Land & Water Law Review

Volume 14 | Issue 2 Article 4

1979

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LAND AND WATER
LAW REVIEW

VOLUME XIV 1979 NUMBER 2

Historically, many states, such as Wyoming, have prohibited the use of corporate funds in referendum elections. One reason for the prohibition was the fear that a corporation, with its vast resources, might actually dictate the outcome of the election. However, a recent Supreme Court decision has made it clear that a flat prohibition on corporate expression is unconstitutional. Therefore this article examines the constitutional test which a state must meet in order to regulate the use of corporate funds in elections. It applies the required test to the present Wyoming statute and makes the appropriate recommendations for changing the current statute so that it will be constitutionally permissable.

CORPORATE EXPRESSION IN WYOMING BALLOT ISSUES, REFERENDA AND INITIATIVES: A POLITICAL AND LEGAL DILEMMA*

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While referenda are certainly not new creations in the American political system, the use of referenda has been given a new life and, perhaps, legitimacy, by the success of California's Proposition 13.[1] The new vitality of referenda has again opened the question of corporate expression, and its place in the American system of freedom of expression. The success of Proposition 13, with its emphasis on control of governmental spending, may prompt more use of the

*This article was in part financed by a Law and Liberty grant from the Institute for Humane Studies, Menlo Park, California.

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1. Casper Star-Tribune, June 7, 1978, at 1, col. 1.

referenda.[2] It is for these reasons that the issue of corporate expression—its uses and limitations—will be discussed below with regard to participation in referenda.

Historically, the place of corporations in the electoral process has been a matter which has been much discussed both by reformers and legal commentators.[3] Fearing that the vast resources of the corporations might allow corporations to dominate elections, reformers have called for restrictions upon the use of corporate funds in elections.[4] In states such as Wyoming, the use of corporate funds in elections, including initiatives, referenda and other ballot issues has been prohibited.[5] Perhaps, in the spirit of fairness, the Wyoming Legislature has extended the prohibition to include funds belonging to trade unions, professional associations, civic, fraternal and religious groups.[6] When the very unique character of initiatives, referenda and other ballot issues is considered, the constitutionality of such prohibition must be seriously questioned. Recent judicial decisions have limited the power of the state to regulate the use of corporate funds in those types of elections such as initiatives, referenda and other ballot issues.[7] The present Wyoming statute regulating corporate expression, as well as the expression of trade unions and similar organizations, would not meet the constitutional test which has been developed in recent judicial decisions, particularly that of the United States Supreme Court in *First National Bank of Boston v. Bellotti,* et al.[8] The Wyoming Legislature, if it desires regulations of corporate expression in that arena, should legislate regulatory provisions which are constitutionally permissible under the principles of the *First National Bank of Boston* case.

2. U.S. News and World Report, October 9, 1978, at 30.
3. *Cf.* Sterling, *Control of Campaign Spending: The Reformers' Paradox,* 59 A.B.A.J. 1148, 1152-53 (1973); King, *Corporate Political Spending and the First Amendment,* 23 U.P.H.L. REV. 847 (1962); Haley, *Limitations on Political Activities of Corporations,* 9 VILL. L. REV. 593, 611-14 (1964); EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 635-40 (1970).
4. Ervin, *Campaign Practices and the Law: Watergate and Beyond,* 23 EMORY L.J. 1 (1974); INSTITUTE FOR SOCIAL RESEARCH, Newsletter 4-5 (1975).
5. WYO. STAT. § 22-25-102 (1977).
6. WYO. STAT. § 22-25-102(a) (1977).
7. First National Bank of Boston, et. al. v. Bellotti, et. al., ___ U.S. ___, 98 S.Ct. 1407 (1978); C & C Plywood Corp. v. Hanson, 420 F. Supp. 1254 (1976); Schiller Park Colonial Inn, Inc. v. Berz, 63 Ill. 2d 499, 349 N.E.2d 61 (1976); Pacific Gas and Electric Co. v. Berkeley, 6 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); 79 A.L.R. 3d 491 (1977).
8. First National Bank of Boston v. Bellotti, *supra* note 7.

Types of Referenda

The referendum, "a means by which a measure is submitted directly to the people for approval or disapproval,"[9] takes a variety of forms.[10] The compulsory referendum is used if the state constitution stipulates that certain measures must be referred to the electorate. The decision of the electorate, then, is legally binding on the legislature. Typically, this type of referendum is used for issuance of state bonds, establishment of state banks, or extension of the suffrage within a state.[11] In every state, it is used for the approval of a new constitution or constitutional amendment.[12] Wyoming statutes provide for the use of such a compulsory referendum in these and other circumstances, including use in political subdivisions of the state[13] for the issuance of bonds, for the acceptance of a county-wide one percent sales tax and the retention of judges.[14]

The second type of referendum found in Wyoming is the legislative referendum. In this case it is the prerogative of the legislature to refer a statute to the electorate. If the statute is popularly approved, then it becomes law. It should be noted that the impetus for referring an issue to the electorate in this situation comes from the legislature and is not constitutionally dictated.[15]

The final type of referendum, the petition referendum or initiative, originates directly from the electorate. Upon the acquisition of a requisite number of signatures, the legislature is compelled to refer to the electorate the statute in question. If the measure succeeds, the statute is given the

9. Gazey, *Direct Democracy—A Study of the American Referendum*, 25 PARL. AFFAIRS 123, 123-139 (1971).
10. *Id.* at 124-27.
11. *Id.* at 124.
12. WYO. CONST. art. 20, § 1. Gazey, *supra* note 9, at 124.
13. Included in the statutory definition of political subdivisions in the State of Wyoming are the following:
> . . . any county, city, town, school district, community college district, hospital district, water conservancy district, cemetery district, fire protection district, or any other political subdivision of the state constituting a body corporate, whether incorporated under general act, special charter, or otherwise.

WYO. STAT. § 22-21-102(a)(i) (1977).
14. WYO. STAT. § 22-21-103 (1977) (bond issues); WYO. STAT. § 39-6-412 (1977) (one-percent sales tax issue); WYO. CONST. art. 5, § 4(g) (retention of judges).
15. WYO. CONST. art. 3, § 52. *See* also Gazey, *supra* note 9, at 123. Wyoming, like all other states except Wisconsin, does not allow use of the advisory referendum. This type of referendum differs from the compulsory referendum only in the formal significance given the electoral decision. Gazey, *supra* note 9, at 125.

force of law, while disapproval means its defeat.[16] In the petition referendum or initiative process, the legislature is generally restricted from amending any laws referred through petition.[17] Additionally, Wyoming, like most other states which utilize this measure, does not allow initiatives to deal with appropriation measures.[18] Only in Nevada is the electorate allowed the referral of all laws.[19]

Historical Development of the Referendum

The referendum is characteristic of American democracy, affording greater opportunity for direct participation and standing as an answer to the perplexing problem of controlling governmental abuses.[20] The referendum is a product of the Progressive Era and was adopted by many states during that period. Wyoming, too, considered the introduction of the referendum, along with the initiative and recall, early in the twentieth century. Governor Joseph M. Carey first advanced the measures to the legislature in his 1911 message to the Wyoming legislature, with such other participatory measures as the Australian ballot,[21] the direct primary system[22] and a Corrupt-Practices Act.[23] While the ballot, primary and corrupt-practices measures were in some part adopted in the 1911 legislative session, the initiative and referendum proposal, after winning the support of the legislature, failed to win the necessary majority of votes among the electorate.[24] The initiative, referendum and recall were again discussed by Carey in his 1913 message to the legislature and he again strongly urged their adoption.[25] The legislature took no action on those measures during that legislative session, however.[26]

16. Gazey, *supra* note 9, at 127.
17. *Id.*
18. WYO. CONST. art. 3, § 52(g). "The Wyoming Fair Coal Tax Committee . . . has filed an initiative application to impose an additional five percent severance tax on the value of coal produced." Letter from Wyoming Secretary of State Thyra Thomson to Margaret Maier Murdock (February 28, 1979). Subsection (g) of art. 3, § 52 does not permit initiatives or referenda for the purpose of dedicating revenues. It is arguable that the initiative proposed by the Wyoming Fair Coal Tax Committee is not a dedication of revenues, but rather is the creation of revenues that can thereafter be dedicated by the Legislature.
19. Gazey, *supra* note 9, at 127.
20. *Id.* at 123.
21. LARSON, HISTORY OF WYOMING 321-323 (1965).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 330.
26. *Id.*

The move toward adoption of the referendum and other participatory measures during the Progressive Era was initially an attempt to control abuses by the state legislatures.[27] Ironically, however, because many thought that legislative abuse was a product of increased suffrage,[28] the referendum was not immediately accepted as an instrument of control.[29] The increased participation which is the essence of the referendum was identified with the dangers inherent in increased suffrage. Thus, for those fearful of increased democratization, the alternative lay in a greater centralization of control through a strengthened executive.[30] The Progressives, however, maintained their position that only an increase in participation through the use of the referendum and related measures[31] would alleviate abuses by the legislature. In this regard, the Progressive Era made its mark, as noted by historians:

> . . . the progressive movement was directed towards a broader democracy and a greater efficiency in administration. It is clear that the reformers, however acute in their disappointment in the actual function of political and economic institutions, were not inclined to despair of democracy. There was none of that tendency, so marked in European nations, to achieve order at the cost of liberty, to substitute efficient dictatorship for inefficient popular government. On the contrary, most of the progressives had a boundless faith in the efficacy of democracy, and for all the ailments that assailed American institutions their panacea was more democracy.[32]

Despite the initial acceptance given the referendum and related measures, however, the procedures were not frequently used after their adoption. There was a marked decline in the incidence of referenda use until following the Second World War,[33] when a new concern with government stimulated a renewed interest in the referendum. This re-

27. BEARD AND SHULTZ, DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM AND RECALL 4 (1912).
28. *Id.* at 11-12.
29. *Id.* at 4-12.
30. *Id.* at 6-7.
31. Other Progressive Era instruments of direct democracy included the direct primary, recall, initiative and the petition. Gazey, *supra* note 9, at 124. MORISON AND COMMAGER, 2 THE GROWTH OF THE AMERICAN REPUBLIC 467-70 (1962).
32. MORISON AND COMMAGER, *supra* note 31, at 465.
33. Gazey, *supra* note 9, at 123.

