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The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after *First National Bank v. Bellotti*

CHARLES R. O'KELLEY, JR.*

The Supreme Court has addressed on only a few occasions the extent to which corporations enjoy those constitutional rights so fundamental to private citizens. In this article Professor O'Kelley discusses the inherent difficulty in applying familiar constitutional principles to corporations and examines those cases in which the Supreme Court has either extended or denied to corporations various constitutional rights. Finding that two underlying conceptual doctrines—the Field rationale and the associational rationale—have guided the Court in previous decisions in this area, he then applies these doctrines in an analysis of the recent Supreme Court decision in First National Bank v. Bellotti. He argues that although the Court reached the correct result, the reasoning of the various opinions was seriously flawed. Finally, he applies the two doctrines in an examination of the constitutionality of the corporate campaign contribution and expenditure limitations of the Federal Election Campaign Act demonstrating how future cases involving corporate claims of first amendment protection should be analyzed. He concludes that if the statute is properly construed and the two doctrines correctly applied, the limitations on corporate campaign contributions and expenditures should withstand constitutional challenge.

Judicial consideration of the extent and nature of the constitutional rights enjoyed by corporations has been sporadic. The United States Supreme Court has extended certain rights to corporations, but has withheld other rights. The Court has determined that corporations are entitled to access to the federal courts.¹ The Court has also determined that corporations are entitled to freedom of the press under the first amendment,² freedom from unreasonable searches and seizures under the fourth amendment,³ and to the protection of the due process⁴ and equal protection⁵ clauses of the fourteenth amend-

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1. See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86, 91 (1809) (term citizen should be construed to describe real persons who come into court, even under their corporate name).

2. See *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (state surtax on newspapers with large circulation invalidated as restraint on freedom of press).

3. See *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (subpoena for production of corporate records so broad that it constituted unreasonable search and seizure in violation of fourth amendment).

4. See *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26, 28, 36 (1889) (although corporations are persons within meaning of § 1 of fourteenth amendment, state law authorizing doubling of damages when railroad company refuses to pay actual value of property damaged or destroyed because of railroad's failure to fence track does not infringe fourteenth amendment).

5. See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886); see notes 36-50 *infra* and

ment. The Court, by implication, has also extended to corporations fifth amendment protection against double jeopardy.⁶ Corporations are not citizens within the meaning of the privileges and immunities clause,⁷ however, and they are not entitled to the fifth amendment privilege against self-incrimination.⁸ Moreover, the Court has determined that the liberty guaranteed by the fourteenth amendment is not characteristic of corporations and therefore the protection of the fourteenth amendment does not extend to them.⁹

Missing from the Court's various decisions involving corporations is any expressly enunciated common rationale. Many cases appear to involve an ad hoc determination rather than the development or application of a general principle. That the development of a constitutional jurisprudence on the nature of a corporation and its rights has been neglected is not surprising. Because the modern business corporation was unknown to the framers of the Constitution, courts addressing the issue of the constitutional rights of corporations have been forced to make decisions regarding those rights without recourse to the rich historical sources available when issues relating to the rights of individuals are being addressed. Additionally, the artificial nature of a corporation is an inherent source of difficulty in developing an all-encompassing rationale.

Nowhere is the lack of an agreed rationale for the treatment of corporations more apparent than in the current debate over the extent of the first amendment rights of a corporation. In *First National Bank v. Bellotti*¹⁰ the Court invalidated a Massachusetts statute prohibiting business corporations from making contributions or expenditures to influence the vote in connection with any matter submitted to the voters, unless the matter would materially affect the property, business, or assets of the corporation.¹¹ Federal legislation, however, prohibits corporations from expending money in connection with federal elections.¹² *First National Bank* may be read as extending to corporations the same first amendment rights enjoyed by individuals, accordingly, corporations may no longer be constitutionally prohibited from making expenditures in connection with initiatives, referenda, or elections to federal or state offices. This interpretation of the extent of the constitutional rights of corporations has been pressed by some commentators,¹³ and there

accompanying text.

6. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (acquittal of corporation in accordance with Federal Rule of Criminal Procedure 29(c) unappealable because of double jeopardy clause).

7. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-87 (1839) (because corporations are not citizens within meaning of privileges and immunities clause, one state not required to give extraterritorial effect to corporate charter granted by another state).

8. See *Hale v. Henkel*, 201 U.S. 43, 75 (1906) (subpoena for testimony of corporate officer upheld against claim of corporate fifth amendment privilege).

9. See *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 252, 255 (1906) (state statute forbidding life insurance companies from using defense that applicant made false or misleading statements on application, unless matter misrepresented actually contributed to death of insured, does not violate fourteenth amendment).

10. 435 U.S. 765 (1978).

11. *Id.* at 767-68.

12. See 2 U.S.C. § 441b (1976); notes 171-210 *infra* and accompanying text.

13. See Clagett & Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of*

are several lower court decisions that appear to support this view.¹⁴ *First National Bank* and other decisions of the Court may also be read to support a contrary view.

The significance of the final resolution of this matter is not to be underestimated. Because the framers did not speak for the people on this issue, the congress should decide the role that the modern business corporation is to play in the marketplace of ideas. Opinions about the proper scope of this role may differ. Should General Motors Corporation, for example, be allowed to spend ten million dollars in 1980 to promote the candidacy of a presidential aspirant? Should Mobil Oil Corporation be allowed to spend unlimited sums to purchase advertisements promoting certain political and social views? Legislative prohibitions of corporate expenditures would be foreclosed by a Supreme Court determination that the first amendment rights of corporations are co-extensive with those of individuals.

This article will first explore the inherent difficulty that the artificial nature of the corporation presents when courts attempt to analyze the constitutional rights of a corporation. Next it will trace the history of the Supreme Court's treatment of the corporation to determine a common rationale for this treatment and the extent to which the Court has successfully grappled with the inherent difficulty caused by the artificial nature of the corporation. The article will then examine the *First National Bank* decision to ascertain what the Court really said, the extent to which the decision can be viewed as consistent with the Court's prior decisions, and the extent to which the decision may be viewed as aberrant. Finally, the article will discuss the constitutional validity of legislative restrictions on "corporate speech" after *First National Bank*.

I. ANALYTIC DIFFICULTY IN DETERMINING CORPORATE CONSTITUTIONAL RIGHTS

Because a corporation is an artificial, legally created entity, the Supreme Court has had tremendous difficulty determining what rights a corporation possesses. As the Court stated in *Trustees of Dartmouth College v. Woodward*,¹⁵ a corporation exists "only in contemplation of law."¹⁶ Frederick Maitland noted, "Into its nostrils the State must breathe the breath of a

Government Restraints on Political Campaign Financing, 29 VAND. L. REV. 1327, 1375 (1976) (pending dispositive Supreme Court decision, corporations can and should take position that their first amendment rights are coextensive with outer limits of protection); cf. Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148, 165 (1974) (discussing constitutionality of repealed 18 U.S.C. § 610, which prohibited campaign contributions or expenditures by national banks, corporations, and labor organizations).

14. See *C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 425 (9th Cir. 1978) (under *First Nat'l Bank* and *Buckley*, Montana statute forbidding corporations from promoting ballot issue by contributions is blanket infringement of first amendment and cannot stand); *Schwartz v. Romnes*, 495 F.2d 844, 852-53 (2d Cir. 1974) (New York state statute prohibiting corporate contributions for political purposes must be construed narrowly so that it will not infringe corporate contributors' rights of speech and petition); *Pacific Gas & Elec. Co. v. City of Berkeley*, 60 Cal. App. 3d 123, 127, 129, 131 Cal. Rptr. 350, 352, 353 (1976) (Berkeley city ordinance prohibiting corporations from making contributions to any candidate or committee abridged corporations' first amendment rights).

15. 17 U.S. (4 Wheat.) 518 (1819).

16. *Id.* at 636.

fictitious life, for otherwise it would be no animated body but individualistic dust."¹⁷ This artificiality is a legal fact accepted without question or concern by the legally trained. Why, then, is the corporation a source of such difficulty for the courts?

To properly decide a case involving the constitutional rights of a corporation, a court must avoid the analytic trap that philosopher Gilbert Ryle described as a "category-mistake." A category-mistake "represents the facts of mental life as if they belonged to one logical type or category (or range of types or categories), when they actually belong to another."¹⁸ Ryle then gave an example of a category-mistake:

A foreigner visiting Oxford or Cambridge for the first time is shown a number of colleges, libraries, playing fields, museums, scientific departments and administrative offices. He then asks "But where is the University? I have seen where the members of the Colleges live, where the Registrar works, where the scientists experiment and the rest. But I have not yet seen the University in which reside and work the members of your University." It has then to be explained to him that the University is not another collateral institution, some ulterior counterpart to the colleges, laboratories and offices which he has seen. The University is just the way in which all that he has already seen is organized. When they are seen and when their co-ordination is understood, the University has been seen. His mistake lay in his innocent assumption that it was correct to speak of Christ Church, the Bodleian Library, the Ashmolean Museum *and* the University, to speak, that is, as if "the University" stood for an extra member of the class of which these other units are members. He was mistakenly allocating the University to the same category as that to which the other institutions belong.¹⁹

The corporation as an artificial entity is particularly likely to be the subject of category-mistake. Let us examine a hypothetical situation in which corporation ABC holds legal title to Black Acre; ABC's shares are owned by individuals A, B, and C, and individual D desires to purchase Black Acre. Upon receiving a deed to Black Acre executed by A, B, and C as individuals, D demands to receive a deed executed by "the corporation." He is not guilty of a category-mistake because the corporation is a legal entity and ownership is a *legal* concept that treats as fact the difference between a corporation and those who own its shares. If, upon receiving the re-executed deed showing the corporation as the grantor with the signatures of A, B, and C affixed to the document as the representatives of the corporation, D still demands that the corporation execute the deed, he is guilty of a category-mistake. Signing one's name is a *physical* act, which can only be performed by a natural person. Execution by a corporation is a legal fiction.

