




1978

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Recommended Citation

Fox, Francis H. (1978) "Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending," *Kentucky Law Journal*: Vol. 67 : Iss. 1 , Article 5.
Available at: <https://uknowledge.uky.edu/klj/vol67/iss1/5>

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Corporate Political Speech: The Effect of *First National Bank of Boston v. Bellotti* Upon Statutory Limitations on Corporate Referendum Spending

BY FRANCIS H. FOX*

INTRODUCTION

The United States Supreme Court in *First National Bank v. Bellotti*¹ held that business corporations have a first amendment right to spend money to communicate views on referendum issues. By striking down a Massachusetts statute which forbade corporate attempts to influence the vote by either contributions to referendum committees or expenditures for direct advertising, the Supreme Court for the first time held that business corporations² have a constitutional right to engage in political speech.

Bellotti is the logical culmination of three strands of constitutional principle. First, it recognizes that the Constitution protects the right of the listener as much as it protects the right of the speaker.³ Second, it perceives that the first amendment's purposes are better served by allowing the untrammelled use of means of communication than by enacting legislation designed to foster equality of access to those means.⁴ Finally, it recog-

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¹ 98 S. Ct. 1407 (1978).

² As well as "media" corporations—those owning newspapers, etc. (the institutional press). The distinction is discussed *id.* at 1418-19.

³ *E.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

⁴ *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of other is wholly foreign to the First amendment. . . ."); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

nizes that commercial speech is entitled to first amendment protection.⁵ The five-to-four split among the Justices⁶ testifies to the different views and competing principles in this area of constitutional concern; future cases delineating the boundaries of corporate free speech are certain to arise.

This article will assess the impact of the *Bellotti* case on the area of the law most immediately affected: state regulation of corporate spending to influence the vote on referendum questions. Questions concerning *Bellotti's* impact upon prohibitions relating to spending in favor of a particular candidate will not directly be addressed.⁷

I. THE CASE

Massachusetts has regulated election spending by corporations since 1907. At first, corporations were prohibited from spending money for the benefit of candidates or political parties, or to influence the vote on any referendum question.⁸ A subsequent amendment allowed corporations to spend in order to influence the vote on any referendum question relating to a proposed "taking, purchasing or acquiring" of the corporation's "property, business or assets" and a later amendment allowed corporations to spend on any question "affecting" the corporate property, business or assets.⁹ In 1943 this standard was modified to allow such spending only if the question "materially" affected the corporate property, business, or assets.¹⁰

⁵ *E.g.*, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

⁶ Justice Powell wrote the opinion of the Court, in which Chief Justice Burger and Justices Stewart, Blackmun, and Stevens joined. Chief Justice Burger wrote a concurring opinion. Justices White, Brennan, and Marshall joined in one dissent and Justice Rehnquist filed a separate dissent.

⁷ See note 98 *infra* for a discussion of the resolution of the problem of corporate candidate campaign spending by the Federal Corrupt Practices Act.

⁸ 1907 Mass. Acts ch. 576, § 22; 1907 Mass. Acts ch. 581.

⁹ 1911 Mass. Acts ch. 422; 1938 Mass. Acts ch. 75.

¹⁰ 1943 Mass. Acts ch. 273 § 1. See *Lustwerk v. Lytron, Inc.*, 183 N.E.2d 871, 874 (Mass. 1962).

A. *The Statute at Work*

The provision of the Massachusetts Constitution that allows income taxes has always forbidden graduated rates.¹¹ In 1962 a referendum question proposed to amend the state constitution to allow the legislature to impose graduated income taxes.¹² In *Lustwerk v. Lytron, Inc.*,¹³ the Massachusetts Supreme Judicial Court ruled that corporations could spend money to oppose this referendum question. On a very sparse record, the court ruled that since the proposed amendment might result in graduated rates upon corporate income as well as upon individual income, a board of directors might reasonably conclude that it would materially affect the corporation. Corporate money flowed into the campaign and the proposed amendment was defeated.¹⁴

A similar referendum was defeated in 1966.¹⁵ In 1972 a referendum seeking the same constitutional amendment was again proposed. However, the legislature had amended the statutory prohibition against corporate spending so that no referendum concerning the taxation of individuals would be deemed

¹¹ MASS. CONST., amend. art.44.

¹² The proposed amendment provided:

Article _____. Full power and authority are hereby given and granted to the general court in the alternative to the exercise of the power and authority to impose and levy a tax on income in the manner provided in Article XLIV of the amendments to the Constitution of the Commonwealth, to impose and levy a tax on incomes at rates which are proportional or graduated according to the amount of income received, irrespective of the source from which it may be derived, and to grant reasonable exemptions, deductions and abatements. Any property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessment rates and taxes as at present authorized by the Constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

Lustwerk v. Lytron, Inc., 183 N.E.2d 871, 872 n.1 (Mass. 1962).

¹³ 183 N.E.2d 871 (Mass. 1962).

¹⁴ The history of the corporate spending statute and the Massachusetts legislature's attempts to amend the constitution to allow graduated income taxes is described in *Bellotti*, 98 S. Ct. at 1412 n.3, app. at 24-26; Brief for Appellant at 20 n.5. See *Lustwerk v. Lytron, Inc.*, 183 N.E.2d 871, 871 (Mass. 1962); *First Nat'l Bank v. Attorney Gen.*, 290 N.E.2d 526 (Mass. 1972); *First Nat'l Bank v. Attorney Gen.*, 359 N.E.2d 1262 (Mass. 1977) (this was the *Bellotti* case at the state level).

¹⁵ Brief for Appellant at 20 n.5, *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407 (1978).

materially to affect a corporation.¹⁶ In a challenge to that expansion of the statutory prohibition, the Massachusetts Supreme Judicial Court allowed corporate money to be spent to oppose the 1972 income tax referendum.¹⁷ Three justices ruled that the 1972 referendum pertained to both corporate and individual taxation and that the statutory amendment should prohibit corporate spending only on referenda that *solely* pertained to individual taxation.¹⁸ Two of the justices thought that the statutory amendment did apply to prohibit corporations from spending money on the 1972 referendum question but that such a prohibition violated the first amendment rights of corporations.¹⁹ As a result of that decision, corporate money was spent in the 1972 campaign and the referendum question was defeated by about a two-to-one margin.²⁰ In this historical context the Massachusetts legislature passed the law that was struck down by the Supreme Court in *Bellotti*.

The legislature, for the fourth time since 1962, certified a graduated tax referendum question for the ballot.²¹ The legislature took steps to assure, once and for all, that corporate money remained out of the campaign. The statutory prohibition against corporate spending was amended to provide that no ballot question solely concerning individual taxation would be deemed materially to affect a corporation.²² The graduated tax

¹⁶ 1972 Mass. Acts ch. 458. See *First Nat'l Bank v. Attorney Gen.*, 290 N.E.2d 526, 529 n.3.

¹⁷ *First Nat'l Bank v. Attorney Gen.*, 290 N.E.2d 526. This suit was brought by four corporations, three of which were among the five which subsequently brought the *Bellotti* case.