newed interest was a response to the growth of government: both the federal government and the state governments had gradually extended their powers, perhaps as a result of the increased demands placed upon them.[34] The outcome of this growth in governmental tasks and taxation was a seeming usurpation of popular power by the government.[35] Thus, the renewed use of the referendum was a means by which some measure of political power could be returned to the electorate, giving it a fuller role in determining the direction and boundaries of governmental actions.[36]

Wyoming did not adopt the use of the referendum and initiative until the 1967 legislative session. The measures were ratified by the electorate in the November, 1968 general election and became effective in December, 1968.[37] The recall, a related participatory tool, has still not been adopted in Wyoming. The measure again failed to gain the necessary legislative support in the 1979 legislative session.[38]

Since the adoption of the referendum and initiative in 1968, Wyoming has not yet utilized these measures on a statewide basis. Since 1968 only seven applications for initiative petitions have been filed with the Secretary of State.[39] While two of the petitions are currently being circulated in the state,[40] the first five initiative proposals failed for lack of sufficient number of signatures on the initiative petitions.[41] No applications have been filed with the Secretary of State for referenda petitions since the adoption of the referendum measure in 1968.[42]

Although use of the referendum has not yet been made on a statewide basis in Wyoming as mentioned above, voter approval of certain ballot issues is required for certain local governmental decisions such as bond issues and the one percent sales tax proposals.[43] In addition, on a statewide basis,

34. *Id.*
35. *Id.*
36. *Id.*
37. Governor Hansen recommended the adoption of initiative and referendum measures to the 1965 Legislature, but the measures were not adopted in that legislative session. LARSON, *supra* note 21, at 543. *See* WYO. CONST. art. 3, § 52.
38. Casper Star-Tribune, January 31, 1979, at 1, col. 5.
39. Letter from Wyoming Secretary of State, *supra* note 18.
40. *Id.*
41. *Id.*
42. *Id.*
43. WYO. STAT. § 22-21-103 (1977) (bond issues); WYO. STAT. § 39-6-412 (1977) (one-percent sales tax issue); WYO. CONST. art. 5, § 4(g) (retention of judges).

state constitutional amendments must be accepted by the electorate in Wyoming, just as is the case in all other states, before they become part of the state constitution. Thus, though neither the initiative nor referendum have been utilized by the citizens of Wyoming on a statewide basis, through the use of a compulsory referendum the voters are still called upon to participate on various ballot issues. Perhaps the increased concern with governmental spending, however, will promote the use of the referendum in the State of Wyoming.[44]

Contemporary Use of the Referendum

Although the frequency of referendum has increased since the Second World War, among social scientists there is little agreement as to its usefulness and appropriateness as a contemporary instrument of political participation. While contemporary usage of the referendum in Proposition 13-like situations may increase social science investigation of referenda, many appraisals of the modern use of the referendum are critical and disapproving.[45] Even among modern supporters of the referendum[46] there is not found the moralistic exurberance that marked the Progressive Era.[47] These modern referenda supporters have found their main task to be answering arguments against continued use of the referendum.[48]

Those critical of referenda use have depended upon two basic arguments. The first centers around the anachronistic character of the referendum, while the second focuses on inherent flaws in the referendum which may lead to misuse.

44. U.S. News and World Report, *supra* note 2. Certainly the adjustment of the mineral severance tax is an issue that may well be ultimately submitted to the electorate. Ironically, that initiative proposal seeks to raise taxes, in contrast to measures such as California's Proposition 13.

45. Scott and Nathan, *Public Referenda: A Critical Reappraisal*, 5 URBAN AFF. Q. 313 (1970); Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 65 AM. POL. SCI. REV. 124 (1970); Horton and Thompson, *Powerlessness and Political Negativism: A Study of Defeated Local Referendums*, 67 AM. J. SOC. 485 (1962); McDill and Ridley, *Status, Anomie, Political Alienation and Political Participation*, 68 AM. J. SOC. 205 (1962); Wolfinger and Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 767 (1968).

46. Gazey, *supra* note 9, at 123-39; Gwartney and Silberman, *Distribution of Costs and Benefits and the Significance of Collective Decision Rules*, 54 SOC. SCI. Q. 568 (1973); Bradshaw and Mercer, *Vote for Your Future: The Anatomy of a Successful Capital Improvements Bond Campaign*, 10 NATION'S CITIES 27 (1972); Hamilton, *supra* note 45, at 137.

47. BEARD AND SHULTZ, *supra* note 27, at 1-70; THE NATIONAL ECONOMIC LEAGUE, THE INITIATIVE AND REFERENDUM 7-22 (1912).

48. Hamilton, *supra* note 45, at 125.

With regard to its antiquated nature, critics have noted that the referendum as an instrument of direct democracy is functionally impossible on a large scale, especially in a complex, heterogeneous society.[49] These critics question if "public indignation and deep suspicion of legislative behavior (are) appropriate today,"[50] and contend that the referendum is not simply bothersome in its inefficiency and ineffectiveness. They feel that use of the referendum now may be a serious impediment to an effective legislative process,[51] as modern legislators can better formulate solutions to governmental problems because they can amass information more efficiently and evaluate it better, and can thus come to more "reasonable conclusions".[52] The success of California's Proposition 13 and the introduction of similar measures in more than half of the United States,[53] however, would lead one to suspect that voters might not share in such an attitude.

With regard to the inherent faults in the referendum system, commentators fear that the referendum "provides an instrument for political manipulation and 'opinion-molding' ".[54] Consequently, these critics claim that the way is open for any well-finance interest group, with the aid of professional firms skilled in referenda campaigns to have an influence on referenda outcomes disproportionate with that interest group's representation in the general populace. Such critics argue that public opinion would be molded in support of the interest group's position through the use of emotional appeals, scare tactics and the over-simplification of complicated problems through slogans.[55] Even those most fervent in their support of the referendum as a means to control government spending are as likely to express a fear of corporate participation in referenda for just such a reason.[56]

49. Scott and Nathan, *supra* note 45, at 314. SYED, GOVERNMENT BY THE PEOPLE: THE POLITICAL THEORY OF AMERICAN LOCAL GOVERNMENT 77, 81 (1966) notes (in Syed's words) Woodrow Wilson's caution that "government by town meeting was a thing of the past, feasible only in small, homogeneous communities. Americans . . . were resorting to direct legislation to force upon their representatives the consciousness that their duty was to represent and serve the people and not the private interests."
50. Scott and Nathan, *supra* note 45, at 316.
51. *Id.* at 326-27.
52. *Id.* at 317.
53. U.S. News & World Report, *supra* note 2.
54. Scott and Nathan, *supra* note 45, at 317.
55. *Id.;* ENVIRONMENTAL PROTECTION AGENCY, FACTORS AFFECTING POLLUTION REFERENDA 61-62 (1971).
56. Gazey, *supra* note 9, at 123-39; Gwartney and Silberman, *supra* note 46, at 568; Bradshaw and Mercer, *supra* note 46, at 27; Hamilton, *supra* note 45, at 137.

Such critiques of the use of the referendum are usually empirically unsubstantiated. Others considering the validity of the referendum have brought forward substantial statistical evidence to support its continued use, however.[57]

To the charge of antiquated impracticality, it has been noted that regardless of its alleged inefficiency, the referendum is perhaps the only practical modern means to meet a demand for direct political participation which has never subsided entirely and may be again on the increase. Regarding the characterization of the referendum as a subversion of the legislative process, it should be recognized that the referendum is a complement of and not a substitute for representative legislation.[58] Examination of the use of the referendum in the United States since the Second World War substantiates such rationale.[59] In short, the use of the referendum, and in particular the legislative referendum, does "... not indicate legislative 'buck-passing,' " but rather represents the satisfaction of a need for participation expressed by the electorate.[60] The increased contemporary use of the petition referendum may provide the legislatures not only with legislation viewed as necessary by the public, but also may provide the legislatures with parameters of public concern on particular issues, including governmental spending and behavior of governmental officials.

Although any instrument of democratic government is open to abuse, it is submitted that only when there is no chance of effective use of such an instrument by the electorate should its use be abandoned. Especially with regard to the use of referenda, it is questioned whether the campaigns surrounding referenda are any less rational than those which elect representatives.[61] American voters react to and seek certain things from a political campaign. A referendum is not different from an election of representatives in

57. Gazey relied on an examination of the actual use of the referendum which had been made by states between the years 1945-1968, and what decisions were reached in each referendum. Gazey, *supra* note 9, at 123-39.
58. *Id.* at 131, 138, 139.
59. Gazey found that the petition referendum was used only 59 times in 10 states during the 23-year period (1945-1968) of her study. The legislative referendum was used in only 4 states for only 14 issues during that period. The advisory referendum was also used by only 4 states during the period. The largest use of the referendum was in the form of the compulsory referendum. The total number of uses reported in the study was 336 for the 23-year period, for an average of 14.6 per year. *Id.* at 127-35.
60. *Id.* at 131.
61. CAMPBELL, GURIN AND MILLER, THE VOTER DECIDES 144-164 (1954).

this regard. In their interpretation of the electorate's reaction to political symbols as unthinking and accepting, it must also be questioned whether analysts have not been short-sighted in their judgments of the electorate's rationality, especially in view of the success of Proposition 13 and like measures across the country.[62]

REGULATION OF CORPORATE EXPRESSION

No other facet of electoral regulation is so consumed with suspicion and fear as that restricting corporate expression. Following the Watergate era, and, perhaps as a reaction to the disruptive effects of that period, many state legislatures enacted stringent campaign laws designed to limit the participation of corporations in electoral processes and, in some cases, exclude corporations from the electoral arena.[63] In 1977, the Wyoming Legislature, reflecting a national trend, enacted legislation which would essentially prohibit the use of corporate funds in initiatives, referenda and other ballot issues, both on the state and local level.[64]

Chapter 25 of Title 22 of the Wyoming Statutes, 1977, provides the framework by which Wyoming elections are regulated. Specific sections of the chapter require that expenditures and contributions be fully disclosed.[65] However, Section 22-25-102 contains the statutory provisions which relate to corporations, labor unions, and practically any other organization, other than political action groups and political parties.[66] Sub-section (a) provides, in part, that:

> no organization of any kind, including a corporation, partnership, trade union, professional association, or civic, fraternal or religious group, . . . directly or indirectly through any officer, member, director or employee, shall contribute funds, other items

62. U.S. News & World Report, *supra* note 2; KAPLAN, THE CONDUCT OF INQUIRY 127-28 (1971); DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260-76 (1957). Downs contended that rationality in voting was determined by the interest of the voter: when the voter voted in his own self-interest, he was acting in a rational manner. Thus, while it is perhaps true, as Campbell, et. al., contend, that voters do not always base their vote on an informed and impartial analysis of the issues of a campaign, it is important to realize the rationality of their decisions (for thier own self-interest) in a Downsian sense. *Id.*

63. LIBRARY OF CONGRESS, ANALYSIS OF FEDERAL AND STATE CAMPAIGN FINANCE LAWS—SUMMARIES AND QUICK-REFERENCE CHARTS 287-303 (1977).

