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Bellotti - Corporations' Freedom of Speech

George W. Scofield

ity, nor dissenting judge objected to an injunction being imposed.[75] The plaintiff in the instant case was only eighteen years old, had served his probationary sentence, and recently had married. He had obtained a job, and his employer had requested that the defendant remove the display.[76] The plaintiff's ability to become a productive member of society and society's interest in the rehabilitative process were impeded by this continued exposure.[77]

This case demonstrates the difficulty of regulating the extent to which a person may speak the truth when such speech causes another great distress. The strong competing interests of privacy and free speech defy easy accomodation. The majority eased its task of balancing these interests by improperly stressing the distinction between an individual's and the media's right to disseminate information. However, given the majority's finding that the defendant was motivated by a desire to harass the plaintiff, this writer believes the defendant's actions were sanctioned consistently with the Constitution.

Rick Revels

Bellotti—CORPORATIONS' FREEDOM OF SPEECH

First National Bank of Boston,[1] seeking a declaratory judgment, challenged the constitutionality of a Massachusetts statute[2] prohibiting corporations from making political contribu-

75. *Id.* at 24, 26, 33. The court did not mention that an injunction is generally an inappropriate remedy to restrain torts such as defamation or harassment against the person, nor attempt to justify its action by the finding of special circumstances and irreparable injury. *See* Greenberg v. Burglass, 254 La. 1019, 1027, 229 So. 2d 83, 86 (1969). *See also* LA. CODE CIV. P. art. 3601.

76. 355 So. 2d at 29.

77. *See, e.g.*, Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 828 (D.C.D.C. 1955); Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 538, 483 P.2d 34, 40, 93 Cal. Rptr. 866, 872 (1971); Melvin v. Reid, 112 Cal. App. 285, 287, 297 P. 91, 93 (1931).

1. The other plaintiffs joining First National Bank of Boston in suing were: New England Merchants National Bank, the Gillette Co., Digital Equipment Corp., and Wyman-Gordon Co.

2. MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1977), provides, *inter alia:*

tions or expenditures that promote a candidate or seek to influence the public on any question not, in the language of the statute, "materially affecting" the business property or assets of the corporation. The Massachusetts Supreme Judicial Court sustained the statute, holding that business corporations can claim no first amendment protection for noncommercial speech.[3] The Supreme Court of the United States reversed, five to four, *holding* that since the statutory prohibition of corporate speech was not justified by any compelling state interest, it unconstitutionally restricted the free flow of political information. *First National Bank of Boston v. Bellotti,* 435 U. S. 765 (1978).

Corporations have always been considered artificial persons in the contemplation of the law.[4] Whether corporations are entitled to the same constitutional rights accorded natural persons has been a troublesome, at times metaphysical, issue in American constitutional law.

In 1817, in the *Dartmouth College* case,[5] Chief Justice

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

3. First Nat'l Bank of Boston v. Attorney Gen., 359 N.E.2d 1262 (Mass. 1977), *rev'd,* 435 U.S. 765 (1978). The court stated:

> [A] corporation does not have the same First Amendment rights to free speech as those of a natural person, but, whether its rights are designated "liberty" rights or "property" rights, a corporation's property and business interests are entitled to Fourteenth Amendment protection. . . .
>
> Thus, we hold today 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 . . . .

Id. at 1270.

4. Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

5. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

Marshall struggled with the constitutional protections granted corporations under the contract clause.[6] Speaking of a corporation's property rights, Chief Justice Marshall stated that corporations possessed "only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence . . . . But this being does not share in the civil government of the country, unless that be the purpose for which it is created."[7] Thus, it appears that Chief Justice Marshall recognized the very distinction drawn in the Massachusetts statute, *i.e.*, corporations are free to speak on issues directly affecting corporate property but are not free to share in the civil government of the country through the exercise of protected free speech. Later, the Court indicated that only those rights given by the corporate charter or those rights essential to the full enjoyment of the main object of the corporate charter are protected.[8] The cases under the contract clause gave protection to a corporation for property rights granted by its charter but intimated that corporations do not possess the general civil rights belonging to natural persons.[9] "The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter."[10]

The fourteenth amendment, primarily through the privileges and immunities clause and the due process clause, is the vehicle through which first amendment restrictions are imposed upon the states.[11] For a corporation to be protected from state infringement of its first amendment rights, it must come

6. U.S. CONST. art. 1, § 10, provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." A corporate charter is considered a contract within the meaning of the contract clause. Chicago, Burlington, and Quincy R.R. Co. v. Iowa, 94 U.S. 155 (1876).

