First National Bank of Boston v. Bellotti: The Reopening of the Corporate Mouth—The Corporation's Right to Free Speech

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Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate.[1]

Historically, a corporation has been defined as an "artificial being, invisible, intangible, and existing only in contemplation of law."[2] Although it has been argued that a corporation, as a creature of the state, has only those rights granted to it by the state,[3] corporations for almost a century have been deemed to be persons within the meaning of the fourteenth amendment and are, therefore, entitled to due process and equal protection of the law.[4] Freedom of speech and the other freedoms encompassed by the first amendment have always been viewed as fundamental components of the liberty safeguarded by the due process clause.[5] Yet until recently,[6] the Supreme Court has never defined the extent to which freedom of speech and other first amendment liberties are accorded to corporations as corporations; that is, to artificial entities created by statute for the purpose of pursuing certain economic goals. Since the turn of the century, corporations have been prohibited from spending money to influence the outcome of elections, both on the fed-

1. United States v. UAW, 352 U.S. 567, 597 (1957) (Douglas, J., dissenting).

2. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). Chief Justice Marshall, speaking for the Court, stated: "Being the mere creature of law, [a corporation] . . . possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." *Id.*

3. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting); *id.* at 825-27 (Rehnquist, J., dissenting).

4. *Id.* at 780; Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Smyth v. Amos, 169 U.S. 466, 522 (1898).

5. Stromberg v. California, 283 U.S. 359, 368 (1931).

6. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

eral[7] and state levels.[8] A major purpose of the first amendment is to protect free discussion of governmental affairs.[9] Nevertheless, the extent to which a corporation may rely on the first amendment to participate in debating political issues through expenditures from its general funds has not yet been answered.[10]

The Supreme Court's recent decision in *First National Bank v. Bellotti*[11] established a significant perspective both on fundamental first amendment doctrines and on a corporation's right to free expression regarding political issues. The case makes an important break with precedent in that every other decision recognizing corporate freedom of expression has involved a corporation in the business of communication.[12] Undoubtedly, the decision in *Bellotti*, which presented an issue of first impression to the Court,[13] will be the forerunner of many future decisions dealing in the complex area of corporate political spending.

Accordingly, by examining the Court's analysis in *Bellotti*, this Comment will focus on the merits of granting first amendment protection to corporate political spending on state referendum issues. The governmental interests in prohibiting this form of corporate spending will then be considered. Finally, the possible application of the *Bellotti* decision to federal and state statutory restrictions on corporate political spending will be examined.

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7. *See* Federal Election Campaign Act of 1976, 2 U.S.C. § 441b (1976). Previous codifications of the prohibition include: Act of June 25, 1948, ch. 645, 62 Stat. 723 (repealed 1976); Act of June 25, 1943, ch. 144, § 9, 57 Stat. 167 (repealed 1948). For a discussion of earlier federal prohibitions on corporate contributions to influence the outcome of federal elections, see United States v. UAW, 352 U.S. 567, 570-93 (1957).

8. As of fall of 1979, the following 28 states have "corrupt practices" statutes prohibiting or limiting corporate political spending: ALA. CODE tit. 10, § 2-168 (1975); ARK. STAT. ANN. § 3-1110 (1977); ARIZ. REV. STAT. ANN. § 16-471 (1978); DEL. CODE ANN. tit. 15, § 8007 (1974); FLA. STAT. ANN. § 104.091 (West 1973); GA. CODE ANN. § 22-5105 (1970); ILL. ANN. STAT. ch. 73 § 762 (Smith-Hurd Supp. 1979); KAN. STAT. ANN. § 25-1709 (1964); KY. REV. STAT. § 121.035 (1974); MD. ANN. CODE art. 33, § 26-9 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 55 §§ 7-8 (West 1978); MINN. STAT. ANN. § 210A.34 (West Supp. 1979); MISS. CODE ANN. § 97-13-15 (1978); N.H. REV. STAT. ANN. § 70:2 (1970); N.J. STAT. ANN. §§ 19:34-32, -45 (1964); N.Y. ELECTION LAW § 14-116 (McKinney 1978); N.C. GEN. STAT. §§ 163-269, -270 (1976); N.D. CENT. CODE § 16-20-08 (Supp. 1977); OHIO REV. CODE ANN. § 3599.03 (Page 1972); OKLA STAT. tit. 26, § 15-110 (1976); ORE. REV. STAT. § 260.472 (1977); S.D. COMPILED LAWS ANN. § 12-25-2 (Supp. 1976); TENN. CODE ANN. § 2-1932 (Supp. 1978); TEX. ELEC. CODE ANN. arts. 14.06, 15.17 (Supp. 1978); W. VA. CODE § 3-8-8 (1979); WIS. STAT. ANN. § 11.38 (West Supp. 1979); WYO. STAT. § 22-25-102 (1977).

9. Mills v. Alabama, 384 U.S. 214 (1966). Justice Black, speaking for a six-member majority, stated that free discussion "includes discussions of candidates, structures and forms of government, the manner in which government is operated, or should be operated, and all such matters relating to political processes." *Id.* at 218-19.

10. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 767 (1978).

11. 435 U.S. 765 (1978).

12. *See, e.g.*, Time Inc. v. Hill, 385 U.S. 374, 376 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 685 (1959).

13. 435 U.S. at 767.

THE *BELLOTTI* DECISION

The appellants[14] were engaged in various commercial pursuits in Massachusetts.[15] At the general election of November 2, 1976, a proposed constitutional amendment which would have permitted the legislature to modify the income tax laws of the Commonwealth by imposing a graduated tax on the income of individuals was to be submitted to the voters as a referendum question.[16] Appellants wanted to spend money to publicize their views on the proposed amendment through media advertisements urging defeat of the proposal.[17]

The appellee, the Attorney General of Massachusetts, informed the corporations that he intended to prosecute under Massachusetts General Laws, chapter 55, section 8, if such expenditures were made.[18] Section 8 prohibits banks and corporations from making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters other than one materially affecting the property, business, or assets of the corporation.[19] The statute specifies further that no question submitted to the voters solely concerning the taxation of income, property, or transactions of individuals is deemed to materially affect the property, business or assets of the corporation.[20] A corporation violating section 8 could receive a maximum fine of $50,000 and a corporate officer, director, or agent could receive a maximum fine of $10,000, imprisonment, or both.[21] In response to the Attorney General's threatened prosecution under section 8, the corporations brought a declaratory action seeking to have the statute declared unconstitutional.[22] The Massachusetts court upheld the

14. Appellants are the First National Bank of Boston, New England Merchants National Bank, the Gillette Company, Digital Equipment Corp., and Wyman-Gordon Company. *Id.* at 768 n.1.

15. *Id.* at 756 n.1., 769.

16. *See* First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 774-75, 359 N.E.2d 1262, 1265 (1977).

17. *Id.* at 774, 359 N.E.2d at 1265.

18. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1978) provides:

> [N]o business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

19. *Id.*

20. *Id.*

21. *Id.*

22. First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 774-75, 359 N.E.2d 1262, 1265 (1977).

constitutionality of section 8.[23]

The Applicable Constitutional Rules

In the Supreme Judicial Court of Massachusetts, the corporations argued that section 8 violated the free speech, due process, and equal protection clauses[24] of the Constitution and similar provisions of the Massachusetts Constitution.[25] Appellants' first amendment claims in the Massachusetts court were that section 8 was invalid on its face, and that it was overbroad and was void for vagueness.[26] Alternatively, they claimed that, even if facially valid, the statute was unconstitutional as it applied to them.[27] As "artificial persons," corporations cannot act or communicate except through representatives or third parties, whose actions or communications necessarily involve an expenditure of corporate funds.[28] Thus, a prohibition on such expenditures precluded their exercise of free speech under both the federal and state constitutions.[29]

The Massachusetts court viewed the fundamental question as whether business corporations have first amendment rights coextensive with those of natural persons or associations of natural persons.[30] While acknowledging that the statutory bar against corporate contributions and expenditures operates in an area of fundamental first amendment activities,[31] the court answered this question by focusing on a

23. First Nat'l Bank v. Bellotti, 435 U.S. 765, 771 (1978).

24. This Comment will not address the corporations' equal protection arguments because of the Supreme Court's disposition of their first amendment claim. *See id.* at 774 n.8.

25. *Id.* at 770. Appellants' state constitutional claim was that § 8 was invalid by virtue of the provisions of articles 16 and 19 of the Declaration of Rights of the Constitution of the Commonwealth. First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 791, 359 N.E.2d 1262, 1274 (1977).

26. First Nat'l Bank v. Attorney gen., 371 Mass. at 781-82, 359 N.E.2d at 1268.

27. *Id.* at 782, 359 N.E.2d at 1268-69.

28. *Id.* at 782, 359 N.E.2d at 1269.

29. *Id.*

30. *Id.* at 783, 359 N.E.2d at 1269.

31. *Id.* at 782, 359 N.E.2d at 1269 (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976)). In *Buckley*, Senator James L. Buckley and eleven other co-plaintiffs challenged the constitutionality of the Federal Election Campaign Act of 1974 (codified in scattered sections of 2, 18 U.S.C.), and other major provisions of existing federal law regulating the financing of political campaigns for federal office. The Act limited the amount of political contributions and expenditures an individual or group could make to any single candidate for a federal office and also limited the amount a candidate could expend or contribute from his own personal income on his campaign. *See* 18 U.S.C. § 608(a)(1), (b)(1)-(3), (c) (1976). The plaintiffs contended that since contributions and expenditures are at the very core of political speech, the Act's limitations infringed upon their first amendment rights. Buckley v. Valeo, 424 U.S. 1, 15 (1976).