¹⁸ *Id.* at 541.

¹⁹ *Id.* at 539.

²⁰ *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407 app. at 25 (1978).

²¹ The process for placing a so-called legislative amendment to the Massachusetts Constitution before the voters is cumbersome. The proposed amendment must be passed by the House and the Senate, in joint session, in each of two separate legislative sessions, before the question will go on the ballot. MASS. CONST., amend. art. 48. Each of the four times the legislature passed the proposed amendments by top-heavy majorities, but each time the people voted them down by substantial margins. See Brief for Appellant at 20 n.5, *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407 (1978), and sources cited in note 14 *supra*.

²² 1973 Mass. Acts ch. 348. The statute as it existed in 1976 read, in pertinent part: [N]o business 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

referendum question certified for the 1976 election was one which solely related to individual taxes.²³ The penalties for violation of the prohibition were increased to include corporate fines of up to \$50,000 and jail sentences of up to one year for any individual assisting a corporate violation.²⁴

Five corporate plaintiffs challenged the statute in a declaratory judgment action brought against the Massachusetts Attorney General. The plaintiffs' management believed that the proposed tax, although imposed only upon individuals, would adversely affect the business climate in the state and thus have an impact upon the plaintiff corporations. Plaintiffs believed that the tax would make it more difficult to attract and keep executive talent in the state, that it would reduce disposable income, and that it would discourage industries from remaining in or locating in Massachusetts.²⁵ The Attorney General

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.* No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both.

MASS. ANN. LAWS ch. 55, § 8 (Michie/Law Co-op 1978) (emphasis added). The Supreme Court majority opinion in *Bellotti* did not expressly pass on the validity of the legislative judgment that a personal income tax issue could not have a material effect on corporations. 98 S. Ct. 1407, 1414 n.6. (1978). Justice White, in dissent, pointed out that the legislature's decision "is not disapproved by this Court today." *Id.* at 1430.

²³ This proposed amendment differed from the earlier versions, *see* note 12 *supra*, in granting power "to levy a tax on personal incomes at rates which are graduated." The complete text is set forth in *First Nat'l Bank v. Attorney Gen.*, 359 N.E.2d 1262, 1265 n.3.

²⁴ *See* statute quoted in note 22 *supra*.

²⁵ A detailed statement of the relationship of each plaintiff to the state's economy and the beliefs of its management is found in *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407 app. at 15-24 (1978).

agreed that plaintiffs' management believed that the proposed tax would materially affect the corporations but denied that it would in fact do so.²⁶

Plaintiffs attacked the statute as a deprivation of first amendment rights, as a denial of equal protection, as being unduly vague, and as improperly utilizing an irrebuttable presumption in a criminal case (the presumption that a ballot question solely relating to individual taxes could not materially affect a corporation). The Supreme Judicial Court of Massachusetts unanimously rejected each of these arguments, holding the statute to be valid and enforceable.²⁷

With respect to the first amendment claim, the court held that, although corporations had first amendment rights, those rights could be limited to speech that was material to the corporation's business or assets.²⁸ Since the statute in question allowed corporate speech as to matters which would materially affect the corporation, the statute exactly matched the constitutional requirements. The statement of agreed facts had not contained a finding that the referendum question would in fact materially affect plaintiffs; thus plaintiffs had failed to prove that the statute was unconstitutional.²⁹

B. *The Supreme Court Opinion*

On appeal, the United States Supreme Court reversed. The majority opinion articulated a broad and sweeping declaration of the right of the public to hear political communications from all sources. The nature or identity of the speaker was

²⁶ 98 S. Ct. at 1412-13, 1413 n.4. See also, *First Nat'l Bank v. Attorney Gen.*, 359 N.E.2d 1262, 1266 (Mass. 1977).

²⁷ 359 N.E.2d 1262 (Mass. 1977). The judgment of the court without opinion was entered prior to the election, on September 28, 1976. The opinion was filed in February 1977.

²⁸ *Id.* at 1270.

²⁹ *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407, 1413-14 (1978). Plaintiffs had not sought an actual trial on the merits wherein they might attempt to prove by expert testimony that the referendum question would in fact materially affect corporations. Plaintiffs argued that to allow speech only after forcing the speaker to establish the truth of his contentions to the satisfaction of a jury would impose an unconstitutional prior restraint upon first amendment activity. Thus, they did not seek to show that they did not come within the statute's restrictions, but attempted to show it was void on its face.

of little moment;³⁰ the speech was protected under the Constitution.

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. 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.³¹

The majority opinion could find no support in precedent or logic for the proposition that corporations, as creatures of the state, could be limited by the state in their ability to communicate.³² Neither could it find any basis for distinguishing between media corporations and other corporations as far as the constitutional right to communicate is concerned.³³

Having found that the Massachusetts statute directly impinged upon protected speech and having found no basis for excluding corporations from the protection that should be afforded the speech, the Court examined the statute under the "strict scrutiny" standard.³⁴ The statute's possible purpose of preserving the electoral process from the undue influence of wealthy interests was found to be unsound³⁵ and, in any event,

³⁰ See also *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). *Buckley* had already made clear that restrictions on the amount of money that can be spent upon political communication were direct restrictions upon communication itself. The Massachusetts court itself had emphatically recognized this in an earlier case, stating that groups need money to communicate political views "and if all use of money were to be denied them the result would be to abridge even to the vanishing point any effective freedom of speech, liberty of the press, and right of peaceable assembly." *Bowe v. Secretary of the Commonwealth*, 69 N.E.2d 115, 130 (Mass. 1946).

³¹ 98 S. Ct. at 1416.

³² *Id.* at 1417 n.14.

³³ *Id.* at 1417-20. As appellants had argued in their brief, the views of the largest bank in New England on the question of whether or not a particular tax might discourage employers from locating in Massachusetts might be more interesting to the voter than the views of *Sports Illustrated* magazine on this same subject, although *Sports Illustrated* is owned by a "media corporation," which a bank is decidedly not. The Court rejected appellees' attempt to draw a distinction between the "institutional press" and other corporations.

³⁴ *Id.* at 1421. See generally *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Shelton v. Tucker*, 364 U.S. 479 (1960).

³⁵ The Court stated that the possibility of corrupting candidates is not present in

not supported by the record.³⁶ The purpose of protecting the interests of shareholders who might not want to hear their corporation take a political view was, similarly, treated with skepticism³⁷ and, even if valid, seen as not achieved by a statute which was both underinclusive and overinclusive.³⁸ The referendum prohibitions were held to be void on their face.³⁹

Chief Justice Burger's concurring opinion pointed out the many problems that would accrue were the Court to differentiate between media corporations and other kinds of business corporations with respect to the first amendment. He strongly rejected the notion that the "Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others."⁴⁰ His opinion⁴¹ explores fascinating constitutional issues which would have arisen had the Court ruled against the plaintiffs in the manner suggested by the White dissent.⁴²

a referendum campaign. The possibility that the electorate might be overwhelmed by the arguments made by corporate interests was deemed a risk required by the Constitution: "But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment." 98 S. Ct. 1407, 1423-24 n.30.

