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ited treasuries, and their insurance premiums. The Court, however, disregarded these potential consequences in favor of ensuring that constitutional rights will be enforced by the courts, even though in doing so it abandoned strong precedent. The true impact of *Monell*, however, will not be realized until the lower federal courts decide what "the full contours of municipal liability under § 1983 . . . [shall] be."[94]

Nancy J. Murray

Corporations' Right to Free Speech in Referendum Elections: First National Bank v. Bellotti

The Massachusetts general election on November 2, 1976, included a referendum proposing a constitutional amendment that would authorize a graduated income tax upon individuals. Several corporations[1] desired to spend corporate funds for newspaper advertisements advocating defeat of the amendment. When Francis X. Bellotti, the Massachusetts Attorney General, advised them that such expenditures would violate a Massachusetts statute prohibiting corporate expenditures to influence referendum elections,[2] the corporations sought a declaratory judgment from the Massachusetts Supreme Judicial Court declaring the statute unconstitutional,

94. *Id.* at 695.

1. The First National Bank of Boston, New England Merchants National Bank, The Gillette Company, Digital Equipment Corporation, and Wyman-Gordon Company.

2. MASS. LAWS ANN. ch. 55, § 8 (Michie/Law. Co-op 1978) provides:

> No corporation carrying on the business of a bank, . . . no 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.

The statute had been repeatedly amended in attempts to draft a statute that would both satisfy the Massachusetts Supreme Court on the corporate free speech issue and prevent corporate expenditures from defeating the individual income tax referendum. *See* 7 SUFFOLK U.L. REV. 1117 (1973). Although the referendum had already been conducted before the case reached the United States Supreme Court, the case was not rendered moot, as it fell within the class of controversies "capable of repetition, yet evading review." First Nat'l Bank v. Bellotti, 98 S. Ct. 1407, 1414, 55 L. Ed. 2d 707, 716 (1978). Because proposed amendments were seldom enacted more than 18 months before an election, no case challenging the statute could ever be fully litigated before an election result would intervene to render the case moot.

both on its face and as it applied to them. The corporations argued that the statute violated freedom of speech guaranteed by the first amendment as applied to the states by the due process clause of the fourteenth amendment, denied the corporations equal protection of the laws, and violated similar provisions of the Massachusetts Constitution.[3] The Massachusetts court decided that a corporation had freedom of speech protection only when the referendum issue materially affected its business, property, or assets, on the grounds that a corporation's right to protected speech arises only from its property interests under the fourteenth amendment.[4] Since the Massachusetts legislature had determined that no referendum question solely concerning the taxation of individuals could materially affect a corporation's property interest,[5] the Massachusetts court refused to substitute its judgment for the legislature's, and upheld the constitutionality of the challenged statute. *Held, reserved*: The Massachusetts statute prohibiting corporate expenditures to influence referendum elections is an unconstitutional abridgement of free speech under the first and fourteenth amendments. *First National Bank v. Bellotti*, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

I. DEVELOPMENT OF CORPORATE RIGHTS VERSUS RESTRICTIONS ON CORPORATE POLITICAL ACTIVITY

The Supreme Court's invalidation of the Massachusetts law prohibiting corporate expenditures should come as no surprise. It is the natural result of an inevitable collision of two independent lines of legal development involving corporations. For the past century a series of Supreme Court decisions has gradually expanded the scope of protected corporate liberties under the fourteenth amendment. During the same period, a series of statutes enacted both by Congress and the states had increasingly restricted the use of corporate funds to influence elections. The stage was set for a conflict between the restrictive statutes and the corporate claims to constitutionally protected liberty when the Supreme Court decided in *Buckley v. Valeo*[6] that individuals' political expenditures and contributions are protected speech under the first amendment.

A. Corporate Rights Under the Fourteenth Amendment

While a corporation is a legal creation, not an individual, the United States Supreme Court has progressively extended fourteenth amendment protection to corporations over the past century. Decisions so holding

3. MASS. CONST. arts. X, XI, XVI.

4. First Nat'l Bank v. Attorney General, 359 N.E.2d 1262, 1270 (Mass. 1977).

5. *Id.* at 1271. To avoid appellants' claims that the section created an "irrebuttable evidentiary presumption," the court interpreted expenditures on the personal tax issue as a separate per se crime requiring proof of each element. *Id.* at 1276. Yet the court also held that the appellants could have invalidated the law by showing that the individual income tax would materially affect their business or property (the absence of "material effect" was itself not an element of the per se crime). *Id.* at 1271.

6. 424 U.S. 1 (1976).

have focused either upon the constitutionally protected rights the corporation possesses as an entity, or upon certain constitutionally protected expressive activities, whether sponsored by a corporation or an individual.

