

Constitutional Law—First Amendment—Corporate Free Speech: *First National Bank of Boston v. Bellotti*¹: On April 9, 1976, five banks and business corporations operating in Massachusetts² filed suit for declaratory and injunctive relief in the Massachusetts Supreme Judicial Court.³ The plaintiffs alleged that they desired to expend corporate monies to effect the defeat of a ballot question before the Massachusetts voters in the November, 1976 election.⁴ This question would, if approved, allow the state legislature to impose a graduated tax on the income of individuals.⁵ It was further alleged that the Mas-

¹ 435 U.S. 765 (1978).

² Plaintiffs were the First National Bank of Boston and New England Merchants National Bank, both national banking institutions; Wyman-Gordon Company and Digital Equipment Corporation, corporations chartered in Massachusetts; and Gillette Company, a Delaware corporation. *Id.* at 768 n.1.

³ MASS. GEN. LAWS ch. 231A authorizes the Supreme Judicial Court to issue declaratory judgments.

⁴ 435 U.S. at 769.

⁵ The Graduated Income Tax, (GIT), has long been a subject of controversy in Massachusetts. In 1962, when a proposed personal and corporate GIT was on the ballot, corporations challenged then MASS. GEN. LAWS ANN. ch. 55, § 7 (West 1946), which was very similar to the statute set out in note 7 *infra*. In *Lustwerk v. Lytron, Inc.*, 344 Mass. 647, 183 N.E.2d 871 (1962), the Supreme Judicial Court held that § 7 did *not* prohibit corporate expenditures on the GIT amendment as the GIT was deemed to "materially affect" the business, property or assets of corporations. The GIT amendment was defeated in November of 1962 and again in 1968.

In 1972, by 1972 Mass. Acts ch. 458, the Massachusetts General Court (legislature) amended ch. 55, § 7 to read:

No question submitted to the voters concerning the taxation of the income, property, business or assets of individuals shall be deemed materially to affect the property, business or assets of the corporation.

This provision was challenged in 1972 when a personal and corporate GIT was again placed on the ballot. The Supreme Judicial Court held that § 7's prohibition applied only to a referendum question concerned solely with a GIT on individuals, and that it could not be applied to forbid corporate spending relative to a GIT referendum involving corporate income. *First National Bank of Boston v. Attorney General*, 362 Mass. 570, 290 N.E.2d 526 (1972). The GIT referendum lost in the 1976 election.

The statute was amended again in 1973, 1974 and 1975. The last of these amendments, 1975 Mass. Acts ch. 151, is the most recent attempt by the General Court to conform to the mandate of the Supreme Judicial Court. It created the present MASS. GEN. LAWS ANN. ch. 55, § 8 (West)—the statute at issue in *Bellotti*. This statute was worded identically to section 7 of the 1972 version of the statute except for the insertion of the word "solely":

No question submitted to the voters *solely* concerning the taxation of the income, property or transaction of individuals shall be deemed materially to affect the property, business or assets of the corporation. (emphasis supplied)

MASS. GEN. LAWS ANN. ch. 55, § 8 (West).

As a result, the *Bellotti* plaintiffs, besides being subject to the general statutory prohibitions set out in note 7 *infra*, were also made subject to the statute's specific prohibition against corporate expenditures on personal GIT referenda. Although the Supreme Judicial Court distinguished the "general" from the "specific" prohibitions, *First National Bank v. Attorney General*, 1977 Mass. Adv. Sh. 134, 148-50, 359 N.E.2d 1262, 1270-72 (1977), the distinction was deemed by the United States Supreme Court to be immaterial for first amendment purposes. 435 U.S. at 772 n.6.

sachusetts Attorney General (the defendant) had threatened to prosecute the plaintiffs under the provisions of Massachusetts General Laws, chapter 55, section 8 if such expenditures occurred.⁶ Chapter 55, section 8 prohibits corporations from expending funds on any public referendum issue which does not "materially affect" the corporation.⁷ Plaintiffs claimed, *inter alia*, that this statute on its face violated the first amendment to the United States Constitution.⁸

The Supreme Judicial Court rejected plaintiffs' first amendment claim.⁹ While recognizing that chapter 55, section 8, because it restricted spending relative to the political process, operated in an area of first amendment concern,¹⁰ the Court concluded that plaintiffs, as business corporations, have only a limited claim to the first amendment's protection.¹¹ The Supreme Judicial Court held that a corporation can claim first amendment protection for its speech only when it seeks to communicate on an issue that materially affects the corporation's business, property or assets.¹² Since the challenged statute itself established these same parameters, it did not violate the free speech rights of plaintiff corporations.¹³

⁶ 435 U.S. at 769.

⁷ MASS. GEN. LAWS ANN. ch. 55, § 8 (1975) reads, in pertinent part:

[N]o business corporation incorporated under the laws or doing business in the commonwealth . . . shall directly or indirectly give, pay, expend or contribute, any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. . . .

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.

⁸ The first amendment reads, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble for redress of grievance." U.S. CONST. amend. I. By its terms, the first amendment applies only to acts of the federal government. However, the amendment has been made applicable to the states through the due process clause of the fourteenth amendment. *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

The *Bellotti* plaintiffs also argued that the statute was unconstitutional as applied, that it was vague and overbroad, that it violated the due process and equal protection clauses of the fourteenth amendment and articles 16 and 19 of the Declaration of Rights, Constitution of the Commonwealth of Massachusetts. 435 U.S. at 770. While the state court addressed each of these claims, (see note 13 *infra*), the Supreme Court's disposition of the first amendment claim made it unnecessary to consider these other arguments. 435 U.S. at 774 n.8.

⁹ *First National Bank of Boston v. Attorney General*, 1977 Mass. Adv. Sh. 134, 359 N.E.2d 1262 (1977).

¹⁰ *Id.* at 144, 359 N.E.2d at 1269, quoting, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

¹¹ 1977 Mass. Adv. Sh. at 147, 359 N.E.2d at 1270.

¹² *Id.* at 148, 359 N.E.2d at 1270.

¹³ *Id.* The Massachusetts Court also rejected the contention that the statute violated the first amendment as applied because a personal graduated income tax

On appeal,¹⁴ the United States Supreme Court, in a five to four decision,¹⁵ reversed and HELD: That speech otherwise protected by the first amendment does not lose that protection simply because the speaker is a corporation.¹⁶ The Court further determined that plaintiffs' proposed speech

would materially affect the corporation; the Court held that since there was a "rational basis" for the legislative determination that a personal GIT referendum would not have such an effect, the statute was applied constitutionally. The Court also noted that plaintiff corporations neither made, nor attempted to make a showing of such an effect. 1977 Mass. Adv. Sh. at 148-50, 359 N.E.2d at 1271.

The related first amendment claims of overbreadth and vagueness were also rejected. Construing the statute narrowly, to avoid forbidding activities and expenditures in the normal course of corporate affairs, the Court determined that the statute was not so overbroad as to prohibit protected speech. *Id.* at 151-54, 359 N.E.2d at 272-73. The Court admitted that the statute's "materially affecting" limitation was general in nature, but held that the statute was not vague because the specific prohibition involved in the challenged action—the prohibition concerning expenditures on personal tax referenda—was both precise and definite. *Id.* at 154-57, 359 N.E.2d at 1273-74. Plaintiff's claims based on provisions of the Massachusetts Constitution—articles 16 and 19 of the Declaration of Rights—were rejected on the grounds that these provisions were comparable to the federal constitution's first amendment, and thus controlled by the court's prior resolution of the first amendment claims. *Id.* at 157-58, 359 N.E.2d at 1274-75.