³⁶ Corporations had spent substantial sums in earlier referendum campaigns, see note 101 *infra*, but had not dominated the scene. 98 S. Ct. at 1423. In the 1976 campaign no corporate money had been spent. *Id.* at 1423 n.28.

³⁷ The majority opinion questions why "the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management. . . ." *Id.* at 1425 n.34.

³⁸ *Id.* at 1424-26.

³⁹ *Id.* at 1426.

⁴⁰ "Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination." 98 S. Ct. at 1429. See also Burger's opinion a few days after *Bellotti* in *Landmark Communications, Inc. v. Virginia*, 98 S. Ct. 1535 (1978) (upholding a press claim).

But see Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1971), and Justice Stewart's dissents in *Brazburg v. Hayes*, 408 U.S. 665, 725 (1972) and *Zurcher v. Stanford Daily*, 98 S. Ct. 1970, 1984 (1978).

⁴¹ Chief Justice Burger also joined in the majority opinion. 98 S. Ct. at 1426.

⁴² One controversial aspect of Burger's concurring opinion was his suggestion that "media conglomerates" could be more dangerous to the electoral process than non-media corporations who are "not regularly concerned with shaping popular opinion on public issues," in that it might be easier for the media corporations to dominate an election. *Id.* at 1426-27.

Justices White, Brennan, Marshall, and Rehnquist dissented.⁴³ Justices Brennan and Marshall joined in a dissent authored by Justice White⁴⁴ which disagreed with almost every aspect of the majority opinion. Justice White believed that the Massachusetts statute advanced first amendment interests, rather than curtailed them, and thus did not need to survive strict scrutiny.⁴⁵ He expressed confidence, however, that the statute could "survive even the most exacting scrutiny."⁴⁶ Justice White found that the Massachusetts statute served essentially the same purposes outlined in Justice Powell's opinion. He felt, however, that these purposes were very important and he believed that the statute properly and rationally served them.⁴⁷ Justice White went further and expressed the view that corporate communications, since they do not represent a manifestation of individual freedom or choice, are entitled to less first amendment protection than is speech which embodies individual self-expression.⁴⁸ Restricting corporate speech would not significantly diminish any particular expression of views because individuals would remain free to communicate all viewpoints.⁴⁹ The disagreement between the majority and Justice White's dissent is, in a word, total.⁵⁰

Justice Rehnquist's separate dissent stressed the fact that corporations are artificial creatures of the state and that, although the state could not deprive corporations of property without due process, it could limit corporate speech to topics material to that property.⁵¹

⁴³ 98 S. Ct. at 1430-43.

⁴⁴ *Id.* at 1430.

⁴⁵ *Id.* at 1434-39.

⁴⁶ *Id.* at 1430.

⁴⁷ *Id.* at 1430-39.

⁴⁸ *Id.* at 1432.

⁴⁹ *Id.*

⁵⁰ Justice White's opinion recognized that newspapers and "other forms of literature" could not be silenced merely because they were produced by corporations, but he indicated that media corporations should not be free from electoral contribution or expenditure limitations. 98 S. Ct. at 1432 n.8. But a prohibition upon direct or indirect expenditures, such as MASS. ANN. LAWS ch. 55, § 8 (Michie/Law. Co-op 1978), would certainly include the substantial expense of publishing views in an editorial page of a corporate owned newspaper. Justice White does not explain how he would exempt such expenditures from the statute. Certainly a statute which would forbid a newspaper from taking out a political advertisement in another paper but not forbid it from publishing the same message in its own pages does not have much to recommend it.

⁵¹ 98 S. Ct. at 1442-43.

II. THE EFFECT OF BELLOTTI UPON STATE REGULATION OF CORPORATE REFERENDUM SPENDING

A. *The Extent of Statutory Regulation*

At the time of the *Bellotti* argument, the parties had been able to find thirty-one state statutes which purported to restrict electoral campaign spending in some way.⁵² Some statutes did not cover referendum spending;⁵³ some had broad language, prohibiting use of corporate funds for "political" purposes, which had never been construed in the face of a constitutional attack;⁵⁴ others had similar language which had been judicially narrowed;⁵⁵ one had corporate prohibitions which had been ruled unconstitutional.⁵⁶ About ten states had statutes that applied special restrictions to corporate spending with language that might be broad enough to cover referendum, as well as candidate, campaigns.⁵⁷ Some of these statutes

⁵² The appellee referred to these statutes in Brief for Appellee at 32 n.19, *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407 (1978). Appellants briefly described the text of each in Reply Brief for Appellant at 9-10 & n.6, *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407 (1978).

⁵³ *E.g.*, DEL. CODE ANN. tit. 15. § 8004 (a) (Supp. 1977).

⁵⁴ *E.g.*, MINN. STAT. ANN. § 210A.34 (West Supp. 1977), prohibiting corporate contributions "for any political purpose whatsoever."

⁵⁵ N.Y. ELEC. LAW § 14-116 (McKinney 1977) prohibited corporate contributions "for any political purpose whatever." This language had been construed as not applying to ballot questions in order to avoid constitutional questions. *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974). Similarly, the Ohio statute, OHIO REV. CODE ANN. § 3599.03 (Page 1972), prohibited the use of corporate funds for any "partisan political purpose," but had been held not to apply to "the adoption of a constitutional amendment or the passage of a bond issue or of a tax levy. . . ." *Corrigan v. Cleveland-Cliffs Iron Co.*, 157 N.E.2d 331, 334 (Ohio 1959).

⁵⁶ MONT. REV. CODES ANN. § 23-4744 (Supp. 1977) prohibited corporate contributions and expenditures on ballot questions and had been ruled unconstitutional in *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976). *See also* *Pacific Gas & Elec. Co. v. City of Berkeley*, 131 Cal. Rptr. 350 (Ct. App. 1976) (Berkeley Election Reform Act unconstitutional).

⁵⁷ IOWA CODE ANN. § 56.29 (West Supp. 1978-79) prohibits corporate contributions "for the purpose of influencing the vote of any elector."

KY. REV. STAT. § 121.035(1) (Supp. 1978) prohibits corporations from furnishing money or anything of value to any "political or quasi-political organization . . . to be used by such organization for any purpose whatever." The validity of the Kentucky statute is discussed in Comment, *The Constitutionality of Kentucky's Prohibition of Corporate Campaign Contributions: A First Amendment Analysis* (July 21, 1978) (unpublished paper on file in Kentucky Law Journal office).

N.H. REV. STAT. ANN § 70:2(I), (III) (1970) prohibits contributions by corpora-

applied to unions and other organizations.⁵⁸ The *Bellotti* case, unless unexpectedly narrowed by some future Supreme Court decision, will make it very difficult to impose discriminatory restrictions on corporate referendum spending. With the use of referendum questions becoming more common, however, it is probable that states will attempt some sort of regulation in this area.⁵⁹

B. *Scope of the Opinion*

Predicting how Supreme Court decisions in new areas will be construed in the future is risky business, especially when the decision is five to four. *Bellotti* has cautionary language pointing out that the record failed to support the claimed justifications for regulation of corporate referendum spending.⁶⁰ Per-

tions, partnerships, and labor unions for the purpose of promoting the success or defeat of ballot questions or "measures."

