COMMENTS

FIRST NATIONAL BANK OF BOSTON v. BELLOTTI: CORPORATE POLITICAL SPEECH IN BALLOT-MEASURE CAMPAIGNS

I
INTRODUCTION

As "artificial persons," corporations are entitled to some of the constitutional rights accorded natural persons.[1] In *First National Bank of Boston v. Bellotti*,[2] the Supreme Court confronted the issue whether corporations have a right under the first amendment to spend money to publicize their views on a state constitutional amendment proposal. Political speech traditionally has been accorded a high degree of constitutional protection. In the modern political world, the expenditure of money has been recognized as essential to publicize one's opinions effectively, and has been accorded the same constitutional protection as political speech.[3] The *Bellotti* Court was faced with the task of balancing the importance of political speech against the state interests in controlling elections, protecting dissenting shareholders, and avoiding corruption and the appearance of corruption. The case is important because it marks the first time that the Supreme Court has recognized that political speech does not lose its protection merely because its source is a corporation. The opinion's impact is limited, however, to protecting corporate speech in ballot-measure campaigns.

This Comment begins with a discussion of the *Bellotti* decision and the cases leading up to it. Next, the Comment examines the competing concerns presented to the Court, including political speech, control over corruption in elections, and protection of dissenting shareholders. Finally, the Comment focuses on the fact that the case arose in the context of a ballot measure[4] to help explain the limited applicability of the Supreme Court's opinion.

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1. A corporation is an artificial person made up of a group of natural persons. The interests of the corporation are distinct from those of its individual members. H. HENN, CORPORATIONS § 78 (2d ed. 1970). Chief Justice Marshall stated that the purpose of a corporation was to bestow "the character and properties of individuality on a collective and changing body of men." Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 562 (1830). *See* text accompanying notes 60-64 *infra*.

2. 435 U.S. 765 (1978).

3. *See* text accompanying notes 97, 98 *infra*.

4. The term "ballot measure" is used here to describe issues which the electorate has the opportunity to decide. These may include constitutional amendments, bond issue authorizations, questions, and initiative proposals. The use of the term "election" is limited in this Comment to indicate a voter choice among candidates for public office.

II
THE CASE

A. *The Lower Court Decision*

In May 1975, the Massachusetts legislature approved a proposed amendment to the state constitution which would have permitted the imposition of a graduated income tax on individuals. The proposed amendment was to be submitted for the voters' approval in November 1976, as required by the Massachusetts Constitution.[5] To publicize their opposition to the income tax proposal, the plaintiff-corporations[6] decided to place advertisements in newspapers and other media in an effort to persuade voters to reject the proposal. The Attorney General of Massachusetts, Francis X. Bellotti, however, warned that such an advertising campaign would violate the provisions of the Massachusetts criminal statute prohibiting political expenditures by corporations,[7] and threatened prosecution. In *First National Bank of Boston v. Attorney General*[8] (*First National Bank II*), the plaintiffs sought a declaratory judgment from the Massachusetts Supreme Judicial Court that the state's ban on political expenditures by corporations was unconstitutional both on its face and as applied.[9]

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5. The Massachusetts Constitution requires that any proposed amendment to the state constitution be approved by a majority of a joint session of both houses of the legislature in two consecutive sessions. Before it can be incorporated into the state constitution, the amendment proposal must further be approved by a majority of voters in a public referendum. Mass. Const. art. XLVIII, pt. 4, §§ 2, 4, 5.

Previously, the graduated income tax amendment had been defeated in public referenda in 1962, 1968, and 1972. In November 1976, the amendment was submitted to the voters, and was defeated once again.

6. Plaintiffs included both banks and corporations. The banks were First National Bank of Boston and New England Merchants Bank. The corporations were Wyman-Gordon Company, The Gillette Company, and Digital Equipment Corporation.

7. The Massachusetts political contributions law provides, in relevant part:

> [N]o business corporation incorporated under the law of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation . . . , 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.

MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1979) [hereinafter referred to as section 8]. Section 8 also provides for a fine of up to fifty thousand dollars for corporations that violate the restrictions, and a fine of up to ten thousand dollars or imprisonment for up to one year, or both, for corporate officers, directors, or agents who violate the section.

8. 77 Mass. Adv. Sh. 134, 359 N.E.2d 1262 (1977), *rev'd sub nom.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

9. *Id.* at ____, 359 N.E.2d at 1265, 1268-69. Plaintiffs claimed that adoption of the proposed amendment would substantially and materially affect their businesses by (1) discouraging corporations from settling or remaining in the state through the creation of an unfavorable tax climate, thereby adversely affecting the banks' industrial loans, deposits, and other services; (2) discour-

The case was heard by the Supreme Judicial Court of Massachusetts in June 1976. In September, the court issued an order, without opinion, that the plaintiffs had failed to show that the Massachusetts statute was an unconstitutional exercise of legislative power. The statute was declared valid and enforceable, and the corporations were barred from making expenditures to publicize their views before the November referendum.[10]

In February, a full opinion was handed down by the court.[11] The justices acknowledged that "a corporation's property and business interests are entitled to Fourteenth Amendment protection,"[12] and incidental to that protection, that corporations also possess certain first amendment rights. The parameters of those rights, however, could be limited by the legislature to matters which materially affect their property, business, or assets, as long as there is a rational basis for so limiting corporate speech. Corporations could not claim constitutional protection with respect to other communications.[13] Because the plaintiffs failed to show that the proposed amendments would materially affect their businesses, the statutory prohibition was found to have been constitutionally applied.[14]

Next, the court rejected the plaintiffs' contentions that the statute was overbroad and void because of vagueness. With respect to overbreadth, the court said that the Massachusetts statute does not bar activities which are in the normal course of the plaintiffs' corporate affairs and do not involve corporate expenditures specifically designed to influence the electoral process.[15] Constitutionally protected activities, such as in-house newspapers, communications to shareholders, and participation of corporate employees in media discussions or legislative hearings, were said to be unaffected by the legislation. Such activities were considered part of the normal course of corporate affairs, and did not involve corporate expenditures specifically designed to influence the electoral process.[16] The court also rejected the plaintiffs' vagueness argument. Although the statute imposed a general limitation on corporate expenditures, restricting such expenditures to referendums that "materially affect" a corporation's business, the statute was specific in proscribing expenditures on referendums solely concerning personal income taxation. According to the court, this language was precise and definite, and therefore not unconstitutionally vague.[17]

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aging persons of high-ranking executive, technical, and middle-management ability (and thus, of high salary potential) for settling or remaining in Massachusetts, thereby limiting the corporations' ability to recruit and retain such personnel; and (3) shrinking the disposable incomes of individuals living in the state, thus decreasing money available for either in-state purchases of consumer products of plaintiff corporations or deposits in the plaintiff banks. Brief for Plaintiffs at 8-11, First Nat'l Bank of Boston v. Attorney Gen., 77 Mass. Adv. Sh. ____, 359 N.E.2d 1262 (1977).

10. *See* 77 Mass. Adv. Sh. at ____, 359 N.E.2d at 1265 & n.6.
11. *Id.* at ____, 359 N.E.2d at 1262.
12. *Id.* at ____, 359 N.E.2d at 1270.
13. *Id.* at ____, 359 N.E.2d at 1270-71.
14. *Id.* at ____, 359 N.E.2d at 1271.
15. *Id.* at ____, 359 N.E.2d at 1272-73.
16. *Id.*
17. *Id.* at ____, 359 N.E.2d at 1273-74.