The Supreme Court distinguished between contributions and expenditures for first amendment purposes. The Court held the Act's expenditure ceilings unconstitutional, since they imposed direct and substantial restraints on the quantity of political speech of individuals, groups, and candidates and, therefore, limited political expression. *Id.* at 39. In contrast, a limitation upon the amount that any one group of individuals may contribute to a candidate or political committee entails only a marginal restraint upon the contributor's ability to engage in free communication. Although a contribution may constitute symbolic speech or conduct as it manifests an expression of support, a limitation upon contributions does not infringe the contributor's freedom to discuss candidates and issues. *Id.* at 20-21. On the basis of this distinction between expenditures and contributors, the Court upheld the Act's limitation on the latter. For a more

corporation's protection under the fourteenth amendment of not being deprived of its property without due process of law.[32] As an incident of that protection, the court acknowledged that corporations necessarily possess certain first amendment rights of free speech.[33] The court stated, however, that the right of corporate free speech stems only from the corporation's interest in its property and is, therefore, limited to that extent.[34] Under this line of reasoning, the court held that only when a general political issue materially affected a corporation's business or property could a corporation claim first amendment protection entitling it to express its opinion to the public.[35] Since this limitation was identical to the first sentence of section 8, the court concluded that the challenged statute had permissibly identified the perimeters of corporate speech.[36]

In direct contradiction to the state court's perception of the issue presented in *Bellotti*, the United States Supreme Court stated that the proper question was not whether corporations have first amendment rights coextensive with those of natural persons,[37] but "whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."[38] Stating that the proposed speech by appellants was at the very core of the first amendment protection,[39] the Court focused on the inherent worth of the speech in terms of its capacity for informing the public rather than

complete discussion of the *Buckley* decision, see Clagett & Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VANDERBILT L. REV. 1327 (1976).

Similar provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441b (1976), prohibit any corporation or labor union from making contributions or expenditures in connnection with federal elections. The constitutionality of § 441b has not been determined and the Supreme Court has assiduously avoided answering the issue in a number of cases. *See, e.g.*, Cort v. Ash, 422 U.S. 66, 69-70 (1975); Pipefitters Local 562 v. United States, 407 U.S. 385, 398-99, 409 (1972); United States v. UAW, 352 U.S. 567 (1957).

In the Massachusetts court, the appellants relied primarily on the prohibition on expenditures in order to fall within the distinction made in *Buckley*. First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 782-83 n.11, 359 N.E.2d 1262, 1269 n.11 (1977). The Attorney General argued that the record showed that in the 1972 referendum question then in issue, all of the appellants except Digital Equipment Corporation had made contributions to a political committee. *Id.* The Supreme Judicial Court apparently felt that the distinction between contributions and expenditures made in *Buckley* was irrelevant to this case. *Id.* Yet, the *Buckley* distinction would appear to be even more significant here since § 8 completely foreclosed both forms of expenditures, whereas in *Buckley* the Act attempted only to limit the amount of contributions and expenditures. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 805-12 (1978) (White, J., dissenting).

32. First Nat'l Bank v. Bellotti, 435 U.S. at 771. *See also* First Nat'l Bank v. Attorney Gen., 371 Mass. at 783-84, 359 N.E.2d at 1269-70.

33. First Nat'l Bank v. Attorney Gen., 371 Mass. at 784, 359 N.E.2d at 1270.

34. *Id.*

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

36. *Id.*

37. First Nat'l Bank v. Bellotti, 435 U.S. at 775-76.

38. *Id.* at 778.

39. This is especially true when the particular type of speech in question is indispensible to the decision making process. *Id.* at 777.

upon the identity of its source.[40] The Court emphatically rejected the Massachusetts court's analysis that a corporation's first amendment rights must derive from its property.[41] Instead, the Court stated that section 8's "materially affecting" test is not a shibboleth of the boundaries of corporate speech marked by the Constitution.[42] Rather, section 8 imposed an impermissible prohibition on speech based on the identity of the interests that a particular speaker may represent in public debate of controversial issues.[43] In essence, section 8's "materially affecting" test required that the speaker possess sufficient interest in the subject of his speech to justify its communication.[44] The Court, however, found no support in the Constitution for the proposition that the expression on important public issues, otherwise protected by the first amendment, loses that protection simply because its source is a corporation that cannot prove that the issues materially affect the corporation's business.[45] Consequently, the Court held that section 8 abridged expression protected by the first amendment in that it constituted a legislative attempt to control speech directly by "dictating the subjects about which persons may speak and the speakers who may address a public issue."[46]

A number of state statutes continue to prohibit a corporation's participation in state referendum elections.[47] An examination of the

40. *Id.* at 776-77.

41. *Id.* at 780. On this point the Court cited Grosjean v. American Press Co., 297 U.S. 233 (1939), where a state license tax was imposed on newspaper publications for the privilege of selling or charging for the advertising in their newspapers. In support of the tax the state argued that the guarantee of the fourteenth amendment against deprivation of property without due process of law applied only to natural persons but not to artificial persons. *Id.* at 235. In holding the tax unconstitutional, the Court stated that a corporation was a person within the meaning of the equal protection and due process clauses, *id.* at 244, and that a corporation engaged in the business of publishing or broadcasting enjoys the same liberty of the press as is enjoyed by natural persons. *See id.* at 248-50.

42. 435 U.S. at 781.

43. *Id.* at 784.

44. *Id.*

45. *Id.*

46. *Id.* at 785. The Court noted that even if the "materially affecting" requirement was unobjectionable, the limitations in § 8 would still contain an impermissible restraining effect on protected speech because corporate management could never be sure whether a court would agree with its judgment as to the effect a particular referendum had upon the corporation's business. *Id.* at 785 n.21. Since a prudent corporate management would not be willing to risk both the personal and corporate criminal penalties provided for in § 8, much valuable information which the corporation might be able to provide to the public would remain unpublished. *Id. Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (chilling effect of large civil damage awards in libel actions by critics of public officials requires actual malice to be shown); Smith v. California, 361 U.S. 147, 151 (1959) (city ordinance making proprietor of bookstore absolutely liable for mere possession of book judicially determined to be obscene constitutes prior restraint inhibiting speech).

47. Twenty-two states have statues that, in effect, prohibit corporations from contributing funds for any political purpose. Those states are: Alabama, Arizona, Florida, Illinois, Kansas, Kentucky, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming. See statues cited note 8 *supra*.

Corporation enabling acts in most states do not contain express provisions either prohibiting

Supreme Court's analysis in granting first amendment protection to corporate expression in the political realm, and of the governmental interests advanced by Massachusetts to thwart such expression, affords an opportunity to discern the extent of first amendment protection of corporate speech and of the continuing validity of state statutes prohibiting such speech.

THE FIRST AMENDMENT AND THE CORPORATE ENTITY

Discussion of public issues has long been considered an activity fundamental to the operation of our system of government.[48] The paramount importance of this form of free political discussion has been emphasized by commentators[49] and by the Court[50] as reflecting our "profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open."[51] Hence, the first amendment was designed to afford the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[52] Discussion of public issues, especially in referendum elections, contributes to the capacity of the citizenry to make informed choices; thus, the widest possible dissemination of information is needed.[53] In light of this strong first amendment interest, a denial of basic liberties to an important segment of our society—corporations—is not permissible. It is to this concern that the *Bellotti* Court directed its attention.[54]

The Focus on Corporate Speech

The Court stated that the ability and value of speech for informing the public does not depend on the identity of its source.[55] The Supreme Court's focus on speech itself, rather than the speaker, is not a novel

or authorizing political contributions or expenditures. *See* Garrett, *Corporate Contributions for Political Purposes*, 14 BUS. LAW. 365, 366 (1959). Contributions are prohibited, however, in the corporation act of at least one state: ALA. CODE tit. 10, § 2-168 (1975). Three states have spending prohibitions in their constitutions: ARIZ. CONST. art. 14, § 18; KY. CONST. § 150; OKLA. CONST. art. 9, § 40.

48. Buckley v. Valeo, 424 U.S. 1, 14 (1975).

49. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9-10 (1966) (the state has a special incentive to suppress opposition in the political process; hence, freedom of expression is usually the necessary condition for securing other freedoms). *See also* A. HEARD, THE COST OF DEMOCRACY 426-27 (1960).

50. *See* Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

51. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

52. Buckley v. Valeo, 424 U.S. 1, 14 (1975) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

53. First Nat'l Bank v. Bellotti, 435 U.S. 765, 790, n.29 (1978). *See also* Buckley v. Valeo, 424 U.S. 1, 14, 15 (1975).

54. *See* 435 U.S. at 778. "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech." *Id.* at 777.

