stone, as Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657-66 (1990) suggests. Cf. Gerald G. Ashdown, Controlling Campaign Spending and the "New Corruption": Waiting for the Court, 44 Vand. L. Rev. 767, 767-76 (1991).

-End Footnotes-

Members of associations often do not all agree with their organizations' collective choice. Such dissonance poses a problem inherent in collective decision-making even when a purely advocacy association is involved and only one issue is to be resolved. n65 That problem, which is solvable tolerably in an advocacy organization, is exacerbated (and not equally solvable) if funds are contributed by individuals to an association under compulsion (by reason of government mandate or economic necessity) or in order to obtain goods, services, or other non-advocacy benefits that the enterprise offers, and those funds also fuel the enterprise's advocacy voice.

-Footnotes-

n65 An organization's speech is apt to be the result of different, sometimes contradictory, preferences of its members (or agents), and therefore may well not constitute the speech of any of its individual participants. To recognize this difference does not deny the separateness of the individual participant's claim (and if the government yields to that claim, his or her entitlement) to be free from the obligation to support, by funds or otherwise, the organization's capacity to offer "its" speech. If that claim or entitlement is a negative speech interest protected by the First Amendment (as the Supreme Court states in cases of mandated membership and implies for other forms of membership by its reasoning in those cases), see cases cited supra note 2, there is often a sharp conflict between the individual's speech interest and that of the group which may have effects on the audience and on society. Analysis of the various speech interests involved, which suggests different values for each, has been offered by Dan-Cohen, *Freedom's*, supra note 4, at 1234-67.

-End Footnotes-

If the individual's contribution is compelled or indisputably made solely in order to obtain the goods or collateral benefits and the contributor is ignorant of, or effectively indifferent to, the group's uses of collective funds for advocacy activities, that contribution can fairly be said not to constitute, and that use not to reflect, volitional support of those activities by the contributor. If the contribution is not forced and is indisputably made to support the advocacy activity of the group by the contributors who are relatively indifferent to the collateral benefits, the contributors' support of the advocacy activities is not relevantly less volitional than their support of the activities of a purely advocacy organization. In the "real" world, although the polar cases are not infrequently approximated, many kinds of multi-purpose associations exist between the poles. The magnitude of the compulsion or collateral rewards inducing individuals to join or remain members of particular kinds of multipurpose associations (both in absolute terms and in relation to the advocacy activities on the association's agenda) affects the volitional character of the individual's support of the particular group's advocacy activities. That the logic of collective action may require some selective incentives or collateral inducements to individuals to support even an advocacy group's advocacy activities n66 does not mean that any and all such inducements or tie-ins are necessary or appropriate in order to solve free-rider problems or to enable interest groups to perform such of their functions as may be claimed, praised, or deplored.

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n66 See Olson, supra note 58, at 5-52; Mancur Olson, Jr., *The Rise and Decline of Nations* 17-35 (1982) [hereinafter Olson, *Nations*].

-End Footnotes-

Doubtless an interest group's advocacy voice will be more powerful if it is fueled by the funds raised through a multi-purpose association than if it is effected through the more modest funding induced by emotional or affective appeals n67 of an association formed solely to give a collective advocacy voice. However, at least with respect to compelled support, and possibly to some

kinds of collateral inducements or tie-ins, the cost to individuals of having part of their advocacy voice held hostage to their need or desire for the tied-in goods is not trivial. That cost deprives the individual's advocacy voice of the volitional character that may appropriately be deemed necessary to give it validity in matters of public choice, if not also in matters of private choice. In decisions on matters of public governance, the effect of one person's choice on how the state's coercive power should be exercised (or restrained) over all persons gives each an interest in preserving the freedom of others to choose that is lacking for choices made about private exchanges or returns.

-Footnotes-

n67 That such appeals have power, notwithstanding the impulse of "rational" actors to see only their self-interest and to free-ride, is the suggestion of a growing body of literature that does not question the basic premise. See, e.g., Russell Hardin, *Collective Action* 101-24 (1982); Terry M. Moe, *The Organization of Interests* 24-30, 23344 (1980).

-End Footnotes-

Moreover, the resulting power in the group supports a collective advocacy voice that lacks the justification of an individual's expressive role. Wealth gives power to individuals to color the mix of information and advice the audience receives in favor of the expressions or views the wealthy person prefers, particularly in matters on which the audience is asked to make an advocacy choice. The argument that airing of offsetting or contrary views by others enables public decisions to be made appropriately by reason of the resulting mix in the marketplace of ideas is less persuasive today than it may have been historically. n68 Such justification as exists for entitling the audience to receive and act upon a mix of information and advice that is so colored is to be found less in the notion of possible expressive offsets to the advocacy power of wealthy individuals or expressive associations than in other considerations. Those considerations stem from the notion of individuals' entitlement to spend their wealth and exercise "disproportionate" n69 power in advocacy activities and expression, and society's interest in freedom from government efforts to control or influence the viewpoints in that mix or to prohibit individual inputs to that mix, whether made personally or collectively through expressive associations.

-Footnotes-

n68 Justification for the coloring power of wealthy individuals on public discourse, or at least for forbidding government to limit that power, sometimes proceeds on the assumption that disagreements among those with wealth will result in the audience receiving a full (or at least a broad enough) range of conflicting views. That assumption may be valid for many matters on which the public is addressed. However, that assumption's validity is far from self-evident on the many important matters in which those with wealth have views more congruent with one another than with the views of those without wealth or the capacity to form interest groups. See, e.g., E.E. Schattsneider, *The Semi-Sovereign People* 34-35 (1969); Kay Lehman Schlozman & John T. Tierney, *Organized Interests and American Democracy* 398-410 (1986); David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 *Hastings Const. L.Q.* 541, 568-77 (1991). Nor can the power of those with wealth to tint the mix of views and information presented to the public be offset (individually or in interest

groups) generally by the possibility that those who lack wealth can somehow (by banding together or otherwise) acquire access to communication mechanisms or persuasive powers to dissolve the tint, or at least materially affect the colors of the mix. See, e.g., CBS v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973); Weinberg, supra note 28, at 1138-64.

n69 That is, more than the power of others who have little or no wealth.

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Whatever the validity or reach of those arguments, n70 they do not justify empowering the advocacy voices of multi-purpose associations, or the use of their wealth to enhance the power of their voices over the voices of individuals or purely expressive associations. Nor do they preclude fettering the voices of multi-purpose organizations. Such enterprises obtain their funds for non-advocacy activities by contributions from individuals who, although they wish to (or must) support those activities, need not, and may not wish to fund the group's advocacy voice apart from the non-advocacy activities that induced the contribution. To preclude collective voices so funded from affecting the mix of advocacy voices that the public receives does not mean that the public will be denied views funded by those individuals who wish to give, or add, particular color to advocacy messages, or that those individuals will be precluded from so using their wealth. Those persons remain entirely free, collectively or individually, to provide such colors--by spending personal funds for advocacy activities or contributing them to advocacy enter [*28] prises uninfluenced by the inducement to receive the benefits from the enterprise's non-advocacy activities.

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n70 There is room to argue over the quality and quantity of information and persuasion that is appropriate to influence citizens in making public choices in a democratic society, and particularly over the extent to which an individual's wealth or lack of wealth should affect the menu offered to those making the choice. See supra notes 28, 63.

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The considerations that justify prohibition of vote-buying in the electoral process (notwithstanding that such prohibition precludes Pareto superior exchanges), may not deny all uses of wealth by individuals in electoral contests or referenda or the like, including purchase of advocacy voices. However, those considerations suggest problems with forcing individuals' advocacy support or inducing it by offering collateral benefits which necessarily obfuscate the extent to which advocacy choices of individuals are made when they contribute to associations organized principally for non-advocacy purposes. The state need not be confined in protecting individuals' freedom of choice in advocacy matters to forbidding coercion or fraud by multi-purpose associations n71 in acquiring funds that may be used for advocacy activities. Other kinds of obstructions to choice in the contribution of funds for advocacy activities may also be deemed improper by a society that respects individuals' freedom to have, and to make, advocacy choices. Moreover, a democrat [*29] ic society may also be concerned that the flow of funds to such activities be the result of a more or less self-conscious choice by individuals to expend funds for effecting value preferences for governance of the society. The harmful effects of vote

trafficking on the individual and on society n72 are echoed in the linking by a multi-purpose association of support for its advocacy voice to the necessities or other non-advocacy benefits that it offers and that are not otherwise available. The same is true, although to a lesser degree, of linking advocacy support to obtaining benefits whose magnetic attraction overwhelms and effectively obscures the advocacy support thus given. n73 The metaphor of a market for political results is no more than a metaphor. n74 It does not suggest that in matters of public governance society should be precluded from acting on [*30] the premise that people who contribute to advocacy action without the inducement of immediate collateral rewards for making the contribution are more likely than those offered collateral rewards to evaluate the relationship of their contributions to their advocacy preferences. n75 Even if society is not required--or permitted--in every case to enforce that conception of free choice in the exercise of advocacy action, it should not be precluded from protecting that vision in such matters, at least as the compulsion or lure of the collateral inducement increasingly obscures the import of the accompanying advocacy action.

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n71 The assumption that the source or existence of an individual's wealth is irrelevant to, and may not qualify, his or her right to use or spend it on expression protected by the First Amendment, including advocacy activity, see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 684-85 (1990) (Scalia, J., dissenting); Larry E. Ribstein, *Corporate Political Speech*, 49 Wash. & Lee L. Rev. 109, 125-59 (1992), does not protect him or her from sanctions for acquiring it improperly. In some cases, such sanctions may entail impediments to the individual's speech, such as ordering the return of improperly acquired property (e.g., a speech amplifier) or even an injunction against use of misappropriated cash to fund speech if the misappropriator is an agent and the victim his principal. Cf. *Snepp v. United States*, 444 U.S. 507, 507-16 (1980).

In any event, the multi-purpose association's acquisition of its collective assets from individuals is more closely related to the multi-purpose association's expenditure on advocacy speech than is an individual's acquisition of assets, contractually or otherwise, in discrete arms-length transactions with another. That both transactions may be characterized as contracts does not make their entailments the same. In the latter case, the relationship of the parties to the exchange is not continuing, and the acquirer's use of the assets acquired does not generally involve any asset in which the contributor continues to be implicated, or have a residual interest, at the time of the expenditure on speech. In the former case, collective assets are acquired from individuals in exchange for continuing membership or participation in the collective, and continuing interest in use of the assets. Moreover, if the individuals do not, or may not, want the assets to be expended for advocacy speech, that speech interest would not be protected, except trivially, by permitting the group to spend the collected funds on advocacy speech and be punished later for violating its promise or a prohibition against soliciting funds for such use. This is not to say that the First Amendment would not preclude government interdiction of such expenditures by the group if the interdiction were applied or aimed discriminatorily at certain viewpoints or were designed to, or effectively did, suppress the content of the speech.

n72 Pamela J. Karlan, *Not by Money, But by Virtue Won?: Vote Trafficking and the Voting Rights System*, 80 Va. L. Rev. 1455, 1464-75 (1994); see also Robert

C. Clark, Vote Buying and Corporate Law, 29 Case W. Res. L. Rev. 776, 804-05 (1979).

n73 The principle that underpins government decisions to protect individuals from being forced or induced by incentives that mask the support of a group's advocacy voice to give such support does not require government to protect individuals against the compulsion that disadvantages in their social or economic condition, like poverty, may impose upon them to give aid to candidates or causes that promise them government benefits. The considerations underlying the First Amendment that permit, and indeed support, the former do not require the latter, even if they support or permit it. In short, not all impediments to free choice in advocacy matters need be removed by government (by proscription, subsidy, or otherwise) even if some are removed and the removal of others, such as disadvantages resulting from disparities in education, health, or the like, may also be desirable. Nor is freeing individuals' opportunities for advocacy choice from being tied to their need for, or desire for, other goods incompatible--in principle or in practice--with preserving individuals' freedom to seek or support government action (or inaction) in order to obtain personal benefits that will result from the government action (or inaction) that they support. Cf. Karlan, *supra* note 72, at 146061. Nor does providing such protection to individuals even implicate limiting the expenditures of wealthy individuals for advocacy activity in order to even the playing field for those lacking such wealth, or restricting "the speech . . . of some . . . in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

n74 Even metaphorically to analyze the choices embodied in exchanges between interest groups (or individual voters) and elected officials as buying and selling "goods," cf. Robert D. Tollison, *Public Choice and Legislation*, 74 Va. L. Rev. 339, 341-51, 363-64 (1988), assumes volitional behavior on all sides. That assumption implicates inquiry into the funding of those exchanges, and in particular whether the funds that associations obtain and use for advocacy action are freely given or are obtained by government mandate, economic necessity, or even merely tie-in sales of goods that are desired but not necessary for the purchaser. Cf. Kelman, *supra* note 61, at 204-15. The shadow on the volition that fuels the advocacy views of an association funded by compelled contributions or by a tie-in process does not equally darken the volitional character of an individual's gift to a political association or personal expenditure on behalf of a candidate or cause.

n75 A requirement of full disclosure by the multi-purpose association of its past or contemplated uses of funds for specified advocacy activities may mitigate the obscuring effect of the non-advocacy incentives to contribute to or support it. Nevertheless, the problem is not one that disclosure will cure. Ex ante relief is hard to effect, and ex post relief by way of damages does not prevent the ex ante failure to disclose or use the funds. Cf. *supra* note 72. More important, disclosure of a potential use of funds does not remove the fetters on the contributor's freedom of choice in advocacy matters, although illumination of the choice may in some circumstances unfetter the constraints enough to be relevant in measuring whether the government intervention is narrow enough.

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Degrees of compulsion and obfuscation to informed and free individual choice in affecting an association's advocacy voice vary with associations. n76 The cost of implementing protection of such freedom on the circulation or distribution of advocacy voices to the public also varies with the scope and mode of protection proposed. The wisdom and the constitutionality of a proscription of the use of funds for collective advocacy action by multi-purpose associations turn on examination of the institutional role and the operation of particular kinds of multi-purpose associations and particular types of intervention.

-Footnotes-

n76 For example, where smaller "private" associations are involved, the lure of the tied-in benefits is less likely to obscure or overbear the import of the group's advocacy activities. A relatively small multi-purpose association will offer higher visibility for its advocacy activities to aspirants who are more likely to contemplate active participation in its affairs. In such enterprises, the free-rider problem is less serious and unbundling less needed to enhance individual choice. Olson, Nations, supra note 66, at 53-65.

-End Footnotes-

B. Intervention in Advocacy Activities of Compelled or Pressured Association

To discuss in the abstract the existence or import of a "negative" speech right or interest of individuals, or society's legitimate interest in having multi-purpose associations' advocacy speech undertaken by its members individually or collectively in a separate expressive association does not solve the problems that assertion of those interests generates in [*31] specific institutional or operational contexts. In each of those contexts honoring, or deferring in whole or in part to, the individual's claim or society's interest in protecting it entails curtailing the right of the group to speak and of its audience to hear its communication. Assessing the propriety of that curtailment requires examination of particular associations and particular government interventions.

1. Integrated Bar

We begin by examining constitutionally-begotten court-imposed limitations on the advocacy speech of associations whose members are directed by government to join or support the organization. A flowering garden of jurisprudence on the problem of such associations and their advocacy speech--albeit cultivated largely in state law--has grown from the claims of members of integrated bars. n77 The claims are made primarily by dissident individuals seeking to be excused from membership in the state bar association, seeking rebate of a portion of their dues payments, or seeking to curtail the public utterances that the bar association makes--generally in the form of lobbying and urging public acceptance or support for particular policy proposals.

-Footnotes-

n77 See supra note 21. There are many variations in the formulae (contained in the charter or rules creating the bar association) defining the powers and authority of such organizations. See infra notes 90, 92, 93.

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Generally the association functions primarily for the licensure, education, and discipline (including promulgation of ethical standards) of the members of the bar. In addition, however, almost all such associations are empowered in very general terms to seek to improve the administration of justice, to provide legal research in areas of substantive and procedural law, and to provide for discussion of law reform. Under those general provisions, integrated state bar associations acting either by their boards alone or with approval of their membership have used portions of the associations' funds, largely supplied by compelled dues, to lobby and otherwise to publicize positions in support of or opposed to proposals on public questions before the legislature or the voters. n78

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n78 See, e.g., Arrow v. Dow, 544 F. Supp. 458, 463-64 (D.N.M. 1982) (listing 16 bills on which the New Mexico State Bar expended funds for lobbying).

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That membership in such associations is compelled by government is not disputed by anyone, notwithstanding that the sanction for failure to join may be only denial of access to a reasonably chosen mode of work (and the personal fulfillment, as well as the material returns it brings) rather than imprisonment or other criminal sanction. The considerations supporting an integrated (rather than a voluntary) bar association have [*32] been deemed "reasonable" by the Court, even though a case certainly can be made that a voluntary bar association may reasonably achieve the same societal goals and, therefore, a mandate to join is not necessary. n79

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n79 Lathrop v. Donohue, 367 U.S. 820, 842-43 (1961); Keller v. State Bar, 496 U.S. 1, 7-9, 15-17 (1990). The wisdom of requiring an integrated bar is far from obvious. The impact of bar associations on the politics, reforms, and ideology of the society, see Terence C. Halliday, Beyond Monopoly 41-47 (1987), argues for voluntary rather than integrated bar associations to serve those functions. The conflicting policy considerations have been the subject of continuous debate and research by practitioners, judges, and academics. See In re State Bar, 485 N.W.2d 225, 226 (Wis. 1992). Compare Anthony Murray, The Unified Bar Serves the Public Interest, Cal. Law., May 1983, at 13, 13 and W. Reece Smith, Jr., In Support of the Integrated Bar, 5 Fla. Bar J. 258, 258-59 (1980) with Edward L. Lascher, Dismantle the Unified Bar, Cal. Law., May 1983, at 12, 12 and Theodore J. Schneyer, The Incoherence of the Unified Bar Concept, 1983 Am. Bar Found. Res. J. 1, 79-96.

Although the Supreme Court, in assessing the claim of infringement of freedom of association, noted the distinction between the compulsion to become a member and the compulsion to pay dues, see Keller, 496 U.S. at 17, state courts do not make much of that distinction. However the claim is cast, the opinions seem to proceed on the premise that the requirement to associate should be upheld if the state has a reasonable basis for forcing the association. E.g., In re Chapman, 509 A.2d 753, 755-56 (N.H. 1986); Report of Comm. to Review the

State Bar, 334 N.W.2d. 544, 546-47 (Wis. 1983) ("A unified bar association is more likely to administer its programs in the public interest and . . . the performance of such functions is more efficient and economical if conducted by a single association financially supported by all lawyers"); see also Cheryl A. Cardelli, Casenote, Falk v. State Bar of Michigan: First Amendment Challenge to Bar Expenditures, 1982 Det. C.L. Rev. 737, 738-39, 747-50.

Occasionally there are imputations that the First Amendment is the source of the complaining individual's entitlement to freedom of association and of the limits on government power to restrict association. See, e.g., Gibson v. Florida Bar, 798 F.2d 1564, 1567-69 (11th Cir. 1986); Arrow, 544 F. Supp. at 462; Falk v. State Bar, 342 N.W.2d 504, 506-14 (Mich. 1983), cert. denied, 469 U.S. 925 (1984); Chapman, 509 A.2d at 757-58; cf. Gibson v. Florida Bar, 906 F.2d 624, 631-32 (11th Cir. 1990), cert. granted, 499 U.S. 918 (1991), cert. dismissed, 502 U.S. 104 (1991). However, the logic of the apparent standard of judicial review (i.e., reasonable basis) is that, apart from its relation to speech activities, the claim of freedom not to associate derives from the liberty protected by the Fifth and Fourteenth Amendments and is to be so tested. See Gibson, 798 F.2d at 1569; cf. Gibson, 906 F.2d at 631-32; cf. Kidwell v. Transportation Communication Int'l, 946 F.2d 283, 299 (4th Cir. 1991). For the Supreme Court, the substantive judgment about the propriety of coercing membership, at least in a more or less "impersonal" association, is derivative because the case comes to it with the state's "reasonable" preference already expressed. Cf. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

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Delegation by government of power to regulate substantial areas of professional conduct of the legal profession to a "private" association subject to implicit restrictions against "arbitrary" action n80 raises no [*33] questions that have not been answered in upholding such delegation for other trades or professions. n81 Being forced by government formally to join or to contribute to the support of a government-sponsored professional or occupational association goes a step further but presents no significantly different constitutional or other normative obstacles. Compelling a person to join, or at least support, a self-regulatory organization is reasonable in order to solve free-rider problems and to assure that the association can educate, prescribe standards for, and discipline the profession. n82

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n80 See Note, Developments in the Law: Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 994 (1963).

n81 See, e.g., J.F. Barron, Business and Professional Licensing: California, A Representative Example, 18 Stan. L. Rev. 640, 651-53 (1966); Walter Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6, 10-13 (1976); Louis L. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 247-53 (1937); George W. Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650, 701 (1975).

n82 See, e.g., In re Rhode Island Bar Ass'n, 374 A.2d 802, 803 (R.I. 1977); In re Unification of N.H. Bar, 248 A.2d 709, 713-14 (N.H. 1968).

To the extent that lawyers' activities in initiating or conducting litigation implicate petitioning the government, the validity of restraints on those activities implicit in compelling support of, or membership in, a professional association may require testing under the strict scrutiny jurisprudence of the First Amendment rather than under the "reasonable basis" jurisprudence dealing with intrusions on liberty. Compare *In re Primus*, 436 U.S. 412, 433-34 (1978) with *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 334-35 (1985) and *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 457 (1978). But cf. *Washington Legal Found. v. Massachusetts Bar Found.*, 795 F. Supp 50, 55-56 (D. Mass. 1992). For protection of association as an implementation of the right to petition, see *United Transp. Union v. State Bar*, 401 U.S. 576, 585 (1971); *UMW v. Illinois Bar Ass'n*, 389 U.S. 217, 221-22 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7-8 (1964); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963); *In re New Hampshire Disabilities Rights Ctr.*, 541 A.2d 208, 215 (N.H. 1988).

