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Statutory Limitations on Corporate Spending in Ballot Measure Campaigns: The Case for Constitutionality

Twenty-three states and the District of Columbia currently provide for the enactment of legislation by ballot measure. These provisions were enacted to shift power and political influence away from well-financed or well-connected interest groups toward the general public and groups lacking extensive connections or finances. In the past decade, use of the ballot measure process has steadily increased. One controversial question attending the use of this process is whether a great disparity in spending between the sides in ballot measure campaigns affects the results of such campaigns.

Many commentators have concluded that disproportionate spending does exert a dominating influence in these campaigns. In several states, proposals highly favored in early polls have been defeated after massive media spending by the opposition late in the campaign. The degree of

3. In this Note, "ballot measure" is used generically to denote all forms of direct democracy—including the initiative and the referendum. While usage is somewhat imprecise in the United States, the term "initiative" is generally used to denote a proposed law or constitutional amendment placed on the ballot because a specified number or percentage of registered voters have signed petitions to that effect. "Referendum" refers to a law passed by the legislature but nevertheless placed on the ballot because of such a voter petition. In either case, the provision goes into effect only after approval by a majority, or sometimes a supermajority, vote. Lowenstein, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 29 U.C.L.A. L. REV. 505, 508 n.4 (1982).
5. See Lowenstein, supra note 3, at 510 n.16 (contains a survey of those who have expressed this view, many without citing empirical evidence).
disproportionate spending on these proposals, which concerned nuclear energy issues, mandatory deposits for beverage containers, and other measures opposed by large corporate interests, ranged from three-to-one to two hundred-to-one.  

Other commentators contend that even greatly disproportionate spending is not an important factor in determining the outcome of ballot measure elections. Professor Ronald J. Allen, for instance, asserts that monied interests do not threaten to dominate a proposed national initiative process. Although he acknowledges that “[o]rganized, monied interests clearly have an advantage in qualifying measures for the ballot,” he concludes that they cannot buy the election.

A recent study by Professor Daniel Lowenstein, however, has documented the dominating influence of disproportionate spending in ballot measure campaigns in California. Perhaps more important, Professor Lowenstein has explained the apparently inconsistent results of previous empirical studies by distinguishing spending in support of ballot measures from spending in opposition to ballot measures. The Lowenstein study demonstrates that although “one-sided spending has been ineffective when it is in support of a proposition, it has been almost invariably successful when it is in opposition.”

The studies in this area reveal that the primary sources of funds for one-sided spending in opposition to ballot measures are business corporations. The ability of business corporations to defeat ballot measures

Spending and What To Do About It, 32 FED. COM. L.J. 315, 319-27 (1980) [hereinafter cited as Mastro].

7. See infra note 15 & accompanying text.
8. Easley, supra note 6, at 687-91. Opponents of a 1976 Massachusetts bottle bill outspent the bill's supporters 35 to 1. Id. at 687. Opponents of a similar measure in Colorado that same year outspent the bill's supporters 50 to 1. Mastro, supra note 6, at 321.
9. These commentators have supported their positions with empirical data. See, e.g., Allen, The National Initiative Proposal: A Preliminary Analysis, 58 NEB. L. REV. 965, 1028-38 (1979); see also Lee, California, in REFERENDUMS, supra note 1, at 104-06.
10. Allen, supra note 9. Citing data primarily from candidate campaigns, id. at 1029, Professor Allen concludes that “[t]he limited data we have, then, tends to confirm the suspicion that money . . . is not a dominant factor in determining the outcomes of initiated measures.” Id. at 1035.
11. Id. at 1036.
12. Lowenstein, supra note 3, at 517-47. The study covered 25 California ballot measures between 1968 and 1980 that involved significantly disparate spending.
13. Professor Lowenstein credits others with having recognized the significance of such a distinction. Id. at 511 n.21. Professor Lowenstein is apparently the first to document the view.
14. Id. at 511.
15. Easley, supra note 6, at 687, 691 (opposition to bottle bill and nuclear energy measures was almost entirely corporate generated); Lowenstein, supra note 3, at 533-34 & n.112, 537 & n.128, 540 & n.148 (detailing the major sources of funds for campaigns in opposition to the California ballot measures studied); Mastro, supra note 6, at 320 (all three Colorado initiative campaigns studied were “staunchly opposed” by corporate interests and corporate money).
through massive, one-sided spending may frustrate the purpose of these
direct democratic processes because, despite the existence of ballot mea-
ures, power remains in the hands of well-financed interest groups.

Several schemes have been proposed to eliminate the influence of
massive spending on the election process. Some states have enacted laws
that require the filing of campaign statements disclosing the amount of
contributions and expenditures, and the identities of those who contrib-
ute more than a certain amount. Federal regulations also require spon-
orship identification for broadcasts of political or social messages.

These rules nonetheless may be ineffective for curbing corporate influ-
ce in campaigns. For example, if they provide only for the identifica-
tion of central groups that may receive funds from various sources, then
the true identity of the corporate contributor can remain hidden from the
general public. Thus, the primary value of disclosure laws lies in docu-
menting the corporate influence on ballot measure campaigns, not in
curbing that influence.

Public financing of ballot measure campaigns has also been pro-
posed as a means of curbing corporate influence. This method of re-
form has received little consideration, however, presumably because it
entails technical and administrative problems and significant cost.

Limitation on private spending is the most plausible means of curb-
ing corporate influence on the election process. Private spending can be
limited in two ways: contribution limits and expenditure limits. As of
1977, eighteen states limited or prohibited corporate contributions to bal-

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16. As used in this Note, the term "business corporation" is meant to exclude mem-
bership organizations, cooperatives, or corporations without capital stock. This is consistent with
the usage of the terms in 2 U.S.C. § 441b(b)(4)(c) (1982). Unless otherwise indicated, "corpo-
ration," or any derivative thereof, is used interchangeably with "business corporation."

17. See, e.g., CAL. GOV'T CODE §§ 84200, 84210 (West 1976) (contributions over $50); MONT.
21 states have enacted some form of disclosure law regarding ballot measure campaign con-
tributions. See Mastro, supra note 6, at 353-54.

18. 47 C.F.R. § 73.1212 (1983). As of
1983.

19. Mastro, supra note 6, at 353-54 & n.127; see also D. ADAMANY & G. AGREE, POLITICAL

20. Mastro, supra note 6, at 354.

21. See Lowenstein, supra note 3, at 578.

22. Professor Lowenstein has proposed a plan for public financing of ballot measure cam-
paigns that he thinks is workable. See id. at 578-83. One can expect, however, that legislators
will be reluctant to adopt large-scale public financing provisions, particularly in light of cur-
ett budget deficits and the recent disdain for "big" government.

23. Contribution limits restrict the amounts individuals or entities can contribute to a
central committee organized to support or oppose a ballot measure or candidate. Expenditure
limits restrict the amounts that can be spent, either by individual candidates directly or by
central committees, in the campaign. Buckley v. Valeo, 424 U.S. 1, 14-23, 58 (1976); see infra
notes 33-42 & accompanying text.
lot measure campaigns. In the 1974 primary election, California voters adopted expenditure limits on ballot measure campaigns. Such provisions could go far toward curbing the dominating corporate influence in ballot measure campaigns.