Finally, the plaintiffs claimed that the statute denied them equal protection of the laws under both the fourteenth amendment and article I of the Massachusetts Declaration of Rights because the statute applied only to corporations. They asserted that a statute that impinges on free speech cannot survive strict scrutiny analysis, and alternatively, that a limitation on corporate speech does not bear a reasonable relation to a permissible governmental objective and must fall.[18] The court rejected both of these arguments. Application of the strict scrutiny standard was inappropriate because "plaintiffs do not possess First Amendment rights on matters not shown to affect materially their business, property or assets."[19] Instead, the court said that the traditional standard for economic matters should be applied, *i.e.*, whether the legislative classification rests on some "fair and substantial relation to the object of the legislation."[20] The court recognized that the legislative desire to protect shareholders from *ultra vires* activities was a legitimate state objective justifying application of the statute only to corporations.[21]

B. The Supreme Court Decision

Plaintiffs appealed to the United States Supreme Court. In a 5-4 decision, the Court reversed the Massachusetts court's decision, and held that a state cannot prohibit corporations from spending money to influence the outcome of referendums.[22] Justice Powell, writing for the majority, said that the issue was not whether corporations possess first amendment rights, but rather whether the Massachusetts statute infringed on constitutionally protected expression.[23]

Striking down the statute, Justice Powell wrote that discussion of governmental affairs is at the heart of the protection offered by the first amendment. The fact that the speakers were corporations could not justify a ban on the proposed speech.[24] Previously, the Supreme Court had extended constitutional

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18. *Id.* at ____, 359 N.E.2d at 1275.

19. *Id.*

20. *Id.* (citing F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

21. The court rejected plaintiffs' argument that section 8 denied equal protection of the laws because it applied only to corporations and not to similarly situated associations, such as labor unions, business trusts, real estate investment trusts, charitable corporations, and limited or general partnerships. *Id.* at ____, 359 N.E.2d at 1275. The court reasoned that the legislature need not deal with every conceivable individual or group in similar circumstances when regulating economic activity. *Id. See also* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949).

22. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The majority included Justices Powell, Stewart, Blackmun, and Stevens. Chief Justice Burger wrote a separate concurring opinion in which he addressed issues beyond the scope of those raised in the challenge to the Massachusetts statute. He expressed the view that corporations that owned newspapers and other media should not be accorded greater first amendment protection than that accorded other corporations, and concluded that section 8 should be struck down as a "serious and potentially dangerous restriction on the freedom of political speech." 435 U.S. at 802. Justice White, joined by Justices Brennan and Marshall, dissented. Justice Rehnquist filed a separate dissenting opinion. *See also* N.Y. Times, Apr. 27, 1978, at 12, col. 1; N.Y. Times, Apr. 28, 1978, at 15, col. 1.

23. 435 U.S. at 775-76.

24. *Id.* at 777. The Court noted: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.*

protection to corporations in the business of communications and to commercial speech,[25] based on the twin policies of fostering individual self-expression and of guaranteeing "public access to discussion, debate, and the dissemination of information and ideas."[26] The decision in *Bellotti* furthered these policies by permitting business corporations to enter public debate on controversial issues. By limiting the political speech of corporations to activities materially affecting business, the Massachusetts statute impermissibly limited the free flow of speech. It dictated the subjects about which corporations were permitted to speak, and limited the persons or entities that were allowed to speak on any particular public issue.[27]

Against the interests furthered by free speech, the Court weighed the state's interests in sustaining the confidence of individual citizens in government, preventing corruption and preserving the integrity of the electoral process, and protecting the rights of shareholders whose views differ from those expressed by management for the corporation. With respect to the concern for preserving confidence in government, the majority found that the Massachusetts attorney general had failed to show that the wealth and power of corporations had been used improperly to influence the outcomes of past referendums. Nor had the attorney general shown that citizens' confidence in the democratic process had been shaken.[28] Furthermore, the risk of corruption from corporate spending in candidate elections "simply is not present in a popular vote on a public issue." The only risk found by the Court was that corporate advertising may succeed in influencing the outcome of a referendum.[29]

With respect to the state's interest in protecting the rights of minority shareholders, the Court held that the Massachusetts statute denied the plaintiffs equal protection of the laws because it was both underinclusive and overinclusive. The statute was underinclusive for three reasons. First, the statute permitted corporate expenditures for lobbying administrative and legislative bodies, but prohibited the expenditure of funds to inform or persuade the electorate during a referendum.[30] Second, the fact that the statute only placed limitations on corporate speech relating to income tax referendums indicated that the Massachusetts legislature was concerned with limiting such speech on a particular subject. Contrary to the conclusion of the Massachusetts court,[31] the Supreme Court viewed this as an impermissible limitation on corporate speech,

25. *See, e.g.*, Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 95 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); Bigelow v. Virginia, 421 U.S. 809, 818 (1975).

26. 435 U.S. at 782-83 & nn.18 & 20, and cases cited therein.

27. *Id.* at 784-85.

28. *Id.* at 789-90. *See also* Buckley v. Valeo, 424 U.S. 1, 27 (1976); Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973).

29. *Id.* at 790. "To be sure, corporate 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: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Id.* (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959)).

30. *Id.* at 791 n.31, 793.

31. *See* text accompanying notes 15-17, *supra*.

aimed at improving the chances for passage of the graduated income tax amendment.[32] Finally, the statute was underinclusive because it barred spending by banks and business corporations alone. It did not apply to spending by other entities that similarly commanded large concentrations of wealth and included minorities who may have disagreed with the viewpoint advocated by the majority of members. By confining the statute's coverage to banks and corporations, the state undermined its argument that the purpose of the statute was to protect dissenting shareholders.[33]

The Court found the statute to be overinclusive because it prohibited banks and corporations from spending money to express their views on referendum issues even if shareholders had unanimously voted to authorize the expenditure. In such situations, the state's concern for protecting dissenting shareholders is not relevant. In addition, the Massachusetts legislature had failed to consider that established procedures of corporate democracy could be used to protect the interests of dissenting shareholders, or that minority shareholders could bring a derivative action to challenge the use of corporate funds for improper purposes.[34]

III
PREVIOUS CHALLENGES TO THE MASSACHUSETTS STATUTE

First National Bank II was the third case litigated before the Massachusetts Supreme Judicial Court that raised the question whether corporations have the right to spend money for the purpose of making their views known on referendum issues. Since 1943, the Massachusetts political contributions law had barred business corporations from spending money to influence voters on any referendum question that did not materially affect the business, assets, or property of the corporation.[35] In 1962, that statute was challenged for the first time.[36] In *Lustwerk v. Lytron, Inc.*,[37] the holder of eighteen percent of the

32. 435 U.S. at 793 (citing Brief for Appellee at 6, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)).

33. *Id. See also* text accompanying notes 117-19 *infra*.

34. *Id.* at 794-95.

35. Corporate expenditures and contributions have been restricted in Massachusetts since 1907. 1907 Mass. Acts, ch. 576, § 22. After the 1921 consolidation of the General Laws, and until 1938, the statute barred corporate expenditures, "except that such a corporation . . . may in good faith publish or circulate paid matter when, under a question submitted to the voters, the taking, purchasing or acquiring of any of the property, business or assets of the corporation is involved." 1913 Mass. Acts, ch. 835, § 353. Under the 1938 amendments, corporations were allowed to spend money when the issue involved "the taking, purchasing or acquiring of, *or any matter or thing affecting* any of the property, business or assets of the corporation." 1938 Mass. Acts, ch. 75 (emphasis added). In 1943 and 1946, the statute was revised to require that the question "materially affect" the corporation's interest. 1943 Mass. Acts, ch. 273, § 1; 1946 Mass. Acts, ch. 537, § 10.

36. The challenged portion of the statute provided, in part, "No business corporation . . . shall directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of . . . 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." 1943 Mass. Acts, ch. 273, § 1, *as amended by* 1946 Mass. Acts, ch. 537, § 10 (current version at MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1979)).

37. 344 Mass. 647, 183 N.E.2d 871 (1962).

common stock of Lytron, Inc., sought to enjoin the company from spending money or contributing to any committee to influence voters against the proposed graduated income tax amendment to the Massachusetts constitution. The court held that the political contributions statute did not prohibit corporate expenditures to oppose a graduated income tax referendum proposal, and that it was not unreasonable for a corporation's board of directors to decide that its business would be materially affected by an expansion of the legislature's taxing power.[38] Consequently, the court never reached the question whether the state may constitutionally regulate a corporation's first amendment rights in connection with elections.