Plaintiffs argued that the statute's effect on the "fundamental right" of free speech required that it be examined under a standard of strict scrutiny (*See* *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 (1972)), and claimed further that the statute's failure to restrict the political expenditures of labor unions, partnerships, business trusts, charitable corporations and other economic entities beside business corporations, resulted in an unconstitutional classification. However, the Supreme Judicial Court refused to apply strict scrutiny, since it had already concluded that the first amendment rights of corporations were *not* implicated by section 8. Instead, the Court applied a minimum rationality standard of review. *See generally* *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Railway Express, Inc. v. New York*, 336 U.S. 106 (1949). The Court reasoned that since the legislature could rationally determine that other economic entities did not pose the same problems as business corporations, a "rational basis" for the classification did exist and there was thus no violation of the equal protection rights of business corporations. 1977 Mass. Adv. Sh. at 159-61, 359 N.E.2d at 1275.

Plaintiffs finally contended that the specific legislative judgment that questions concerning the taxation of individuals do not effect business corporations created an irrebuttable legislative presumption of a fact constituting one of the elements of the crime. This, it was argued, was in violation of the due process clause of the fourteenth amendment. *See generally* *Turner v. United States*, 396 U.S. 398 (1970); *Tot v. United States*, 319 U.S. 463 (1943). The Massachusetts Court rejected this argument as well, concluding that the state properly remained with the burden of proving all of the elements of the crime. 1977 Mass. Adv. Sh. at 161-63, 359 N.E.2d at 1275-76.

¹⁴ 430 U.S. 964 (1977) (probable jurisdiction noted). 28 U.S.C. § 1257(2) (1966) authorizes direct appeal to the Supreme Court of an order from any state high court upholding the validity of a state statute under the federal constitution, a federal law, or federal treaty.

¹⁵ Justice Powell wrote the opinion of the Court. The Chief Justice concurred in a separate opinion. 435 U.S. at 795-802. Justice White, joined by Justices Brennan and Marshall, dissented. *Id.* at 802-23. Justice Rehnquist filed a separate dissenting opinion. *Id.* at 823-28.

¹⁶ 435 U.S. at 784.

was protected by the first amendment,¹⁷ and that neither the state's interest in protecting the electoral process from undue corporate influence nor in protecting the rights of corporate shareholders were sufficient to withstand review under a strict scrutiny standard.¹⁸ The Court therefore found the Massachusetts statute unconstitutional as an abridgement of corporate rights to free speech.¹⁹

Bellotti is the first case in which the United States Supreme Court has attempted to define the nature and extent to which the speech of corporations is protected under the first amendment. This decision gains added significance by suggesting a method and terms by which restrictions on corporate speech should be examined in the future. In effect, the *Bellotti* Court simply applied, in the context of corporate speech, the traditional first amendment standard of review. The Court's discussion and disposition of the various interests asserted by the state to justify restricting corporate communications will have significant impact upon similar regulatory attempts in the future.

This casenote will first examine briefly the status of corporate speech prior to *Bellotti*. The *Bellotti* decision itself will then be examined, with particular attention accorded the Court's perception and definition of the issue before it and the Court's treatment of the principal interests asserted by the state on behalf of its statutory restriction of corporate speech. Finally, this casenote will evaluate the reasoning of *Bellotti* and discuss the general implications of the decision on corporate speech generally, and in particular the impact of the decision on a municipal corporation's claim to first amendment protection will be analyzed.

I. FIRST NATIONAL BANK OF BOSTON V. BELLOTTI

A. The Unexamined Status of Corporate Speech Prior to *Bellotti*

From a very early date the United States Supreme Court has held that a business corporation is a "person" as that term is used within the due process and equal protection clauses of the fourteenth amendment.²⁰ Yet the Court had failed, prior to *Bellotti*, to discuss in any meaningful way corporate rights under the more specific terms of the first amendment. Most often in free speech cases the Court has focused upon the character of the speech at issue. As a result, the Court had not endeavored to define with precision the rights of certain *speakers*, such as corporations, to exercise first amendment rights.

¹⁷ *Id.* at 776-78.

¹⁸ *Id.* at 795.

¹⁹ *Id.*

²⁰ See, e.g., *Smyth v. Ames*, 169 U.S. 466, 522 (1898); *Covington & Lexington Turnpike Co. v. Sandford*, 164 U.S. 578, 592 (1896); *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394, 396 (1886); but see *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 527 (1937) (opinion of Stone, J.) ("the liberty [guaranteed by the due process clause] is the liberty of natural, not artificial persons"), (quoting, *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906)); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).

The first application of substantive first amendment safeguards within a corporate context occurred in the 1936 case of *Grosjean v. American Press Co.*²¹ In *Grosjean*, several corporations engaged in publishing newspapers challenged a Louisiana statute which established a two percent license tax which was applicable only to publishers of newspapers with circulation in excess of 20,000. The Supreme Court, in sustaining the publishers' first amendment challenge to the tax, expressly rejected the state's contention that corporations could not claim first amendment rights through the due process clause of the fourteenth amendment.²² In reaching this decision, however, the Court simply applied precedents which involved the due process rights of corporations generally;²³ no specific discussion of corporate first amendment rights was provided. In addition, the *Grosjean* Court was not faced with a state attempt to distinguish corporate speech from non-corporate speech since the license tax applied to *all* publishers of newspapers with a circulation of 20,000 or more. As a result, the Court in *Grosjean* recognized a general corporate right to claim first amendment protection through the fourteenth amendment, but did not define the nature or parameters of this right.

Although the Court in subsequent years decided numerous cases in which corporations sought first amendment protection,²⁴ the significance of the speaker's corporate status was never explored. It is significant to note that, as in *Grosjean*, each of these cases involved statutes or regulatory efforts which made no distinction between the speech of corporations and the speech of individuals.²⁵ The best opportunities for defining the status and parameters of the protection to be afforded corporate speech under the first amendment were provided in several cases arising under the Federal Corrupt Practices Act.²⁶ That Act forbids corporations, as well as labor unions, from contribut-

²¹ 297 U.S. 233 (1936).

²² *Id.* at 244.

²³ See authorities cited in note 20, *supra*.

²⁴ See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975); *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); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

²⁵ See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (Florida's "right to reply" statute applies to "any newspaper" which "assails the personal character of any candidate."—FLA. STAT. § 104.38 (repealed, 1975)).

²⁶ 2 U.S.C. § 441b (1976) (formerly 18 U.S.C. § 610 (1948)). A large number of states have similar statutory provisions limiting the political activity of corporations and labor unions. See, e.g., ALA. CODE tit. 10, § 10-2-168 (Supp. 1979); ARIZ. REV. STAT. § 16-471 (1975); IOWA CODE ANN. § 56.29 (West) (Supp. 1979-80); KAN. STAT. § 25-1709 (1973); KY. REV. STAT. § 121-035(1) (Supp. 1978); MASS. GEN. LAWS ANN. ch. 55, § 8 (West) (Supp. 1979); MINN. STAT. ANN. § 210A.34 (West) (Supp. 1980); MONT. REV. CODES ANN. § 23-4744 (Supp. 1977); N.H. REV. STAT. ANN. § 70:2(I) (1970); N.J. REV. STAT. § 19: 34-45 (1964); N.Y. ELEC. LAW § 14-116 (McKinney) (1978); N.D. CENT. CODE § 16-20-08 (Supp. 1977); OHIO REV. CODE ANN. § 3599.03 (Baldwin) (1975); OKLA. STAT. ANN. tit. 26, § 15-110 (West) (Supp. 1979-80); OR. REV. STAT. § 260.472 (1977); S.D. COMPILED LAWS ANN. § 12-25-2 (Supp. 1979); TENN. CODE ANN. § 2-1932 (Supp. 1972); TEX. ELEC. CODE ANN. art. 14.06 (Supp. 1980); WIS. STAT. ANN. § 11.38(1)(a)(1) (West) (Supp. 1979-80).

ing to or making expenditures on behalf of candidates for federal elective office. The Act clearly distinguishes corporate from "private" speech, and thus would conceivably provide courts with an opportunity to consider the constitutional issues raised by such a distinction. However, on the four occasions in which the Corrupt Practices Act was challenged, the Supreme Court disposed of the cases on grounds which rendered consideration of the constitutional issues premature and unnecessary.²⁷ Thus, when five business corporations sued for injunctive and declaratory relief in Massachusetts, the exact nature and scope of first amendment protection available for corporate speech was an unresolved question.²⁸