55. *Id.*

approach; on a number of occasions the Court has recognized that the first amendment is designed to protect the right of the listener.[56] A speaker's interest in self-expression "is a concern of the First Amendment separate from the concern for open and informed discussion."[57] Indeed, the Court specifically declined to consider in *Bellotti* the outer limits of first amendment protection of corporate speech or whether corporations possess first amendment rights commensurate to those enjoyed by individuals.[58] This focus on the proposed speech, rather than on the speaker, led the Court to reject the Massachusetts' argument that such speech could be restricted on the basis that appellants were corporate entities.[59]

The Corporate Entity. The Massachusetts Attorney General had argued that corporations, as creatures of the state, have only those rights granted them by the state.[60] The Court recognized, however, that the states do not have unlimited power to define the rights of their creatures.[61] If the states had such absolute control, corporations would be in jeopardy of losing all constitutional guarantees.[62] The Attorney General's position would also be irreconcilable with numerous decisions by the Supreme Court holding state laws invalid under the first and fourteenth amendments when they infringe upon the protected speech of corporate entities[63] and with the decisions granting other con-

56. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). *See also* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976). *See generally*, Comment, *First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93 (1973); Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

57. First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978). *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

58. 435 U.S. at 777. The Court indicated that there may very well be an occasion, under different circumstances, where a justification for a restriction on speech would not be upheld when applied to individuals, but might suffice when applied to corporations. *Id.* at 777-78 n.13. As an example, corporate speech may be denied in the context of corporate contributions to and participation in political campaigns for elections to public office. *Id.* at 787 n.26. *See* Buckley v. Valeo, 424 U.S. 1, 24-29 (1975); Federal Election Campaign Act § 112(2), 2 U.S.C. § 441b (1976). The constitutionality of corrupt practices legislation has never been determined by the Court; in fact, the Court has on several occasions avoided the constitutional issues raised by such legislation. *See* First Nat'l Bank v. Bellotti, 435 U.S. at 798 n.2 (Burger, C.J., concurring). Such legislation, therefore, is still constitutionally questionable. *See generally* Redish, *Reflections on Federal Regulation of Corporate Political Activity*, 21 J. PUB. L. 339, 354-57 (1972).

59. *See* 435 U.S. at 778-79 n.14 (1978).

60. Brief for Appellee at 4, 23-25, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978). *Cf.* 435 U.S. at 809-10 (White, J., dissenting) ("The State need not permit its own creature to consume it."); *id.* at 824-28 (Rehnquist, J., dissenting) (state's grant of special privileges to corporations to acquire and utilize property entitles the state to subject corporations to regulations on political liberties).

61. *Id.* at 778-79 n.14. *See* WHYY v. Glassboro, 393 U.S. 117, 119 (1968); Terral v. Burke Constr. Co., 257 U.S. 529, 532-33 (1922). *See generally* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

62. 435 U.S. at 778-79 n.14.

63. *See, e.g.*, Southern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (corporation's pres-

stitutional guarantees to corporations.[64]

The Court further undermined the Attorney General's argument by declaring that even in those cases where corporate speech had been denied first amendment protection, there was no indication that the reason for the denial was that the speaker was a corporation rather than an individual.[65] While corporate identity has been a decisive factor in denying corporations certain constitutional guarantees, such identification has no place in the realm of the first amendment. As the Court explained: "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations . . . depends on the nature, history, and purpose of the particular constitutional provision."[66] Hence, corporations have been denied the privilege against compulsory self-incrimination,[67] and a right of privacy equivalent to that of individuals.[68] These privileges are unavailable to the corporate entity because their historic function and nature has been directed towards the protection of individuals.[69] The nature, purpose, and history of the first amendment, however, has not only been for individual self-fulfillment through free expression, but also for the preservation and promotion of open discussion to which corporate speech on political and economic issues certainly contributes.[70]

Despite its separate legal treatment, a corporation should not be viewed in every instance as an artificial creature. Realistically, the corporate entity is not a fiction in the ordinary sense but simply one of the many institutional forms of regularly recurring group activity.[71] The Supreme Court itself has observed that "[a] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."[72]

Denial of free expression for the reason that the speaker is a corporate entity would also contradict the modern day trend in demanding

entation of theatrical production involving nudity protected); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (broadcast of rape victim's name protected from civil liability for invasion of privacy); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (first amendment prohibits states from requiring newspaper to make space available for a reply from a candidate whom the newspaper has criticized).

64. *See* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (fifth amendment double jeopardy); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) (fourth amendment).

65. 435 U.S. at 778-79 n.14.

66. *Id.*

67. Wilson v. United States, 221 U.S. 361, 382-86 (1911).

68. California Bankers Ass'n v. Shultz, 416 U.S. 21, 65-67 (1974); United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950).

69. First Nat'l Bank v. Bellotti, 435 U.S. at 778-79 n.14. *See also* United States v. White, 322 U.S. 694, 698-701 (1944).

70. *See* text & notes 53-56 *supra*.

71. *See* L. FULLER, LEGAL FICTIONS 19 (1967).

72. Hale v. Henkel, 201 U.S. 43, 76 (1906).

that corporations be made responsible to the society in which they operate and from which they draw their sustenance.[73] During the past decade, the public has demanded more of business in insisting that corporations give increasing attention to their social responsibilities in the community.[74] Heightened demand for corporate responsibility necessitates effective means by which corporations may carry out these responsibilities effectively. Therefore, limiting a corporation's free speech would not only cut off extremely qualified sources of information to the public, but would also prevent corporations from fulfilling their social obligations by depriving corporations of their ability to communicate with the citizenry at large.[75]

The Court, however, side-stepped a potentially persuasive argument that corporate political expression should be accorded first amendment protection based upon the speech and associational activity of its individual owners. Since the inherent value of speech does not depend upon whether its speaker is a corporation or an individual,[76] the rights of "political expression and association should not be less protected when individuals are organized in a business corporation."[77] Implicit in the guarantees of the first amendment is the right to join with others to speak and to associate for the advancement of political ideas or beliefs.[78] These rights should not be forfeited when the individuals' means of association is incorporation.[79]

The Supreme Court's decision in *NAACP v. Button*[80] supports this

73. *See* K. DAVIS & R. BLOMSTROM, BUSINESS, SOCIETY AND ENVIRONMENT: SOCIAL POWER AND SOCIAL RESPONSE 413 (3d ed. 1975).

74. Examples of the type of social responsibilities the public is demanding of corporations are as follows: (1) Enhanced corporate performance in hiring and promoting minorities and women; (2) increased pollution control efforts and conservation efforts; (3) development of corporate social programs including financial support for assorted charities, use of business expertise in community problems, and reduction of business's role in the community power structure; (4) improved consumerism, including warranties, product safety, and truth in lending and advertising; and (5) opening of boards of directors to public members representing various interest groups. *See* K. DAVIS & R. BLOMSTROM, *supra* note 73, at 8; R. ESTES, CORPORATE SOCIAL ACCOUNTING 2 (1976).

75. In United States v. UAW, 352 U.S. 567 (1957), Justice Douglas observed: "It is therefore important—vitally important—that all channels of communication be open to them [the people] during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *Id.* at 593 (Douglas, J., dissenting).

Thus, prohibitions on certain forms of corporate speech, like § 8 and similar state statutes, would have a substantial nationwide impact.

> Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labor and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present substitute for it except the state itself.

Tax Commission v. Aldrich, 316 U.S. 174, 192 (1942) (Jackson, J., dissenting).

76. See text & notes 55-59 *supra*.

77. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 166 (1978).

78. *See* Buckley v. Valeo, 424 U.S. 1, 15 (1976); NAACP v. Button, 371 U.S. 415, 428-31 (1963); NAACP v. Alabama, 357 U.S. 449, 460 (1958).

79. *See* NAACP v. Button, 371 U.S. 415, 428 (1963).

80. 371 U.S. 415 (1963).

conclusion. In *Button* the NAACP, a nonprofit corporation, brought suit to restrain enforcement of a Virginia statute that effectively prohibited the NAACP from soliciting and financing litigation for its own lawyers or interfering with lawyer-client control of litigation.[81] The Virginia attorney-solicitation ban threatened the organization's activities of encouraging and assisting local school desegregation litigation.[82] In striking down the statute, the Court found the NAACP's activities to be a form of political expression and association protected by the first and fourteenth amendments.[83]

Corporate political expression is the product of shareholder speech and associational activity. An integral part of that associational activity is the selection and delegation of authority to corporate representatives.[84] Corporate representatives will often formulate and advance corporate policy, political or otherwise, on behalf of the shareholders. Corporate political expression should not be granted less protection because it is voiced or formulated by corporate representatives. Through their representatives, shareholders may find certain political expression advantageous in furthering legitimate business objectives. Thus, even when the corporation is not organized primarily for political purposes, its first amendment rights should be protected.[85]

Protected Speech of Nonmedia Corporations. Bellotti is significant because it represents the first time first amendment protection has been afforded to corporations not engaged in the business of communica-

81. *Id.* at 417, 423-26.
82. *Id.* at 417-19.
83. *Id.* at 428-29.
84. *Cf.* Cousins v. Wigoda, 419 U.S. 477, 487-88, 491 (1975) (political party is free from attempted state control in determining the composition of national convention delegates according to party standards).
85. In *Bellotti*, Justice White attempted to distinguish *Button* on the grounds that the NAACP was a corporation that was "formed for the express purpose of advancing certain ideological causes shared by all [its] members." 435 U.S. at 805 (White, J., dissenting). In these corporations "association in a corporate form may be viewed as merely a means of achieving effective self-expression." *Id.* Justice White argued that this unanimity of purpose breaks down in business corporations because "[s]hareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes." *Id.*