64. WYO. STAT. § 22-25-102 (1977).

65. WYO. STAT. § 22-25-106 (1977).

66. WYO. STAT. § 22-25-102 (1977).

> of value or election assistance . . . in order to aid or promote the interests, success or defeat of any . . . ballot proposition. No persons shall solicit or receive a payment or contribution from an organization prohibited from making contributions under this sub-section.[67]

The statutory provision does make some exception by allowing any organization to communicate directly with its members regarding ballot issues.[68] Presumably sub-section (a) of the statute would include in its prohibition any increases in pay to employees or officers of a corporation or labor union which would be made for the express or implied purpose of using such increases as salary for communicating the corporation or labor union's position with regard to any initiative, referendum or other ballot issue.[69]

As explained previously, the initiative and referendum have not been used statewide in Wyoming. However, other ballot measures, such as constitutional amendments, bond issues, retention of district judges, and adoption of the 1% sales tax option, are widely used. Presumably, the prohibition against corporate and labor union expression in ballot measures would include these types of ballot measures. It should also be noted that the Wyoming statute does not provide an exception to its prohibition when the interests of the corporation or labor union are materially affected, as the statutes of some other states do.[70] In this respect, the Wyoming statute represents a broader and more inclusive prohibition.

Statutorily, the corporation or labor union in Wyoming is precluded from participating with corporate or union funds in any ballot measure or issue, even if that measure materially affects the interests of the corporation or labor union. Ostensibly, under Wyoming statute, a "political action committee" may be formed, by which individual officers, employees or members of a corporation or labor union may express their views. However, the funding of the political action group must be from individual donations. As

67. WYO. STAT. § 22-25-102(a) (1977).
68. WYO. STAT. § 22-25-102(d) (1977).
69. The prohibition against direct and indirect contributions in this section would seem to imply such a restriction. WYO. STAT. § 22-25-102(a) (1977).
70. WYO. STAT. § 22-25-102 (1977).

noted above, increases in salaries of officers and employees, which are directly or impliedly made for the purpose of expressing the corporation's position on a ballot measure, would be impermissible. Designation of union dues for a similar purpose would be statutorily impermissible, unless such designation is done on an individual and voluntary basis. Accordingly, absent actual circumvention of the statute, which is beyond the scope of this analysis,[71] the corporation and trade union are effectively denied participation in ballot issues.

The constitutionality of the statutory prohibition of corporate or labor union expression in Wyoming ballot issues has apparently not been seriously challenged in the Wyoming state courts.[72] However, it is submitted that the Wyoming prohibition against corporate and labor union expression in ballot measures, as presently written, is constitutionally deficient as the statute fails to make adequate provision for guaranteeing first amendment freedom of expression made applicable to the states through the fourteenth amendment of the United States Constitution.[73]

CONSTITUTIONAL ANALYSIS OF CORPORATE EXPRESSION

Traditionally, judicial decisions regarding corporate expression in referenda, as well as in other types of elections, have supported legislative restrictions or prohibitions on corporate expression.[74]

71. It is possible that corporations, labor unions, or other organizations prohibited participation in both ballot issues and candidate elections do in fact circumvent the restrictions and contribute money or services or other goods in such campaigns. That type of transgression, however, is not only outside the focus of this discussion, but is also very difficult to document. Generally, *see* Ferman, *Congressional Controls on Campaign Financing: An Expansion or Contraction of the First Amendment?* 22 AM. U.L. REV. 1, 21 (1972); Gallagher, *New Jersey Election Reform, A New Law For Old Campaigners,* 27 RUTGERS L. REV. 836, 842-3 (1974); Roady, *Ten Years of Florida's "Who Gave It—Who Got It" Law,* 27 LAW AND CONTEMP. PROB. 434 (1962).

72. *Cf.* _____ WYO. OP. ATT'Y GEN. _____ (1978).

73. First National Bank of Boston v. Bellotti, *supra* note 7.

74. While not reaching the constitutional issue, the Court's opinion in United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America, 352 U.S. 567, 568-84 (1956) far from dispelled the notion that corporate wealth was in fact a danger to the electoral process. *See* also United States v. Congress of Industrial Organizations, 335 U.S. 106 (1947). In the federal cases prior to the *First National Bank of Boston* case, the constitutionality of the Federal Campaign Act was addressed in a piecemeal fashion. United States v. Boyle, 482 F.2d 755 (D.C. cir. 1973) (held valid); United States v. First National Bank, 329 F. Supp. 1251 (D.C. Ohio 1971) (held invalid as it applied to secured loan given to candidates in the course of business at normal rates); United States v. Pipefitters Local Union, 434 F.2d 1116 (8th Cir. 1970) (held valid).

On the state level, the results prior to the First National Bank of Boston case were mixed, with courts generally not reaching the constitutional issues by limiting

The constitutionality of state restrictions or prohibitions upon corporate expression in elections was seldom denied until recently.[75] Although the United States Supreme Court's decision in the *First National Bank of Boston*[76] case represents a radical departure from the previous judicial tendency, it is nonetheless important to examine the constitutional rationale which accompanied judicial decisions restricting corporate expression in order to understand the basis of the Court's decision in the *First National Bank of Boston* case. Hopefully, such an examination will also aid in finding a guide to the permissible bounds of restrictions on corporate expression after that case.

The permissible constitutional bounds of state restrictions upon corporate expression should be analyzed within the context of traditional first amendment tests[77] through application of the fourteenth amendment.[78] Although the clear and present danger test first announced in *Schenk v. United States*[79] could possibly serve as an appropriate test,[80] it is more likely, particularly after the Court's decision in the *First National Bank of Boston* case, that a balancing test less restricted by the constraining qualification of a showing of "imminency"[81] would be used. As a general rule, courts should be expected to utilize the general approach suggested by Fleishman:

> First, it classifies the individual right being asserted into one of three classes: (1) absolutely unprotected speech, such as non-public affairs libel and whatever the court chooses to call "obscenity;" (2) absolutely protected speech, such as that pure

the statutes' application. Pecora v. Queens County Bar Ass'n., 46 Misc. 2d 530, 260 N.Y.S. 2d 116 (1965) (limited construction of campaign act precluded it from reaching Bar activity in judge selection); Smith v. Higinbothom, 187 Md. 115, 48 A.2d 754 (1946) (limited construction of state Corrupt-Practices Act did not bring incorporated bar association activity within contemplation of the statute); *cf.* Bare v. Gorton, 84 Wn. 2d 380, 526 P.2d 379 (Wash. 1974) (held state law, regulating referenda as well as candidate selection elections, unconstitutional) noted in *Election Law—Initiative 276—The Constitutionality and Feasibility of Political Campaign Expenditure Limitations in Washington*, 50 WASH. L. REV. 794 (1975).

75. *Id.*
76. First National Bank of Boston v. Bellotti, *supra* note 7.
77. *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 215, 220-21 (1972) [hereinafter cited as *Implications*]; *Constitutional Law—State Campaign Spending Restriction Violates the First Amendment*, 49 TUL. L. REV. 1146, 1149 (1975).
78. *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936).
79. 249 U.S. 47 (1919).
80. Ferman, *supra* note 71, at 17-20; *Implications*, *supra* note 77, at 221-22.
81. Ferman, *supra* note 71, at 20.

> and simple speech directly banned by sedition laws; and (3) presumptively protected speech, such as all other kinds of speech, association, petition and assembly. Secondly, with respect to presumptively protected speech, it evaluates and weights the particular freedom for which protection is sought. Thirdly, it evaluates and weights the governmental interest being asserted against it. Finally, it attempts to measure the means chosen in two ways: by evaluating the extent of their negative impact on the rights claimed by assessing their reasonable relationship to, and comparative efficiency in serving, the legitimate governmental interest.[82]

Initially, it should be noted that the use of corporate funds for the purposes of influencing a referendum, initiative or other ballot issue is not easily categorized as suggested above. Although a contribution or expenditure contemplates a conveyance of funds, it is also true that pure speech may also result from the use of those funds in advertising and personal solicitation.[83] Given the difficulty in ascertaining what component of the corporate expression might be characterized as pure speech and what should be characterized as presumptively protected speech, it should be anticipated that courts will continue to merely categorize the conveyance of corporate funds for purposes of political advocacy as expression, rather than trying to accomplish the task of bifurcating corporate expression into its respective components of pure and other types of speech. However, in the past, courts and other commentators have attempted to relegate the expression of corporations to the area of unprotected speech. Essentially, this was done by asking two threshold questions: Is the corporation equivalent to a natural individual? And, is the expression of the corporation commercial or non-commercial? Accordingly, as courts have done in the past, this analysis will assume that corporate expenditures or contributions have components of both pure and other types of speech and, accordingly, are to be treated as expression.[84]

82. Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 NO. CAR. L. REV. 389, 408-410 (1973); *See* also *Comment—The Federal Election Campaign Act of 1971: Reform of the Political Process?*, 60 GA. L. REV. 1309 (1972).
83. Buckley, et. al. v. Valeo, et. al., 424 U.S. 1, 15-23 (1976).
84. *Id.*

Traditional Analysis: Threshold Questions—Status of the Speaker and Character of the Speech

As the restriction imposed upon corporate expression in referenda, initiatives and other ballot issues emanate from the state rather than from the federal government,[85] a constitutional challenge to the validity of such restrictions is first met with the question of whether the expression has constitutional protection under the first amendment as applied to the states through the fourteenth amendment. As will be discussed, traditional analysis of this question has turned, to a large extent, upon the status of the speaker and the characterization of the speech involved. Courts and commentators have advocated the denial of constitutional protection if the corporate expression fails to meet the threshold questions posed. Although, there has been a dramatic departure from examining the constitutionality of the restrictions from the perspective of the status of the speaker and characterization of the speech, it is still important to understand the basis of that analysis. While the two traditional modes of analysis are similar, they represent distinct judicial efforts to balance the very real societal fear of corporate monopolization of opinion with the danger of prohibiting expression which might ultimately aid the electorate in making a rational choice.