The Massachusetts Supreme Judicial Court squarely faced in *Bellotti* the issue which had been left unresolved by the Supreme Court. While conceding that section 8 potentially impinged on first amendment freedoms by restricting expenditures relative to the political process,²⁹ the Court did not consider this fact alone to be dispositive of the constitutional issue involved. The "basic question" as to section 8's validity, stated the Supreme Judicial Court, is "whether business corporations, such as the plaintiffs, have First Amendment rights coextensive with those of natural persons."³⁰

The Massachusetts Supreme Judicial Court concluded that a corporation's rights under the first amendment are not the same as those of a natural person.³¹ The Court reasoned that a corporation has rights under the first and

²⁷ See *Cort v. Ash*, 422 U.S. 66, 69-70 (1975) (Court, holding that Act does not imply a private cause of action, does not reach constitutional issues); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 400-01 (1972) (Court remands case for proper jury instructions, does not address constitutional issues); *United States v. United Auto Workers*, 352 U.S. 567, 589-91 (1957) (Case remanded for full trial prior to determination of constitutional issues); *United States v. Council on Industrial Organization*, 335 U.S. 106, 124 (1948) (Act held inapplicable to conduct alleged, constitutional question not reached).

Justice Douglas, concurring in *United Auto Workers*, 352 U.S. at 593-98, and Justice Rutledge concurring in *Council on Industrial Organization*, 335 U.S. at 129-56 would have reached the first amendment issues implicated. Both would have concluded that the Corrupt Practices Act violates the first amendment rights of corporations and labor unions.

A number of lower federal courts have considered the constitutional issues raised by the Federal Corrupt Practices Act. All have held the Act valid. See, e.g., *United States v. Chestnut*, 533 F.2d 40 (2d. Cir.), cert. denied, 429 U.S. 829 (1976); *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), cert. denied, 414 U.S. 1076 (1973); *United States v. Russell*, 415 F. Supp. 9 (W.D. Tex. 1975); *United States v. Painters Local Union No. 481*, 79 F. Supp. 516 (D. Conn. 1948), rev'd on other grounds, 172 F.2d 854 (2d Cir. 1949).

²⁸ A few state and lower federal courts have been willing to deal directly with the issue of first amendment protection for corporate speech. See *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314, 1334 (W.D. Pa. 1974) (held protected); *Borough of Collingswood v. Ringold*, 66 N.J. 350, 331 A.2d 262 (1975) (speech not denied protection merely because its source is a corporation).

²⁹ 1977 Mass. Adv. Sh. at 144, 359 N.E.2d at 1269, citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

³⁰ 1977 Mass. Adv. Sh. at 145, 359 N.E.2d at 1269.

³¹ *Id.* at 147, 359 N.E.2d at 1270.

fourteenth amendments only to that extent necessary to protect the business or property interests of the corporation.³² Thus, the Court held that "only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public."³³ Section 8, which itself prohibited corporate spending only on referenda questions *not* materially affecting the corporation, therefore did not violate plaintiff corporations' first amendment rights. By appealing this decision, the plaintiffs placed before the United States Supreme Court an opportunity to finally consider and define the first amendment rights of corporations.

B. The Supreme Court Decision

From the outset of Justice Powell's discussion of the substantive first amendment issue for the *Bellotti* majority,³⁴ it is clear that the Court has adopted a different approach from that espoused by the Supreme Judicial Court. Justice Powell stated that the Supreme Judicial Court, by phrasing the inquiry in terms of the extent to which a corporation could claim first amendment protection, posed the "wrong question."³⁵ Since the first amendment often serves "societal interests" broader than those of the party seeking their vindication,³⁶ the correct question must be "whether § 8 abridges expression that the First Amendment was meant to protect."³⁷

³² *Id.*

³³ *Id.* at 148, 359 N.E.2d at 1270.

³⁴ Because the 1976 referendum upon which the plaintiffs based their complaint had been held prior to the time the controversy reached the Supreme Court, the threshold issue of mootness had to be resolved before the Court could reach a determination on the merits. 435 U.S. at 774-75. Classifying the case as one "capable of repetition, yet evading review" the Court concluded that it was not moot. See generally *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The Court was satisfied that both conditions necessary for invoking the doctrine were present. First, the challenged action was too short in its duration to be fully litigated prior to its expiration. The Court observed that there are approximately eighteen months between the legislative authorization of a proposed referendum and the election. This is too short a time to obtain complete judicial review and, in any event, judicial review itself is meaningless if the plaintiffs are not given enough time before the election to *effectively* communicate their views. 435 U.S. at 774.

Second, the Court believed that there was at least a "reasonable expectation" that the complainants would be subject to the same action again. In support of this contention the Court pointed to the repeated submission of the GIT issue to the voters, (see note 5 *supra*); the plaintiffs' insistence that they would continue to oppose a GIT; and the defendant's assertion that he would continue to enforce the law. *Id.* at 774-75.

In addition to invoking the "capable of repetition, yet evading review" doctrine the Court seemed inclined to view the continued "chilling" effect of § 8 as precluding mootness. The statute's criminal penalties discouraged corporations from obtaining review by violating the law, and the statute's effect would linger despite the technical passing of the particular controversy. *Id.* at 775.

³⁵ 435 U.S. at 776.

³⁶ *Id.*

³⁷ *Id.*

Having taken an approach which focuses on the type of speech involved rather than the identity of the speaker, Justice Powell had little difficulty in concluding that the speech restricted by section 8 was protected by the first amendment. The Massachusetts statute obviously restricted speech relating to discussion of public, political affairs.³⁸ The majority agreed that this type of speech is "indispensable to decisionmaking in a democracy"³⁹ and lies at the very "heart" of the first amendment.⁴⁰ For the *Bellotti* Court the value of such speech in informing the public as to important public issues is not altered by the identity of the speaker.⁴¹

Justice Powell then turned to the Supreme Judicial Court's conclusion that a corporation could claim protection for its speech only to the extent necessary to protect its property or business interests. Terming the Supreme Judicial Court's position a "novel and restrictive gloss" on the first amendment, he thoroughly rejected this reasoning.⁴² Justice Powell not only denied that the "materially affecting" test articulated by the Massachusetts court had been the governing rationale in any prior decision of the Supreme Court,⁴³

³⁸ That political expenditures are political "speech," and not merely conduct related to speech, for purposes of the first amendment was settled in *Buckley v. Valeo*, 424 U.S. 1, 15-16 (1976). For a critique of this conclusion, see Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1001 (1976).

The speech/conduct distinction is important in determining the standard of review applicable to a given governmental restriction. If "pure speech" is restricted, the government must show that its interest is "compelling" and that there is no less restrictive means of achieving that interest. See text and notes at notes 46 & 47 *infra*. However, if only conduct relating to speech is restricted, the government just needs to demonstrate an "important" or "substantial" interest. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (conviction of appellant for destroying draft card upheld).

³⁹ 435 U.S. at 777.

⁴⁰ *Id.* at 776. The Court's discussion in this regard tends to imply a view of the first amendment which elevates political speech to a level somewhat above other types of speech. This view of the first amendment has support in prior case law. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50, 61 (1976); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Roth v. United States*, 354 U.S. 476, 484 (1954); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). See also A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). However, the view that political speech has a preferred status among first amendment values has also been questioned. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50, 73 n.1 (1976) (Powell, J., concurring); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976); *Winters v. New York*, 333 U.S. 507, 510 (1948).

⁴¹ 435 U.S. at 777.

⁴² *Id.* at 777-83.

⁴³ Justice Powell conceded that the "materially affecting" theory would satisfy the media and commercial speech cases, but denied that the theory was relied upon in any of these decisions. 435 U.S. at 781. The Court interpreted the media cases as focusing on the constitutional role of the media in informing the public and providing a public forum for the debate and discussion. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969); *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Similarly, the commercial speech cases were viewed as vindicating the public's interest in the free flow of information rather than a corporate entity's right to disseminate commercial information. 435 U.S.

but observed that no prior decision had recognized a separate source of protection under the first and fourteenth amendments when a corporation asserted the constitutional right.⁴⁴ *Grosjean v. American Press Co.*,⁴⁵ Justice Powell emphasized, expressly rejected the Supreme Judicial Court's conclusion that a corporation's "liberty" (as opposed to "property") interests are not protected under the first and fourteenth amendments.⁴⁶ There was, therefore, no basis for the Supreme Judicial Court's purported limitations of the first amendment rights of corporate speakers.