This argument fails to differentiate the degrees of protection for political expression to be accorded different types of corporations. As the majority opinion in *Bellotti* pointed out: "If the legislature may direct business corporations to 'stick to business' it may also limit other corporations—religious, charitable, or civil—to their respective 'business' when addressing the public." *Id.* at 785. Although such corporations were not formed for the express purpose for advancing the political expression, this should not be the criteria for awarding first amendment privileges for expression they now may propose. Hence, it may be difficult, practically and constitutionally, to distinguish business corporations from those corporations formed to advance political goals. *See id.* at 796 (Burger, C.J., concurring). Furthermore, political expression advanced by corporate representatives to achieve business objectives carries implied shareholder approval manifested both by the shareholders' investment in the corporation, and their selection of and delegation of authority to such representatives. *See* text and notes 84-85 *infra*. *See also The Supreme Court, 1977 Term*, *supra* note 77, at 166 n.32; text & notes 103-04 *infra*.

tions or entertainment.[86] The Massachusetts court reconciled section 8's "materially affecting" requirement with prior decisions by the United States Supreme Court by stating that no nonmedia corporation had ever been granted first amendment protection.[87] Thus the Court was confronted with the issue of whether mass media corporations enjoy special first amendment protection by virtue of the press clause which is unavailable to nonmedia corporations by the speech clause.[88]

Although conflicting opinions on this issue have been voiced by present members of the Court,[89] the question was not resolved in *Bellotti*.[90] Instead, the Court focused on the recognized role that media corporation speech plays in our society.[91] The Court stated that decisions granting first amendment protection to media corporations did not concern the connection between the speech and that corporation's business, but concerned the role those institutions' communications have in providing a forum for discussion and in informing and educating the public.[92] Since the appellants' proposed speech would be per-

86. *See* cases cited note 63 *supra*.

87. First Nat'l Bank v. Bellotti, 435 U.S. 765, 781 (1978).

88. *See id.* at 783. Language in some cases may suggest an independent scope to the press clause. *See* Bigelow v. Virginia, 421 U.S. 809, 828-29 (1975); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 247, 256, 258 (1974); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973). *See also* Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975). Other cases indicate that the press clause does not confer any special constitutional privileges on the press not enjoyed by the citizenry at large. *See* Pell v. Procunier, 417 U.S. 817, 830 (1974) (press enjoys no greater right than general public to acquire information about prison conditions); Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972) (denying qualified journalist's privilege to withhold source identity from grand jury inquiry).

89. The Chief Justice perceives no special or institutional privilege conferred on media corporations through the press clause, since he views freedom of the press as a fundamental personal right not for the sole benefit of the press. First Nat'l Bank v. Bellotti, 435 U.S. at 797-802. According to the Chief Justice, that the press clause confers no special privilege to the press does not suggest that the clause is redundant. Rather, the speech-press clause distinction could be explained by interpreting the press clause as focusing specifically on the liberty to disseminate expression broadly to the unseen public. *Id.* at 799-800 n.5. For at the time of the drafting of the first amendment, the word press was the sole means of broad dissemination of ideas and news. *Id.* at 800 n.5.

According to Justice Stevens, the recent press cases cannot be fairly described as a withdrawal of protections available to the press, but instead are more fairly characterized as a refusal to develope or to recognize new rules of law. Address by J.P. Stevens, University of Arizona, College of Law Dedication (Sept. 8, 1979), *reprinted in* 21 ARIZ. L. REV. 599 (1979).

According to Mr. Justice Stewart, however, the primary purpose of the press clause was to create a fourth institution (the institutional press) outside of the government to act as an additional check on the three branches of government. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975). In order to effectuate this purpose, Justice Stewart would grant the institutional press special constitutional status and protection over and above the protection accorded to the public through the speech clause. *Id.* at 633-36.

90. *See* First Nat'l Bank v. Bellotti, 435 U.S. at 798 (Burger, C.J., concurring).

91. *Id.* at 781-83.

92. *Id.* at 783. The Chief Justice, however, has questioned the legitimacy of the modern day press in providing a forum for informing the public because today's media conglomerates place the power to inform in a few hands, thus posing a greater threat to influencing public opinion than does the speech proposed by appellants. *Id.* at 796-97.

The Chief Justice's position that the power inherent in large newspaper chains or media conglomerates itself creates the threat to our freedom and ability to be informed may lack support.

forming the same role as media enterprises, the Court refused to draw the boundaries of first amendment protection between the speech of media corporations and other business corporations.[93] Under this analysis, distinguishing between speech materially affecting a corporation's business and speech having no such effect has no constitutional relevance.[94]

The Commercial Speech Cases. The Supreme Court stated that the recent commercial speech decisions,[95] in addition to the press cases,[96] demonstrate that the Attorney General's "materially affecting" theory is inapplicable in defining first amendment guarantees of corporate expression.[97] The commercial speech cases show that free speech values are not limited solely to political dialogue, but extend to any exchange of ideas or information that might make an individual's choices better informed.[98] The Court in *Bellotti* noted that these cases "illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[99]

The Massachusetts Attorney General sought to reconcile the commercial speech cases with the "materially affecting" theory by arguing that a corporation would have a direct financial interest in its commercial speech.[100] If corporate speech must be limited to business related matters, then a corporation's hawking of its wares would be granted more constitutional significance than a bank's expression of its opinion on proposed tax laws.[101] This position is untenable, as the expression of economic and political views may result in criminal liability under section 8, while entertainment-oriented corporations displaying sexu-

For example, Gannett Newspapers, one of the largest newspaper chains in the United States, split in their endorsements—60% for Gerald Ford, 40% for Jimmy Carter—in the 1976 presidential election, and there is no indication that Gannett or other mass media congolomerates try to dictate news and/or editorial policy from corporate headquarters. Shaw, *The Chain of Command*, THE QUILL, December 1978 at 11.

93. 435 U.S. at 796-97 (Burger, C.J., concurring). The Court refused to draw the line because of the apparent difficulty in distinguishing media corporations from the appellants as a matter of fact or constitutional law. *See id.* at 796.

94. *See* Brief of Appellant at 43, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

95. *See, e.g.*, Bates v. Arizona State Bar, 433 U.S. 350 (1977) (advertising by attorneys of prices for routine legal services); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (real estate sales); Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976) (advertisement of prescription drug prices).

96. For a listing of the press cases cited by the Court see First Nat'l Bank v. Bellotti, 435 U.S. at 778-79 n.14.

97. *Id.* at 783.

98. *See* Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 763 (1976).

99. 435 U.S. at 783.

100. *Id.* at 783 n.20.

101. *Id.*

ally explicit material would be granted first amendment protection.[102]

Furthermore, the fact that the speaker is engaged in profit making activity, or that the proposed speech has an underlying profit-motive, should not be a criterion upon which first amendment protection is circumscribed. Even though a corporation is engaged in a business for profit, the Supreme Court has recognized that a corporation's expressions are entitled to first amendment protection.[103] The *Bellotti* Court alluded to the substantial loss to society if constitutional protection were conferred only upon speech that pertains solely to business.[104]

The Supreme Court thus concluded that the proposed speech of the appellant corporations did not fall outside the first amendment's purposes or fail to satisfy its premises. Massachusetts' criminal statute did not identify the boundaries of first amendment protection for corporate speech, but instead constituted an attempt by the State to prohibit speech itself. Therefore, section 8's prohibition of speech could only survive the exacting scrutiny of the Court if a subordinating state interest were demonstrated.[105]

THE GOVERNMENTAL INTERESTS

Massachusetts asserted two principal justifications for section 8's prohibition on corporate speech.[106] The first was the state's interest in sustaining the active role of the individual voter in the electoral process.[107] It was claimed that the suppression of corporate speech in this area would prevent the diminution of the citizens' confidence in government.[108] The second was the interest in protecting the rights of a shareholder whose views differ from those expressed by the management on behalf of the corporation.[109] The Supreme Court rejected

102. "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance. . . ." Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976).

103. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952).

104. 435 U.S. at 782 n.18.

105. *Id.* at 786. Strict scrutiny is the appropriate standard of judicial review of government action that aims to abridge speech based on its content. *See* NAACP v. Button, 371 U.S. 415, 438-39 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 463 (1955); Thomas v. Collins, 323 U.S. 516, 530 (1945). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 602-05 (1978). The burden is placed on the state to show that its interests are compelling. Elrod v. Burns, 427 U.S. 347, 362 (1976). If a statute identifies permissible justification, the nexus between the means employed by the state and its legitimate end must be closely drawn to avoid unnecessary abridgment. First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 1, 25 (1976); Street v. New York, 394 U.S. 576, 592 (1969). Since § 8 attempted directly to control speech, strict scrutiny by the Court was appropriate in considering the state's asserted justification for the abridgment of such speech.

106. First National Bank v. Bellotti, 435 U.S. at 787.

107. *Id.*

108. *Id.*

109. *Id.*

these interests as being out of context in the area of referendum elections.[110] A discussion of the Court's approach to these asserted state interests will clarify the circumstances under which corporate political expression will be granted first amendment protection.