N.D. CENT. CODE §16-20-08 (Supp. 1977) prohibits corporate contributions and expenditures for any political purpose.

S.D. COMPILED LAWS ANN. § 12-25-2 (Supp. 1977) prohibits corporate contributions to "any candidate, committee or political party."

TENN. CODE ANN. § 2-1932 (Supp. 1977) prohibits corporate contributions and expenditures for the purpose of "aiding in the success or defeat of any proposition submitted to a vote of the people."

TEX. ELEC. CODE ANN. art. 14.06 (Vernon Supp. 1978) prohibits corporations and labor unions from making contributions and expenditures for the purpose of "aiding or defeating the approval" of ballot questions, but it allows separate segregated funds.

W. VA. CODE § 3-8-8 (Supp. 1978) prohibits corporate contributions "for the payment of any primary or other election expenses whatever" but allows separate segregated funds.

WIS. STAT. ANN. § 11.38(1)(a)(1) (West Supp. 1978-79) prohibits corporate contributions and disbursements to promote or defeat referenda but allows separate segregated funds.

WYO. STAT. § 22-25-102 (1977) prohibits corporations, partnerships, trade unions and other groups from contributing funds or election assistance to promote the success or defeat of any ballot question.

See notes 54 *supra* and 58 *infra*, for similar statutes from other jurisdictions.

⁵⁸ Compare N.C. GEN. STAT. § 163-278.19 (1976) (applying to corporations and labor unions) with OKLA. STAT. ANN. tit. 26 § 15-110 (West Supp. 1976) (prohibiting only corporate contributions).

⁵⁹ There are no federal referenda and there are no federal statutes purporting to restrict corporate spending as to state referenda.

⁶⁰ 98 S. Ct. at 1423. The majority opinion noted the lack of "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes." *Id.* The Court also noted that the "effect upon the speakers' business interests" of proposed speech might be "relevant or important in a different context," *id.* at 1420 n.20, even though it reversed a lower court decision which had held that corporate speech could be forbidden that did not materially affect the corporation.

haps a future case might take advantage of this *Bellotti* caveat. An analysis of the likely sweep of the case should begin, however, with two obvious points.

First, it is of some interest that the Court decided the case on the merits at all. The Supreme Court had on four previous occasions declined to rule on the constitutionality of the Federal Corrupt Practices Act, which curbs corporate and union spending on federal elections.⁶¹ On each of these occasions, the Court had adopted a view of the statute or of the procedural posture of the case which postponed a consideration of the first amendment rights of unions and corporations. Such reluctance to decide the merits of this constitutional issue might have impelled the Court to dismiss appellants' appeal in *Bellotti* for a similar reason, in this case, mootness.

The judgment of the Massachusetts court (without opinion) was entered September 28, 1976, a few weeks before the November 2 election. Efforts to obtain a stay or injunction against the statute's enforcement were unavailing. The opinion of the Massachusetts court was not handed down until February 1, 1977.⁶² On April 18, 1977, more than five months after the election, the Supreme Court postponed a determination of jurisdiction, instructing the parties to brief and argue the question of mootness as well as the merits.⁶³ With the case scheduled to be heard about one full year after the election, the Massachusetts Attorney General vigorously contended that the case was moot. A strong possibility existed that the Court would once again avoid a determination on the constitutional merits.⁶⁴ The Court held, however, that the facts brought the case within the "capable of repetition yet evading review" ex-

⁶¹ This statute, now appearing in 2 U.S.C. § 441b (1976) has been before the Court in *Cort v. Ash*, 422 U.S. 66 (1975); *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972); *United States v. UAW*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1948).

⁶² *First Nat'l Bank v. Attorney Gen.*, 359 N.E.2d 1262 (Mass. 1977).

⁶³ 430 U.S. 964 (1977).

⁶⁴ There has been comment that the Supreme Court has been narrowing access to the Court by stringent application of restrictive concepts such as mootness. See the dissenting comment of Justice Brennan in *Kremens v. Bartley*, 431 U.S. 119, 140 (1977): "I have frequently voiced my concern that the recent Article III jurisprudence of this Court in such areas as mootness and standing is creating an obstacle course of confusing standardless rules. . . ." See also *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

ception to the mootness doctrine.⁶⁵ The fact that the Court forthrightly eschewed the mootness device through which it could have avoided the whole question highlights the significance of the majority opinion.

The second point to be recognized is the breadth of the majority opinion itself. Although the statute raised a bevy of questions such as due process,⁶⁶ equal protection,⁶⁷ freedom of speech,⁶⁸ and the right to be free of presumptions in a criminal trial,⁶⁹ there were narrow grounds on which the holding could have been based. Although appellants argued for a broad ruling, the minimum first amendment holding that they advocated was that the Massachusetts court decision, which required a corporation claiming first amendment rights to prove, at trial, that the proposed speech would be material to the

⁶⁵ 98 S. Ct. at 1414-15. See generally *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The *Bellotti* Court was unanimous in its holding on mootness. In support of its mootness holding, the Court quoted the criteria set forth in *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975): "(1) The challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." 98 S. Ct. at 1414. The Court pointed out that the approximate 19-month period of time between legislative authorization of the referenda and the date of the election in each of the four attempts to pass a graduated tax amendment had been "too short a period of time for appellants to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long." *Id.* at 1415. The second part of the *Weinstein* criteria was also satisfied, the Court said, because "[a]ppellants insist that they will continue to oppose the constitutional amendment, and there is no reason to believe that the Attorney General will refrain from prosecuting violations of [the statute in question]." *Id.*

⁶⁶ May a statute forbidding corporate spending except as to matters materially affecting the corporation be constitutionally applied to forbid expenditures pertaining to a proposed constitutional amendment which would allow, but not require, see note 13 *supra*, the legislature to impose graduated personal income taxes? Or is it too vague in that no one can foretell whether taxes will be imposed, what the tax rates will be, whether they might later be raised, what effect such factors might have upon the decision of corporate employees to locate in the state, and similar uncertain factors?

⁶⁷ May a statute impose different spending restrictions for one type of a ballot question than for others? May a statute impose spending prohibitions upon corporations but not upon unions, trusts, etc.?

⁶⁸ To what extent may corporations be prohibited from spending money on political matters?