After the proposed amendment to the state constitution was twice defeated by the electorate during the 1960's, the political contributions law was amended in 1972 to limit corporate expenditures and to give the income tax amendment proposal a better chance of passage. The legislature attempted to clarify the meaning of the phrase "materially affecting" by adding the following to the statute: "No question submitted to the voters 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."[39] When the amended statute was challenged in *First National Bank of Boston v. Attorney General*[40] *(First National Bank I)*, the Massachusetts court again upheld the right of corporations to publicize their views on the income tax referendum. This time, however, the holding was based on constitutional grounds. Speaking for the majority, two justices found that the addition was unconstitutional under the first and fourteenth amendments because it did "not meet the requirements of a narrowly drawn law, circumscribing only the evil to be curtailed."[41] They carefully avoided, however, identifying the type of restrictions on corporate speech that would be valid.[42] In a concurring opinion, three other justices found that the 1972 amendments did not diminish the corporate right to spend money to influence the votes of people on the proposed constitutional amendment. Because the statutory revision specifically barred corporate spending on ballot questions that pertained solely to taxation of individuals, it did not apply to the 1972 referendum question which concerned both a graduated personal income tax and a graduated corporate income tax.[43]

The Massachusetts legislature, frustrated by another defeat of the income tax proposal in 1972, once again amended the statute in 1973 to limit corporate expenditures even further. The amendment specified that issues solely concerning taxation of individuals would not be considered to materially affect the corporation's business.[44] In order to increase the tax proposal's chance of passage, and to avoid opposition by corporations desiring to express their

38. *Id.* at 649-51, 653, 183 N.E.2d at 875, 876.
39. 1972 Mass. Acts, ch. 458.
40. 362 Mass. 570, 290 N.E.2d 526 (1972).
41. *Id.* at 590, 290 N.E.2d at 539.
42. *Id.*
43. *Id.* at 592-94, 290 N.E.2d at 540-41.
44. 1973 Mass. Acts, ch. 348.

views, the 1976 referendum question was limited so that it did not, in any way, apply to corporate income taxation.[45]

The corporate plaintiffs, however, continued to believe that their interests would be materially affected by a personal graduated income tax.[46] In bringing their appeal to the United States Supreme Court, they emphasized that (1) all business corporations have first amendment rights that cannot be limited to matters "materially affecting" the speaker, (2) strict scrutiny is the proper standard by which to judge a statute that attempts to limit fundamental first amendment rights, and (3) the Massachusetts political contributions law unconstitutionally denied them equal protection of the laws.[47]

IV
COMPETING INTERESTS: POLITICAL SPEECH VERSUS GOVERNMENTAL CONTROL OF ELECTIONS

A. Political Speech and Corporations

In *Bellotti*, the Supreme Court extended first amendment protections to corporations. But competing interests, including the potential for electoral abuse and the protection of the rights of objecting shareholders, forced the Court to limit the extent of first amendment protection afforded the corporations. Freedom of speech is recognized as a fundamental constitutional right under the first amendment. In a series of opinions beginning with *Gitlow v. New York*, the Supreme Court has upheld the principle that freedom of speech is a fundamental personal liberty, protected under the first and fourteenth amendments against infringement by the states.[48] The Court has interpreted freedom of speech to serve a dual purpose. Not only does it protect the rights of speakers to express their views, but it also protects the rights of others to listen to what is said.[49] The framers of the Constitution recognized that unless the free flow of ideas is guaranteed, the electorate cannot make well-informed decisions.[50] As Judge Learned Hand said, the first amendment "presupposes

45. 77 Mass. Adv. Sh. at ____, 359 N.E.2d at 1265 n.3.

46. *See* note 9 *supra*.

47. *See generally* Brief for Appellants at 14-18, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

48. 268 U.S. 652, 666 (1925). *See also* Schneider v. State, 308 U.S. 147, 160 (1939); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Near v. Minnesota, 283 U.S. 697, 707 (1931); Stromberg v. California, 283 U.S. 359, 368 (1931); Fiske v. Kansas, 274 U.S. 380, 382 (1927); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

49. In Stanley v. Georgia, 394 U.S. 557 (1969), the Supreme Court stated: "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive. . . .' " *Id.* at 564 (quoting Martin v. City of Struthers, 319 U.S. 141, 143 (1943)). *See also* United States v. CIO, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring); Thomas v. Collins, 323 U.S. 516, 530 (1945); Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 251-52, 69 N.E.2d 115, 129 (1946).

50. Dennis v. United States, 341 U.S. 494, 503 (1951). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Pennekamp v. Florida, 328 U.S. 331, 346 (1946); Schneider v. State, 308 U.S. 147, 161 (1939).

that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[51]

Legislative enactments that have the effect of restricting fundamental first amendment freedoms must pass the test of strict judicial scrutiny in order to be held constitutional.[52] In *United States v. O'Brien*,[53] the Supreme Court enumerated the principles by which government infringement on first amendment freedoms must be judged: "[G]overnment regulation is sufficiently justified if it is within the the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[54] Under this test, any statute restricting speech is susceptible to a charge of overbreadth, and must be narrowly drawn to proscribe only a precise evil.

The Supreme Court has protected exercise of the right of free speech in many open forums, including colleges and universities,[55] the workplace,[56] and the media.[57] Nowhere, however, is the right of free speech more zealously

51. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

52. Strict judicial scrutiny requires the state to show that a law is necessary to promote a compelling state interest. In addition, statutes must be drafted with precision and must be narrowly tailored to promote legitimate state objectives. Finally, the state must choose the "least drastic means" of effectuating its objectives. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972); Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. O'Brien, 391 U.S. 367, 377 (1968); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958); De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937).

53. 391 U.S. 367 (1968).

54. *Id.* at 377. In *O'Brien*, the Supreme Court reviewed the constitutionality of a statute that made any mutiliation of a Selective Service draft card a criminal offense. Defendant claimed that the statute infringed on his first amendment rights because it prohibited an act of "symbolic speech." The Court upheld the statute because it promoted a sufficient governmental interest to sustain regulation of the non-speech act, and there was only minimal restriction on first amendment freedoms. *See also* Whitney v. California, 274 U.S. 357, 374-76 (1927) (Brandeis, J., concurring).

55. In Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972), the Supreme Court refused to compel the Attorney General to grant a temporary nonimmigrant visa to a Marxist journalist from Belgium to enable him to speak at a number of American colleges and universities. Nevertheless, the majority acknowledged that the first amendment protects both the right to "receive information and ideas" and the right to express those ideas.

56. In Thomas v. Collins, 323 U.S. 516 (1945), the Court held that a state law requiring the registration of union organizers abridged both the labor organizers' right to speak and the workers' right to hear what might be said.

57. Justice White, writing for the undivided Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), said:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Id. at 390 (upholding the "fairness doctrine"). *See also* Associated Press v. United States, 326 U.S. 1, 20 (1945).

guarded than in the American political arena.[58] The Supreme Court has afforded political speech the broadest possible protection because protection of political expression, discussion of public issues, and debate on the qualifications of candidates, is integral to our constitutional system of government.[59]

Under the United States Constitution, a corporation enjoys certain of the rights and protections granted to individuals. For instance, it has been held that the fourth amendment protection against unreasonable searches and seizures applies equally to corporations and natural persons,[60] but the fifth amendment provision against self-incrimination does not.[61] The due process clauses of the fifth[62] and fourteenth[63] amendments and the guarantee of equal protection of the fourteenth amendment[64] apply to corporations and natural persons alike. Until *Bellotti*, however, the Supreme Court had never squarely ruled on the application of the first amendment to corporations.

There is considerable judicial support, nevertheless, for the proposition that a corporation should enjoy freedom of speech on an equal basis with individuals. On a number of occasions, the Supreme Court has impliedly recognized the first amendment rights of corporations. In *Grosjean v. American Press Co.*,[65] the Court held that a Louisiana license tax imposed on the advertising revenue of large newspapers was an unconstitutional prior restraint on freedom of the press. The Court noted that corporations were "persons" protected by the due process and equal protection clauses of the fourteenth amendment,[66] and held that the first amendment rights of corporations were protected against infringement by the states.[67] The tax was invalidated because it was a device employed to limit the circulation of information to the public. "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."[68] Thus, out of a concern for both the right of the newspapers to publish and the

58. Comment, *Corporate Freedom of Speech*, 7 SUFFOLK U. L. REV. 1117, 1119 (1973).

59. Mills v. Alabama, 384 U.S. 214, 218 (1966). Similarly, in Roth v. United States, 354 U.S. 476 (1957), Justice Brennan said that the first amendment protects freedom of speech and of the press "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 484. *See also* Buckley v. Valeo, 424 U.S. 1, 14 (1976).