Status of the Speaker: The Right of the Corporation to Political Expression

Although it has long been recognized that expression serves a societal function apart from the needs of the speaker,[86] it is not surprising, given the American legal system's emphatic attention to individual rights and freedoms,[87] that traditional analysis has proceeded from the proposition that the protection to be accorded expression is in large part defined by the rights that would otherwise be given to the speaker.

85. WYO. STAT. § 22-25-102 (1977). *See also* LIBRARY OF CONGRESS, *supra* note 63, at 287-303, for a listing of the respective state restrictions on corporate expression.
86. First National Bank of Boston v. Bellotti, *supra* note 7, at 1416, n. 12.
87. *See* in general the FEDERALIST PAPERS (Hacker, ed) (1964).

As the corporation has been entitled to many of the rights belonging to real or natural individuals,[88] opponents of laws prohibiting corporate expression have simply presumed the extension of first amendment rights to the corporation.[89] Yet the presumption that first amendment rights would be extended to the corporation in fact failed to appreciate the extent to which the law has distinguished the corporation from the natural person. Although the corporation is entitled to the protections of the due process and equal protection clauses of the fourteenth amendment, the corporation is not guaranteed the protections that would otherwise be found in the privileges and immunities clause of that amendment.[90] Additionally, the corporation's rights under the due process clause are further limited as the corporation is not entitled to the fifth amendment protection against self-incrimination,[91] nor is it entitled to vote.[92] Thus, the simple equating of the corporation with a natural individual has proven insufficient as a conceptual tool, given the very clear judicial distinguishing of corporate and natural rights in other areas.

In a similar vein, by urging the constitutionality of prohibitions on corporation expression, the proponents of such prohibitions on corporate expression have argued that the corporation, as a creature of the state, is susceptible to state restrictions or limitations through the incorporation laws of the state.[93] The incorporation argument, however, is vulnerable to attack in at least two respects. First, only two states have any express restriction on corporate expression in their laws of incorporation which would limit expression as a condition precedent to incorporation.[94] It is significant to note that Wyoming is not one of those two states.[95] Indeed, most states impose restrictions upon corporate expression only after the corporation is established. Consequently, if states

88. *See, e.g.*, King, *Corporate Political Spending and the First Amendment, supra* note 3, at 854-64 (1962); Barrow, *Regulation of Campaign Funding and Spending for Federal Office*, 5 J. LAW REFORM 159 (1972).
89. Haley, *Limitations on Political Activities of Corporations*, 9 VILL. L. REV. 593, 611-13 (1964).
90. Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. 359, 380 (1972).
91. *Id.*
92. *Id.*
93. People v. Gansley, 191 Mich. 357, 158 N.W. 195 (1916); United States v. United States Brewers' Ass'n., 239 F. 163 (W.D. Pa. 1916); *see* also *Corporate Contributions to Ballot-Measure Campaigns*, 6 J. LAW REF. 781, 791-3 (1973).
94. FLETCHER, 6A CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2939 (1968).
95. WYO. STAT. §§ 17-1-103 and 17-1-201 through 205 (1977).

such as Wyoming are to maintain the validity of a prohibition or restriction on corporate expression because of the artificial nature of the corporation, such an argument must proceed from a different basis than the restrictions which are placed upon the organization in its pre-incorporated stage.[96]

Most modern corporation acts, like that in Wyoming, reflect a trend from a concession to an enabling philosophy. The corporation is often given an implied grant of power to accomplish all that is essential to its purpose.[97] Although at least two commentators have registered their disagreement with the premise that corporate contributions and expenditures may accomplish corporate purposes,[98] legislative recognition of corporate donations for charitable purposes[99] and the accepted use of corporate funds for lobbying efforts[100] would seem to reveal the antiquated notion of such an argument. In addition, the incorporation argument would not be applicable to attempted regulation by one state of a corporation incorporated elsewhere.[101] Finally, like the argument of those would simply equate the first amendment rights of the corporation to those which are granted to a natural person, the incorporation argument fails to adequately account for the varied judicial recognition that had been given corporate rights in other areas.

Perhaps in reaction to the limitations imposed by viewing the corporation as an individual for the purpose of assessing what rights or protections were to be accorded the corporation under the first and fourteenth amendments, op-

96. The notable exception being the reservation in most acts of the right to amend the Corporation Act. *See, e.g.*, MODEL BUSINESS CORPORATION ACT § 149 (1974); Dartmouth College v. Woodward, 17 U.S. 519 (1819).

97. WYO. STAT. § 17-1-104(a)(xviii) (1977); MODEL BUSINESS CORPORATION ACT § 4(q) (1974).

98. BALLANTINE, BALLANTINE ON CORPORATIONS § 85 (1946); FLETCHER, 6 CYCLOPEDIA OF LAW OF CORPORATIONS § 2939 (1950). However, the more recent edition of Fletcher seems to renounce this earlier position. FLETCHER, *supra* note 94. *See* also *Corporate Contributions to Ballot-Measure Campaigns, supra* note 93, at 791-93.

99. WYO. STAT. § 17-1-104(a)(xiii) (1977); MODEL BUSINESS CORPORATION ACT § 4(m) (1974).

100. *See* Haley, *supra* note 89, at 609-11.

101. However, see the concept of quasi-foreign corporations in Western Airlines v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961). For the corporation which obtains a certificate of authority to transact business in Wyoming, the Wyoming statutes dictate that such corporations, by making application for certificate, are subject to "the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character." WYO. STAT. § 17-1-702 (1977). For those corporations that do not obtain a certificate of authority, but might otherwise contribute to referenda within Wyoming, the incorporation argument is arguably inapplicable unless the quasi-foreign corporation concept is employed.

ponents of laws prohibiting corporation expression argued that corporations were constitutionally protected due to the essentially group basis of corporations[102] and the substantive rights of the individuals in that corporation to associate freely.[103] This position was bolstered by the utilitarian tenet that to some extent political articulation became more effective by association. Citing *NAACP v. Alabama*,[104] commentators have noted the need to further political goals through individuals combining for the articulation of their interests. The coincidence of economic and political combinations should be viewed no more suspiciously than any other combinations or associations.[105] In addition, following the traditional lines of division in an industrial society, commentators who argued for the unconstitutionality of the prohibition on corporate expression maintained that articulation of the corporate interest was necessary to counter-balance the voice of labor,[106] often not reached by state restrictions[107] and, arguably, not needing the protective care provided by federal and state governments in labor's infancy during the New Deal.[108]

Although the aggregate or association arguments might certainly be applicable to the small or closely-held corporation, it has been questioned whether the political expression of large, publically-held corporations was truly reflective of the political dispositions of its shareholders.[109] Commentators have pointed out that large blocks of stock of publically-held corporations are often held by other financial institutions such as mutual investment groups. Thus, the expression supposedly made for the real individual might be two or three times removed from its purported sources.[110]

102. *Cf. Corporate Contributions to Ballot-Measure Campaigns, supra* note 83, at 786. *See, e.g.*, Mr. Justice Stewart's sentiment in his dissenting opinion in Lucas v. Forty-fourth General Assembly of Colorado, 377 U.S. 713, 749 (1964):
> Representative government is a process of accommodating groups' interests through democratic institutional arrangement. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy.

103. *See* the discussion by Ferman, *supra* note 71, at 13-15 with regard to disclosure of contributions.
104. 357 U.S. 449 (1958).
105. *Cf. Corporate Contributions to Ballot-Measure Campaigns, supra* note 93, at 786-91.
106. Wood, *Corporations and Politics*, 22 BUS. LAW. 775, 778 (1967).
107. LIBRARY OF CONGRESS, *supra* note 63, at 287-303. However, it should be noted that the Wyoming statutory provision treats corporations and labor unions alike. *See* text, *infra*, at note 6.
108. *Cf.* Wood, *supra* note 106, at 778.
109. Rosenthal, *supra* note 90, at 383; *Implications, supra* note 77, at 252.
110. Rosenthal, *supra* note 90, at 383.

Consequently, the content of the expression was suspect. In fact the findings of numerous studies have revealed that the policy of the corporation was often controlled by self-perpetuating management rather than the stockholders.[111] Even if management was responsive to stockholders, some commentators have argued that the disproportionate influence which a majority stockholder or a group of stockholders having a majority of the shares possessed, prevented the application of the one man, one vote principle[112] which should serve as the basis for protected association.[113] If corporate expression was to be protected as a result of the association of individual stockholders, employees and clients, it was in turn argued that each element should have equal representation to insure that the corporate expression was truly reflective of the interests within and without the corporation. In view of the disparate influence which could be exercised by majority shareholders or management, it was maintained that an equal protection question with regard to equal representations truly existed with regard to corporate expression.[114]

If the corporation did not in fact conform to the image of a reflective conveyor of political information for shareholders, employees and clients that might be desired theoretically,[115] it should also be noted that the substantive content of the corporation's message was never analyzed. Rather, in examining the rights of the corporate speaker as an aggregate, the kernel of the analysis became the impeding effect which the restriction or prohibition expression had upon the process of association for the articulation of interests. It was

111. BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 69 (1932); *contra* Manne, *Some Theoretical Aspects of Share Voting*, 64 COLUM. L. REV. 1427 (1964).

112. Rosenthal, *supra* note 90, at 383.

113. *Id.*

114. *See* Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 NO. CAR. L. REV. 349, 352-69 (1973); Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 819-21 (1974).

It suffices to note that the First National Bank of Boston Court held that inequalities in persuasion cannot serve as a basis for prohibiting expression without destroying the basis of democratic society itself—the ability of each voter to make that electoral choice which best serves his interest, however perceived. First National Bank of Boston v. Bellotti, *supra* note 7, at 1423. *See* also generally, Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975). Also, Manne's analysis would tend to suggest greater economic rationality in the corporate decision, though not based on the one-man, one-vote principle, as shareholders may purchase shares to acquire a greater voice in those issues which more crucially affect them. Manne, *supra* note 111, at 1427-430.

115. Rosenthal, *supra* note 90, at 383.

perhaps the remote relationship of many shareholders to the control of the corporation that caused many to believe that the freedom of association argument was little more than a subterfuge for the corporation's right to substitute its expression for that of its shareholders, employees and clients.[116]

In retrospect, the attempts to equate the corporation with an individual or utilize the organization of the corporation as a basis for claiming freedom of association were legally inadequate because they were simply too limited. In examining only one aspect of the communicative process —namely, the speaker—those making such arguments failed to appreciate the societal function which corporate expression might serve apart from the status of the speaker. Although some attempt was made to examine the content of the corporate expression, the analysis utilized before the *First National Bank of Boston* case was overly simplistic in its attempt to characterize the expression as either commercial or presumptively protected speech.