7. 17 U.S. (4 Wheat.) at 636.

8. Pearshall v. Great N.R.R., 161 U.S. 646, 661 (1896).

9. *See, e.g., id. See also* Stone v. Mississippi, 101 U.S. 814 (1879); West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

10. Baltimore and Ohio R.R. v. Harris, 79 U.S. (12 Wall.) 65, 81 (1870).

11. *See, e.g.*, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940); Hague v. CIO, 307 U.S. 496 (1939); Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

within the protection accorded by the fourteenth amendment. The privileges and immunities clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States . . . ."[12] The Court has held that the term "citizens," as it appears in this clause, applies to only natural persons, members of the body politic, and not to artificial creations of the state.[13] Thus, corporations are not entitled by this clause to assert privileges and immunities secured to "citizens" against state legislation.

The due process and equal protection clauses of the fourteenth amendment provide that no "State [shall] deprive any *person* of life, liberty or property, without due process of the law; nor deny to any *person* the equal protection of the laws."[14] Roscoe Conkling, a former member of the Joint Congressional Committee which drafted the fourteenth amendment, told the Court in oral argument in 1882 that the drafters intended to include corporations within the meaning of the word "person" as it appears in the due process and equal protection clauses of the fourteenth amendment.[15] Four years later, in *Santa Clara v. Southern Pacific Railroad,*[16] Chief Justice Waite, speaking for a unanimous Court, announced:

> The Court does not wish to hear argument on the question whether the provisions in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these *corporations.* We are all of the opinion that it does.[17]

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

13. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). *See also* Hague v. CIO, 307 U.S. 496 (1939); Orient Ins. Co. v. Daggs, 172 U.S. 557 (1899).

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

15. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,* 47 YALE L.J. 371 (1938). *See* San Mateo County v. Southern Pac. R.R., 116 U.S. 138 (1885). Roscoe Conkling twice declined a seat on the Supreme Court. He submitted a manuscript record of the committee to support his argument.

16. 118 U.S. 394 (1886).

17. *Id.* at 396 (emphasis added). *But see* Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 83 (1938) (Black, J., dissenting);Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576 (1949) (Douglas, J., dissenting). Both justices vigorously denied that corporations were persons within the meaning of the fourteenth amendment, arguing

Thus the Court affirmed Conkling's assertion that the word "person," at least within the meaning of the equal protection guaranty, includes corporations. Later, in a number of cases, the Court held that corporations were also persons within the meaning of the due process clause, but, significantly, protection under this clause was limited to rights directly related to the corporation's property on the basis that the "liberty" referred to in the due process clause is the liberty of natural, not artificial, persons.[18] The scope of the constitutional protection accorded corporations through the due process clause encompassed corporate property and corporate economic interest but not the general civil liberties possessed by natural persons.[19]

The next dramatic development occurred in *Grosjean v. American Press Co., Inc.*[20] Justice Sutherland, writing for a unanimous Court, held that a Louisiana tax on a corporate newspaper violated the due process clause of the fourteenth amendment because it abridged the American Press Company's freedom of the press. Justice Sutherland's opinion granted this protection without squarely addressing the state's contention that the due process clause protected the "liberty" of natural persons and not the "liberty" of corporations.[21] The

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that neither the history nor the language of the amendment supported an interpretation of "persons" that includes corporations. Justices Black and Douglas found that the true purpose of the amendment was to protect *human* rights, thereby denying protection to corporations. Both opinions were ignored by the other justices and condemned by the legal press. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 794 (4th ed. 1970).

18. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Western Turf Ass'n v. Greenburg, 204 U.S. 359 (1907); Northwestern Nat'l Life Ins. v. Riggs, 203 U.S. 243 (1906); Smyth v. Ames, 169 U.S. 466 (1898).

19. B. SWARTZ, THE CONSTITUTION OF THE UNITED STATES 12-18 (1965).

> In its inclusive import . . ., the "liberty" protected by the Constitution comprises all the civil liberties of the individual. Insofar as such liberties include rights of persons alone, they must pertain only to natural persons . . . . To the extent that the "liberty" guaranteed by the Constitution embraces property rights, it protects artificial, as well as natural, persons . . . . [I]t makes no difference that the corporate personality is solely a creature of the law.