Preserving the Integrity of the Electoral Process

The Referendum Distinction. The Supreme Court noted that the governmental interests in preserving confidence in the government, in the integrity of the electoral process, and in preventing the appearance of corruption were interests of the highest importance.[111] Such governmental interests are the primary justification for many of the state and federal laws regulating corporate participation in election campaigns.[112] Yet the Court stressed that referendum elections are held on issues, not on candidates running for election to public office.[113] The risk of corruption generated by corporate participation in expending or contributing money in candidate elections is simply not present in a popular vote on public issues.[114]

The Attorney General argued that since referendum elections involve the direct participation of the electorate in the law-making process, the state's interest in sustaining the active role of the citizenry is especially great.[115] The Court stated, however, that this interest would not justify prohibiting public presentation of corporate views.[116] A number of decisions have recognized that the first amendment will not

110. *Id.* at 778-79. These interests have historically been associated with partisan candidate elections only. *Id.* As the Court stated:

> [O]ur consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

Id. at 788 n.26.

111. *Id.* at 788-79.

112. *Id.* at 788 n.26. Federal laws have attempted to prohibit corporate political spending since the turn of the century. *See* 2 U.S.C § 441(b) (1976); Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907). The Supreme Court decisions dealing with these statutes have consistently recognized that the governmental interest in prohibiting corporate political participation in federal elections is to prevent corruption that would discourage voter participation and mar the integrity of the political process. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 25 (1976); Pipefitters Local 562 v. United States, 407 U.S. 385, 415-16 (1972); United States v. UAW, 352 U.S. 567, 570, 575 (1957). This fact is further demonstrated by the Court in *Bellotti* leaving intact that part of § 8 prohibiting corporate expenditures and contributions in the election of persons to public office. 435 U.S. at 788 n.26. For a further discussion on the federal statutes regulating corporate political spending, the governmental interests identified in such statutes, and the Supreme Court decisions interpreting both the statutes and interests, see generally Mager, *Past and Present Attempts by Congress and The Court to Regulate Corporate and Union Campaign Contributions and Expenditures in the Election of Federal Officials*, 1976 So. ILL. U.L.J. 338, 338-39 (1976); Redish, *Reflections on Federal Regulation of Corporate Political Activity*, 21 J. PUB. L. 339, 339-46 (1972).

113. First Nat'l Bank v. Bellotti, 435 U.S. at 790. See discussion note 112 *supra*.

114. 435 U.S. at 790.

115. *Id.* at 790 n.29.

116. *Id.*

accommodate the highly paternalistic approach that statutes like section 8 adopt in restricting what the people may hear.[117] The very nature of a referendum election increases the need for "the widest possible dissemintion of information from diverse and antagonistic sources."[118] Disclosure that the source of the information comes from a corporation, however, may be required in order to allow the people to better evaluate the argument to which they are subjected.[119] Nevertheless, the allegation that allowing corporate participation in referendum elections will undermine the democratic process assumes that the general public is capable of being unduly influenced by such participation.

The Domination Argument. The Attorney General argued that since corporations have access to wealth and power, their views may drown out other points of view, thus exerting an undue influence on the outcome of a referendum election and eventually diminishing the confidence of the people in the democratic process and in the integrity of government.[120] It is true that corporations are granted advantages, such as limited liability, perpetual life, and transferability of interest, in order to enhance their economic viability.[121] Nevertheless, Massachusetts failed to show that the relative voice of corporations had been overwhelming, much less significant, in influencing referenda, or that any shock to the confidence of the citizenry in government had ensued.[122]

Corporations must spend money in order to make their views known. Corporations, as artificial persons, cannot act or communicate except through representatives or third persons as their medium of expression.[123] Such representation necessarily involves the expenditure of money. A restriction on the amount of money a corporation can spend on political communication would reduce the quantity of expres-

117. *Id.* at 791 n.31. *See, e.g.,* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 96 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); Whitney v. California, 274 U.S. 357, 377 (1927).

118. First Nat. Bank v. Bellotti, 435 U.S. at 790 n.29 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

119. First Nat'l Bank v. Bellotti, 435 U.S. at 792 n.32.

120. *Id.* at 789.

121. *See id.* at 809. (White, J., dissenting). Justice White argued that because these very privileges enable corporations to dominate debate on an issue, the state would have a compelling interest in denying corporate expression on matters of public importance. *Id.* at 809-21. As the Court notes, this argument would have an unsettling impact, since the state could then control the more dominant and wealthier corporate members of the press in order to increase the relative voice of less influential and smaller members. *Id.* at 791 n.30. This argument would contradict basic principles of first amendment jurisprudence. *See* text and note 127 *infra.*

122. 435 U.S. at 789-90. The Court, however, did mention that if legislative findings supported the contention that corporate advocacy threatened to dominate the democratic process then this argument would merit their attention. *Id.* at 789. Since the record did not support the bare assertion that corporate participation unduly influences the outcome of referendum elections, the statute's prohibition did not survive the strict scrutiny of the Court. See text & notes 174-83 *infra.*

123. Brief of Appellants at 35-36, Buckley v. Valeo, 424 U.S. 1 (1976).

sion by restricting the size of the audience reached and the number and depth of issues.[124] As the Court noted, the mere fact that a corporation's expenditure of funds advocating a particular point of view might persuade the electorate is not a reason to suppress such speech; in our system of government it is the people who are entrusted with the task of judging the merits of conflicting arguments.[125] Accordingly, the state or federal government "is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."[126] Thus, the danger of domination of the electoral process does not lie with the corporate expenditures on referendum issues, but with the legislature's usurpation of the people's ability to weigh all the issues. Suppression of corporate speech on political issues would have the effect of enhancing the voice of other speakers that lack the same access to the financial resources of the corporate speaker. Nevertheless, "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[127]

Protection of Shareholders' Rights

Protection of corporate shareholders is an interest that has historically been reserved to the state.[128] Two federal cases have upheld bans on corporate campaign contributions, noting the need to protect stock-

124. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976). Justice White contends that even a total prohibition on corporate communications concerning political questions would not deprive the public of access to corporate viewpoints, nor would it deprive the corporations of the ability to express them since corporate management, employees, and stockholders would be free to communicate thoughts individually. First Nat'l Bank v. Bellotti, 435 U.S. at 807. This argument ignores the fact that § 8's restriction is aimed at the communicative impact of corporate expression itself. Thus, it overlooks many of the Court's statements that content-based regulations cannot be justified by claiming that the content of expression can be voiced by other speakers, at another time, in another place, or in another manner. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 716-17, 722 (1977) (implicitly rejecting argument that objection to state motto on license plates could be expressed by displaying counter-motto instead of removing the motto); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976) (invalidating ban on advertising of prescription drug prices; held irrelevant that consumers might be able to acquire the same information in other ways); Spence v. Washington, 418 U.S. 405, 411 & n.4 (1974) (reversing conviction for taping peace symbol onto flag displayed in window of residence, stating the availability of other means is irrelevant when government prosecutes for the expression of an idea). *See also* L. TRIBE, *supra* note 105, at 603-04.

125. First Nat'l Bank v. Bellotti, 435 U.S. at 791.

126. *Id.* at 791-92 n.31.

127. *Id.* at 790-91 (quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)). In *Buckley*, the Court struck down as violative of the first amendment portions of the Federal Elections Campaign Act Amendments of 1974 that imposed a ceiling on independent expenditures on behalf of candidates, personal funds spent by candidates, and total expenditures by candidates. Professor Tribe has suggested that this holding resulted from the Court's reluctance to upset existing wealth distributions by diverting political influence from the rich and thereby diminishing their voice for the benefit of others. L. TRIBE, *supra* note 105, at 1134-35. This view would support the Court's rejection of appellee's argument that corporate viewpoints should be suppressed because of corporations' easy access to vast sums of money to express these viewpoints. *See also* discussion note 121 *supra*.

128. First Nat'l Bank v. Bellotti, 435 U.S. at 792. *See* Cort v. Ash, 422 U.S. 66, 82-84 (1975).

holders who may subscribe to political views contrary to those held by corporate management.[129] The Court itself has noted that one of the purposes of federal legislation preventing the use of corporate or union funds for political purposes is to protect shareholders and union members from domination by corporate or union management.[130] The Supreme Court, however, has never passed on the constitutionality of the Federal Corrupt Practices Act legislation[131] and it is significant that the *Bellotti* Court found no compelling state interest in protecting shareholders whose political views may be different from the views expressed by management.

The Under and Over Inclusiveness of Section 8. The Supreme Court held that the ban employed by the state in implementing section 8 supplanted less restrictive means by which dissenting shareholders could vindicate their rights where corporate political expression is involved.[132] The Court found that the statute was both under-inclusive and over-inclusive in attempting to afford shareholder protection.[133]

The Court indicated that section 8 was under-inclusive for three reasons. First, corporate expenditures on referenda are prohibited, while corporate expenditure or activity with respect to passage or defeat of legislation is permitted, as Massachusetts does not prohibit lobbying by corporations.[134] Management's efforts to promote or defeat legislation may be no less contrary to a particular shareholder's political views than is management's stand on a particular referendum issue. Apparently, the Massachusetts legislature felt that its members were more capable of withstanding the pressures and temptations of lobbying than the public in general.[135] Accordingly, the Court was of the opinion that if corporations have the first amendment right to petition legislative and administrative bodies,[136] there can be no reason for not allowing corporate views to be presented openly to the electorate in referenda.[137] Secondly, the fact that only one kind of ballot issue had been winnowed out for special treatment undermined the probability

129. United States v. Chesnut, 533 F.2d 40, 50, 51 n.12 (2d Cir. 1974), *cert. denied*, 429 U.S. 829 (1976); Schwartz v. Rommes, 357 F. Supp. 30, 36 (S.D.N.Y. 1973), *rev'd on other grounds*, 495 F.2d 844 (2d Cir. 1974).