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The Supreme Court has divided claims to be free from such compulsion (at least insofar as the association effectively consisted only of paying dues to the bar association) into claims for freedom to decline to associate and claims for freedom to decline to support the group's speech. n83 The former was apparently reviewed as a claim to deprivation of "liberty" (not implicating the First Amendment) and rejected. n84 The [*34] latter was reviewed as a claim of interference with speech and therefore as a violation of the First Amendment, and was upheld. n85 Hence, while [*35] the portion of the compelled dues payments that was used to implement the association's professional activities could constitutionally be exacted without involving any speech right or violating any "liberty" right of the payor, n86 the portion expended on "activities of an ideological nature which fall outside of those areas of professional activity" violate the payor's First Amendment speech rights. n87

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n83 See, e.g., *Keller*, 496 U.S. at 15-17; *Lathrop*, 367 U.S. at 842-43.

n84 See *Lathrop*, 367 U.S. at 842-43. The sources of protection of association or associational relationships for individuals and for associations are not easily found in the Constitution. The Constitution contains no explicit reference to association, possibly because of a reluctance to offer too protective a stance against government for some associational relationships. See Charles E. Wyzanski, Jr., *The Open Window and the Open Door*, 35 Cal. L. Rev. 336, 341-42 (1947). Cf. *The Federalist* No. 10 (Madison); Thomas Hobbes, *The Leviathan* 190 (E.P. Dutton & Co. ed., 1950) (1651). Both the individual's and the group's claims to protection of association seem to be based upon the assumption of a more or less "natural right" of individual human beings to associate--i.e., to relate to others in intimate affiliation or in private or public groups and to act collectively. See Alexis DeTocqueville, *Democracy in America* 323 (Henry S. Commager ed. & Henry Reeve trans., Oxford University Press 1947) (1840); Robert A. Horn, *Groups and the Constitution* 16 (1956); John Stuart Mill, *On Liberty* 109-10 (Stefan Collini ed., 1989) (1859); Charles E. Rice, *Freedom of Association* 1-18 (1962); Tribe, *supra* note 9, section 15-3, at 1308-12; cf. *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1875). But cf. Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations,*

Our First Amendment Discourse and the Problem of Dibartolo, 1990 Wis. L. Rev. 149, 180-88. For a suggestion that the "right" of association is independent and not merely instrumental in implementing other individual rights, see Tribe, *supra* note 9, section 12-26, at 1010-15; Reena Raggi, An Independent Right of Freedom to Association, 12 Harv. C.L.-C.R. L. Rev. 1, 11-14 (1977). See also Dan-Cohen, Rights, *supra* note 4, at 177.

Possibly the principal source of constitutional protection for the "right" of association (which, as we have seen, entails several substantially different kinds of relationships) is the "liberty" which is protected in the Due Process Clauses of the Fifth and Fourteenth Amendments. See, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19, 23-25 (1989); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). Notwithstanding the sweeping language in many opinions about the protection that the First Amendment offers for freedom of association, those particular cases involve behavior that implicates, in addition to the freedom of association, First Amendment speech and religion claims, as the Court later suggested in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), and *Stanglin*, 490 U.S. at 23-25. But cf. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978). Support may also be found in the "privacy" concept suggested by additional protective provisions in, and adumbrations from, the Bill of Rights. Tribe, *supra* note 9, sections 15-3, 15-4, at 1308-14; see William O. Douglas, The Right of Association, 63 Colum. L. Rev. 1361, 1368-70 (1963). The limitless Ninth Amendment has also been urged as a source of the right of association. See Randy E. Barnett, Are Enumerated Constitutional Rights the Only Rights We Have?: The Case of Association Freedom, 10 Harv. J.L. & Pub. Pol'y 101, 110-12 (1987). But cf. Wyzanski, *supra*, at 341-42. The claim to protection of religious liberty is likely to be a more substantial, if narrower, source of some associational rights. Another viable constitutional source of protection of association or refusal to associate may be found in the ricochet off the equal protection concept that is explicit in the Fourteenth Amendment and implicit in the Fifth Amendment. See *Stanglin*, 440 U.S. at 25-30.

n85 *Keller*, 496 U.S. at 15-17. The First Amendment is increasingly the source of a claimed freedom of association that first unfolded in Supreme Court opinions that protect a group and its members against government threats to its members' freedom to speak and to join as groups engaged largely in communication or advocacy speech. See *supra* note 47; see also *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984); *Thomas v. Collins*, 323 U.S. 516, 530-31 (1945); *De Jonge v. Oregon*, 299 U.S. 353, 363-65 (1937). To be invoked, the First Amendment presumably requires a claim that the government intervention that impairs freedom of association (whether by compelling a person to join a group, by compelling the group to accept outsiders, by seeking to deter persons from joining, or otherwise) in some sense also impairs speech or related assembly or petition rights of the claimants. The relationship thus protected is more public than private, see C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 1030-40 (1978); Frank H. Easterbrook, Implicit and Explicit Rights of Association, 10 Harv. J.L. & Pub. Pol'y 91, 99 (1987), and it entails more the protection of public activities and the social value of exchange and development of ideas and information than fulfillment of the persona of the individual member. But cf. Dan-Cohen, *Freedom*, *supra* note 4, at 1251-54.

n86 See *Keller*, 496 U.S. at 11-13. But see *id.* at 17. On the assumption that joining the state bar association was mandated by government, the Court in *Lathrop* treated the complaint as raising a question under the Fourteenth

Amendment as to the scope of the imputed First Amendment's prohibition against government interference with freedom of association. Lathrop, 367 U.S. at 842. Apparently on the assumption that the only obligation of membership was to pay dues, id. at 843, the propriety of the compulsion to associate was reviewed under a less strict standard than is said to be required for measuring a claimant's rights (certainly for measuring free speech rights) under the First Amendment. Id.; see Levine v. Heffernan, 864 F.2d 457, 462 (7th Cir. 1988), cert. denied, 493 U.S. 873 (1989). The Lathrop Court relied expressly on Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956), and simply found that the state "might reasonably believe" that regulating its bar by requiring membership in the state bar association was preferable to leaving the matter to a voluntary association and that a "legitimate end of state policy" overshadowed any claims of individuals that they not be required to join or become members of the association in order to practice law. Lathrop, 367 U.S. at 843; cf. Buckley v. Valeo, 424 U.S. 1, 20-23 (1976) (suggesting that freedom of association differs from freedom of speech and is, at least when not connected to speech, entitled to less protection).

n87 Keller, 496 U.S. at 14.

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In Keller v. State Bar, n88 the Court barely acknowledged the difficulty of administering the constitutional regime thus created, which requires distinguishing between expenditures for ideological or political activities and expenditures for professional activities. It referred to the elaborate jurisprudence generated for "compelled" dues payments under union or agency shop arrangements to illuminate the methods for administering the distinction so as to protect individual objectors without unduly interfering with the group's First Amendment speech rights. n89 The Court's opinion in Keller offers a constitutional solution that substantially tracks [*36] the results reached in some jurisdictions in addressing comparable challenges to the integrated bar--i.e., pro-ration of members' dues. n90 The Court's solution does not expressly preclude the integrated bar association from engaging in ideological or political speech so long as it supports such speech only by voluntary contributions from members. n91 Such a solution leaves the association with greater freedom than do solutions adopted by states that "interpret" the powers of the integrated bar to be so limited (either by reason of the authorizing mandate or by the court's supervisory authority) as to preclude the association from engaging in political or ideological activities. n92 Those states rely on the same kind of ambiguous distinction between permissible and impermissible expression as does the Supreme Court. However, they invoke the distinction to limit the subject matter of the group's speech rather than to limit the funds with which it can fuel its ideological speech. n93

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n88 496 U.S. 1 (1990).

n89 Id. at 11-15. But see Jennifer Friessen, The Costs of "Free Speech": Restrictions on the Use of Union Dues to Fund New Organizations, 15 Hastings Const. L.Q. 603, 606-14 (1988).

n90 See, e.g., Gibson v. Florida Bar, 906 F.2d 624, 631-32 (11th Cir. 1990); Gibson v. Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986); Schneider v. Colegio de Abogados, 682 F. Supp. 674, 690 (D.C.P.R. 1988), aff'd in relevant part, 917 F.2d 620, 640 (1st Cir. 1990), cert. denied, 112 S. Ct. 865 (1992); Virgin Islands Bar Ass'n v. Virgin Islands, 648 F. Supp. 170, 180-81 (D.C.V.I. 1986), aff'd in part, rev'd in part and remanded, 857 F.2d 163, 168-69 (3rd Cir. 1988); Reynolds v. State Bar, 660 P.2d 581, 581 (Mont. 1983).

n91 But in Keller, the Court expressly left open a question that casts a shadow on such engagement. Keller, 496 U.S. at 17. The Court referred back to the California courts the question whether notwithstanding the limits placed on the group's use of the forced dues payments, the speech rights of persons who were compelled to become members of the association were violated if the organization engaged in any ideological or political activities. Id.; cf. Kidwell v. Transportation Communications Int'l Union, 946 F.2d 283, 299 (4th Cir. 1991), cert. denied, 112 S. Ct. 1760 (1992).

n92 See, e.g., In re Chapman, 509 A.2d 753, 758-59 (N.H. 1986); On Petition to Amend Rule 1 of the Rules Governing the Bar, 431 A.2d 521, 529-30 (D.C. 1981); cf. Arrow v. Dow, 554 F. Supp. 458, 462-63 (D.N.M. 1982); Florida Bar ex rel. Frankel, 581 So. 2d 1294, 1299 (Fla. 1991); Sams v. Olah, 169 S.E.2d 790, 798 (Ga. 1969), cert. denied, 397 U.S. 914 (1970); In re The Committee To Review The State Bar, 334 N.W.2d 544, 547 (Wis. 1983).

n93 Some states have rejected the claimant's First Amendment claim and authorized the integrated bar association to engage in ideological activities. See, e.g., Falk v. State Bar, 342 N.W.2d 504 (Mich. 1983). But Keller vitiates the premise of those rulings. Keller, 496 U.S. at 15-17.

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The conclusion of those states, as well as the question left open by the Supreme Court in Keller, implicates the constitutional right of the group to speak at all on ideological or political questions. If the association were not created under special government auspices as an institution which all lawyers must join and support, it might plausibly urge that the limitations on ideological or advocacy activities that the Court's ruling creates violate its rights and its complying members' speech rights under [*37] the First Amendment. But it is hard to validate the argument that the government, by curtailing the group's ideological or advocacy speech and limiting its activities to matters necessary to fulfill the functions which alone justify creation of the compelled association, cannot protect the speech interests of those whom it expressly directs to join or contribute to a group that it specially authorizes and empowers. n94 And the justification for government thus protecting individuals' speech interests makes that protection not unduly restrictive of any possible "rights" that the other members may have to act or speak collectively, n95 since those other members are free to form a voluntary association to communicate their advocacy views. n96

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n94 The fact that the government mandates the existence of, and empowers, the group does not entitle the government to restrict the group's conduct by imposing unconstitutional conditions such as authorizing or directing the group to exclude members on grounds of race or gender, or to support some but not

other ideas or political views or candidates. However, neutrally precluding the government-mandated group from engaging in advocacy speech or ideological activities, and confining the group narrowly to the technical aspects of the functions that impelled its creation, does not reach any of the troublesome areas shadowed by the notion of unconstitutional conditions.

n95 Even if the Constitution did not of its own force require such protection, the government could as a matter of policy offer protection (as some states do) without violating the constitutional rights of those members who wish the association to engage in advocacy activities. Cf. supra note 90.

n96 See, e.g., Lathrop v. Donohue, 367 U.S. 820, 874-75 (1961) (Black, J., dissenting).

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The contention may be made that an audience's interest in the group's speech precludes the government from curtailing that speech. Whether the argument is cast in terms of respecting the autonomy of individual listeners n97 or of the social value of allowing ideas to be expressed in order to be exchanged or considered, n98 it has no power as a basis for compelling an individual personally to speak or to contribute toward the utterance of speech. The enlightenment of A, either individually or for political or general societal purposes, does not justify coercing B to speak--both because of the considerations that entitle B as an autonomous human being to be free from such coercion, and because the enlightenment of A achieved through coerced speech is questionable. n99 Thus, if the audience interest is not sufficient to require the government [*38] to compel persons to speak, the audience interest has little more power as a basis for compelling persons to pay money to an organization in order to furnish the wherewithal for that organization to provide speech for an audience.

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n97 See supra note 33.

n98 See supra note 34.

n99 Moreover, even if the notion of free speech and the terms of the First Amendment required government, on occasion, to subsidize speech, see supra note 28, nothing in the considerations justifying such a subsidy for the benefit of the speaker or the audience could justify compelling a person to speak or contribute to an association to support speech.

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2. Professional and Occupational Associations

There are also reasons to limit the advocacy activities of associations that, often because they exert effectively monopolistic power, offer benefits that constitute practical necessities for members. The power of such groups to induce membership is frequently enhanced by the special relationship of their activities to government function. n100 Membership in such associations is not significantly less compelled if driven by economic necessity than if mandated

by government; n101 pro tanto, the
[*39] individual's negative speech interest is no less impinged.

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n100 The roles delegated to professional or occupational associations by the government often include participation in the fashioning of examinations for admissions to practice, supervising licensing of practitioners, accrediting professional schools or practice facilities, and monitoring compliance with licensure and other requirements imposed by the government (generally fashioned with the advice of the association). See Council of State Governments, *Occupational Licensing Legislation in the States* 88-90 (1952). The extent to which medical societies and some occupational or labor unions are intertwined with government licensure or accreditation procedures and monitoring of government-required standards for the profession or trade has been the subject of considerable comment. See, e.g., Oliver Garceau, *The Political Life of the American Medical Association* 103 (1941); Paul Starr, *The Social Transformation of American Medicine* 168 (1982); Jonathan Lang, *Toward a Right to Union Membership*, 12 Harv. C.R.-C.L. L. Rev. 31, 40-49 (1977) (discussing medical societies); Clyde W. Summers, *The Right to Join a Union*, 47 Colum. L. Rev. 33, 35 n.8 (1947); Comment, *The American Medical Association: Power, Purpose, and Politics in Organized Medicine*, 63 Yale L.J., 938, 939-53, 959 (1954); see also Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 229-34 (1937); Note, *Exclusion from Private Associations*, 74 Yale L.J. 1313, 1320-21 (1965). So too have the access practices of private hospitals that are the beneficiaries of substantial government subsidies. Cf. *Desai v. St. Barnabas Medical Ctr.*, 510 A.2d 662, 667-68 (N.J. 1986); *Greisman v. Newcomb Hosp.*, 183 A.2d 878, 882 (N.J. 1962); *Woodard v. Porter Hosp., Inc.*, 217 A.2d 37, 39 (Vt. 1966). Compare *Eaton v. Grubbs*, 329 F.2d 710, 715 (4th Cir. 1964) and *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 967 (4th Cir.), cert. denied, 376 U.S. 938 (1963) and *State ex rel. Sams v. Ohio Valley Gen. Hosp. Ass'n*, 140 S.E.2d 457, 462-63 (W. Va. 1965) with *Ascherman v. Presbyterian Hosp. of Pac. Medical Ctr., Inc.*, 507 F.2d 1103, 1104-05 (9th Cir. 1974) and *Kiracofe v. Reid Memorial Hosp.*, 461 N.E.2d 1134 (Ind. Ct. App. 1984).

n101 For example, failure to join county medical societies in the past and, more recently, societies of medical specialists, frequently denied physicians access to hospitals, referrals from colleagues, and other professional benefits so that practice of the profession without being a member was either impossible or severely restricted. See *Ezekiel v. Winkley*, 572 P.2d 32, 39 (Cal. 1977); see also *Blende v. Maricopa County Medical Soc'y*, 393 P.2d 926, 930 (Ariz. 1964); *Reiswig v. St. Joseph's Hosp. & Medical Ctr.*, 634 P.2d 976, 980 (Ariz. Ct. App. 1981); *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 460 P.2d 495, 499 (Cal. 1969); *Falcone v. Middlesex County Medical Soc'y*, 170 A.2d 791, 796-97 (N.J. 1961); *Davidson v. Youngstown Hosp. Ass'n*, 250 N.E. 2d 892, 895 (Ohio Ct. App. 1969).

Although membership in such enterprises is effectively compelled, in theory the members are free to agree that the association would not engage in advocacy activities. In the absence of a nonadvocacy agreement, it can be argued that the group's engagement in advocacy activities is voluntary even if membership is compelled. That the potential for advocacy activities is part of the incentive for the existence of the association does not mean that dominating collateral incentives should be permitted as tie-ins to induce participation, particularly for late-comers who cannot easily alter the terms of reference, even if they

wish to do so. The difficulty of forming competing associations which do not have the collateral incentives of the initial enterprise implicates the inadequacy of the volition with which members support the initial venture's advocacy activities.

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In addition to its interest in freeing the compelled member from the obligation to support advocacy activities with which he or she does not agree, society may be concerned with narrowing the agenda of such associations to only those activities necessary to support the organization's professional or occupational functions. For example, a legislature, which by comprehensive delegation of authority has facilitated a medical society's "strangle-hold" on access to the profession in order to serve professional purposes, might reasonably believe that the association should be confined to serving those professional purposes by expressly defined activities, and should not be able to function as a mechanism that obtains coerced financial support for advocacy of ideological positions from doctors who do not wish to give such support. Society may also be concerned that the government-supported internal structure of the association permits bureaucratic distortion of the membership's voice in effecting the group's advocacy speech. Hence the legislature might reasonably require a medical society to focus its activities on technical, ethical, and educational problems in the practice of the profession n102 rather than to address the public on political or ideological questions.

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n102 See supra notes 100-01. Activities that focus on professional problems may involve responding to requests by the legislature or licensing agency for information on such professional matters.

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To be sure, the audience interest in the medical association's advocacy speech may be deemed more legitimate than its interest in the integrated bar's expression because the medical association is not a speaker created by the government. In the case of the medical association, it is less doubtfully "the willing speaker" that engages the individual audience [*40] and the society interested in exchanging views. However, the association funds its expression by contributions from members who are "compelled" to be members whether or not they desire to support or participate in the enterprise's advocacy speech. To the extent that the message is thus supported by coerced contributions, the audience receives a signal of magnified intensity if not also of distorted content.

The economic imperative that compelled membership in local medical societies has been considerably diluted in most areas of the country since the first half of this century. Still, the magnetic attraction of associations of medical specialists continues to reflect the "practical necessity" of belonging to them. n103 Doubtless similar pressures exist to join other professional and occupational associations, n104 some of which are specially supported or empowered by government. The pressures on stock brokers to join the National Association of Securities Dealers (NASD) n105 derive from such practical necessities. So too may the pressures to join some farm organizations, stock or commodities exchanges, state or local associations of real estate agents or

brokers, n106 optometrists, n107 pharmacists, architects, or accountants--particularly if the association's magnetism for members is strengthened by government support, such as empowering the association to accredit candidates for government-imposed license requirements. n108 To the extent of such

[*41] "compulsion" to join, the considerations that justify severing the group's advocacy activities from its other operations, as discussed above in the case of local medical associations, are relevant to support intervention to curb such groups' advocacy speech. n109

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n103 See supra notes 100-01. Physicians' access to medical care providers like HMOs may require membership in "accredited" specialist associations.

n104 See, e.g., Olson, supra note 58, at 132-67.

n105 NASD is statutorily authorized by the Securities Exchange Act of 1934, 15 U.S.C. sections 78A-7811 (1988) and is closely regulated by the government. Although membership is not compelled by government quite as directly as it is in the case of the integrated bar, the role of the government in the authorization, supervision, and regulation of the NASD is pervasive, see generally Louis Loss & Joel Seligman, Securities Regulation 2794-816 (1992) (describing pervasive regulation of NASD); [June 1983] Nat'l Ass'n Sec. Dealers, Inc. Reprint of the Manual (CCH) paragraph 101 (same); Sheldon M. Jaffe, Broker Dealers and Securities Markets 132-67 (1977) (same), and considerably more extensive than in medical societies and in most other trade or professional associations.

n106 See, e.g., FTC Staff Report by Los Angeles Regional Office, The Residential Brokerage Industry 80-100, 107-42 (1983); Arthur D. Austin, Real Estate Boards and Multiple Listing Systems as Restraints of Trade, 70 Colum. L. Rev. 1325, 1363 (1970); Michael K. Braswell & Stephen L. Poe, The Residential Real Estate Brokerage Industry: A Proposal for Reform, 30 Am. Bus. Law J. 271, 305-19 (1992); Mark D. Murr, Note, The Professionalization of Real Estate Brokerage and the Problem of Multiple Listing Service Exclusion: A Sherman Act Analysis, 59 Tex. L. Rev. 125, 128-31 (1980).

n107 Compare Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) with Friedman v. Rogers, 440 U.S. 1, 18-19 (1979).

n108 See Note, Exclusion from Private Associations, 74 Yale L.J. 1313, 1319 (1965). Many states authorize professional societies to design and grade licensing examinations for their professions. For example, the American Institute of Certified Public Accountants (AICPA) is authorized to create and grade licensing exams in every state. Id. Possibly there are organizations that are not empowered by special government support but that do have a stranglehold on a trade or profession so that their membership may fairly be deemed to be "compelled." The stranglehold is not often likely without government. However, if it occurs, government regulation of the membership rules and intrusion on advocacy activities of such associations is more readily justifiable than is comparable regulation of groups that do not offer practical necessities to aspirants. Cf. Zechariah Chafee, Jr., The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1022 (1930); Note, Developments in the Law: Judicial Control of Private Associations, 76 Harv. L. Rev. 983, 993-94 (1963).

n109 See supra text accompanying notes 100-03. Even if membership in, or support for, many such associations cannot fairly be said to be compelled by economic necessity, the incentive to join may be almost entirely powered by the professional or occupational benefits that membership offers. In such cases, the advocacy voice of the enterprise, if not an afterthought in inducing membership, may well not be a factor whose absence would diminish membership or materially alter function. The propriety of unbundling support for the advocacy activities of the group from support for its other activities would turn on considerations affecting that question in the case of voluntary associations. See Olson, Nations, supra note 66, at 28; see also text accompanying notes 186-90.

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Vindication of the community's interest by legislation requiring "compelled" professional associations to unbundle advocacy speech from their other activities or otherwise to restrict the compelled funding of (or decision-making process for) such speech would not deprive members of the occupation or profession of the power to amplify voluntarily their voices by collective action in advocacy speech. Nor would such legislation deny their message to any interested audience. Doctors and securities brokers, for example, would remain free to band together in organizations other than the specially empowered medical association or the NASD and amplify their voices by such collective action. n110

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n110 It is difficult to envision circumstances other than government-mandate which could compel a person to join or support a wholly advocacy enterprise. See supra text accompanying note 39. But in such circumstances, cf. infra note 203 (discussing "white primary cases"), legislation severing individual members' obligations to support is at odds with (and may be trumped by) the enterprise's entitlement to protection under the First Amendment. See infra text accompanying notes 198-202. The reasons that preclude unbundling in the case of wholly advocacy organizations are not applicable to the case of multi-purpose associations that people are compelled to join. In the former case, advocacy activities would effectively be suppressed by mandated unbundling because of the obstacles to carrying on the advocacy activities in newly-created advocacy associations. In the latter case, the advocacy activities can readily be carried on in newlyformed voluntary enterprises.

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The Constitution of its own force does not require medical or other professional or occupational association's advocacy activities to be so confined, even if it might so confine comparable activities of the integrated bar, and, more doubtfully, those of unions with union shop arrangements. However, if the state imposes such a requirement, constitutional issues are raised.