Among the earliest decisions defining a corporation's rights as an entity protected under the fourteenth amendment is a recognition that corporations qualify as "persons" whose corporate property rights[7] are protected under the due process clause, which provides: "[N]or shall any State deprive any person of life, liberty, or *property*, without due process of law . . . ."[8] A definition of the extent of other corporate rights under the fourteenth amendment, however, has been more difficult. Rights possessed by individuals do not necessarily belong to corporations. Despite dicta in early Supreme Court decisions suggesting that a corporation may not claim fourteenth amendment protection under the "liberty" clause,[9] the Court's definition of corporate rights has not distinguished rights arising from the property clause from rights arising from the liberty clause. Rather, in identifying rights available to corporations, the Court has considered whether the nature and evolution of the claimed right made it appropriate for corporations.[10] The basic guarantees of natural justice, such as a right to petition the government,[11] a right against unreasonable search and seizure,[12] and protection against being placed in double jeopardy,[13] belong to corporations under the fourteenth amendment. On the other hand, the personal nature of such rights as the free exercise of religion and the right to vote make them clearly inappropriate to business corporations.[14] Because there is no human personality to be invaded, the constitu-

7. Smyth v. Ames, 169 U.S. 466, 522 (1898).

8. U.S. CONST. amend. XIV, § 1 (emphasis added).

9. In a retreat from the dominant "substantive due process" review of economic regulation, established in Lochner v. New York, 198 U.S. 45 (1905), the Court had held in a series of decisions that liberty, particularly liberty of contract, belonged solely to "natural persons," when it denied corporations' claims to fourteenth amendment liberty protection against state economic regulations. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906). In Hague v. CIO, 307 U.S. 496 (1939), the only such case involving the first amendment, the Court had applied this reasoning to deny standing to the ACLU, a corporation. Even so, the individual union member plaintiffs were successful in their first amendment challenge to a restrictive Jersey City ordinance. Although the denial of protection to the liberty of the corporation made no practical difference to the case's outcome, *Hague v. CIO* is sometimes cited for its dictum that the fourteenth amendment due process clause limits its protection of corporations to their "property rights."

10. Comment, *Constitutional Law—Freedom of Speech and the Corporation*, 4 VILL. L. REV. 377, 377-79 (1959).

11. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-38 (1961) (first amendment); *cf.* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-12 (1972) (corporate right to petition limited by antitrust laws).

12. G.M. Leasing Corp. v. United States, 429 U.S. 338, 353-55 (1977) (fourth amendment).

13. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (fifth amendment).

14. U.S. CONST. amends. I, XV. *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (no denial of equal protection when water district restricted voting rights to landowners, including corporations, and denied them to nonlandowning resident individuals). *See also* SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976) (federal securities laws applied to religious corporation despite a freedom of religion claim under the first amendment).

tional protections against self-incrimination[15] or invasion of privacy[16] have likewise been denied to corporations.

By contrast, in decisions involving the protected status of a corporation's expressive activities, the Court has not considered the corporation as an entity, but has focused on whether the expression itself should be protected under the freedom of the press and freedom of speech guarantees of the first amendment, as applied to the states through the fourteenth amendment. In giving protection to a wide variety of expressions[17] under the freedom of the press guarantee,[18] the Court has not distinguished between corporate and individual sponsors in defining the scope of protection. Protection for corporate expressions under the free speech guarantee, however, has not been so extensive. Corporate expressive activities have been protected as free speech in three contexts. The speech of corporate employers in a National Labor Relations Board dispute has first amendment protection,[19] and a nonbusiness corporation's speech activity in challenging illegal discrimination on behalf of its members is protected as a liberty under the fourteenth amendment.[20] Most important, however, is the

15. Curcio v. United States, 354 U.S. 118, 122 (1957); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 204-06 (1946); Wilson v. United States, 221 U.S. 361, 382-86 (1911); Hale v. Henkel, 201 U.S. 43, 74-75 (1906) (fifth amendment).

16. California Bankers Ass'n v. Schultz, 416 U.S. 21, 65-67 (1974); United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950); *cf.* Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy for married couple, derived from first, third, fourth, fifth, and ninth amendments, incorporated in the fourteenth).

17. Protected corporate "publications" take many forms:

(1) *Newspapers. See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Associated Press v. NLRB, 301 U.S. 103 (1937).

(2) *Books. Compare* Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440-41 (1957) (upholding New York obscenity law), *with* Smith v. California, 361 U.S. 147, 151-55 (1959) (invalidating California statute punishing possession of obscene book).

(3) *Films. Compare* Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688 (1959), *and* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500-02 (1952) (film licensing invalid under first amendment), *with* Young v. American Mini Theatres, Inc., 427 U.S. 50, 58-71 (1976), *and* Times Film Corp. v. City of Chicago, 365 U.S. 43, 47 (1961) (film licensing upheld).