60. U.S. CONST. amend. IV. *See generally* H. HENN, *supra* note 1, at § 80; Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-09 (1946).

61. U.S. CONST. amend. V. *See* Wild v. Brewer, 329 F.2d 924, 927 (9th Cir.), *cert. denied*, 379 U.S. 914 (1964).

62. U.S. CONST. amend. V. *See generally* Sinking-Fund Cases, 99 U.S. 700, 718-19 (1878).

63. U.S. CONST. amend. XIV. *See generally* Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Covington & Lexington Tpke. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896); Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889).

64. U.S. CONST. amend. XIV. *See generally* Smyth v. Ames, 169 U.S. 466, 522 (1898); Charlotte, Columbia & Augusta R.R. Co. v. Gribbes, 142 U.S. 386, 391 (1892); Pembina Mining Co. v. Pa., 125 U.S. 181, 189 (1888); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886); Munn v. Illinois, 94 U.S. 113, 134 (1877).

65. 297 U.S. 233 (1936).

66. *Id.* at 244.

67. *Id.*

68. *Id.* at 250.

right of the people to receive information, corporate publishers expressly were held to be protected by the first and fourteenth amendments.

Since *Grosjean*, corporations engaged in the business of disseminating information have been held to be entitled to first amendment protections. In *New York Times Co. v. Sullivan*,[69] the Court held that a newspaper corporation is protected by the first amendment from defamation actions arising out of allegedly libelous statements made in advertisements expressing some public grievance or protest.[70] Similarly, in *Joseph Burstyn, Inc. v. Wilson*,[71] the Court held that a corporation in the business of distributing motion pictures is protected under the first amendment by virtue of its status as an "important organ of public opinion." For the same reason that books, newspapers, and magazines that are published and sold for profit are protected, commercial motion pictures are also safeguarded by the first amendment.[72] In neither *New York Times Co.* nor *Joseph Burstyn, Inc.*, however, did the Court expressly extend *Grosjean* to hold that corporations not in the media business should be afforded broad first amendment protections.

B. Integrity of the Electoral Process

After the Civil War, the nation experienced a period of vast commercial and industrial expansion. Corporations grew in both size and number, and became the repositories of great concentrations of wealth. There was little, if anything, that could be done under state or federal law to halt the giving of large corporate gifts to party finance committees and individual candidates, and the resulting indebtedness of elected officials to their corporate benefactors.[73] In 1906, in response to increasing electoral abuse, the New York legislature enacted the first state political contributions law.[74] Shortly thereafter, it was disclosed that large corporate contributions had been made to Theodore Roosevelt's successful 1904 presidential campaign. In response, Congress en-

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69. 376 U.S. 254 (1964).

70. *Id.* at 271.

71. 343 U.S. 495 (1952).

72. *Id.* at 501-02. *See also* Roaden v. Kentucky, 413 U.S. 496, 504 (1973) (movies carry presumption of first amendment protection).

73. As early as 1894, Elihu Root first recognized the need for legislation to curb the influence of corporations. Urging the New York State Constitutional Convention to take measures to prohibit corporate political contributions, he explained that:

> The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public.

Hearings Before the House Committee on Elections, 59th Cong., 1st Sess. 12 (1906), *quoted in* United States v. UAW-CIO, 352 U.S. 567, 571 (1957). *See also* Schwartz v. Romnes, 495 F.2d 844, 849-51 (1974); E. ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143 (Bacon & Scott ed. 1916).

74. 1906 N.Y. Laws, ch. 239, § 1. The prohibition is now covered at N.Y. ELEC. LAW § 14-116 (McKinney 1978).

acted the first federal corrupt practices legislation,[75] which attempted to curb corporate contributions to candidates for federal elective offices.[76]

The Supreme Court frequently has considered the effect that legislation limiting campaign spending has on the exercise of first amendment rights. The first significant constitutional challenge to a statute that limited contributions to candidates for federal elective offices was considered in *United States v. CIO*.[77] In that case, a union and a union official were indicted under the Federal Corrupt Practices Act for printing an endorsement of a particular congressional candidate in the union's newspaper.[78] At trial, the district court dismissed the indictments on grounds that the statute unconstitutionally abridged free speech and assembly. The court held that Congress may not abridge first

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75. The statute, in relevant part, provided:

> [I]t shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.

Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. This Act was revised and incorporated into section 313 of the Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070. For a thorough discussion of the historical background of corrupt practices legislation, see Justice Frankfurter's majority opinion in United States v. UAW-CIO, 352 U.S. 567, 570-83 (1957).

At the turn of the century, labor was still largely unorganized and its political influence was insignificant. With the growth of organized labor, political spending by labor organizations became a matter of public concern, and a ban was imposed on union contributions. The ban was aimed at equalizing the strictures on corporations and labor unions, and protecting dissenting union members from the use of their dues money for political activities that they opposed. *See, e.g.*, War Labor Disputes (Smith-Connally Anti-Strike) Act, Pub. L. No. 78-89, ch. 144, § 9, 57 Stat. 167 (1943); Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, ch. 120, tit. III, § 304, 61 Stat. 159 (1957) (codified at 2 U.S.C. § 441b(b) (1976)). *See also* Bicks & Friedman, *Regulation of Federal Election Finance: A Case of Misguided Morality*, 28 N.Y.U.L. REV. 975, 994 (1953); Comment, *Election Laws: A Corporation May Not Contribute Funds to Affect the Outcome of a Referendum*, 5 ST. MARY'S L.J. 848, 849 (1974).

In 1948, the amendments to section 313 were incorporated into section 610 of Title 18. Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, 62 Stat. 683. Section 610 prohibited campaign contributions or expenditures by national banks, corporations, and labor organizations. This prohibition was repealed in 1976, Act of May 11, 1976, Pub. L. No. 94-283, tit. II, § 201(a), 90 Stat. 496, but the language was incorporated into the Act of May 11, 1976, Pub. L. No. 94-283, tit. I, § 112(2), 90 Stat. 490 (codified at 2 U.S.C. § 441b (1976)) [hereinafter referred to as section 610].

76. The power of Congress to pass legislation to control corruption in elections is derived from the United States Constitution, which states, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [*sic*] Senators." U.S. CONST. art. I, § 4.

The same governmental concerns that justify curbs on election campaign spending, however, do not apply to ballot-measure campaigns. *See* note 4 and text accompanying notes 132-33 *infra*.

77. 77 F. Supp. 355 (D.D.C.), *aff'd*, 335 U.S. 106 (1948).

78. The union leadership was indicted for violations of section 313 of the Corrupt Practices Act of 1925, as amended by section 304 of the Labor Management Relations Act. Section 304 barred any expenditure by a labor organization in connection with an election to choose candidates for federal office. Labor Management Relations Act of 1947, Pub. L. No. 80-101, ch. 120, tit. III, § 304, 61 Stat. 159 (1947) (current version at 2 U.S.C. § 441(b) (1976)).

amendment freedoms while exercising its constitutional power to regulate the electoral process and to prevent corruption in campaigns.[79]

The Supreme Court affirmed the district court's dismissal of the indictments.[80] The Justices held that the statutory prohibition on expenditures contained in section 313 was inapplicable to opinions on candidates or ballot-measure proposals published in trade journals or internal house newspapers that were put out by corporations or labor unions.[81] "It is unduly stretching language to say that the members or stockholders are unwilling participants in such normal organizational activities, including the advocacy . . . of governmental policies affecting their interests, and the support . . . of candidates thought to be favorable to their interests."[82]

The concurring opinion of Justice Rutledge, joined by Justices Black, Douglas, and Murphy, is significant because it identified the purposes of federal corrupt practices statutes and found no justification for curtailing the free speech rights of labor unions. The Justices found the objectives of the statute to be (1) prevention of undue influence of labor unions and corporations on federal elections, (2) preservation of the purity of elections from the misuse of aggregated union and corporate funds, and (3) protection of union members whose political views may be contrary to those of the majority, but whose money nevertheless would be used to publicize the majority's views.[83] In furtherance of the legislative goals, section 313 was found to have imposed a blanket prohibition on all expenditures made by a union in connection with elections. The Court found that such a prohibition amounted to an unconstitutional prior restraint on speech, press, and assembly, and therefore dismissed the indictments.[84] The concurring opinion is important because it would have declared the statute unconstitutional, and would have recognized the first amendment rights of corporations twenty years before the *Bellotti* decision.