Having concluded that the plaintiffs' proposed speech was within the protection of the first amendment, and having further rejected reasoning of the Massachusetts Supreme Judicial Court that speech loses its protection when its proponent is a corporation, Justice Powell reviewed the propriety of section 8 under a "strict scrutiny" standard.⁴⁷ Under this standard, a state can justify restriction of protected speech only by articulating a "compelling" governmental interest furthered by the restriction.⁴⁸ In addition, a state must show that the means chosen to serve this governmental interest are carefully drawn so as not to impose undue burdens on protected rights.⁴⁹

To meet this standard, Massachusetts advanced two principal justifications for the restrictions contained in section 8. First, the state cited a desire to maintain the integrity of the electoral process and to protect the role of individual citizens within the political system.⁵⁰ Second, the state proposed to prevent corporate shareholders from indirectly financing corporate political purposes at odds with their individual political views.⁵¹ The *Bellotti* majority considered, but ultimately rejected, both of these arguments.

Justice Powell conceded that a state's interest in maintaining electoral integrity and individual political participation is compelling.⁵² Nevertheless,

at 781-83. See, e.g., *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976).

The Court appeared troubled at the implicit suggestion in the Supreme Judicial Court's holding that commercial speech would be protected because it relates to a corporation's business while political speech would not. The Court noted that until recently the commercial nature of speech *undermined* its entitlement to protection, and was therefore unwilling to extend greater protection to a merchant's "hawking of wares" than to political debate. 435 U.S. at 783 n.20. See generally *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24; *Valentine v. Chrestensen*, 316 U.S. 52 (1942); Note, *Advertising of Prescription Drug Prices as Protected Commercial Speech*, 19 B.C. IND. & COM. L. REV. 276 (1977).

⁴⁴ 435 U.S. at 780.

⁴⁵ 297 U.S. 233 (1936).

⁴⁶ 435 U.S. at 781 & n.16.

⁴⁷ *Id.* at 786.

⁴⁸ *Id.* See, e.g., *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *NAACP v. Button*, 371 U.S. 415, 458 (1969).

⁴⁹ *Id.* See, e.g., *Buckley v. Valeo*, 425 U.S. 1, 25 (1976); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

⁵⁰ 435 U.S. at 787.

⁵¹ *Id.*

⁵² *Id.* at 778-79. See also *Buckley v. Valeo*, 424 U.S. 1, 27 (1976); *Civil Service Comm'n v. Nat'l. Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); *United States v. United Auto Workers*, 352 U.S. 567, 570 (1957).

section 8 was not sufficiently related to this interest to pass constitutional muster. Although a state may legislate to prevent both the reality and the appearance of political corruption, section 8 focused upon referenda questions exclusively. Justice Powell reasoned that since referenda questions involve *issues* and not particular *candidates*, there is no danger of improper *quid pro quo* arrangements in the referenda context and, hence, no danger of corruption. Thus, a ban on referenda expenditures is not sufficiently related to an interest in preventing the corruption of political candidates.⁵³ As an alternative ground, the state argued that, because of highly concentrated economic power, corporate participation in the electoral process results in undue corporate influence over elections.⁵⁴ The majority, however, concluded that the record before it contained insufficient proof of such "undue influence" or threat to the citizens' confidence to justify the statutory restriction on this basis.⁵⁵

In addition to rejecting the state's argument on the basis of insufficient evidence, Justice Powell's subsequent reasoning and discussion implies a more general dissatisfaction with the "undue corporate influence" argument. The Court cited *Buckley v. Valeo*⁵⁶ for the proposition that attempts by the government to restrict or limit the relative political influence of individual elements within society are disfavored.⁵⁷ The *Buckley* Court, in holding unconstitutional a federal statute limiting the permissible amounts an individual may expend independently on behalf of a political candidate,⁵⁸ stated, "the concept

⁵³ 435 U.S. at 790. Every court which has considered this question has also made the distinction between candidate elections and referenda questions and found the danger of corruption not present in the latter. See *Schwartz v. Romnes*, 495 F.2d 844, 851-53 (2d Cir. 1974); *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd*, No. 76-3118 (9th Cir. October 3, 1978); *Pacific Gas & Electric v. Berkeley*, 60 Cal. App. 3d 123, 128-29, 131 Cal. Rptr. 350, 353 (1976); *Advisory Opinion on Constitutionality of 1975 Public Act 227*, 396 Mich. 465, 242 N.W.2d 3 (1976).

It was on this point that the Court distinguished the case before it from the Corrupt Practices Act (see text and notes at notes 26 & 27 *supra*). The Court ventured no opinion on the constitutionality of these Acts. 435 U.S. at 788 n.26, 790.

⁵⁴ 435 U.S. at 789.

⁵⁵ 435 U.S. at 789-90. The only evidence of this sort in the record was a report of personal and corporate contributions to committees supporting and opposing the Massachusetts Graduated Income Tax referendum question in 1972. These records showed that the predominantly business supported Committee for Jobs and Government Economy raised and expended \$120,000 to oppose the referendum, whereas the pro-GIT Coalition for Tax Reform, Inc. raised and expended only \$7000. See Brief for Appellants, Appendix to Jurisdictional Statement at page 41, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Justice Powell, however, found this record insufficient to establish any undue corporate influence, as Massachusetts does not require reporting of expenditures made independently of organized committees.

Justice Powell also claimed that the result of the 1976 GIT referendum in itself rebutted any inference of overwhelming corporate political influence; despite the total absence of corporate referenda spending in 1976, the GIT was still defeated. 435 U.S. at 789 n.26.

⁵⁶ 424 U.S. 1 (1976).

⁵⁷ 435 U.S. at 790-91.

⁵⁸ 18 U.S.C. § 608(e)(1)(1971) (repealed 1976).

that government may restrict some elements in our society in order to enhance the relative voices of others is wholly foreign to the First Amendment."⁵⁹ Justice Powell, citing this language in the corporate context, suggests strongly that *any* attempt to limit the political influence of a particular speaker—corporate or otherwise—is impermissible.⁶⁰

The second justification advanced by the state in *Bellotti* was a desire to protect corporate shareholders by preventing the use of corporate funds for political purposes. While accepting, *arguendo*, this interest as compelling,⁶¹ the majority concluded that section 8 was both over and underinclusive as a means for achieving this end. Justice Powell explained that the statute was underinclusive because it proscribed only one category of corporate political activity while leaving unfettered other types of corporate political spending that might also displease shareholders.⁶² In addition, the statute did not purport to limit the political activity of other artificial economic entities, such as labor unions and investment trusts, which include individuals in the same relative position as corporate shareholders.⁶³ The Court based its determination of overinclusiveness on the statute's absolute prohibition of corporate spending on referenda even when there is unanimous authorization by affected shareholders. In such a situation, the Court held, protection is not needed.⁶⁴ Since the interests advanced by the state in the context of referenda spending were inadequate to meet the stringent test of strict judicial scrutiny, Justice Powell and the *Bellotti* majority held Massachusetts General Laws, chapter 55, section 8 unconstitutional as violative of the first amendment.⁶⁵

C. Justice White's Dissent

The principal dissenting opinion in *Bellotti* was filed by Justice White.⁶⁶ His opinion indicates strong disagreement with the majority both as to the

⁵⁹ 424 U.S. at 48-49.

⁶⁰ 435 U.S. at 790-92. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state "right to reply" law struck down) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (FCC "fairness doctrine" upheld).

⁶¹ 435 U.S. at 795.

⁶² For example, the statute does not prohibit corporate spending on public or political issues not the subject of a referendum, nor does it forbid corporate lobbying activities. Cf. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (Sherman Act held not to prohibit lobbying activities).