130. *See* Pipefitters Local 562 v. United States, 407 U.S. 385, 414-15 (1972); United States v. UAW, 352 U.S. 567, 572-73 (1957); United States v. CIO, 335 U.S. 106, 113, 115 (1948).

131. *See* note 31 *supra*; First Nat'l Bank v. Bellotti, 435 U.S. at 819-21 (White, J., dissenting).

132. First Nat'l Bank v. Bellotti, 435 U.S. at 792-95.

133. *Id.* at 793.

134. *Id.*

135. *Id.* at 791-92 n.31.

136. *See* California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961).

137. 435 U.S. at 791-92 n.31.

of a genuine state interest in protecting shareholders.[138] Instead, it suggested that the statute was designed to satisfy the legislature's desire to silence the views of corporations on particular issues.[139] Finally, section 8's criminal liability is limited to corporations and banks, excluding from its provisions business trusts, real estate investment trusts, labor unions, and other associations.[140] Such organizations may, and often do, have resources greater than those comparable to many corporations and banks.[141] Minority interests may be just as contrary to the views expressed by these institutions as a minority shareholder's interest is to views expressed by a corporation.[142]

The Court found section 8 over-inclusive because it would continue to prohibit corporate spending on referendum measures even when shareholders unanimously authorized the contribution or expenditure of such funds.[143] The Court stated that through the procedures of corporate democracy or by resort to derivative suits, shareholders may decide whether their corporation will express its viewpoints on public issues by expending corporate funds.[144]

Corporate Democracy and the Union Cases. A number of Supreme Court decisions have held that an individual may not be compelled to adhere to a particular ideological or political viewpoint that he finds unacceptable.[145] Two cases, *Abood v. Detroit Board of Education*[146] and *International Association of Machinists v. Street*,[147] merit discussion in this context. In both *Abood* and *Street* employees were required, either by state law or by contract, to pay dues or service fees to the union, which constituted the exclusive bargaining representative for the employees.[148] The employees in both cases were nonunion members, but were still obligated to pay the union the required service fee.[149] A portion of the funds paid by the employees were used by the unions to further certain political goals unrelated to collective bargaining.[150] A

138. *Id.* at 793. Section 8's ban reached corporate advocacy of certain political questions in referendum elections, but did not affect other equally important political issues for which shareholders may not agree to spend corporate funds. *Id.*

139. *Id.*

140. *See* MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1978).

141. 435 U.S. at 793.

142. *Id.*

143. *Id.* at 794.

144. *Id.* at 794-95.

145. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); West Virginia v. Barnette, 319 U.S. 624 (1943).

146. 431 U.S. 209 (1977).

147. 367 U.S. 740 (1961).

148. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211-12 (1977); International Ass'n of Machinists v. Street, 367 U.S. 740, 742-44 (1961).

149. 431 U.S. at 211-12; 367 U.S. at 742-44.

150. 431 U.S. at 212-13; 367 U.S. at 743-44.

number of the workers opposed the use of their funds for the political desires of the union. To the extent these funds were used by the union for political purposes unrelated to collective bargaining, the Court held them to be unconstitutional.[151] Such use compelled the nonunion employees to contribute money for the propagation of opinions to which they did not subscribe.[152] Although no specific remedy was required in *Street*,[153] the Court in *Abood* required the union to return to each nonunion member that portion of the service fee used by the union to support its political activity.[154]

The dissent in *Bellotti* argued that *Abood* and *Street* directly supported Massachusetts' asserted interest in protecting minority shareholders from being compelled to support corporate management views with which they disagree.[155] Since those cases did not involve corporations,[156] the Court stated that *Abood* and *Street* were irrelevant to the issues presented in *Bellotti*.[157] The Court explained that the critical distinction between the union member and the corporate shareholder is that a shareholder is not *compelled* to contribute anything.[158] A shareholder voluntarily invests in a corporation and is free to withdraw his investment at any time.[159] This distinction between a voluntary and a compelled contribution is supported by *Abood*, since only those nonunion employees compelled to pay dues to the union were entitled to a refund.[160] Union members who voluntarily joined the union were not entitled to a refund because they were deemed to have consented to the union's political expenditures.[161]

Corporate political spending may force shareholders or potential investors to choose between supporting ideas with which they disagree or passing up investment opportunities.[162] Hence, an individual's belief may effectively foreclose some investment opportunities. Yet given the wide range of comparable investment opportunities available in corporations, this burden of choice is substantially less than in circumstances where employees are forced to choose between supporting po-

151. 431 U.S. at 232, 235-36; 367 U.S. at 765-70.
152. 431 U.S. at 235 & n.31; 367 U.S. at 744.
153. 367 U.S. at 774.
154. 431 U.S. at 237-42.
155. *See* 435 U.S. at 813-18 (White, J., dissenting). *But see* text & notes 158-70, 183-88 *infra*.
156. *See* cases cited note 130 *supra*.
157. 435 U.S. at 794-95 n.34.
158. *Id.*
159. *Id.*
160. Abood v. Detroit Bd. of Educ., 431 U.S. at 241-42.
161. *See id.* at 234-36.
162. First Nat'l Bank v. Bellotti, 435 U.S. at 818 (White, J., dissenting) ("[T]he State has a strong interest in assuring that its citizens are not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities."); *see The Supreme Court, 1977 Term, supra* note 77, at 173. *But see* text & notes 163-70 *infra*.

litical issues to which they do not subscribe and losing their jobs.[163] Accordingly, a state's interest in protecting shareholders from the burden of a compelled choice is substantially less.

Furthermore, there is no valid reason why a dissenting shareholder's wishes should be entitled to more solicitude when the corporation decides to expend funds supporting a particular point of view than in other corporate decisions.[164] Minority shareholders are not entitled to silence the majority of shareholders or the corporation itself.[165] Similarly, though the use of employee's funds for union political activities was unconstitutional in *Abood* and *Street*, the union was allowed to pursue those activities.[166]

Minority or dissenting shareholders should be presumed competent to protect their own interests and, therefore, be relegated to pursuing intracorporate or judicial remedies when they disagree with corporate expenditures of funds to further a certain political point of view.[167] Shareholders as a group have the power to insist upon protective provisions in the corporate charter,[168] and to elect the board of directors.[169] In addition, shareholders may challenge corporate disbursement of funds through the judicial avenue of derivative suits.[170] As a final measure, the shareholder who disagrees with the political views of management can simply sell his shares.

THE IMPACT OF THE *BELLOTTI* DECISION

Although the Supreme Court in *Bellotti* held that a corporation may assert first amendment rights when the proposed speech merits first amendment protection,[171] whether the decision will be limited in its scope to referendum or initiative measures remains to be seen.

163. *See* Abood v. Detroit Bd. of Educ., 431 U.S. at 212-13; *The Supreme Court, 1977 Term, supra* note 77, at 173 n.68.

164. First Nat'l Bank v. Bellotti, 435 U.S. at 794-95 n.34.

165. *Id.*

166. *See id.*

167. *See id.* at 794-95.

168. *Id.* Shareholders may be able to enact bylaws to limit the power of the board of directors and management to make corporate expenditures. *See* N. LATTIN, THE LAW OF CORPORATIONS § 97, at 400-02 (2d ed. 1971). The enactment of bylaws has historically been a shareholders' function, *id.*, but modern statutes have, with increasing frequency, vested the authority to adopt, alter or amend bylaws, subject to shareholder approval, in the board of directors, thus limiting shareholders power to limit management's actions. *See* ARIZ. REV. STAT. ANN. § 10-027 (1976); MODEL BUSINESS CORPORATION ACT ANN. § 27 (1971).

169. First Nat'l Bank v. Bellotti, 435 U.S. at 794-95.

170. *Id.* The most obvious remedy available to the corporate shareholder rests on the theory that the expenditure of corporate funds is *ultra vires*, on the ground that such political expenditures by general business corporations fall outside the scope of the corporate purpose. *See* N. LATTIN, *supra* note 168, §§ 63-65, at 203-18; ARIZ. REV. STAT. ANN. § 10-007 (1975). This argument, however, might become rather limited as states continue to adopt statutes like the Model Business Corporation Act § 3, which allows corporations the power to pursue any activity for any lawful purpose. *See* ARIZ. REV. STAT. ANN. § 10-003 (1975).

171. 435 U.S. at 775-76.