The constitutionality of these and other statutory limits on corporate spending in ballot measure campaigns, however, has been seriously questioned. The Supreme Court has invalidated contribution and expenditure limits in various contexts, and state courts have followed suit. In contrast, the Court has affirmed the constitutionality of disclosure laws, and the use of public financing in ballot measure campaigns would seem to present no constitutional problem, under the same reasoning the Court has used to uphold public financing of presidential campaigns. The constitutionality of these reforms is small consolation, however, due to the ineffectiveness of disclosure laws and the cost and other problems associated with public financing.

This Note presents several theoretical bases for upholding statutory restrictions on corporate spending in ballot measure campaigns. The Note first reviews the line of decisions that implies a constitutional barrier to the implementation of such regulations. It then analyzes two methods by which this barrier can be removed and compares the potential advantages and disadvantages of each. The Note advances a theoretical justification for one of these methods which may be more satisfactory than justifications previously advanced. According to the argument advanced here, the rights of the corporate speaker do not justify constitutional protection for the political speech of business corporations. Such protection serves neither of the primary values underlying first amendment protection of political speech. Because corporate political speech is not a product of free choice, its protection does not serve the self-fulfillment value. Nor does it serve the interest in promoting successful self-government, because, as will be shown, the corporate speaker is unable to advocate positions on public policy issues based on considerations of justice.

25. CAL. GOV'T CODE §§ 85300-85305 (West 1976) (repealed 1977) (one side prohibited from spending in excess of $500,000 more than the other side in a ballot measure campaign). These provisions were invalidated by the California Supreme Court in Citizens for Jobs & Energy v. Fair Political Practices Comm'n, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976), and subsequently repealed. See infra note 43 & accompanying text.
26. See infra notes 33-54 & accompanying text.
27. See Bellotti, 435 U.S. at 792 n.32; Buckley, 424 U.S. at 84 & n.113.
28. Lowenstein, supra note 3, at 581-82.
29. See Buckley, 424 U.S. at 85-108.
30. See supra notes 17-22 & accompanying text.
31. See infra notes 108-16, 127 & accompanying text.
32. See infra notes 128-75 & accompanying text.
The Constitutional Barriers

The constitutionality of statutory restrictions on corporate spending in ballot measure campaigns has been drawn into question by several Supreme Court decisions. In *Buckley v. Valeo*, the Court heard constitutional challenges to key provisions of the Federal Election Campaign Act of 1971. The Act imposed limits on campaign contributions and overall expenditures, and established disclosure and recordkeeping requirements in elections for President, Vice-President, and members of Congress. The Act also provided for some public financing of such elections. Challenged by various candidates, contributors, political parties, and public interest groups, the Act had been upheld by the Court of Appeals for the District of Columbia Circuit.

The Supreme Court upheld the public financing, disclosure, and recordkeeping provisions against several constitutional challenges. It also upheld two types of contribution limits: limits on the amount that an individual or a political action committee could contribute to a particular candidate's campaign and limits on the overall amount an individual could contribute in any year. But the Court invalidated the Act's expenditure limits, which would have imposed ceilings on the amount that any candidate could expend on his own behalf and on the level of overall spending by any candidate's campaign. The Court viewed these provisions as unjustified infringements upon the first amendment rights of can-

36. *See id. at 85-90*. The Federal Election Campaign Act established the Presidential Election Campaign Fund, which is financed from revenues collected through the taxpayers' designation that one dollar of federal income tax liability be paid to the Fund. *See 26 U.S.C. §§ 9006-9013* (1982).
38. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). The court of appeals' per curiam opinion noted that

"[t]he corrosive influence of money blights our democratic processes . . . . The excesses revealed by this record—the campaign spending [and] funding . . . .—support the legislative judgment that the situation . . . must not be allowed to deteriorate further . . . . [T]hese latest efforts on the part of our government to cleanse its democratic processes . . . should not be rejected because they might have some incidental, not clearly defined, effect on First Amendment freedoms."

*Id.* at 897-98. Judge Skelly Wright, who was instrumental in forging the District of Columbia Circuit's opinion, has criticized the Supreme Court's reversal of part of this decision. *See Wright, Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).
40. *Id.* at 58-59 & n.67. The Court viewed these contribution limits as necessary to further the compelling state interest in preventing the reality or appearance of corruption of elected officials. *See infra* note 65 & accompanying text.
41. *Id.* at 58-59 & n.67.
The destructive impact of the Court’s decisions upon the states’ ability to curb the influence of corporate spending on the ballot measure process was soon apparent. Shortly after Buckley, the California Supreme Court invalidated, “under the rule of Buckley v. Valeo,” the expenditure limits on ballot measure campaigns passed by California voters in 1974.  

Two years after Buckley, in First National Bank v. Bellotti, the Court addressed the question of restrictions on corporate spending in ballot measure campaigns. At issue was a Massachusetts statute prohibiting business corporations from making contributions or expenditures to influence the outcome of any ballot measure that did not materially affect the property, assets, or business of the corporation. The corporations challenging the statute had sought to contribute to a campaign opposing a state constitutional amendment that allowed for a graduated tax on the income of individuals.

In a close decision, the Court, per Justice Powell, invalidated the Massachusetts statute as an unconstitutional infringement on the first amendment rights of business corporations. Justice White, joined by Justices Brennan and Marshall, contended in dissent that the statute did not infringe first amendment freedoms and that even if it did, such an infringement was justified by a compelling state interest. Justice Rehnquist, in a separate dissent, agreed that business corporations should not have first amendment rights in this context. Three years later, in Citizens Against Rent Control v. City of Berkeley, the Court considered the constitutionality of a municipal ordinance limiting contributions to committees in support of, or in opposition to, ballot measures. The ordinance was challenged by a committee formed to oppose a ballot measure that would have imposed rent control. Possibly because the ordinance affected individuals as well as corporate contributors, its impact on first amendment rights was conceded. The Court found no adequate justification for the infringement on first amendment freedoms and invalidated

42. Id. at 39-59.
45. Id. at 767-68.
46. Id. at 769.
47. Id. at 804-09; see also infra notes 107-09 & accompanying text.
48. Id. at 809-12; see also infra notes 71-72 & accompanying text.
49. Id. at 822-28; see also infra note 106 & accompanying text.
51. Id. at 292. The contributions were limited to $250. BERKELEY, CAL., ELECTION REFORM ACT § 602 (1974).
52. Citizens Against Rent Control, 454 U.S. at 292.
53. Id. at 294.
the ordinance. 54

Through these decisions the Court has tacitly "assumed the power to regulate federal and state elections." 55 The Court has deprived both the voters and their elected representatives of the only effective means of curbing corporate domination of ballot measure campaigns—statutory restrictions on corporate campaign spending. 56

Although currently the issue lies dormant in the courts, the problem of undue corporate influence on the ballot measure process persists. 57 States continue to consider enacting legislation that is likely to be tested for constitutionality. Because the composition of the Court has changed 58 since Bellotti, the last case in which it squarely addressed the issue of limitations on corporate spending in ballot measure campaigns, the Court could reach a different result if it reconsiders the question. Thus, a reassessment of the constitutional considerations in this area is in order.

Theoretical Bases for Upholding Corporate Campaign Spending Limits in the Face of First Amendment Challenge

Two Approaches

Corporate campaign spending limits can be upheld against first amendment challenges in two ways. First, the Court could conclude that such restrictions are justified infringements on the first amendment rights of corporations and other speakers. Second, the Court could hold that the first amendment does not provide the same protection for the political speech of business corporations that it provides for natural persons and nonbusiness organizations.