Id. at 15, 16.

20. 297 U.S. 233 (1936).

21. Corporations had previously been held to be persons within the due process clause, but this protection had been extended only to the corporation's property rights,

opinion further held that a corporation is a *person* within the meaning of the due process and equal protection clauses. More significantly, the Court emphasized the importance of preserving an "untrammeled press" as a means of informing the public[22] but said nothing about the rights of commercial corporations, other than the press, to speak freely without state restriction. The fact that the newspaper was a corporation seemed incidental to the Court's extension of first amendment press protection through the fourteenth amendment.[23] Thus, only three years later in *Hague v. C.I.O.*,[24] Justice Stone reiterated prior opinions in a separate concurring opinion and stated that corporations cannot claim to be deprived of freedom of speech because they enjoy no such freedom—the liberty granted by the due process clause is the liberty of natural, not artificial, persons.[25] This opinion seems to support the proposition that the Court in *Grosjean* was primarily concerned with protecting the press, regardless of its corporate form.

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not to the "liberty" through which first amendment protections are imposed on the states. This is the point the Court failed to address. See text at note 17, *supra*.

22. The Court gave an abbreviated historical overview of attempted censure and taxation of the press, concluding that such restrictions were prohibited by the first and fourteenth amendments. 297 U.S. at 245-49. The Court found the press to be a vital source of public information and stated: "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.* at 250. The opinion seems to stand for the proposition that the *press* is protected from state interference by the due process clause of the fourteenth amendment and not that *corporations, per se,* are protected.

23. Brief for Appellee at 16, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The case does not declare that "corporations *per se* have First Amendment rights, but merely [recognizes] that natural persons retain their First Amendment rights even though they publish or distribute their views under corporate auspices." *Id.* at 16-17.

24. 307 U.S. 496 (1939).

25. *Id.* at 527. See note 17, *supra*.

While Justice Stone in his concurring opinion dismissed the American Civil Liberties Union (ACLU) as not being protected by the liberty of the due process clause, the majority dismissed the corporation as not being entitled to the privileges and immunities of section 1 of the fourteenth amendment.

Significantly, neither the majority nor Justice Stone's concurrence made any attempt to distinguish *Grosjean*. The inconsistency between the two opinions—*Grosjean* extending first amendment free press protection to a corporation through the due process clause of the fourteenth amendment and *Hague* denying it to the ACLU—can only be reconciled by the need to protect the press regardless of the form in which it does business.

Corporations do not come within the protection for citizens of the privileges and immunities clause of the fourteenth amendment, but they are considered to be persons and thus are protected under the equal protection clause.[26] With the exception of *Grosjean*,[27] corporate protection under the due process clause has been extended only to property rights and not to the general civil "liberties" of natural persons.[28] Of course, corporations have been granted other constitutional protections.[29] In fact, certain types of corporate organizations have been given first amendment free speech protection. Corporations in the communications business have been granted freedom of speech protection because they supply the general public with indispensable information.[30] In such cases, corporations have been granted protection from state infringement without any discussion of their corporate status; they enjoy first amendment protections despite publishing and distributing their views under corporate auspices. Additionally, freedom of speech protection has been granted to non-profit-oriented corporations, such as the N.A.A.C.P., that are directly engaged in those activities protected by the first and fourteenth amendments.[31] This type

26. See text at notes 14-18, *supra*.

27. See text at notes 20-23, *supra*.

28. See text at note 18, *supra*.

29. *See* General Motors Leasing Corp. v. United States, 429 U.S. 338 (1977) (fourth amendment, unreasonable search and seizure); Rex Trailer Co. v. United States, 350 U.S. 148 (1956) (fifth amendment, double jeopardy); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (fifth amendment and fourteenth amendment, deprivation of property without due process).

30. New York Times v. Sullivan, 376 U.S. 254 (1964); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). It cannot be doubted that motion pictures and newspapers are a significant medium for communicating ideas, providing information, and disseminating opinion. For this reason, they come within the freedom guaranteed by the first amendment and protected by the fourteenth amendment from infringement by the states. This protection has been extended without regard to the speakers' corporate form.