The most rigorous criterion for assessing government proscriptions affecting speech--the "strict scrutiny" standard that requires a compelling need for the government restriction and imposition of the least restrictive alternative--does not easily fit the context of proscribing advocacy activity by professional

organizations. n111 Neither the considerations nor the circumstances which should determine how "compelling" the state's need must be to justify restricting the group's advocacy speech, n112 or how narrowly drawn those restrictions must be, n113 are clearly delineated. Applying those criteria to assess the propriety of restricting the advocacy speech of associations of the kind here considered presents a particular puzzle. The same doubts that afflict the integrated bar cases as to whether dues payments or memberships are the equivalent of speech by the individual are present in cases of effectively "compelled" membership. If those doubts are similarly resolved, society is confronted with conflicting claims for protection of speech interests. On [*43] the one hand are the claims of persons who effectively are compelled to support the group and, pro tanto, its advocacy speech with which they may disagree. Their claim is not lessened if the compulsion is a function of the often monopolistic power that the government specially delegates over practical necessities sought by individuals from the associations. On the other hand is the claim for protection of the speech interests of the association and its complying members. Which claims present the compelling need? How does the conflict between the claims affect the compelling character of the government's "need" and the scope of permissible restrictions?

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n111 As we shall see, restrictions on the activities of purely expressive associations present different problems than do restrictions on the advocacy activities of multi-purpose associations. See infra text accompanying notes 198-202. Restrictions on the activities of purely expressive organizations demand the strictest judicial scrutiny and can rarely, if ever, be justified. In the case of multi-purpose associations, such restrictions present a call for a somewhat different, and less demanding, review. The formulae by which the Court couches the degrees of deference it accords to the legislature produce a nominally varied array of standards for testing the propriety of different kinds of protected speech in different contexts. See, e.g., Richard A. Brisbin, Jr. & Edward V. Heck, *The Battle over Strict Scrutiny: Coalitional Conflict in the Rehnquist Court*, 32 Santa Clara L. Rev. 1049 (1992). There is much room to argue over whether different results under the different standards are driven by the particular standard invoked, or by the special circumstances or content which are said to call for different standards, cf. Geoffrey R. Stone et al., *Constitutional Law* 532-767, 1257-337 (1991), or whether the standards are simply conclusory devices to bless results driven by other considerations. In any event, it is not necessary for our purposes, if indeed it is possible, to mark or justify all the lines the Court has thus drawn among strict scrutiny review, intermediate scrutiny review, deferential scrutiny review, review of restrictions on commercial speech, and other patterns of review.

n112 See, e.g., *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 18889 (1979) (Blackmun, J., dissenting).

n113 See infra note 176.

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The integrated bar and union shop cases n114 provide some clues to answers. In those cases, considerations of individual autonomy support the judgment to relieve members of such groups from obligations to help support the groups' advocacy speech. Those cases also argue for confining the role of the

enterprise to the more or less technical, professional, or occupational activities that were instrumental in calling it into being and empowering it so that membership in it a practical necessity. The government may reasonably seek to protect individuals against being forced by economic compulsion (generated in fair part by government privileging of associations) to contribute to those associations and thereby to advocacy activities that the Constitution forbids the government from mandating them to support.

-Footnotes-

n114 See supra note 2; infra note 134.

-End Footnotes-

To be sure, such government interventions address only advocacy speech, the core expression that is at the heart of the First Amendment; but they do not purport to impinge on expression of viewpoints. Interventions that thus focus solely on subject matter and are neutral as to viewpoint have been upheld in many contexts in which the impact of subject matter restriction on viewpoint expression is closer than it is in the context of multi-purpose associations' advocacy speech and individual members' possible speech preferences. n115 That distinction has also

[*44] been invoked to justify government restrictions on political speech in a variety of contexts, n116 including protecting the negative speech interests of compelled members. n117 The distinction between subject matter-based strictures on speech that are viewpoint-neutral and those that are not suggests testing regulation of the former by less critical standards than test regulation of the latter--at least insofar as the regulation of the viewpoint-neutral speech does not either suppress the content of the speech or seek or effect restriction of viewpoint expression under the guise of content-neutrality.

-Footnotes-

n115 For example, the longstanding denial of income tax deductibility for a range of advocacy expenditures, I.R.C. section 170(c)(2) (1994), and the denial of charitable tax exemption to otherwise exempt organizations if a substantial part of their activities consists of attempting to influence legislation, id. section 501(c)(3). See also *Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983); *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959). But cf. *George Cooper, The Tax Treatment of Business Grass Roots Lobbying: Defining and Attaining the Public Policy Objectives*, 68 Colum. L. Rev. 801, 810-16 (1968); *Anne B. Carroll, Religion, Politics and the I.R.S.: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 Marq. L. Rev. 217, 227-29 (1992). Consider also the exclusion of such expenditures in computing permissible utility rates in e.g., *Southwestern Elec. Power Co. v. Federal Power Comm'n*, 304 F.2d 29, 36-38, 42-47 (5th Cir.), cert. denied, 371 U.S. 924 (1962), and *Rochester Gas & Elec. Corp. v. Public Serv. Comm'n*, 51 N.Y.2d 823, 825 (1980), and the recently validated prohibition against corporate electoral expenditures in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

n116 See authorities cited supra note 2; see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (prohibiting only political advertising on municipallyowned buses whose captive audience may be likened to "compelled" membership; compare *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952); but cf. *United States SouthWest Afr./Namibia Trade & Cultural Council v. United*

States, 708 F.2d 760, 773-74 (D.C. Cir. 1983)); Greer v. Spock, 424 U.S. 828, 834-38 (1976) (involving political speakers on military bases); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799-806 (1985) (involving solicitation by advocacy for association contributions from federal employees); Meese v. Keene, 481 U.S. 465, 480-83 (1987) (addressing persons engaged in "political propaganda" on behalf of foreign powers); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 554-67 (1973); United Pub. Workers of America v. Mitchell, 330 U.S. 75, 96-103 (1947); Broadrick v. Oklahoma, 413 U.S. 601, 609-18 (1973). Compare CBS v. Democratic Nat'l Comm., 412 U.S. 94, 126-30 (1973) with FCC v. League of Women Voters, 468 U.S. 364, 386-95 (1984). The restrictions with which this Article is concerned affect a public audience that is broader than that affected in many of those contexts; and they may limit speech by a stronger form of obstruction than do the restrictions upheld in those contexts. But they do not seek to prohibit communication of particular messages or preclude the human participants in "the speaker" from expressing the message individually or through another collective mechanism. Nor do they generate the probability of effective suppression of speech that normally justifies a requirement of strict scrutiny to find a compelling need and the narrowest feasible restriction.

n117 Keller v. State Bar, 496 U.S. 1, 14-16 (1990); see also infra note 134 (citing union shop cases).

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Whatever the possible levels of scrutiny for the standards of judicial review of content-neutral restrictions of expression, something less than the strictest scrutiny is called for where the regulation operates at the point of conflict between the speech interests of individuals and those of the group. The threat to the association's speech interest by such a restriction is offset (even if not entirely) by the gain to the negative speech interest of individuals forced to support the association. The courts inevitably must compare (or balance) the value of the association's speech interest against the value of the individual's speech interest in a context [45] that contemplates possible substitution of expression by individuals or expressive associations for the expression of the multi-purpose group--a process that implicates a standard less critical of the restriction than "strict scrutiny." n118

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n118 The Court's opinions on subject matter and content-neutrality are somewhat opaque in defining what makes a restriction on expression content-neutral and what makes the restriction non-neutral or content- (i.e., viewpoint-) based. The jurisprudence addressing proscriptions on time, place, and manner of expression is aimed at something other than the communicative impact of conduct or expression, and is relevant only as it monitors those proscriptions to prevent their being used to affect content. Proscriptions aimed at the communicative impact of expression but not at affecting communication of particular viewpoints (i.e., addressed to an area of subject matter rather than a point of view) may be imposed on some speakers or in some places, but not others; communication on some subjects, but not others, may be restricted if not wholly suppressed. Compare R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543-47 (1992) and Boos v. Barry, 485 U.S. 312, 321-29 (1988) with

Burson v. Freeman, 112 S. Ct. 1846, 1849-51 (1992). See Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of ContentBased Underinclusion*, 1992 Sup. Ct. Rev. 29, 38-45; Geoffrey R. Stone, *ContentNeutral Restrictions*, 54 U. Chi. L. Rev. 46, 81-86, 108-15 (1987) [hereinafter Stone, *Content-Neutral Restrictions*]; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 207-17 (1983) [hereinafter Stone, *Content Regulation*]; Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 650-55 (1991). Moreover, even when the Court concludes that a particular restriction is content- or subject matter-neutral, but is nonetheless subject to "heightened scrutiny" because of its communicative impact, a less "compelling need" sometimes seems to suffice to uphold the restriction than would otherwise be required to uphold a restriction more plainly addressed to viewpoint. Compare *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2458-59 (1994) and *Burson*, 112 S. Ct., at 1856-58 and *Young v. American Mini Theatres*, 427 U.S. 50, 58-61 (1976) with *Boos*, 485 U.S. at 329-32 and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 22731 (1987) and *Carey v. Brown*, 447 U.S. 455, 459-71 (1980) and *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-40 (1980) and *Police Dep't v. Mosley*, 408 U.S. 92, 94-102 (1972). But cf. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-23 (1991).

The nascent distinction between the rigor of review of formally content- or subject matter-neutral restrictions and of viewpoint restrictions is sensible, if not always compelled, notwithstanding the disagreement among commentators. See Smolla, *supra* note 29, section 3.02[2]ci; Kagan, *supra*, at 58-77; Note, *The Content Distinction in Free Speech Analysis after Renton*, 102 Harv. L. Rev. 1904, 1913-20 (1990). Compare T.M. Scanlon, Jr., *Content Regulation Reconsidered*, in *Democracy and the Mass Media* 331 (1990) [hereinafter Scanlon, *Content Regulation*] and Paul B. Stephen, *Content Discrimination*, 68 Va. L. Rev. 203, 223-31 (1983) and Stone, *Content Regulation*, *supra*, at 190-200 with Shiffrin, *supra* note 29, at 17 and Martin A. Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev. 113, 128-42 (1981) and Note, *A Unitary Approach to Claims of First Amendment Access to Publicly-Owned Property*, 35 Stan. L. Rev. 121, 131-43 (1982).

Categorization of speech by reference to its content without implicating its viewpoint is difficult to effect, and to the extent that consequences follow therefrom the categorization is dangerous to make operative. See, e.g., *Turner*, 114 S. Ct. at 2458-59; Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1, 29-39 (1990); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 603, 667-84 (1990). Nevertheless, some kind of categorization, either by content or by context is unavoidable, see *Turner*, 114 S. Ct. at 2466; Scanlon, *Freedom*, *supra* note 29, at 537-42; Scanlon, *Content Regulation*, *supra*, at 343; Stone et al., *supra* note 111, at 1256-57; Sunstein, *supra* note 8, at 233-34; Hon. John Paul Stevens, *The Freedom of Speech*, 102 Yale L.J. 1293, 1308-13 (1993), even if the categories cannot be clearly delineated and differential treatment for speech among categories cannot easily be justified. See cases cited *supra* note 2; *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1511 (1993) (involving commercial speech); Richard Hiers, *Public Employees' Free Speech*, 5 U. Fla. J.L. Pub. Pol'y 169, 171-72 (1993).

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If the requisite "need" to protect the speech interests of individuals by impeding or restricting the group's advocacy speech can be found, the union shop and state integrated bar decisions also suggest varied modes of drawing sufficiently narrow restrictions on the group's speech. n119 Arguably the narrowest restriction that would serve to protect the individual is offered by the dues proration prescriptions. n120 A broader, but possibly necessary restriction, may be a requirement that the association obtain the consent of a majority or super-majority of its members for each item of group advocacy speech, n121 or even a limitation of the advocacy [*47] speech of the association.

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n119 As in the case of the integrated bar, the professional functions of the association may require speech that borders on advocacy speech. Thus, to the extent that the state delegates to the association a significant role in licensing procedures and examinations and in monitoring state-prescribed standards of conduct, some such speech to government will be necessary and appropriate. Associations dealing with the legislative and administrative process will require exchange of information and explanation of policy, but it need not require lobbying or public pleading. Cf. 40 Cong. Rec. 96 (1905) (statement of Theodore Roosevelt urging legislation limiting corporate contributions in elections); Hearings on Contributions to Political Committees before House Comm. on Election of the President, 59th Cong., 1st Sess. 76 (1905).

n120 Disclosure requirements alone are inadequate. See supra note 75. The Supreme Court has recently left open the question whether even dues proration prescriptions are narrow enough, if formal membership is required. Keller, 496 U.S. at 17. The mere fact of being formally associated with the group, and therefore its speech, may be thought to be such an interference with the individual's negative speech rights that it is not cured merely by pro-ration of dues. This argument may raise somewhat different questions than are implicated in a First Amendment choice. See supra note 36.

n121 Advocacy speech by the group may reasonably be regarded by the legislature as so peripheral both to the function for which the association was specially empowered and to the individual "compelled" to join that rules requiring such consent will not interfere materially with the group's principal functions. These rules will offer protection to the individual members (even though not to every member) who are forced to join without imposing upon the public the loss of the message that a majority of the group's members wish to convey.

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If the compelling need is understood to be not only to protect the "compelled" individual member but also to limit the power of enterprises that the state specially authorizes to collect funds and membership for particular purposes, the narrowest feasible restriction to meet that need appropriately could encompass confinement of the group to those functions for which it has been empowered, thereby wholly precluding its advocacy speech. That is the suggestion of some state courts in defining the powers of the integrated bar.

To be sure, the integrated bar is both more formally and substantively a creation of the state than is a voluntary professional or occupational association like county medical associations, and pro tanto, the integrated bar should be entitled to less autonomy. However, so long as the association has "a strangle-hold" on access to (and continuation in) a trade or profession, at least in part because it enjoys special government support, it is hard to find a valid substantive distinction between the integrated bar and enterprises such as county medical associations with respect to the state's power to limit the advocacy activities of the group. n122

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n122 No different conclusion is suggested if, because of the significance of special government support or empowerment, the restriction on advocacy speech is challenged as a claim of an unconstitutional condition. Although Chief Justice Rehnquist (and occasionally a majority of the Court) have signalled views to the contrary, it has been powerfully urged that the judicial test of the propriety of conditioning government assistance on the recipient foregoing a preferred liberty should be no less strict than the test of the propriety of express government regulation of that liberty. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1505-06 (1989). Even on that premise, as we have seen, there is good reason to uphold a restriction on advocacy speech. But it may well be appropriate to test limitations on the advocacy or ideological speech of a multi-purpose association that is created or specially empowered by government to perform limited non-speech functions by a less demanding standard than should govern the propriety of conditioning a benefit to an individual (like employment or a subsidy) on his foregoing advocacy speech. See David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675, 717-39 (1992); infra note 173.

-End Footnotes-

3. Trade Unions with Agency or Union Shop Arrangements

The union or agency shop agreement operates to deny employment with a particular employer unless the worker joins or pays dues or their equivalent to the contracting union. Toleration of the union or agency shop agreement by common law courts or authorization of the phenomenon by legislation entails some government support, but not the elaborate [*48] legislative scheme, subsidy, or intertwining encountered in the case of many other professional or occupational associations. n123 Indeed, such support is not necessary to underpin the conclusion that an individual's membership or support is effectively compelled even if not by government command. Where union shop arrangements are industry-wide, the worker's obligation to join or pay is no less compelled than is the lawyer's support of the integrated bar or than may be the need of the doctor or plumber to join the association of his profession. Even when, as is increasingly common, the union's control over jobs is less than industry-wide, n124 the loss of employment opportunities is likely to generate more than trivial costs. Not only is there the problem of geographic dislocation, but other costs (like loss of health care benefits or the firmspecific asset embodied in the specialized accommodation to particular jobs and routines that comes from work experience) make it likely that exclusion from the union (or expulsion from employment for failure to pay the equivalent

dues) should no more be permitted arbitrarily than should exclusion from the integrated bar or the medical association. n125

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n123 To be sure, the union's existence reflects the government's willingness through the judiciary to respect, to a limited extent, the employees' private ordering. The union's role as collective bargainer is facilitated by reason of the government-granted or government-respected exclusive bargaining power of the union, the government-authorized requirement of dues or "in lieu" payments, and the imposed requirement of collective bargaining. See, e.g., Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61-65 (1975); NLRB v. General Motors, 373 U.S. 734, 740 (1963); J.I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944). But there is also ground to argue that the government's support of unions does not reach that level of special empowerment offered to many professional or trade associations or to business corporations. See, e.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 665 (1990); Paul C. Weiler, *Governing the Workplace* 105-33 (1990); Kohler, *supra* note 84, at 18088; Joel Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws*, 1990 Wis. L. Rev. 1, 99-117; Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351, 364-82 (1984); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights of Self Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1774-87 (1983).

n124 For the most part, the worker, particularly the less skilled worker, is excluded from working for a particular employer or group of employers, but not necessarily from all employment for which he is equipped. On the other hand, in many cases the union controls access to employment in an entire industry or a substantial part of the entire industry for which the individual is equipped to work. See, e.g., Olson, *supra* note 58, at 75.

n125 See, e.g., *Thorman v. International Alliance of Theatrical Stage Employees*, 320 P.2d 494, 497-98 (Cal. 1958); *James v. Marinship Corp.*, 155 P.2d 329, 334-35 (Cal. 1944); *Moore v. Local Union No. 483*, 334 A.2d 1, 2-4 (N.J. 1975); *Miller v. Ruehl*, 2 N.Y.S.2d 394, 395-96 (Sup. Ct. Erie County 1938); *Dorrington v. Manning*, 4 A.2d 886, 889 (Pa. 1939).

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There is much room to argue over whether an individual's contribution to the support of a labor union under an agency shop or union shop contract is compelled by the government. n126 That argument need not detain us. If the individual's obligation to contribute to the union is deemed not to be government compelled, it is nevertheless compelled by social and economic pressures which derive in part from government authorization for the union and employer effectively to mandate union membership.

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n126 Possibly the notion of "government action" should extend beyond mandates to join an integrated state bar association to other arrangements that are less dependent for their existence upon government mandates than the state bar

association, but more dependent upon government-mandated infrastructure than simple contract enforcement. Those possibilities raise questions that have been much debated. See Stone et al., supra note 111, at 1499-500. It stretches the concept of "government action" almost to the breaking point to make it embody the union's and employer's action in "compelling" dues payments to the union in agency shop arrangements under the Railway Labor Act, 45 U.S.C. section 153 (1988), and even further to make it embody compelled speech in agency shop arrangements. See Harry H. Wellington, Labor and the Legal Process 213-64 (1968). It goes beyond that point to extend the concept to agency shop arrangements authorized under the National Labor Relations Act (NLRA), *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), or at common law. See Kenneth G. Dau-Schmidt, Union Security Agreements under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in *Beck*, 27 Harv. J. on Legis. 51, 57-63 (1990). For the government to be the actor legitimately charged with compelling speech, it must be involved not merely with supporting the association, but also with the activity that caused the injury. See *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968); Lang, supra note 100, at 47-49. Arguably, the government's connection with the speech of an individual in a union shop arrangement is so much less than it is with the forced dues payment that its impingement on the individual's speech rights in union shop arrangements is too attenuated to offset the need to authorize a union shop. See Cantor, supra note 30, at 51-52; cf. *DeMille v. American Fed'n of Radio Artists*, 187 P.2d 769, 773-76 (Cal. 1947), cert. denied, 333 U.S. 876 (1948) (a need that was found sufficient to justify compelled dues payments quite apart from the use of some portion of them for union advocacy activities or public speech).

For an employer (whether government or private) to seek the non-speech benefits of a union shop at the cost of allowing the union to spend dues on intra vires union advocacy speech does not entail employer dictation of content of speech that is supported by dues. Absent such dictation of content, the case for government-authorized union shop arrangements violating the employee's speech rights under the First Amendment is weakened considerably.

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Whether or not government-compelled speech is deemed to be involved, n127 there are good reasons to protect the employee against the [*50] use of his or her compelled contributions supporting the union's advocacy speech, but they do not stem from the same considerations that are urged to protect him or her from government-compelled speech. A society, particularly an industrial society, could reasonably make the judgment that exclusive bargaining power in the union, compulsory collective bargaining, and union shops offer a desirable regime for optimal collective bargaining and achievement of industrial stability, or at least industrial peace. n128 Because the legislature "has great latitude in choosing the methods by which [industrial peace] is to be obtained," n129 it could also reasonably conclude that the reasons for a union shop arrangement do [*51] not require, and moreover the effectuation of the arrangement would be impeded by requiring, individuals to contribute to the support of the union's advocacy speech. Implementation of that judgment may be embodied in statutes or court orders separating support of the union's advocacy speech from the obligations of membership.

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n127 If the union shop arrangement is seen, as it well may be seen for enterprises covered by the Railway Labor Act and should be seen for others, as not entailing government compulsion to join or pay dues, the argument certainly does not entail government compulsion to speak. No constitutional objection can seriously be raised against the union's use of institutionally- (as opposed to government-) coerced dues for its public or advocacy speech.

n128 See Railway Employees' Dep't v. Hanson, 351 U.S. 225, 233-35 (1956).

There are good reasons, in principle, to limit the employee's freedom not to associate with the union. Hence, even if an employee may properly challenge as government action the arrangements to which he is thus compelled to submit, it does not follow that the Constitution requires that he prevail. Employees may be required to support (by dues payments or their equivalents), if not to join, a union in order to avoid free-rider problems and to promote labor peace. Non-union members may reasonably be required to pay for benefits from wage scales and working conditions for which the union bargained and which are enforced by use of teams of officers, lawyers, and others who are paid from union dues. Because it is not feasible and not lawful to set terms that do not cover union and non-union employees alike, the latter may appropriately be required to contribute their fair share to meet the financial and organizational burden. There is also reason to believe that many persons who would normally form or join a union will not do so if free-riders are permitted. See Olson, Nations, supra note 66, at 21-22.

Indeed, at least in England, the notions of "effective and stable organization" and full workers' bargaining strength are said to require union shops or their equivalents. Royal Commission on Trade Unions and Employers' Associations, 1965-1968, at 160-63 (The Rt. Hon. Lord Donovan, Chmn., 1968). It also has been pointed out that there are advantages to management in dealing with a union representing all its employees, if only to lessen the likelihood of unrest resulting from the competing unions and jurisdictional disputes.

n129 See Hanson, 351 U.S. at 233. The Court apparently treated the employee's claims to be relieved of the obligation to associate, which were cast in terms of the First Amendment, as asserting a deprivation of liberty rather than an interference with speech. See id. at 233; International Ass'n of Machinists v. Street, 367 U.S. 740, 760-63 (1961). The Court in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), used the rhetoric of the First Amendment with respect to the dues payment obligation, but reviewed the issue under a "reasonable basis" standard, id. at 217-32, in contrast to the strict scrutiny standard applied to the speech support question, id. at 222-35. But see id. at 244-67 (Powell, J., concurring). Communications Workers of America v. Beck, 487 U.S. 735 (1988), implicitly upheld the associational obligation without even discussing the question of the constitutionality of applying the Labor Management Relations Act (LMRA) to limit the obligation to pay dues under an agency shop contract. Id. at 76162.