This part of the Note first evaluates the justified infringement approach and indicates that reliance on this approach may be misplaced. It then explores the theoretical justifications that have been advanced for the second approach—the "no constitutional protection" approach. Those justifications, however, may be inadequate according to many first amendment theories. Accordingly, the next part proposes a theoretical justification for the "no constitutional protection" approach that is consistent with generally accepted first amendment theories.

54. Id. at 295-300.
56. See supra notes 17-25 & accompanying text.
57. See supra notes 5-16 & accompanying text.
58. Justice Stewart, who voted with the Bellotti majority, has been replaced by Justice O'Connor.
The Justified Infringement Approach

Regulations that adversely affect an activity protected by the first amendment are closely scrutinized by the Court, but can be upheld if the infringement on first amendment rights is justified. The Court has consistently subjected campaign spending limits to strict scrutiny. Under this analysis such regulations, if they infringe upon protected activity, will be upheld only if the government can show that: first, the regulation is necessary to further a compelling governmental interest, and second, the regulation is a closely tailored means to this end.

In Buckley, the Court upheld some of the challenged regulations as necessary to further the government's interest in preventing corruption of officials elected with the help of massive campaign contributions. As the Bellotti Court correctly noted, the danger of corruption of public officials is not present in the area of ballot measure campaigns. The compelling state interest that motivates—and should justify—statutory limits on spending in ballot measure campaigns is preventing corruption of the election process. This interest has been articulated as preserving the integrity or fairness of the election process and as sustaining the confidence of the citizens in the integrity of the election process and the democratic form of their government. These alternatives suggest slightly different subinterests.

If sufficient evidence of undue corporate influence on the ballot measure election process was not available to the Bellotti Court, it is readily

59. Some forms of speech are not within the scope of the first amendment. See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54 (1974) (obscene material); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (fighting words). The view that corporate political speech is not protected by the first amendment is explored infra notes 98-183 & accompanying text.


61. See, e.g., Bellotti, 435 U.S. at 786, 792-95; Buckley, 424 U.S. at 25.

62. For arguments that corporate political speech is not activity that should be protected by the first amendment, see infra text accompanying notes 98-175.

63. Bellotti, 435 U.S. at 786; Buckley, 424 U.S. at 25.

64. See supra notes 33-42 & accompanying text.


67. In Bellotti, the state argued both these points. 435 U.S. at 789; see also Easley, supra note 6, at 723-26 (the interest is the need to save the ballot issue campaign process from "destruction through corporate domination and control"); Lowenstein, supra note 3, at 587 (the interest is in making "ballot measure elections fairer").

68. The Bellotti Court recognized that preserving the fairness of the electoral process and the confidence of the public is "of the highest importance" and could "merit our consideration" in an appropriate case. 435 U.S. at 789. But the Court found no showing in the record that such interests were, in fact, implicated in the Massachusetts case. "[T]here has been no showing that the relative voice of corporations has been overwhelming or even significant in
available now. For this reason, some commentators have advocated the justified infringement approach as a rationale for upholding campaign spending limits of various types on ballot measure campaigns. Justice White endorsed this approach in his dissent in Bellotti. He noted the evidence of corporate domination of the electoral process in Massachusetts and other states, and contended that the danger of such influence justifies state and federal measures aimed at eliminating this threat.

There are several reasons to favor the justified infringement approach to upholding spending restrictions on ballot measure campaigns. First, although the Bellotti Court refused to uphold the Massachusetts statute, the opinion of the Court implied that the justified infringement approach might succeed in an appropriate case. Moreover, in several places the opinion calls into question the validity of the “no constitutional protection” approach by categorically rejecting the view that corporate political speech is not constitutionally protected. The slim Bellotti majority and the subsequent change in the composition of the Court, however, may indicate potential for a new ruling on this latter point.

influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.” Id. at 789-90 (footnote omitted). The majority opinion accused Justice White of relying on “incomplete facts” in finding a “domination of the electoral process by corporate wealth” in his dissenting opinion. Id. at 789 n.28.

Professor Easley contends that “a stronger case for the danger of corporate dominance could have been made than was presented in the case before the [Bellotti ] Court.” See Easley, supra note 6, at 686. The Court may simply have refused to balance the state interest against the first amendment rights of corporations in spite of sufficient evidence. See infra notes 92-94 & accompanying text.

69. See supra notes 6-16 & accompanying text.
70. See, e.g., Easley, supra note 6, at 723-26; Lowenstein, supra note 3, at 587.
71. 435 U.S. at 809-12 (White, J., dissenting).
72. Id. at 810-12 & n.11.
73. See supra note 68.
74. “The First Amendment . . . serves significant societal interests,” the Bellotti Court said. “The proper question . . . is not whether corporations 'have' First Amendment rights,” but whether the Massachusetts statute “abridges expression that the First Amendment was meant to protect.” 435 U.S. at 776. Corporate political speech, because it is about matters of public concern, “is the type of speech indispensable to decisionmaking 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 . . . does not depend upon the identity of its source, whether corporation, association, union, or individual.” Id. at 777. This view, that the source of communication is irrelevant to first amendment analysis, is based on the theory that “the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.” Id. at 791 (footnote omitted). Accordingly, this view seems based on the rights of hearers. Elsewhere in the Bellotti opinion, the Court seems to base its holding on the rights of the corporate speaker: “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” Id. at 790-91.
75. See supra note 58.
The justified infringement approach also might be used to uphold broader restrictions. Both corporate and noncorporate contribution limits, as well as limits on overall expenditures by one side in a campaign, could be justified.\textsuperscript{76} In addition, the approach could provide an alternative method of justifying spending limits in candidate campaigns if the danger of corruption of elected officials is difficult to show or if the challenger contends that a less drastic means serves that end.\textsuperscript{77}

Finally, the justified infringement approach encompasses situations that the "no constitutional protection" approach does not. The first amendment protects the rights of hearers as well as those of speakers.\textsuperscript{78} When it is appropriate to focus on the rights of hearers, the source of the information is irrelevant to deciding whether the communication is protected. Thus, the "no constitutional protection" approach, which focuses on the source of corporate political speech, is an inappropriate rationale for upholding infringements on those rights.\textsuperscript{79}

The justified infringement approach, however, would provide a rationale for restrictions on the rights of hearers. Assuming that corporate campaign spending limits do diminish the flow of communications to the public and thus constitute infringements upon the rights of hearers, they are imposed in order to enhance the value of those very same rights. If the state can show that such regulations give the hearing public better access to a wider range of ideas, then these restrictions should be upheld as justified "infringements" upon the rights of hearers. Arguably, restrictions on corporate political contributions do not infringe upon the rights of hearers at all. Directors, officers, and shareholders remain free to fund political campaigns and publish messages at their own expense and in their own right. Justice Rehnquist saw no infringement upon the rights of hearers in the \textit{Bellotti} case because "[t]he free flow of information is in no way diminished."\textsuperscript{80} Three other Justices agreed.\textsuperscript{81}

To the extent that the Court chooses to scrutinize such legislation

\textsuperscript{76} Protecting the electoral process from the dominating influence of disproportionate spending would justify restrictions on contributions from whatever source. The "no constitutional protection" approach, on the other hand, is aimed only at upholding restrictions on corporate spending. \textit{See infra} notes 98-175 & accompanying text.

\textsuperscript{77} Because massive disproportionate spending may have a dominating influence on candidate campaigns, the interest in preserving the integrity of the election process would justify spending limits in those campaigns as well. Preventing the corruption of elected officials is the only governmental interest heretofore recognized by the court as justifying spending limits in candidate campaigns. \textit{See supra} notes 64-67 & accompanying text.