⁶³ 435 U.S. at 793.

⁶⁴ *Id.* at 794.

⁶⁵ In a concurring opinion, Chief Justice Burger felt compelled to anticipate questions likely to arise in the future. The Chief Justice was concerned that judicial acceptance of the Massachusetts position on corporate speech would lead to heightened and possibly dangerous state regulation of corporations engaged in the media and communications businesses. Arguing as a matter of both fact and constitutional law that it is difficult to distinguish media corporations from business corporations, the Chief Justice maintained that a failure to scrutinize carefully all governmental limitations on corporate expression would endanger the freedom of persons using the corporate form to engage in the business of publication or communication. 435 U.S. at 795-801.

⁶⁶ 435 U.S. at 802-23. Justice Rehnquist submitted a separate dissent. *Id.* at 823-28.

degree of protection afforded corporate speech, and the weight to be given the interests advanced by the state. While the *Bellotti* majority focused upon the type of speech involved, Justice White considered the identity of the speaker to be highly relevant for first amendment purposes. Although conceding that corporate communications come within the scope of the first amendment, Justice White nevertheless contended that such speech is simply not "fungible" with private or individual speech.⁶⁷ He argued that since corporate speech does not involve the notion of individual self-expression, it does not further what he perceived to be the "principal function" of the first amendment and was therefore entitled to less stringent protection.⁶⁸

In determining the weight to be accorded the interests advanced by the state in order to justify its restriction of corporate speech, Justice White first considered the state's interest in preventing undue or overwhelming corporate influence on elections. He sharply criticized the majority's suggestion that *Buckley v. Valeo* could be applied in the context of corporate speech to prohibit attempts to restrict corporate political influence.⁶⁹ A state's interest in preventing undue influence, Justice White argued, assumes a different dimension where corporations are involved. Corporations are artificial entities, created by the state for economic purposes. They are granted special privileges, such as limited liability and perpetual life, by the state to effectuate these economic purposes to the fullest extent. Presumably the state profits from the economic activity which this scheme permits. Yet these corporate advantages, which may be of economic benefit to the state, may also be a political disadvantage. The state should not be put in the position of having corporate wealth accumulated through state-sanctioned economic advantages used to acquire unfair political advantages: "The State need not permit its own creation to consume it."⁷⁰ The prevention of this possibility, Justice White argued, is a far different state concern than simply the equalization of individual political resources.⁷¹

⁶⁷ *Id.* at 804.

⁶⁸ *Id.* at 804-07. Justice White distinguished business corporations such as the *Bellotti* plaintiffs from corporations formed specifically for the purposes of advancing political or ideological beliefs. See *NAACP v. Button*, 371 U.S. 415, 428 (1963). He argued that corporations falling into the latter category are merely using the corporate form to achieve effective self-expression, whereas business corporations have no such political bent but are instead created and used by the shareholders for strictly economic purposes. The unanimity of purpose in such organizations breaks down when corporate funds are used for political purposes unrelated to the corporation's business. Lacking unanimity of political purpose, business corporations cannot be considered as a forum for the self-expression of shareholders. 435 U.S. at 805-06.

While Justice White gave controlling consideration to the self-expression function of the first amendment, he was willing to recognize other values within the first amendment's protective sweep. While one of these is the right to receive information, Justice White expressed doubt that even a complete prohibition of corporate communication would result in the loss of any significant information. Individual officers, shareholders, and employees of the corporation would remain free to communicate any ideas to the public that the corporation itself might wish to express. 435 U.S. at 807.

⁶⁹ 435 U.S. at 809.

⁷⁰ *Id.* at 810.

⁷¹ *Id.* at 809-10.

In addition, Justice White challenged the majority's conclusion that the record showed inadequate "proof" of overwhelming corporate influence to support a legislative attempt to prevent such influence.⁷² Analyzing the statistics used by the majority, White arrived at a different conclusion concerning the existence of undue corporate influence.⁷³ In addition, on a more fundamental level, he questioned the propriety of substituting the Court's judgment for that of the state legislature in determining "undue" corporate influence. That question, Justice White argued, is uniquely tailored for resolution by a political branch of government.⁷⁴

Justice White was also ready to accord greater weight to the state's interest in protecting the rights of corporate shareholders. Relying on the Court's 1977 decision in *Abood v. Detroit Board of Education*,⁷⁵ Justice White argued that by restricting corporate political expenditures to protect shareholders the state furthered interests recognized under the first amendment.⁷⁶ In *Abood*, the Court held that public employees, compelled by a collective bargaining agreement to pay an "agency fee" to a labor union as a condition of employment, had a first amendment right to prohibit the use of these funds for political purposes by the union.⁷⁷ This right stems from the individual's right to adhere to and support his own views, and to refuse to provide support for the views or beliefs of others.⁷⁸ Justice White contended that the Massachusetts statute, by limiting the political uses to which corporate funds may be put, furthered the first amendment protection recognized in *Abood*.⁷⁹ Justice White would therefore uphold the constitutionality of chapter 55, section 8 based upon both interests asserted by the State.⁸⁰

⁷² *Id.* at 810-11 & n.11.

⁷³ *Id.*

⁷⁴ *Id.* See generally Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345 (1977).

⁷⁵ 431 U.S. 209 (1977).

⁷⁶ 435 U.S. at 813.

⁷⁷ 431 U.S. at 235-36.

⁷⁸ *Id.* at 234-36.

⁷⁹ Justice White recognized that *Abood* was not perfectly analogous to the situation presented in *Bellotti*. The political use of shareholder funds by private corporations does not, without more, implicate the first amendment as it lacks the "state action" necessary to trigger the constitutional guarantee. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Civil Rights Cases*, 109 U.S. 3 (1883). Although recognizing that no affirmative duty to protect shareholders exists, Justice White maintained that this does not preclude a state from choosing to protect this interest, since, "[s]tates have always been free to further rights protected by the Constitution even when not compelled to do so." 435 U.S. at 814.

The majority disposed of the *Abood* analogy in a footnote, finding it "irrelevant." Besides noting the lack of state action in the *Bellotti* circumstances, Justice Powell noted that while the teachers in *Abood* were required to pay the union service fee or lose their jobs, the corporate shareholders in *Bellotti* were not subject to such coercion.

The Court also refused to extend the *Abood* remedy—refund of the portion of the dissenter's fee improperly spent—to the total ban on political expenditures worked by the Massachusetts statute. *Id.* at 794 n.34.

Unpersuaded by either of these distinctions Justice White argued that a choice between political use of funds and withdrawal of investment was no less a burden on

II. THE AFTERMATH OF *BELLOTTI*A. *The Analytical Framework*

Of central significance in *Bellotti* is the manner in which the Court perceived and framed the core issues. This analytical framework is composed of two steps. First, the Court determined the type of speech affected by the statute. Since this speech, considered without regard to the speaker's identity, was protected by the first amendment, the statute was evaluated under a strict scrutiny standard of review. At the second step in the analysis the state was required to articulate compelling interests served by the statute which did not infringe unduly upon protected expression. By choosing to focus upon the character of the speech involved rather than its source, the Court was able both to limit the breadth of its inquiry and establish a meaningful framework for subsequent analysis and application. Although the *Bellotti* majority failed to articulate clearly the underlying rationale, it is submitted that the Court's approach is correct.

By focusing upon the nature of the speech being controlled, the *Bellotti* majority merely applied traditional first amendment analysis of governmental restrictions. The characterization of speech as obscene, defamatory, fighting words or commercial has always been a crucial factor in free speech cases.⁸¹ This is true even when corporations have claimed first amendment rights.⁸² As viewed in this context, *Bellotti* breaks no new ground. However, the problem before the *Bellotti* Court was unique in one important respect. In virtually all prior cases the Court was required to determine whether particular speech was protected by the first amendment.⁸³ Further, the challenged governmental restrictions on speech in these previous cases operated on individuals and corporations alike.⁸⁴ But Massachusetts did not claim in *Bellotti* that all ex-

the dissenter's first amendment rights than that contained in *Abood*. While refund was readily available in the *Abood* context, Justice White contended that inability to segregate one shareholder's ownership interest from another makes this remedy unworkable in the corporate context. *Id.* at 808.