As another example, suppose that A, B, and C, the sole shareholders of ABC Corporation, desire to run a newspaper advertisement to express

17. Maitland, *Introduction* to O. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* at XXX (F. Maitland trans. 1900).

18. G. RYLE, *THE CONCEPT OF MIND* 16 (1949).

19. *Id.* at 16-17.

opposition to a referendum, using *ABC Corporation's* funds to pay for the advertisement and lending *ABC Corporation's* reputation to it. Suppose further that *A*, *B*, and *C* meet for cocktails and hammer out the desired advertisement, possibly something as simple as "*ABC Corporation urges the defeat of Proposition Number One.*" The advertisement is placed in the newspaper and the next day *A* receives a call at the corporation's office from a representative of the sponsors of a debate on the merits of Proposition Number One, requesting that *ABC Corporation* participate. If *A*, *B*, and *C* appear for the program, the sponsors' representative is guilty of a category-mistake if he expresses disappointment that *ABC Corporation* could not attend. Unlike "ownership," "speech" is not a legal concept, but a physical act. Speech is a human act and is the product of human thought. To believe that legal entities are capable of physical acts is a category-mistake and any superstructure erected on this category-mistake may be invalid.

The significance of these examples of category-mistakes for constitutional analysis should not be overlooked. Not all category-mistakes are as easily recognized as the above examples, and any legal principle or decision derived from an assumption that proves to be a category-mistake is likely to be incorrect.

The current debate about the first amendment rights of corporations illustrates this problem. In *Buckley v. Valeo*,²⁰ the Supreme Court held that expenditures to further expression, such as paying for a political advertisement, are a type of expression akin to speech and thus protected under the first amendment.²¹ *Buckley* did not consider the rights of corporations. If corporate expression is equally entitled to this protection, however, the Federal Election Campaign Act, which bars corporate political expenditures,²² must be unconstitutional.

The first response to this argument should be that its proponent has made a category-mistake. Expression is possible only by natural persons, not by corporations. Only a natural person may express himself through a political expenditure. Any expenditure of corporate assets for political purposes must be an expression of the natural persons who authorize and direct the expenditure.

Although it is necessary to avoid falling into a possible underlying category-mistake when using catch phrases such as "corporate speech," avoiding this logical mistake is only the beginning of the analysis of the nature and extent of the first amendment rights of corporations. In order to determine the options open to the Supreme Court in delineating and defining those rights, this article will turn to an analysis of the Supreme Court's decisions involving other constitutional rights of corporations. The purpose of this analysis is to determine if there is a common, as yet unelucidated, rationale or principle underlying the Court's various decisions, and to determine if the Court's jurisprudence is free of the category-mistake of treating corporations as capable of physical acts such as expression.

20. 424 U.S. 1 (1976).

21. *Id.* at 39.

22. See 2 U.S.C. § 441b (1976).

II. CORPORATE CONSTITUTIONAL RIGHTS

A. AREAS OTHER THAN THE FIRST AMENDMENT

Immediately after the adoption of the Constitution one might have rendered a reasonable opinion, based on the document's literal language, about the constitutional rights of individuals. One could not have rendered with equal certainty an opinion on the constitutional status of corporations. Nowhere in the Constitution does the word "corporation" appear. Did the word "person" include corporations? Did the answer depend on the circumstances?

From this point of uncertainty, the Supreme Court, over the ensuing years, has slowly clarified the constitutional status of the corporation. The initial problem faced by the Supreme Court was whether the federal courts could constitutionally take jurisdiction over an action to which a corporation was a party. In *Bank of the United States v. Deveaux*,²³ the federally chartered bank, whose officers and directors were citizens of Pennsylvania,²⁴ sued to recover from citizens of the State of Georgia the value of property seized to satisfy a state tax.²⁵ The defendants questioned whether a corporation had the power to sue in federal court because the Court's jurisdiction was limited under the Constitution "to controversies between citizens of different states."²⁶ Chief Justice Marshall noted in a unanimous decision that "both parties must be citizens, to come within the description" and that a corporation "is certainly not a citizen."²⁷ Nonetheless, a corporation represented its members who were citizens and the real parties in interest.²⁸ Therefore, "where the members of the corporation are . . . citizens of a different state from the opposite party, [the corporation] come[s] within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals."²⁹

Clearly, Marshall did not fall prey to a category-mistake in his analysis. A corporation is a legal entity, but it represents the composite interests of real people who possess legal status as citizens. Citizenship is a legal status given only to natural persons. The issue, however, was not whether corporations can be citizens but rather what the framers reasonably meant by using that term in the clause describing the jurisdiction of the federal courts. Marshall concluded that the framers must have intended that natural persons choosing to conduct their business affairs in corporate form should have access to the federal courts to the same extent as if they had conducted their business in another form.³⁰ Commendably, Marshall was neither deluded into denying federal jurisdiction based on the category-mistake that a corporation is *actually*, as opposed to legally, something more than its component parts, nor forced into a category-mistake by holding that a corporation can be a citizen.

23. 9 U.S. (5 Cranch) 61 (1809).

24. *Id.* at 63.

25. *Id.* at 62-63.

26. *Id.* at 86; see U.S. CONST. art. III, § 2.

27. 9 U.S. (5 Cranch) at 86.

28. *Id.* at 87.

29. *Id.* at 88.

30. *Id.* at 91. Nor, obviously, could this rule be a one-way street. In *Marshall v. Baltimore & Ohio R.R.*, 5 U.S. (16 How.) 314, 326-27 (1853), the Court confirmed that a corporation not only has access to the federal courts, but is also subject to suit in the federal court.

Deveaux established only that corporations have the same right of access to federal courts as individual citizens. The Court next faced the question whether a Georgia corporation was a citizen within the meaning of the privileges and immunities clause and thus constitutionally entitled to contract in the State of Alabama to the same extent as citizens of Alabama. The Court, in *Bank of Augusta v. Earle*,³¹ concluded that corporations were not citizens within the meaning of the privileges and immunities clause, which applies only to natural persons.³² The shareholders of such corporations could exercise their rights as citizens to contract in Alabama, or they could form an Alabama corporation to so contract.³³ Moreover, a state could expressly, or by longstanding comity, acquiesce in a foreign corporation's exercise of the privileges and immunities granted to its citizens.³⁴ A state, however, was not required, in the absence of such consent, to give extraterritorial effect to a charter granted by another state.³⁵

Not until 1886 was the Supreme Court again required to consider the extent of the constitutional rights of corporations. In *Santa Clara County v. Southern Pacific Railroad*,³⁶ the Court considered the method employed by the State of California to tax the real property of corporations that operated railroads in more than one county. Mr. Chief Justice Waite stated:

The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of opinion that it does.³⁷

This disposition of the issue in itself gives no clues to the Court's rationale. The decision was not made in a vacuum, however, but in the context of the lower court proceedings in *Santa Clara* itself and a case that involved identical issues, *County of San Mateo v. Southern Pacific Railroad*.³⁸ Both these cases were heard below by Mr. Justice Field in his capacity as Circuit Judge. It is not unreasonable to presume that his elaborate and persuasive opinions in these two cases below reflected the views of his brothers on the Supreme Court and that these views were then manifested, at least implicitly, in the Supreme Court's decision in *Santa Clara*. Justice Field's lower court decision in *Santa Clara*,³⁹ although partially reworded, was essentially identical to his lower court opinion in *San Mateo*. It is therefore appropriate to consider both decisions as equal evidence of Justice Field's considered opinion on the issues presented.

The argument of the defendant railroads in the lower court in both *San Mateo* and *Santa Clara* was that they were denied the equal protection of the laws guaranteed by the fourteenth amendment because California's real

31. 38 U.S. (13 Pet.) 519 (1839).

32. *Id.* at 586.

33. *Id.* at 588-89.

34. *Id.* at 592.

35. *Id.* at 586, 596.

36. 118 U.S. 394 (1886).

37. *Id.* at 396.

38. 13 F. 722 (C.C.D. Cal. 1882), writ of error dismissed per stipulation of counsel, 116 U.S. 138 (1885).

39. 18 F. 385 (C.C.D. Cal. 1883), *aff'd*, 118 U.S. 394 (1886).

property statute required assessment of the whole value of railroad property owned by railroads operating in more than one county without deduction of the amount of any mortgages, but allowed all other corporations and persons a deduction for the amount of mortgages on their property when assessing its value.⁴⁰ The railroads also argued that the California statute denied them the due process of law guaranteed by the fourteenth amendment because they were denied notice of and a hearing on these assessments, but other corporations and natural persons were entitled to both notice and a hearing.⁴¹

In both cases Justice Field held that corporations were entitled to equal protection of the laws and due process of the law to the same extent as individuals.⁴² In *San Mateo* he explained:

And this . . . [is so] because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense, and whatever affects the property of the corporation necessarily affects the commercial value of their interests. If, for example, . . . a corporation created for banking purposes acquires . . . [property], no stockholder can claim that he owns any particular item of this property, but he owns an interest in the whole of it which the courts will protect against unlawful seizure or appropriation by others

All the guarantees and safeguards of the Constitution for the protection of property possessed by individuals may, therefore, be invoked for the protection of the property of corporations.⁴³

Two questions are raised by the Supreme Court's determination in *Santa Clara* that corporations are entitled to equal protection of the laws under the

40. See *County of Santa Clara v. Southern Pac. R.R.*, 18 F. at 390; *County of San Mateo v. Southern Pac. R.R.*, 13 F. at 726.

41. See *County of Santa Clara v. Southern Pac. R.R.*, 18 F. at 409; *County of San Mateo v. Southern Pac. R.R.*, 13 F. at 726.

42. See *County of Santa Clara v. Southern Pac. R.R.*, 18 F. at 404; *County of San Mateo v. Southern Pac. R.R.*, 13 F. at 744.