\textsuperscript{78} \textit{See infra} note 117 & accompanying text.

\textsuperscript{79} When the rights of hearers are at issue, communications are valuable because of their content, not their source. \textit{See supra} note 74. The "no constitutional protection" approach argues that the source of corporate political speech is not deserving of first amendment protection in its own right. \textit{See infra} notes 98-183 & accompanying text.

\textsuperscript{80} \textit{Bellotti}, 435 U.S. at 828 (Rehnquist, J., dissenting).

\textsuperscript{81} \textit{Id.} at 806-08 (White, J., dissenting).
on the basis of whether it infringes upon the rights of speakers, a more difficult problem of justification is presented: the infringed rights of speakers are pitted against the enhanced rights of hearers. Under this analysis, the relevant preliminary question is, "Which speakers should receive first amendment protection?" In this context, the "no constitutional protection" approach could be used to uphold restrictions on corporate speakers.

Thus, the justified infringement approach may be both an appropriate method of scrutinizing ballot measure spending restrictions and a potentially successful means to reverse the Court's direction in this area. Proponents of these restrictions, however, should be wary of relying solely on this approach, for several reasons.

First, the Court has been known to resort to literal readings of the first amendment and to eschew interpreting it as protecting the fairness of political debate at the expense of infringing upon the freedom of protected sources of information or ideas. For example, in *Miami Herald Publishing Co. v. Tornillo*, the Court invalidated a state statute giving a right-of-reply to current candidates for public office who had been attacked in newspaper editorials. The Court recognized the very real threat posed by the concentration "in a few hands [of] the power to inform the American people and shape public opinion." The state had argued that the elimination of this threat was a compelling state interest that justified the infringement on the first amendment rights of newspapers. In reaching its decision, the Court relied solely on its observation that the governmental coercion involved amounted to "a confrontation with the express provisions of the First Amendment."

The *Tornillo* Court's cursory analysis in this context was unusual. Over a wide range of issues, once it determines that a governmental regulation obstructs the exercise of first amendment rights, the Court normally considers whether the obstruction is justified by compelling governmental interests. Professor Emerson has pointed out that *Tornillo* is one of two cases in which the Burger Court departed from this analysis and applied an "absolute" doctrine, refusing to consider whether the state interest justifies the infringement. As long as corporate polit-

82. The *Bellotti* Court seemed to base its holding, at least in part, on the rights of the corporate speaker. See supra note 74.
84. *Id.* at 256-58.
85. *Id.* at 250.
86. *Id.* at 254.
87. See, e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976) (local ordinance restricting location of theaters exhibiting sexually explicit films); *Buckley*, 424 U.S. at 15-23 (various campaign spending regulations); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-401 (1969) (access to broadcast media); see also supra note 60 & accompanying text.
88. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422,
ical speech is recognized as having first amendment protection, legislative restrictions on corporate spending to influence the outcome of ballot measure campaigns may be invalidated by courts utilizing this approach.

A second reason to avoid relying solely on the justified infringement approach is indicated by the treatment accorded it in *Bellotti.*\(^8\) The plaintiff presented to the Court evidence of substantial disparities in campaign expenditures in previous unsuccessful initiatives in Massachusetts. The State of Montana filed an *amicus curiae* brief noting its similar experience with an initiative.\(^9\) This evidence, along with a report from the California Fair Political Practices Commission concerning the 1976 California primary election, was cited by Justice White in his dissent.\(^9\) Despite this evidence, the *Bellotti* Court's slim majority was unwilling to find a demonstrable "compelling state interest" justifying the infringement.

Even more disconcerting is the *Bellotti* Court's suggestion that, even if supported in the record, the arguments for restricting a corporation's right to spend in ballot measure campaigns to protect the election process from corruption were "[not] inherently persuasive or supported by the precedents of this Court."\(^9\) The Court, citing language from two first amendment cases, implied that such restrictions might well be constitutionally infirm no matter how substantial the showing of the countervailing state or governmental interest in preserving the integrity of the election process.\(^9\) These passages are reminiscent of the absolute doctrine employed in the *Tornillo* case.\(^9\)

Finally, the justified infringement approach may not be helpful to those seeking to uphold regulations of corporate political speech in areas other than campaign spending. In certain of these contexts, the compelling state interest justifying restrictions on corporate activities designed to influence the resolution of current issues may be difficult to demonstrate, even if present. For example, in *Consolidated Edison Co. v. Public*

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90. *Id.* at 433.
91. *Bellotti*, 435 U.S. at 810-11 & n.11. The 1972 Massachusetts initiative involved a disparity in spending levels of $120,000 to $7,000. In that same year in Montana, the disparity was $144,000 to $451. *Id.*
92. *Id.* at 790.
93. Justice Powell was unmoved by the argument that corporate advertising could influence elections: "The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" *Id.* (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)). The Justice also noted that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 435 U.S. at 790-91 (citing *Buckley*, 424 U.S. at 48-49).
94. *See supra* notes 83-88 & accompanying text.
Service Commission, the state was unable to satisfy the Court that any compelling state interest justified a prohibition against the public utility companies' practice of distributing inserts discussing controversial issues of public policy along with the monthly electric bills. The state restriction was aimed at a practice potentially no less influential than massive corporate campaign contributions. But the influence of such bill inserts is much more difficult to demonstrate than is that of corporate spending in ballot measure campaigns, for which election results and data on campaign spending can be correlated. Comparable evidence of the impact of bill inserts is unavailable if such communication is not directed toward the outcome of any particular election or legislative action. In attempting to justify the infringement in Consolidated Edison, the state was forced, because of a lack of such empirical data, to rely on interests other than preventing the dominating influence of the bill inserts. The Court was unpersuaded and invalidated the prohibition as an unconstitutional infringement of the first amendment rights of the corporations affected.

Thus, despite the possibilities and advantages of the justified infringement approach, the Court's cursory analysis of the justifications for the approach in Tornillo and Bellotti suggests that the approach may prove inadequate as a means of upholding ballot measure campaign spending limits.

The "No Constitutional Protection" Approach—Prior Theoretical Justifications

Another approach to upholding statutory limits on corporate spending in ballot measure campaigns may be more effective. The "no constitutional protection" approach centers on the thesis that the first amendment provides no protection to the political speech of business corporations. Such an interpretation of the first amendment renders unnecessary any showing of a compelling governmental interest to justify statutory restrictions that would otherwise constitute infringements upon protected activity.