Justice White also found that the statute protected the state's economic viability by eliminating the danger of ideological and political influence over investors. *Id.* at 818-19.

⁸⁰ 435 U.S. at 821-22. In a separate dissent, Mr. Justice Rehnquist espoused a view of corporate free speech rights even more restrictive than that of Justice White. 435 U.S. at 822-28. He argued that the first amendment protects only speech affecting the very existence of the corporation. *Id.* at 824, quoting, *Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

⁸¹ See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial speech); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, *Alberts v. California*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

⁸² See note 25 *supra*.

⁸³ A related issue is whether "speech" is implicated at all. See *United States v. O'Brien*, 391 U.S. 367 (1968) (appellant's burning of draft card held not to be speech but merely "conduct relating to speech").

⁸⁴ See, e.g., *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (town ordinance forbidding all posting of "For Sale" signs on property challenged by corporations and individuals).

penditures on behalf of public referenda questions were, in themselves, unprotected by the first amendment; after *Buckley v. Valeo*, this argument was untenable.⁸⁵ Further, section 8 as challenged in *Bellotti* was not neutral in application; it specifically restricted only corporate speech. Under these circumstances, the propriety of determining a statute's constitutionality by means of the traditional first amendment approach is not readily apparent.

However, when the broad range of interests protected by the first amendment are considered, the Court's analytical framework appears to be justified. Both the Massachusetts contention that only the *speaker's* rights under the Constitution control in determining the extent of first amendment protection,⁸⁶ and Justice White's view that speech should be evaluated in relation to individual self-expression,⁸⁷ ignore the often substantial interests of non-speakers. As the *Bellotti* majority recognized, there are broader societal interests that come within the first amendment's protection.⁸⁸

The right to receive information has figured quite prominently in the first amendment decisions of the Supreme Court. Although this "right" has been invoked in a wide variety of contexts,⁸⁹ a particularly illustrative example is the Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁹⁰ In *Virginia Board of Pharmacy*, a consumer group challenged a state regulation forbidding pharmacists to advertise prescription drug prices. In granting the consumers standing to raise the first amendment claim the Court stated: "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, *to its source and to its recipients both.*"⁹¹ The Supreme Court struck down the advertising ban, finding an unwarranted interference with the free flow of commercial information.⁹²

The Court's analysis in *Bellotti* is consistent with this reasoning.⁹³ The approach of the Massachusetts Supreme Judicial Court, which considered only

⁸⁵ See note 35 *supra*. Indeed, the Massachusetts Court explicitly recognized that section 8 operated in an area of fundamental first amendment activities. 1977 Mass. Adv. Sh. at 144, 359 N.E.2d at 1269.

⁸⁶ See text and notes at notes 28-30 *supra*.

⁸⁷ 435 U.S. at 804-05.

⁸⁸ *Id.* at 776.

⁸⁹ See *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (right of access to information concerning prison conditions); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (right to receive obscene materials in the home); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (right to public access to broadcasting); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (right to information regarding contraceptives); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (right to receive foreign mail without post office censorship); *Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976) (right to be exposed to a wide variety of literature). It is important to note that the "right to receive" is not absolute. See *Zemel v. Rusk*, 381 U.S. 1 (1965) (no right to receive information by traveling to certain countries to which travel has been restricted by the Secretary of State).

⁹⁰ 425 U.S. 748 (1976).

⁹¹ *Id.* at 756-57 (emphasis supplied).

⁹² *Id.* at 765, 770.

⁹³ While the Court did not explicitly rely on a "right to receive" to support its formulation of the issue, the Court did recognize this right. For example, in rebutting the state's contention that the "materially affecting" test was the rationale behind the

the status and rights of the speaker, ignores the interests of listeners. Similarly Justice White's perspective, which gives dominant consideration to the first amendment protection of personal self-expression, is excessively restrictive. The first amendment's guarantee is broad enough, as *Virginia Board* shows, to encompass not only the individual interest in self-expression but also the broader societal right of access to useful information. In some circumstances the personalized interest identified by Justice White will control;⁹⁴ in other contexts, maintaining the free flow of information will be the primary concern.⁹⁵ Often, perhaps, these interests will overlap. The *Bellotti* Court did not err in refusing to frame the issue from the perspective of a restricted first amendment. Rather, the Court took a view which more fully protects *all* first amendment rights.

Yet the soundness of the majority's approach does not lie only in its responsiveness to the broad values underlying the first amendment. An additional strength is that the Court's analytical framework allows room for considering those factors which motivate legislatures to treat corporate speech differently. While the Court in *Bellotti* refused to consider the speaker's identity in its threshold identification of protected speech, it did examine interests advanced by the state regarding particular threats posed by corporate speakers. Each of the state's justifications for imposing the restrictions embodied in chapter 55, section 8 were tailored to the unique problems created by corporate communication in the electoral process. Initially, at least the Supreme Court recognized the validity of these interests.⁹⁶ The Court did not hold that corporate speech cannot be restricted under any circumstances to a greater extent than individual speech. Instead, *Bellotti* leaves open the possibility that restrictions on corporate speech will be upheld if the state can show a compelling interest which is substantially served by such a restriction.⁹⁷

However, the Court's invalidation of the Massachusetts statute in *Bellotti* poses certain problems for states seeking to justify restrictions on corporate political speech. These problems stem from the Court's probing and critical evaluation of the interests advanced in *Bellotti*. As a result, a desire to prevent undue corporate influence on elections may now be insufficient to support restrictions on corporate speech.

The "undue influence" issue was the cornerstone of the state's defense of section 8. The Court disposed of this interest on two separate grounds. First, the Court assumed the legitimacy of the interest but found inadequate proof of "undue influence" on the record.⁹⁸ While this disposition in theory permits states to prove a danger of undue corporate influence on elections sufficient to justify statutory restrictions on corporate political speech, it does not

prior press and commercial speech cases, (see note 40 *supra* and accompanying text), the Court pointed out that these cases were grounded on the public's right to receive a clean and free flow of information. 435 U.S. at 781-83.

⁹⁴ See, e.g., *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁹⁵ See note 110 *supra*.

⁹⁶ 435 U.S. at 788-89, 795.

⁹⁷ The Court specifically alluded to this possibility. 435 U.S. at 777 n.13.

⁹⁸ *Id.* at 789-90.

suggest how the state is to proceed. Nor does the Court explain, in any detail, exactly *what* must be proved since the amount of disproportionate impact on the electoral process necessary to justify statutory restrictions on corporate speech was never explained. In addition to these questions of proof, there is a more fundamental concern involved in a judicial determination of the extent of influence on elections. Justice White suggested that a judicial inquiry into the existence of "undue" corporate influence is a step into an area where "the expertise of legislators is at its peak and that of judges at its lowest."⁹⁹ He thus questioned the competence and propriety of the judicial branch in dealing with questions intimately connected with the electoral process.

Neither of these problems are insurmountable. The *Bellotti* Court, in examining the record for evidence of disproportionate corporate influence, did not usurp the duties and responsibility of the political branches. Rather, the Court merely exercised its traditional function of weighing and assessing the evidence before it in light of the applicable standard of review. In this manner the Court was merely assuring that the legislature exercise its powers within constitutional limitations. Therefore the competency of judicial bodies to apply the *Bellotti* framework is unassailable. In addition, the close scrutiny given by the Court in *Bellotti* to claims of undue influence indicates only that states should be prepared to support, with findings or record evidence, the need for regulation in the area of corporate first amendment freedoms.¹⁰⁰

However, the *Bellotti* Court advanced a second reason for rejecting the state's attempt to protect elections from undue corporate influence; the Court suggests that such a legislative purpose is, in itself, impermissible.¹⁰¹ A state may not, consistent with the commands of the first amendment, restrict protected speech merely due to an impact, even disproportionate impact, on those to whom it is addressed. "The fact that advocacy may persuade the electorate is hardly a reason to suppress it; the Constitution 'protects expression which is eloquent no less than that which is unconvincing.'"¹⁰² Similarly, quoting *Buckley v. Valeo*,¹⁰³ the Court stated that expressions by one element of society may not be abridged merely to enhance the relative voice of others.¹⁰⁴

In Justice White's view, this disposition of the undue influence issue is seriously flawed. In his dissent Justice White argued that due to the special

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 789.