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Notwithstanding the Supreme Court's constitutional view, n130 society could equally reasonably conclude that industrial peace and economic efficiency do not require (but on the contrary preclude) n131 separation of the obligation to join or pay dues and the obligation to support union advocacy speech. That judgment could be implemented by legislation expressly requiring payment of dues in

solido, by legislation expressly authorizing the union and the employer to enter into such arrangements, or merely by failure of the legislature to forbid common law enforcement of such arrangements between union and employer.

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n130 See Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 514-19 (1991); Abood, 431 U.S. at 223-37. The Court's opinions dealing with labor relations statutes permit, if not require, legislatures to limit union advocacy activities by restricting the use of union funds for advocacy purposes. See infra note 134. These decisions do not go so far as to prohibit union speech in advocacy matters, but the opinions do not forbid such a prohibition either, and at least some of the Justices suggest the propriety of such a prohibition. See Lehnert, 500 U.S. at 550-62 (Scalia, J., concurring in part and dissenting in part).

n131 Cf., e.g., DeMille, 187 P.2d at 773-76.

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On either view, the government can be said to be intruding on individuals' freedom of speech--of members who do not wish to contribute to support the group's speech or of the group and its members who do wish the group to speak. The validity of the intrusion on the speech of either the dissident individual or the group raises substantial questions under the First Amendment. Striking the balance between the conflicting claims is not without difficulties. n132 As with the integrated bar or the economically compelled association of many professional or occupational organizations, to the extent that the government's mandate or the economic pressure on the individual to join or pay "in lieu" fees is seen as remote from a compulsion to participate in the union's advocacy speech, the weight of the individual's claim that his or her speech is impaired diminishes. Nevertheless, the burden imposed on the individual's speech interest is, as in the case of other compelled associations, considerably heavier than if no mandate or economic compulsion to make such payments is imputed. On the other hand, legislation relieving members of the obligation to support the union's advocacy speech impairs the union's (and its complying members') speech. Indeed, be [*52] cause the union is neither a government-created institution like the integrated bar, nor, arguably, a specially empowered enterprise like the medical association or the NASD, its (and its majority members') claims to freedom of speech for its collective voice may be stronger than the claims of either of the others. n133

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n132 Cf. Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 904-06 (1st Cir. 1988), cert. denied, 488 U.S. 1043 (1989).

n133 The Supreme Court has suggested that "the gravest doubt" would arise from a prohibition against publication "by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from adoption of measures, or the election to office of men espousing such measures." United States v. CIO, 335 U.S. 106, 121 (1948). Powerful arguments to the same effect also were urged by dissenters in a later opinion dealing with a different application of that statutory prohibition. See United States v. UAW, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). Cf. Thomas v. Collins, 323

U.S. 516, 528-29 (1945).

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Such claims by unions may not be doctrinally incompatible with legislation preventing unions from freely using dues compelled (by government or institutionally) for its advocacy speech. An uneasy tension exists, however, between the suggestion of constitutional protection for union speech and the teaching of cases authorizing (or indeed requiring) union speech to be impaired by restricting the use of portions of members' dues payments. n134 The level of tension would be raised if all union speech were confined by legislation to the speech for which the Court allows the dissidents' funds to be used. Such a limitation would impose a greater cost on society and the union (or its non-dissident [*53] members) because it would narrow the area of permissible union advocacy speech. The Constitution does not require that result, as the Court's decisions make clear. Whether it does or should permit that result to be mandated by a legislature n135 is a more difficult question.

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n134 The Court's opinions construing the labor relations statutes are less than clear either in theory or in the reach of their holdings. Aggregately, they require limiting the union's use of 'employees' "compelled" contributions to the collective bargaining activities for which the contributions were forced, but in defining those activities they interdict much more than is required by concern for the First Amendment rights of individual members. For cases wrestling with delineation of the proper amount of interdiction under the Railway Labor Act, see Hanson, 351 U.S. at 232; compare Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 443-55 (1984); Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 118 (1963); Street, 367 U.S. at 750-70, under state employment agreements, see Lehnert, 500 U.S. at 507; Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 301-04 (1986); Abood, 431 U.S. at 303, under the LMRA, see Beck, 487 U.S. at 744-62. See generally Friessen, supra note 89, at 610-11 (analyzing the effects of placing restrictions on the uses of contributions to the union).

The requirements that the Court has fashioned effectively place the burden on the union to prove the correctness of its expenditures. The requirements thus surprisingly place a burden on the victim of speech restriction to prove the speech's entitlement--a burden that may be substantial. Compare Rex H. Reed, Revolution Ahead: Communications Workers v. Beck, 13 Harv. J.L. & Pub. Pol'y 635, 645-47 (1990) with DauSchmidt, supra note 126, at 53 and Friessen, supra note 89, at 610-14. On the other hand, the requirements appear to place on the dissenting member the burden of coming forward to reveal his or her dissent. See Street, 367 U.S. at 774.

n135 Cf. supra note 92 (citing state court decisions in the integrated bar context).

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An affirmative answer is supported in this context by the same considerations that support an affirmative answer in the case of other compelled associations, particularly since such a limitation on the union's speech does not preclude the members from making their collective voice heard through a

separate, voluntarily formed expressive association. If the union's functions evolve to include a larger role for advocacy activities on behalf of its members and a lesser role for benefits from traditional collective bargaining activities, n136 and its membership remains effectively compelled, the problem of unbundling individual support for advocacy activity is somewhat different. n137 Even if collective bargaining and resulting economic benefits dominate the role of the union for its members, and its expressive voice is peripheral, the claim for protection of the collective voice at the expense of the individual's [*54] speech interest is at its strongest when the union is not able to compel support by an agency or union shop agreement. At that point, government intervention entails restrictions on a less compelled, even if not entirely voluntary, n138 association, and the focus then shifts to examining the propriety of intervention to restrict the group's use of funds acquired through the offering of desired, but non-essential, non-advocacy benefits to finance advocacy activities.

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n136 See Dan C. Heldman, *Unions, Politics and Public Policy: A (Somewhat) Revisionist Approach*, 13 Harv. J.L. & Pub. Pol'y 517, 575-76 (1990); Kohler, *supra* note 84, at 180-88; James E. Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 Tex. L. Rev. 1071, 1118-24 (1987); Joseph L. Rauh, *Legality of Union Political Expenditures*, 34 S. Cal. L. Rev. 152, 153-56 (1961); Comment, *Of Politics, Pipefitters and Section 610: Union Political Contributions in Modern Context*, 51 Tex. L. Rev. 936, 981-83 (1973). It has been reported that "in France and Spain, unions have concentrated on political lobbying and have gradually withdrawn from the messy business of representing real people with real concerns over job security and pay." Wintry Whiff of Discontent, *Fin. Times*, Nov. 10, 1993, at 15.

n137 As the relationship of members to unions more closely approximates that of political party members to the party, the union's and its members' claim for First Amendment protection becomes a more significant obstacle to severing individuals' contributions from the group's advocacy action whether by proration or otherwise. For an advocacy association whose membership is voluntary, it is difficult to find constitutional justification for legislative severance. See *infra* text accompanying notes 198-202. If membership is compelled by government mandate, the validity of severance turns on the considerations that would constitutionally justify government mandate to support or join such an enterprise, if any can do so. But see *supra* note 39. It is difficult to envision a purely advocacy enterprise whose membership is compelled by social or economic pressure, because the compulsion is generally a function of non-advocacy benefits. The more compelling the pressure to join, the less likely is the enterprise to be an advocacy, rather than a multi-purpose, enterprise. However, the compulsion may be a function of the monopoly power of the advocacy association, such as may be true of a political party or parties with respect to access to the ballot. A union which is simply an advocacy association, no less than a political party, is constitutionally amenable to a wide range of regulatory restrictions. See *infra* text accompanying notes 203-06.

n138 Cf. *Kidwell v. Transportation Comm'n Int'l Union*, 946 F.2d 283, 291-92, 297 (4th Cir. 1991). In theory, and notwithstanding the impact of the Railway Labor Act on state "right to work" laws, employees start with freedom to join or refrain from joining "voluntary" unions that may be compared with investors'

freedom to invest in a business corporation or the freedom to join social or "network" associations like the Jaycees or the Rotary Club. While they therefore cannot be said to be "forced" to support the union's advocacy speech by joining the union, these employees have economic incentives that are not less powerful than those of an investor if the object is to measure the power of those incentives against the lure of supporting the union's advocacy speech. In part, the more intense free-rider problem in the case of unions impels the union members to put pressure on outsiders to join. See Olson, *supra* note 58, at 66-97; Olson, *Nations*, *supra* note 66, at 21-22. In part, outsiders are likely to feel more need to join in order to have a voice in decisions that affect wages and the terms of employment. See Summers, *supra* note 100, at 49. Apart from the items of considerable value acquired by union membership, see *Mitchell v. International Ass'n of Machinists*, 16 Cal. Rptr. 813, 815 (Ct. App. 1961), there may also be items of property like health benefits and pensions; see also *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280-88 (1984). Those incentives constitute stakes for the employees that may well exceed those for investors, and certainly represent higher stakes for the employees than the benefits offered by many professional or "network" associations to their members. Moreover, the benefits offered by such associations, such as improving the skills and opportunities of members, do not depend upon collective action in bargaining with a single well-informed and intensely motivated employer or group of employers. To have a voice in defining the terms for employment bargains may be seen as more important than obtaining the more diffused benefits offered by the Jaycees or Rotary Club. See *Mitchell*, 16 Cal. Rptr. at 815. Thus, the obligation to support the union's advocacy speech comes at a higher cost to the individual whose need to join and remain with the union is greater than his or her need to join or remain with the Jaycees or Rotary Club.

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C. Intervention in Advocacy Activities of Voluntary Association

Most large multi-purpose associations (like investor-owned business corporations, many farm organizations, some trade or professional associations, environmental groups, and groups such as the Elks or the Jaycees that offer networking contacts, social activities, or community activities) do not attract their members because they are the sole or principal source of practical necessities that members are under considerable social or economic pressure to acquire. Although the material benefits such enter [*55] prizes offer to members individually are real enough, those benefits do not rise to the level of "practical necessities," and indeed are often simply modest components of a social-economic-political pie. While some of those groups (like investor-owned business corporations, some veterans associations, farm organizations, and occupational associations) may depend in large measure on an elaborate scheme of government legislation and administration to facilitate their formation and enable their operation, others (like the Elks, the Rotary Club, the Jaycees, and the Sierra Club) function without such a filigree of authorization and protection. In assessing the permissible scope of government restrictions on the advocacy activities of such "voluntary" associations, it is relevant to consider the significance of their non-advocacy activities in their agenda and as inducements to join them and the significance of government support to their operation.

1. Investor-Owned Business Corporations n139

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n139 The constitutional validity of restricting advocacy speech or activities of large, publicly held business corporations in deference to the speech interest of its relevant stockholders does not imply the validity of a similar proposal to restrict corporate speech or activities in deference to the speech interests of its other stakeholders--i.e., creditors, employees or customers, suppliers, or the community. To be sure, analytically it is possible to decompose the enterprise, and focus separately on each type of contributor to its operation. On one level of abstraction, stockholders may be said to be no more (or less) contractual parties or necessary contributors to the enterprise's operations or viability than are creditors, employees, customers, or other suppliers of goods, services, or capital.

Undoubtedly, distinctions can be made in policy among the kinds of contributors who ought to be required to be consulted when the corporation's public voice is to be exercised, and those who could otherwise be made hostage to "the corporation's" speech preferences. Cf. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 898-90 (3rd Cir. 1983). It is not necessary now to examine whether the First Amendment does, or should, limit the kind of consultation which might thus be made a condition to advocacy speech by large public investor-owned enterprises in order to reflect, or at least respond, to the views of those other constituencies. Notwithstanding claims on behalf of other constituencies, see Ribstein, supra note 71, at 126-27, 152, nothing in either policy or the Constitution requires the enterprise's public voice to echo all possible constituencies merely because the stockholder constituency, with its passive role in assuming the residual risk of the enterprise, is singled out for resonance. Moreover, the investor-stockholder's claim for government action to limit collective decisions in corporate advocacy activities (in the making of which he has at least a nominal role) differs from the claim of an individual for government to limit comparable decisions by another individual to whom she lends funds or with whom he transacts. Cf. Karlan, supra note 72; Dan-Cohen, *Freedoms*, supra note 4, at 1243. At stake in the latter case is the speech interest of the autonomous human being who is the borrower in a discrete transaction. No comparable interest exists for the collective speech of the corporation in which the stockholder has a continuing interest.

-End Footnotes-

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An individual who "voluntarily" joins a multi-purpose association has a considerably weaker claim to government action to relieve him or her of the obligation to support the association's advocacy activities or speech than does the individual who is "compelled" to join the association. Unlike the multi-purpose associations whose membership is compelled, investor-owned business corporations' attraction for stockholders may fairly be characterized as voluntary. Nevertheless, stockholders' support of the enterprise's advocacy activity by reason of its use of the stockholders' proportionate interest in the collective assets may not fairly be so characterized. n140 Indeed in some, if not many, matters stockholders may well oppose the advocacy position of the enterprise.

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n140 It should be noted that an investor whose corporation engages in advocacy speech that he opposes cannot "exit" costlessly. If he exits after the speech, he has to bear the cost (or enjoy the gain) resulting from the speech. In any event, transaction costs and the cost of finding equivalent investments (notwithstanding efficient market theory) create a certain "stickiness" in changing investments. That "stickiness" grows as institutional investors increasingly intermediate between individuals and portfolio companies and thus force individuals' choices to a third level. Nonetheless, investors in such shares enter into those contracts, if not wholly knowingly and willingly, at least more "voluntarily" than those who join unions with union shop arrangements, some medical societies, or similar "compelled" membership enterprises.

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It is said that investors "know" that business corporations engage in advocacy activities in which they have little or no input, and therefore must be taken to consent to those activities when they invest. n141 But the consent of a purchaser of stock to the business corporation's advocacy activity is even less volitional than is the consent of a purchaser of a soft drink to the form of the label on the can or bottle or to the chemical composition of the label. The difference (as an incentive for choosing an investment) between the strength of the appeal of expected return on what is often a form of savings, and the weakness of the investor's concern about corporate advocacy activity is, in most cases, n142 likely to be so great that investors normally (and "rationally") resolve the latter concern simply by their choice of the former, without much consciousness

[*57] about the import of the corporate advocacy activity. n143 The notion of "consent" to finance the firm's advocacy activities in such circumstances is particularly problematic when the activity whose consent is thus purchased entails advocacy of political proposals for which society generally provides that the consenter could not lawfully be paid to vote. n144 Even if a person's support (but not vote) for a proposal or candidate may lawfully be purchased by another individual, the lawfulness of the purchase requires knowledgeable and freely given support in exchange for the purchase price. The extent to which such support is freely "sold" turns in part on the relative visibility of the advocacy voice purchased.

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n141 See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 686-67 (1990) (Scalia, J., dissenting); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 625 (1991); Ribstein, *supra* note 71, at 126, 138-40.

n142 Opposition by churches or "cause" groups to the products or the operations of a corporation (e.g., environmental or race discrimination concerns) generate campaigns that have some modest spillover effects on investors. However, rarely are the corporation's advocacy activities the subject of such campaigns or effects. Moreover, disclosure of the advocacy activity is quite beside the point. The problem is more one of adhesion. See *supra* note 75 and accompanying text.

n143 On the opposite side of the investment transaction (i.e., corporate expenditure on advocacy speech as a percentage of revenues or profit), the

amounts involved rarely exceed sums the loss of which would result in disciplining managers or the expenditure of which would, under governing corporate law norms, be found to be "waste," even if their utility to corporate ends was nil. Cf. Stern v. General Elec. Co., 924 F.2d 472, 474-77 (2d Cir. 1991).

n144 See supra note 72.

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In the case of such tie-in sales by business corporations, the extent to which support is freely "sold" also depends upon whether alternative choices for investing without yielding advocacy voice are generally available. Few business corporations unbundle investment and advocacy voice. The aspirations of those who form and expect to control investorowned public business corporations suggest that unbundled enterprises will not be (and in fact are not) formed sufficiently frequently (or extensively) to offer to passive investors any real choice. n145 Hence, in the absence of a prohibition against bundling, those who prefer unbundled investments effectively will not have such a choice. That a person's economic interests may appropriately affect his or her personal voice in support of (or opposition to) candidates or government policies does not require those interests to be given collective voice in a joint purpose association by tie-in sales of non-advocacy benefits that intrinsically obscure the advocacy support thus given.

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n145 Cf. Comment, The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures, 42 U. Chi. L. Rev. 148, 156-58 (1974). The marginal role of advocacy activity in investors' choices of investments that makes competition among business corporations with respect to that activity remote and unlikely does not negate the societal interest in effecting the freer choice for individuals that comes from prohibiting tie-in sales in such circumstances.

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The limitations on individual investors' freedom of choice in advocacy activities thus resulting from corporate advocacy power raise the question whether society should intervene to relieve individual investors of the necessity to support financially corporate advocacy speech and to encourage freer investment. Corporate advocacy power also raises the [*58] question whether society should intervene because of the impact on the audience of speech funded by contributions made (and augmented) only for purposes other than advocacy to an enterprise that lacks the autonomy of a human being--particularly if the enterprise's specially authorized internal structure entails a bureaucratic arrangement that filters out the influence of members' voices in the group's advocacy decisions.

a. Protecting the Individual's Voice

Not only do institutional arrangements normally preclude the stockholder's entry into the corporation (i.e., the act of investing) from providing the consent to corporate advocacy activities that would be the equivalent of the volitional act of advocacy by the stockholder, but those arrangements give the

investor little or no power to affect the corporate voice n146 and little more to exit costlessly. Those limitations on stockholder power result from the rules that the government provides for corporate governance and operation.

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n146 The impotence of stockholders to affect corporate action in general, resulting from both the legal allocation of decision-making authority and rational apathy, is specially marked in matters of corporate advocacy because of the marginal economic character of such conduct.

The breadth of managerial discretion allowed by the business judgment rule needs no elaboration when there is no showing of management diversion of assets or similar self-serving use of corporate property. Regarding management's freedom to engage in political speech, see Joseph L. Naar, *Open Politics, A New Problem*, 40 Am. J. Econ. & Soc'y 221 (1981); *The Corporate Image: PR to the Rescue*, Bus. Wk., Jan. 22, 1979, at 47, 48-54.

The notion that management that uses assets for advocacy purposes will be displaced by stockholders who disagree with management in such matters, see, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794-95 (1978); Ribstein, *supra* note 71, at 136-40, is simply not consonant with either observed reality about proxy fights and motives for take-overs, or with decision theory. See, e.g., Olson, *supra* note 58, at 55-57. While the movement toward empowering and inducing institutional investors to participate in corporate governance is growing, its ultimate success does not solve the problem of separating corporate political and economic power.

Most corporate decisions, particularly those affecting the profitability of normal business dealings in free markets, can only be made effectively and implemented efficiently if stockholders "delegate"--i.e, relinquish--to management decision-making power over the use of contributed funds. However, when corporate power is exercised in the form of advocacy speech, there is more reason to require express stockholder approval, if only because it is less costly to seek advance stockholder consent for such action, which is not a matter of daily routine.

-End Footnotes-

It may or may not be accurate to characterize many of the requirements of corporate statutes as embodiments of clauses that rational persons would have negotiated in contracts among themselves if they could [*59] have bargained freely and knowingly. n147 Those statutory clauses are said to be preferable to negotiated clauses struck among rational wealth maximizing individuals because they save the transaction costs that would be involved in negotiating such multi-faceted contracts among thousands, perhaps millions, of dispersed participants. n148 It is precisely because of the risk consequences to the investors posed by savings in transaction costs thus effected by the corporate form that the necessity exists for the state to intrude into the terms of the arrangement more than it would (and possibly more than it constitutionally could) into separate contracts between individuals. n149

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n147 Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 1-25 (1992); Richard A. Posner, *Economic Analysis of Law* 372 (4th ed. 1992); Ribstein, *supra* note 71, at 121-22.

n148 It is said that in order to overcome the obstacles to individuals contracting *inter se*, an elaborate scheme of laws (e.g., the state corporation codes) is required to embody in standardized form crucial portions of the contracts that theoretically might, but practically cannot, be struck by bargaining among the participants. See *supra* note 147. Those laws (e.g., providing limited liability, easy transferability of participations, centralized management, unlimited duration, personification of the corporation for some purposes, and fiduciary strictures) are not attributes or "natural rights" of individuals acting singly or in concert. They are fashioned by the state as necessary conditions for corporate power. So too is the stockholder's insulation from tort liability and regulatory sanction, an insulation that could not be achieved by contract among stockholders. Historically and functionally, the limits that the state imposes upon the exercise of corporate power by those who wield it, and the modes of decision-making within the enterprise that it prescribes, are of the same "essence" of corporateness as the state's offer of special arrangements embodied in its corporation codes that enable such power.

The state plays a crucial role in setting the terms of the corporate governance arrangements, a role that goes much deeper into, and is much more essential to the functioning of, those arrangements than its role in enforcing simple contracts or in offering protection for property, contract rights, or tax benefits, cf. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting), that are the predicates for accumulation of wealth by individuals. See William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 *Stan. L. Rev.* 1471, 1489, 1508-09 (1989); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *Hastings L.J.* 577 (1990). See generally Symposium, *Contractual Freedom in Corporate Law*, 89 *Colum. L. Rev.* 1395 (1989).

n149 The mechanism by which transaction costs are saved exposes the dispersed stockholder participants to governance uncertainties (e.g., of agents or controllers changing the investment risks of the enterprise and of the stock, diverting assets for their personal benefit, altering the terms of the arrangement, etc.) with which they might deal if they had negotiated their "contracts" on a one-on-one basis. As dispersed atoms they cannot negotiate to reduce or diminish those risks. Hence, the state that authorizes the mechanism (including its voting and management arrangements, perpetual duration, corporate "personality," stockholder limited liability, and liquidity) for exposing the stockholders to such risks may appropriately restrict the terms of the mechanism in order to protect the dispersed participants for whom it is saving the transactions costs. All states impose certain restrictive rules of internal decision-making on state chartered corporations in order to limit the power of the enterprises' agents. Possibly also those rules reflect deference to a theoretical need to limit the impact of group choice on individual preferences of members, or recognition of the limits on the volition and knowledge of dispersed public investors when they buy or vote their stock. Many of those rules cannot be avoided in the initial corporate charter arrangements, nor can they be altered by even unanimous consent. See, e.g., Symposium, *supra* note 148. Notwithstanding the current fashion of characterizing corporate arrangements

as a nexus of contract, there is reason to conclude that the state's power to prescribe the terms for such arrangements is, and should be, considerably broader than its power to restrict the terms of the general run of commercial contracts between two parties, particularly in view of the externalities that the state creates by granting limited liability.

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In matters of corporate decision-making with respect, for example, to the expenditure of corporate assets for advocacy speech, decisions might theoretically be made other than by management or by holders of a mere majority of stock. n150 Society might plausibly seek to disentangle the individual's investment opportunity from his or her support of corporate advocacy activities on issues that affect the individual in a capacity other than, or in addition to, his or her role as investor. Severing corporate advocacy speech from other corporate activities frees investors from the need to yield to the corporation some of their advocacy voice as part of the price of investing, n151 and such severance does not prevent investors from spending their own funds to advocate public policies in their own economic interest either individually or through advocacy groups.