The Bellotti Court rejected one form of the "no constitutional protection" approach. The Court reversed the Massachusetts Supreme Judicial Court's holding that "only when a general political issue materially affects a corporation's business, property or assets may that corporation

96. Id. at 540-41.
97. Id. at 533-44.
98. In this Note, "corporate political speech" denotes the spending of corporate funds by business corporations to influence election results or otherwise to shape political decisions. The argument that such spending is conduct and not speech was rejected in Buckley, 424 U.S. at 15-17. It is important to note that the corporate speech considered here is not commercial speech. See infra notes 182-83 & accompanying text.
claim First Amendment protection for its speech . . . on that issue."99 At first glance it appears that even if the Court had adopted the Massachusetts court's view,100 the decision would not significantly affect corporate spending in ballot measure campaigns. The political speech of business corporations could still receive constitutional protection if related to issues materially affecting the property interests of the corporation. The primary threat to the political process posed by corporate contributions arises in those campaigns in which the outcome will have a significant effect on the corporation's business or assets.101

Deeper analysis reveals, however, that despite its limitation, the Massachusetts court's formulation of the "no constitutional protection" approach might have significant impact. According to the Massachusetts court, the constitutional protection afforded this speech was an incident of fourteenth amendment protection of the corporation's property and business interest, rather than the first amendment.102 Legislative restrictions on corporate political speech, if regarded as affecting only business and property interests, could be upheld under a rational basis standard of review upon a showing that the regulation was reasonably related to a legitimate governmental purpose.103 This lower standard of scrutiny could result in less frequent invalidation of such regulations than would occur under the "compelling state interest" standard.104

Both dissenting opinions in Bellotti endorsed versions of the "no constitutional protection" approach,105 though they did so for different reasons. Justice Rehnquist noted that a corporation's right of political expression was not necessary to the fulfillment of the commercial functions or purposes for which it was created under state law. Because the constitutional protection of such expression was not "incidental to its very existence," a corporation's right to political speech was not protected by the first amendment.106

100. All four dissenters in Bellotti agreed with the Massachusetts court's holding. See supra notes 47-49 & accompanying text; infra notes 105-09 & accompanying text.
101. See supra notes 8-16 & accompanying text.
102. 371 Mass. at 784, 359 N.E.2d at 1270.
103. See Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n, 313 U.S. 236, 244-47 (1941) (renouncing the Court's former due process philosophy, under which the Court would review the wisdom of economic regulations); Nebbia v. New York, 291 U.S. 502, 525-39 (1934) (New York's milk price fixing statute not violative of due process because not unreasonable, arbitrary, or capricious).
104. "Since 1941, the Court has consistently maintained that under the due process clause the making of legislative policy on economic matters is solely for the legislatures and beyond the scope of the judicial function." W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 449 (5th ed. 1980) [hereinafter cited as W. LOCKHART].
105. Both dissents also referred to the justified infringement approach. See Bellotti, 435 U.S. at 809-21, 826 & n.6.
106. Id. at 823.
Justice White articulated the view that certain of the values served by the first amendment were not furthered by corporate political speech. In determining whether the self-expression or self-fulfillment value is served by constitutional protection of a given type of speech, the identity of the source is relevant because the aim is to protect the rights of speakers. Justice White concluded that because corporate communications do not represent a manifestation of individual freedom or choice, they are entitled to less First Amendment protection.

The view expressed by Justice White has received extensive exposition in the work of Professor C. Edwin Baker. Rejecting the marketplace of ideas model, according to which the rights of hearers are protected by the first amendment, Professor Baker contends that the liberty model provides the most coherent theory of the first amendment. According to the liberty model, the first amendment protects only the rights of speakers, and this protection is based solely on society's interest in advancing self-expression and individual freedom of choice.

Professor Baker maintains that the commercial speech of business enterprises should not be constitutionally protected because it is "rooted in the profit-oriented requirements of the enterprise [and] fails in principle to exhibit individually chosen allegiance to personal values." Baker also contends that the political speech of the commercial corporation, like its commercial speech, should not be constitutionally protected because it "may represent the management's judgment that the company's income, profits, and stability would be reduced or endangered" by a political outcome other than that advocated. Such communication reflects "values which do not originate in either individual or collective visions or decisions about what humanity should be." In fact, this characteristic of corporate political speech is a product of legal constraints, not merely social pressures, on the governance of business corporations. According to the liberty model, such corporate speech

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107. These terms were used by Professor Emerson. See T. Emerson, Toward a General Theory of the First Amendment 3-7 (1966).
109. Id. at 807.
111. Baker, Scope, supra note 110, at 964.
112. Id. at 991-92.
114. Id. at 35.
115. Id. at 36.
116. Corporate political speech must represent management's judgment that the political outcome advocated is in the corporate interest. See infra notes 141-61 & accompanying text.
should not be protected by the first amendment because it is not a product of individual choice or self-expression.

The use of the liberty model in the "no constitutional protection" approach yields an unsatisfactory theoretical justification for denying first amendment protection to corporate political speech. The liberty model fails, first, because it affords no protection for the interests of the audience. The cases and most commentators agree that the first amendment is meant to serve the interests of the "hearing" public as well as those of the "speaking" public.\(^\text{117}\) As noted earlier, to the extent that corporate political speech serves these interests, it should receive constitutional protection. Statutory restrictions, if they infringe upon the rights of the audience to hear a particular point of view,\(^\text{118}\) should be justified only if they further the hearers' interests in having access to a wider range of views.\(^\text{119}\)

The liberty model is also unsatisfactory because it fails to recognize that the first amendment serves more than just the self-fulfillment value\(^\text{120}\) and that protection of the rights of speakers or hearers is warranted if such protection furthers those other values. As discussed above, first amendment protection for corporate political speech may lead to the invalidation of statutory restrictions on corporate spending in ballot measure campaigns because the Court may find that the infringements are unjustified.\(^\text{121}\) Prior theoretical justifications for the "no constitutional protection" approach, which are premised on the liberty model of the first amendment, are unsatisfactory because they fail to address all of the interests that freedom of speech is intended to serve and that may be implicated in statutory restrictions on corporate political speech.

**Toward a New Theoretical Justification for the "No Constitutional Protection" Approach**

Because of the inadequacies of both the justified infringement approach and the previously advanced versions of the "no constitutional protection" approach, discussed in prior sections, a new theoretical justification for denying constitutional protection to the political speech of business corporations is needed. This justification should be compatible

\(^{117}\) For cases, see *Bellotti*, 435 U.S. at 783; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (FCC's fairness doctrine upheld on grounds of first amendment rights of viewers and listeners); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (reversing conviction for viewing obscene films in privacy of one's home, partly on ground that "the Constitution protects the right to receive information and ideas"). For commentary, see *infra* notes 128-31 & accompanying text.

\(^{118}\) See supra notes 80-81 & accompanying text.

\(^{119}\) See supra text accompanying note 80.

\(^{120}\) See infra notes 128-31 & accompanying text.

\(^{121}\) See supra notes 83-94 & accompanying text.
with most first amendment theories, which hold that the amendment serves more than just the self-fulfillment value. In this section of the Note, such a justification first is proposed and then is fully examined.

The proposed theory can be summarized as follows: free speech on current issues of public policy is protected not only because it promotes self-expression, self-fulfillment, and free choice;\footnote{See infra notes 128-31 & accompanying text.} protection is also granted to facilitate successful self-government and the enactment of just and equitable laws through the operation of the democratic processes established by the Constitution.\footnote{See infra note 132 & accompanying text.} Accordingly, the absence of individual choice in the political speech of business corporations is an insufficient ground for denying it first amendment protection; if the corporate communication nevertheless advances the purpose of successful self-government, then it warrants constitutional protection.

Protection for speech that promotes successful self-government might be granted based on the rights of hearers and the value of the communication to them as voters,\footnote{See supra notes 78-80 & accompanying text.} because the communication facilitates the selection of just laws. Protection might also be granted based on the right of speakers to publish their views of what political result would be just, because protection would facilitate the advocacy of just alternatives.\footnote{The concept of justice is, of course, difficult to define precisely, so it will be necessary to consider definitions that various thinkers have given. See infra notes 162-75 & accompanying text.}

Corporate political speech, however, is informed with neither the personal choice nor the individual values that would justify first amendment protection. The following discussion will demonstrate that the corporate speaker is unable to formulate or advocate positions on public policy issues based on considerations of justice, at least as the concept is defined by many.\footnote{See infra note 136.} This inability warrants denying first amendment protection to corporate political speech, except insofar as it aids the hearing and voting public. The rights of the speaker cannot justify first amendment protection for the political speech of business corporations.