Under the precise holding in *Bellotti*, a general business corporation may expend or contribute corporate funds to express its political viewpoints on referendum or other ballot measures submitted to the general public, whether or not the particular referendum or ballot measure materially affects the business, property, or assets of the corporation.[172] The *Bellotti* decision is limited to corporate participation in referendum issues[173] and does not imply or encompass the comparable right of corporate spending in political campaigns for election to public office.[174] The Court itself narrowed its holding[175] and the issue remains whether the decision in *Bellotti* is limited solely by Massachusetts' failure to show a compelling state interest in this case. One writer has suggested that the Court left considerable room in its decision for restrictions on corporate advocacy and that state justification for restricting corporate political expression on referendum issues may yet exist under *Bellotti*.[176]

One such justification suggested in *Bellotti*, would be a substantiated legislative finding that corporate participation does in fact exert undue influence on the political process.[177] The Court stated that Massachusetts' assertion of undue corporate influence was not "supported by record or legislative findings,"[178] indicating that section 8's ban was the result of unfocused fears and unsubstantiated legislative concerns.[179] The Court intimated that a different result might have been reached if the state had been able to substantiate its claim that corporate advocacy undermines the democratic process.[180] The *Bellotti* Court was unclear, however, as to how such a showing would have changed the outcome of its decision.[181] The Court, nevertheless, did

172. *Id.* at 784.
173. *See id.* at 788 n.26, 789-90. See text & notes 112-19 *supra*.
174. 435 U.S. at 788 n.26. *But see* text & notes 209-32 *infra*.
175. 435 U.S. at 788 n.26.
176. L. TRIBE, *supra* note 105, at 59 n.14 (Supp. 1979).
177. 435 U.S. at 789-90.
178. *Id.* at 789.
179. *See id.* at 789-90; L. TRIBE, *supra* note 105, at 59 n.14 (Supp. 1979).
180. *See* 435 U.S. at 789.
181. *See id.* The Court, however, by citing Red Lion Broadcasting Co. v FCC, 395 U.S. 367 (1969), indirectly suggested how its decision might have differed if Massachusetts had shown that corporate political spending in fact exerted undue influence on the electoral process in referenda. In *Red Lion*, the Court upheld the FCC's "fairness doctrine" regulations requiring broadcasters to grant a right of reply to anyone subject to personal attacks in political editorials. 395 U.S. at 396, 400-01. The Court upheld the regulations on two grounds: (1) Since broadcast frequencies are a scarce resource, and in light of the public interest in broadcasting, the government could require broadcasters to give free and fair coverage of opposing viewpoints, *id.* at 376-86, 386-90; and (2) without such regulations, station owners would be able to unduly dominate the airways by making time available only to the highest bidder and those who express those viewpoints with which they agree. *Id.* at 390-95.

Under *Red Lion*, a state's showing of domination of the electoral process as a result of corporate political spending on referendum measures may justify state regulations on the amount a corporation may spend. The right-to-reply regulations effectively reduces a broadcaster's unfettered presentation of its views by allowing others to participate. Restrictions on corporate political

make it clear that the mere fact that corporate advocacy might persuade the public does not amount to undue influence.[182]

Another possible area where *Bellotti* may be limited arises in the state's interest in protecting minority shareholders' rights.[183] The Court stated that this state interest was legitimately within the province of state law, but that section 8's ban was too restrictive.[184] The Court argued that relegating minority shareholders to the remedies of corporate democracy and derivative suits was sufficient to protect their rights.[185] The state may, however, adopt less restrictive means that would survive constitutional scrutiny. A state may protect shareholders by requiring majority shareholder approval of any corporate expression proposed by management.[186] Minority interests could also be protected by means that do not silence the majority's rights of expression. For example, the state may require that a special dividend be paid to shareholders objecting to corporate political expenditures.[187] The state may also permit only those corporate political expenditures financed by voluntary contributions from shareholders in corporately administered funds.[188]

One manner of ascertaining the scope and effect of *Bellotti*, is to view its application in the lower courts. The first case to date that has applied the *Bellotti* decision is *C & C Plywood Corp. v. Hanson*.[189] In that case a number of corporations sought to participate in a Montana initiative proposal involving the siting of nuclear facilities.[190] A Mon-

spending would have the same limiting effect. *Red Lion*, however, would not support a total prohibition on corporate political spending for referenda, even upon a showing of undue corporate influence, since in *Red Lion* station owners could present their views as often and as long as desired so long as a right to reply was granted. Although *Red Lion* may support state regulation of corporate political spending for referenda upon a showing of corporate domination, the regulation may be limited to the special context of limited access to broadcast channels. In the area of political speech, the broadcast media is not the only effective channel of communication.

182. 435 U.S. at 790. As the Court stated, "[C]orporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it." *Id.*

183. See text & notes 128-46 *supra*.

184. 435 U.S. at 787-88.

185. *Id.* at 794-95. See text & notes 167-70 *supra*.

186. The desire for special regulations to ensure majority shareholder approval for corporate political spending depends on one's confidence in the ability of corporate democracy to resolve policy differences between management and majority shareholders. State regulation of the corporate democratic processes and the availability of judicial avenues to curb unauthorized corporate acts may be sufficient to protect shareholders' interests. *See The Supreme Court, 1977 Term, supra* note 77, at 173-74 n.71.

187. *Cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237-42 (1977) (refund of portion of union dues used for political expression); International Ass'n of Machinists v. Street, 367 U.S. 740, 755 (1961) (suggesting refund). But the "free rider" problem may make this method unfeasible. *See* Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148, 158-59 (1974).

188. Federal law allows the formation and operation of such funds by corporations in federal elections under 2 U.S.C. § 441b(b)(2)(C) (1976). *See also* text & notes 209-32 *infra*.

189. 583 F.2d 421 (9th Cir. 1978).

190. The initiative proposal was known as the Nuclear Facility Siting Act and was to be placed on the 1976 November ballot. *Id.* at 423.

tana statute, however, forbade corporations or banks to pay or contribute funds on ballot measures.[191] The corporations sought to have the statute declared unconstitutional as violative of their rights of free expression.[192] The district court declared the statute unconstitutional insofar as it totally prohibited corporate contributions in support of or opposition to initiative issues.[193]

On appeal, the Ninth Circuit applied the *Bellotti* decision to affirm the judgment of the district court, holding the Montana statute to be overbroad.[194] The court stated that the statute was overbroad because it totally prohibited any contribution; it was not just minimally regulatory, but totally proscriptive.[195] The court noted that the Montana statute's prohibition was even broader than the Massachusetts statute struck down in *Bellotti*, since the latter permitted corporate contributions and expenditures on ballot issues materially affecting a corporation's business.[196] Also, the Montana statute was impermissible in that the state's interests in preventing undue corporate influence over ballot issues and in protecting minority stockholders' rights were not compelling.[197]

Relying upon a construction of the Montana statute and *Buckley v. Valeo*,[198] the State had argued that the statute proscribed only corporate contributions, but not direct expenditures, and therefore, did not offend the first amendment.[199] The Ninth Circuit stated that the State's reliance on *Buckley* was "misplaced".[200] The Supreme Court in *Buckley* held that the provisions of the Federal Election Act of 1971,[201] which limited the amount of *expenditures* an individual could make either on behalf of a clearly identified candidate,[202] or on behalf of his

191. *Id.* at 423. The pertinent part of MONT. REV. CODE § 23-4744 (Supp. 1977) reads:
> No corporation, [or] bank . . . shall pay or contribute in order to aid, promote, or prevent the nomination or election of any person, or in order to aid or promote the interests, success, or defeat of any political party, organization, or *ballot issue*. No person shall solicit or receive such payment or contribution from such corporation.

(emphasis added).

192. 583 F.2d at 423.

193. *See* C & C Plywood Corp. v. Hanson, 420 F. Supp. 1254, 1264 (D. Mont. 1976).

194. 583 F.2d at 425.

195. *Id.*

196. *See id.* at 424 & n.4.

197. *Id.* at 423. Although the Ninth Circuit struck down the Montana statute as it related to referenda, the balance of the statute applying to the election of candidates was unaffected. See note 191 *supra*.

198. 424 U.S. 1 (1976).

199. C & C Plywood Corp. v. Hanson, 583 F.2d 421, 424 (9th Cir. 1979). *See* discussion note 31 *supra*. It is unclear whether the Massachusetts Attorney General attempted to argue the contribution-expenditure distinction in *Bellotti* in an attempt to save a portion of the Massachusetts statute from constitutional scrutiny. But the fact that it may have been argued and rejected by the Court is alluded to in the opinion. *See* 435 U.S. at 786 n.23, 788 n.26.

200. 583 F.2d at 424.

201. 2 U.S.C. §§ 431-456 (1976); 18 U.S.C. §§ 591-607 (1976).

202. 18 U.S.C. § 608(e)(1) (1976).

own candidacy,[203] were direct restraints on political speech, and thus unconstitutional under the first amendment.[204] The Court in *Buckley* also held, however, that regulations on the amount one may *contribute* to a candidate were permissible under the first amendment since such action constituted only symbolic expression of support for a candidate and, therefore, only minimally infringed first amendment rights.[205]

The government interest asserted in *Buckley* and in *Hanson* was the prevention of corruption. This interest was deemed sufficient to regulate contributions, but insufficient to limit the amount of expenditures an individual can make.[206] The Ninth Circuit, in analyzing *Bellotti*, also pointed to the clear distinction the Supreme Court made between referendum issues and candidate elections.[207] The *Buckley* contribution-expenditure distinction did not apply in nonpartisan elections, since the Court in *Bellotti* declared both the contribution and expenditure prohibitions of the Massachusetts statute unconstitutional.[208] Hence, it is fairly clear that *Bellotti* eliminates a state's ability to limit corporate contributions for referenda since the governmental interests that justify such limitations are absent. Yet it is unclear whether the *Bellotti* decision may be applied to support corporate political spending in partisan campaigns for political office.

Presently the Federal Election Campaign Act of 1971 prohibits corporations from making either contributions or expenditures in federal elections to public office.[209] The question then arises whether the *Bellotti* decision, taken in connection with the *Buckley* rationale, renders statutory prohibitions against corporate political spending in federal elections unconstitutional. To approach this question, a preliminary inquiry is necessary to determine whether the *Bellotti* rationale is applicable to partisan campaigns for political office. Since the amount of contributions, but not expenditures,[210] in federal election campaigns may be restricted under the first amendment, any proposition that the *Bellotti* decision renders proscriptions against corporate political spending in federal elections unconstitutional must be limited to a discussion of corporate spending in the form of expenditures.