Character of the Speech: Restrictions on Corporate Expression

In answer to the contentions of opponents to statutes prohibiting or restricting corporate expression—that the speech or expression of the corporation is not capable of regulation unless the state shows a compelling need to do so, courts have attempted to categorize the speech, excluding from any protection that corporate speech or expression which is purely commercial in nature.[117] The classic formulation of the commercial speech exception was found in *Valentine v. Christensen.*[118] On its face, the *Valentine* decision simply required that a determination be made as to the character of the corporate expression or speech. Once such a determination was made, the protections which accompanied such expression or speech then flowed from the requisite category to which the speech or expression was assigned. That speech which was characterized as commer-

116. In fact, King advocates this position and sees it as an adjunct to the proposition that one should express himself as effectively as possible. King, *supra* note 3, at 863.
117. Valentine v. Chrestensen, 316 U.S. 52 (1942).
118. *Id.*

cial was not entitled to the protection, while that characterized as non-commercial was entitled to such protection.

Initially, commentators strenuously argued that even a *Valentine* exception was an abridgement of first amendment rights.[119] However, even putting aside the wisdom of the *Valentine* exception, it was submitted that corporate expression could never be completely free of commercial utility. Thus, even those political expressions which would otherwise be entitled to the protections of the first amendment were, under a *Valentine* exception, unprotected as the corporation may have some commercial goal which was satisfied by the advocacy of the essentially political position.

Additionally, it was questioned whether a test which incorporated the *Valentine* exception could ever be constructed. Although a profit-informational dichotomy had been suggested as a standard to differentiate commercial speech from that which was not commercial,[120] the expanded definitions of business purposes in the lobby context would have dictated a different standard. Perhaps a standard could have been constructed which would have distinguished expression aimed at consumer consumption of an immediate product from that which, while ultimately affecting continued profitable commercial activity of the corporation, had as its focus persuasion of the electorate with regard to a political choice. For example, corporate expression in support of a school bond issue would hardly be commercial speech, though success of such an issue might result in better working conditions for employees, a more stable economic base and perhaps a more profitable market.

Any standard which attempted to accomplish the exception set forth in the *Valentine* case had to categorize speech which admittedly had both components of commercial and non-commercial information. While the standard suggested above, as well as that discussed by other commentators, was theoretically feasible, it failed to give any substantive definition to commercial speech or differentiate it from that corporate expression which had very definite political connota-

119. *Cf. Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).
120. *Implications, supra* note 77, at 219.

tions. Thus, the theoretical approach suggested by *Valentine* had largely been abandoned in judicial decisions,[121] even before the *First National Bank of Boston* case.

Until the *First National Bank of Boston* case, both the courts and commentators attempted to analyze the constitutionality of statutes prohibiting corporate expression in referenda by either examining the status of the speaker or characterizing the corporate expression as commercial versus non-commercial expression. Both analytic frameworks have failed as both, having different foci, essentially attempted to bifurcate society into commercial or economic interests and political interests. In retrospect, given the admittedly substantial economic basis of politics,[122] it was understandable why these analytic frameworks had to be discarded. In large part, the United States Supreme Court in the *First National Bank of Boston* case abandoned the previous approaches. Instead, the Court has centered its examination upon the third aspect of the communicative process—namely, the listener and his need or right to receive relevant information in making an informed choice.

The Hearer's Right to Know: First National Bank of Boston v. Bellotti

The First National Bank of Boston, as well as other national banking associations and business corporations, challenged the constitutionality of a Massachusetts law which, in pertinent part, specified that:

> no business corporation incorporated under the laws of or doing business in the Commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or

121. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 95 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976). The First National Bank of Boston Court discarded the Valentine exception. First National Bank of Boston v. Bellotti, *supra* note 7, at 1420, n. 20.

122. Almond and Powell, *A Developmental Approach to Political Systems: An Overview* in FINKLE AND GABLE, POLITICAL DEVELOPMENT AND SOCIAL CHANGE 54 (1971).

> 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.[123]

A constitutional amendment that would have permitted the Massachusetts Legislature to create a graduated personal income tax was to be submitted to the electorate at a general election. The First National Bank of Boston, as well as the other appellants, brought an action to have the statute declared unconstitutional.

The Massachusetts Supreme Judicial Court refused to set aside the legislative finding embodied in the Massachusetts law regarding the materiality of the ballot issue in question. The Massachusetts court then determined the constitutional issue to be one of whether the corporations involved were entitled to the same rights as an individual under the fourteenth amendment if the political issue in question did not materially affect the corporation's interests. In upholding the constitutionality of the prohibition, the Massachusetts court adopted a novel variation of the traditional approaches discussed previously.

The Massachusetts court held that the corporations were entitled to the same protection under the fourteenth amendment as an individual would be, but restricted the protection to only those business or property interests of the corporation which would be affected by the electorate's approval of the referendum if later adopted by the legislature. As there existed a legislative finding, upheld by the Massachusetts court, that the ballot issue in question would not materially affect the "property, business or assets of the corporation," the Massachusetts Supreme Judicial Court held that the proposed expression of the appellant corporations was not entitled to the protection of the fourteenth amendment.[124]

123. MASS. GEN. LAWS, ch. 55, § 8 (Supp. 1975).
124. First National Bank of Boston, et. al. v. Attorney General, 359 N.E.2d 1262, 1270 (1977).

Upon appeal, the appellant corporations initially asked the Court to decide the constitutional question on the narrower issue of the validity of the legislative finding regarding materiality.[125] A five to four majority of the Court refused to take such a limited view of the case, but instead considered the larger issue of the constitutionality of the prohibition.[126] Mr. Justice Powell, speaking for the majority of the Court, rejected the view that the case could be decided simply upon the status of the speaker or the character of the speech, stating that:

> We thus find no support in the First or Fourteenth Amendments, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material affect on its business or property.[127]

The majority opinion did not go as far as the position taken by Mr. Chief Justice Burger in his concurring opinion, in which the Chief Justice suggested that corporate expression is to be protected absolutely under the freedom of press.[128] However, the majority opinion did find in the freedom of the press cases the germ of the proposition that the Court would bring to fruition in the *First National Bank of Boston* case. The majority noted that those cases were "based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."[129]

The majority opinion, over a strenuous dissent, eliminated as a practical consideration the threshold questions which had previously been interposed before corporate expression could be viewed as presumptively protected expression or speech. In large part, the *First National Bank of Boston* case effectively relegated the constitutional question to one of weighing the hearer's right to know against the

125. First National Bank of Boston v. Bellotti, *supra* note 7, at 1414-15.
126. *Id.* at 1415-20.
127. *Id.* at 1420.
128. *Id.* at 1427-29.
129. *Id.* at 1419.

state's interest in the regulation. While the Court did not go as far as equating the expression of any corporation to that of the press, the majority opinion did clear the conceptual and theoretical underbrush which had surrounded the initial threshold questions of the corporation's right to expression. While the state was given significant latitude in the regulation of corporate expression, it is submitted that such regulation can only be accomplished upon the showing of a compelling state interest. The Court's formulation of the standard to be applied in determining whether the state's interest was to be characterized as compelling took on dimensions that were not previously revealed.

The Balance of the State's Interest Against the Hearer's Right to Information

The "constitutionality of . . . (the) prohibition of the 'exposition of ideas' by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech."[130] As the prohibition was aimed at political expression, the Court further required that the balance would be struck in favor of the expression unless the state could show a "subordinating interest which is compelling"[131] by means that are "closely drawn to avoid unnecessary abridgement."[132] While the Court's formulation of the test is not dissimilar to that used on other occasions, the test is significant in that the nature and character of the election are interjected into the balancing process.

The interests of the state presented in this context of the restriction of corporate expression were essentially twofold: the protection of the integrity of the electoral process and the protection and the safeguarding of minority stockholders who might well disapprove of the corporate expression.[133] As the dissenting opinion of Mr. Justice White demonstrated, the majority of the Court was unwilling to examine the state's purported need to protect the electoral process in the abstract.[134] Recognizing that "preserving the in-

130. *Id.* at 1421.
131. *Id., citing* Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).
132. *Id., citing* Buckley v. Valeo, *supra* note 83, at 25.
133. *Id.* at 1422, 1424.
134. *Id.* at 1432-34.

tegrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for wise conduct of government' are interests of the highest importance,"[135] the Court gave predominant importance to the character and nature of the referendum in noting that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."[136] To argue, as the Commonwealth of Massachusetts did, that corporate expression in a referendum may persuade the electorate to take a position contrary to the electorate's own interests is certainly to question the very rationality of the electorate. In doing so, the Commonwealth of Massachusetts adopted a "highly paternalistic"[137] attitude that, though laudable in its intentions, was essentially undemocratic.[138]

As the referendum results in an immediate electoral decision, leaving no decisions to an intermediate elected official who might possibly be beholden to special interests, the state's primary interest in restricting corporate expression must be the fear of a corporate monopoly of political expression in referenda. Such a fear, in large part, is based upon a perception of the corporation as having the resources and ability to mold opinion grossly out of proportion to its representation within the society. Such a view is not supported by the literature which has been amassed investigating the influence of interests within a referendum,[139]

135. *Id.* at 1422, *citing* United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America, *supra* note 74, at 575.
136. *Id.* at 1424.
137. *Id.*, n. 31.
138. *Id.* at 1423.
139. Some studies critical of corporate participation in referenda have characterized corporate expression in terms of a veto effect. One study that investigated the success and failure of pollution referenda cited a variety of variables as influencing the outcome of referenda. ENVIRONMENTAL PROTECTION AGENCY, FACTORS AFFECTING POLLUTION REFERENDA 4 (1971). One set of characteristics fell under the population category. Population characteristics referred to the proportion of the population with a family income less than $3,000 and also to the median income in the community. It was especially noted that "bond elections for pollution control projects are more likely to pass in communities with a high percentage of low-income families." *Id.* Another group of variables dealt with the community, while the third set of characteristics dealt with the type of issue involved in the referendum.

Community characteristics were those indicating (1) the existence of a pollution problem, (2) population growth and (3) tax rate. The existence of a problem was found to be positively associated with approval of pollution control referenda; population growth was "associated with the failure of pollution control bonds" and the tax rate was negatively correlated with pollution control referenda success. *Id.*

Issue characteristics referred to the amount of the issue proposed and also to the method of repayment. The study found that "the amount of the issue is negatively correlated with passage of the bonds." *Id.* at 5.