(4) *Radio and television broadcasts.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); but note the limits the fairness doctrine imposes on broadcasters in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

(5) *Public entertainment featuring nude performers.* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

18. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936). It is well established that both freedom of speech and freedom of the press as protected under the first amendment are liberty, not property, rights "incorporated" by the due process clause of the fourteenth amendment. Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Stromberg v. California, 283 U.S. 359, 368 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925). *Contra*, Roth v. United States, 354 U.S. 476, 503-08 (1957) (Harlan J., dissenting in part); Beauharnais v. Illinois, 343 U.S. 250, 287-95 (1952) (Jackson, J., dissenting).

19. NLRB v.Gissel Packing Co., 395 U.S. 575, 617 (1969); *see* Comment, *supra* note 10, at 386-87; Comment, *Employer Freedom of Speech in Labor Relations*, 14 FORDHAM L. REV. 59 (1945); Annot., 146 A.L.R. 1024 (1943).

20. NAACP v. Button, 371 U.S. 415, 428-29 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958).

Court's recognition of the protected status of commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[21] This case emphasizes that the right to freedom of speech preserves not only the expressive rights of the speaker but also protects society's right to receive "a free flow of commercial information."[22] Thus, even if a speaker's self-expressive interests in the expression are not sufficient to give it protected status, as, for example, the pharmacist's interest in communicating his prescription prices, the advertisement may nevertheless constitute protected speech because of the public's interest in receiving the information. The protected status of corporate advertisements was not expressly considered by the Court in *Virginia Pharmacy*. By analogy, however, even though it is doubtful whether a corporation may claim any right to self-expression, advertisements sponsored by a corporation should have the same protection as those made by an individual under the "right to receive" rationale when they offer valuable information to the public.[23] In summary, although other corporate claims to protection under the fourteenth amendment may be evaluated by whether such a right is appropriate to the corporate entity, a corporation's right to free expression, whether by speech or press, depends upon the protected interests inherent in the communication itself.

B. Restrictions upon Corporate Participation in the Political Process

Although corporate press and some corporate speech activities have been protected under the first and fourteenth amendments, whether political expressions sponsored by corporations were also protected had been previously undecided by the Court. To determine the status of corporate political speech, consideration must be given to three competing interests: one is the first amendment protection for political speech in general; another is the governmental responsibility for safeguarding the electoral process from corruption; and the third is the inseparable connection between expenditures of money and any political expression by a corporation.

Political speech has been given the highest degree of first amendment protection.[24] The basic assumption of the constitutional free speech guarantee is that unfettered discussion will allow truth to prevail through the control provided by the free exercise of the listener's reason, rather than by state regulation.[25] The first amendment, as applied to the states through the fourteenth, safeguards a free "marketplace of ideas" as a foundation

21. 425 U.S. 748 (1976).

22. *Id.* at 763-65.

23. *Cf.* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (corporation's real estate for sale signs protected as commercial speech).

24. Thornhill v. Alabama, 310 U.S. 88 (1940); *see* Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-66.

25. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).

for self-government.[26] Any governmental restrictions of the content of political speech are thus inherently suspect.[27]

The state, however, has a strong competing interest in protecting the electoral process from corruption,[28] which complicates the question of whether corporate political speech is protected. When the Supreme Court was first recognizing corporate rights under the fourteenth amendment, Congress and the states were also enacting the first laws prohibiting the use of corporate funds to influence elections,[29] initially by prohibiting corporate contributions to candidates. Variations and expanded versions of such laws still exist in most state and federal election codes. Designed to protect the electoral process from corruption, such statutes generally have a common focus: to prevent money from replacing votes as the medium of exchange of self-government.[30] To discourage the interference that large sums of money in corporate and union treasuries may have with the electoral process, various federal and state statutes prohibit corporate and union contributions to candidates,[31] deny corporations tax deductions[32] or

26. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

27. City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).

28. The electoral process should be distinguished from the political process. The electoral process involves the citizen's exercise of his right to vote; its premise is that all voters' expressions are to be equal at the ballot box. *See* Baker v. Carr, 369 U.S. 186 (1962); Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 347-54 (1977); Comment, *Campaign Finance Acts—An Attempted Balance Between Public Interests and Individual Freedoms*, 24 U. KAN. L. REV. 345, 347-51 (1976). Once elected, governing representatives' primary duty is to represent those voters who elected them, not merely the donors whose money financed the campaign. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964). In order to preserve this trust between a voter and his elected representative, the state and federal governments may have a constitutional duty to regulate elections and prohibit corruption. *See* U.S. CONST. art. I, § 4 & art. IV, § 4. In a protected speech analysis, this state interest may assume a constitutional dimension equivalent to first amendment interests. As a further distinction, in the electoral process only citizens have a right to participate as voters; corporations have no such right. *See* U.S. CONST. amend. XV.