The Court in *Buckley* recognized that a restriction on the amount of money an individual spends on political communication reduces that individual's quantity of expression by restricting the size of the

203. *Id.* § 608(a)(1).
204. 424 U.S. at 19-20. See discussion in note 31 *supra*.
205. 424 U.S. at 17-21.
206. C & C Plywood Corp. v. Hanson, 583 F.2d 421, 424 (9th Cir. 1978).
207. *Id.* See text & notes 111-19 *supra*.
208. *See* 435 U.S. at 784-86, 786 n.23.
209. 2 U.S.C. § 441b (1976).
210. *See* Buckley v. Valeo, 424 U.S. 1, 18-21, 39-44 (1976).

audience reached.[211] Therefore, the Act's expenditure limitations impinged not only a speaker's self-interest in free expression, but also open and informed discussion of political issues and candidates.[212] These concerns were also involved in *Bellotti*, since the Massachusetts statute restricted the ability of a corporation to express its political views on ballot measures.

The same restrictions on a corporation's ability to express its political views are codified in the expenditure limitations of the Federal Election Campaign Act of 1971.[213] It should be remembered that the *Bellotti* decision emphasized that the inherent worth of speech rests in its ability to inform the public, and that the identity of its source should not determine whether such speech is to be granted first amendment protection.[214] Hence, it seems difficult to argue that political speech in federal elections should be accorded less significance than an individual's expenditures expressing the same viewpoint.[215]

The *Bellotti* Court, however, held impermissible the prohibition of corporate expenditures and contributions only in ballot measures. In contrast, the Campaign Act proscribes corporate contributions or expenditures only in federal elections. This distinction, as it applies to expenditures, may be valid only if a distinct and compelling government interest were to justify the Act's expenditure limitations. Three possible governmental interests could be asserted to support the Act's

211. *Id.* at 19. In both *Buckley* and *Bellotti*, the Court expressly rejected the argument that state or governmental regulation of corporate political spending regulates conduct (the act of spending money) and not speech itself. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 n.23 (1978); Buckley v. Valeo, 424 U.S. 1, 16-17 (1976). The argument that the spending of money introduces a nonspeech element that may properly be regulated or will reduce the exacting scrutiny imposed by the Supreme Court on first amendment issues originates from the Court's decision in United States v. O'Brien, 391 U.S. 367 (1968). In *O'Brien*, the defendant was prosecuted for burning his draft card. The defendant claimed that the first amendment prohibited his prosecution because his act was "symbolic speech" directed against the war in Vietnam and the draft. *Id.* at 376. While acknowledging that O'Brien's conduct was sufficient to bring first amendment protections into play, the Court sustained the conviction on the basis that "a sufficiently important governmental interest in regulating the nonspeech element" had been asserted by the state. *Id.* at 376. This intent was "unrelated to the suppression of free expression" and affected an "incidental restriction on alleged First Amendment freedoms" that was no greater than necessary for the furtherance of that governmental interest. *Id.* at 376-77. When such situations arise, the Court will not impose strict scrutiny on the government to justify such regulations. *Id.* at 378-82.

The Court in *Buckley* expressly distinguished the *O'Brien* test in the area of corporate political spending "because the governmental interests advanced in support of the [Federal Election Campaign] Act involve 'suppressing communication'" itself and not only the act of spending money. Buckley v. Valeo, 424 U.S. at 17. Even the *O'Brien* Court stated that its decision would not apply in the situation "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U.S. at 382. This position was reaffirmed by the Court in *Bellotti*. 435 U.S. at 786 n.23. For a view opposing the Court's position on the speech-nonspeech element in corporate political spending, see Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1007-08 (1976).

212. *See* Buckley v. Valeo, 424 U.S. 1, 19-20 (1976).

213. 2 U.S.C. § 441b (1976).

214. 435 U.S. at 777, 784.

215. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 796 (1978) (Burger, C.J., concurring).

limitation on corporate expenditures: (1) To prevent corruption or the appearance of corruption that corporate expenditures may spawn in federal elections; (2) to prevent corporate expenditures from exerting undue influence on the democratic process; and (3) to prevent minority shareholders from supporting corporate political expenditure to which they do not subscribe. In *Buckley* the primary government interest asserted to justify the Campaign Act's expenditure and contribution restrictions was the prevention of corruption or its appearance in federal elections.[216] Although this interest was sufficient to uphold the Act's limitations on contributions, it was insufficient to justify restrictions on the amount an individual or group might expend in federal elections.[217] Thus, under *Buckley* and *Bellotti*, preventing corporations from making expenditures in connection with federal elections would have no constitutional support.

The Court in *Bellotti* specifically left open the possibility that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[218] If the Court were to sustain such a demonstration by Congress, it would unduly strain the *Buckley* contribution/expenditure distinction and the *Bellotti* rationale. If the *Buckley* contribution/expenditure distinction is valid, it ought to apply to the corporate speaker since *Bellotti* holds that the identity of the speaker is irrelevant.

A showing that corporate expenditures may exert undue influence, and hence drown out the relative voice of the electorate, may support the Campaign Act's expenditure prohibitions. This possibility was also left open in *Bellotti*.[219] The *Bellotti* Court made it clear, however, that a claim of undue influence must be supported by fact and not just bare assertions.[220] What effect such a showing would have on corporate expenditures is unclear[221] for the Court reaffirmed in *Bellotti* the concept that restricting the speech of some elements of our society to enhance the voice of others is totally foreign to the first amendment.[222] Perhaps a showing of undue influence would support restrictions on the amount corporations may expend in federal elections, but not a total prohibition of such activity.[223] Even with such restrictions, corporations

216. 424 U.S. at 26-27.
217. *Id.*
218. 435 U.S. at 788 n.26.
219. See text & notes 120-27, 175-83.
220. See text & notes 175-83.
221. See discussion note 181 *supra*.
222. First Nat'l Bank v. Bellotti, 435 U.S. at 790-91 (quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).
223. See discussion note 181 *supra*.

should be allowed to spend money to express their political viewpoints to the public while, at the same time, be policed for any potential abuses encountered with such expression.

The third area of possible justification of the Act's proscription on corporate expenditures is the protection of dissenting shareholders.[224] Protecting shareholders' interests may justify certain federal restrictions on corporate political activities when a state's identical interest may not.[225] State power to regulate political activities of corporations may extend only to those entities incorporated by that particular state.[226] Although a state has some interest in protecting resident shareholder investments in foreign corporations, the commerce clause may bar disparate state treatment of domestic and foreign corporations' political activities. On the other hand, the federal government may claim a genuine interest in protecting shareholders throughout the nation from being compelled to support candidates through the expenditure of corporate funds, and hence, federal regulations would avoid any disparate state treatment.[227] The *Bellotti* Court, however, pointed out that a shareholder's participation in a corporation is voluntary, not compelled.[228] Therefore, the first amendment is not offended when corporate political activities support views with which dissenting shareholders disagree.[229] If the *Bellotti* Court's interpretation of *Abood* and *Street* stays the same,[230] federal regulation may be inappropriate and the Court may well argue as it did in *Bellotti*, that a dissenting shareholder's access to the remedies of corporate democracy and derivative suits is sufficient.[231]

In conclusion, corporate expenditures in federal elections may be entitled to constitutional protection and, thus, the validity of the Federal Election Campaign Act's prohibition of such expenditures may be seriously questioned. The *Bellotti* decision, however, left considerable leeway in its opinion for either expansion or restriction, and it is unclear whether the Court will apply the decision in the area of federal elections.[232]

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224. See text & notes 128-70 *supra*.
225. *See The Supreme Court, 1977 Term, supra* note 77 at 173 n.70.
226. *Id.*
227. *Id.* See text and note 130 *supra*.
228. 435 U.S. at 794-95 n.34.
229. *Id.*
230. See text & notes 145-70 *supra*.
231. *See* 435 U.S. at 794-95.
232. If corporate political expenditures in federal elections should be allowed, corporate contributions should also be permitted, at least in those amounts that individuals or groups may contribute under the Federal Election Campaign Act. Congress has concluded that the avoidance of corruption or its appearance is marginal at those dollar levels. *See* 2 U.S.C. § 431 (1976); discussion note 28 *supra*. Although 2 U.S.C. § 431 is a definitional section, the dollar amounts related therein appear to be the limit Congress would consider as necessary to avoid any taint of corruption or the appearance of corruption.

CONCLUSION

This Comment has discussed the merits of granting first amendment protection to corporate political spending on state referendum issues by examining the Court's constitutional analysis in the *Bellotti* decision. Since the value of speech for informing the public does not depend on the identity of its source, corporate political expression should not be afforded less protection because it originates from a corporate entity. The governmental interest in prohibiting this form of corporate spending was not sufficient to justify restrictions on proposed corporate political speech. The asserted governmental interest in preserving the integrity of the electoral process, preventing undue corporate influence, and protecting the rights of minority shareholders did not establish the existence of a compelling state interest supporting a direct prohibition of speech. Finally, this Comment examined the impact of the *Bellotti* decision and its potential future application to federal and state restrictions of corporate political spending in candidate elections. While the Court in *Bellotti* left considerable room for restricting the application of this decision to the area of candidate elections, *Bellotti*, together with *Buckley*, may support limited corporate political involvement in candidate elections.