The final set of variables dealt with the influence of campaign factors, and were considered the most influential. These variables included the existence of op-

nor does it comport with the experience in California referenda in which corporate expression proved to be counter-

position groups, partisanship of groups in the campaign and the number of criticisms raised. Among these variables, the most important, accounting "for 41% of the variance in election outcome," was the existence of opposition groups in the campaign:

> The power of opposition groups lies in their ability to create doubt in the minds of the undecided voters. When there is organized opposition, there is little that proponents can do to make an issue pass. *Id.*

The study noted that effectiveness of the opposition to an issue seemed to come from "the ease with which one can create doubt in the minds of the voters." *Id.* at 62. Most voters, it was argued, "are simply trying to make a difficult decision on the basis of inadequate and conflicting information. . . . Rather than vote to spend money for a project for which the benefits are perceived to be uncertain, the doubtful voter will vote against the bond issue." *Id.* at 65. The inference, of course, could well be that corporate involvement provides the means for such manipulative opposition. Scott and Nathan, *supra* note 45, at 317.

Other studies have dissected this phenomenon further, however, and have found that a multiplicity of subfactors influenced the electorate's reception of a referendum issue. The effect of elite involvement, corporate and otherwise, was found to be a major contributing factor in the success of measures aimed at consolidating local governments. Henderson and Rosenbaum, *Prospects for Consolidating Local Government: The Role of Elites in Electoral Outcomes*, 17 AM. J. OF POL. SCI. 695 (1973). That study found that "success (of a referendum) will be associated with high levels of elite support and involvement in the campaign . . .; a campaign's failure will be associated with active elite opposition to the plan or low levels of elite participation on behalf of it." Thus, elite ambivalence was as detrimental to the success of a referendum as actual opposition. *Id.* at 704-705.

Nor is the elite structure as unitary in interests as might be thought. Zeigler, *The Group, Its Membership, and the Public* in SEASHOLES, VOTING, INTEREST GROUPS, AND PARTIES 53, 56 (1966); STOKES, VOTING RESEARCH AND THE BUSINESSMAN IN POLITICS 23 (1960); TRUMAN, THE GOVERNMENTAL PROCESS (1951) (classic discussion of the role of interest groups within a group theory of politics).

As has been noted, "success is dependent upon (1) getting major interest groups to take an active part in promoting the consolidation plan, and (2) attracting a broad spectrum of organizations and their leaders to endorse the proposal." Henderson and Rosenbaum, *supra*, at 699. Thus, a wide variety of groups must become involved in the referenda process, the implication being that no single group wields sufficient influence to affect the outcome of the process single-handedly.

Although broad elite support of a referendum issue was found to be necessary, it should also be noted that broad support is not alone a sufficient condition for success. Success was also found to be dependent upon the distribution of political influence, both actual and potential, among a community's members. The extent to which an elite of any variety influenced a referendum issue was correlated with the degree to which resources available to it were uncommitted. While the findings on this point were not conclusive, there was substantial evidence to support the proposition that success was more likely in "communities with (1) a slack elite structure, and (2) a high level of involvement in the campaign for consolidation by previously unmobilized political influentials." *Id.* at 701. Thus, the degree to which any interest was efficacious in its referenda expression was determined at least in part by the general political system and not solely by the financial resources the interest could bring to bear on a referendum question.

Finally, success will depend somewhat on the elite's perception of civic involvement and, in particular, the role of civic dissatisfaction, *Id.* at 701-702. This is so, as there is some tendency for success to be "associated with a significant intensity and diffusion of civic dissatisfaction among community influentials; failure will follow when civic dissatisfaction among influentials is not widespread and intense." *Id.* at 702.

The net effect of the multiplicity of subfactors evaluation of the referendum is the rejection of the simplistic notion that the corporation, acting by itself, can exercise an effective veto over a referendum issue. The validity and the utility of the group theory of democracy, coupled with a search for the numerous subtleties which affect a referendum outcome leads to the conclusion that "[a] more plausible assessment of the role of pressure groups in the electoral process can be made if we consider them as allies of the regular political organizations." Ziegler, *supra*, at 702. The considerable skepticism of the *First National Bank of Boston* Court prevented it from accepting the contention of the Commonwealth of Massachusetts that corporations wielded excessive influence in referenda. First National Bank of Boston v. Bellotti, *supra* note 7, at 1423.

productive.[140] On a more theoretical basis, however, the *First National Bank of Boston* Court, while leaving open the possibility of a future case in which the state interest in prohibition could be proven to be compelling, found that the rationality of the electorate must be presumed until substantial evidence indicates otherwise.[141] Thus, though the Court noted that "the risk of corruption perceived in cases involving candidate elections" did exist, the Court held that such a risk "simply is not present in a popular vote on a public issue."[142]

Addressing the second interest of the state in prohibiting corporate expression in referenda, the majority of the Court found that the protection of minority shareholders or shareholders who did not approve of the corporate expression was "belied, however, by the provisions of the statute" that were both "under and over inclusive."[143] It should be noted that the Court did not examine the appropriateness of the provisions after once having concluded that the need to protect shareholders was a compelling one. Rather, the majority of the Court found that the inappropriateness of the measures used to protect the shareholders indicated that the needs in protecting shareholders was not a compelling one for the Commonwealth of Massachusetts.[144] This seeming juxtaposition of tests demonstrates the scrutiny with which the Court will examine the interests of the state in determining whether such interests are compelling.

Turning aside the purposes of regulation suggested by the Commonwealth of Massachusetts and taken up by Mr. Justice White in his dissenting opinion,[145] the Court found that the statutory prohibition was under-inclusive in that the corporation could engage in lobbying and, in certain instances, could even express itself in ballot issues, if those ballot issues materially affected the interests of the corporation.[146] On the other hand, a majority of the Court found that the statutory provisions regarding prohibition of corporate

140. *See*, generally, *Corporate Contributions to Ballot-Measure Campaigns*, *supra* note 93.
141. First National Bank of Boston v. Bellotti, *supra* note 7, at 1423.
142. *Id.*
143. *Id.* at 1424.
144. *Id.* at 1424-25.
145. *Id.* at 1434-38.
146. *Id.* at 1424-25.

expression were over-inclusive in that they precluded corporate expression even when such expression would be unanimously approved by shareholders of that corporation.[147] Making abbreviated reference to the rights of minority shareholders which are enforced through derivative suits and intra-corporate remedies,[148] the Court found that the protection of the shareholders, even if a compelling state interest, was not done through statutory provisions which were reasonably correlated to the ends sought to be achieved.[149]

The majority of the Court, by its decision in the *First National Bank of Boston* case, removed the threshold questions which had generally been interposed before corporate expression was characterized as presumptively protected by discarding traditional approaches to examining the constitutionality of prohibitions on corporate expression. Instead, the Court focused upon the hearer's right to information and found that such a right could not be restricted without a definite showing of a compelling state interest, particularly when the election involved was one in which the electorate made an immediate decision, such as in a referendum or other ballot issue.

In considering the compelling nature of the state's interest, the Court perhaps also gave notice that it would no longer ratify legislative findings when the effect of such findings was to preclude the electorate from receiving relevant information that could be utilized in its electoral decision-making.

PERMISSIBLE REGULATION OF CORPORATE EXPRESSION IN REFERENDA, INITIATIVES AND OTHER BALLOT ISSUES

After the decision in *First National Bank of Boston,* it is clear that the present Wyoming statutory provision prohibiting corporate expression in referenda, initiatives and other ballot issues is unconstitutional. If the Wyoming State Legislature is of the opinion that the expression of corporations should be regulated in such elections, it ought to revise

147. *Id.* at 1425-26.
148. *Id.*
149. *Id.* at 1426.

the present Election Code in accordance with the dictates of the *First National Bank of Boston* case. Because of the *First National Bank of Boston* case, it may also be prudent for the Wyoming State Legislature to re-examine the Election Code in its totality. Greater definitional specificity will only aid the State in overcoming any challenges to the constitutionality of the Election Code. Consequently, complete revision of the Election Code is advisable. In part, the revision should include a far more specific definition of the activities which are to be reached by the statutory restrictions as well as revision of the provisions respecting regulation of corporate expression.

Activities Reached by State Regulation Of Corporate Expression

Before ascertaining the actual methods of regulation of corporate expression in ballot issues, it is necessary to appreciate the reach which such regulations may have. In view of the demanding scrutiny of the United States Supreme Court in the *First National Bank of Boston* case, the Legislature should thoroughly define that corporate conduct activity which it seeks to regulate.[150] Besides the expected transfer of currency, either in the form of a contribution[151] or an expenditure,[152] statutes restricting corporate expression may also reach the following:

1. the furnishing of supplies or use of corporate equipment;[153]

150. In many instances there will be no judicial interpretation of a state's statute and its exact meaning with regard to corporate expression in referenda must await litigation. As this deters corporate expression, it must be anticipated that poorly-defined statutes will come under greater judicial scrutiny.

151. The term may mean simply currency or can extend to "anything of value." *Cf.* 24 A.L.R. Fed. 162, 167 (1976). Within the context of a referendum, the term, as contrasted with an expenditure, may have no real importance. *See* text, *infra*, footnote 178. After the *Buckley v. Valeo* case, the term contribution generally denoted giving funds to a candidate, group or committee authorized to take donations for such a candidate or group.

152. The term expenditure generally denotes spending funds to promote a candidate or group, provided such funds are not under the control or supervision of either the candidate, the group, or any representative of the candidate or group. Prior to the *Buckley v. Valeo* case, much federal litigation had centered upon this term. *See, e.g.*, United States v. Anchorage Central Labor Council, 193 F. Supp. 504 (D.C. Alaska 1961) (the cost of four television broadcasts lasting 15 minutes each was not an expenditure); United States v. Lewis Food Co., 366 F.2d 710 (9th Cir. 1966) (whether the corporation's appraisal of the candidates' records placed in advertisement was intended as "active electioneering" and, thus an expenditure, was a jury question).

153. *See, e.g.*, KY. REV. STAT. § 121.015(6)(c) (1974).