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n150 In theory, the parties could arrange their private ordering or the state could establish requirements, inter alia, so that the essentially transient stockholders decide any or all questions by majority or super-majority vote, simply by delegating authority to agents to act, or by some other mechanism. The corporate take-over decisions make plain that the state's special powers over the operation and structure of corporations include the power to shift the locus of decision-making in corporate affairs from the stockholders individually to the stockholders collectively. See CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 81-86, 91 (1987). The considerations that have induced most states to prescribe limits and requirements on such decision-making processes in general suggest that there may also be reason for a state to impose limits on the process by which the corporation makes decisions to engage in advocacy speech or ideological activities.

n151 Severance also relieves stockholders of the need to spend personal funds to offset messages paid for by their share of collective funds.

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The matter has civic import n152 as well as some economic significance for investors, n153 whether the problem is seen as one of agency costs to control management which effectively makes the corporate deci [*61] sions, n154 or one of collective choice. The notion that the holders of a majority of the shares of stock must be the decision-makers on the question of use of corporate funds for advocacy activities, even on questions said to affect corporate affairs, assumes that such questions must be decided in corporate solution. Nothing requires that assumption, n155 even
[*62] if it were valid in the case of compelled professional association or union membership. Indeed, the process of voting by share rather than by person raises questions about the wisdom of allowing corporate assets to be used to influence political decisions. n156

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n152 See infra note 158.

n153 See Victor Brudney, *Business Corporations and Stockholders' Rights under the First Amendment*, 91 *Yale L.J.* 235, 264-65 (1981).

n154 Whether the interests of management and the interests of stockholders in political decisions are the same is an open question. No doubt there is a substantial overlap of interest, but there are many holders of substantial portions of stock of larger corporations, particularly institutional investors like churches, universities, and pension funds, that are likely to reflect political, moral, and social viewpoints that differ substantially from those of corporate managers on many issues. A state may take that potential difference into account in enacting restrictive legislation designed to prevent the agents' use of their principals' assets to espouse the agents' political or social preferences. That the state in fact permits loose (perhaps too loose) stockholder control of management's behavior does not imply that the First Amendment prohibits the state from precluding management's use of corporate assets to speak either personally or on behalf of stockholders. If a manager unlawfully removes funds from the corporate till and deposits them in his own personal account, the manager's speech purchased with such funds may be protected by the First Amendment, unless stockholders are able to enjoin use of funds misappropriated by their unfaithful agents. But cf. Ribstein, *supra* note 71, at 12526. But nothing in the First Amendment precludes the state from seeking to prevent management from using cash actually in the corporate till to pay for the managers' personal speech.

It does not detract from this conclusion that unbundling might induce even higher agency costs for investors by enabling (and possibly encouraging) managers to appropriate corporate assets through extra compensation and by using that cash to fund separate advocacy collectives, like PACs. See, e.g., Ribstein, *supra* note 71, at 140-44.

n155 On the contrary, requiring stockholders to be bound by their fellow investors' political choices for the advocacy use of corporate funds conflicts with expectations of many investors, and in any event is at odds with the simple premise of investing for profit. That premise relieves stockholders of the need to deal with the complex problems of social choice when they make investments. See, e.g., Milton Friedman, *The Social Responsibility of Business*, *N.Y. Times*, Sept. 13, 1970, (Magazine), at 32.

It has been suggested in the literature that hailed the Bellotti decision that the very passivity of dispersed public investors and the liquidity of their investment coupled with the special competence of management argues for a need to delegate to management the corporate voice on advocacy matters. See, e.g., Francis H. Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti upon Statutory Limitations on Corporate Referendum Spending*, 67 *Ky. L.J.* 75, 95 (1978-79); John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 *Ariz. L. Rev.* 373, 415 (1980); Robert A. Prentice, *First Amendment Protection of Corporate Political Speech*, 16 *Tulsa L.J.* 599, 639-40 (1981). That suggestion implausibly assumes special managerial competence in matters of public policy and ignores the

agency cost of delegating such power to managers without any real accountability to the constituents. Moreover, such an arrangement is at odds with democratic political values because, in effect, it requires investors to delegate to the management of the economic collectivity the political power which is normally exercisable by individuals acting alone or in organizations having substantial political purposes. The arrangement assumes that the virtues that are claimed for interest group pluralism are served by (or require) treating the large business corporation as one of the many competing interest groups. Edwin M. Epstein, *The Corporation in American Politics* 221-30 (1969); Bolton, *supra*, at 414-16; Ribstein, *supra* note 71, at 130-34; cf. Dan-Cohen, *Rights*, *supra* note 4, at 180-81. That notion is neither self-evident nor necessary for such validity as the pluralist hypotheses may have. On the contrary, the case remains to be made for assimilating those enterprises that attract capital so overpoweringly for narrow economic purposes and so opaquely for advocacy activity with expressive associations or multi-purpose membership associations with advocacy roles. See, e.g., Charles E. Lindblom, *Politics and Markets* 161-233 (1977); Crawford B. MacPherson, *The Rise and Fall of Economic Justice* 92-100 (1987). That modulating or stilling the corporate advocacy voice will leave the field to other multi-purpose associations and advocacy associations that can be formed by investors reinforces the conclusion that there is little reason to infuse interest group virtues or entitlements to investor-owned business corporations.

n156 The practice of share voting determines corporate decisions by aggregate wealth rather than by aggregate number of persons. The views of stockholders on political, moral, or social matters would therefore be reflected by the share rather than by the person on votes to use corporate assets for advocacy or public speech. Moreover, the assets of all, not merely the majority, of the shares would be used to support the particular views that prevail. The premise of equal weight per individual vote to reflect political preferences is eroded more significantly by the use of corporate expenditures than by the use of individual voters' expenditures, notwithstanding the disparity in wealth among individuals. The distortion is even more complicated by reason of the ownership of stock by institutions, both for-profit and not-for-profit. The fear of undue political power inhering in a system of voting by the share was reflected in the early requirement in some states of voting by the shareholder rather than by the share. See David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"*, 56 *Cornell L. Rev.* 1, 6-8 (1970).

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b. Limiting Corporate Advocacy Power

More is involved than the interest which the state may have in protecting the individual investor against tie-in sales of advocacy voice to investment in business enterprises. The state also has a legitimate interest in limiting the advocacy activities of investor-owned business corporations by decoupling the corporation's advocacy speech and ideological activities from its economic functions. Quite apart from concern with "corruption" of candidates, the potentially distorting impact of corporations' advocacy is a legitimate source of concern to a democratic

[*63] government. n157 The distortion is in part a function of the content of a message that does not emanate from, and is not subject to the full range of motives and preferences of, individual human beings. n158 In part also [*64] it is a function of the magnitude of the public investor-owned

corporation's power to communicate by use of collective assets thus assembled (from persons who may not wish to support its advocacy voice) which are apt systematically to be larger than individuals' assets.

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n157 Cf. Hobbes, *supra* note 84.

n158 David Shellely, *Autonomy, Debate and Corporate Speech*, 18 *Hastings Const. L.Q.* 541, 577-84 (1991); cf. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3rd Cir. 1983). In prevailing economic theory, investor-owned corporate business enterprise exists principally, if not solely, to maximize returns to the enterprise, and thereby its shareholders' wealth and the productive use of social resources. To be sure, human investors in such enterprises are not less profit-focused in making their investments than is (or should be) "the corporation" in performing its functions. See Jeffrey Nesteruk, *Bellotti and the Question of Corporate Moral Agency*, 1988 *Colum. Bus. L. Rev.* 683, 689-96. Nor are individuals who engage in businesses that they own directly less profit-focused than the corporation; but the corporation does not have the personal autonomy that implicates exercise of non-economic preferences and the possibility of self-realization or self-fulfillment by expression (or by listening to expression) that the First Amendment seeks to assure for individual human beings. In practice, large business corporations are rarely recorded as intentionally departing very far from wealth maximizing theory, notwithstanding so-called "charitable" giving or touted social responsibility. See, e.g., Charles R. O'Kelley, *The Constitutional Rights of Corporations Revisited: The Political Impact of Legal Mythology*, 67 *Geo. L.J.* 1347, 1349-51 (1949); William Patton & Randall Bartlett, *Corporate "Persons" and Freedom of Speech: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 1981 *Wis. L. Rev.* 494, 498, 509-510; see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 804-05, 809-10 (1978).

Presumably in a free market economy the players require some restraints in their pursuit of society's resources and creation of externalities, and those restraints are to be imposed by government acting in response to the preferences of individual human beings who have a much broader range of preferences than simply wealth maximization. To allow the wealth maximizing business corporation a powerful voice in determining how social resources are to be allocated by government is to give that corporation significant power in determining how the rules of the only game it is playing should be changed, rather than confining it to play under the rules preferred by human individuals. If market forces are the energizing source of economic creativity, corporate political power should not be allowed to impede operation of those forces by seeking government alterations or favors. Nor should such power be allowed to shift (or to avoid internalizing) externalities or to produce excessive public goods. Not only may such power divert managerial attention from focusing on optimal economic results, but it also tilts the operation of the processes of choice in the political system to affect allocations of market power, the costs of externalities, taxes, defense expenditures, foreign policy, etc.

If the "private" long-term economic decisions of large for-profit corporate businesses significantly affect the economic condition of the entire society, it is difficult to legitimate their entitlement to the power to prevent the imposition by society of constraints on their economic behavior. Society could reasonably conclude that allowing authority in such firms to make political

expenditures goes too far down the road to such power. It is not necessarily true that what is good for General Motors is good for the country.

To be sure, individual owners of businesses or individual investors who accumulate personal wealth also have such power to seek political action to favor their economic interests. To acknowledge that it may be undesirable or impossible to restrict such political power does not mean that it is equally (or at all) undesirable or impossible to restrict corporate power that is fueled by investors with differing civic aspirations.

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It is not inconsistent with the premises that the audience should be, and is, able to comprehend and parse political messages to recognize that the process of comprehension and parsing is made more difficult if contestants with agendas that are substantively colored and structurally narrowed can systematically present more (and more timely) messages than others, whether in connection with referenda, n159 other electoral contests, or otherwise. The result is a distortion in the character of the aggregate information disseminated to, and the content of the messages received by, the public. n160 Moreover, the audience is left with an impression of human support for particular viewpoints that may well be inaccurate, and [*65] in any event is costly to offset. n161 To curtail the distorting effects of the structurally restricted advocacy speech offered by business corporations by confining those enterprises to the economic roles for which they are specially empowered, does not require so restricting expenditures by wealthy individuals who inevitably have broader potential advocacy agendas. Identification of the legitimate reasons that society may have for limiting the power of business corporations to engage in advocacy speech thus raises the question whether vindicating those legitimate interests violates the First Amendment. n162

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n159 See Daniel H. Lowenstein, A Patternless Mosaic: Campaign Finance and the First Amendment after Austin, 21 Cap. U. L. Rev. 381, 410-13 (1992). Justice Powell's references in Bellotti to the absence of evidence that corporate expenditures "exert an undue influence on the outcome of a referendum vote," see Bellotti, 435 U.S. at 789-90; Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296-99 (1981), contrast with the substantial evidence of researchers on the subject, both before and after the Bellotti decision. See Steven D. Lydenberg, Bankrolling Ballots 1-3 (1979); S. Prakash Sethi, Advocacy Advertising and Large Corporations 14-15, 191204 (1977); Daniel H. Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 29 UCLA L. Rev. 505, 517-33 (1982); Steven D. Lydenberg & Susan Young, Business Bankrolls for Local Ballots, Bus. & Soc'y Rev. 51 (1980); Randy M. Mastro et al., Taking the Initiative: Corporate Control of the Referendum Process through Media Spending and What to Do about It, 32 Fed. Comm. L.J. 315, 317-27 (1980); Comment, Corporate Advocacy Advertising: When Business' Right to Speak Threatens the Administration of Justice, 1979 Det. C.L. Rev. 623, 623-27; see also Citizens Against Rent Control, 454 U.S. at 307 n.3 (White, J., dissenting). The longer term history of the relationship of corporate power to referenda suggests a rational basis for fear of undue influence. See Carl E. Schneider, Free Speech and Corporate Freedom: A

Comment on First Nat'l Bank v. Bellotti, 59 S. Cal. L. Rev. 1227, 1275-79 (1986). If the research does not show that one sided spending can effect victory for a proposition, it plainly suggests that one sided spending can secure a proposition's defeat.

That support for the same causes or candidates may not always be given by all investor-owned business corporations does not mean that corporate advocacy voices are as diversified as individual voices. To that extent, corporate advocacy voices have a systematic economic advantage that alters the process of electoral choice that advocacy action only by individuals (separately or organized in advocacy groups) would produce.

n160 See, e.g., Shelledy, supra note 158, at 568-77.

n161 Whether or not corporations outspend individuals in elections or referenda, they can focus the light they shed more powerfully on particular candidates and causes than can dispersed or less organized individuals. See Shelledy, supra note 158, at 543, 573-77. In addition, notwithstanding the constitutionally-authorized power of individuals to expend their wealth in electoral matters, there is little reason to doubt that the demonstrated corporate ability to skew the results of referenda, see supra note 158, applies, at least to elections in which corporate managers tend to favor the same candidates. Against those results, it is somewhat misleading to suggest that more speech fueled from corporate sources necessarily means a more enlightened electorate. See Schneider, supra note 159, at 1280-83; Shelledy, supra note 158, at 568-77; cf. Novosel, 721 F.2d at 901.

To be sure, the audience may discount the content of the message because of, or notwithstanding, the name recognition of the sender. However, the extent (and direction) of that discount is not self-evident, and in any event a question is raised as to the appropriate role of such corporate "name recognition" in the rational process of making a voting decision. Moreover, to offer speech to offset the sender's message is costly. Hence, the possibility of such discount does not preclude the state from appropriately concluding that the investor and society are best served by requiring a greater congruence between the speakers and the funders.

n162 Other questions may be raised with respect to curtailing the property rights of the corporation and its investors by precluding the corporation from engaging in speech that conditions the public on political issues or in lobbying or other activities which would affect government policy having an impact on the corporation's operations. There is, for example, no doubt that in today's society the role of government regulation on the productivity, efficiency, and profitability of corporations is very large. Therefore, business corporations have a property interest in determining how those regulations should be adopted and which ones should be adopted. That interest, however, generates no more and no less than the normal interplay of tensions between regulating the uses of property and the requirements of due process or equal protection of law. Deep deference is given to the legislative judgment in such matters by judicial review limited simply to inquiring whether there is, or whether there can be said to be, a reasonable basis for the stricture. If restricting advocacy speech of investor-owned business corporations not in the communications business were tested by that standard, the reasonable basis question would be asked in response to a claim under the Equal Protection, Due Process, or possibly the "Takings" Clauses. It is possible that in some circumstances, prohibition of

advocacy activity that seeks to avert government intervention (or failure to intervene) in its affairs will fail to meet that standard. But that possibility approaches the vanishing point if access to courts as part of the right to petition is not hampered and if corporations are permitted to appear by counsel before legislative committees or administrative agencies in response to requests for information or advice with respect to proposed legislation or rules. Compare the proposal of President Theodore Roosevelt to prohibit any use of corporate funds "in connection with any legislation save by the employment of counsel in public manner for distinctly legal services." 40 Cong. Rec. 96 (1905).

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c. The Relevant Criteria for Judicial Review

In the classic formulation, regulation directed at classifications that implicate curtailing expression is not valid unless it is the least restrictive alternative adopted to meet a compelling state need. That formulation, which may appropriately test government suppression or even lesser intrusions on the speech of individuals or expressive associations is not so clearly the appropriate standard in the case of multi-purpose enterprises. A puzzling configuration of tensions appears in the case of business corporations that is comparable to that which affects the constitutional question in the case of compelled association. It is comparable but not identical because the stockholder's participation is more voluntary than compelled. Hence the individual's negative speech interest may plausibly be regarded, in current constitutional jargon, to be of lower value than the interest in not being compelled to speak. But that interest is yielded when a stockholder makes an investment; and it is not as freely given up as it would be if that interest were not surrendered in exchange for collateral rewards, particularly rewards of a magnitude that obscures the actuality of the choice being made.

The question whether the First Amendment prohibits the state from limiting corporate advocacy speech by restricting a corporations' internal decision-making rules or its advocacy power n163 must be answered in the light of the inevitability of some state-imposed burdens on the speech interests of some investors. n164 Moreover, each choice of allocation of [*67] decision-making powers within the corporation that the state makes inevitably affects the speech the audience receives.

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n163 The state's rules governing the power of stockholders to contract for the allocation of corporate funds to advocacy speech may favor those who become holders of a majority of the stock by allowing them to contract (initially or by amendment) to allocate the minority's interest as well as their own. The rules instead may favor those who become the minority by precluding any allocation of corporate funds to corporate speech without the minority's consent. The rules may fracture the participants' power by limiting the majority to some sort of proportional use of corporate funds, or they may totally prohibit use of such funds for advocacy speech. Under any of the rules, the state is denying to some individuals unrestricted choice in the use of their invested funds for advocacy or public speech.

n164 The problem is not solved by authorizing the founders or later members of the corporation to choose for themselves how to allocate decision-making power over collective advocacy activities because, as we have seen, "free choice" by investors in such matters (on the conventional moral assumptions underlying the notion of freedom of contract) is not a feasible possibility either in the initial formation of the enterprise, see supra text accompanying notes 141-45, or by way of the amendment process, which encounters late-comer problems.

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Hence, although the issue confronting the reviewing court is posed by the prohibitions of the First Amendment, the issue does not involve the validity of a "compelling need" simply to silence a message to the detriment of the "speaker" and the audience. n165 To treat the corporation as the "speaker" entitled to protection under the First Amendment is to reify an association of human beings at the expense of the First Amendment interests of some, perhaps many, of the human members of the association. Such reification is as improper as it is unnecessary. The problem is not whether the speech of "the corporation" is suppressed. The questions are: (a) who in the association, which is "the corporation," should have what decision-making role on whether the group collectively acting as the corporation should speak; and (b) whether the members should be remitted to speaking individually or through an expressive association. The emphasis in the decided cases on the audience's interest in hearing corporate speech n166 quite ignores the question whether the corporate speaker has power--in the sense of authority--to speak. If the government validly defines the internal mechanism of authority to enable [*68] the corporation to speak or limits its power to speak other than by its members, the audience's entitlement to the speech is thereby equally defined. If there exists a right to hear, it is only the right to hear what others can and wish to say. n167 Listeners do not themselves generate the speech that the First Amendment protects; nor can they be "enriched" by it unless willing and able speakers exist.

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n165 The issue is not, as the Bellotti Court suggested, comparable to the issue in Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (deciding whether "government may restrict the speech of some elements in our society in order to enhance the relative voice of others"). See First Nat'l Bank v. Bellotti, 435 U.S. 765, 790-91 (1978) (quoting Buckley, 424 U.S. at 48-49). Nor does the First Amendment claim challenge the validity of a legislative choice to put a cap on the sums that may be spent on speech by persons who can claim a personal individual right or power to speak, or by expressive associations which they form to speak.

n166 See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 533-35 (1980); Bellotti, 435 U.S. at 781-83; see also Martin H. Redish, Reflections on Federal Regulation of Corporate Political Activity, 21 J. Pub. L. 339, 344-45 (1972); cf. Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 8-9 (1986). The Court's analysis in Bellotti and its progeny purports to focus on the abstraction of "speech" and to subject to "strict scrutiny" a denial of the audience's entitlement to receive it. The Court's analysis assumes (although the Court purports to deny the relevance of its assumption) that the speech emanates from a "speaker" that has a natural and ineluctable authority

to express itself, so that impeding that speech deprives the audience of an entitlement protected by the First Amendment.

If the corporation is not reified, and its decision-making structure in the form that the state law provides is viewed as the mechanism that powers its speech, there is nothing natural or ineluctable about "the corporation's" speech. See David L. Ratner, Corporations and the Constitution, 15 U.S.F. L. Rev. 11, 19 (1980); Mayer, supra note 148, at 627-29, 633-34, 637-38.

n167 For a critical interpretation of the cases relied upon by the Court in Bellotti as spawning and developing the notion of a right to hear that operates quite independently of a need for a willing and able speaker, see Schneider, supra note 159, at 1246-51.

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That the corporation's collective voice may differ from the voices of any or all of its stockholders n168 does not require that "it" be authorized to speak for the benefit of listeners or society. The cost of doing so entails (apart from individual investors yielding part of their advocacy power) empowering a "speaker" that lacks the autonomy or aspirations of a human being to furnish messages for individual listeners to digest and for society to consider, n169 and amplifying that speaker's message to a volume that may well distort the menu from which the audience is asked to choose. n170

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n168 See supra note 37; see also Bolton, supra note 155, at 387-88; Ribstein, supra note 71, at 134; Shelledy, supra note 158, at 579-81.

n169 Efforts to impute aspects of a human's value preferences to a corporation, see ALI Principles of Corporate Governance: Analysis and Recommendations section 2.01 & comments (American Law Inst. 1994), do not suggest that the corporation has the equivalent of human autonomy, particularly in ordering preferences for government action. Apart from any theoretical challenges to such imputation, the reality of corporate behavior suggests how limited is the range of non-profit-maximizing preferences thus imputed.

n170 As a practical matter, the substance of the corporation's message (as distinguished from its volume) can be offered by a separate advocacy organization of stockholders. Any resulting reduction in amplification of the message may curtail some aspects of robust public debate, but that curtailment is not without its virtues for enhancing the quality of the debate. See Shelledy, supra note 158, at 568-71.

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If society seeks to anchor the corporate advocacy voice in the authority of those who own the corporation n171 or to limit the corporation's power to exercise that voice as a component of its "property," the "compelling" quality n172 of society's need to do so must be assessed in the [*69] context of the state as necessary intervenor in allocating power over corporate advocacy activities among stockholders, because the state, as architect of the corporate enterprise, has large discretion over its design. n173 Judicial review of restrictions on corporate advocacy poses problems for

the reviewing court that do not differ from those posed by restrictions on advocacy by multi-purpose associations whose support is induced by compulsion, although the question is closer. n174

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n171 See Dan-Cohen, *Freedoms*, supra note 4, at 1241-43; Shelledy, supra note 158, at 577-84; Prescott M. Lassman, Note, *Breaching the Corporate Walls: Corporate Political Speech and Austin v. Michigan State Chamber of Commerce*, 78 Va. L. Rev. 759, 786-87 (1992). The justification for thus limiting the wealth-powered speech of "the corporation" does not extend to curtailment of the speech of wealthy individuals.

n172 The criteria for determining whether there is a compelling need are vague. See, e.g., *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., dissenting). The historic fear in the United States of the power of aggregated wealth in corporate solution may have diminished in the latter half of this century. But it is not without basis as a predicate to support a compelling need. See supra note 159.

n173 If viewed as a problem in unconstitutional conditions by reason of the government's special assistance, judicial assessment of the propriety of conditioning enjoyment of corporate privileges on foregoing advocacy speech need not preclude that restriction. See supra note 122. The government's discretion in granting privileges is not unlimited. For example, furnishing amplifiers for speech expressing some viewpoints, but not others, or for use by some persons but not by irrelevantly different others, or on irrelevantly different terms, must meet the strictest scrutiny and presumably would not be upheld. Within the limits permitted by those considerations, judicial review of the propriety of the government grant, if the grant is neutral as to content (e.g., if it permits only limiting decibel volume or use only to amplify music) and is backed by a sanction that merely requires the recipient to forego such use, may be less strict than it should be if the sanction were to require not merely foregoing use of the amplifier, but prohibition of use of privately available amplifiers. Cf. *Buckley*, 424 U.S. at 90-92 (questioning validity of subsidy). At least in a minimalist state, the test of the propriety of conditions on such government grants, while demanding in order to preclude favoring some views or speakers or substantial monopolization or suppression of speech, need not be as strict as would be required in a welfare state. But see Elena Kagan, *The Changing Faces of First Amendment Neutrality*, 1992 Sup. Ct. Rev. 29, 53-58.