31. NAACP v. Button, 371 U.S. 415 (1963). In *Button* the Court stated: "We think [the NAACP] may assert [the protection of the first amendment], because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail . . . . We also think [the NAACP] has standing to assert the corresponding rights of its members." *Id.* at 428. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court stated:

[The NAACP] and its members are in every practical sense identical. The

of corporation is but a means of advancing its members' political beliefs and ideas,[32] and again, protection has been extended through the fourteenth amendment without reference to corporate status. It is clear that both of these types of corporations have free speech protection because of their particular purpose.

Significantly, *Bellotti*[33] focuses directly on the corporate political speech issue. The appellants, national banking associations and business corporations, wanted to spend money to influence the vote on a *referendum* proposal to amend the Massachusetts Constitution. Appellants sought to have a Massachusetts statute declared unconstitutional because it prohibited corporate expenditures for the purpose of influencing the vote on an issue submitted to the general public other than one "materially affecting any property, business or assets of the corporation."[34] The Massachusetts Supreme Judicial Court upheld the validity of the statute, finding no violation of the first amendment, the due process or equal protection clauses of the fourteenth amendment, or similar provisions of the Massachusetts Constitution.[35] The Supreme Court of the United States, with Justice Powell writing for the majority, reversed and held the statute unconstitutional.

Justice Powell dismissed as an "artificial mode of analysis" the rationale of earlier cases[36] holding the "liberty" guaranteed by the fourteenth amendment to be only that of natural, not artificial, persons.[37] The majority adopted the reasoning of

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> Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.

357 U.S. at 459. *See also In re* Primas, 436 U.S. 412 (1978); Harrison v. NAACP, 360 U.S. 167 (1959).

32. NAACP v. Button, 371 U.S. 415 (1963).

33. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

34. MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1977). For the text of section 8, see note 2, *supra*.

35. First Nat'l Bank of Boston v. Attorney Gen., 359 N.E.2d 1262 (Mass. 1977), *rev'd*, 435 U.S. 765 (1978). See note 3, *supra*.

36. *See* cases cited at note 18, *supra*.

37. 435 U.S. at 779-80. The Court found that the *liberty* of speech of the first amendment is within the *liberty* safeguarded from invasion by state action by the due process clause of the fourteenth amendment. To support this analysis the Court cited *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), and *Gitlow v. New York*, 268 U.S.

Grosjean[38] and channeled first amendment protection to corporations through the due process clause of the fourteenth amendment. The Court found "practically universal agreement that a major purpose of [the first] amendment was to protect the free discussion of governmental affairs."[39] The majority felt that corporations could not be denied freedom of political speech consistently with this purpose. From this viewpoint, the status of the speaker becomes less significant because supplying the public with the information and ideas needed to make informed political decisions is of paramount importance.[40] Justice Powell, like Justice Sutherland in *Grosjean*, was primarily concerned with the protection of speech and press freedoms, *not* with the corporate nature of the parties.[41]

The majority acknowledged two state interests that might justify limitations on corporate political advocacy: preservation of the integrity of the electoral process[42] and protection of minority shareholders whose views may conflict with those expressed by the corporate management.[43] In recognizing these interests the Court seems to have assumed that corporate status is relevant in determining if there are sufficient state interests to justify limitations on corporate political speech. However, the Court found neither state interest sufficient to justify the Massachusetts statute.

The first interest, prevention of corruption, was unsupported by any record or legislative findings that corporate ad-

652 (1925). Neither decision expressly granted *corporations* this protection; they held in terms of the general protections of the due process clause.

38. 297 U.S. 233 (1936).

39. 435 U.S. at 776, *quoting* Mills v. Alabama, 384 U.S. 214, 218 (1966).

40. 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.

435 U.S. at 777. *See also* Garrison v. Louisiana, 379 U.S. 64, 74-75(1964); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-26 (1948).

41. See text at notes 20-23, *supra*.

42. 435 U.S. at 788-89.

43. *Id.* at 792.

vocacy threatened to undermine the democratic process.[44] The Court found that the Massachusetts statute prohibiting appellants from speaking did not achieve the second purported state interest—protecting minority shareholders. The statute was underinclusive, as it did not prohibit other types of corporate advocacy, and overinclusive, as it prohibited corporate action even if authorized unanimously by the shareholders.[45]

Chief Justice Burger joined in the opinion and judgment of the Court but went beyond the facts to raise additional questions. He feared that if the Massachusetts Supreme Judicial Court's narrow reading of first amendment protections was accepted, then speech limitations, similar to those imposed by the Massachusetts statute, might be extended to persons employing the corporate form to carry on the business of mass communications.[46] This fear seems unfounded as the corporate press and other forms of corporate mass communications have long been protected.[47] Burger stated that "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to *all* who exercise its freedoms."[48]