⁶⁹ May a statute prohibiting corporate spending except as to matters materially affecting the corporation conclusively "deem" a ballot question solely pertaining to individual taxes to have no such material effect? See note 22 *supra* for the wording of the statute. Nonmateriality should be part of the prosecution's burden of proof.

corporation, amounted to the imposition of a prior restraint.⁷⁰ However, the Court ruled quite broadly, holding that states may not limit corporate referendum spending to matters that materially affect corporate assets.⁷¹

Chief Justice Burger's concurring opinion deliberately went beyond the facts in the case to set forth some considerations which indicate that he favors fairly broad free speech rights for business corporations.⁷² This opinion, the mootness holding, the breadth of Mr. Justice Powell's opinion, and the fact that the case rests on some fairly basic foundations⁷³ justify a view that the decision will severely restrict state attempts to limit corporate referendum spending.⁷⁴

C. Possible Methods of Statutory Restrictions on Corporate Referendum Spending

1. Imposition of Dollar Limitations on Contributions and Expenditures

The Massachusetts statute stricken in *Bellotti* contained an absolute prohibition upon corporate contributions or expenditures⁷⁵ to support or oppose referendum questions if the ques-

⁷⁰ See *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) ("even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty."). In ruling as broadly as it did, of course, the Court included this principle within its holding. See 98 S. Ct. at 1420 n.21.

⁷¹ This author does not imply that narrower grounds were more appropriate than the grounds chosen. A narrower decision would have raised more questions and led to greater uncertainty than did the Court's decision.

⁷² See 98 S. Ct. at 1427-29.

⁷³ See notes 3-5 and accompanying text *supra* for a discussion of these basic constitutional foundations.

⁷⁴ The decision was not availing to the city of Boston in an interesting case wherein the mayor wished to use city funds, raised by taxes, to persuade the voters to vote in favor of a statewide referendum question which would amend the state constitution as it relates to real estate taxes. The Supreme Judicial Court enjoined such spending. *Anderson v. City of Boston*, No. 78-253 (S.J.C. for Suffolk County, order entered July 19, 1978, Mass. Adv. Sh. 2297). This situation is analagous to a labor union spending money raised by compulsory dues. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

⁷⁵ "Contributions" as used herein refers to transfers of money or things of value to campaign committees. "Expenditures" refers to direct spending by the person or entity concerned, such as paying for a newspaper or radio advertisement. See 2 U.S.C. § 431(e) and § 431(f) (1976) for a statutory description as the terms relate to candidate campaigns.

tions did not materially affect the corporation's assets.⁷⁶ Whether the imposition of a dollar limit upon expenditures or contributions for corporate referendum spending, as opposed to an outright ban, could survive constitutional scrutiny is one question that arises. An inquiry into this question requires an analysis of the principles underlying *Bellotti* and those underlying *Buckley v. Valeo*.⁷⁷

Buckley was an attack on the Federal Election Campaign Act.⁷⁸ The Act comprehensively regulated all aspects of the financing of federal elections.⁷⁹ A \$1,000 limit was placed on the contribution which any person⁸⁰ could make for any one candidate,⁸¹ and an identical limitation was placed on the expenditures that a person could make on one candidate.⁸² The Court recognized that both contributions and expenditures involved freedom of expression and freedom of association and thus implicated the first amendment.⁸³ The purposes behind the limi-

⁷⁶ See note 22 *supra* for the wording of the statute.

⁷⁷ 424 U.S. 1 (1976).

⁷⁸ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, as amended by Pub. L. No. 93-443, 83 Stat. 1263. The statute was amended following *Buckley*. It appears now at 2 U.S.C. § 431-455 (1976).

⁷⁹ The Act concerns the financing of candidates for federal office and political parties. There being no federal referendum, the statute has never purported to address referendum financing.

⁸⁰ The definition of "person" did then and still does include corporations. 2 U.S.C. § 431(h) (1976).

⁸¹ 18 U.S.C. § 608(b)(1) (repealed by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, title II, § 201(c), 90 Stat. 475).

⁸² 18 U.S.C. § 608(e)(1) (repealed by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, title II, § 201(a), 90 Stat. 475).

⁸³ 424 U.S. at 14-15.

To the extent that this analysis depended upon freedom of association as well as freedom of speech, it is relevant to note that business corporations, *see California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972), and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961), and other types of corporations, *see NAACP v. Button*, 371 U.S. 415 (1963), possess such rights. *But see* A. ROSENTHAL, *FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 28 n.64 (1971), for the proposition that the concept of freedom of association is not applicable to corporations.

Some of the successful plaintiffs in *Buckley* were nonprofit corporations such as New York Civil Liberties Union, Inc. One reason the \$1,000 contribution limitations were upheld is that the Court recognized that there was some additional elbow room for higher contributions to occur. For example, separate segregated funds of corporations and unions were not subject to the \$1,000 limitation, and the opinion recognized that many such funds operated by corporations, corporate divisions, and corporate subsidiaries could contribute significant sums to candidates. 424 U.S. at 28 n.31. *See* 2 U.S.C. § 441b (1976) for the present description of such funds.

tations were very important: to avoid the fact or appearance of corruption.⁸⁴ However, the act of donating money to a candidate's committee was less an exercise of expression by the donor than by the committee.⁸⁵ Although this contribution indicated the donor's support and implicated the freedom of association, it was an indirect act of communication.⁸⁶ The Court, balancing the vital public interest in avoiding corruption against a perceived indirect limitation of the freedom of expression and association, upheld the contribution limitation.⁸⁷ The *Buckley* Court struck down the expenditure limitation, finding it to be an immediate, direct, and substantial restriction upon political expression.⁸⁸ Although the expenditure limitation served the compelling purpose of avoiding the fact or appearance of corruption, and although expenditures might be used as a way around the contribution limitation, it had too direct an effect on political expression.

Thus *Buckley* indicates that contribution and expenditure limitations, as well as prohibitions, implicate first amendment rights but that some limitation can be placed on these rights. *Bellotti* recognized that business corporations possess such first amendment rights. Could some limitation be placed on corporate referendum spending that would withstand constitutional attack? The purpose of the limitation and the means chosen to serve it must be examined.

There are many possible forms that statutory limitations on corporate referendum spending could take. The dollar limitations might be large or small; they might apply only to business corporations or they might apply to other groups or even to individuals; they might or might not be coupled with some form of notice to, or approval by, shareholders. This paper will not address every specific form which such limitations could take.

It might also be recognized that a particular combination of ballot question and spending limitation might unconstitutionally shackle a corporation without reference to the first

⁸⁴ 424 U.S. at 26-27.

⁸⁵ *Id.* at 20-21.

⁸⁶ *Id.* at 20-21, 28-29.

⁸⁷ *Id.* at 29.

⁸⁸ *Id.* at 19, 39-51.

amendment. A spending limitation might constitute a deprivation of property without due process if it applied to a ballot question of vital significance to the corporation.⁸⁹ For example, a \$5,000 or \$10,000 spending limitation might inadequately allow a corporation to protect its own existence if the ballot question related to whether the corporation's assets should be condemned or its business taken over by a public authority.⁹⁰ Similarly, a referendum question calculated to impose prohibition might constitute a life-or-death matter to corporations in the liquor business.⁹¹ While the cases may not have enunciated, in so many words, a corporate right to self-defense, a corporation's status to invoke the due process clause in order to protect its own property has been recognized for years.⁹² A spending limitation concerning a question truly vital to the corporation would need very little impetus from the first amendment in order to be ruled invalid.