29. Corporations were first barred from federal election contributions in 1907, to end the corrupting effect of "political debts." Act of Jan. 26, 1907, Pub. L. No. 59-36, 34 Stat. 864. Re-enacted in 1925 as the Federal Corrupt Practices Act, the law extended its criminal penalties to contribution recipients as well. Pub. L. No. 68-506, ch. 368, § 313, 43 Stat. 1070 (1925) (current version at 2 U.S.C. § 441b (1976)).

30. *Hearings before House Comm. on Elections*, 59th Cong., 1st Sess. 12 (1894) (statement of Elihu Root), *quoted in* United States v. UAW-CIO, 352 U.S. 567, 571 (1957).

31. 2 U.S.C. § 441b (1976); *see* United States v. Boyle, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973) and United States v. United States Brewers Ass'n, 239 F. 163 (W.D. Pa. 1916) (in both cases statute's constitutionality upheld). Similar contribution restrictions apply to public utility holding companies. 15 U.S.C. § 79(h) (1976). *See also* Egan v. United States, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943). For a survey of state statutes limiting corporate contributions, see H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 173-77 (1976); Garrett, *Corporate Contributions for Political Purposes*, 14 BUS. LAW. 365, 368-69 (1959); King, *Corporate Political Spending and the First Amendment*, 23 U. PITT. L. REV. 847 (1962); Annot., 125 A.L.R. 1029 (1940). *See, e.g.*, TEX. ELECTION CODE ANN. art. 14.06 (Vernon Supp. 1978-79); O'Connor, *Campaign Financing in Texas*, 40 TEX. B.J. 1029, 1031-32 (1977).

32. I.R.C. § 162(e). *Compare* Cammarano v. United States, 358 U.S. 498, 513 (1959) (upholding IRS regulation denying tax deduction for corporate expenditure to influence initiative election), *with* Speiser v. Randall, 357 U.S. 513, 526 (1958) (invalidating law condi-

exemptions[33] for political expenses, and require detailed financial reporting[34] to facilitate the discovery of possible improper payments.

Another method of controlling this potential interference of money is not only to forbid *contributions* but also to prohibit any political *expenditure* by a corporation or union. Political expenditures by corporations have been prohibited in both federal[35] and state[36] elections. Such laws, however, may totally silence corporations, since a corporation lacks a natural voice and may therefore effectively communicate its political views only through activities involving some expenditure of corporate funds.[37] Thus, a determination of whether corporate political expenditures are constitutionally protected is an essential aspect of a determination of the constitutional status of corporate political speech in general. Although the constitutional validity of the federal statute prohibiting corporate or union expenditures has been repeatedly challenged, the Court has avoided deciding this question by narrowly construing the statute to exclude from prohibition such expenditures as in-house political publications and use of funds created by voluntary member or shareholder contributions.[38]

C. *Money as Speech*

The potential conflict between the series of Court decisions identifying protected corporate expressions and the state and federal statutes restricting corporate political expenditures was brought sharply into focus by the Supreme Court in 1976. In *Buckley v. Valeo* the Court held that both po-

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tioning veteran's tax exemption upon loyalty oath). *See* Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U.L. REV. 1033, 1066-74 (1965).

33. I.R.C. § 501(c)(3), (h).

34. 2 U.S.C. §§ 431-439 (1976) (election reporting); 2 U.S.C. §§ 261-270 (1976) (lobbying reporting); *see* Buckley v. Valeo, 424 U.S. 1, 66-82 (1976) (contribution and expenditure disclosures upheld); United States v. Harriss, 347 U.S. 612, 625-26 (1954) (Federal Lobbying Act's disclosure requirements upheld); Burroughs v. United States, 290 U.S. 534, 544-45 (1934) (record requirement for interstate political committee upheld). *But see* Thomas v. Collins, 323 U.S. 516, 532 (1945) (Texas statute requiring registration to solicit union memberships invalid). *See generally* H. ALEXANDER, *supra* note 31, at 170-76.

35. A prohibition of corporate and union expenditures in federal candidate elections was first adopted in 1947. Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136 (current version at 2 U.S.C. § 441b (1976)). The legislative history of the statute indicates that the congressional purpose was to end the "undue influence" exerted by labor union expenditures in past elections. *See* S. REP. No. 101, 79th Cong., 1st Sess. 20-24 (1945); H.R. REP. No. 2739, 79th Cong., 2d Sess. 27-51 (1947); H.R. REP. No. 2093, 78th Cong., 2d Sess. 3-12 (1945). For a summary of the legislative history, see United States v. UAW-CIO, 352 U.S. 567, 579-84 (1957).

36. *See, e.g.*, MASS. LAWS ANN. ch. 55, § 8 (Michie/Law. Co-op 1978), set out in note 2 *supra*.

37. Laws prohibiting corporate expenditures to influence elections not only forbid direct political expenditures of corporate funds, such as advertising, leaflets, or signs, but also usually penalize such "in kind" diversion of corporate resources as use of manpower, office space, supplies, or property to influence an election.