Justice White, dissenting, conceded that corporate speech is within the scope of first amendment protections but considered the state interests sufficient to justify the statute.[49] Corpo-

44. "If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened *imminently* to undermine democratic process, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration." *Id.* at 789 (emphasis added). Justice White, in his dissenting opinion, found that the facts presented by the appellees proved corporate domination. *Id.* at 810 (White, J., dissenting). Although the majority seems to have recognized this state interest as justifying some restrictions, it seems it would have taken overwhelming evidence to prove the state interest.

45. The statute was underinclusive because it singled out a particular ballot question (individual income tax) undermining the likelihood of a genuine state interest in protecting shareholders. The statute did not prohibit corporations from lobbying or from carrying on other corporate advocacy on a public issue, until it became the subject of a referendum. For the text of the statute, see note 2, *supra.*

The overinclusiveness was demonstrated by the fact that the statute prohibited corporate advocacy even if shareholders were unanimously in favor of such action. 435 U.S. at 794.

46. *Id.* at 796. (Burger, C.J., concurring).

47. See notes 22, 23 & 30, *supra.*

48. 435 U.S. at 802 (Burger, C.J., concurring) (emphasis added).

49. *Id.* at 804, 809-10 (White, J., dissenting).

rate speech, except for that of corporations formed for the purposes of advancing ideological causes,[50] is not a form of communication which furthers the self-expression of individual shareholders. Shareholders in a profit-oriented corporation are united by a common desire to make money. This unanimity of purpose breaks down when there is no business purpose in the communication and the motive is merely the advancement of management's political views.[51] Therefore, Justice White believed that Massachusetts' restrictions on corporate advocacy were justified by the compelling state interest in preventing corporate managers from using funds to promote ideas that did not further the business interests of the corporation. He also concluded that the state's interest in preserving the integrity of the electoral process and preventing corruption was furthered by the statute; if corporations' communications were left unchecked, their vast economic power would lead to control, not only of the economy but of the electoral process.[52]

Only Justice Rehnquist believed that corporate freedom of speech should be limited to issues that materially affect the corporation's property or assets.[53] Justice Rehnquist distinguished the holding in *Grosjean* as being limited to allowing a corporation engaged in the business of publishing or broadcasting to have the same freedom of the press that is enjoyed by natural persons.[54]

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50. See text at notes 31 & 32, *supra*.

51. "Thus when a *profitmaking* corporation contributes to a political candidate this does not further the *self-expression or self-fulfillment* of its shareholders in the way that expenditures from them as individuals would." 435 U.S. at 806 (White, J., dissenting) (emphasis added). The Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), struck down limitations on individual expenditures because they *directly* restricted the right of individuals to speak their minds. At the same time, however, the Court upheld contribution limitations as being only an *indirect* restriction upon an individual's ability to freely communicate ideas. Corporate expenditures would be analogous to this latter restriction as only *indirectly* restricting shareholders' self-expression.

52. 435 U.S. at 809.

53. *Id.* at 828 (Rehnquist, J., dissenting).

54. There can be little doubt that when a State creates a corporation. . . , it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the *liberty* of press *essential* to the conduct of its business. . . . It cannot be so readily concluded that the right of

Apparently, *Bellotti* gives corporations freedom of speech protection equal to that of individuals.[55] However, a corporation should not be given speech protection in issues that do not affect the corporate property; once the property aspect is removed the speech becomes the purely personal view of corporate management, undeserving of the constitutional protection afforded by *Bellotti.* The only justification provided by the Court was the right of the public to receive such ideas and information.[56] However, corporations with vast economic resources and marketing expertise may "drown out" "smaller" voices, thus misleading the public as to the level of support for a particular point of view.[57] Ceilings on corporate contributions, rather than an absolute prohibition, could prevent such corporate abuse.[58] This would allow the strengths and weaknesses of each position to be assessed on the basis of logic and reasoning and not according to the sheer volume of its exposure.

Legislation restricting corporate political advocacy will be subject, as a result of *Bellotti,* to the strict scrutiny demanded by the first amendment.[59] However, the holding in *Bellotti*

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political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes.