Seven years later, the United Auto Workers was charged with making illegal campaign contributions from general union funds in connection with a number of Michigan congressional races. In *United States v. UAW-CIO*,[85] the Supreme Court examined the purposes of the federal corrupt practices legislation, as identified in Justice Rutledge's concurring opinion in *United States v. CIO*.[86]

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79. 77 F. Supp. at 357. The Court stressed that:

> At no time are these rights so vital as when they are exercised during, preceding or following an election. If they were permitted only at times when they could have no effect in influencing public opinion, and denied at the very time and in relation to the very matters that are calculated to give the rights value, they would lose that precious character with which they have been clothed from the beginning of our national life.

Id.

80. The Government appealed directly to the Supreme Court under the Criminal Appeals Act. 335 U.S. 106 (1948).

81. *Id.* at 121-23.

82. *Id.* at 123.

83. *Id.* at 134 (Rutledge, J., concurring).

84. *Id.* at 155.

85. 352 U.S. 567 (1957).

86. *See* text accompanying note 83 *supra*.

In particular, the Court focused on the objective of preventing associations that are able to amass large concentrations of wealth from exerting excessive political influence.[87] Based upon an examination of the Senate and House committee reports and the Senate debates on the Labor Management Relations Act, the Court concluded that union contributions for the purpose of publicizing political views or supporting particular candidates were proscribed by the law.[88]

In a dissenting opinion, Justice Douglas, joined by Chief Justice Warren and Justice Black, expressed concern that the majority opinion marked a retreat from the traditional strong protection of political speech.[89] The dissent urged that the first amendment should be read broadly, and should not be construed to prohibit the expenditure of money by any group that desires to communicate an idea to the public.[90] "Some may think that one group or another should not express their views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But those are not justifications for withholding first amendment rights from any group—labor or corporate."[91] Thus, the dissent took the position that laws imposed to limit electoral abuses may not infringe on protected free speech rights.

The third challenge to the scope of federal corrupt practices legislation came in *Pipefitters Local 562 v. United States*.[92] The Supreme Court held that the establishment by the union of a political fund, financed by the voluntary contributions of union members, did not violate the corrupt practices statute. The Court held that as long as the political fund was segregated from the union's general fund, and the contributions were obtained neither by threat of physical force, job discrimination, or financial reprisals, nor as a condition of employment or union membership, the money could be used for political purposes.[93] Furthermore, the policies underlying the statute were unhampered by the establishment of voluntary political funds. "[N]o one who objects to the organization's politics has to lend his support, and the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source."[94]

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87. 352 U.S. at 589-90.

88. *Id.* at 585-87.

89. *Id.* at 593 (Douglas, J., dissenting).

90. *Id.* at 594. The dissent also argued that the protection afforded first amendment rights should not depend on the size of the audience. "It is startling to learn that a union spokesman or the spokesman for a corporate interest has fewer constitutional rights when he talks to the public than when he talks to members of his group." *Id.* at 595. Whether the union-sponsored broadcast constituted "active electioneering" or a simple statement of the record of certain candidates on the issues was considered irrelevant by the dissenters. Simple statements of fact and speech aimed at affecting the outcome of an election were protected. "To draw a constitutional line between informing people and inciting or persuading them and to suggest that one is protected and the other not by the First Amendment is to give Constitutional dignity to an irrelevance." *Id.* at 596.

91. *Id.* at 597.

92. 407 U.S. 385 (1972).

93. *Id.* at 401, 421, 426-27. In reaching its decision, the Court relied heavily on the legislative history of federal corrupt practices legislation, together with section 205 of the Federal Election Campaign Act of 1971. The 1971 legislation expressly authorized labor organizations to solicit contributions in order to establish political funds.

94. 117 CONG. REC. 43381 (1971) (remarks of Rep. Hansen), *quoted in* 407 U.S. at 423-24.

In the landmark case of *Buckley v. Valeo*,[95] the Court considered the validity of the Federal Election Campaign Act of 1971,[96] which limited contributions to and expenditures by candidates for federal elective office. At the outset, the Court acknowledged the effect such monetary limitations have on political speech and association.[97] Since money was viewed as tantamount to speech, limitations on campaign contributions and expenditures were subjected to the test of strict judicial scrutiny that is normally applied to limitations on political speech.[98]

A divided Court upheld the statutory limitations placed on contributions to candidate campaigns, but struck down a variety of expenditure limitations. With respect to expenditure limitations, the Court struck down restrictions on (1) the amount that individuals independently may spend to express their views on political candidates,[99] (2) the amount that candidates may spend from personal or family resources,[100] and (3) the total amount a candidate is authorized to spend for election to federal office.[101] The Court found that these restrictions did not sufficiently promote the government's goals of stemming the appearance and reality of corruption, equalizing the influence of various groups in the political system, and halting the escalating costs of political campaigns to pass the test of strict scrutiny.[102] "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign."[103] Thus, the

95. 424 U.S. 1 (1976).

96. Pub. L. No. 92-225, 86 Stat. 3 (1972), *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), *and* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 478 (1976) (codified in scattered sections of 2, 18 U.S.C.).

97. The Court noted that:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19.

98. *Id.* at 25. In addition, the claim of discrimination in favor of incumbents and major-party candidates, and the danger of legislative self-interest, mandated the application of a strict standard of review. In United States v. Carolene Products Co., 304 U.S. 144 (1938), Justice Stone said that strict scrutiny may be necessary where legislation is involved "which restricts those political processes which can ordinarily be expected to bring about repeal of desired legislation." *Id.* at 152 n.4 (1938). *See* Comment, Buckley v. Valeo: *The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852, 858 & n.46 (1976).

The *Buckley* Court, however, recognized that even a statute that significantly interferes with constitutionally protected political rights may be upheld if a sufficiently strong governmental interest can be shown, and if the statute is so narrowly drawn as to avoid unnecessary abridgment of associational freedoms. 424 U.S. at 25, and cases cited therein.

99. 424 U.S. at 39-51; 18 U.S.C. § 608(e)(1) (repealed 1976).

100. *Id.* at 51-54; 18 U.S.C. § 608(a) (repealed 1976).

101. *Id.* at 54-59; 18 U.S.C. § 608(c)(1) (repealed 1976).

102. *Id.* at 55-57.

103. *Id.* at 57.

Court struck down the statutory limitations placed on the quantity of campaign expenditures and the restrictions imposed on the scope of constitutionally protected campaign activities.

The Court in *Buckley* did, however, endorse the limitations imposed on annual contributions made to a particular candidate's campaign by persons[104] and political committees,[105] and the ceiling restricting total contributions by an individual during any calendar year.[106] The Court held that the contribution limitations effectuated valid government interests without directly impinging on constitutionally protected political activities.[107] The contributor's declaration of support for a candidate is conveyed by the symbolic act of contributing, not by the amount of the contribution. Thus, a limit on the amount a person may give to a candidate or campaign committee involves only minimal and permissible restraint on political communication.[108] The Justices also were convinced that imposing a limitation on contributions to political campaigns would not prevent candidates from raising sufficient amounts of money to effectively communicate their positions.[109] Thus, the Act's contribution limitations were found to have only a marginal effect on contributors' free expression, while expenditure limitations represented a substantial constraint on political speech.[110]

In general, these cases reflect the strong concern that permitting unlimited contributions to the campaign coffers of candidates for public office would result in the election of officials who would be indebted to special interest groups. Those officials, it is feared, would act in office as public watchdogs for the interests of the corporations, unions, or other special interest groups that helped them win their elections. History has shown that these fears are justified.[111] On the basis of what has been learned from the profound corporate influence on elections and government officials around the turn of the cen-

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104. *Id.* at 23-29; 18 U.S.C. § 608(b)(1) (codified at 2 U.S.C. § 441a(a) (1976)). The term "person" is defined broadly in the statute to include "an individual, partnership, committee, association, corporation, or any other organization or group of persons." 2 U.S.C. § 431(h) (1976).