\section*{Theories of the First Amendment—Protected Interests—Rationale Underlying Protection of Political Speech}

Professor Baker has demonstrated how and why the protection of corporate political speech fails to serve the self-fulfillment value.\footnote{See supra notes 110-15 & accompanying text. Justice White endorsed this view when he maintained that some of the values protected by the first amendment are not served by the protection of corporate political speech. See supra notes 107-09 & accompanying text.} Most commentators contend, however, that the first amendment serves other
values in addition to the self-fulfillment value. Doctor Alexander Meiklejohn argued that the protection of freedom of speech is granted solely in the interest of effective self-government.\(^{128}\) Professor Emerson contends that first amendment protection serves several broad categories of values.\(^{129}\) A system of free expression, he says, is necessary to assure self-fulfillment, discern the truth, secure participation in social and political decision-making, and maintain the balance between stability and change in society.\(^{130}\) While apparently accepting Emerson's list, Professor Tribe says that freedom of speech is "an end in itself, an expression of the sort of society we wish to become and the sorts of persons we wish to be."\(^{131}\)

These leading commentators thus agree that the first amendment protects political speech at least in part to facilitate effective self-government, presumably through the proper functioning of the democratic political processes set out in the Constitution. The aim of these democratic processes is the enactment of just and equitable laws. This goal is evident from the preamble to the Constitution, which states that the purpose of the Constitution is to "establish justice" and to "promote the general welfare."\(^{132}\) The first amendment plays a particularly important role in promoting the enactment of just laws, which, in addition to serving the self-fulfillment value, may be said to be its most important function.

The justness of laws enacted after public policy debate and democratic election is a product of speaker-advocates proposing just laws and of hearer-voters choosing just laws. The freedoms that enable these participants to perform their proper functions in this scheme are appropriately protected by the first amendment and other constitutional provisions.

If access to the political speech of business corporations facilitates the voters' choice of just laws, then that speech merits constitutional protection based on the rights of hearers. Any restrictions of that access would be justified only by a compelling governmental interest.\(^{133}\)

First amendment protection of the political speech of business corporations arguably might be justified based on the rights of the speaker, that is, on facilitating the performance of its role as advocate. If so, the Court might well find that campaign spending limitations infringing

\(^{128}\) See A. MEIKLEJOHN, POLITICAL FREEDOM (1948).

\(^{129}\) See T. EMERSON, supra note 107, at 3-15.

\(^{130}\) Id.

\(^{131}\) L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576 (1978).

\(^{132}\) U.S. CONST. preamble.

\(^{133}\) As suggested earlier, it may be that corporate campaign spending limits do not restrict hearers' access to political ideas at all; on the other hand, if the rights of hearers are infringed, a compelling interest may justify such restrictions. See supra notes 80-81 & accompanying text.
upon the rights of these speakers to advance the interests of hearers are not justified by any compelling state interest. Such a finding is particularly likely if the Court resorts to the absolute doctrine of Tornillo.

Logically, however, only speakers capable of proposing or advocating policy alternatives based on considerations of justice should receive this protection. Speakers wholly incapable of injecting into their proposals that quality at which the system aims—justice—should not be entitled to protection designed to facilitate that end.

The discussion that follows will demonstrate that a business corporation is incapable of proposing or advocating laws or policy alternatives based on considerations of justice, however that concept is traditionally defined. This situation is not only a product of market and social realities, but also is a function of the legal order. It follows that the business corporation should not receive first amendment protection in its own right as a political speaker.

The Corporate Speaker and Political Speech

The Inapplicability of the Right of Association

Initially, it seems plausible that a corporation's political speech could receive constitutional protection based on the rights of its members—the shareholders and managers—to associate and to exercise their right to speak in this way. The Court has recognized that when the first amendment protects the pursuit of goals and activities by individuals, those individuals may join together to pursue such goals and activities. A compelling governmental interest must be shown in order to justify an infringement upon the constitutionally protected right of association of members of political organizations.

Problems arise, however, when this "right of association" analysis is applied to corporate political speech. The rise of the modern corporation has resulted in the separation of ownership and control in large public corporations. Thus, the corporation's political speech may not reflect the views of its shareholders to the same degree that a political organiza-

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135. See supra notes 83-94 & accompanying text.
136. "Justice" has been defined in a multiplicity of ways. This Note focuses on the two theories of justice most prominent in the Anglo-American tradition. See infra notes 162-75 & accompanying text.
137. L. Tribe, supra note 131, at 702.
tion's speech reflects the views of its members. Political organizations comprise people with similar political beliefs, at least on certain issues, and exist for the very purpose of speaking on those political issues. Corporations are composed of individuals interested in making money, who may have quite dissimilar political views.

Of course, to the extent that a corporation's political speech concerns issues having a significant impact on the business of the corporation, all shareholders are financially interested in a particular political outcome. But because the individual shareholders are persons with values distinct from the corporation's and with diverse views on public policy, their political choices may differ from those advocated by the corporation. Their financial interests in the outcome may be outweighed by their political interests in advancing their views on proper public policy. As voters, free of any obligation to be entrepreneurial, they can choose to vote in accordance with their political, as opposed to financial, interests.

As the discussion below will demonstrate, no such choice between economic and political alternatives is available to shareholders in their capacity as owners of a corporation which is presumed to speak for them. Even if they could convince management or a majority of the shareholders to endorse a political outcome that is adverse to the common financial interest, the corporation may not be used to advocate such an outcome because of the laws of fiduciary duty which govern the management of corporations.

State Corporation Laws of Fiduciary Duty

State corporation law traditionally provides that business corporations be managed with a view toward maximizing corporate profit and shareholder gain. Accordingly, the traditional rule is that directors of corporations must act only with the welfare of the corporation as their ultimate end. Directors must exercise their judgment "uninfluenced by personal, or any considerations other than the welfare of the corporation." Directors who act to further an interest other than that of the corporation are subject to personal liability via a shareholder derivative suit under state law. Some early decisions upheld directors' actions seemingly in the interest of some other segment of society on the ground that

141. PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS § 2.01 (Tent. Draft No.1, 1982) [hereinafter cited as PRINCIPLES].
they were profit-enhancing in the long run.\textsuperscript{145} According to these cases, the business judgment rule protects corporate directors if, but only if, they intend to advance the corporate interest when making such decisions.\textsuperscript{146} 

This protection would not be available to directors who admitted to acting with other interests in view and who did not claim to be at least indirectly advancing the corporate interest by their actions.\textsuperscript{147} Such directors would be liable to the corporation for the amounts by which their actions have adversely affected the economic interest of the corporation.\textsuperscript{148} Similarly, actions taken pursuant to a majority vote of shareholders would also be voidable via derivative suit and could subject the board of directors to personal liability for waste of corporate assets.\textsuperscript{149} Thus, a corporation may not further the interests of another segment of society to the exclusion of its own economic interests\textsuperscript{150} because, according to the traditional view, such actions would be illegal.