38. Pipefitters Local 562 v. United States, 407 U.S. 385 (1972); United States v. CIO, 335 U.S. 106 (1948). In United States v. UAW-CIO, 352 U.S. 567 (1957), the Court held that the alleged funding of political broadcasts, if proved, might constitute violations of the statute, but it remanded the case for a trial to develop the facts, and thus avoided deciding the statute's constitutionality. On remand, however, the defendants were acquitted by a jury after a trial on the merits. *See* Lambert, *supra* note 32, at 1047 n.69.

litical contributions and independent political expenditures made by individuals are forms of expression protected under the first amendment.[39] The Court upheld the $1,000 annual ceiling on individual contributions to a candidate set by the Federal Election Campaign Act Amendments of 1974,[40] but invalidated any limitations upon independent expenditures in general made by either individuals or candidates.[41]

In deciding that these uses of money were forms of expression to be protected as free speech, the Court did not expressly rule whether the political payments constituted either "pure speech," symbolic conduct with a protected communicative element, or simply mere conduct. The level of judicial scrutiny to be applied to sustain a government restriction upon such speech or conduct depends on how the behavior is categorized. An infringement of pure speech can be upheld only when the most stringent strict scrutiny test is satisfied.[42] By contrast, state regulations of conduct are sustained if they meet the minimal test of a rational relation to a legitimate state purpose.[43] When nonverbal conduct has a communicative element, however, it may be considered "symbolic speech" that is protected by the first amendment.[44] To determine whether a state regulation of such conduct with a communicative element can be sustained, the four-part test established in *United States v. O'Brien* must be satisfied:

> A government regulation is sufficiently justified if it is within 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.[45]

The *Buckley* Court avoided an express characterization of the contested political expenditures as either pure speech or as conduct with a communicative element by its determination that even if political gifts and expenditures were considered arguendo to be conduct, the statutory pending limits would fail the third part of the less stringent *O'Brien* test. Because the

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39. 424 U.S. 1 (1976).

40. *Id.* at 24-38. The Federal Election Campaign Act re-enacted with some changes the former Federal Corrupt Practices Act prohibitions of corporate and union contributions and expenditures; it is codified in 2 U.S.C. § 441b (1976). This section was not challenged by the *Buckley* plaintiffs.

41. 424 U.S. at 39-51. For a discussion of *Buckley v. Valeo*, see Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 356-75 (1977), and Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1001-21 (1976).

42. The "strict scrutiny" test places the burden upon the state to demonstrate that the state has a "compelling interest" in its regulation of speech and that the statute is narrowly drawn to avoid unnecessary abridgement. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960).

43. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

44. First amendment protection is given to conduct when it is an inextricable part of an expressive or associational activity. Spence v. Washington, 418 U.S. 405 (1974) (display of American flag painted with peace symbol); Eisenstadt v. Baird, 405 U.S. 438 (1972) (Douglas, J., concurring) (distribution of birth control device); Thornhill v. Alabama, 310 U.S. 88 (1940) (peaceful picketing); Stromberg v. California, 283 U.S. 359 (1931) (display of red flag).

45. United States v. O'Brien, 391 U.S. 367, 377 (1968).

purpose of the statute's expenditure prohibition was to limit the amount of money spent in political campaigns, and thereby the number of political messages such money would finance, the statute was directed precisely at the "suppression of free expression."[46] With this reasoning the Court decided that both political expenditures and contributions constituted protected speech under the first amendment.[47]

Although both contributions and expenditures were classified as protected expressions by the introductory rationale of the per curiam opinion, the opinion also revealed the differing first amendment interests present in the two types of political payments. The Court's detailed discussion of contributions indicated that the primary first amendment interest infringed by the contribution ceilings was the individual's right to freedom of political association, with passing notice of the free speech element of contributions. These contribution limitations were upheld, however, because the infringement of associational rights was an unavoidable result of a narrowly drawn means of accomplishing the compelling state interest of preventing actual or apparent electoral corruption.[48]

In contrast to the valid contribution ceilings, the individual expenditure ceilings were invalid "limitations on core First Amendment rights of political expression,"[49] imposing "more severe restrictions on protected freedoms."[50] Such a severe infringement of free speech was justified neither by the government interest in preventing actual or apparent electoral corruption nor by a desire to equalize "the relative ability of individuals and groups to influence the outcome of elections."[51] Any government attempt to equalize voices in the political process by restricting the more powerful was held inconsistent with the first amendment's guarantee of "unfettered interchange of [political] ideas."[52]

By thus establishing that political expenditures by individuals are protected speech under the first amendment, *Buckley v. Valeo* provided the basis for a first amendment challenge to statutory prohibitions of political expenditures by corporations. The decision established that political expenditures are to be analyzed as speech rather than conduct, applied a strict scrutiny analysis to statutory restrictions on expenditures, and determined that preventing the undue influence of those with greater wealth or power did not constitute a valid state interest that would justify first amendment infringement.