105. *Id.* at 35-36; 18 U.S.C. § 608(b)(2) (codified at 2 U.S.C. § 441a(a) (1976)). "Political committee" is defined in the statute as "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1000." 2 U.S.C. § 431(d) (1976).

106. *Id.* at 38; 18 U.S.C. § 608(b)(3) (codified at 2 U.S.C. § 441a(a) (1976)). *See also* 2 U.S.C. § 431(e) (1976) (defining "contribution").

107. *Id.* at 58. *See generally* Brest, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 177 (1976).

108. *Id.* at 21.

109. *Id.* at 21-22.

110. *Id.* at 23. The Court stated, "[A]lthough the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." *Id.*

111. For example, before any corrupt practices legislation had been passed in New York, one executive officer of a life insurance company which regularly contributed to election campaigns commented, "I don't justify the use of money for campaign purposes. I justify the use of these funds in the protection of the policy holders' interests. I don't care about the Republican side of it or the Democratic side of it. . . . What is best for New York Life is what moves and actuates me." A. HEARD, THE COSTS OF DEMOCRACY 129 (1960).

tury,[112] and the Watergate scandals of the early 1970's, the imposition of limitations on the rights of some individuals and groups to express their views with respect to election campaigns is clearly warranted.[113] Such limitations were supported in *Buckley* to assure that political expression by individuals would not be drowned out by the voices of the wealthy interests, to avoid corruption, and to "act as a brake on the skyrocketing cost of political campaigns."[114]

C. Protection of Dissenting Shareholders

Along with protecting political speech and guarding against electoral corruption, the *Bellotti* Court was concerned with protecting the interests of shareholders who may object to corporate political expenditures. Corporate directors have a fiduciary duty to both the corporation and the shareholders to act in good faith.[115] They may not act in a manner contrary to the best interests of the corporation. Spending on referendums may well fall within this fiduciary duty. Thus, if a director can reasonably claim that an expenditure is in the best interests of the corporation and will not result in the waste of corporate assets, the expenditure should be permitted.[116] When a referendum issue is closely related to a corporation's business, and the results of the referendum would have a substantial effect on the corporation's profits, directors should have not only the right but the duty to publicize the corporation's position.

Concern for minority shareholders is not a sufficient reason for prohibiting corporate political spending in the exercise of first amendment rights. In most areas of corporate activity, shareholders must defer to the judgment of a majority of directors or shareholders.[117] Some shareholders may object to a corporation's dividend policy, growth strategy, public relations program, labor practice, or other corporate activity. Nevertheless, a corporation cannot be prevented by a minority of shareholders from pursuing a policy approved by the majority of shareholders or the directors acting in the interests of the corporation. Similarly, if the majority of directors decides to make a political expenditure, potential benefits inure to the corporation, as well as to both dissenting and consenting shareholders.

Shareholders can express their objections to corporate practices through a number of mechanisms, such as elections of directors and proxy votes. Those

112. See United States v. UAW-CIO, 352 U.S. 567, 570-83, for a discussion of the early need for campaign contribution legislation.

113. The Court stressed that:

> [t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrated that the problem is not an illusory one.

424 U.S. at 26-27 (1976).

114. *Id.* at 25-26.

115. H. HENN, *supra* note 1, at §§ 235-241.

116. *Id.*

117. *See* King, *Corporate Political Spending and the First Amendment*, 23 U. PITT. L. REV. 847, 873-76 (1962).

who do not agree with the majority may, as a last resort, sell the stock and reinvest the proceeds elsewhere.[118] Minority shareholders may also challenge objectionable corporate disbursements by instituting derivative actions against the corporation. Such actions would have to allege that the expenditures were *ultra vires*, outside the scope of permissible corporate purposes, or were made to further the personal interests of management.[119] It is unclear whether the proposed expenditures in *Bellotti*, whose purpose was to publicize a viewpoint in a referendum question, constituted an *ultra vires* act.[120] Under the old common law doctrine, a corporation could not engage in acts or dealings beyond the scope of the specific purposes stated in the corporate charter.[121] Today, however, most states do not require corporations to be established for limited purposes.[122] Corporate "purpose" clauses may either be broadly worded or may include exhaustive listings of permissible corporate activity.[123] Furthermore, courts construe these clauses liberally and presume that corporate acts are not *ultra vires*.[124]

The *ultra vires* doctrine has not been widely accepted by courts in recent years as a theory on which to base a claim for shareholder relief. Although two early cases held that political contributions exceeded permissible corporate authority, their precedential value has been seriously undermined by the subsequent demise of the *ultra vires* doctrine.[125] For instance, in *A. P. Smith Mfg.*

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118. See *id.* at 873 for a discussion of the applicability of the principle of majority rule to voluntary associations. *See generally* DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 149-50, 187 P.2d 769, 776 (1947), *cert. denied*, 333 U.S. 876 (1948).

119. 435 U.S. at 795. One defense to such an action is the "business judgment" rule. Under this rule, no breach of a fiduciary duty will be found when the directors of a corporation use sound business judgment in making their business decisions, their judgment is uninfluenced by personal considerations, and their judgment is exercised in good faith. H. HENN, *supra* note 1, at § 242. This rule has been accepted unanimously in American jurisdictions.

120. The Massachusetts Supreme Judicial Court, in *First National Bank II*, suggested that the enactment of section 8 reflects the legislative concern of protecting shareholders against *ultra vires* corporate acts. 77 Mass. Adv. Sh. at ____, 359 N.E.2d at 1275. In Massachusetts, breach of fiduciary duty is considered an ultra vires act. Waste of corporate assets may be considered a breach of fiduciary duties, depending on the degree of wantonness or ill intent shown on the part of the directors. 13A MASSACHUSETTS PRACTICE *Business Corporations* § 466 (Peairs 2d ed. 1971). Because in *Bellotti* the directors had proposed, in good faith, an expenditure of money for what they considered to be the best interests of the corporation, there was no evidence to support a possible charge of breach of fiduciary duties.

121. H. HENN, *supra* note 1, at § 184.

122. *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(b) (1976); N.Y. BUS. CORP. LAW § 201(a) (McKinney Supp. 1978).

123. The Massachusetts statute, for example, provides that corporate purposes must be enumerated in the articles of organization. MASS. GEN. LAWS ANN. ch. 156, § 6 (West 1970).

124. 13 MASSACHUSETTS PRACTICE *Business Corporations* § 361 (Peairs 2d ed. 1971). Corporate acts will not be deemed ultra vires if they are within the express or implied authority granted to the corporation by the states in which it is incorporated. Edwards, Inc. v. Fields, 57 Mass. App. Dec. 22, 25-26 (Dist. Ct. 1975).