43. *County of San Mateo v. Southern Pac. R.R.*, 13 F. at 747-48. Justice Field stated his analysis elegantly in *Santa Clara*:

Whatever affects the property of the corporation—that is, of all the members united by the common name—necessarily affects their interests. . . . Whatever confiscates or imposes burdens on its property, confiscates or imposes burdens on their property, otherwise nobody would be injured by the proceeding. Whatever advances the prosperity or wealth of the corporation, advances proportionately the prosperity and business of the corporators, otherwise no one would be benefited. It is impossible to conceive of a corporation suffering an injury or reaping a benefit except through its members. The legal entity, the metaphysical being, that is called a corporation, cannot feel either.

County of Santa Clara v. Southern Pac. R.R., 18 F. at 403.

fourteenth amendment.⁴⁴ First, what is the rationale for this decision? Second, what is the Court's position on extending to corporations due process of law under the fourteenth amendment?

As to the first question, as already noted, it is reasonable to conclude that the Court concurred with Justice Field's analysis below in *Santa Clara* and *San Mateo*. As to the second question, it would also be reasonable to conclude that Justice Waite's announcement was intended to state the Court's position that both equal protection of the laws and due process of the law were available to corporations and that the failure to mention due process was an oversight, because the complaining tax authorities raised both equal protection and due process claims in the proceedings below.⁴⁵ Moreover, Justice Field's lower court decision held that corporations were protected by both the equal protection and due process clauses of the fourteenth amendment.⁴⁶

Both of these conclusions are borne out by the Court's opinion, written by Justice Field, in *Minneapolis & St. Louis Railway v. Beckwith*.⁴⁷ *Beckwith* involved an action brought by railroad corporations to challenge a state law on the grounds that it denied corporations equal protection and due process.⁴⁸ Justice Field agreed that corporations are persons within the meaning of the fourteenth amendment and asserted that "[i]t was so held in *Santa Clara*."⁴⁹ Further, Justice Field's opinion for a unanimous Court in *Beckwith* confirmed that the Supreme Court in *Santa Clara* based its fourteenth amendment holding on the rationale set forth by the Justice in his lower court decisions in both *San Mateo* and *Santa Clara*. In addition to citing *Santa Clara*, Justice Field noted that corporations could invoke the benefits of constitutional provisions as well as laws that guarantee to persons "the enjoyment of property, . . . afford to them the means for its protection, or prohibit legislation injuriously affecting it."⁵⁰

The lower court opinion in *San Mateo* also contained the dicta that corporations "have never been considered citizens for any other purpose than the protection of the property rights of the corporators."⁵¹ For example, the "prohibition against the deprivation of life and liberty in the . . . fifth amendment does not apply to corporations, because . . . the lives and liberties of the individual corporators are not the life and liberty of the corporation."⁵²

The Supreme Court, in effect, adopted this view without discussion in *Northwestern National Life Insurance Co. v. Riggs*,⁵³ a case involving a constitutional challenge to a Missouri statute that limited the effect of certain insurance contract clauses. The Court stated that "[e]qually without foundation is the contention that the statute, if enforced, will be inconsistent with the

44. See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886).

45. See *County of Santa Clara v. Southern Pac. R.R.*, 18 F. at 390.

46. *Id.* at 404.

47. 129 U.S. 26 (1889).

48. *Id.* at 28 (Iowa statute entitled owner of livestock to recover double value for any animals killed or injured by trains at points where railroad company failed to erect fence).

49. *Id.*

50. *Id.*

51. *County of San Mateo v. Southern Pac. R.R.*, 13 F. 722, 747 (1882), writ of error dismissed per stipulation of counsel, 116 U.S. 138 (1885).

52. *Id.*

53. 203 U.S. 243 (1906).

liberty guaranteed by the Fourteenth Amendment. The liberty referred to in that Amendment is the liberty of natural, not artificial persons."⁵⁴

Justice Harlan, who authored the opinion in *Santa Clara*, also wrote the opinion in *Riggs*. This lends weight to the conclusion that the underlying rationale of the Supreme Court in *Riggs* is the same as that set forth by Justice Field in the lower court opinion in *San Mateo*.

Thus Justice Field's opinions below in *San Mateo* and *Santa Clara*, as adopted by the Supreme Court in *Santa Clara* and *Beckwith*, supply a clear rationale, which this article will refer to as "the Field rationale," for measuring the constitutional rights of a business corporation in the protection of its property: such rights must be coextensive with the rights that its shareholders would enjoy if they had chosen to conduct their business in an unincorporated form. This rationale fully justifies Marshall's decision in *Deveaux* that a corporation may sue for damages in federal court to the same extent as an individual. The rationale also avoids the category-mistake of assuming that a business corporation is something other than the legal form chosen by individuals to operate a business.

Furthermore, the Field rationale developed in *San Mateo*, as implicitly adopted in *Riggs*, clearly recognizes that only natural persons can assert natural liberties, as opposed to rights necessary to protect property. This position is free of category-mistake and emphasizes again the Court's realization that a business corporation is merely a vehicle to facilitate the conduct of business by and for natural persons; a corporation is not itself a natural person and does not possess the attributes of a natural person.

After *Riggs* the Court considered the applicability to a corporation of the fourth amendment's protection against unreasonable searches and seizures and the fifth amendment's privilege against compelled self-incrimination. In *Hale v. Henkel*⁵⁵ a corporate officer refused to testify before a grand jury investigating the corporation and further refused to honor a subpoena duces tecum requiring him to produce corporate records in his possession to aid the investigation of his corporation.⁵⁶ As to Hale's refusal to testify, the Court held that the privilege against self-incrimination is purely personal. Hale could not invoke the privilege of any third person, including any privilege of his corporation, based on a concern that his testimony might incriminate that third person.⁵⁷

In considering Hale's right to the fifth amendment's privilege against self-incrimination for the oral testimony sought, the Court noted that this question could never arise for a corporation:

The question whether a corporation is a "person" within the meaning of this Amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, *since it can only be heard by oral evidence in the person of some one of its agents or employees*.⁵⁸

54. *Id.* at 255.

55. 201 U.S. 43 (1906).

56. *Id.* at 46.

57. *Id.* at 69-70.

58. *Id.* at 70 (emphasis added).

In effect, the *Henkel* Court was saying that because oral communication is an act peculiar to natural persons, it is *physically* impossible for a corporation to give oral evidence. It would therefore be a category-mistake to extend to corporations the constitutional privilege against self-incrimination by oral communication. Hale, of course, could assert the privilege against self-incrimination personally to the extent not obviated by a grant of immunity.⁵⁹

The Court then discussed Hale's refusal to produce corporate documents in his possession. The Court first noted that it is an established principle that requiring the production of a person's own private papers to connect him with a crime violates the fifth amendment's prohibition against compelling a person to be a witness against himself.⁶⁰ A corporation could also have books and records that might connect it to a crime, and those records would necessarily be in the possession of its officers. Hale therefore argued that the corporation's privilege against self-incrimination would be violated if he produced the documents.⁶¹

The Court, however, refused to accept Hale's argument. Instead, it reasoned that a corporation is a creature of the state with a right to continued existence only in accordance with the laws of that state. Because of the artificial nature of a corporation, much of the evidence of its misconduct might be discoverable only from an examination of its books and records. The state and federal government, therefore, must have a reserved visitorial right to inspect the books and records of a corporation. Consequently, a corporation has no fifth amendment protection against compulsory self-incrimination.⁶²

This analysis seems unnecessarily artificial in light of the Field rationale, which underlies the previous decisions of the Court. Perhaps the Court fell prey to a category-mistake and treated a corporation as capable of producing books and records. To properly analyze the corporation's rights, production, which is a physical act, must be contrasted with ownership, which is a legal right. Individuals may both own and produce books and records, but corporations may only own them. As the Court subsequently stated in *Wilson v. United States*,⁶³ a case involving similar issues, the privilege against self-incrimination prevents compulsory production only of personal items in one's possession.⁶⁴ The Court need have said no more in connection with production of documents than it did in connection with oral testimony. The question of fifth amendment protection for a corporation cannot arise in this context because a corporation is incapable of production.

Thus, the holding in *Hale v. Henkel* clearly can be supported under the Field rationale. Because of its artificial nature a corporation convicted of a crime cannot be imprisoned, but must be punished by a monetary extraction. Denying fifth amendment protection to a corporation does not, however, disadvantage those who choose to conduct their businesses in corporate form vis-a-vis those who do not choose to incorporate. In either case the privilege extends only to the person in possession of the records, and only to the extent

59. *Id.* at 67, 69.

60. *Id.* at 71.

61. *Id.* at 74.

62. *Id.* at 74-75.

63. 221 U.S. 361 (1911).

64. *Id.* at 378.

the records are personal. A partner or agent possessing records of an unincorporated business would be in exactly the same position as an officer possessing records of a corporation. A subpoena duces tecum directed at business records would have to be honored except to the extent the records were within that individual's personal privilege against self-incrimination.⁶⁵

The *Henkel* Court, however, further stated in dictum, later adopted in *Wilson*,⁶⁶ that corporations are entitled to protection against unreasonable searches and seizures under the fourth amendment. This opinion was clearly based on the Field rationale. The Court stated:

A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its *property* cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination.⁶⁷

In summary, the reasoning in *Henkel* on the fourth amendment issue and its decision on the fifth amendment issue are both consistent with the Field rationale. The emphasis on the state's reserved right of visitation to justify denial of the fifth amendment privilege against self-incrimination can be viewed as the possible result of a category-mistake. Although it is an unfortunate choice of grounds for those in search of purity of rationale, it does not undercut the Field rationale.

The Supreme Court has apparently also held that corporations are protected by the double jeopardy clause of the fifth amendment.⁶⁸ This status is apparent, rather than express, because the Court has decided the applicability of the double jeopardy clause in cases in which a corporation was a defendant, without expressly stating that it was extending the protection of the double jeopardy clause to a corporation.⁶⁹ No opinion, therefore, sets forth a rationale for the extension to corporations of the protection against double jeopardy.⁷⁰

65. This result, however, may not be defensible in a case in which a corporation's sole shareholder is given immunity and required to testify against his corporation. The testimony could possibly result in a criminal penalty being assessed against the corporation, or if the shareholder refuses to testify, a judgment of contempt against him. This tactic could not be employed against a sole proprietor. In such limited cases it would seem to be a category-mistake to treat the corporation as more than its shareholder, and, therefore, incorrect to deny the corporation fifth amendment protection.