¹⁰¹ It is interesting to note that the "undue influence" interest has been recognized as an interest supporting the Federal Corrupt Practices Act, see note 31 *supra* and accompanying text), without any serious question being raised as to the validity of this governmental concern. See *United States v. United Auto Workers*, 352 U.S. 567, 570 (1957); *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1973); *United States v. Painters Local Union No. 481*, 79 F. Supp. 516 (D. Conn. 1948), *rev'd on other grounds*, 172 F.2d 854 (2d Cir. 1949); *Advisory Opinion on Constitutionality of 1975 Public Act 227*, 396 Mich. 465, 242 N.W.2d 3, 13 (1976).

¹⁰² 435 U.S. at 790, quoting *Kingsley Int'l. Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959).

¹⁰³ 424 U.S. 1 (1976).

¹⁰⁴ 435 U.S. at 790-91, quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

economic advantage extended to corporations by statute, a state's interest in limiting *corporate* influence was a different and far more important interest than the mere desire to equalize the resources of candidates. This interest in his view was proper and supplied a strong basis for asserting the validity of section 8.¹⁰⁵

Inexplicably, Justice Powell failed to deal with this distinction. Instead he elected simply and without discussion to apply the *Buckley* rationale to a situation that arguably called for a different set of balances. While the Court's failure to squarely confront the purported distinction between the *Buckley* and *Bellotti* situations may be noteworthy, it is submitted that, on balance, the Court was justified in applying the principle of *Buckley* to the corporate speech context. Basic policies and tenets of the first amendment would be harmed by giving *Buckley* the limited application argued by Justice White. The "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open"¹⁰⁶ does not distinguish those speakers who have "special advantages" from those that do not. Furthermore, the Court has refused in the past to allow states to restrict speech simply because of the speaker's power to influence.¹⁰⁷ So long as a speaker can provide information relative to the discussion or resolution of an issue of public concern, the first amendment protects this speech and leaves to the people, not the government, the power to evaluate the relative strength of the arguments presented.¹⁰⁸ As the *Bellotti* Court noted: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source whether corporation, union or individual."¹⁰⁹

In addition, to accept Justice White's view that a corporation's speech may be constitutionally restricted because of the "special advantages" which corporate entities enjoy is to elevate in many respects form over substance. While corporations may amass wealth due to economic advantages extended by the state, many individuals also profit directly as shareholders from the advantages enjoyed by these corporations. *Buckley* precludes any attempt to limit the influence of these individuals although such influence may flow from the very same advantages as enjoyed by the corporate entity. To deny a corporation the right to speak because it profits from special advantages is to distinguish such speech without rational basis. The *Bellotti* Court correctly refused to allow the artificial distinction of special advantages to control.

In any event, it is clear that the Court in *Bellotti* was not willing to permit restriction of corporate speech merely to prevent alleged undue influence over the electorate. Undue influence, even if adequately shown, by itself is insufficient. Actual corruption or some other direct threat of undermining the democratic processes must be shown before restrictions on communication protected by the first amendment will be sustained.¹¹⁰

¹⁰⁵ 435 U.S. at 809-10.

¹⁰⁶ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁰⁷ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

¹⁰⁸ 435 U.S. at 791 & nn.30 & 31, 792.

¹⁰⁹ *Id.* at 777.

¹¹⁰ *Id.* at 787-91.

B. Application of the Bellotti Framework

Although the *Bellotti* Court sought to emphasize the limitations of its holdings,¹¹¹ the decision's impact on the entire problem of corporate speech cannot be denied. For, while the decision focused only upon corporate spending in the context of public referenda questions, *Bellotti* establishes an analytical framework by which governmental attempts to restrict other types of corporate communication can be tested in the future. The two-step process requires first, consideration of the type of speech restricted and second, evaluation of the restriction under a strict scrutiny standard of review.

It is somewhat ironic, given the large amount of legislation directed toward the communications of business corporations, that a *municipal* corporation would rise as one of the original claimants of the first amendment rights vindicated by *Bellotti*. Yet when the City of Boston was sued by taxpayers seeking to enjoin the city's use of public funds to support a referendum question on the 1978 Massachusetts ballot,¹¹² the city argued, citing *Bellotti*, that the first amendment protected its right to communicate its view on the issue to the public.

The case in which this issue arose was *Anderson v. Boston*.¹¹³ Like the *Bellotti* case decide two years earlier, the *Anderson* case came before the Mas-

¹¹¹ *Id.* at 776-78.

¹¹² The question at issue would, if approved, allow for the classification of property for real estate tax purposes into residential, business, industrial and vacant classes. As a result, business and industrial property would be taxed at a higher rate than residential property. The referendum was an attempt to prevent the predicted escalation of residential property taxes in light of the Supreme Judicial Court's 1975 ruling that all property, regardless of use, be taxed at its fair cash value. *See* *Weinstock v. Hull*, 367 Mass. 66, 323 N.E.2d 867, *appeal dismissed*, 423 U.S. 805 (1975).

¹¹³ 1978 Mass. Adv. Sh. 2297, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979). The *Anderson* case was not the first time that the spending of municipal funds on behalf of referenda questions has been challenged. Yet, previous challenges have generally been decided solely on the issue of the extent of the municipality's spending power under state law, with no first amendment issues raised. *See* *Mines v. DelValle*, 201 Cal. 273, 257 P. 530 (1927); *Elsenu v. Chicago*, 334 Ill. 78, 165 N.E. 129 (1929); *Porter v. Tiffany*, 11 Ore. App. 542, 502 P.2d 1385 (1972); *Shannon v. Huron*, 9 S.D. 356, 69 N.W. 598 (1896); *Port of Seattle v. King County Superior Court*, 93 Wash. 267, 160 P. 755 (1916). The only previous decision in this area relevant to first amendment concerns is *City Affairs Comm'n of Jersey City v. Comm'rs of Jersey City*, 134 N.J.L. 180, 46 A.2d 425 (1946), where the Court, in holding that a municipality could publicize at public expense its position on a referendum question, discussed the city's right to self-protection and self-advancement. The Court's discourse on informing the electorate, though not couched in first amendment language, touches upon first amendment concerns. In any event, the *Jersey City* case was severely cut back just seven years later when the New Jersey Supreme Court held that a municipality could only spend money concerning a referendum question if it gave a fair representation to *both* sides of the issue. *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*, 13 N.J. 172, 98 A.2d 673 (1953).

The first amendment issues surrounding public spending have been most frequently raised from the perspective of those who object, on first amendment grounds, to public expenditures for political purposes. *See* *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Stern v. Kramansky*, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975). *See also* note 99 *infra*.

sachusetts Supreme Judicial Court for resolution. The Massachusetts Court, after determining that state law did not authorize municipal expenditures for purposes of influencing the vote on a referendum question,¹¹⁴ addressed the city's first amendment claim. The Court appeared a bit uncomfortable applying first amendment principles in a municipal context.¹¹⁵ However, the Court chose to examine the problem within the framework provided by the Supreme Court in *Bellotti*.¹¹⁶ The Court thus assumed that protected expression was implicated, and applied that strict scrutiny standard of review.¹¹⁷ The Supreme Judicial Court ultimately concluded, however, that a state's interest in assuring the fairness of elections is compelling and justifies prohibiting municipal speech in the context of ballot referenda questions.¹¹⁸

On first impression, a distinction is readily apparent between *Bellotti* and *Anderson*. While business corporations, even prior to *Bellotti*, consistently have been considered "persons" within the meaning of the fourteenth amendment,¹¹⁹ municipalities have not been so recognized.¹²⁰ Thus, as a threshold issue, it could be argued that a municipality has no claim to rights under the first or fourteenth amendments. However, as the *Anderson* Court pointed out, the Supreme Court in *Bellotti* expressly rejected an approach which phrases the issue in terms of the constitutional status of the speaker. The type of speech restricted and not the identity of the speaker controls. There is no reason why the *Bellotti* framework should not be applied in the *Anderson* context.¹²¹

Attempts to distinguish municipal speech as presented in *Anderson* from the corporate speech at issue in *Bellotti* likely will not prove fruitful. As far as the type of speech is concerned, the two cases are surprisingly similar. In both cases speech relating to referendum issues was involved. The *Bellotti* Court found this type of speech, involving as it does public discussion of governmental affairs, to be at the "heart" of the first amendment. Thus the *An-*

¹¹⁴ The Court held that such spending was inconsistent with, and preempted by, Massachusetts General Laws Chapter 55, which governs political fund raising and expenditures in the Commonwealth. 1978 Mass. Adv. Sh. at 2310, 380 N.E.2d at 633-34.