Id. at 824-25 (Rehnquist, J., dissenting) (emphasis added). See text at notes 20-23, *supra.*

55. The Court, however, did recognize that under different circumstances a "justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." 435 U.S. at 777-78 n.13.

56. See text at notes 39-40, *supra.*

57. Comment, *Corporate Political Affairs Program,* 70 YALE L.J. 821, 826 (1961). The Court answered this contention by providing that the source of the advertisement should be disclosed to enable people to evaluate more accurately the arguments to which they are exposed. 435 U.S. at 792 n.32.

58. Brief for Appellants at 76, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

59. In first amendment cases, the Supreme Court is least likely to accept governmental interests not considered by the relevant decision maker. The Court also requires an especially close nexus between the ends and the means. The statute must be narrowly drawn to achieve the objectives of the government without unnecessarily reaching expressive conduct protected by the first amendment. In short, government must come forward with sufficient proof to convincingly justify its abridgment of first amendment rights. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 603 (1978).

should not be extended to include candidate elections.[60] The state has an overriding interest in preserving the integrity of the electoral process. The possibility of corruption is much greater in candidate elections than in *referendum* votes. Large contributions to candidates have the potential for creating debts that can be paid by elected candidates in the form of favors or passage of special-interest legislation.[61] In contrast, corporate expenditures on issues before the general electorate create no obligation to the corporation on the part of the voters.[62] Prevention of this corruption in candidate elections justifies legislation limiting corporate advocacy.

Statutes analogous to the Massachusetts statute are currently in force in a majority of the states,[63] and similar restrictions are embodied in the Federal Corrupt Practices Act.[64] Generally, the purpose of this type of legislation is to prevent undue influence or corruption of the electoral process that may result from large corporate contributions[65] and to protect minority

60. Appellants did not challenge the constitutionality of the statute dealing with candidate elections. 435 U.S. at 788 n.26.

61. Schwartz v. Romnes, 495 F.2d 844, 851 (2d Cir. 1974).

62. *Id. See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 788 n.26, where the Court said: "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."

63. Currently 31 states have enacted statutes restricting contributions in various ways, the following 26 states singling out corporations for special treatment: ALA. CODE tit. 17-22-3 (1976); ARIZ. REV. STAT. ANN. § 16-471(A) (1978); IND. CODE ANN. § 3-4-3-3 (Burns 1976); IOWA CODE ANN. § 56.29 (1976); KAN. STAT. § 25-1709 (1973); KY. REV. STAT. §§ 121.025, 121.035 (1976); LA. R.S. 18:1482-83 (Supp. 1976); ME. REV. STAT. tit. 21, § 1395.2 (1976); MASS. GEN. LAWS ANN. ch. 55 § 8 (West 1975); MINN. STAT. ANN. § 210A.34 (West 1975); MONT. CODE ANN. § 13-35-227 (1975); N.H. REV. STAT. ANN. § 70:2(I) (1955); N.J. REV. STAT. § 19:34-45 (1930); N.Y. ELEC. LAW § 14-116 (McKinney 1976); N.C. GEN. STAT. § 163-278.19 (1973); N.D. CENT. CODE § 16-20-08 (1975); OHIO REV. CODE ANN. § 3599.03 (Page 1953); OKLA. STAT. tit. 26, § 15-110 (1976); OR. REV. STAT. § 260.472 (1973); PA. STAT. ANN. tit. 25, § 3225(b) (Purdon 1943); S.D. COMPILED LAWS ANN. § 12-25-2 (1975); TENN. CODE ANN. § 2-1932 (1972); TEX. ELEC. CODE ANN. Art. 14.06 (Vernon 1977); W. VA. CODE § 3-8-8 (1978); WISC. STAT. ANN. § 11.38(1)(a)(1) (West 1975); WYO. STAT. § 22-25-102 (1977).