66. See *Wilson v. United States*, 221 U.S. 361, 376, 384 (1911) (corporate officer holding company's books subject to corporate duty cannot claim privilege against self-incrimination to prevent production of books even if implicated in corporation's illegal conduct).

67. *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (emphasis added) (no unreasonable search and seizure when search warrant specifically and properly limited demands for production of corporate documents).

68. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571-72 (1977) (double jeopardy clause prevents appeal of acquittal of corporation pursuant to Federal Rule of Criminal Procedure 29(c)).

69. Compare *id.* and *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam) (double jeopardy clause prevents appeal of acquittal of corporation and employees ordered by court before close of prosecution's case) with *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956) (double jeopardy clause does not apply to action against corporation involving civil sanction) and *American Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946) (double jeopardy clause does not apply to prosecution of corporation and officers for two independent offenses under same statute).

70. The Supreme Court has recently denied certiorari in a case that carefully presented the rationale for

After this survey of the Supreme Court's decisions governing the constitutional rights of corporations in other than the first amendment area it is fair to conclude that a consistent rationale does underlie these decisions, although the rationale of the Court is not set forth clearly in most cases or at all in others. The Court has consistently extended to corporations the same constitutional rights in defense of the corporation's business and property that would have been available to an unincorporated individual. This result should not differ, moreover, if the business is conducted as a nonprofit corporation. At the same time the Court has not made the category-mistake of treating corporations as capable of physical acts or having physical attributes. This article now turns to the conceptually more difficult area of the first amendment.

B. THE FIRST AMENDMENT

In analyzing the Supreme Court decisions on the first amendment rights of corporations, we must consider what rationale underlies the decisions and whether it is consistent with the Court's analysis in other areas and, therefore, free from category-mistake. In this endeavor it is useful first to consider cases involving corporations wishing to assert first amendment rights to protect expression that is a part of their business. Then it is useful to consider cases involving corporations wishing to assert first amendment rights in other contexts.

In *Grosjean v. American Press Co.*,⁷¹ nine corporations sought an injunction against enforcement of an act authorizing the State of Louisiana to impose a license tax in an amount equal to two percent of the gross receipts of newspapers having a circulation of more than 20,000 copies per week. Failure to report or pay the tax was punishable as a misdemeanor.⁷² The Court's primary inquiry was whether this tax was an abridgment of freedom of the press and therefore invalid under the first amendment as made applicable to the states by the fourteenth amendment. Reconstructing the historical setting within which the first amendment was conceived, the Court observed that one of the concerns of the framers was prior censorship. The act of the English Parliament providing for prior censorship expired by its terms in 1695, and the framers intended the first amendment to prevent its resurrection in this country. The framers were also aware that the press in England was still subject to restraint through the so-called "taxes on knowledge," which were intended to curtail circulation. Indeed, the Commonwealth of Massachusetts

extending to corporations the protection of the double jeopardy clause. See *United States v. Security Nat'l Bank*, 430 U.S. 950 (1977). In *Security Nat'l Bank* a judgment of acquittal had been entered in an action against a corporation for illegal campaign contributions, and the Government appealed. See *United States v. Security National Bank*, 546 F.2d 492 (1976). The corporation asserted the protection of the double jeopardy clause, but the Government countered that corporations could not claim the protection afforded by that clause. The court of appeals first noted that the double jeopardy clause is clearly available in cases in which only monetary penalties, and not any danger to life and limb, are involved. *Id.* at 493. Then it reasoned that it is the "shareholders who in the end must bear the financial burden consequent upon criminal liability." *Id.* at 494. Moreover, "No corporation, large or small, can escape the 'incalculable effect' which a conviction may have on the public attitude toward the company" *Id.* This analysis is without doubt the same one that Field set forth in both *San Mateo* and *Santa Clara*.

71. 297 U.S. 233 (1936).

72. *Id.* at 240-41.

had instituted a stamp tax on newspapers and magazines in 1785 and an advertisement tax in 1786, both of which were violently opposed and quickly repealed. In light of this historical background the Supreme Court ruled that the Louisiana newspaper tax constituted an abridgement of freedom of the press that the framers intended to prevent by adoption of the first amendment.⁷³

The Court also considered whether the complaining corporations, whose business was newspaper publication, could avail themselves of the freedom of the press guaranteed by the first amendment to the same extent as a natural person publishing a similarly affected newspaper.⁷⁴ The Field rationale requires that corporations be allowed to assert the constitutional rights necessary to protect their business to the same extent as if they were unincorporated. Nothing could be more essential to the business of newspapers than freedom of the press. This need is especially obvious when the abridgment, as in *Grosjean*, involves a discriminatory tax on the revenues of certain newspapers. Such an abridgment represents an imminent danger to the continued existence of the business. Therefore, under the Field rationale, a corporation whose business includes publishing a newspaper must be able to assert first amendment rights of freedom of speech and press to protect its business.

Although this result suggests that a corporation is capable of speech, it does not involve any category-mistake. The corporation cannot speak, but its business requires individual speech and a corporation may be held legally responsible for the speech of its agents. Therefore, it is entitled to protection under the Field rationale.

The Court in *Grosjean* stated that corporations are entitled to the first amendment protection of freedom of the press, but presented no express rationale for its decision. The Court, however, cited one case for the proposition that corporations are not citizens within the meaning of the privileges and immunities clause;⁷⁵ that proposition is consistent with the Field rationale.⁷⁶ The Court also cited two cases for the proposition that corporations are protected by the equal protection and due process clauses of the fourteenth amendment.⁷⁷ Both cases cite the Supreme Court's decision in *Santa Clara* as support for this proposition,⁷⁸ and both cited opinions were written by Justice Harlan, the author of the the Supreme Court's *Santa Clara* opinion. In addition, one of these cases⁷⁹ cites Justice Field's opinion in

73. *Id.* at 245-51.

74. *Id.* at 244.

75. *Id.* at 244 (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868)).

76. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 178-79, 181-85 (1868) (because corporation has no legal existence outside state where created, other states may recognize it on whatever terms they think proper; therefore, Virginia law requiring out-of-state insurance companies to post bond before carrying on business within state is constitutional). *Paul* follows the holding in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839). The determination that the privileges and immunities clause does not apply to corporations is consistent with the Field rationale and free of category-mistake. See notes 31-35 *supra* and accompanying text (discussing *Bank of Augusta v. Earle*).

77. 297 U.S. at 244 (citing *Smyth v. Ames*, 169 U.S. 466, 522 (1897); *Covington & L. Turnpike Rd. Co. v. Sanford*, 164 U.S. 578, 592 (1896) (state statute compelling turnpike company to reduce rates so far that it cannot repair road or earn any dividends for shareholders deprives company of due process)).

78. See *Smyth v. Ames*, 169 U.S. 466, 522 (1897); *Covington & L. Turnpike Rd. Co. v. Sanford*, 164 U.S. 578, 592 (1896).

79. See *Covington & L. Turnpike Rd. Co. v. Sanford*, 164 U.S. 578, 592 (1896).

Minneapolis & Saint Louis Railway v. Beckwith,⁸⁰ which evidenced the Supreme Court's adoption of the Field rationale.⁸¹

That the cited cases were based on the Field rationale is not conclusive evidence that the Court used that rationale in *Grosjean*. Nonetheless, it is all the evidence available. Because the rationale fits the facts of the case, avoids category-mistake, and explains that the corporation can obtain first amendment protection for expressions by others that are a part of its business, it is fair to conclude that *Grosjean* constituted another case based on the Field rationale.

In the years after its decision in *Grosjean*, the Supreme Court has decided many cases involving the first amendment rights of a corporation whose business involved a form of expression that allegedly was protected by the first amendment and was being unconstitutionally abridged. Only one dissenting opinion mentions that it is the corporation that is asserting the rights.⁸² Obviously, the Court has felt that this factor warranted no discussion. Nor should this attitude be surprising when one analyzes these decisions in the context of the Field rationale.

A typical case, *Joseph Burstyn, Inc. v. Wilson*,⁸³ involved a corporation engaged in the business of distributing motion pictures. The corporation challenged a New York statute permitting the banning of sacrilegious motion picture films and attaching criminal penalties to the exhibition of a film so banned.⁸⁴ The Supreme Court determined that motion pictures were a form of expression safeguarded by the first amendment and therefore held the statute invalid.⁸⁵ There was no discussion of why a corporation could assert first amendment rights. Other cases involving the first amendment rights of a corporation whose business involved a form of expression had similar fact patterns.⁸⁶

The Field rationale clearly justifies the result in these cases. Applying this rationale, the court first must determine whether a natural person conducting the business would be able to assert the protection of the first amendment. This determination entails a preliminary determination of whether the form of expression is either "speech" or "press" within the meaning of the first amendment. Obviously, this inquiry causes no difficulty when the business involved is, as in *Grosjean*, publishing a newspaper. Many of the cases after *Grosjean*, such as *Joseph Burstyn*, however, have not involved such clearly covered forms of expression. Thus, the primary focus of these cases has been on the nature of the expression. If it is determined that the expression is of the type entitled to protection, then the court must decide whether the statute or

80. 129 U.S. 26 (1889).

81. See notes 47-50 *supra* and accompanying text.

82. See *Bridges v. California*, 314 U.S. 252, 280-81 (1941) (Frankfurter, J., dissenting).

83. 343 U.S. 495 (1952).

84. *Id.* at 497-99.

85. *Id.* at 502, 506.