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46. 424 U.S. at 17. *But see* Wright, *supra* note 41, at 1005-10.

47. 424 U.S. at 14-23. The Court did not further distinguish whether the expenditure and contribution ceilings operated as direct or indirect infringements upon speech and applied the two-part exacting scrutiny test to both, which requires a showing by the government of a "sufficiently important interest" and use of "means closely drawn to avoid unnecessary abridgment." 424 U.S. at 25, 44-48.

48. 424 U.S. at 29-30.

49. *Id.* at 44-45.

50. *Id.* at 23.

51. *Id.* at 48.

52. *Id.* at 49. The Court implicitly rejected as a valid governmental interest the prevention of "undue influence" by particular individuals or groups, the rationale used in 1947 to justify the prohibition of corporate political expenditures. *See* note 35 *supra*.

II. FIRST NATIONAL BANK V. BELLOTTI

The questions presented to the Court in *First National Bank v. Bellotti* were not only whether corporations have a constitutional right to engage in political speech, but also whether a state may limit corporate political expression to issues "materially affecting" the corporation's business. The Massachusetts court had framed the issue as whether and to what extent corporations have first amendment rights. Justice Powell, however, joined by four other Justices,[53] defined the issue as whether the statute "abridges expression that the First Amendment was meant to protect."[54] This focus upon the expression instead of the speaker relieved the Court of the difficult task of defining the extent of the corporation's constitutional rights and allowed it to proceed with a traditional first amendment analysis of the contested statute and its effect upon the proposed advertisement. This approach was consistent with prior decisions interpreting the protected status of corporate expressions under the first and fourteenth amendments.[55] The analysis was thereby limited first to an examination of whether the proposed expenditure was protected speech, and next to an identification of the nature of the state abridgement. Finally, as the test of "exacting scrutiny" was invoked, the Court considered whether the asserted state interests were compelling, and, if so, whether the statutory restriction was narrowly drawn to avoid unnecessary abridgement of free speech.[56]

Relying on *Buckley v. Valeo*,[57] Justice Powell assumed without discussion that the proposed political expenditures were speech, leaving only the question of whether the speech was protected. The content of the proposed advertisment opposing the tax issue fell clearly within the zone of protection afforded by the first amendment, because discussion of governmental affairs lies "at the heart of the First Amendment's protection,"[58] and also because the public has a protected interest in receiving diverse information about political issues.[59]

Justice Powell rejected the argument that in spite of the protected nature of the expression's content, the corporate identity of the advertisement's sponsor could nevertheless deprive it of free speech protection. The Massachusetts court had limited a corporation's free speech protection to those issues "materially affecting" its business, property, or assets, on the grounds that free speech rights under the fourteenth amendment could be

53. Justices Stewart, Blackmun, and Stevens; Chief Justice Burger submitted a separate concurring opinion.

54. 98 S. Ct. at 1415, 55 L. Ed. 2d at 717.

55. *See* notes 17-23 *supra*.

56. *See* notes 42 & 47 *supra*.

57. "It is too late to suggest 'that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.' " 98 S. Ct. at 1421, n.23, 55 L. Ed. 2d at 724 n.23.

58. *Id.* at 1415-16, 55 L. Ed. 2d at 717-18.

59. The first amendment protects not only the individual's right to self-expression but also society's interest in a free flow of information. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-15 (1966); text accompanying notes 21-23 *supra*.

derived only from a corporation's property interests. Justice Powell refuted the view of the Massachusetts court by pointing out that freedom of the press and freedom of speech as applied to corporate expressions in past decisions[60] clearly focused on "liberty" rights, not "property" rights.[61] As further support to the view that the corporate identity of the advertisement's sponsor should not deprive it of protected status, Justice Powell cited the unquestioned protected status afforded to the political expressions of news media corporations, such as newspapers. Justice Powell could identify no rational basis for denying similar protected status to other business corporations.[62] In a concurring opinion, Chief Justice Burger reinforced this argument by examining the historical origins of the first amendment; he could find no indication that the framers of the amendment intended persons or organizations engaged in "institutional press" activities to have greater protection than others.[63]

Justice Powell found that the Massachusetts statute would abridge this protected speech by imposing criminal penalties upon a corporation for spending its funds to influence referendum voters.[64] By conditioning the penalties both upon the corporate identity of the speaker and upon the content of the expression, the statute improperly required a speaker to justify its speech by showing sufficient property interests in the election issue.[65]

Because the statute abridged protected speech, Justice Powell invoked strict scrutiny, under which the statute could survive only upon a showing by the state of a "subordinating interest which is compelling."[66] Massachusetts contended that its statute was designed to sustain the active participation of the individual citizen in the electoral process by preventing actual or apparent electoral corruption and by restricting the potential un-

60. *See* notes 17-23 *supra*.