The traditional view has somewhat given way, particularly among commentators, to the notion that corporations be allowed to pursue other, societal interests. Advocates of corporate social responsibility favor allowing the corporation's decision-makers the freedom to expend reasonable sums, or to forsake profits to a reasonable extent, to advance goals that serve only the social interest.\textsuperscript{151} The recognition of such altruistic activity as legitimate in its own right has been described as bringing corporate social responsibility "out of the closet."\textsuperscript{152} No longer would the director of a corporation have to make the "long-term corporate ben-


\textsuperscript{146} Courts consistently protect directors when such claims are made. Weiss, Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse, 28 U.C.L.A. L. Rev. 343, 424 (1981).

\textsuperscript{147} The absence of cases supporting this proposition is predictable. Directors would seldom, if ever, admit in the course of litigation, even if it were true, that their actions did not at least indirectly advance the corporate interest.


\textsuperscript{150} Of course, the corporate interest and societal interest are not always mutually exclusive. The point of this discussion is to examine the legal constraints that apply to corporate managers when these interests are, in fact, mutually exclusive; conclusions can then be drawn regarding the raison d'être for corporate political speech and the ability of corporate managers to advocate public policy positions based on considerations of justice.


This view was adopted in at least one case, which involved corporate charitable contributions. In *Theodora Holding Corp. v. Henderson*, the court, relying on an express statutory authorization for "donations for the public welfare or for charitable, scientific or educational purposes," held that the director who caused the corporation to contribute to a charitable foundation was not liable to the corporation for any adverse economic impact to it. The view was also recognized in a recent tentative draft of the American Law Institute's Restatement. Section 2.01(c) of that draft provides that a business corporation "may devote resources, within reasonable limits, to public welfare, humanitarian, educational, and philanthropic purposes."

Does corporate *campaign* spending fall within this emerging "social responsibility" exception to the general rule of fiduciary duty? It might seem so, at least according to the ALI formulation, if such spending constitutes devoting resources to public welfare purposes. But the comments in the ALI report define "public welfare" in terms of clearly defined governmental policy or "declared social policies." Corporate campaign spending amounts to devoting resources to the determination of future, as yet undeclared, public policy. Thus, such spending seems not to fall within the ALI formulation of the corporate social responsibility view. This is as it should be; even if the law grants corporate directors or shareholder majorities the right to reallocate reasonable sums in the social interest, this power should be confined to the pursuit of goals that are in the social interest as already determined by the public political process.

That the actions of corporate management will in fact usually be in the corporate interest is a function of the social order. This situation,

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153. Management can always argue that actions in the social interest are also in the long-term corporate interest. In such a case, the ultimate motive for the Board's action must be the latter—unless the doctrine of corporate social responsibility is recognized. Even this doctrine, however, does not apply to corporate political speech, which therefore must always be motivated, at least ultimately, by a desire to advance the corporate interest. *See infra* notes 157-61 & accompanying text.

155. *Id.* at 404-05 (citing *DEL. CODE ANN.* tit. 8, § 122(9) (1974)).
156. *PRINCIPLES,* supra note 141, § 2.01(c).
157. *Id.* at 31-32 (emphasis added).
158. There is presumably some consensus on these goals in the body politic. More significantly, the dissenting shareholder who has her proportionate share of corporate funds reallocated already will have been, in some sense, responsible for the policy goal being advanced by such expenditures by virtue of her participation in the electoral process as an individual voter. Such goals are established as a result of either direct election by voters or a determination by their elected representatives. A shareholder with the right to vote thus, theoretically at least, will have had some involvement in the policy determination.
recognized by Justice Douglas,\(^{159}\) is unlikely to change even if the law grants corporations more latitude to act in the social interest.\(^{160}\) Moreover, according to even the most progressive views of corporate social responsibility, corporate political speech must be directed exclusively toward political results that are in the corporate interest.\(^{161}\) When spending to affect the outcome of ballot measure, or candidate, elections, the managers of a corporation are legally obligated to have the interest of the corporation and its shareholders as their ultimate concern.

Theories of Justice

Given the legal constraints imposed by fiduciary duty, corporate management is incapable of proposing or advocating public policy alternatives based solely on considerations of justice. Corporate speakers are handicapped in such a way that they are incapable of purposefully imbuing their proposals with the characteristic at which the democratic political system aims—justice.\(^{162}\) According to the two most influential theories of justice in Anglo-American jurisprudence, which are discussed below,\(^{163}\) this handicap is a necessary product of the legal constraint of fiduciary duty.

One need not overlook the fact that individual voters often “vote their pocketbooks.” Likewise, individuals and political organizations often propose and advocate political positions because of the potential economic impact on the speakers. But these speakers have the ability, at least, to exercise their constitutional right of free speech to attempt to institute just laws. They are free to subordinate their own economic interest to the interests of others. Corporate management, however, is precluded from acting in this way.

A comprehensive survey of philosophical theories of justice is beyond the scope of this Note. Yet, a brief discussion of two prominent theories\(^{164}\) demonstrates how the legal constraint of fiduciary duty pre-

\(^{159}\) See Bell v. Maryland, 378 U.S. 226, 245-46, 265-67 (1963) (Douglas, J., concurring) (remarking that a restaurant corporation's policy of refusing to serve black customers is the result of "corporate motives" and not "personal prejudices").


\(^{161}\) See supra notes 156-58 & accompanying text. Predictably, there is an absence of case law directly on point here. Corporate management is unlikely to admit in the course of shareholder litigation that its actions were not intended to advance the corporate interest, even in the rare case in which this is so.

\(^{162}\) The discussion here will consider the two theories of justice which are most prominent in American legal philosophy and their ramifications for the "no constitutional protection" approach.

\(^{163}\) See infra note 164.

\(^{164}\) The theories selected for examination here were chosen because of their leading places in American legal philosophy. Rawls' work is an important formulation of the social contract theory and has had a remarkable impact beyond the circles of academic philosophy. READING RAWLS at xi (N. Daniels ed. 1975). For explications and criticisms of Rawls' work,
vents the corporate speaker from proposing or advocating public policy positions based on considerations of justice. The proper focus here is on the methodology employed in arriving at conclusions about a just legal order. How do we determine whether a given policy is just? What does it mean to consider justice when formulating positions on public policy? The question of which laws or social structures are just is logically independent of the initial methodological question.

In *A Theory of Justice*, John Rawls incorporates and expands upon the social contract theory advanced by such writers as Locke, Rousseau, and Kant. While people may "disagree about which principles should define the basic terms of their association," Rawls says, they can "still agree that institutions are just when . . . the rules determine a proper balance between competing claims to the advantages of social life." In short, justice is fairness, Rawls says, and he attempts to provide a methodology on which all who accept that notion can agree.

According to the contractarian method Rawls proposes, the test of whether a particular law is fair or just is whether it is the sort of rule that rational, self-interested persons would choose from what he calls the "original position." This is a hypothetical pre-social position in which a person is ignorant of the actual place he will take in society. Such a person operates behind a "veil of ignorance" which conceals his personal inclinations and aspirations. This method is intended as "a natural guide to intuition"; one can, and must, adopt the perspective of the original position at any time in order to consider the justness of some principle or law. The purpose of this maneuver is "to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice and, therefore, on these principles themselves."

The restraints imposed by the laws of fiduciary duty prohibit corpo-
rate managers from adopting the perspective of the original position, or acting on the results they reach thereby, when making decisions about corporate political speech. They are legally bound to consider the economic interest of the corporation—given its actual position in society and its singularly economic aspirations.173 According to Rawls' version of the contract theory, then, it is impossible for one in this position to develop or to advocate public policy alternatives based on considerations of justice. Corporate political speakers must say what they say, not because it is fair or just, but because it is in the corporate interest.