86. See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933-34 (1975) (first and fourteenth amendments prohibit enforcement against corporation running topless bar of overbroad local ordinance prohibiting topless entertainment); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (first and fourteenth amendments prohibit enforcement against corporate publisher of state "right of reply" statute); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (first and fourteenth amendments prevent damage award in civil libel action by public official against newspaper corporation for publishing advertisement critical of public official when no actual malice shown).

action abridges expression in a manner prohibited by the first amendment. Furthermore, under the Field rationale the court does not need to deal with the corporate status of a party asserting first amendment rights, as long as the corporation asserts the rights in connection with a form of expression that is a part of the corporation's business.

Up to this point the Court successfully dealt with the dilemma presented by a corporation. If a constitutional right to protect property or business would be available to a natural person, then, under the Field rationale, the Court has consistently held that the right is equally available to a corporation for the protection of its property. Critical to the validity of the treatment afforded corporations under the Field rationale is that the rationale is not based on a category-mistake: a corporation can properly be considered the owner of property or business. In cases in which a corporation asserted a constitutional right that by its terms and intent could be asserted only if a corporation were deemed to be a natural person or capable of physical acts, the Court has avoided a category-mistake and denied the corporation that constitutional right.

If the Court were faced with an assertion of first amendment rights by a corporation to protect expression that was not a part of the corporation's business, the Field rationale would be inapplicable. The first amendment could be asserted by the corporation only if the corporation could properly be treated as being capable of the physical act of speech or expression. Should it not then follow that a corporation could not be extended first amendment rights for expression not a part of business?

The Court faced this question in *Hague v. Committee for Industrial Organizations*.⁸⁷ The original action was brought by certain individuals, unincorporated labor unions, and the American Civil Liberties Union, a membership corporation.⁸⁸ The plaintiffs asked that certain city ordinances be declared unconstitutional and void on the grounds that they deprived the plaintiffs of the privileges of free speech and peaceable assembly guaranteed to them as citizens of the United States by the first amendment made applicable to the states by the fourteenth amendment.⁸⁹

The Supreme Court held that only natural persons, not corporations or unincorporated associations, could assert these first amendment rights. The Court was divided on the governing rationale. Justice Roberts reached the result by first noting that only citizens have freedom of speech and assembly.⁹⁰ Because only natural persons can be citizens, natural persons alone "are entitled to the privileges and immunities which section 1 of the fourteenth amendment secures for 'citizens of the United States.'" ⁹¹ Justice Stone reached the same result as Justice Roberts, but used a different analysis. He maintained that first amendment rights were not restricted to citizens, but extended to all persons under the due process clause of the fourteenth amendment.⁹² In his discussion of the corporate plaintiff, Justice Stone, citing for support the holding in the *Riggs* case, stated, "[as] to the American Civil

87. 307 U.S. 496 (1939).

88. *Id.* at 500-01.

89. *Id.* at 503.

90. *Id.* at 513. Justice Roberts was joined only by Justice Black and Chief Justice Hughes on this issue. *Id.* at 500, 532.

91. *Id.* at 514.

92. *Id.* at 519. Justice Stevens was joined by Justice Reed. *Id.* at 500.

Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons.”⁹³

The result in *Hague* is consistent with the Court’s precedent and free of category-mistake because it does not treat a corporation as capable of the physical act of speech. It is not necessarily clear, however, that a corporation should be extended first amendment rights only when the expression to be protected is a part of its business. Nor is it clear that the denial of first amendment rights to a corporation for expression that is not a part of its business would always be free of category-mistake.

The proper analysis must examine the factual context and the realities involved to arrive at the correct result. To take the simplest example, a nonprofit corporation formed by a single natural person as a vehicle for the expression of his ideas is in reality no more than that individual. Any ideas expressed through such a corporation are those of that individual, although the corporation may, through gifts of others, obtain assets that are used to amplify the individual’s expression. The relationship between the individual and the corporation remains the same even if the individual uses as his vehicle a for-profit corporation.

The key consideration, therefore, is the identity between the member or shareholder and the person who is actually expressing himself. Whether or not the corporation exists, it is the individual’s views that are being expressed. In such a situation it is not a category-mistake to say that the corporation is merely the medium of expression for its owner. Can there be any doubt that in such a case the corporation should be able to assert first amendment rights to protect the ideas expressed through it?

The answer should be different for a large corporation whose shareholders and representatives have no community of views. If, for instance, Mobil Oil Corporation pays for an advertisement that expresses certain social views, the expression involved is not that of the myriad shareholders, but of the top management of Mobil. The reality of this situation does not by itself mandate that Mobil be treated as if it were capable of expression.

The Supreme Court was not presented with a clear-cut issue of the first amendment rights of a one-member nonprofit advocacy corporation or a one-shareholder for-profit corporation. Instead, it was forced to grapple with two cases arising out of the civil rights struggle and involving a multimember nonprofit advocacy corporation, *NAACP v. Alabama ex rel. Patterson*⁹⁴ and *NAACP v. Button*.⁹⁵

In *Patterson* the Court reviewed a civil contempt judgment entered by an Alabama state court against the NAACP. The state had sought to exclude the organization, a nonprofit membership corporation organized under the laws of New York, from Alabama for failure to qualify to do business as a foreign corporation. Alabama sought the production of numerous items in its attempt to prove that the NAACP had conducted sufficient intrastate activities to require this qualification. The state court ordered the NAACP to produce

93. *Id.* at 510 (citing *Northwestern Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906)); see notes 53-54 *supra* and accompanying text.

94. 357 U.S. 449 (1958).

95. 371 U.S. 415 (1963).

these items, including its membership lists. When the organization refused to produce its membership lists, the court entered a judgment of contempt.⁹⁶

The NAACP maintained that Alabama could not constitutionally require production of the membership list because production would violate the members' right to freedom of association guaranteed by the first amendment.⁹⁷ The Court first had to determine whether the NAACP could assert this right on behalf of its members. The Court noted that if the members themselves were required to assert the right it would become meaningless; in the act of asserting their rights, they would be revealing their identity. In order to preserve the first amendment right of freedom of association, the corporation had to be allowed to assert the rights on behalf of its members.⁹⁸ The Court further justified its result by stressing the nexus between the corporation and its members.

Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense *identical*. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.⁹⁹

The Court concluded that disclosure of the membership list would abridge the members' right to free association and reversed the Alabama Supreme Court's denial of the NAACP's motion to vacate the contempt judgment.¹⁰⁰

The Court in *Patterson* treated the NAACP in the manner suggested in the example above for a one-member nonprofit advocacy corporation. The NAACP's membership was limited to those holding and desiring to express the same views.¹⁰¹ Expression by the NAACP was expression that all the members wished to make. The decision, based on the realities involved, coincides with the principle that individuals should be entitled to exercise the same first amendment rights whether within the structure of a corporation or as an unincorporated association. Although the Court in *Patterson* recognized the corporation's role as a medium for the expression of the views of its members,¹⁰² it did not reach the question whether a corporation should be able to protect this right of expression on its own behalf.

In *NAACP v. Button*¹⁰³ the Court faced the issue whether the NAACP could assert first amendment rights not only on behalf of its members, but also on behalf of itself. In *Button* the NAACP brought suit to restrain enforcement of a Virginia criminal statute banning improper solicitation of legal or professional business, which had been construed by the Virginia Supreme Court to apply to the activities of the NAACP.¹⁰⁴ The NAACP had

96. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 451-54.

97. *Id.* at 460.

98. *Id.* at 458-60.

99. *Id.* at 459 (emphasis added).

100. *Id.* at 454, 461-62, 467.

101. The Constitution of the NAACP provided for acceptance as a member of " '[a]ny person who is in accordance with [its] principles and policies.' " *Id.* at 459.

102. *Id.*

103. 371 U.S. 415 (1963).

104. *Id.* at 417-19, 423-26.

been engaged in litigation aimed at ending racial segregation in the public schools of the Commonwealth.¹⁰⁵ NAACP staff attorneys had been acquainting interested listeners with the legal steps necessary to achieve desegregation and using printed forms to obtain from such persons authorization for the NAACP, or others, to represent them in legal proceedings to achieve desegregation.¹⁰⁶ These activities were held by the Virginia Supreme Court to be "solicitation" of the type criminally proscribed by the statute.¹⁰⁷

The NAACP challenged the statute on the ground that it infringed the first amendment rights of the NAACP and its members and lawyers to freedom of association and expression.¹⁰⁸ As in *Patterson*, the NAACP attempted to assert the first amendment rights of its members. Again the Court found the NAACP to be a proper party to assert those rights for its members.¹⁰⁹ The Court further held that the NAACP was entitled to assert first amendment rights of association and expression "on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail."¹¹⁰

The Court concluded that the solicitation engaged in by the staff of the NAACP was a form of association and expression entitled to protection under the first amendment,¹¹¹ and that the statute unduly inhibited those first amendment rights.¹¹² The state's interest in regulating the legal profession did not in these circumstances provide a compelling state interest justifying the abridgment of first amendment rights.¹¹³ NAACP activity presented no danger of malicious litigation or unethical pecuniary gain.¹¹⁴ Nor was there any risk of conflict of interest because "the aims and interests of [the] NAACP have not been shown to conflict with those of its members and nonmember Negro litigants."¹¹⁵ Indeed, as noted in *Patterson*, NAACP members must subscribe to the organization's principles and policies.¹¹⁶ The state failed to show any "substantive evils flowing from [NAACP] activities" that could justify Virginia's broad statutory prohibitions.¹¹⁷

As in *Patterson*, the Court in *Button* recognized that when a group of individuals shares unanimity of interest and desires to express their common views, those individuals may exercise their freedom of expression through the medium of a corporation, through other representatives, or through both. The Court in *Button* further held that any corporation so utilized could assert first amendment rights available to its members as natural persons, not only on behalf of those members, but also for itself as their instrument. The Court's rationale will be referred to hereafter as the "associational rationale."

By adopting the associational rationale, the Court avoided the category-mistake trap that its decision in *Northwestern National Life Insurance Co. v.*

105. *Id.* at 419-20.

106. *Id.* at 421.