125. McConnell v. Combination Mining & Milling Co., 30 Mont. 239, 76 P. 194 (1904), *modified on rehearing*, 31 Mont. 563, 79 P. 248 (1905), involved corporate payments to a lawyer for use in the "silver cause" and for lobbying in favor of the creation of a new county. The Montana Supreme Court held that the payments were ultra vires because they were outside the range of legitimate purposes of the corporation. *Id.* at 571, 79 P. at 251. *See also* Note, *Civil Responsibility for*

Co. v. Barlow,[126] a number of shareholders challenged the decision by the board of directors to make a charitable gift to Princeton University for general educational purposes. The trial court held that the gift was not *ultra vires* despite the fact that the articles of incorporation gave no authorization for the making of charitable gifts. Corporate expenditures resulting in indirect benefits, such as benefits to employees, goodwill in the community, and the development of a pool of potential employees, were within the legal power of the corporation. In addition, the corporation was found to have a "solemn duty" to make such charitable contributions.[127] In order to preserve "the American way of life," corporations, with their great concentrations of wealth, were recognized as having an affirmative obligation to support institutions that rely on donations for their existence.[128] On appeal, the New Jersey Supreme Court upheld the corporation's right to make the donation because giving money to a local university would further the public welfare and yield indirect benefits to the corporation.[129]

The holding of *Schwartz v. Romnes*[130] has virtually destroyed the utility of the *ultra vires* doctrine as a shareholder's weapon in political contribution cases. In *Schwartz*, the plaintiff-shareholders argued that the contribution by the New York Telephone Company to a group supporting passage of a transportation bond issue referendum was an unauthorized corporate act and hence, *ultra vires*. The court rejected this theory and held that the contribution was prompted by a legitimate concern for the state's transportation network and the economy as a whole. Hence, the contribution was protected by the state's corporation statute.[131]

Given the narrow applicability that has been accorded the *ultra vires* doctrine by recent courts, it is unlikely that the expenditures proposed by the Massachusetts corporation in *Bellotti* on behalf of a ballot-measure campaign would be considered to be beyond valid corporate purposes. The plaintiff-corporations presented the court with facts indicating their reasonable belief that passage of the constitutional tax amendment would have a detrimental effect on the corporations' properties, businesses, and assets. The spending of corporate funds to protest against a tax which was expected to have an adverse

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Corporate Political Expenditures, 20 U.C.L.A.L. REV. 1327, 1328-31 (1973). Two years later, in People ex. rel. Perkins v. Moss, 187 N.Y. 410, 80 N.E. 383 (1907), an insurance company's contribution to the Republican National Committee's presidential campaign fund was deemed to be "absolutely beyond the purposes for which [the] corporation existed and was wholly unjustifiable and illegal." *Id.* at 425, 80 N.E. at 388 (Hiscock, J., concurring).

126. 26 N.J. Super. 106, 97 A.2d 186 (Super. Ct. Ch. Div. 1953).

127. *Id.* at 117, 97 A.2d at 192.

128. *Id.*

129. 13 N.J. 145, 161, 98 A.2d 581, 590 (1953).

130. 495 F.2d 844 (1974). *See also* text accompanying notes 153-55 *infra*.

131. *Id.* at 854; N.Y. BUS. CORP. LAW § 202(a)(12) (McKinney 1963). Moreover, to the extent that the expenditure was prompted by business benefits that the directors could reasonably believe would accrue to the corporation from improved roadways, it was protected by the traditional "corporate benefit" rule. Under the common law "corporate benefit" rule, courts have implied the power of corporations to contribute to charitable causes where some indirect benefit could accrue to the corporation. *See* H. HENN, *supra* note 1, at § 183, and cases cited therein.

effect cannot be considered to be a waste of corporate funds, and therefore would not be *ultra vires*. Rather, the expenditures were designed to protect corporate assets, thus effectuating a legitimate corporate purpose.

V
APPLICATION OF CORRUPT PRACTICES LEGISLATION TO BALLOT MEASURES

The *Bellotti* Court thus weighed competing interests, and extended first amendment rights to protect corporate political speech. *Bellotti*, however, may not be read so broadly as to protect corporate speech in candidate elections. The case concerned corporations that wanted to exercise their first amendment rights in a ballot-measure campaign rather than in an election campaign. A ballot measure is a vote on an issue, whereas an election entails a selection among political candidates.[132] Traditionally, corrupt practices legislation has been justified by the desire to prevent corruption in elections and the need to protect minority shareholders who may object to certain corporate expenditures for political or social causes. While these concerns may be sufficient reason to limit corporate political speech relating to electoral campaigns,[133] they do not apply equally to ballot-measure campaigns. For example, the desire to avoid corruption and the appearance of corruption is largely absent when discussing ballot measures. Ballot measures are conclusively decided on the day that votes are cast; the possibility of future favors in return for campaign gifts is limited. Once a ballot measure is decided, its supporters cannot be directly repaid in gratitude for their support. Practically speaking, only if an official throws his or her strong support behind a ballot measure, and incurs political debts in the effort to enlist the support of others, is it conceivable that corruption will be an issue.

Surprisingly few cases have considered whether state and federal corrupt practices acts apply equally to both election and ballot-measure campaigns.[134] No clear trend can be discerned from the decisions. *People v. Gansley*[135] stands as the only case to deny a corporation the right to make expenditures relating to referendums. In *Gansley*, a brewing company donated five hundred dollars in support of a local liquor option referendum. The indictment charged the defendant corporation with violating a statute that prohibited corporations from

132. *See* note 4 *supra*.

133. *See* text accompanying notes 73-114 *supra*.

134. Statutes vary in their applicability to elections and ballot measures. Some statutes only prohibit corporate contributions to political parties, political committees, or political candidates. *E.g.*, ALA. CODE tit. 10, § 2-168 (1975). Others bar corporations from making any expenditure to influence an election. *E.g.*, ARIZ. REV. STAT. ANN. § 16-471(A) (1956); N.J. REV. STAT. §§ 19: 34-45 (1964); ORE. REV. STAT. § 260.472 (1973). Others, such as the statutes in Ohio and New York, prohibit corporations from using money or property "for any political purpose whatever." OHIO REV. CODE ANN. § 3599.03 (Page 1972); N.Y. ELEC. LAW § 460 (McKinney Supp. 1976). For a discussion of the development of the Massachusetts statute, see text accompanying notes 35, 39, 44 *supra*. *See also* A. REITMAN & R. DAVIDSON, THE ELECTORAL PROCESS: VOTING LAWS AND PROCEDURES 93 (1972).

135. 191 Mich. 357, 158 N.W. 195 (1916).

paying any money to a candidate or political committee "for the payment of any election expenses whatever." The Michigan court held that the statute was intended to apply to all elections, including local option referendums. Because the corporation was organized to manufacture beer and not use its funds to influence public sentiment in connection with any election, the contribution was barred under the broad wording of the Michigan law.[136]

In another early case, *State v. Terre Haute Brewing Co.*,[137] the defendant corporation was indicted for making contributions in support of a campaign to defeat a local liquor referendum.[138] The Indiana statute proscribed corporate spending "to promote the success or defeat of any candidate for public office or of any political party or principle or for any other political purpose whatever." The Indiana Supreme Court concluded that because the statute only barred contributions to procure results that are purely political in character, it should not apply to propositions, submitted to the voters, that are not political in nature. The statute should be read only to apply to "politics" as commonly understood.[139] Accordingly, the indictments were dismissed.

More recently, an Ohio corrupt practices statute was called into question in *State ex rel. Corrigan v. Cleveland-Cliffs Iron Co.*,[140] in which a corporation contributed five hundred dollars to the Citizens Committee for City and County Issues. The Citizens Committee was organized to advocate a state constitutional amendment to change the procedures required to adopt county charters, and to encourage the passage of certain bond issues and tax levies. The Supreme Court of Ohio concluded that the statutory prohibition against the use of corporate funds for "any partisan political purpose" did not include corporate contributions for the purpose of advocating a particular viewpoint on ballot-measure proposals.[141] Use of the word "partisan" was interpreted to narrow the construction of "political purpose" so as to exclude from the statutory prohibition contributions aimed at constitutional amendments, bond issues, and tax levies. The court distinguished *Gansley*[142] on the basis that the Michigan statute clearly proscribed expenditures to any political committee to promote the success or defeat of any "principle or measure." Similarly, the Ohio court distin-

136. *Id.* at 375-76, 158 N.W. at 201. Such corporate influence, according to the court's interpretation of the intent of the Michigan legislature, risks contamination of honest government. "It is probably that the Legislature had in mind the fact that it is a matter of history that corporations have in many instances used their funds (acting through and by their officers) to influence elections, and that body believed that such practice was an abuse and menace to good government, which it sought to remedy by this legislation." *Id.* at 376, 158 N.W. at 201.