Opposed to the social contract theory is the utilitarian theory of John Stuart Mill and others.174 According to this theory, a law is just when it achieves the greatest net satisfaction considering all the individuals belonging to the society that the legal order governs.175 Individuals may disagree as to what rules will, in fact, have the effect of maximizing utility in this way. But the utilitarian method requires a deliberate consideration and weighing of the interests of all members of society.

Corporate managers are legally obligated to consider only the interests of a particular portion of society: the shareholders of the corporation. They are legally prohibited from considering the effects of public policy alternatives on the interests of extra-corporate members of society. Their ultimate end must be to maximize the net satisfaction of their specific constituency—the shareholders. Considerations of justice—as defined by utilitarian theory—cannot inform or control their decisions regarding the political speech of the corporation.

Conclusion: The Corporate Speaker and Political Speech

The economic interest of the corporation is the raison d'être of corporate political speech. That a policy advocated by a corporation is equitable or just, in either the contractarian or utilitarian sense, can only be fortuitous. Accordingly, first amendment protection for corporate political speech is not warranted based on the rights of the speaker. The goal of enacting just laws through democratic processes is not furthered by granting such protection, unless it is based on the rights of hearers and the protection of the voters' ability to perform their function.

Statutory limitations on corporate spending in ballot measure campaigns should not be invalidated for infringing upon the first amendment rights of business corporations. Such corporations should have no first amendment rights of political free speech to be infringed.

173. See supra notes 141-61 & accompanying text.
175. J. Rawls, supra note 165, at 22.
Some Ramifications of the Theory

A question that surfaces in the wake of the theory outlined above is the one that concerned Chief Justice Burger in Bellotti. How do we protect the first amendment rights of press corporations if the political speech of corporations is not so protected? How could one protect the right of the press, when operated in the corporate form, to editorialize and to advocate certain positions on political issues? Arguably, the guarantee of freedom of the press would suffice.

Chief Justice Burger, however, rejected an interpretation of the first amendment distinguishing freedom of the press from freedom of speech in this fashion.

But when political speech takes the form of editorializing, media corporations are not constrained by the laws of fiduciary duty to consider only the interests of their shareholders. Editorials are written by employees who are not bound by the laws of fiduciary duty. Thus, when writing or publishing these pieces, the corporation's employees are free to advocate policy based on considerations of justice.

If a press corporation chooses to influence the outcome of a political campaign or referendum by contributing to a candidate's campaign or to a committee in support of or in opposition to a ballot measure, it will be subject to the restraints that apply to ordinary business corporations. When spending corporate money in this way, media managers should be bound by the laws of fiduciary duty. Thus the media corporation would not receive first amendment protection for political speech in the form of corporate contributions. But the right to editorialize, which is central to the freedom of the press, would be protected because the editorial's position can be based on considerations of justice.

Moreover, because the reasons for constitutionally protecting commercial speech and political speech can differ, the denial of first amend-

176. See 435 U.S. at 796 (Burger, C.J., concurring).
179. For an argument that the press clause gives some protection to the media that the speech clause does not grant to the general citizenry, see Bezanson, The New Free Press Guarantee, 63 VA. L. REV. 731 (1977). See generally W. Lockhart, supra note 104, at 1007-11.
180. The Chief Justice perceives two difficulties with this interpretation: (1) The Framers probably did not contemplate a special privilege for the institutional press, and (2) the especially privileged class is difficult to define. See Bellotti, 435 U.S. at 798-802 (Burger, C.J., concurring). The Chief Justice was unmoved by former Justice Stewart's arguments to the contrary. See Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975).
181. Justice Rehnquist reaches the same result—different treatment for a press corporation's editorial speech and its campaign contributions—by way of a different theory. He argues that the freedom to editorialize is essential to the conduct of a press corporation and therefore protected, while the freedom to contribute to political campaigns is neither essential nor protected. Bellotti, 435 U.S. at 825 n.4 (Rehnquist, J., dissenting).
Corporation protection for the political speech of the business corporation does not necessarily imply that its commercial speech should be similarly treated. The recent development of protection for commercial speech\(^{182}\) is not inconsistent with the theory and proposal advanced here.\(^{183}\)

Finally, it should be emphasized that only constitutional protection for corporate political speech has been considered here. Even if such protection is denied, statutory protection is not precluded. The entry of the corporate speaker into the political debate can still be provided for, and controlled by, appropriate legislative bodies. Reliance on the political process to ensure an adequate level of participation by interested corporations is not unreasonable. Corporations are, and will very likely remain, perhaps the best-represented segment of our society in the political process.

**Summary**

The ability of business corporations to defeat ballot measures through massive spending frustrates the purpose of direct democracy. Limits on corporate contributions and expenditures are the only effective means of remedying this situation. Although such limits have been enacted by the voters, and by their elected representatives, recent Supreme Court decisions have invalidated many of these provisions and have cast doubt on the constitutionality of others.\(^{184}\)

Restrictions on corporate political speech serve compelling governmental interests: preserving the integrity of the electoral process, and restoring the original goal of direct democratic processes and the voters' confidence in them. Thus, corporate spending limits should be upheld as justified infringements of first amendment rights.

Though these limits may infringe upon the rights of hearers, they nonetheless increase the value of those same rights. To the extent that these restrictions are seen as infringements upon the rights of speakers,


\(^{183}\) The Court has protected commercial speech (i.e., that which does no more than propose a private commercial transaction, see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 379, 385 (1972)) "because it furthers the societal interest in the 'free flow of commercial information.' " Bellotti, 435 U.S. at 783 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976)). Corporate political speech might be protected for similar reasons, i.e., based on the rights of hearers. See supra notes 78-80 & accompanying text. It has been contended here that protecting corporate political speech based on the right of the speaker, as the Bellotti majority did, is unwarranted. See supra note 82.

\(^{184}\) See supra notes 33-56 & accompanying text.
they should also be justified as serving compelling governmental interests. The Court, however, may resort to the “absolute” doctrine of Tornillo and decline to find infringements upon speakers’ rights justified by the need to safeguard the rights of hearers.

Anticipating the Court’s cursory treatment, advocates of corporate spending limits can argue that the corporate political speaker should not enjoy first amendment protection in its own right. Such protection serves none of the values or goals that the first amendment is intended to serve, according to generally accepted first amendment theories. Corporate political speech does not represent a manifestation of individual free choice, and so its protection does not serve the self-fulfillment value. Because the corporate speaker is incapable of developing or advocating public policy positions based on considerations of justice as traditionally defined, its speech does not serve to advance the goal of successful self-government which first amendment protection of political speech is also intended to further. First amendment protection for the editorial speech of press corporations, or for the commercial speech of business corporations in general, is not inconsistent with this view.

The goal of direct democracy is a noble one. Efforts to safeguard the ballot measure process in order to further that goal should not be invalidated by the Court. Laws of corporate governance and laws granting advantages to businesses operated in the corporate form, when combined with unwarranted first amendment protection for the political speech of these entities, produce a disturbing and anomalous situation. The health of the political process depends on the participation of well-informed voters acting in accordance with their political and moral values. Yet the richest, and therefore the most powerful, actors in the body politic, business corporations, are legally constrained to act without regard to such values. The Constitution should not stand in the way of reforms necessary to allay the threat to direct democracy posed by this disturbing anomaly.

Matthew J. Geyer*

185. See supra note 127 & accompanying text.
186. See supra notes 122-75 & accompanying text.

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