107. *Id.* at 425.

108. *Id.* at 428.

109. *Id.*

110. *Id.*

111. *Id.* at 428-29.

112. *Id.* at 437.

113. *Id.* at 438.

114. *Id.* at 440-42.

115. *Id.* at 443.

116. *Id.*

117. *Id.* at 444.

*Riggs*¹¹⁸ had created. It is true that life and liberty are attributes that only natural persons can possess. In the abstract, the *Riggs* holding that the liberty guaranteed by the fourteenth amendment is that of natural persons seems free of category-mistake. After *Riggs*, however, the Supreme Court began to fill the due process clause with specific liberties guaranteed by other amendments. In *Gitlow v. New York*,¹¹⁹ the due process clause of the fourteenth amendment was assumed to encompass the safeguards of the first amendment.¹²⁰ As the "liberty" protected by the fourteenth amendment grew in scope, it was inevitable that the Court would be required to rethink its *Riggs* holding in various concrete situations. The associational rationale alleviates the category-mistake inherent in the *Riggs* decision. Indeed, it is possible that in the *Hague* case,¹²¹ which appears to have relied on *Riggs*, the ACLU should have been allowed to assert first amendment rights if its members possessed the requisite identity of views and desire to express them to bring the ACLU's conduct within the associational rationale.¹²²

The adjustment in the prior rationale accomplished by the *Button* case would appear to have left the Supreme Court with a consistent body of precedent. Under the Field rationale a corporation would have the same constitutional rights to protect its business as would its shareholders if they conducted that business as an unincorporated association. A corporation cannot assert a constitutional right that by its nature can be available only to natural persons or applicable only to the acts of natural persons. Under the associational rationale, however, when individuals with a desire to express their common views exercise their freedom of expression through the medium of a corporation and its agents, the corporation may assert that the expression is protected under the first amendment.

Although the proper answer seems clear under the Court's prior decisions and rationale, the Court had not yet answered the next logical question concerning the first amendment rights of corporations: What are the corporation's rights of freedom of expression when the expression involved is not a part of the business of the corporation and does not represent the commonly held views of its members or shareholders? It is this question that the Court first addressed in *First National Bank v. Bellotti*.¹²³

III. *First National Bank v. Bellotti*

In 1976 the Massachusetts General Court proposed to the people of the state a constitutional amendment permitting the legislature to impose a graduated tax on the income of individuals.¹²⁴ Banking and business corporations claimed that institution of a graduated tax on the income of individuals would damage their business. Consequently, the corporations wished to spend

118. 203 U.S. 243 (1906); see notes 53-54 *supra* and accompanying text.

119. 268 U.S. 652 (1925).

120. *Id.* at 666.

121. 307 U.S. 496 (1939).

122. See note 93 *supra* and accompanying text (discussing *Riggs*).

123. 435 U.S. 765 (1978).

124. See *First Nat'l Bank v. Attorney Gen.*, 359 N.E.2d 1262, 1265 (Mass. 1977), *rev'd sub nom.* *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

money to publicize by newspaper advertisements and similar methods their opposition to the proposed amendment.¹²⁵

A state statute appeared to prohibit their expenditures. The statute prohibited a corporation incorporated under the laws of Massachusetts or doing business in the state of Massachusetts from giving or expending anything of value

for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.¹²⁶

The statute further created the irrebuttable evidentiary presumption that "[n]o 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."¹²⁷ The statute contained no similar prohibition against expenditures by natural persons conducting similar businesses.¹²⁸

Under threat of prosecution, two banking corporations and three business corporations brought a declaratory judgment proceeding to have the statute declared unconstitutional.¹²⁹ The plaintiff corporation maintained that because the U.S. Supreme Court had established that expenditures furthering expression are akin to speech,¹³⁰ the statute violated their rights under the first amendment and denied them equal protection of the laws.¹³¹ The Supreme Judicial Court for the County of Suffolk upheld the validity of the statute.¹³²

On direct appeal the United States Supreme Court, in a five to four decision, held that the statute was an unconstitutional abridgment of speech protected under the first amendment.¹³³ The Court did not discuss other claimed deficiencies in the statute. To properly analyze the Court's opinion, it is first necessary to look at the *First National Bank* case within the historical and conceptual framework that supports the Court's prior decisions involving the constitutional rights of corporations.

Under the Field rationale a corporation has the same constitutional rights in connection with its business as its shareholders would if they were to conduct the business as an unincorporated association. Accordingly, corporations are entitled to equal protection of the law and should, therefore, be treated no differently in connection with their business than similarly situated

125. *Id.* at 1265-66.

126. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1979).

127. *Id.*

128. *Id.*

129. *First Nat'l Bank v. Attorney Gen.*, 359 N.E.2d 1262, 1265 (Mass. 1977), *rev'd sub nom. First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

130. See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (Federal Election Campaign Act expenditure and contribution limits operate in area of political expression, the most fundamental first amendment activity).

131. *First Nat'l Bank v. Attorney Gen.*, 359 N.E.2d 1262, 1275 (Mass. 1977), *rev'd sub nom. First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

132. *Id.* at 1273, 1275, 1276.

133. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978).

entities. If Massachusetts had attempted by statute to prohibit a corporation from making expenditures for supplies needed in its business, but had placed no similar restrictions on expenditures by natural persons conducting a similar business, the statute would unquestionably violate the equal protection clause.

At first blush it appears that the Massachusetts statute challenged in *First National Bank* is invalid on the same grounds. Analysis, however, does not support the applicability of the equal protection clause. The statute is not aimed at an expenditure as a mere disbursement of corporate assets. Rather, it is aimed at the expenditure as expression. It is not a category-mistake to speak of a corporation as being capable of making expenditures to purchase supplies. A corporation has the legal right and power to do so. It is, however, a category-mistake to speak of a corporation as being capable of expression. Expression can be made only by natural persons. Because it is incapable of expression, a corporation, *as a corporation*, cannot possibly claim a denial of equal protection of the laws when it is prohibited from making expenditures for the purpose of promoting expression. Consideration of the *First National Bank* decision must therefore focus not on the corporation's right to equal protection, but rather on first amendment rights.

The Court has generally refused to extend to corporations a constitutional right that is by its nature applicable only to natural persons or their acts. Under this general principle, first amendment rights may not be asserted by corporations because corporations are incapable of expression. The Court's holdings, however, reveal exceptions to this general rule when application of the rule would not result in category-mistake.

As discussed above, when a corporation's business is, or includes, the marketing of expression, it may assert first amendment rights under the Field rationale to protect that expression and, therefore, its business.¹³⁴ In such cases, the corporation need not claim that the expression is that of the corporation, but only that it is a component part of the corporation's business. The prohibition challenged in these cases was aimed at the expression itself regardless of the source. The Massachusetts statute, in contrast, is not aimed at the expression itself because natural persons may make such expenditures. Rather, it is aimed at the source of "expression."¹³⁵ Moreover, the "expression" prohibited by the Massachusetts statute is neither a product of nor marketed by a corporation. Accordingly, the Field rationale exception to the general rule is inapplicable.

Presumably corporate management desires, at least in part, to make the prohibited expenditures to protect or benefit the corporation. If the first amendment affords greater protection to a natural person whose expression is motivated by a desire to protect his business than it affords to a person whose expression is motivated by other concerns, the Field rationale would arguably apply when such corporate expenditures were made. When the question is framed in this manner, it seems clear that the Supreme Court would extend no greater protection to the speech or expenditures of an individual desiring to protect his business than to the speech or expenditures of an individual

134. See notes 71-86 *supra* and accompanying text.

135. Expenditures by natural persons that are intended to further expression are treated as a form of expression. See *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (campaign expenditure and contribution limits regulate political expression).

motivated by other concerns. For example, an individual who owned and operated a business that manufactured high quality glass drink bottles might wish to make expenditures to support a proposed referendum to ban nonreturnable bottles, feeling that such a ban would increase his business. Another individual might wish to make expenditures to support the same referendum because of ecological concerns. Surely the Court would extend no greater right of expression to the first individual.

Consideration of the societal values protected by freedom of expression supports this conclusion. The values so protected are commonly thought to be: (1) Self-fulfillment; (2) truth; (3) citizen participation in social and political decision-making; and (4) maintenance of a balance between stability and change in society.¹³⁶ Protection of these values is not enhanced by giving to an individual a greater right to express himself because he is motivated by business interests.

An individual thus has no greater right to express himself simply because he is motivated by business interests. The proposition can be restated as follows: An individual has no first amendment rights by virtue of the fact that his expression is motivated by his business interests. Accordingly, under the Field rationale, a corporation is extended no first amendment rights to make expenditures for the purpose of furthering expression *by virtue* of the fact that the expression is motivated by its business interests.

Our analysis must also take into account the associational rationale. Under that rationale, when individuals choose to express their common views through the medium of a corporation and its agents, the corporation may assert the protection of the first amendment to the same extent as could its members or shareholders were they an unincorporated association. The key to this rationale is the realization that expression can be the product or act only of natural persons. When the shareholders and the natural persons who are the agents of the corporation have a unanimity of view, a political expenditure by the corporation is simply the expression of the shareholders through the medium of the corporation. Accordingly, the corporation should be able to protect its effectiveness as a medium by asserting the same first amendment rights as its shareholders could have asserted as an unincorporated body. The clearest example of the correctness of this principle is a corporation sole whose shareholder causes the corporation to make an expenditure to pay for a newspaper advertisement setting forth his own views. The expression represented by the expenditure, as well as the expression made possible by the expenditure, is that of the individual shareholder regardless of the fact that he has used assets of the corporation.