Assuming a referendum question of less than life-or-death significance, a spending limitation would be judged by the familiar process of weighing the statutory purpose against the first amendment concerns at stake. As the Supreme Court stated in *Bigelow v. Virginia*: "Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the first amendment interest at stake and weighing it against the public interest allegedly served by the regulation."⁹³

⁸⁹ It has been suggested that similar statutory restrictions could violate the due process or equal protection clauses of the fourteenth amendment. See Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 48 (1974).

⁹⁰ Such a ballot question was before the court in *Pacific Gas & Elec. Co. v. Berkeley*, 131 Cal. Rptr. 350 (Ct. App. 1976) (corporate spending prohibition stricken on first amendment grounds).

⁹¹ See, e.g., *Cammarano v. United States*, 358 U.S. 498 (1959) (liquor companies advertised against prohibition initiative in Arkansas and proposal for state monopoly of liquor sales in Washington).

⁹² See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). The lower court in *Bellotti* held that the right to protect its property, recognized in *Pierce*, constituted the full range of protected corporate speech. See *First Nat'l Bank v. Attorney Gen.*, 359 N.E.2d 1262, 1270 (Mass. 1977). The Supreme Court rejected this proposed limitation. *First Nat'l Bank v. Bellotti*, 98 S. Ct. 1407, 1416-21 (1978).

⁹³ 421 U.S. 809, 826 (1975).

In this balancing process, the state purpose must be a compelling one and the statute must satisfy the "exacting scrutiny applicable to limitations on core first amendment rights of political expression."⁹⁴ Because core first amendment rights are at stake, the limiting statute is not entitled to the usual presumption of validity.⁹⁵ "The presumption rather is against the legislative intrusion into these domains."⁹⁶ What, then, is the likelihood that the legislative purpose behind a corporate spending limitation as to referendum questions would be deemed sufficient?

First, the need to avoid the fact or appearance of corruption, the purpose found applicable in *Buckley*, does not apply to a limitation upon referendum spending. The Court in *Bellotti* stated: "The risk of corruption involved in cases involving candidate election . . . simply is not present in a popular vote on a public issue."⁹⁷ While a contribution to or an expenditure for a candidate might give rise to the reasonable fear that the candidate will repay this "debt" after the election, there is no similar risk when the advertising message is directed toward the voting population as a whole. A purpose similar to that underlying the Federal Election Campaign Act, construed in *Buckley*, underlies the Federal Corrupt Practices Act.⁹⁸ Corporations are forbidden to contribute money to candidates for

⁹⁴ *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976).

⁹⁵ *See Schneider v. State*, 308 U.S. 147, 161 (1939).

⁹⁶ *United States v. CIO*, 335 U.S. 106, 140 (1948)(Rutledge, J., concurring).

⁹⁷ 98 S. Ct. at 1423.

⁹⁸ The Federal Corrupt Practices Act, now found in 2 U.S.C. § 441b, was Congress' response, in 1907, to what was perceived as a substantial threat to the nation: the influence which huge contributors had over candidates and thus elected officials. The history is fully spelled out in *United States v. UAW*, 352 U.S. 567, 568-87 (1957). Avoiding the fact or appearance of corruption constitutes a compelling purpose, *Buckley v. Valeo*, 424 U.S. 1, 26-29 (1976), and the prohibitions against expenditures serve that purpose as do the prohibitions against contributions because there is a risk that ostensibly independent expenditures may be coordinated by the candidate, and even if they are not coordinated, heavy expenditures might be noticed, appreciated, and rewarded by the candidate. The FCPA applies to both unions and corporations, and allows each to administer separate segregated funds, for political purposes, maintained by voluntary contributions. Whether the expenditures prohibition would be upheld would probably depend upon the legislative and record findings in any test case. Compare the Powell and White commentaries in this regard. 98 S. Ct. at 1422 n.26, 1439. It is not clear to what extent most business corporations have any desire to be rid of the FCPA, which shields them, in a way, from pressures to contribute to various candidates.

campaigns without administering segregated funds for such purposes. The purpose of this Act makes it more likely that it would withstand constitutional scrutiny⁹⁹ than would any restriction on corporate referendum spending.

The most probable purposes of any statutory restriction upon corporate referendum spending would be either to equalize access to the media or to avoid the undue influence upon public opinion which might follow from the unlimited expenditure of funds by wealthy and powerful interests. These purposes underlay the statute at issue in *Bellotti*, and varying approval of their weight was one of the major differences separating the majority opinion from Justice White's dissenting opinion. With regard to undue influence, the majority opinion, although stating that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts,"¹⁰⁰ showed little receptivity to such a purpose. The Court indicated what kind of a record might be sufficient to save such a statute from constitutional attack: "If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving first amendment interests, these arguments would merit our consideration."¹⁰¹ Such

⁹⁹ See note 61 *supra* and accompanying text for a discussion of challenges to this statute.

¹⁰⁰ 98 S. Ct. at 1423.

¹⁰¹ *Id.* The record in *Bellotti* showed that in the previous election, held in 1972, corporations had contributed substantially to the committee which opposed that year's graduated tax proposal. The record contained the names and amounts of all contributors, but there was no specific finding as to what the dollar amount of corporate contributions was. The total amount contributed was \$120,000, and the plaintiff corporations estimated that perhaps one-half of that total was contributed by corporations. *Id.* app. at 25-26, 31, Brief for Appellant at 14. The total spent by the committee supporting the proposal in 1972 was between \$7,000 and \$15,000. *Id.* at 1423 n.28. The 1976 proposal, with no corporate money spent, was defeated by about the same ratio as was the 1972 proposal.

Statistics contained in an amicus brief indicated that in a recent California referendum pertaining to nuclear power, corporations contributed \$2,630,104 out of a total \$2,771,804 raised in opposition (there had been \$1,903,425 raised by proponents) and that in a recent Montana referendum, corporate opponents of a measure contributed virtually all of the \$144,300 "opposed" whereas proponents had raised only \$451. *Id.*, Brief of State of Montana, Amicus Curiae at 9-10. The White dissent referred to these facts. *Id.* at 1434 n.11.

a standard would be difficult to meet. Such an emphatic rejection of this "undue influence" purpose makes it appear extremely unlikely that a particular record or legislative recitation of spending history would be sufficiently egregious to warrant the imposition of any limitation on corporate spending.

With regard to equalized access, the majority opinion noted that earlier statutory efforts to compel equality of access to media sources for public issues had failed,¹⁰² and that *Buckley* had specifically recognized that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ." ¹⁰³ Such a flat rejection of this purpose with regard to the prohibition on corporate spending in *Bellotti* would also seem to carry over to a specific limitation. It is most doubtful that any limitation could be justified as an attempt to equalize access to the media.