137. 186 Ind. 248, 115 N.E. 772 (1917). In a related case, the same court considered whether the directors and officers of a corporation could be convicted for making such contributions. Under the Indiana Corrupt Practices Act, Law of March 3, 1911, ch. 121, § 12, 1911 Ind. Acts 288 (subsequent version at IND. CODE § 3-1-30-12) (repealed 1975), which made officers of a corporation liable for violating the Act, the court upheld the convictions. State v. Fairbanks, 187 Ind. 648, 115 N.E. 769 (1917).

138. The referendum concerned whether the sale of "intoxicating liquors" should be prohibited in the locality.

139. 186 Ind. at 251, 115 N.E. at 773.

140. 169 Ohio St. 42, 157 N.E.2d 331 (1959).

141. *Id.* at 49, 157 N.E.2d at 336.

142. *See* text accompanying notes 135-36 *supra*.

guished *State v. Fairbanks*[143] on the basis of language in the Indiana statute that applied specifically to "measures or propositions submitted to vote at a public election."[144]

In a similar case, the Supreme Court of Montana narrowly interpreted its corrupt practices statute. At issue in *State ex rel. Nybo v. District Court*[145] was whether an organization formed to promote passage of a sales tax referendum was subject to the Montana statute, which prohibited corporations from paying or contributing funds "in order to aid or promote the interests, success, or defeat of any political party or organization."[146] The court defined referendums as "legislative" rather than "political" in character. Contributions for "legislative" activities were not intended to be limited by the statute.[147] Thus, under the terms of the statute, "political party or organization" had no relevance to the defendant's activities because a referendum was considered a legislative procedure that has been delegated to the electorate.

Finally, in *Schwartz v. Romnes*,[148] an important case decided shortly after *First National Bank I*,[149] the United States District Court for the Southern District of New York ruled that the New York Election Law[150] barred corporate contributions related to ballot measures. *Schwartz* was a stockholder derivative suit in which a shareholder of AT&T contested the contribution of fifty thousand dollars by AT&T's wholly-owned subsidiary, the New York Telephone Company, to a group organized to obtain voter approval of a transportation bond issue on the 1971 ballot. The district court stated that the section of the New York Election Law that prohibited a corporation from using any money or property "for any political purpose whatever" was aimed at preventing large corporations from securing political influence through the use of large contributions. The statute was read to bar contributions made to influence the outcome of a vote on a ballot question or proposition.[151] The decision was based on the state's interest in protecting the election process against the possibility of undue influence by corporations, as well as protecting shareholders from use of

143. *See* note 137 *supra*.

144. 169 Ohio St. at 49, 157 N.E.2d at 336 (emphasis omitted).

145. 158 Mont. 429, 492 P.2d 1395 (1972).

146. MONT. REV. CODES ANN. § 94-1444 (1969) (current version at MONT. REV. CODES ANN. § 23-4744 (Cum. Supp. Vol. 2, Pt. 2 1977)). The statute currently in force proscribes contributions or payments to promote the success or defeat of any "political party, organization, or ballot issue." In C & C Plywood Corp. v. Hanson, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd*, 583 F.2d 421 (9th Cir. 1978), the present Montana statute was challenged by nine corporations and one bank. The plaintiff-corporations sought a declaratory judgment to permit them to make expenditures in opposition to passage of a ballot measure, the passage of which would have required legislative approval of any nuclear facility licensed by the state. The district court granted the plaintiff's request for a declaratory judgment and found that the total prohibition of corporate spending on ballot measures violated the first amendment absent any compelling state interest. The court did not recognize that corporations should be accorded absolute first amendment rights, but expressed concern that the state should not inhibit free and open debate on public issues. 420 F. Supp. at 1266.

147. 158 Mont. at 435-36, 492 P.2d at 1399.

148. 357 F. Supp. 30 (S.D.N.Y. 1973), *rev'd on other grounds*, 495 F.2d 844 (2d Cir. 1974).

149. *See* text accompanying notes 40-43 *supra*.

150. *See* note 74 *supra*.

151. 357 F. Supp. at 33, 36.

corporate assets for political causes with which they might not agree. The court weighed these interests against the constitutional rights of corporations and found the governmental interests sufficient to justify the regulation of corporate activity.[152]

On appeal, the United States Court of Appeals for the Second Circuit reversed[153] the conviction because New York Telephone's contribution had been made in support of a bond referendum that was nonpartisan in nature. The court balanced the state interest in preserving the integrity of its elections against the constitutional rights of political contributors. A narrow interpretation of the statute was considered essential because first amendment rights were threatened by the New York penal statute. "[I]t is incumbent upon us to construe § 460 . . . in a manner that will not transgress constitutional rights, including those of corporate contributors which, like individuals, are guaranteed freedom of speech and petition."[154] With respect to the concern about corruption, the court addressed the distinction between referendums and elections, and concluded that first amendment rights should not be limited to protect against the remote possibility of impropriety in a ballot-measure campaign.[155]

Schwartz is significant because it marks the first time that a federal court directly confronted the conflict between a corporation's first amendment rights and a state's control over the electoral process. The court's holding, that the ban on contributions for "political purposes" did not include corporate contributions to "non-partisan" referendums, set the stage for the United States Supreme Court's consideration of the issue of corporate first amendment rights in referendum campaigns.

VI
CONCLUSION

In *First National Bank of Boston v. Bellotti*, the Supreme Court faced the task of defining where the individual's right to exercise first amendment freedoms ends and where the state's power to regulate speech begins. The case was complicated by the fact that the individuals whose rights were in question were corporations. Traditionally, corporations have been viewed as artificial persons, and the rights of natural persons under the Constitution have been only selectively extended to corporations.[156] The *Bellotti* Court had to balance

152. *Id.* at 36.
153. Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974).
154. *Id.* at 852.
155. The Second Circuit court said:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.

Id. at 852-53.
156. *See* text accompanying notes 60-64 *supra*.

the rights of corporations under the first amendment to make their positions known, and the rights of the voters to receive a free flow of information from all sources, against the state's interest in preventing corruption and protecting objecting shareholders.

The *Bellotti* Court did not directly address the issue of whether and in what contexts corporations' first amendment rights would be recognized. Rather, the problem before the Court was whether Massachusetts had the right to forbid corporations to spend money to express their views during a referendum campaign about a state income tax. Framed in this way, the limits of the decision become clear. The Court held that the identity of the speaker should not be considered when deciding whether speech is to be protected.[157] Furthermore, the Court recognized that speech in the context of referendum campaigns does not pose the same problems about corruption and confidence of the voters in government as are present in candidate elections. In light of the fact that the holding was limited to corporate speech in the context of ballot measures, it is clear that the Supreme Court did not mean to open the door to unrestricted corporate spending in all elections. Nor did a majority of the Justices intend to cast doubt on the constitutionality of existing corrupt practices legislation.[158] The importance of the decision is that, for the first time, the Supreme Court recognized the applicability of the first amendment to protect corporate speech, if only in the narrow context of ballot-measure campaigns.[159] A broader reading of the opinion improperly exaggerates the Court's holding.

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157. *See* text accompanying note 24 *supra*.

158. In a dissenting opinion, Justice White, joined by Justices Brennan and Marshall, expressed the fear that the Court's opinion "casts considerable doubt upon the constitutionality of legislation passed by some 31 States restricting corporate political activity, as well as upon the Federal Corrupt Practices Act, 2 U.S.C. § 441(b) (1976 ed.)." 435 U.S. at 803. They concluded, "If the corporate identity of the speaker makes no difference, all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day." *Id.* at 821.

159. In the recent opinion in the case of Federal Election Commission v. Weinstein, 462 F. Supp. 243 (1978), the District Court for the Southern District of New York interpreted *Bellotti* to apply only to corporate speech on particular issues. Corporate financial contributions to candidates for elective office, the court said, are distinguishable: "Such contributions by themselves say little, but given the realities and expense of modern communications they may permit the indirect purchase of votes. To permit even small political contributions by corporations would alter the structure and presentation of political issues. Instead of encouraging individual free speech, the allowance of corporate contributions would obscure it." 462 F. Supp. at 249.