One need look no further than this example to see that the Massachusetts statute considered in *First National Bank* is void on its face because it is overbroad in its coverage. The Massachusetts statute places a total ban on corporate expenditures. The expenditures of a corporation sole are included within the statute's embrace. Under the associational rationale, however, such a corporation is entitled to first amendment protection to the same extent as its shareholder, a natural person acting as an individual. Unless a total ban on expenditures or contributions by a natural person for the purpose of influencing a referendum can withstand first amendment scrutiny, the Massachusetts statute cannot stand. A total ban on individuals' expenditures

136. See T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (1963).

or contributions concerning ballot issues would no doubt succumb to a first amendment challenge.¹³⁷ The Massachusetts statute is, therefore, overinclusive and void on its face because it infringes on the rights of a corporation sole.¹³⁸ No further inquiry or analysis by the Court was necessary.

The Court, with Justice Powell speaking for the majority, did reach the result suggested by the above analysis. In invalidating the Massachusetts statute for unconstitutionally abridging freedom of speech the Court was unable to set forth a satisfactory framework for its decision, either in light of precedent or with a view to future cases certain to arise. It is only a slight exaggeration to say that Justice Powell reached the right result for the wrong reason and that Justice White's dissent, which was joined by Justices Brennan and Marshall, urged the wrong result but more nearly grasped the correct governing rationale. Justice Rehnquist, in dissent, was the only Justice to recognize the importance and true meaning of the cases underlying the Field rationale, but he ignored the cases underlying the associational rationale. Clearly, the Court was a house divided, grasping at parts of the correct rationale, but unable to unite the pieces into one conceptually solid whole.

Justice Powell began his opinion with an acknowledgment that the issue presented was one of first impression.¹³⁹ His phrasing of the issue, unfortunately, obscured the basic problem presented by the case: "The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural person. Instead, the question must be whether . . . [the statute] abridges expression that the First Amendment was meant to protect."¹⁴⁰ Obviously the Court was required to determine whether the Massachusetts statute abridges expression that the first amendment was meant to protect. Inherent in this determination, however, is a further determination of the first amendment rights of corporations.

Even more troublesome than his phrasing of the issue is Justice Powell's failure to note that what the statute seeks to prohibit is the expression, if any, to be found in a corporate expenditure. For example, after noting that the protection of political expression was a major reason for adopting the first amendment and that political speech is indispensable in a democracy, Justice Powell stated, "[A]nd this is no less true because the *speech comes from a corporation*."¹⁴¹ Justice Powell then further restated the issue by asking "whether the *corporate identity* of the *speaker* deprives this proposed speech of what otherwise would be its clear entitlement to protection."¹⁴² One could fairly infer that Justice Powell had fallen prey to a category-mistake. Did he realize the distinction between a corporate expenditure and the expression that it is intended to further? Did he overlook the reality that a corporation is incapable of expression?

The majority opinion next rejected the Massachusetts Supreme Judicial Court's conclusion that a corporation's first amendment rights are derived

137. Cf. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam) (upholding contribution limits, but invalidating expenditure limits of Federal Election Campaign Act).

138. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794-95 (1978) (statute overinclusive because it prohibits corporate expenditure even if all shareholders agree).

139. *Id.* at 767.

140. *Id.* at 776.

141. *Id.* at 777 (emphasis added).

142. *Id.* at 778 (emphasis added).

from its property rights.¹⁴³ As previously discussed, corporations have, under the Field rationale, constitutional rights, including certain first amendment rights in connection with their business to the extent enjoyed by natural persons in like businesses.¹⁴⁴ They possess first amendment rights pursuant to the associational rationale when they represent the medium through which natural persons exercise their rights of association and expression.¹⁴⁵ Justice Powell was thus correct when he rejected the Supreme Judicial Court's delineation of the first amendment rights of corporations. His opinion, however, supplied no replacement rationale; it merely rebutted the Supreme Judicial Court's conclusion,¹⁴⁶ pointed out the gaps in Justice Rehnquist's analysis,¹⁴⁷ and expressed concern about the ramifications of adopting Justice White's analysis.¹⁴⁸ Justice Powell found comfort in the Supreme Court cases affording corporations first amendment protection,¹⁴⁹ yet he failed to analyze those cases. Thus he failed to see that they rest on the Field rationale and accordingly provide no support for his decision.

Having determined that the statute abridged protected expression, Justice Powell then turned to the question whether the statute could "survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech."¹⁵⁰ In order to prevail, the state was required to show a compelling subordinating interest.¹⁵¹ The majority opinion identified only two asserted state interests: That of sustaining the active role of the individual citizen in the electoral process and that of protecting the rights of shareholders whose views differ from those expressed by management.¹⁵² Justice Powell concluded that the state had failed to show that corporate political expenditures presented an imminent danger to the participation of the individual citizen in the political process.¹⁵³ Nor did he find the state interest in protecting shareholders sufficient justification for the statute's prohibition because the act was both overinclusive and underinclusive.¹⁵⁴

Only in its discussion of the overinclusiveness of the statute does the majority hit upon a relevant point. The opinion noted that the statute would "prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure."¹⁵⁵ Under the associational rationale, given unanimity of desired expression and desire to express among and between the shareholders and the natural person actually making the expression, the corporation would have first amendment rights as the medium of expression.

Overall it would be fair to describe the majority opinion as dismal. The result is correct, but the analysis is defective and incomplete. The opinion

143. *Id.* at 784.

144. See text at notes 54-55 *supra*.

145. See text at notes 118-22 *supra*.

146. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778-95 (1978).

147. *Id.* at 780-81 n.16.

148. *Id.* at 781-83 nn.17-19.

149. *Id.* at 780-83.

150. *Id.* at 786.

151. *Id.*

152. *Id.* at 787.

153. *Id.* at 788-92.

154. *Id.* at 792-95.

155. *Id.* at 794.

essentially ignores precedent and the realities of what a corporation is. Justice Powell made clear that the decision was not intended to "survey the outer boundaries of the [first] amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."¹⁵⁶ It is fortunate that the opinion is limited to the facts and that the Supreme Court will be able to rethink the underlying principles on another day.

In contrast to Justice Powell's opinion, Justice White's analysis in dissent is truer to both reality and precedent, but he erred in his conclusion that the statute should be upheld. Justice White more clearly recognized the difference between a corporate expenditure and the expression that the expenditure is intended to make possible or amplify. He stated the issue as "whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business."¹⁵⁷ Drawing on *NAACP v. Button*¹⁵⁸ and the associational theory underlying it, Justice White noted that corporations can be mediums through which individuals express their common views.¹⁵⁹ He pointed out, however, that shareholders in business corporations "do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes."¹⁶⁰ He further concluded that "there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders."¹⁶¹

Justice White clearly demonstrated here his understanding of the associational theory. Yet he overlooked the critical fact that unanimity of desire to express common views can exist in a business corporation, as, for instance, in a corporation sole in which the shareholder's views are in reality those expressed. Although the Justice correctly perceived the realities involved and the applicability of the associational rationale, he failed to perceive that these realities and the associational rationale make the Massachusetts statute void on its face because it prohibits protected speech.

White's dissenting opinion contains three other errors that are of interest in connection with our examination of what the Court might do when again presented with this issue. First, Justice White prefaced his opinion with the unsupported statement that "[t]here is now little doubt that corporate communications come within the scope of the First Amendment."¹⁶² Clearly this premise does not accurately reflect precedent. Justice White may have failed to recognize, as did the majority, that the Court's prior extension of first amendment rights to corporations in cases other than those based on the associational rationale are justified by the Field rationale. Justice White's premise should have been that there is now little doubt that the first amendment rights of corporations are coextensive with individuals in some situations and nonexistent in other situations. He should then have applied the Field and associational rationales to the case.

156. *Id.* at 777.

157. *Id.* at 803 (White, J., with Brennan & Marshall, JJ., dissenting).

158. 371 U.S. 415 (1963).

159. *See* 435 U.S. at 805.

160. *Id.*

161. *Id.* at 806.

162. *Id.* at 804.

After making this initial mistake, Justice White was forced to suggest that corporate communication is subject to some restrictions to which individual expression is not.¹⁶³ Corporate communication must be limited because "[i]deas which are not a product of individual choice are entitled to less First Amendment protection."¹⁶⁴ Obviously the Justice fell prey to category-mistake. Corporate communication does not exist; only individuals can have ideas. The corporate expenditure at issue, to the extent it was expression, was the expression of one or more natural persons. The first question then is *whose* speech the expenditure represents. Clearly, it is the speech of those natural persons who authorize the expenditure. Yet that which is expended belongs not to them but to the corporation. The associational rationale establishes that when shareholders utilize a corporation as a medium to express their common views, it is appropriate to protect that expression. In the case of a large corporation, however, the views of shareholders and management may diverge, making the associational rationale inapplicable. The issue in that situation is, in reality, whether the first amendment protects the rights of management to expend the money of their corporation to further their own views. No "corporate expression" is involved.

The third mistake in Justice White's dissent follows from the first two. Justice White is concerned with justifying a prohibition against certain corporate "speech," while protecting the right of a corporation to advertise. He justifies first amendment protection for certain corporate communications through an *implied* unanimity of business purpose among shareholders in a business corporation, viewing advertising as a means of furthering the desires of individuals.¹⁶⁵ In a given situation the shareholders may in fact have such unanimity of view. But to presume this unanimity for a corporation such as General Motors is to stretch credulity past the breaking point. Probably all shareholders wish General Motors to prosper. Not all would wish to express the opinion that an Oldsmobile Cutlass is a great buy. Indeed, some shareholders certainly believe that General Motors should advertise more truthfully, some that it should advertise less truthfully, and some that it should not advertise at all. A corporation with millions of shareholders cannot in any meaningful sense be said to be expressing the unanimous views that its shareholders desire to express when it advertises. By failing to perceive the Field rationale, Justice White has missed the constitutional basis on which any first amendment protection for corporate advertising must rest. Corporate advertising is a *part* of the business. Under the Field rationale it can be argued that the corporation should have the same first amendment rights for its advertising that would be available to natural persons conducting a similar business.

Chief Justice Burger concurred with the majority opinion, but expressed his concern that there is no principled way to distinguish between a business corporation and a corporation that is engaged in a communications business, such as publishing newspapers. He apparently feared that limiting the first amendment rights of a nonmedia business corporation must inherently lead to an undermining of the rights of a media corporation as well.¹⁶⁶ Justice Powell

163. *Id.* at 804-05.