2. the allowing of corporate employees to work for an issue while being paid by the corporation;[154]
3. the communicating with employees by the corporation[155] even if such communication is permitted only during certain periods;[156]
4. the communicating with clientele and customers of the corporation;[157]
5. the communicating with stockholders by the corporation;[158]
6. the soliciting of stockholder contributions by the corporation[159] even when such contributions are to be used in segregated accounts;[160] and,
7. any activity of a majority shareholder, even when such activities are financed through the personal funds of such shareholder.[161]

Although the reach of statutes may vary, it is incumbent upon the State to enact a regulatory system which removes, to the extent possible, any ambiguities regarding the reach of the regulations. In its present form, the Wyoming statutory provisions are ambiguous with regard to most of the above activities.[162] It is submitted that the corporation's communications with employees, shareholders and customers or clientele should not be within the reach of any regulations. Additionally, Wyoming might do well to adopt the thorough definitional provisions patterned after the Federal Election Code which have been enacted by other states. Such definitional provisions do much to remove the ambiguity regarding the reach of the regulations and thus provide the statutory scheme with greater legitimacy in the face of constitutional challenge.

154. *See, e.g.*, KY. REV. STAT. § 121.015(6)(b))1974).
155. Arguably, this practice is not permitted under present Wyoming law. WYO. STAT. § 22-25-102(d) (1977). This might be the conclusion drawn from such provisions as KY. REV. STAT. § 121.015(6)(c) (1974). *See, e.g.*, ARIZ. REV. STAT. § 16-304 (1975) as applied to communication through pay envelopes.
156. *See, e.g.*, IND. CODE § 3-1-30-11 (1975) precluding display of handbills during a 90-day period preceding election.
157. Arguably, this practice is not permitted under the present Wyoming law. WYO. STAT. § 22-25-102(d) (1977). *See, e.g.*, KY. REV. STAT. § 121.035(2) (1974).
158. This practice is probably permitted under the present statute. WYO. STAT. § 22-25-102(d) (1977).
159. *See, e.g.*, KY. REV. STAT. §§ 121.035(2) and 121.025 (1974). It is questionable whether such a practice is presently permitted in Wyoming. WYO. STAT. § 22-25-102(d) (1977).
160. This was a federal restriction existing in 1972. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972).
161. WYO. STAT. § 22-25-102(a) may reach this activity. *See, e.g.*, MASS. GEN. LAWS ch. 55, § 7 (1974).
162. As a result of this ambiquity, otherwise permissible corporate expression may be precluded. *Cf.* Wood, *supra* note 106, at 776.

Optional Regulatory Schemes

As noted above, the present Wyoming statutory provision prohibiting corporate expression in referenda, initiatives and other ballot issues is unconstitutional. However, there exist essentially three different types of regulatory systems that might be investigated by the Wyoming State Legislature: the state-funded system, a limitation or ceiling on expenditures and contributions and a disclosure system. The state-funded system,[163] attempts to provide the information and analysis which the open exchange of political views would normally provide. The process associated with this system is at least simple in theory. The proposition to be presented to the voters is phrased, either by a state officer[164] or the proponent of the measure.[165] Arguments are then formulated by the proponent and opponent of the measure.[166] At this point, a financial analysis may be added, formulated by and at the initiative of the state.[167] The voters are then provided with a pamphlet incorporating the measure, the arguments in favor and against it, as well as the financial analysis, if provided by the state.[168]

As the state-funded system contemplates excluding any other organized publicity with regard to the measure in question,[169] the state or the involved parties' argument and analysis will serve as the only organized means of persuasion in the referendum. Such a system is arguably unconstitutional in light of the *First National Bank of Boston* case, as the system may ultimately work to deprive the electorate of information regarding the measure. This may occur because the system has a very definite tendency to over-simplify the rationale for a given measure.[170] As groups may differ in their reasons for supporting or opposing a measure, this system assumes a unitary articulation of interests, both pro and con, which simply may not exist.[171] Presumably, if agree-

163. *See, e.g.*, OHIO REV. CODE ANN. § 3519.19 (Baldwin 1974).
164. *See, e.g.*, MICH. STAT. § 168.474 (1975).
165. *See, e.g.*, OHIO REV. CODE ANN. § 3519.19 (Baldwin 1974).
166. *See, e.g.*, UTAH CODE ANN. § 20-11a-1 to 20-11a-5 (1975).
167. *See, e.g.*, UTAH CODE ANN. § 20-11a-6 (1975).
168. *See, e.g.*, UTAH CODE ANN. § 20-11a-7 (1975). Only the number specified by statute are prepared.
169. *See, e.g.*, OHIO REV. CODE ANN. § 3599.03(A) (Baldwin 1974) as interpreted in State v. Cleveland - Cliffs Iron Co., 79 Abs. 232, 152 N.E.2d 1 (App. Ct. 1958), *later overruled* by State v. Cleveland - Cliffs Iron Co., 169 O.S. 42, 157 N.E.2d 331 (1959).
170. *Cf. Corporate Contributions to Ballot-Measure Campaigns, supra* note 93, at 787-88.
171. *Cf.* King, *supra* note 3, at 864, in the context of issues important to the corporation and not the candidate.

ment cannot be reached by two parties wishing to represent a respective side, the choice of argument is left to the state officer charged with preparation of the publicity pamphlet.[172]

The state's involvement in the formulation of the arguments is certainly suspect under the principles enunciated in the *First National Bank of Boston* case. Additionally, if corporations are excluded from participation in the mechanism contemplated by the state-funded system, the system is constitutionally deficient, as it represents an attempt by the state to choose for the electorate.

Even if the corporation is not excluded from participating in the state-funded mechanism and is further permitted to engage in organized publicity outside of the pamphlet, a state-funded system is still questionable constitutionally, as it may result in the state, through the auspices of the state enforcement officer, selecting and impliedly giving greater weight to the expression of that group or person selected to represent either the proponent or opponent of the measure. Finally, the state-funded measure does not represent a viable legislative option, as mechanically it may simply provide too little opportunity for the views on the measure to be expressed.[173] As a consequence, it is submitted that the state-funded system, though laudable in its intent, is too restrictive upon the free flow of information to which the electorate is entitled in referenda, initiatives and other ballot issues.

Many states have enacted statutes which place limitations or ceilings on the amount which an individual or corporation may contribute or expend in a given election.[174] The limitation system sought to encourage wide-spread small contributions and thus induce participation.[175] The United States Supreme Court in the case of *Buckley v. Valeo*[176] was faced with the question of the constitutionality of federal limitations or ceilings on the expenditures and contributions which could be made by individuals in the nomination and

172. This would seem to be the effect of OHIO REV. CODE ANN. § 3519.19 (Baldwin 1974).
173. *Cf.* First National Bank of Boston v. Bellotti, *supra* note 7, at 1423-24.
174. LIBRARY OF CONGRESS, *supra* note 63.
175. First National Bank of Boston v. Bellotti, *supra* note 7, at 1423, n. 29 and 30; *see*, generally, the remarks of Fleishman, *supra* note 114, 352-69 and Nicholson, *supra* note 114, at 819-21 stressing the need for access by lesser-endowed groups.
176. Buckley v. Valeo, *supra* note 83.

election of federal representatives.[177] The *Buckley* case was directed at restrictions which might be put upon a natural individual or groups of individuals, rather than corporations. Indeed, the Act examined in the *Buckley* case had specific provisions which prohibited any corporate contributions.[178]

However, in view of the Court's holding in the *First National Bank of Boston* case, it should be anticipated that the same constitutional objections which were applicable to restrictions on individual contributions and expenditures in the election and nomination of federal officials would likewise be impermissible with regard to corporate expenditures or contributions in ballot issues. The *Buckley* Court found the limitation or ceiling on expenditures by individuals to be constitutionally impermissible, while upholding the constitutionality of a similar limitation or ceiling upon contributions to a candidate.[179]

Within the *Buckley* context, the Court viewed a contribution as those funds, services, gifts, loans, or deposits of anything of value which were given to a candidate or to a committee authorized by the candidate to accept contributions on his behalf.[180] Expenditures were viewed by the *Buckley* Court as those funds which, though spent on a specific identifiable candidate, were not made directly to the candidate or a committee authorized to accept contributions on the candidate's behalf.[181] Initially, it is questionable whether the expenditure-contribution dichotomy has any meaning in the context of a referendum, initiative or other ballot issue.

As noted in the discussion regarding state-funded systems, it may well be constitutionally impermissible for the state to designate a certain group or person as either a proponent or opponent of a ballot issue. Thus, in practical terms, expenditures may be equivalent to contributions when those terms are used in the context of a referendum.

177. *Id.*
178. This includes as well expenditures; *see* Appendix, *Id.* at 196-197.
179. Buckley v. Valeo, *supra* note 83, at 143. It must be recognized that an expenditure "controlled by or coordinated with the candidate and his campaign" will be categorized as a contribution and, thus, subject to permissible limitation. *Id.* at 46-47.
180. *Id.* at 23-24.
181. *Id.* at 39-40.

Accordingly, it is arguable that the state may not impose a limitation *per se* on corporate expenditures or contributions made for the purposes of influencing a ballot issue.

Although the state may not permissibly prescribe a limitation on expenditures or contributions *per se*, it is certainly arguable that the state may impose limitations on expenditures by requiring the approval of a given percentage of the shareholders before such expression can be made. Certainly such a requirement would be in accord with the majority's decision in the *First National Bank of Boston* case, in that the purpose of the regulation is clearly the protection of minority and non-consenting shareholders.[182] Such a regulation is not over-broad or under-broad given the state's permissible requirement that certain percentages of the shareholders must consent when the articles of incorporation are amended and other significant acts are taken by the corporation.[183] Similarly, restrictions which would limit corporate expression to a certain amount of stated capital or other measure of corporate worth might well be permissible. However, it should be noted that the limitation would apply only to corporations incorporated under Wyoming law or authorized to do business in Wyoming.

The state may arguably legislate another type of system by which the rights of non-consenting or dissenting shareholders are protected. At least two methods have been proposed: (1) a notice system which would alert the shareholders as to those corporations which would express themselves in referenda, and (2) a check-out or check-in system that would return to dissident or non-consenting stockholders a proportionate share of the cost of the corporation's expression.[184] The notice proposal has largely been rejected in theory and practice, as it would place too great a burden upon the dissenting stockholder in terms of lost investment opportunities.[185] Most commentators have advocated the check-out or check-in system as the most effective means of permitting corporate expression without infringing upon minority

182. First National Bank of Boston v. Bellotti, *supra* note 7, at 1424.
183. WYO. STAT. §§ 17-1-301 through 302 (1977).
184. *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions*, 42 U. CHI. L.R. 148, 157-159 (1974).
185. *Id.*

shareholders' rights.[186] In principle, the check-out system allows each shareholder who does not wish the corporation to engage in political expression the right to withhold that portion of the total amount to be expended by the corporation equal to his proportionate share of the total outstanding stock of the corporation. Under the check-out system, shareholders who do not affirmatively assert their opposition to the proposed corporate expression are presumed to consent to it. The check-in system, conversely, presumes that the shareholder who indicates no preference dissents from the proposed corporate expression.