Thus, to the extent that the privilege foregone (collective advocacy speech) may be exercised without difficulty other than through the special government-empowered instrument (e.g., by forming another group to speak) there is less need for a court to test the propriety of the condition (i.e., the limited use permitted for the government-created instrument) as rigorously as if it were a mandated proscription of the message.

n174 Arguably, restrictions on the advocacy speech of business corporations may be more closely related to the general tenor of viewpoints than comparable restrictions in the case of other organizations. The possibility that restrictions formally addressed neutrally to subject matter will indirectly address particular viewpoints requires careful judicial examination for such an occurrence. See, e.g., *Bellotti*, 435 U.S. at 792-93; *United States v. Eichman*,

496 U.S. 310, 315 (1991). In Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), the Court upheld the validity of a Michigan prohibition against corporate contributions and independent expenditures in assistance of, or in opposition to, the nomination or election of candidates. Id. at 658-69. The Court's opinion disavows support for any broader restriction on corporate political or public speech (e.g., in referenda or speech in support of or opposition to legislation). Still, the Austin decision implements the logic and import of footnote 26 in Bellotti (see Austin, 494 U.S. at 659), in terms that imply that footnote 26 of the Bellotti opinion offers a loose thread which might be pulled hard enough to unravel the decision. See Bellotti, 435 U.S. at 788 n.26; cf. Vote Choice, Inc. v. DiStefano, 814 F. Supp 186, 190-91 (D.R.I. 1992); Vote Choice v. DiStefano, 814 F. Supp. 195, 197-98 (D.R.I. 1992); Alan J. Meese, Limitations on Corporate Speech, 2 Wm. & Mary Bill Rts. J. 305, 314-17 (1993).

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Whether the compelling need is to relieve individual investors of a tied-in obligation or to limit the corporate power that has been created or facilitated for special purposes, the question of the scope of the permissible restriction remains. Is a prohibition against advocacy speech, as contrasted with a super-majority requirement, rebate requirement, or a lesser intrusion with respect to such speech, the least restrictive alternative to effect the compelling state need? n175 The criteria by which to determine what constitutes a "least restrictive alternative" are no more discernible or illuminating than those that determine what constitutes a "compelling state need." n176 As Justice White pointed out in his dissent in First National Bank of Boston v. Bellotti, n177 the state may appropriately consider whether the rebate scheme is either feasible or enforceable, and in any event whether the porosity of its stricture will adequately meet the need to enhance stockholder freedom of advocacy choice or to curb corporate political power. n178 If a broader restraint is to be considered--e.g., a proscription of corporate advocacy speech or a requirement of stockhold [*71] er consent for such speech n179 --the question is whether the restraint is sufficiently narrow to be constitutionally tolerable. n180 In answering that question, it is relevant that even if practical difficulties make a requirement of stockholder consent the equivalent of prohibition of advocacy by the corporation, the stockholders individually or collectively through another association may engage in such advocacy activity. n181 The costs [*72] are principally: (a) the loss of the use of funds available in corporate solution and the use of the corporate organization, n182 coupled with the need to set up a new organization; and (b) the free-rider problem, i.e., the uncertainty of collecting funds for the new organization from stockholders as voluntary individual contributions. That very uncertainty underscores the propriety of imposing such a requirement. It is the state's act of empowering management or holders of a majority of shares to allocate corporate funds that effectively denies to individual investors the opportunity to separate their political and economic interests, and exposes society to the expression of views that many of the owners of the assets financing the expression of those views may oppose. Substituting individual contributions for agency centralization in this area comports more with the theory of democracy than does the bundling of economic and speech interests. n183

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n175 Although a disclosure requirement is not adequately responsive to the problem, see supra note 75, there is room to argue, as in the case of labor unions, that a proportionate rebate or the like to dissenting stockholders is the only appropriate technique for protecting the individual, the group, and the social interest in free speech. To be sure, the relationship of union members to the union differs from that of investors to their corporations in ways that may justify the rebate technique more than the prohibition technique in the case of unions but not in the case of publicly-held corporations. See supra note 139. There is also room to argue that corporate existence and operation are more intricately and pervasively connected to the state than are labor unions. Like the integrated bar or government-supported institutionally-compelled association, government limits on the scope of the enterprise's power, including neutral prohibition of some kinds of speech by the group, are an appropriate technique for protecting the various interests in free speech. Cf. Austin, 494 U.S. at 665-66.

n176 Cf. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 710-11 (1986) (Blackmun, J., dissenting). Commentators have long noted the difficulty in developing and applying criteria for the "least restrictive alternative," criteria which require weighing the adequacy of the stricture to effect the permitted goal against the cost of different degrees of restrictiveness. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1484-90 (1975); Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 464-74 (1969).

n177 435 U.S. 765 (1978).

n178 See *id.* at 817-19 (White, J., dissenting); see also David A. Grossberg, Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. Chi. L. Rev. 148, 158-59 (1974). But cf. *United States v. UAW*, 352 U.S. 567, 595-96 (1957) (Douglas, J., dissenting).

n179 To require stockholder consent presents problems that may make that remedy inadequate or too costly. The votes of corporate, particularly institutional, investors (such as investment companies, pension funds, banks, or insurance companies) in the stock of the portfolio corporation may require "pass-through" to the human investors in those institutions. Without such pass-through, there is a replication at the institutional investor level of the problem met at the portfolio corporation level--except possibly for institutional investors which are themselves advocacy organizations or their equivalent. In addition, there is the question whether in principle anything less than a requirement of unanimity protects the interests of dissenters.

n180 That the states are authorized to charter corporations under our federal system does not deprive the federal government of power to restrict (or allocate internal power over decision-making with respect to exercise of) the corporate advocacy voice, at least for corporations with publicly traded stock. If protecting or enhancing stockholders' freedom in making advocacy choices is (as it can well be) seen as a national problem with respect to investor-owned enterprises, even if states "create" corporations, federal intervention is not precluded, as the securities laws and the union shop cases make plain. See also *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2700-01 (1993).

Interstate anomalies may generate obstacles to such restrictions if they are imposed by state legislation. See, e.g., Norwood P. Beveridge, *The Internal Affairs Doctrine: The Proper Law of a Corporation*, 44 *Bus. Law.* 693, 709-15 (1989); Fisch, *supra* note 141, at 634-35; Lowenstein, *supra* note 159, at 408-09; Nat Stern, *Circumventing Lax Fiduciary Standards: The Possibility of Shareholder Multistate Class Actions for Directors' Breach of the Duty of Due Care*, 72 *Neb. L. Rev.* 1, 3-6 (1993). But cf. Larry E. Ribstein, *Choosing Law by Contract*, 18 *J. Corp. L.* 245, 248-55 (1993). Whether the federal-state dichotomy in the regulation of corporations' affairs should thus operate to deprive each state of a sufficiently compelling need for adopting such restrictions or requirements that might be sufficiently compelling if wholly intrastate behavior were involved is a puzzling question. Nevertheless, the federal system presents a less troubling analytic problem if the question is determining whether State B's need to restrict the behavior of State A's corporation is sufficiently compelling when the restriction is designed to protect the electoral system and citizens of State B from advocacy activities in its territory by corporations (including State A corporations) that are financed by contributions induced by collateral rewards. Cf. *Sadler v. NCR Corp.*, 928 F.2d 48 (2d Cir. 1991).

n181 To prohibit corporations from urging views on "ideological" questions does not preclude the formation by stockholders of groups to do so, a possibility to which the Supreme Court has repeatedly attributed significance in assessing the permissibility of restrictions on a group's speech. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 23536 (1977) (prohibiting union from fueling its speech with dues from coerced payers does not prohibit "the union" from financing its speech with voluntary contributions); *Lathrop v. Donohue*, 367 U.S. 820, 874-75 (1961) (Black, J., dissenting) (suggesting that voluntary bar associations could offer "speech" which would be forbidden to be offered by integrated bar associations); *Cornelius v. NAACP*, 473 U.S. 788, 809 (1985) (noting availability of alternate channels for claimant and audience to vindicate speech rights); see also *Buckley*, 424 U.S. at 21-22. Compare *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983) with *id.* at 552-53 (Blackmun, J., concurring) and *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984). To be sure, the availability of an alternative mechanism of expression does not aid in justifying restriction of speech if the alternative precludes or does not offer effective dissemination of the message. See *Meyer v. Grant*, 486 U.S. 414, 424 (1988). In the case of investors in public corporations, the notion is not unknown that stockholders can band together or that political action committees of stockholders of particular corporations can be created (albeit without the use of corporate funds or assets) to solicit funds solely to effect advocacy speech.

n182 Cf. *Austin*, 494 U.S. 652 at 657-58. The notion that only the corporation can produce certain kinds of information relevant to the message to be sent, see *Austin*, 494 U.S. at 681 n.* (Scalia, J., dissenting); *Prentice*, *supra* note 155, at 636, does not preclude the corporation from sharing the information with stockholders organized in an advocacy group.

n183 See *supra* note 156.

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The audience may lose something that might be contained in corporate speech because of the costs of forming an independent group to speak collectively and the free-rider problem in financing such a group. n184 If stockholders do not

have sufficient incentive to band together and form a new group to support speech that they or management would otherwise make through the corporate mechanism, the audience has lost nothing to which it is entitled. The state is not obliged by the First Amendment or otherwise to create speakers. Nor is there reason to oblige it to permit all collectivities formed for non-speech purposes, particularly those it specially empowers, to fuel their public advocacy powers by way of tie-in sales of their investment returns. n185 Where, as in the case of public corporations, the collateral incentives drown out the advocacy activities as inducements for individual support of the [*74] corporation's activities, the state's effort to assure that it is the advocacy rather than the collateral returns that the member contributions support need not offend the protection the First Amendment affords to the individual speaker or to the audience.

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n184 For example, unbundling may result in reduction of public debate on issues of concern to "business" such as taxes, regulation of pollution or working conditions, etc. In theory, the independent group may lose, or unwittingly filter out, some of the content that would be focused in corporate speech. See Ribstein, *supra* note 71, at 134. In practice, such loss of content does not seem likely. Compare the suggestion that loss of the free-rider effects is a significant impediment to purveying the corporate message, Meese, *supra* note 174, at 318-24, with the suggestion that this effect may not be a serious interference with robust debate, Shelledey, *supra* note 158, at 568-77.

n185 It has been argued that imposing restrictions on the advocacy speech or activities of publicly-held investor-owned business corporations, but not on those of other business associations or individuals, is unconstitutional because the restriction is both overinclusive and underinclusive. See Austin, 494 U.S. at 688-90 (Scalia, J., dissenting); Bellotti, 435 U.S. at 793-94. Those arguments turn in part on the terms of the specific restrictions. However, insofar as the arguments address the failure to cover all corporations or to cover non-corporate aggregated wealth amassed for commercial purposes, they are flawed. Close corporations and most partnerships are relevantly different from large publicly-owned corporations. The restricted role that corporate law leaves for the individual investor in a public corporation contrasts sharply with the multi-dimensional role which the same law and different institutional parameters leave for investors in close corporations or their partnership equivalents. In close corporations, individual owner-participants can contract more or less effectively for collective decisions on all matters, including advocacy activities. State corporate law recognizes this distinction in a variety of ways that do not offend the Constitution. There are probably systemic limits on individual cognition and volition in so contracting. But any government effort to curb the advocacy speech of close corporations in order to reflect more fairly individual participants' preferences is not needed by the participants or the audience nearly as much as in the case of public corporations; and such intervention approaches restriction on the individual's speech. Restrictions on advocacy speech by close corporations are not made more tolerable because the speech is funded by proceeds from the individual's business rather than from the individuals themselves. But cf. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1, 14-18 (1976). The similarity to individual speech justifies a more protective stance for speech of close corporations than of public corporations.

Aggregation of wealth in other collective non-corporate forms may or may not present the same need for restriction of speech as does aggregation of wealth in public business corporations. Whether the failure to include publicly-held limited partnerships in the associations whose advocacy activities are restricted is justified depends upon examination of relevant differences between publicly-held limited partnerships and corporations. Nothing in the Constitution should prevent including public limited partnerships in the coverage, or excluding them if the differences are relevant to the regulatory purpose, in the absence of any suggestion of viewpoint discrimination or suppression of content.

Advocacy speech of expressive associations organized in corporate form is protected as expressive, notwithstanding resort to corporate form. Federal Election Comm'n v. Massachusetts Citizens For Life, 479 U.S. 238, 262-63 (1986).

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2. Other Multi-Purpose Associations with Voluntary Membership

To conclude that investor-owned business corporations may constitutionally be subjected to restrictions on advocacy speech does not imply the constitutionality of similar restrictions on all voluntary multi-purpose associations, whether or not they receive special government support. The magnitude of the impairment of the individual's free choice in supporting advocacy activities resulting from the overwhelming power of the non-advocacy incentives offered to stockholders by business corporations is much reduced for members of most other multi-purpose associations.

Few enterprises offer investors collateral benefits with greater downturn effects on attention to advocacy activities than the business corporation. But enterprises like stock exchanges and some farm organizations n186 offer membership on terms that make the sound of the economic benefits little less powerful as an inducement to participate, and the voice of advocacy activities not much more audible as an objection to potential members. Similar relationships may well exist with respect to benefits offered by associations of real estate brokers, pharmacists, optometrists, plumbers, and others. On the other hand, a vast range of associations offers social and cultural attractions or other very modest non-advocacy benefits as an inducement to participation and relatively more prominent advocacy activities connected to the association's function. Enterprises like the American Association of Retired Persons (AARP), the Sierra Club, and many veterans associations or social or community groups are of that variety. Other groups such as unions without union shop arrangements, voluntary bar associations, n187 the American Automobile Association, some farm associations, and various occu [*75] pational associations offer a balance of non-advocacy benefits and advocacy activities that is more even, but in some cases closer to that of a business corporation, stock exchange, or real estate brokers' associations than to the AARP or many veterans associations.

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n186 See David C. Crago, Cooperative Dissent: Dissenting Shareholder Rights in Agricultural Cooperatives, 27 Ind. L. Rev. 495, 496-97 (1994) (discussing farm producer cooperatives); see also Terry M. Moe, The Organization of Interests 81-89 (1980) (discussing the American Farm Bureau Federation).

n187 Government intervention in the advocacy speech of voluntary bar associations generates special problems. To the extent that lawyers' functions entail the subject matter of the First Amendment (e.g., petitioning government), any restriction on the group's activities implicates the First Amendment. Restrictions on the association's advocacy speech may present problems comparable to restrictions on the advocacy speech of a union of journalists or of a media enterprise. Cf. supra note 82; infra text accompanying notes 208-11.

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The essential justification for unbundling advocacy speech from nonadvocacy activities of those associations is to enable advocacy voice to be uttered and decisions to be made relatively free of entanglement with pursuit of other benefits from membership which are strong enough to obscure the advocacy voice linked to those non-advocacy benefits. n188 To the extent that the non-advocacy benefits offered to individuals as inducements to support the association are modest, particularly if they are social or cultural rather than economic, the entanglement of participation with advocacy activities is apt to present little trammelling of the individual's advocacy choice. In many such enterprises, the social or cultural activity is functionally related to the advocacy activity and so visible that the choice of the former entails little or no pressure on freedom of choice with respect to the latter. For such associations, particularly if advocacy activity is heavy in the scale of their operations and their non-advocacy benefits are obtainable in other associations, the individual's decision to support the association is more consciously addressed as a choice to support its advocacy activity. By the same token, joining the enterprise on those terms suggests a collective voice that is not significantly distorted by contributions from people whose incentive to get collateral benefits that the association offers obscures their support of its advocacy activities. In sum, the lighter the comparative weight of selective non-advocacy benefits in the enterprise's agenda and as inducements to participate, and the closer the content and meaning of those activities are to its advocacy activity, the more the members' support of the advocacy activities of the group can be said to be volitional--or at least sufficiently volitional to be analogized appropriately to member support given to an association pursuing only advocacy activities.

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n188 Removal of the advocacy power may encourage broader membership in some organizations such as voluntary medical or legal societies, with resulting social benefits from diversity among the participants. Diversity benefits carry some weight in cases addressed to discrimination. However, the protection of individuals against tie-ins to race or gender generally implicates less impairment of the group's speech than would comparable efforts to encourage diversity by protecting individuals against tie-ins with the group's advocacy activities.

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The variety of associations that offer visible advocacy activities along with some collateral benefits is large; and the benefits offered and their relative importance in associations' agenda vary considerably. n189 Inter [*76] vention to restrict the group's speech (by rebate, super-majority vote requirement, or restriction of its subject matter) cannot be justified in all

such cases if, or merely because, they can be justified in any of them. Restrictions on associations' advocacy activity or speech solely because that activity is tied in with offers of non-advocacy (particularly non-economic) benefits entails an absolute proposition that is as doubtful in principle as it is infeasible in practice. In a world in which few enterprises engage only in advocacy activities and so many engage in joint activities (if only to overcome free-rider problems), even membership in a wholly political club often offers some non-advocacy benefits. If the logic of collective action presses for tolerance of some tie-ins, it does not require tolerance of tied-in benefits that overwhelm the impact on members of the advocacy activities in the group's agenda and substantially encumber the participant's freedom of choice to support such activities. n190

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n189 See, e.g., Russell Hardin, Collective Action 103-08 (1982); Moe, supra note 186; Olson, supra note 58, at 135-65.

n190 Except where visions such as the civic republican vision inform the members of society, it may be necessary (not merely helpful) to offer some sorts of collateral benefits to individuals in order to produce a collective advocacy voice. But to yield to that necessity may imperil the validity of the collective advocacy voice and may do so more intensely as the lure of the collateral benefits more substantially obscures the fact of the group's advocacy power.

-End Footnotes-

A norm for testing the propriety of government intervention in a multi-purpose association's advocacy activities by reference to how large a place (absolutely and relatively) those activities occupy on the agenda of the association presents obvious difficulties in implementing the command of the First Amendment. n191 A context sensitive to chilling effects [*77] calls for sharp critical assessment of the weight of non-advocacy (particularly non-economic) benefits that induce membership, and a generous readiness to recognize the weight of advocacy activities in the association's agenda. n192 When non-advocacy benefits cannot be easily severed, cannot be found substantially to outweigh the advocacy benefits in the group's agenda, and are found to be modest in incentive power, restrictions on the group's advocacy activities must be tested more like an advocacy or expressive association. That it is difficult to fashion clear subsidiary rules to implement those guidelines need not leave the matter without constitutionally adequate boundaries for judicial review of restrictions that actually are imposed in particular cases. n193 The Supreme Court has suggested a capacity to mark such boundaries. n194 And the [*78] need to do so is inescapable because there can no more be permission for all tie-ins than there can be prohibition of all tie-ins.

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n191 The complex relationships described in Olson, supra note 58, Moe, supra note 186 (particularly in the various farm organizations), and Hardin, supra note 189, illustrate the difficulties.

An added complexity is involved if the organization is heavily dependent upon, or enmeshed with, government support. An organization like a government-authorized and subsidized veterans' association attracts members for the social and community benefits it offers as well as for its advocacy activities. There is room to argue that such organizations are not simply expressive associations and that anti-tie-in considerations (of the sort, albeit not the magnitude) that support unbundling in the case of investor-owned business corporations also support unbundling for veterans' associations. But even though a government-supported veterans' association involves activities in addition to those of an expressive or advocacy organization, advocacy activity plays a role in the agenda of many such associations that is not simply proportionately larger than it is in the business corporation, but is *toto coelo* different. Advocacy activity can fairly be said to be central to many veterans' associations' operations; without advocacy activity, it is likely that veterans' association membership would be considerably smaller. In any event, their non-advocacy activities do not offer the immensely dominating incentive for participating that collateral benefits do for investors in a business corporation. Membership in an enterprise such as a veterans' organization may more accurately be analogized to membership in an indisputable advocacy organization than to investment in a business corporation. To the extent of the "fit" of that analogy, the constitutional objection to unbundling that is insurmountable in the case of an expressive association is also insurmountable in the case of the veterans' association, notwithstanding its government support. The problem arises over a range of enterprises with varying degrees of enmeshment with government, varying kinds of non-advocacy benefits to induce membership and various balances of non-advocacy and advocacy activities in their agendas. Compare, for example, the drawing power and relative weight of non-advocacy benefits offered by the New York Stock Exchange or the American Farm Bureau Federation with those offered by the American Legion or Veterans of Foreign Wars.

n192 Indeed, the problems have arisen most acutely with the claims of gays and lesbians to be included in some enterprises that plausibly claim to be expressive as well as social associations, like the St. Patrick's Day parades in New York and Boston. See *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 366-69 (S.D.N.Y. 1993); *Irish-American Gay, Lesbian & Bisexual Group v. City of Boston*, 636 N.E.2d 1293, 1298-99 (Mass. 1994), cert. granted, 115 S. Ct. 714 (1995); *Yakle*, supra note 44, at 859-62. Similar problems are encountered when the government requires that African Americans not be excluded as a condition to authorizing a parade by the KKK. See *Invisible Empire of the Knights of KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 288 (D. Md. 1988). In a different genre is the claim of an association like the Boy Scouts, that is organized to give education, skills training, or social activities, but which desires to be treated as an expressive association for purposes of determining the impact on its voice of its membership and employment policies with respect to homosexuality. See *Curran v. Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 580, 585-88 (1994).

n193 Specific statutory or regulatory language backed by appropriate study and reporting narrows the scope of the reviewing court's task.

n194 Cf. *New York State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 13-15 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609, 634-38 (1984) (O'Connor, J., concurring). Compare cases dealing with intertwined commercial speech and political speech. See *City of Cincinnati v. Discovery Network, Inc.*, 113 S.