61. 98 S. Ct. at 1417-20, 55 L. Ed. 2d at 719-22. Even though the previous free speech and free press decisions involving corporations would have coincidentally satisfied Massachusetts' "materially affecting" test, Justice Powell refused to explain those decisions by imposing such a latter-day theory, especially since those decisions did not mention the corporation's property rights as a basis of decision.

62. A newspaper expends corporate funds internally when it prints an editorial advocating passage of a referendum. A nonmedia corporation, however, must either purchase printing or broadcast equipment, or engage an independent contractor to communicate its views to the public. *Id.* at 1418-19 & nn.17 & 18, 55 L. Ed. 2d at 720-21 & nn.17 & 18.

63. "[T]he First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms." *Id.* at 1429, 55 L. Ed. 2d at 734. Chief Justice Burger's concurring opinion also emphasized that no distinction had been identified to justify differentiating media from nonmedia corporations under the Massachusetts statute [the statute had been judicially construed to exclude editorial endorsements by newspaper corporations from its penalties]. Chief Justice Burger argued that when news sources were concentrated under central corporate ownership, this central editorial source might pose greater risks of electoral corruption than expenditures by nonmedia corporations, such as the advertisement at issue. Moreover, the Chief Justice also found no basis for distinguishing media from nonmedia corporations in respect to the state interest in protecting the rights of minority shareholders. *Id.* at 1426-27, 55 L. Ed. 2d at 730-31.

64. *Id.* at 1420, 55 L. Ed. 2d at 723.

65. *Id.*

66. 98 S. Ct. at 1421, 55 L. Ed. 2d at 724; *see* note 42 *supra*.

due influence of corporations. Additionally, the state asserted an interest in protecting the minority shareholders of the corporation from the diversion of their investment to support political issues they opposed.[67]

The Court first rejected the state's argument that prohibition of expenditures would lessen corruption: in a referendum involving no candidates, the danger of corruption is not present.[68] Rejecting the validity of the state's asserted interest in reducing the "undue influence" of corporations, Justice Powell echoed *Buckley v. Valeo*: "[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . ."[69] The risk of entrusting the responsibility of evaluating ideas to the people had been implicitly recognized and undertaken by framers of the first amendment. As had been implied by *Buckley*, the majority here explicitly rejected the "prevention of undue influence" as a permissible state interest under the first amendment, as applied to the states through the fourteenth.[70]

Finally, Justice Powell acknowledged that protection of minority shareholders is a valid state interest, but he did not determine whether the interest was compelling. Assuming arguendo that it was compelling, Justice Powell found that the statute was not narrowly drawn to accomplish the purpose of shareholder protection without unnecessary infringement of protected speech.[71] The statute was not sufficiently narrow, because it was both under- and over-inclusive. It was under-inclusive in that it prohibited neither political expenditures by a corporation for lobbying or for non-election public issues nor political expenditures by business organizations other than corporations, such as business trusts or labor unions, which might also have disagreeing minority members. It was over-inclusive by prohibiting corporate political speech even when shareholders gave unanimous approval.[72]

Having found no compelling state interest to justify the abridgement of protected speech, the majority held that the statute was unconstitutional. The decision was carefully confined to invalidate only the restriction upon corporate expenditures to influence referendum elections. Justice Powell

67. 98 S. Ct. at 1422, 55 L. Ed. 2d at 727-28.

68. In a referendum voters act as their own legislators in adopting or rejecting laws; there are no candidates to be corrupted by contributions.

69. 98 S. Ct. at 1423, 55 L. Ed. 2d at 727.

70. *Id.* at 1424, 55 L. Ed. 2d at 728.

71. Justice Powell found " 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking." *Id.* at 1426, 55 L. Ed. 2d at 730.

72. *Id.* at 1424-26, 55 L. Ed. 2d at 728-29. The Court found irrelevant to the protection of minority shareholders two past decisions in which the Court had held that the first amendment protected dissenting members of closed shop unions, created under state or federal law, from having their compulsory union dues used to support political causes they disapproved. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). Those decisions had required rebates to those dissenters of the proportion of their dues used for political purposes. By contrast, corporate shareholders had been denied an implied federal cause of action for illegal diversions of corporate funds to political causes. Cort v. Ash, 422 U.S. 66 (1975). In *Bellotti* the Court emphasized the absence of state action in the corporate setting and the voluntary, transferrable nature of an investment as important distinctions.

strongly implied that a different balancing of interests would be required to review the restrictions upon corporate political expenditures in candidate elections.[73]

Justice White, joined by Justices Brennan and Marshall, began his dissent by agreeing with the majority that corporate political expenditures were protected under the first and fourteenth amendments. He would nevertheless have upheld the Massachusetts statute because he identified a narrower scope of first amendment protection for corporations[74] and found that the corporate free speech rights here were no greater than the first amendment values inherent in the interests asserted by Massachusetts. The challenged statute protected first amendment interests of voters by preventing corporations from dominating the free marketplace of ideas with wealth amassed under "special advantages extended by the State" to the corporate form.[75] The statute further protected the freedom of speech of minority shareholders by preventing diversion of their investment to political causes they disapproved.[76] Because these state interests represented first amendment values at least as significant as those presented by the corporations, Justice White argued that the statute and the compelling state interests that it served should survive exacting scrutiny and criticized the majority for substituting its judgment for that of the Massachusetts legislature in determining the most effective method of safeguarding these first amendment interests.