64. Federal Corrupt Practices Act, 2 U.S.C. § 441(b) (1976). The Act deals with contributions or expenditures for any election to a political office, primary election, or political convention or caucus. This Act prohibits corporate advocacy only in canditate elections and therefore may be constitutional. See text at notes 60-62, *supra.*

65. United States v. CIO, 335 U.S. 106 (1947). This case involved a union, but it is generally conceded that the same rationale would apply to corporations. 93 CONG. REC. 6438 (1947).

shareholders' interests.[66] Significantly, these same interests did not justify the Massachusetts statute in *Bellotti*.[67]

The Court's trend in recent decisions, such as *Bellotti*, has been to decide if the "speech" falls within the scope of first amendment protection, disregarding the nature of the speaker.[68] In *Procunier v. Martinez*[69] a prisoner's communication was protected from governmental interference by the first amendment. In *Bates v. State Bar of Arizona*[70] attorneys' advertisements were held to be protected by the first amendment because they served societal interests in assuring informed decision-making. In *City of Boston v. Anderson*[71] Justice Brennan stayed a judgment of the Massachusetts Supreme Judicial Court[72] enjoining the City of Boston, a municipality, from expending funds to influence the vote in a state election. Brennan stated that if the judgment were allowed to stand, Boston would be prohibited from exercising its first amendment rights. In all these cases the speaker, whether a corporation, prisoner, attorney, or municipality, was granted first amendment protection. However, even though the type of speaker was irrelevant to the extension of first amendment protection, status can play an important role in determining whether the state has an interest concerning the particular speaker that will justify restrictions on freedom of speech. Therefore, in the future, given proper circumstances, legislation limiting corporate advocacy may be justified by the governmental interests asserted in *Bellotti*.[73] Even in the proper situation, however, *Bellotti* seems

66. Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972).

67. See notes 44-45, *supra*.

68. "The proper question therefore is not whether corporations 'have' First Amendment rights . . . , [but] whether § 8 abridges expression that the First Amendment was meant to protect." First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 776.

69. 416 U.S. 396 (1974). The unique governmental interests that may justify restrictions on free speech of inmates are security, order, and rehabilitation.

70. 433 U.S. 350 (1977). The state interests that must justify restrictions on attorneys' free speech (advertising) are generally the maintenance of the quality and dignity of attorneys and the prevention of undesirable effects on the administration of justice.

71. 99 S. Ct. 50 (1978). The state interest asserted was the same as in *Bellotti*, fairness of elections. This interest was again not sufficient.

72. Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978).

73. See text at notes 42-43, *supra*.

to require that the need to restrict speech be well-documented and that the statutory restriction be precisely limited to addressing that need.

George W. Scofield

WRONGFUL DEATH: PRESCRIPTION? PEREMPTION? CONFUSION!

Plaintiff's parents were murdered by an unknown assailant during an apparent robbery. It was more than two years later before the identity of the alleged murderer was established when an inmate of the state penitentiary, who was free on a weekend pass at the time of the crime, was indicted for this offense. Plaintiff then sued the State Department of Corrections for damages arising from the wrongful death of her parents.[1] The First Circuit, reversing the trial court, *held* that the one year period in which a wrongful death action must be brought is not a period of peremption but rather is the one year prescriptive period of article 3536 of the Civil Code,[2] which had been suspended by the application of the doctrine of *contra non valentem.*[3] *McClendon v. State Department of Corrections,* 357 So. 2d 1218 (La. App. 1st Cir. 1978).[4]

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1. Plaintiff contended that the Department should be held (1) strictly liable or (2) negligent for granting a furlough to a man with two prior homicides on his record. Plaintiff also claimed damages for personal property allegedly stolen by the murderer.

2. "The following actions are . . . prescribed by one year: . . . [t]hat for damages . . . resulting from offenses or quasi offenses." LA. CIV. CODE art. 3536.

3. *Contra non valentem agere non currit prescriptio* means no prescription runs against a person unable to bring an action. Aegis Ins. Co. v. Delta Fire & Cas. Co., 99 So. 2d 767, 772 (La. App. 1st Cir. 1957).

4. This note will not discuss the holding that the applicable time limitation for an action for damages to the property of the deceased provided by article 2315 to the deceased's legal heirs is the one year prescriptive period of article 3536. Though this is apparently the first case in which the question arose, there was little doubt that the time limitation for damages to the deceased's property was the prescriptive period of article 3536. *See* Johnson, *Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions,* 37 LA. L. REV. 1, 31 n.148 (1976).

Neither will this note discuss the general application of the doctrine of *contra non valentem* in Louisiana. For the application of the doctrine in Louisiana, *see generally* Hyman v. Hibernia Bank & Trust Co., 139 La. 411, 71 So. 598 (1916); Dagenhart v. Robertson Truck Lines, Inc., 230 So. 2d 916 (La. App. 1st Cir. 1970); Note, *Offenses and Quasi-Offenses—Prescription—Contra Non Valentem,* 32 TUL. L. REV. 783 (1958).