¹¹⁵ *Id.* at 2312-13, 380 N.E.2d at 637.

¹¹⁶ *Id.* at 2311-12, 380 N.E.2d at 636-37, quoting, 435 U.S. at 776.

¹¹⁷ 1978 Mass. Adv. Sh. at 2314, 380 N.E.2d at 637-38.

¹¹⁸ *Id.* at 2315-20, 380 N.E.2d at 638-40.

¹¹⁹ See note 20 *supra*.

¹²⁰ See *Coleman v. Miller*, 307 U.S. 433, 441 (1939); *Risty v. Chicago, R.I. & Pac. Ry. Co.*, 270 U.S. 378, 390 (1926); *Trenton v. New Jersey*, 262 U.S. 182 (1926); *City of Mountlake Terrace v. Wilson*, 15 Wash. App. 392, 549 P.2d 497 (1976). *But see* *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968) (town held to be a "person" within the fourteenth amendment, but only for purposes of asserting claim against state of which town is not a subdivision).

¹²¹ *But see* *Boston v. Anderson*, 47 U.S.L.W. 3316 (1979). (Justice Stevens, with whom Justices Stewart and Rehnquist join, dissenting from denial of motion to vacate stay order entered by Mr. Justice Brennan on grounds that no federal question is involved due to constitutional status of municipal corporations).

der son Court was correct in applying the *Bellotti* framework, and in examining the prohibition on municipal spending under a standard of strict scrutiny. In addition, the Supreme Judicial Court's ultimate conclusion was also correct since the state interests advanced in *Anderson*, unlike those proposed in *Bellotti*, are sufficiently compelling to withstand strict scrutiny. The principal interest¹²² advanced by the state in *Anderson* was the assurance of electoral fairness by maintaining the neutrality of governmental bodies.¹²³ While this is somewhat analogous to the interest asserted, and rejected, in *Bellotti* of preventing undue influence on elections, the additional factor of government speech presents the problem in a somewhat different light. It is submitted that this factor is significant, and that the reasoning of the Court in *Bellotti* suggests if not compels the conclusion reached by the Supreme Judicial Court in *Anderson*.

The rejection of the Government's concern with "undue influence" in both *Bellotti* and *Buckley v. Valeo* illustrates the reluctance of the Supreme Court to approve government attempts to tinker with the unfettered operation of the political process or to balance the relative political influence of different elements in society. However, when closely examined, the speech of a municipality or other government entity does not represent the vindication of a right to unfettered access to the political marketplace. Rather, it appears

¹²² A secondary state interest in *Anderson* is the protection of taxpayers who might object to the political use of their tax funds. 1978 Mass. Adv. Sh. at 2318-20, 359 N.E.2d at 639-40. See also *Stanson v. Mott*, 17 Cal.3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Stern v. Kramansky*, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975). This is somewhat similar to the interest asserted in *Bellotti* of protecting corporate shareholders. 435 U.S. at 792-93. Yet there are distinctions between the two. Public taxpayers are in a somewhat different position than private shareholders. Thus, while the *Bellotti* majority thought *Abood v. Detroit Board of Education* was inapposite in that context, 435 U.S. at 794 n.34, the *Abood* analogy might be relevant in the *Anderson* situation. The *Bellotti* Court rejected the *Abood* analogy because it found neither state action nor a limitation on stockholders' freedom when the action of private corporations is involved. In the municipal speech situation, state action is obviously present, and the taxpayer—unlike the shareholder in *Bellotti*—is by no means free to withdraw his investment, i.e. his tax funds. *Abood*, then, may support the right of the individual taxpayer to prohibit the use of tax revenue to support a political viewpoint.

However the *Abood* analogy alone would not invalidate the municipal claim to free speech. The *Abood* Court, sensitive to the rights of the union to communicate its political position, limited the remedy of the dissenter so as not to completely silence the speech of the majority. The *Abood* Court suggested that the dissenter be refunded the portion of his funds used improperly. This remedy protects both the union's right to speak and the dissenting member's right not to be compelled to speak. 431 U.S. at 237-42.

¹²³ A different issue altogether is presented by municipal spending in partisan election campaigns for candidates. As the *Bellotti* Court distinguished candidate from referenda campaigns on the belief that the danger of corruption is present in the former but lacking in the latter (see 435 U.S. at 790 & n.29), so too municipal spending on behalf of candidates raises different issues than does spending on nonpartisan referenda. Whatever may be said concerning referenda as to candidates, it should be clear that "it is not the function of the government to get itself re-elected." T.I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 699 (1970).

to be the very type of government paternalism criticized and rejected in *Bellotti* and *Buckley*. As the Supreme Judicial Court stated in *Anderson*: "[T]he state government and its various subdivisions should not use public funds to instruct the people, the ultimate authority, how they should vote."¹²⁴

Both *Bellotti* and *Buckley* involved statutes seeking to limit and regulate the political activities of private individuals and corporations. While the expression of governmental opinion does not directly regulate or restrict the speech of private parties, it could have the same effect by neutralizing the political speech of private citizens and associations. Indeed, there is the additional danger that public debate will be overwhelmed by the speech of governmental bodies. The type of governmental activity present in *Anderson* may be even more damaging to first amendment values than the restrictions imposed in both *Buckley* and *Bellotti*. While those restrictions were content-neutral in that they worked equally on all candidates or political positions, governmental speech is not so neutral. The very notion of governmental speech suggests advocacy of one political view or position over all others.¹²⁵ Thus, the reasoning of the Supreme Judicial Court in *Anderson* is consistent with the principles of the first amendment as set forth in *Bellotti*.

CONCLUSION

First National Bank of Boston v. Bellotti is a landmark first amendment decision. It represents the first meaningful Supreme Court consideration of the corporate free speech issue. Yet the Court chose to keep the scope of its holding narrow by not discussing corporate first amendment rights generally, but rather by providing a framework for balancing competing interests. This framework—focusing first on whether the particular speech involved is protected under the first amendment and, if so, weighing the state interests against a strict scrutiny standard of review—is the method by which subsequent governmental restrictions on corporate speech will be measured. When this framework is applied to a claim that a municipal corporation has a first amendment right to spend funds on behalf of a referenda question, the state interest in seeing that governmental units do not interfere with the freedom and impartiality of the political marketplace justifies the restriction on municipal speech.

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¹²⁴ 1978 Mass. Adv. Sh. at 2317, 380 N.E.2d at 639.

¹²⁵ No similar objection can be found to fair and impartial governmental efforts to provide the public with both sides of a political debate. This type of governmental communication does not appear to pose any of the dangers associated with governmental advocacy of one side of an issue. See *Stanson v. Mott*, 17 Cal.3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*, 13 N.J. 172, 98 A.2d 673 (1953). Instead, it is a direct contribution to the pool of information necessary for the individual to make informed and intelligent political choices. The *Buckley* Court, in upholding the public financing provisions of the Federal Elections Campaign Act, looked upon the statute as an effort "not to abridge restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93.