Ct. 1505, 1511-17 (1993); see also Kay Kindred, When First Amendent Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts, 34 Ariz. L. Rev. 709, 710-12, 719-28 (1992); Clark A. Remington, Note, A Political Speech Exception to the Regulation of Proxy Solicitations, 86 Colum. L. Rev. 1453, 1468-74 (1986). Compare also distinctions drawn between political boycotts and economic boycotts, see FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411, 425-28 (1990); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912-15 (1982); International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 224-26 (1982), and "contributions" to, and "expenditures" to support, candidates, see Federal Elections Comm'n v. National Conservative Political Action Conference, 470 U.S. 480, 494, 496, 500 (1985); Buckley v. Valeo, 424 U.S. 1, 47 (1976).

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IV. Intervention in Advocacy Activities of Expressive or Advocacy Associations

In contrast to the multi-purpose associations thus far examined are a large number and wide variety of associations that may be designated expressive associations. Their dominating (and often exclusive) activities consist of expressive behavior, sometimes including ideological or advocacy speech. Thus, there are groups like political parties or other advocacy enterprises n195 that seek to aggregate funds and members in order to amplify (and possibly integrate) their voices, and thereby more effectively generate public support for particular opinions, views, causes, legislation, or candidates that their members prefer. Other kinds of associations, like book publishers, the print and electronic media, and theatrical or motion picture exhibitors, engage in communication or information-purveying generally, without being limited to advocacy roles. Unlike advocacy associations, their role, at least in the case of for-profit enterprises, focuses on the exchange value of the information they offer, often without much concern for advancing the views of their members. The activities of still others, like educational institutions, implicate to a greater or lesser degree the speech that is the subject matter of the First Amendment, but with an import that differs from that of advocacy groups or the media. n196 For some associations, the participants' interest in associating [*79] and their interest in the enterprise's speech are not disentangleable. n197 For still other associations like media enterprises or universities, the matter is more complex. Government efforts directly or indirectly to regulate the expression of any such associations implicates the operation of the First Amendment Speech Clause significantly differently than does comparable government intervention in the advocacy speech of multipurpose associations.

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n195 Advocacy organizations may include groups such as PACs, Massachusetts Citizens for Life, the American Civil Liberties Union, or the NAACP. When such associations adopt the corporate form they are no less expressive associations than if they simply aggregated membership. But cf. Federal Election Comm'n v. Massachusetts Citizens For Life, 479 U.S. 238, 256-65 (1986).

n196 Educational institutions, particularly universities, have been the subject of frequent litigation over rights of members (students and faculty) to access and to be free from restraints on their expression. Moreover, at least in the case of students, there has been controversy over the right to refrain

from contributing to speech or other ideologicallytinctured activities which the university sponsors, but they oppose. Occasionally the litigation involves private universities. The substantial differences between the roles or functions of the university and the roles of advocacy associations or multi-purpose associations that offer other benefits generate different questions and implicate different considerations than are entailed in assessing restrictions on students' or other participants' negative speech interests--such as students' opposition to contributing to programs that the university reasonably deems to be part of its educational mission, or to medical facilities that offer advice on matters such as birth control, abortion, surgery, etc.

n197 For such associations, as Justice O'Connor has suggested, "the selection of members is the definition of [the association's] voice." Roberts v. United States Jaycees, 468 U.S. 609, 633 (1984); see also New York State Club Ass'n, 487 U.S. at 12-15; Dickson v. Taylor, 105 F. Supp. 251, 255 (W.D. Tex. 1952), appeal dismissed, 202 F.2d 426 (5th Cir. 1953); McClain v. Fish, 251 S.W. 686, 689 (Ark. 1923); Brandenburger v. Jefferson Club Ass'n, 88 Mo. App. 148, 158-59 (1901).

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The level of protection to be offered to expressive or advocacy associations derives in fair part from the notion that such associations are essentially amplifiers and possibly integrators, or in any event communicators, of individual expressive interests, albeit strained through the process of collective decision-making. n198 As such, their speech is presumptively entitled to no less protection than is that of individuals, particularly as the justification for the latter's protection is to be found in the autonomy values or interests of the speaker, n199 not merely of the listener. To the extent that the justification for protecting speech rests on the social or political values of exchange of ideas or information, the expressive association's demand for protection of speech may well be stronger than that of the individual.

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n198 See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981). Special historically rooted considerations underlie the speech rights of the press.

n199 See Dan-Cohen, Freedoms, supra note 4, at 1248-54; Shelledy, supra note 158, at 546-55.

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Relevant differences between multi-purpose and expressive groups may be illustrated by examining and comparing the usual inducements to join and remain with the former with the inducements to join and continue as members of the latter--particularly (a) political parties and other advocacy or voice aggregative groups and (b) media corporations. Because the political party or advocacy group exists essentially, if not exclusively, to amplify the advocacy voices of its members, both the principle and the import of the First Amendment require powerful justification for any attempt by the government to interfere with the members' [*80] efforts to generate a collective voice. The possibility that the members may not always agree on the content of the collective voice does not alone

justify interference. An intrinsic cost of fashioning the collective advocacy voice of an association is the necessity for some members to yield to the preference of others, presumably a minority to a majority, when action is to be taken. Government intervention to protect the minority, by way of a dues rebate prescription, for example, will pro tanto weaken the collective voice; and intervention to forbid advocacy speech will ultimately preclude any of the amplification of the speech which it is the essential objective of the members to achieve. In each case, the affected speech is substantially reduced or suppressed, not merely, as in the case of a multi-purpose association, left to be uttered through another amplifying mechanism. The crucial difference in the consequence of government intervention stems from the different incentives that stimulate joining or supporting the two kinds of associations.

Multi-purpose associations such as business corporations, medical societies, the Jaycees, and unions, attract members because they wish to participate in, or share the benefits from, the enterprises' non-advocacy activities; those persons may or may not wish to participate in or support the group's advocacy speech activities. In contrast, members of political parties or advocacy groups are attracted by, and seek to share in or support, the enterprises' dominant or perhaps only, function--advocacy activity or speech. Potential members may be moved by the non-speech benefits offered, but would not join or support the enterprise if not for its advocacy activity.

The existence of the non-advocacy functions of a union, trade association, or business corporation furnishes the principal basis justifying state intervention to restrict the group's advocacy activity. The restrictions would be imposed, in part, in order to encourage, or require, access to the group for individuals, in order to make more readily available to them the benefits of the group's non-speech functions and to society the benefits of their members' participation in the group. n200 And in part, [*81] the state's effort would be to make the process of choosing to support advocacy activity independent of the incentive to obtain the non-advocacy benefits of joining the group. In the case of political parties or advocacy groups, there is little or no function other than advocacy, and thus little or no non-advocacy benefits, that society can seek to make available to outsiders by prescribing decision rules that impinge upon the group's advocacy activities or speech. Any intervention in the speech activity of political parties and advocacy groups, whether to protect the individual against supporting the group's voice or to curb the group's function, is necessarily an intervention that has little to do with access to the benefits of the group's non-speech functions but can serve only to intrude in the speech or advocacy function. By the same token, there is no need to disentangle the process of choosing an advocacy voice from collateral inducements to yield part of one's advocacy voice to the group.

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n200 Requiring individuals to join an association is also justified essentially on the basis of the group's non-advocacy function when the need arises to make those nonmembers who benefit from the function share the group's costs of performing it. The considerations that impel overriding the individual's claim of liberty not to associate with a multi-purpose enterprise such as a union or the integrated state bar are not present with respect to an advocacy group. Such non-advocacy benefits as may be attainable from forcing individuals to join the non-advocacy group are entirely derivative from the

group's non-advocacy role. For an advocacy association, there are no comparable nonadvocacy benefits; and the act of associating cannot be separated effectively from the act of supporting advocacy activity. To force an individual to enter into an advocacy association is to implicate the protection of the First Amendment for the individual's negative speech rights with no offsetting non-speech benefits that might justify overriding that protection by forcing such association upon the individual, even if the group desires compelling association. If compulsion to join is generated by the monopoly power of the advocacy organization (e.g., the monopoly held by a political party), some government intervention in the association's affairs that may affect its voice may be defended, but not at the cost of thinning its voice to the extent that requiring pro-ration or super-majority approval would do. Compare supra note 110 with infra note 203.

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Moreover, any intervention in the group's advocacy activities in order to protect those members who do not agree with, or are not within the range of, the association's then prevailing views, not only threatens distortion of the group's avowed purposes, but inevitably mutes its collective voice. n201 Those who support its purposes and objectives must then form another advocacy group from which the dissidents are excluded in order effectively (i.e., collectively) to articulate or communicate their message. A rule of law that requires curbing the old group's voice in deference to potential dissidents or diluents also requires tolerance of similar dissonance in the new group, and simply starts the cycle over again. n202 In short, restricting the group's advocacy speech in the interest

[*82] of protecting individual members' preferences may not only distort its function, but may leave the members of the group with no viable alternative for collective speech. As a result, the audience will also be deprived of the group's advocacy speech; its content will be suppressed, not merely diverted for presentation through alternate channels.

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n201 It is essential to the function of such groups that members share in at least some large part of the enterprise's ideology or aspirations. The point of aggregating persons in the group is to attract persons who share the ideology and to amplify their voices and powers in achieving public acceptance of whatever it is that they deem it appropriate to advocate. To allow the state to interfere with the group's membership or to relieve the members of the obligation to help fund the group's speech would be to impair the essential purpose of the group's existence--its shared ideology and its advocacy role. Cf. New York State Club Ass'n, 487 U.S. at 13-14; see also supra note 200.

n202 The existence of constitutional power to restrict the speech of one advocacy group by regulating access to the group or its funding by its members threatens the same restriction on the speech of alternative advocacy groups formed to convey the messages that the old majority wished.

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In sum, the multi-purpose group invites society's interest in protecting the advocacy preferences of individual members at the expense of group advocacy. The political party or advocacy group emphasizes society's interest in the group's

advocacy preference at the expense of the individual's preference, particularly because protecting the individual's preference is apt to deny (rather than divert to another speaker) the benefit of the speech to the audience.

To recognize this fundamental distinction between the multi-purpose association and the advocacy enterprise is not, however, to deny that factors which are significant in determining the propriety of government intervention in the former may also play a role in the latter. n203 Incon [*83] gruities, if not contradictions, have appeared in the case law that responds to the tensions generated by the conflict between the unavoidable necessity for state regulation in order to integrate the political party into the electoral process and to avoid corruption and distortion of voice within the enterprise on one hand, n204 and the command of the First Amendment to refrain from government abridgement of the participants' freedom of speech through association on the other. n205 Those tensions and incongruities are reflected in courts' efforts at assessing the "compelling need" for the intervention and whether the form of the intervention is "the least restrictive alternative." n206

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n203 For example, the political party is linked to a government function and empowered by an elaborate system of special government authorization because the government must both prescribe rules for the election process (e.g., time and place for voting, eligibility, etc.) and because only government can bridge the "private" action of the party (including particularly candidate selection) with the "public" process of voting in the government electoral system. It does not lessen the necessity for such government intervention that it is also a response to the felt need to avert or cure perceived corruption or bureaucratic distortion of the organization. The scope of such intervention during the past century suggests deeply felt and widely perceived societal needs for government prescription or restriction of internal decision-making processes and membership practices of political parties. The consequence of such state regulation has been substantially to diminish the parties' "nearly autonomous common law status." G. Theodore Mitau, *Judicial Determination of Political Party Organizational Autonomy*, 42 Minn. L. Rev. 245, 258 (1957); see also Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 Hofstra L. Rev. 191, 196200 (1982); Robert Kerstein, *Unlocking the Doors to Democracy: Election Process Reform*, 15 Fla. St. U. L. Rev. 687, 696-709 (1987); Note, *Developments in the Law--Elections*, 88 Harv. L. Rev. 1111, 1151-54 (1975). Thus, the groups' membership and decision-making rules have been required to yield to government restriction in the interest of implementing and preserving the social goal for which the special government support was fashioned--e.g., a fair and undistorted electoral process.

Similarly, to the extent that the group is the sole source of a "practical necessity" for aspiring members, its exclusivity may have to yield to government efforts to open it up. Thus, for example, a political party may have an effective monopoly on access to the ballot, in part because of its assigned role in the state-created electoral process and in part because of the history of its assigned role in the community, as was true in the white primary cases. See, e.g., *Terry v. Adams*, 345 U.S. 461, 463 (1953); Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 124-25 (1984). But see *Chapman v. King*, 154 F.2d 460, 463 (5th Cir.), cert. denied, 327 U.S. 800 (1946). Such a party may be required by government to

refrain from excluding people, even at the cost of affecting the positions or views ultimately taken by the party.

n204 On another level, the cases upholding intervention in party membership and candidate selection in order to dilute the consequences of monopolistic access to the ballot by one party, as in the white primary cases, rest uneasily alongside the more recent cases giving the party autonomy in the matter of open primaries. See, e.g., *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986); cases cited *infra* note 206.

n205 The felt necessity for extensive government regulation of political parties requires courts to create a filter to separate those party activities that are sufficiently related to the mere mechanics of the electoral process to be legitimately constrainable in the interest of assuring the integrity of that process from those activities that engage the party's advocacy role and substantive decisions. The latter are presumably protected by the First Amendment, and the former are protected by the First Amendment only as their regulation impinges upon the latter. Nonetheless, many party structures and activities related to the mechanics of the electoral process--e.g., selection and operation of state committees with specific functions--so closely affect party advocacy activities that regulation addressed to one must intrude upon the other. More significantly, some party activities--e.g. candidate selection--implicate equally the integrity of the electoral process and the party's advocacy role. The Court's decisions reflect the tensions generated by the need to regulate the one and the command of the First Amendment not to abridge the other. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 790-806 (1983); *Bellotti v. Connolly*, 460 U.S. 1057, 1057 (1983) (Stevens, J., dissenting), dismissing appeal from *Langone v. Secretary of the Commonwealth*, 446 N.E.2d 43, 50-51 (Mass. 1983); see also *Gottlieb*, *supra* note 203; *Kerstein*, *supra* note 203; *Daniel H. Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 *Tex. L. Rev.* 1741 (1993); *Brian L. Porto, The Constitution and Political Primaries: Supreme Court Jurisprudence and its Implications for Party Building*, 8 *Const. Commentary* 433 (1991); *Arthur M. Weisburd, Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 *S. Cal. L. Rev.* 213 (1984); *Guttman*, *supra* note 203, at 117, 118-19 & n.9; *Nancy Northup, Note, Local Non-Partisan Elections, Political Parties, and the First Amendment*, 87 *Colum. L. Rev.* 1677 (1987).

n206 Compare *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 222-33 (1989) and *Tashjian*, 479 U.S. at 213-25 and *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 120-26 (1980) and *Cousins v. Wigoda*, 419 U.S. 477, 487-91 (1975) with *Burson v. Freeman*, 112 S. Ct. 1846, 1849-58 (1992) and *Nader v. Schaffer*, 417 F. Supp. 837, 844-48 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976); compare also *Burdick v. Takushi*, 112 S. Ct. 2059, 2062-68 (1992) and *Storer v. Brown*, 415 U.S. 724, 728-35 (1974) with *Celebrezze*, 460 U.S. at 786-806 and *Rosario v. Rockefeller*, 410 U.S. 752, 756-61 (1973) with *Kusper v. Pontikes*, 414 U.S. 51, 56-61 (1973). But cf. *Celebrezze*, 460 U.S. at 788. Compare the theory of those latter cases with *Terry*, 345 U.S. at 466-70, and *Smith v. Allwright*, 321 U.S. 649, 655-66 (1944).

Some of the considerations that justify government regulation of political parties may affect political action committees. Those committees range from groups composed of large numbers of widely dispersed contributors that attract millions of dollars in contributions from millions of people who do not relate

to one another or participate in the enterprise beyond making the contribution, to small groups (some very well funded, some poorly funded) with active membership participation. Many advocacy groups are formed to litigate, to lobby, or to "educate" the public on particular issues and in support of particular views. They function more or less continuously in such advocacy roles and rarely engage in support of, or opposition to, candidates in elections. Other kinds of advocacy groups, like many political action committees, function wholly or principally in connection with election of candidates to office. There may be more reason to protect the collective voice and autonomy of the former (most political groups) more than of the latter (political action committees). The episodic functioning of the latter groups (principally in connection with elections) often generates internal bureaucratic conditions that invite regulation for the same reasons that invite regulation of political parties, even though they do not involve the extensive structural government support or linkage that obtains between political parties and the electoral process.

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If the government were to seek to restrict the advocacy speech of forprofit communications enterprises such as the electronic or print media n207 in order to enhance or protect the role of individual preferences in the group's advocacy voice, other (possibly more intractable) difficulties would be encountered. The principal (or only) product of the media, like the product of political parties and advocacy groups, is the special subject matter of First Amendment speech protection. However, advocacy speech is only a part of the media's product; separating it from the other parts would present more costly obstacles than would unbundling an industrial or commercial enterprise's advocacy speech from its non-speech products. Identifying advocacy speech, separating it from the media enterprise's other speech, and restricting, or requiring stockholder consent to, the advocacy parts of the enterprise's speech is [*85] likely to chill otherwise protected speech. Because the enterprise's daily operations consist of producing speech, requiring stockholder consent for advocacy speech would have a paralyzing impact on the enterprise's operation. n208 The costs to society of such unbundling implicate virtual suppression of speech, as distinguished from the increased cost of using other mechanisms for speech.

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n207 The import of the protection offered by the First Amendment for broadcast media (both cable and over-the-air) is considerably different from that offered to the print media. See supra note 48. The difference may follow from some underlying perception of the broadcast media, in contrast to the press, as more a forum than a voice. See cases cited supra note 48; FCC v. League of Women Voters, 468 U.S. 364, 386-95 (1984). But neither the differences between the print and electronic media nor the differences between the levels of First Amendment protection offered to each need alter the inquiry about advocacy speech interests of members in the affairs of those enterprises.

n208 The process of identifying advocacy speech and separating it from the media's protected product presents difficulties that at worst cannot be overcome, and at best chill the product. For example, a column or commentator may "support" or merely "report on" a candidate or a legislative proposal in terms that are formally identical. But cf. Buckley v. Valeo, 424 U.S. 1, 40-44

(1976). Moreover, separating the two products (forms of speech), even if possible, imposes larger proportionate costs on the profitability of the enterprise than would be incurred in the case of a non-speech enterprise--costs that are likely to stifle operation of many enterprises. Unbundling by way of pro-ration would present similar difficulties, albeit not quite as paralyzing.

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That the media enterprise may be organized as an investor-owned, for-profit corporation does not assimilate it to the non-speech investorowned business corporations. n209 To be sure, a media enterprise generally attracts investors for the same profit-making purpose as does a nonspeech business corporation. However, the advocacy interests of investors and of the public that are served by unbundling the non-speech enterprise's advocacy speech from the activity which is the essential source of the economic benefits it produces for investors cannot be served in the case of media corporations, except at prohibitive costs. On the contrary, the investor's interests are likely to be disserved by any attempt at unbundling. Hence, society may more appropriately subject individual investors to the bundling and corresponding restraints on individual negative speech interests embodied in conventional corporate decision-making rules in the case of media enterprises than in the case of the commercial business corporation. n210

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n209 As in the case of commercial or manufacturing corporations, there is room to debate whether the persons to be protected in their access to the "association" and from supporting the "association's" speech should be only those in the "stockholder" category. Employees might, by some standards or in some contexts, appropriately be included as members of the association (or indeed form a separate category in the association) to be given protection in such matters. The rights to be accorded to such persons and to the association in relation to them, however, raise considerably broader and more difficult questions than those thus far addressed. They are appropriately subjects for a another inquiry.

n210 If society were to deny corporate status to media enterprises in order to avoid the question of unequal treatment of different types of corporate enterprises, substantial objections to thus disadvantaging them would be generated from both equal protection and First Amendment considerations. In contrast, neither set of considerations precludes more speech protection for media enterprises than for others whose speech is otherwise justifiably curtailed.

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Aggregating capital for non-communicating businesses gives power to the controllers of that capital, whether management or majority stockholders, by reason of contributions that are not made in connection with, or expectation of, the advocacy speech potential of the enterprise. On the other hand, when contributions or investments are accumulated for a business engaged solely in operating a communications or advocacy enterprise, n211 the power over expression is a contemplated and an unavoidable aspect of the aggregation of

wealth which the contributions seed. Society's interest in checking (or protecting) the power of wealth so aggregated may be comparable to, but is not identical with, its interest in checking (or protecting) the power of any wealthy individual who chooses to engage in, or support an association engaged solely in, such conduct or speech. But even though the former may be entitled to less rigorous protection under the First Amendment than the latter, n212 nothing in the Constitution or acceptable policy requires protection of the advocacy voice of corporate wealth accumulated for expressive purposes to be extended to the advocacy voice of corporate wealth accumulated almost entirely for non-speech purposes. n213

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n211 So long as the group is a non-profit expressive or advocacy group, it should make no difference whether it is in corporate form or not, although the Supreme Court is less than clear on the point. Thus, non-profit advocacy groups and their members are said to be entitled to no less protection under the First Amendment if they are in corporate form than if they are not. Federal Election Comm'n v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 256-65 (1986). It is difficult to reconcile the result in Massachusetts Citizens For Life with Federal Election Comm'n v. National Right To Work Comm., 459 U.S. 197 (1982), which held that an advocacy group organized in corporate form was subject to the same restrictions in soliciting contributions for its segregated political fund as was a commercial for-profit business corporation. Id. at 207-10.

n212 Assuring the integrity of an association's voice as the transmitter of the aggregate of its individual members' preferences involves complex problems such as internal institutional obstacles and difficulties in effecting collective choice that are not involved for an individual's voice. Hence, the considerations that may justify government intervention in the affairs of an association are not likely to support intervention in the behavior of individuals. Some considerations that justify intervention in the affairs of multi-purpose organizations, see, e.g., supra note 17, may justify more extensive intervention in the case of investor-owned for-profit expressive enterprises than in the case of non-profit expressive associations. The latter, particularly if like the electronic media, they may be viewed as a forum more than a voice, may in any event not be immune from such intervention, as the regulation of political parties shows. See supra text accompanying notes 203-06.

n213 To acknowledge significant differences between the power to regulate advocacy expression by communications businesses and advocacy speech by other businesses generates problems about conglomerates that have some enterprises in each category. Similar problems are encountered in addressing the advocacy speech of professional or trade associations, where the question is how to determine whether the service function and the advocacy function are comparable, or which predominates, and at what point the enterprise's advocacy activities sufficiently "tilt" it so as to entitle it to protection as a communications enterprise. Despite these difficulties, the problems are not intractable. Practical, constitutionally feasible, solutions are possible. Cf. New York State Club Ass'n v. City of N.Y., 487 U.S. 1, 13-14 (1988); Roberts v. United States Jaycees, 468 U.S. 609, 634-38 (1984) (O'Connor, J., concurring). But cf. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1511-17 (1993).

Legislation could provide for stockholder consent only for advocacy speech by the non-media corporation or division of the conglomerate. In order for the media division to be free of a stockholder consent requirement for its product, that division must be publishing a bona fide publication of general circulation, not merely a trade "giveaway." The definitional problem is not without its difficulties. Moreover, evasion may be possible by use of the media division to advance political policies favorable to the industrial division. The constitutionally adequate distinction drawn in Buckley, between "independent" and controlled or coordinated expenditures, Buckley, 424 U.S. at 46, suggests that the problem is solvable.