Justice Rehnquist dissented on the grounds that as a creature of the state, a corporation was entitled to claim only those rights expressly granted by its charter and those "incidental to its very existence." Liberty to engage in political speech about matters not "materially affecting" the corporation's business, property, or assets was not incidental to its existence. Therefore, its right to make political expenditures was not protected by the fourteenth amendment.[77]

Essentially, *First National Bank v. Bellotti* establishes that state laws

73. 98 S. Ct. at 1422 n.26, 55 L. Ed. 2d at 725 n.26.

74. Business corporations are unable to assert the primary interest protected by the first amendment: "communication as a means of self-expression, self-realization and self-fulfillment." *Id.* at 1431, 55 L. Ed. 2d at 735-36.

75. Such advantages include limited liability, perpetual life, and accumulation of assets. *Id.* at 1433, 55 L. Ed. 2d at 738-39.

76. *Id.* at 1434-35, 55 L. Ed. 2d at 740-41. Justice White likened the dissenting shareholder to the dissenting members of state-created closed shop unions. *See* note 72 *supra*. He acknowledged the absence of state action in the corporate setting but gave little note to the voluntary and liquid nature of an investment when compared to a job.

77. " 'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence.' " 98 S. Ct. at 1440, 55 L. Ed. 2d at 747-48 (quoting Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819)). Justice Rehnquist based his reasoning on his view that the first amendment has limited application to the states. *See* Roth v. United States, 354 U.S. 476, 503-08 (1957) (Harlan, J., dissenting in part); Beauharnais v. Illinois, 343 U.S. 250, 287-95 (1952) (Jackson, J., dissenting). His argument implied that a corporation's claim to freedom of the press depends upon the grant of a state charter for that purpose. Such a limited theory of a corporation's right to freedom of the press suggests a licensing system, which the Court has long disapproved. *See* Chief Justice Burger's concurring opinion, 98 S.

prohibiting corporate expenditures to influence referendum elections may withstand first amendment challenge only if they are narrowly drawn and designed to protect minority shareholders. The Court left unanswered the broader question of whether either corporate contributions or expenditures in candidate elections are protected speech. The *Bellotti* opinion implies that statutes prohibiting corporate political contributions to candidates will probably survive the Court's exacting scrutiny analysis for two reasons. First, the state's interest in preventing the corruption inherent in large contributions already qualifies as a compelling interest.[78] Secondly, corporations have no claim to the freedom of political association, identified in *Buckley* as the primary first amendment interest present in contributions to candidates. By contrast, statutes prohibiting independent corporate expenditures for communications advocating the election or defeat of a particular candidate may not survive exacting scrutiny as applied in *Buckley* and *Bellotti*. A state's interest in preventing the undue influence of corporations, which provided the initial motivation behind statutes prohibiting corporate political expenditures, will no longer serve as a valid, much less a compelling, state interest when the statute infringes protected speech. Furthermore, the public's first amendment interest in receiving a "free flow of information" is equally present in an independent corporate expenditure for candidate advertisements as in those about a referendum issue. Finally, even should a state assert a sufficiently compelling interest, the Court will still be confronted with the difficult task of deciding whether there is a rational basis to deny free speech protection to candidate advertisements by nonmedia corporations in light of the undisputed protected status accorded the editorial endorsements of candidates by news media corporations such as newspapers.[79]

III. CONCLUSION

When the Supreme Court held in *Buckley v. Valeo* that individual political expenditures were protected speech, a challenge to laws prohibiting such expenditures by corporations was inevitable. Corporate rights to freedom of the press and freedom of speech in nonpolitical contexts had been well established by the Court. Although the decision was confined to invalidating a statute prohibiting expenditures made to influence a referendum election, *First National Bank v. Bellotti* establishes that free speech protection under the fourteenth amendment extends to corporate expenditures made in a political context as well. In an analysis focusing upon the protected status of the expression instead of the corporate identity of the speaker, Justice Powell's reasoning included three major principles: first, the public has a protected right, derived from the first and fourteenth

Ct. at 1429, 55 L. Ed. 2d at 733-34; Grosjean v. American Press Co., 297 U.S. 233, 244-51 (1936).

78. Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).

79. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Mills v. Alabama, 384 U.S. 214 (1966).