Even assuming that the statutory purpose of a legislative limit on corporate referendum spending would be found to be "compelling," the method whereby the statute serves that purpose would be subject to close examination. The *Bellotti* Court recognized that legislation directed at speech must not only serve a compelling interest but must be narrowly¹⁰⁴ and sensibly¹⁰⁵ drawn. Thus any statute concerning itself with the "evil" of undue influence or the dominating effect of those able to spend large sums for political publicity should address itself to any entity or group able to raise and expend such sums, not merely to corporations.¹⁰⁶ It should certainly not limit itself to any particular question or category of question¹⁰⁷ and it should apply not merely to efforts to dominate referendum debate but should, in some way, address other methods whereby the political or legislative scene could be dominated, such as by lobby-

¹⁰² *Id.* at 1423 n.30. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (statute requiring a newspaper to make space available to a criticized candidate was held invalid).

¹⁰³ 98 S. Ct. at 1423 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

¹⁰⁴ 98 S. Ct. at 1421. See *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *NAACP v. Button*, 371 U.S. 415, 438 (1963).

¹⁰⁵ 98 S. Ct. at 1424-26. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

¹⁰⁶ See 98 S. Ct. at 1425.

¹⁰⁷ See *id.*

ing.¹⁰⁸ Merely to mention these considerations is to indicate the extreme difficulty that accompanies any attempt to give birth to prohibitory legislation in this area where statutes must be even-handed—neither overinclusive nor underinclusive.

One method of inhibiting corporate influence might be to differentiate, by dollar limits or otherwise, between contributions to referendum campaign committees and direct referendum expenditures by the putative corporate speaker. *Buckley*, it will be remembered, allowed a \$1,000 contribution limit to remain while striking a similar limit upon expenditures.¹⁰⁹

However, as noted earlier,¹¹⁰ the purpose underlying the statute in *Buckley* was to curb the fact or appearance of corruption. It is doubtful that legislation limiting corporate contributions in referenda campaigns would serve a sufficiently compelling purpose to be able to follow *Buckley's* lead.

In considering the validity of a statutory scheme restricting corporate referendum contributions while allowing such expenditures, it must be noted that such a distinction would have a great impact on the effectiveness of the proposed speech. Opposition to or support of a referendum issue can be channeled far more effectively through the medium of a committee which can mount a coordinated campaign, hire professionals, etc., than by means of isolated, non-coordinated individual communications expenditures. The Supreme Court has recently recognized that statutes compelling resort to less effective methods of communication are not easily justified.¹¹¹ Thus despite *Buckley's* statements that limitations upon candidate contributions have only a "limited effect on First Amendment freedoms,"¹¹² and that the availability of direct expenditures

¹⁰⁸ *Id.* But to interfere directly with lobbying rights would incur a host of problems. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

¹⁰⁹ These limitations related to candidate campaigns. See the discussion accompanying footnotes 78-88 *supra*.

¹¹⁰ See note 84 and accompanying text *supra*.

¹¹¹ In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977), the fact that sellers could advertise by other methods was not sufficient to save a statute forbidding "for sale" signs. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976), the fact that consumers could acquire drug price information in other ways was not sufficient to save a statute forbidding druggists from advertising prices.

¹¹² *Buckley v. Valeo*, 424 U.S. 1, 29 (1976).

leaves persons "free to engage in independent political expression,"¹¹³ the restriction nonetheless is a chafing one, and is particularly so with respect to corporate referendum spending. It is unlikely that whatever differences there may be between corporate contributions and corporate expenditures would be deemed sufficient to allow dollar limitations to be placed on the one even if the other is left without limits.

2. *Imposition of Statutes For The Protection of Shareholders*

The Commonwealth argued, in *Bellotti*, that the statutory prohibition on corporate spending could be justified as a means of protecting corporate shareholders.¹¹⁴ The statute forbade the use of corporate resources to advance views with which some shareholders might disagree. The Court made no determination as to whether such a purpose could be deemed sufficiently "compelling" to support a legislative intrusion into corporate management's decision to publicize a political or economic viewpoint. In a 1975 case, however, the Court had noted, with respect to the Federal Corrupt Practices Act, that "protection of ordinary shareholders was at best a secondary concern."¹¹⁵ In any event, the *Bellotti* Court held that such a purpose was not well served, and was in fact belied, by the statute.¹¹⁶

The statute in *Bellotti* was both underinclusive and overinclusive. While it forbade corporate expenditures on referenda, it permitted expenditures for lobbying and expenditures for public questions until such questions became the subject of referenda.¹¹⁷ It allowed unlimited spending on referendum

¹¹³ *Id.*

¹¹⁴ 98 S. Ct. at 1424.

¹¹⁵ *Cort v. Ash*, 422 U.S. 66, 81 (1975). *But see* Comment, *Corporate Political Affairs Programs*, 70 YALE L.J. 821, 836 n.109 (1960).

The interest in protecting a minority shareholder is quite different from the interest in protecting the right of a union member in a closed shop from having some part of his compulsory dues spent to promulgate political positions with which he disagrees. The majority opinion in *Bellotti* pointedly recognized this distinction, 98 S. Ct. at 1425 n.34, distinguishing such cases as *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

¹¹⁶ "Assuming, *arguendo*, that protection of shareholders is a 'compelling' interest under the circumstances of this case, we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking. *Shelton v. Tucker*, 364 U.S. at 485." 98 S. Ct. at 1426.

¹¹⁷ 98 S. Ct. at 1424-25.

questions materially affecting a corporation's assets but prohibited spending as to personal graduated income tax referenda regardless of whether the corporate assets were affected.¹¹⁸ While forbidding business corporations from making such expenditures, it left unregulated other entities or groups which have shareholders whose beliefs may conflict with the expressed views of management.¹¹⁹ Even if 100% of the shareholders authorized an expenditure of corporate funds to oppose a graduated income tax, the statute would still forbid it.¹²⁰ The Court stated: "Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."¹²¹ The question remains whether state regulation or prohibition of corporate spending for political expression by some means more logically related to the rights or status of shareholders than was section 8 could be constitutionally permissible.

The specific approaches which a legislature might take to accomplish this goal of protection are virtually limitless. Without examining particular legislative schemes,¹²² some general observations are possible.

In theory, there is a great difference between an effort to limit speech from a particular source on the one hand, and an effort to assure that whatever speech emanates from a particular source fairly reflects the real position of the speaker on the other. Any legislative effort to forbid or regulate speech from a particular source because it may be expected to dominate a debate or be overpersuasive, misguided, or misleading, causes

¹¹⁸ *Id.* at 1425.

¹¹⁹ Such entities as real estate investment trusts and labor unions were not touched by § 8. *Id.* This and similar arguments had been made by the plaintiff corporations as indicating a violation of equal protection. The Court, ruling in plaintiffs' favor on first amendment grounds, did not reach the equal protection issue. *Id.* at 1414 n.8.

¹²⁰ *Id.* at 1425.