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[*87]

V. Conclusion

Both principle and doctrine have long established that the First Amendment does not protect all speech or all protected speech equally. Variations in content and context are inescapably relevant. It is a fixture in American political theory that participation in public discourse and advocacy activities by elective associations of all sorts significantly serves the governance of a democracy and enriches the individual participants and audience. However, not all associations serve those goals, and even those associations that do differ in their contributions to their achievement. Hence, in assessing the propriety of government interventions in the advocacy speech of associations, recognition of differences in the composition and roles of different associations is essential.

To accord such recognition implicates classifying or categorizing associations. On one level are the problems of delineating categories of speech and of associations, and of justifying differential restrictions on the advocacy speech of associations in particular categories, assuming that adequately separable categories can be delineated. On another level are the problems resulting from the inability to separate cleanly the defined categories by operational rules that draw bright (or at least feasibly administrable) lines, and the consequent difficulties in fitting particular associations into one category or another and applying appropriate standards in assessing the propriety of the restrictions on the advocacy speech of the association.

This Article addresses the first level of problems. It explores criteria by which to define categories of elective public associations whose advocacy speech may appropriately be limited by government. It also seeks to [*88] explain and justify differential limitations on such speech by reference to the possible conflicts between speech interests and preferences of individual members and those of multi-purpose associations, as distinguished from expressive associations. Within the multi-purpose association category, sub-classifications may be delineated by considering whether membership is compelled (by government mandate or economic necessity) or is voluntary, and, if it is voluntary, whether the enterprise depends upon special government support and whether its agenda offers non-advocacy benefits which dwarf its advocacy activities as incentives to join and participate in the association.

Wholly different inquiries are involved when the issue is the propriety of government intrusion in the advocacy speech of associations dedicated solely or principally to expressive conduct, with or without ideological content. The

sole (or virtually the sole) basis for membership in an advocacy group is to affect its voice, in contrast to the reasons for joining non-advocacy associations. The voice of an advocacy or ideological association cannot readily be replaced through the mechanism for replacement available to members of non-advocacy groups--i.e., by the members forming another group to perform the advocacy activities. Any government intervention in the group's voice not only raises intractable questions under the First Amendment, but is unlikely to have any of the justifications that support such intervention in the affairs of non-speech groups.

Other difficulties affect the propriety of government intervention in the advocacy speech of other expressive or communications enterprises like the electronic or print media or educational institutions. The functions of those enterprises differ significantly from those of advocacy or ideological groups and also differ between themselves; so do the incentives for individuals to participate. Those differences implicate differing costs and benefits and differing equilibria in assessing the propriety of particular government intervention in membership rules, operations, or speech of such groups. Those differences emphasize the necessity for focusing on category and context in developing principles to define the "right" to free speech and the protection offered by the First Amendment.

To identify the relevant considerations affecting the propriety of government intervention is not to offer formulae that dictate clear results. The considerations upon which categorization depends produce less than precise definitions. Hence, it is difficult to separate some of the categories at the margin--for example, determining when the pressure to support or join an association is strong enough to amount to compulsion, separating advocacy speech from other speech, or separating multi-purpose enterprises from expressive associations by determining when the [*89] association's non-advocacy benefits sufficiently outweigh advocacy activities in its appeal or its agenda. The flexibility of the resulting process puts a premium on careful legislative drafting and on judicial self-consciousness with respect to the discretion available to the court and the values imported in invoking that discretion.

The ambiguous boundaries of the categories that this Article suggests may make some categories more acceptable and others less acceptable as predicates for constitutionally permissible restrictions on particular associations. Where speech or advocacy is the focus of concern, ambiguities in limiting the category of those whose speech is affected or the kind of speech involved may have prohibitively chilling effects. However, if the premises on which the categories rest are valid, if the categories and the proposed consequences can be justified in the easily recognizable cases, it is worth further effort to explore the possibilities for clearer delineation of categories that will be constitutionally acceptable.

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ARTICLE: THE ILLUSORY DISTINCTION BETWEEN EQUALITY OF OPPORTUNITY AND EQUALITY OF RESULT

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- - - - -Footnotes- - - - -

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SUMMARY:

... "Our society should guarantee equality of opportunity, but not equality of result." ... I will try to show that this conception of equality of opportunity requires large-scale redistributions of resources -- perhaps not literal equality of results, in the sense that every person must have the same resources, but a much closer approximation to that state than the advocates of "equality of opportunity, not result" would ever suspect (and probably much closer than anyone would desire). ... Talent is an arbitrary factor; nature distributes it unequally and, let us assume, education cannot equalize it. ... The only way to satisfy equality of opportunity, therefore, is to equalize people's fortunes so that they do not reflect the irreducible inequalities of talent -- that is, to bring about equality of result. ... The third objection to the view that talents and abilities are factors just as arbitrary as race or aristocratic background is related to the quite different conception of equality of opportunity that I discuss in Part III below. ... In reality, therefore, the so-called equality of opportunity in a market-oriented meritocratic regime is not that everyone has an equal chance to succeed, but that no one has a greater chance than anyone else to determine who will succeed. ...

TEXT:

[*171] I. INTRODUCTION

"Our society should guarantee equality of opportunity, but not equality of result." One hears that refrain or its equivalent with increasing frequency. Usually it is part of a general attack on government measures that redistribute wealth, or specifically on affirmative action, that is, race- and gender-conscious efforts to improve the status of minorities and women. The idea appears to be that the government's role is to ensure that everyone starts off from the same point, not that everyone ends up in the same condition. If

people have equal opportunities, what they make of those opportunities is their responsibility. If they end up worse off, the government should not intervene to help them. n1

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n1 See sources cited infra note 5. Arguments of this kind were frequently made, for example, by opponents of versions of the Civil Rights Act of 1991. See, e.g., 137 CONG. REC. S7247 (daily ed. June 6, 1991) (statement of Sen. Dole).

-End Footnotes-

In this Article, I challenge the usefulness of the distinction between equality of opportunity and equality of result. I do not suggest that the notion of equality of opportunity is an empty one; on the contrary, it is a powerful and important ideal. It is, however, much more complex than the proponents of the distinction between "opportunity" and "result" acknowledge.

The most natural conception of equality of opportunity, which I discuss in Part II, is that equality of opportunity requires the elimination of barriers to advancement that are in some sense arbitrary. I will try to show that this conception of equality of opportunity requires large-scale redistributions of resources -- perhaps not literal equality of results, in the sense that every person must have [*172] the same resources, but a much closer approximation to that state than the advocates of "equality of opportunity, not result" would ever suspect (and probably much closer than anyone would desire). The central idea is a simple and familiar one: talents and abilities, the qualities that (ideally) are responsible for inequalities in results, are in an important sense no less arbitrary than the barriers that any advocate of equality of opportunity would want to eliminate.

In Part III, I will discuss a different conception of equality of opportunity, one that is perhaps closer to what the advocates of "equality of opportunity, not result" have in mind. This conception sees equality of opportunity as a meritocratic principle that allows, roughly speaking, the free operation of the market. According to this view, government actions that alter outcomes produced by the market derogate from equality of opportunity and can be viewed only as efforts to promote equality of result.

My argument in Part III is that the market-oriented meritocratic conception of equality of opportunity, although a coherent view, is an ideal of equality only in a limited and somewhat counter-intuitive sense. More important, the form of equality that characterizes well-functioning market processes also characterizes well-functioning democratic processes. Therefore, in principle, there is no difference between the equality manifested in market-oriented meritocracy (so-called equality of opportunity) and the equality characteristic of a well-functioning democracy that alters market outcomes (so-called equality of result). The distinction between opportunity and result is an unhelpful and misleading way to categorize social institutions.

II. EQUALITY OF OPPORTUNITY AS THE ELIMINATION OF ARBITRARY BARRIERS TO ADVANCEMENT

A. Formal Equality of Opportunity

I begin with what I consider an indisputable aspect of equality of opportunity, what one might call formal equality of opportunity. n2 I believe that those who rely on the distinction between equality of [*173] opportunity and equality of result have this principle in mind as the minimum content of equality of opportunity.

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n2 For an account of this principle, see HENRY SIDGWICK, THE METHODS OF ETHICS 285 n.1 (7th ed. 1907).

-----End Footnotes-----

The principle of formal equality of opportunity holds, in the classic formulation, that careers should be open to talents. n3 The law should not bar a person from an occupation or a position of prestige just because -- as the principle would have been stated at a time when it was more controversial than today -- that person was born into a family that does not belong to the aristocracy. n4 Today the equivalent example would probably not be birth into a nonaristocratic family but birth into a certain racial group. Any law that bars members of a racial minority from certain jobs, for example, denies them equality of opportunity.

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n3 See id.

n4 For a well-known account of the historical development of this principle, see RICHARD H. TAWNEY, EQUALITY ch. III, @ 2 (4th ed. 1964).

-----End Footnotes-----

Why are formal barriers to opportunity unacceptable? Perhaps the most obvious reason is the intuition that a person's fortunes should not depend on such arbitrary circumstances as race or family background. These are accidents of birth that are beyond an individual's control. It is therefore unfair to the individual to allow these factors to be so influential. There are other plausible arguments against formal barriers, of course. For example, one might say that formal equality of opportunity is desirable not because it is fairer to the individual but because it maximizes social well-being. I will consider those arguments below. The most obvious and immediate argument for equality of opportunity, I believe, is based on the idea that it is unfair to allow arbitrary factors to have a dramatic effect on a person's life.

This argument for equality of opportunity, however, quickly leads to arguments for much more than the elimination of formal barriers. The call for "equality of opportunity, not equality of result" is sometimes offered as a reason for opposing welfare state measures. n5 But if the basis of equality of opportunity is the unfairness of allowing arbitrary factors to affect a person's chances in life, it is immediately apparent that equality of opportunity might [*174] require extensive government welfare and redistribution programs. n6

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n5 See, e.g., MICHAEL NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM 123-25 (1982); THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 37-60 (1984).

n6 This is a familiar point. See, e.g., ROBERT HAVEMAN, STARTING EVEN (1988); see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 235-38 (1974) (criticizing equality of opportunity on the ground that it requires redistribution).

- - - - -End Footnotes- - - - -

Even without formal barriers, a person with as much talent and initiative as another may not do as well if he or she has had, for example, an inferior education or inferior health care. Indeed, because family background has such a powerful influence on people's fortunes, true equality of opportunity probably would require a degree of intervention into the family that we would find unacceptable. n7 For example, parents' willingness to play an active role in their children's education surely affects the children's prospects in life. But having parents interested in one's welfare is as much an arbitrary factor as having parents descended from King Arthur. Therefore the idea of equality of opportunity as elimination of arbitrary barriers, if extended logically, would require that the interests and abilities of parents be equalized among families. No one would accept that conclusion.

- - - - -Footnotes- - - - -

n7 This is a principal theme of JAMES FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983). See especially id. at 1-10.

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The government might, however, do many things short of that to equalize opportunity. It could ensure, for example, equal schooling and equal access to health care without unacceptably interfering in the family. The notion of equal schooling is more complex than it might appear at first: some might dispute, for example, whether the government should provide the same resources to all or special educational benefits to those with special needs. n8 In any event, this conception of equality of opportunity would still require substantial government activity, in the nature of welfare state measures.

- - - - -Footnotes- - - - -

n8 See infra text accompanying notes 14-16.

- - - - -End Footnotes- - - - -

It does not follow that the distinction between equality of opportunity and equality of result is useless. It is plausible and coherent to say that the government should ensure that no one's fortunes in life will suffer because he or she did not have access to health care or education as good as anyone else's, but that if opportunities are equalized in that way, the government must not correct any differences in results. Those differences, it might be said, are caused by differences in talent or initiative, not differences in opportunities.

[*175] B. Talents and Abilities as Accidents of Birth

The difference between equality of opportunity and equality of result begins to collapse when one recognizes that differences in talent are as much an accident of birth as skin color or aristocratic pedigree. n9 Of course, people can develop their talents through initiative and determination. But it is not obvious that such qualities as initiative and determination should be considered to be within an individual's control. Even assuming that those qualities are not considered accidents of birth, and even taking the most expansive view of how much people can develop, there is undeniably a substantial component of ability that a person cannot, on any view, control. n10 It is the result not just of heredity but of childhood and other environmental influences that cannot be plausibly attributed to the individual any more than race can be.

-Footnotes-

n9 See JOHN RAWLS, A THEORY OF JUSTICE 73-74 (1971); see also DOUGLAS RAE, EQUALITIES 64-81 (1981).

n10 See RAE, supra note 9, at 70; SIDGWICK, supra note 2, at 285 n.1.

-End Footnotes-

If equality of opportunity means that a person's fortunes should not be determined by factors over which he or she has no control, then allowing people's talents to affect their fortunes violates equality of opportunity. "There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune From a moral standpoint the two seem equally arbitrary." n11 Once we take this step, however, the difference between equality of opportunity and equality of result begins to disappear. Differences in talent and ability, to the considerable extent that they are not within a person's control, should no more be permitted to affect a person's fortunes than differences in race or social class.

-Footnotes-

n11 RAWLS, supra note 9, at 74-75; see also BERNARD WILLIAMS, The Idea of Equality, in PROBLEMS OF THE SELF 230, 239-49 (1973).

-End Footnotes-

Three related objections might be made to this argument.

1. Formal Versus Informal Barriers

First, it might be said that distinctions based on race or family status create explicit formal barriers. By contrast, no law says that untalented people may not seek certain positions. People with lesser talents, unlike the victims of formal barriers, are free to seek [*176] their fortunes as best they can. They will not do as well, not because of barriers erected by the government, but because of a multitude of decisions made by private individuals in the market.

This distinction is an important one for many purposes. Indeed, there must be some difference between a market system that rewards the untalented less than the talented and a system of formal barriers that excludes, for example,

racial minorities: there is strong public consensus against the latter, n12 but few people entirely oppose the former.

-Footnotes-

n12 Even opponents of the antidiscrimination laws acknowledge this point. See, e.g., RICHARD A. EPSTEIN, FORBIDDEN GROUNDS 1-9 (1992).

-End Footnotes-

But this difference between the formal barriers of racially exclusionary laws and the market barriers to those lacking certain talents has nothing to do with whether the influential factor is an accident of birth. The only difference is that one appears as a "formal" barrier and the other seems to be an incident of the operation of a market economy. In both instances, society has made a decision to allow an arbitrary factor to affect a person's fortunes. A market, no less than a formal barrier, is created and maintained by the government: the government defines and maintains property rights, punishes theft and fraud, and so on. The government can do those things in a way that rewards talents (as it does, in a sense, when it maintains a market economy); or it can do those things in a way that rewards some other characteristics, of a kind we do not think should be rewarded. n13 Those two kinds of action by the government are obviously not equally justifiable. But they are both actions by the government, even if only one consists of what we would call a formal barrier. In either case, the government's action results in a person's fortune being determined by an accident of birth.

-Footnotes-

n13 See, e.g., Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470, 470-74 (1923); Cass R. Sunstein, Lochner's Legacy, 86 COLUM. L. REV. 873, 880-81, 896-97 (1987).

-End Footnotes-

2. The Supposed Inevitability of Inequality in Talents

The second objection is that talents, unlike such things as education or health care, cannot be distributed equally. Talents have already been distributed unequally by nature. (Indeed, I have insisted [*177] on that point in saying that foreclosing opportunities on the basis of talents is no less arbitrary than foreclosing them on the basis of race or family background.) Barriers resulting from formal exclusionary laws can be eliminated by the stroke of a pen. Barriers resulting from unequal education, health care, and the like, are more difficult to eliminate, but the government can at least ameliorate them. Talents cannot be equalized even in theory. Indeed, the objection would continue, the government cannot even reduce the differences in talent. Therefore the barrier to equal opportunity resulting from unequal talents cannot be compared to either formal barriers or unequal education.

To be sure, the objection would conclude, some day we might be able to engineer people genetically so as to equalize talents. Then we would have to face the question whether it would be worth doing so in order to equalize opportunity. The answer would surely be no, but at least we would be aware that we were overriding the interest in equality of opportunity in favor of more

fundamental values. But until we can do such things, it might be said, inequalities of talent simply do not raise the question of equality of opportunity because there is nothing we can do about them.

This argument, too, is mistaken, for two reasons. First, although we cannot transplant talents, it does not follow that nothing can be done to equalize them. People might be educated differentially so as to minimize disparities in talent. n14 Equality in education does not necessarily mean that everyone receives the same education; it might mean that educations should be tailored for those with special needs (as is required in certain cases by the Individuals with Disabilities Education Act). n15 Or the idea of "special needs" might be generalized: equal education might mean that education is tailored for the talents of each person (or, more realistically, each category of people) so as to minimize the effects of inequalities of talent. There are many possible arguments against such an approach to education. n16 But for present purposes, it is enough that such a form of education is theoretically possible. That shows the error of [*178] saying that inequalities in talent are simply a given that cannot be altered.

-Footnotes-

n14 See Amy Gutmann, *Distributing Public Education in a Democracy*, in *DEMOCRACY AND THE WELFARE STATE* 107, 110-11 (Amy Gutmann ed., 1988) (discussing FISHKIN, supra note 7).

n15 20 U.S.C. §§ 1400-1485 (Supp. II 1990).

n16 See, e.g., Gutmann, supra note 14, at 111-12.

-End Footnotes-

The notion that nothing can be done about inequalities of talent is mistaken for a further reason. Equality of opportunity, according to the conception I am discussing, requires that people's fortunes in life not be affected by arbitrary factors over which they have no control. One way to achieve this is to eliminate or equalize the arbitrary factors. But if those factors cannot be eliminated, another way of providing equality of opportunity is to ensure that those factors do not affect people's chances in life. Racial differences, like differences in talent, cannot be eliminated: the way we insure equality of opportunity in the face of racial differences is to have institutions that eliminate the influence of race.

At this point, however, equality of opportunity collapses more or less completely into equality of result. Talent is an arbitrary factor; nature distributes it unequally and, let us assume, education cannot equalize it. But equality of opportunity requires that arbitrary factors not determine people's fortunes. The only way to satisfy equality of opportunity, therefore, is to equalize people's fortunes so that they do not reflect the irreducible inequalities of talent -- that is, to bring about equality of result. If we do not take major steps toward equality of result, then the arbitrary difference in talents will produce a difference in fortunes. Therefore equality of opportunity, faithfully pursued, requires substantial equalization of results.

This argument does not establish that equality of opportunity requires complete equality of result: the difference in fortunes is partly the result

of what individuals have done with their talents, and there might be a sense in which that is under their control. Even so, equality of opportunity, understood as the requirement that fortunes not be determined by arbitrary factors, requires a great equalization of results, even if not complete equality. Indeed, even assuming that the objective of a regime of equality of opportunity is to prevent only those factors that are unquestionably beyond people's control from affecting their fortunes in life, that regime would require the elimination of inequalities of fortunes on a massive scale. It would require something approaching equality of result.

[*179] If this argument is correct, distinguishing equality of opportunity from equality of result serves no purpose. Equality of opportunity entails, if not complete equality of result, substantial equality of result. The interesting question is not the choice between equality of opportunity and equality of result. It is how much equality of opportunity we want. To what extent do we want the levelling entailed by the proposition -- which I am taking to be definitional of equality of opportunity -- that fortunes should not depend on arbitrary circumstances? That is a difficult question in many ways. But the claim that equality of opportunity is superior to equality of result does not help resolve it.

3. Essential Versus Inessential Attributes

The third objection to the view that talents and abilities are factors just as arbitrary as race or aristocratic background is related to the quite different conception of equality of opportunity that I discuss in Part III below. The objection is that talents and abilities are different because they are essential, rather than incidental, to the individual. They are constitutive of an individual's identity in a way that race and social class are not. n17 Genetic engineering to equalize talents and abilities is an unthinkable invasion of individual autonomy. Redistributing the fruits of those talents and abilities is obviously less invasive, but in principle suffers from a similar flaw: it amounts to depriving a person of something that is an essential aspect of his or her identity.

-Footnotes-

n17 This position is suggested by writers as disparate in their ultimate views as MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (communitarian redistributivism), and ROBERT NOZICK, supra note 6 (libertarianism opposed to redistribution).

-End Footnotes-

The difficulty with this argument lies in the justification offered for its central claim about the constituents of personal identity. Some societies regard race as the central constituent of a person's identity. n18 (Some would say it is so regarded in our society.) Historically, some societies regarded social class as far more central to one's identity than talents or abilities as we define them. n19 Race is [*180] as unalterable as ability, and in some cultures, social class is no more easily alterable. Nothing inherent in any of these qualities suggests that one is more central to human identity than the other. Different societies define the constituents of human identity differently.

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n18 See, e.g., LOUIS DUMONT, HOMO HIERARCHICUS 33-200 (Mark Sainsbury et al. trans., 1970) (discussing the caste system in India); DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 95-288 (1985) (discussing ethnic conflict generally).

n19 STANLEY I. BENN & RICHARD S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 132 (1965).

-----End Footnotes-----

Again, there are good reasons for considering ability to be more central to a person's identity than family background. But those reasons concern the consequences of doing so. In particular, talents and abilities, at least in a market-oriented society, relate to the capacity to produce goods and services that satisfy others' desires. But talents and abilities remain arbitrary factors in the sense that they are beyond the individual's control, and allowing them to determine a person's fortunes remains inconsistent with equality of opportunity (as I have defined that term for now). There are good reasons for departing from equality of opportunity in this respect, but a departure from equality of opportunity is exactly what is involved. To the extent we do not depart from equality of opportunity, we are necessarily committed to trying to bring about a large measure of equality of result.

III. EQUALITY OF OPPORTUNITY AS A MERITOCRATIC PRINCIPLE

A. The Meritocratic Conception

Equality of opportunity might be understood in a fundamentally different way. The barriers that must be eliminated, according to this understanding, are arbitrary not in the sense that they are beyond people's control but in the sense that one cannot give adequate reasons for them. n20 There is no good reason to allow a person's fortunes to turn on race or social class. But talents and abilities are not arbitrary in the crucial sense because they correspond to the capacity to produce value in society. Rewarding them, therefore, is not inconsistent with equality of opportunity.

-----Footnotes-----

n20 On the connection between equality and the ability to give reasons for differences among people, see WILLIAMS, supra note 11, at 240-41.

-----End Footnotes-----

By contrast, barriers based on factors like race and social class diminish the amount of value produced in society and therefore should be eliminated. Those factors are arbitrary, in the sense that they are irrational; no good reason can be given for them, and a [*181] good reason can be given for eliminating them. When such a formal barrier prevents talented people from reaching the positions for which they are best suited, society loses the benefits of their talents. n21 Multiplied across a large number of people held back by formal barriers, the effects on the total well-being of society can be enormous. Formal barriers based on race or class are arbitrary in this sense, not in the sense that those factors are accidents of birth.