However, there are two obstacles to the implementation of this proposal: administrative costs and the free-rider problem.[187] If the cost of administering such a system is too high, the financial burden on the corporation would essentially preclude its expression. While the administrative costs of administering such a system for a small or closely-held corporation would not be prohibitive, the same could not be said for large, publically-held corporations that might otherwise be doing business in Wyoming. Likewise, it has been argued that shareholders who either request rebates under the check-out system or who do not consent to the expenditure or contribution through a check-in system would ultimately decrease the utility of the expression for those consenting stockholders, resulting in the denial of corporate expression.[188] However, absent a clear showing that such a system would effectively preclude corporate expression, it is submitted that the means are reasonably drawn so as to minimize any abridgement of corporate expression in referenda, initiatives and other ballot issues.

The final regulatory system is one which requires disclosure of all expenditures or contributions which exceed a given amount.[189] This system assumes that recognition of the source of the information is as important as a substantive understanding of that information. The disclosure

186. *Id.*
187. *Id.*
188. *Id.* at 155.
189. Wyoming has a disclosure system presently for expenditures and contributions made to candidates. WYO. STAT. § 22-25-106. There appears to be no disclosure requirements for those making expenditures to promote a candidate when such expenditures are not controlled by or coordinated with the candidate or his committee. Examples of far more comprehensive disclosure systems abound. *See*, generally, LIBRARY OF CONGRESS, *supra* note 63.

system has a professedly deterrent effect that has been demonstrated in California ballot issues.[190] The corporation is theoretically deterred from participation because of both possible stockholder dissent and adverse electoral results due to its contribution.[191] However, the reaction to corporate expenditures or contributions may well depend on the timing of the disclosure. If the required disclosure comes before the election, the system may well preclude or reduce spending through the corporation's fear of adverse voter reactions.[192] However, if the required disclosure comes after the election, the system may simply deter corporate expression that might otherwise be objectionable to shareholders. The *Buckley* Court upheld the constitutionality of disclosure provisions, expressly recognizing the function such disclosures played in the dissipation of electorate cynicism and distrust.[193] Thus, disclosure of corporate expenditures or contributions may serve as the most effective and yet constitutionally permissible means of regulating corporate expression in referenda, initiatives and other ballot measures.

If the Wyoming State Legislature determines that corporate expression should be regulated in referenda, initiatives and other ballot measures, it should adopt a disclosure system that requires disclosure of corporate expenditures and contributions prior to the actual election. If further regulation is felt necessary, the Wyoming State Legislature should investigate the costs associated with a check-out or check-in system. If those costs are not prohibitive, an appropriate legislative finding should be made and such a system adopted. Should a check-out or check-in system prove to be infeasible and further regulation be deemed necessary, it is submitted that amendment of the Wyoming Business Corporation Act to require approval of two-thirds of the total shareholders before any corporate expenditures in referenda, initiatives or other ballot issues could be made is constitutionally permissible. Other measures aimed at limiting the total expenditure through restriction on the amount spent to a proportion of some mea-

190. *Cf.* First National Bank of Boston v. Bellotti, *supra* note 7, at 1424, n. 32; *Corporate Contributions to Ballot-Measure Campaigns, supra* note 93.
191. Brown v. Superior Court, 5 Cal. 3d 509, 96 Cl. Rptr. 584, 487 P.2d 1224, 1231-33 (1971); *see* Ferman, *supra* note 71, at 27; King, *supra* note 3, at 868.
192. *Id.*
193. Buckley v. Valeo, *supra* note 83, at 83.

sure of corporate liquidity are constitutionally questionable, but are certainly far more desirable than any attempt at prohibition of corporate expression.

Permissible Regulation of Corporate Expression In Candidate Elections

Unlike the referendum, initiative or other ballot issue, the candidate election is one in which a candidate is either nominated or elected to office. While the decision in the *First National Bank of Boston* case was limited to prohibitions upon corporate expression in referenda, the case may also have major ramifications for the permissible regulation of corporate expression in candidate elections. While it is probable that the traditional threshold questions will also be discarded when the restrictions on corporate expression are examined in the context of the candidate election as opposed to a referendum, the balancing test and the determinations made pursuant to the test may well differ from that found in the Court's decision in the *First National Bank of Boston* case.

As discussed previously, the majority opinion in *First National Bank of Boston* was not willing to extend the freedom of press to include all corporate expressions as advocated by the Chief Justice in his concurring opinion.[194] Although Mr. Chief Justice Burger in his concurring opinion maintained that "the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedom,"[195] the majority opinion carefully distinguished the referendum from candidate elections.[196]

Given the majority's careful distinguishing of referenda from candidate elections and the view of the dissenting portion of the Court that the preservation of the electoral process is an interest which should be honored by the Court even absent a strong showing of compelling need,[197] it must be questioned whether the Court will as easily find that the risk of corruption and the perception of corruption in can-

194. First National Bank of Boston v. Bellotti, *supra* note 7, at 1427-29.
195. *Id.* at 1429.
196. *Id.* at 1423. *See also* the dissenting opinion of Mr. Justice White, distinguishing the threat of corporate domination in referenda from that found in candidate elections, albeit with less certitude than exhibited by Mr. Justice Powell. *Id.* at 1433-34.
197. *Id.*

didate election is not a compelling state interest as it did in the context of a referendum. Unlike the referendum, the general election does not result in an immediate decision on a specific issue, but rather culminates in a selection of a representative who, in turn, will make further decisions on behalf of the electorate. The possibility of corruption and the electorate's basis for perceiving corruption as a result of corporate participation in a general election is far different from what occurs in a referendum when the electorate decides the political issue.

Having recognized the compelling interest of the state to prevent corruption and mitigate against even the perception or appearance of corruption,[198] the Court might well be expected to find permissible state prohibition of corporate expression in candidate elections. Certainly, social science research reveals that there is increasing cynicism of government and greater distrust of the role which special interests play in governmental affairs.[199]

Perhaps the greatest challenge to a prohibition of corporate expression in candidate elections might come in an over-breadth argument similar to that found in the *First National Bank of Boston* case. As the Wyoming statutes permit lobbying efforts by corporations, it can be argued, as was done in the *First National Bank of Boston* case, that the measure adopted—namely, prohibition—is overly broad to accomplish the state's need to encourage electorate participation through the dissipation of political cynicism. As was true in the *First National Bank of Boston* case, the use of a prohibition is questionable when the corporation is nonetheless permitted to lobby legislators out of the public scrutiny. Without further restrictions upon the lobbying efforts of corporations, the better regulatory tool in a candidate election may be that which would otherwise be found to be constitutionally permissible within the context of the referendum.

Assuming that the prohibition of corporate expression in candidate elections is not desired, the same type of restrictions which are permissible with regard to regulation of corporate expression in referenda are arguably permissible in

198. First National Bank of Boston v. Bellotti, *supra* note 7, at 1423, 1433-34.
199. INSTITUTE FOR SOCIAL RESEARCH, *supra* note 4, at 4.

the regulation of corporate expression in candidate elections. However, at least with regard to the limitations which may be placed on contributions and expenditures, it certainly may be argued that even the principles enunciated in the *First National Bank of Boston* case might allow greater restriction of corporate expression in candidate elections. As a result of the Court's recognition of the States' need to preserve the electoral process by encouraging participation and preventing electorate distrust and cynicism, it may well be argued that a limitation on corporate expenditures is constitutionally permissible. Certainly, such a measure falls far short of a complete prohibition which, in certain circumstances, may still be permissible under the requirements of the *First National Bank of Boston* case. As the state may demonstrate through survey data, the electorate has become increasingly distrustful of the role which special interests play in governmental affairs.[200] The limitation on corporate expenditures is a measure which ostensibly is directed at alleviating electorate distrust which is derived from a perceived corruption of the electorate process by corporations. While such a restriction would have to be carefully drawn to meet the over-breadth objections previously discussed, such a measure nonetheless may well pass constitutional muster.

CONCLUSION

After the United States Supreme Court's decision in the *First National Bank of Boston* case, it has become necessary for the Wyoming State Legislature to re-examine the Wyoming Election Code. If no action is taken by the Legislature, corporations are free to express themselves without restriction or disclosure in all referenda, initiatives and other ballot issues conducted in the state. Should the Legislature feel that regulation is necessary, it should adopt a comprehensive disclosure system. Should further regulation of corporate expression in referenda be deemed necessary, it is advisable that the Legislature pursue limitations on expenditures and contributions which are reasonably related to the end that is sought legislatively—namely, the protection of non-consenting stockholders.

200. *Id.*

With regard to candidate elections, the Legislature may well decide to leave its present prohibition on corporate expenditures and contributions in effect. Such a prohibition is vulnerable to constitutional challenge, particularly the type of over-breadth challenge which was made to the statutory prohibition in the *First National Bank of Boston* case. If the Legislature pursues complete revision of the Wyoming Election Code, it should adopt disclosure provisions similar to those that are enacted in the area of corporate expression in referenda. Similarly, though some constitutional challenge may be made to such restrictions, limitations on corporate expenditures in candidate elections may be made, should the Legislature find that such limitations will prevent corruption and alleviate perceived corruption by the electorate. In the event that the Legislature finds that neither prohibition nor limitation of expenditure is in the best interest of the State, the laws governing corporate expression in referenda and general elections should be integrated with corporate expression being no less restricted in one context than in another.

With the United States Supreme Court's decision in the *First National Bank of Boston* case, a new era in state regulation of corporate expression has begun. While the dimensions of the changes which will be brought by the Court's decision are not clear, it is certain that greater judicial scrutiny must be anticipated. Wyoming, like many states, must re-examine its Election Code to bring the provisions of that Code into conformity with the dictates of the *First National Bank of Boston* case. The choice of striking the proper balance between the electorate's need for relevant political information and the possible damage that could be done to the electoral process by unbridled corporate expression is a difficult one. However, it is submitted that the United States Supreme Court, with its decision in the *First National Bank of Boston* case, has decided that should it be necessary to err, it will be on the side of the electorate's right to know, for as was true for the Progressives, the inventors of the referendum, faith is best placed in more democracy and not less.