¹²¹ *Id.*

¹²² Massachusetts legislators, immediately upon receipt of the *Bellotti* decision, came up with a number of proposed innovations, including the imposition of a \$1,000 ceiling on corporate contributions, the requirement that there be an affirmative vote of a majority of the shareholders for any combination of spending which would exceed \$1,000 per ballot question, and vesting remedies in both the Attorney General and dissenting shareholders to recover monetary penalties upon violation. See 1978 Mass. House Bill No. 6086. This bill, sparked by an expected lively referendum battle in the 1978 elections, was not passed.

severe constitutional problems and probably would not survive court scrutiny. It is a different matter, however, to show concern not about the fact or effect of speech but rather about the question of who, among different persons arguably entitled, has the right to determine what a pluralistic speaker has to say. Assuming such protection is a valid state purpose and the corporate (or trust or partnership) treasury is to be used to promulgate a view, which person, persons, or sub-groupings have the right to determine what those views will be? Can the state regulate the relationships between these persons or groups according to recognized principles of law even though there will be some incidental effect upon what is said? Theoretically, there is room for legislative activity here. Practically, the area is fraught with hazards.

The answer should depend upon whether the particular state statute is rationally addressed to the question of allocating decision making powers among those with an interest in the corporation, or whether the statute actually shapes or slants what is proposed to be said. Obviously, there are legitimate state concerns in regulating intra-corporate relationships. If the proposed statute actually addresses those concerns it is not in jeopardy. If in the guise of addressing those concerns it actually stifles corporate expression, the indication from *Bellotti* is that it will fail.

Much would depend upon the precise way in which the legislation sought to serve such a purpose. A statute giving a minority group of shareholders a veto power over a good faith decision by management to promulgate a particular view would be doomed to fail. For example, if a statute allowed ten percent of the shareholders to enjoin a proposed expenditure which related to the promulgation of a viewpoint on a referendum question but did not allow them otherwise to interfere with the authority of the management and the directors, such a statute could not withstand judicial scrutiny. The minority shareholder's pocketbook interest would be adversely affected by *any* ill-advised investment or spending decision by management. A statute which gives such shareholders extraordinary relief only if the spending wasted corporate money in a "political" way would seem to belie an interest to protect the shareholder's investment. Without giving the minority the veto

power in all situations—a clear impossibility—such a statute would be underinclusive with respect to the purpose of protecting minority shareholders. Such an attempt to allocate decision-making powers within the corporation would seem likely to fall to the first amendment right of the public to hear as well as the right of the majority of the shareholders to have the normal corporate process followed in decisions related to corporate speech.¹²³ If the various constituents of a pluralistic entity are grappling with the question of whether to publicize a political or economic view or to remain silent, any legislative thumb on the scale compelling a decision in favor of silence is more than suspect after *Bellotti*.

Rather than confer a veto power on a minority of shareholders, a statute might require the vote of a predetermined percentage of the shareholders prior to allowing management to spend corporate money on a political question. The proponents of such legislation might argue that the decision to enter the political realm is so important and potentially controversial that it is warranted only if a certain substantial majority—say, two-thirds or three-fourths—are in favor of it. By analogy, many state statutes require the consent of a substantial majority of the shareholders before a corporate decision to sell or mortgage substantially all of the corporate assets may be validly acted upon.¹²⁴

Such a statute appears to achieve the purpose of protecting shareholders from the dissipation of corporate resources to advance views with which the shareholders may not agree.¹²⁵

¹²³ The majority opinion's skeptical attitude concerning efforts to give minority shareholders extraordinary powers only in the area of referendum spending is apparent at 98 S. Ct. 1425 n.34, which states in part, "Appellee does not explain why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders."

A statute truly concerned with advancing the rights of minority shareholders might give such a minority the right to compel management to communicate a particular view contrary to the view management proposed to communicate. Such a statute would, of course, make a shambles of the corporate decision-making process. A requirement that a speaker alter the content of his proposed speech is not much more tolerable than a requirement that enforces silence on a prospective speaker.

¹²⁴ See 6A FLETCHER, CORPORATIONS § 2949.2 (1968).

¹²⁵ As noted previously, see text accompanying notes 109-111 *supra*, such a purpose may not be a "compelling" one.

The fact that a minority of the shareholders may disagree with the expenditure does not, it might be argued, detract from the reasonableness of the statute since any corporate decision runs the risk of offending some shareholders and here, at least, there is protection for the majority. However, this means is underinclusive. The requirement that two-thirds of the shareholders must approve a \$1,000 referendum expenditure with no similar requirement for other, non-communicative expenditures indicates that this method protects shareholders in too narrow a range.

As a practical matter, requiring such approval as a precondition to the right to spend would, if anything, be a more serious infringement of corporate speech than allowing the expenditure to occur *unless* a certain minority takes appropriate steps to invoke a veto. To require a corporation to obtain the affirmative consent of a certain percentage of its shareholders prior to making a particular expenditure would in many instances impose a severe economic and administrative burden upon the corporation. This would especially be so with respect to large, publicly held corporations.¹²⁶ It may be doubted whether there is any proposition on which two-thirds of the shareholders of General Motors would be in agreement. What is not doubtful is that it would be expensive to find out. The calling of a shareholders' meeting, the solicitation of votes by proxy, and all the other paraphernalia associated with acquiring shareholder approval would be prohibitively expensive with respect to all but the most vital of questions.¹²⁷ It is clear that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected lib-

¹²⁶ It would be less of a burden with a closely held corporation or a corporation solely owned by a holding company, whose directors could, with comparative ease, approve the subsidiary's expenditure. A statutory scheme that tended to favor the political speech of closely held corporations or those wholly owned by other corporations over that of corporations owned by disparate numbers of shareholders would lend further difficulty to a statute intruding into a delicate area where rational and precise means must serve compelling interests.

¹²⁷ Such expenses might not be tax deductible. The Internal Revenue Code, 26 U.S.C. § 162(e)(2), forbids such deductions. It is not inconsistent to recognize that such spending may be a constitutional right yet not deductible for tax purposes. *Cammarano v. United States* 358 U.S. 498 (1959). This factor, among others, may act as a natural brake on corporate referendum spending.

erty."¹²⁸ "[I]nhibition as well as prohibition against the exercise of precious first amendment rights is a power denied to government."¹²⁹

The best way to achieve the goal of shareholder protection is to rely upon the general principles of corporate control. If the corporate choices concerning a particular referendum question are to support it, to oppose it, or to remain silent, it would seem far more preferable for the legislature to allow the normal forces within the corporate entity to choose among the options. There is no reason to think the legislature is better able than the constituents to make a wise decision.

CONCLUSION

The Court in *Bellotti* affirmed that unreasonable burdens could not be placed in the way of prospective corporate speech on political or economic matters.¹³⁰ It will be difficult to draft a state statute whose burden would be held a reasonable one. It seems likely that the *Bellotti* case will preclude any statutory restrictions which impose substantial and discriminatory burdens upon corporate expression of opinion concerning referendum questions.

¹²⁸ *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973).

¹²⁹ *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965).

¹³⁰ The majority opinion recognized that even if the "materially affecting" standard of § 8 were appropriate, it would be unconstitutional as applied to the facts in the case to prohibit corporate communications: "Even assuming that the rationale behind the materially affecting requirement itself were unobjectionable, the limitation in § 8 would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished. . . ." 98 S. Ct. at 1420 n.21.