164. *Id.* at 807.

165. *Id.* at 808.

166. *Id.* at 798 & n.2 (Burger, C.J., concurring).

also shared this view.¹⁶⁷ The Field rationale makes this concern unwarranted. A media corporation draws its first amendment rights from the fact that the expression it desires to protect is part of its business.¹⁶⁸

Justice Rehnquist appears to have grasped the Field rationale in his dissent, but he totally overlooked the associational rationale and the cases underlying it. In addition, his opinion implied that the Field rationale is based in part on the reserved right of the state, as the creator of a corporation, to regulate it, rather than on the inherent nature of the corporation as an artificial entity.¹⁶⁹ This mistake leaves Justice Rehnquist open to Justice Powell's criticism that such rationale would not empower a state to restrain corporations created under the laws of the United States.¹⁷⁰ The critical error is Justice Rehnquist's failure to perceive the existence of the associational rationale.

Because section eight of the Massachusetts statute was impermissibly overbroad, the Court reached the right result in *First National Bank*, although it perceived the correct reason for the result only dimly at best. The majority clearly could not see how a conceptually acceptable line of analysis could be drawn from the cases in which it had previously granted first amendment rights to corporations and be extended to cases that it might yet face. Justice White's dissent seemed more aware of the realities involved, but his opinion still strikes far wide of the mark. Justice Rehnquist at least set out a partial analysis of some of the cases underlying the Field rationale, and Chief Justice Burger showed concern for the implications of a decision upholding section eight for media corporations.

167. *Id.* at 791 n.30.

168. This conclusion appears to have been shared by Senator Taft of Ohio, and presumably other members of Congress, as indicated by the following dialogue during Senator Taft's presentation to the Senate of the views of the Senate conferees about the intended scope of one of the predecessors to present § 441b, which governed political contributions by labor unions:

Mr. Barkley. The Senator from Ohio referred to the law prohibiting the making of direct or indirect contributions by corporations as a justification for making the same provision in the case of labor unions. Let us consider the publication of a corporation which, day after day, takes a position against one candidate and in favor of another candidate, and does so in its editorials. The editorials occupy space in that newspaper or publication, and the space costs a certain amount of money. Is that a direct or an indirect contribution to a campaign; and if it is neither, what is it?

Mr. Taft. I would say that it is the operation of the newspaper itself.

Mr. Barkley. That is true; it is the operation of the newspaper. But I gathered the impression that in referring to the present law prohibiting the making of contributions, directly or indirectly by corporations, the Senator inferred that if a corporation publishes a newspaper—as most of them do—and uses the editorials in that publication in advocacy of or opposition to any candidate, at least that is a direct contribution to the campaign. It could not be anything else.

Mr. Taft. I do not think it is either a direct or an indirect contribution. I do not think it is an expenditure of the sort prohibited, because it seems to me it is simply the ordinary operation of the particular corporation's business.

93 CONG. REC. 6437 (1947) (introducing Labor Management Relations Act, 1947, Pub. L. No. 80-101, ch. 120, tit. III, § 304, 61 Stat. 136 (1947)).

169. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 822-27 (1978) (Rehnquist, J., dissenting).

170. See *id.* at 778 n.14.

IV. AFTER *First National Bank*

Because the 1980 Presidential election campaign is already underway, the Supreme Court may be required, in the context of determining the validity of section 441b of the Federal Election Campaign Act, to consider again the extent to which corporations may avail themselves of first amendment protection.¹⁷¹ Section 441b of the Act makes it unlawful for "any corporation organized by authority of any law of Congress to make a contribution or expenditure" in connection with any election to political office, primary, or political convention or caucus.¹⁷² The section also makes it unlawful for an officer or director of a corporation "to consent to any contribution or expenditures by the corporation, prohibited by this section."¹⁷³ The section applies to labor unions and national banks as well as to corporations.¹⁷⁴ The Supreme Court has never directly passed on the validity of section 441b or its predecessors.¹⁷⁵

In contrast to this treatment of corporations, the Federal Election Campaign Act allows natural persons to make contributions, within limits, to candidates and political committees in connection with federal election contests.¹⁷⁶ Moreover, as a result of the Court's decision in *Buckley v. Valeo*,¹⁷⁷ natural persons may make *unlimited* expenditures in connection with federal election contests as long as these expenditures are made independent of, and without coordination with, a candidate or a political committee.¹⁷⁸

It is crucial to understand how the *Buckley* result was reached. The Court in *Buckley* reasoned that both political contributions and independent political expenditures are forms of expression akin to speech and are therefore protected by the first amendment.¹⁷⁹ Limitations on contributions, however, were considered a less severe restriction on first amendment rights than limitations on independent expenditures¹⁸⁰ because a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."¹⁸¹ The quantity of

171. See Federal Election Campaign Act, § 112(2), 2 U.S.C. § 441b (1976). A more carefully drawn or more narrowly construed state statute prohibiting corporate expenditures in connection with election campaigns or referenda might also be open to challenge. See note 14 *supra* for some prior lower court cases. Another possible case might arise if Congress were to prohibit or limit corporate expenditures to further, as by paid advertisement, the expression of general social or ideological views. Such a case is far less likely to arise in the present political climate, however; therefore, this article will consider in depth only the challenge to § 441b, which is the most likely to occur.

172. 2 U.S.C. § 441b(a) (1976).

173. *Id.*

174. *Id.*

175. See *United States v. International Union United Auto. Aircraft & Agric. Implement Workers*, 352 U.S. 567, 591 (1957) (no decision on constitutionality of 18 U.S.C. § 610, forbidding corporate or labor contribution or expenditure on federal elections, because not absolutely necessary to decision); *United States v. CIO*, 335 U.S. 106, 110 (1948) (no decision on constitutionality of § 313 of Federal Corrupt Practices Act, forbidding corporate expenditures for political activities, because indictment did not state offense under that section).

176. 2 U.S.C. § 441a (1976).

177. 424 U.S. 1 (1976) (*per curiam*).

178. *Id.* at 51.

179. *Id.* at 16.

180. *Id.* at 20-21, 23.

181. *Id.* at 21.

communication is thus not materially affected by the size of the contribution,¹⁸² although contribution limits may indirectly restrict the expression of the party to whom the contributor would otherwise give a larger amount. By contrast, the Court found that a restriction on an independent expenditure would directly limit the quantity of communication.¹⁸³ Accordingly, it upheld limits on contributions, but not on independent expenditures to promote a political candidate.¹⁸⁴

It seems inevitable that a challenge will be made to section 441b. The challengers will assert that *Buckley v. Valeo* has extended to natural persons limited rights to make political contributions and unlimited rights to make independent political expenditures. It will further be asserted that *First National Bank* makes it clear that corporations must not be denied first amendment rights merely because they are corporations.¹⁸⁵ Accordingly, it will be argued, section 441b must be unconstitutional.

Both the majority and the dissents in *First National Bank* seemed to share a visceral belief that section 441b should be constitutional, although none of the opinions provided a basis for this feeling. The implications of the *First National Bank* decision were of great concern to Justice White, who noted in his dissent:

[T]he Court has previously held in *Buckley v. Valeo* that the interest in preventing corruption is insufficient to justify restrictions upon individual expenditures relative to candidates for political office. *If the corporate identity of the speaker makes no difference*, all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day.¹⁸⁶

Justice Powell in his majority opinion suggested that section 441b could be found constitutional if Congress could "demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."¹⁸⁷ He does not explain why this course is open to the Court in light of *Buckley v. Valeo*. The reason for the Justices' difficulty in indicating a basis for upholding section 441b was their failure to grasp the realities involved in corporate political expenditures. As demonstrated in their analysis of *First National Bank*, they failed to perceive both who was actually speaking and the underlying rationale behind prior decisions.¹⁸⁸

In considering a challenge to section 441b, the Court can be certain to reach the correct result only if it avoids the category-mistakes made in *First National Bank*. To avoid these mistakes the Court must first divide corporate expenditures in connection with federal elections into two categories: Those made by a corporation in which the shareholders and the agents of the corporation authorizing and directing the expenditure are united by a desire and intent to express, through the expenditure, a common belief or opinion;

182. *Id.*

183. *Id.* at 19.

184. *Id.* at 29, 51.

185. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785 (1978).

186. *Id.* at 820-21 (emphasis added).

187. *Id.* at 788 n.26.

188. See notes 140-70 *supra* and accompanying text (discussing *First Nat'l Bank*).

and all other expenditures. Only the former fall within the associational rationale.

The Court in *First National Bank* showed some awareness that the speech represented by a corporate expenditure was different in cases covered by the associational rationale than in cases outside that rationale. Both Justice Powell for the majority¹⁸⁹ and Justice White, in his dissent, analyzed the difference¹⁹⁰ in connection with the Court's holdings in *International Association of Machinists v. Street*¹⁹¹ and *Abood v. Detroit Board of Education*.¹⁹²

In *Street* the Court construed the Railway Labor Act to deny unions the power to use compulsory union dues obtained over an employee's objection for political purposes the employee opposed.¹⁹³ The associational rationale justifies and is consistent with the statute-based holding in *Street*. As long as the members of a union share with their representatives a desire to express common views, the union is merely the medium of the members' expression. In such a case an expenditure by a union can be properly thought of as the expression of each of its members. Once this unanimity of view vanishes, first amendment protection would also be inappropriate. Similarly, in *Abood* the Court on first amendment grounds held that the state could not require an individual to contribute to a public employee's union as a condition of employment to the extent that his contribution would be used to support an ideological cause with which he did not agree.¹⁹⁴

In *First National Bank* Justice White interpreted these decisions to mean that when state action is involved an individual may not be compelled to support views with which he disagrees and that the state can enact laws to protect the first amendment interests.¹⁹⁵ Justice Powell agreed that these cases involved coerced contributions to further the views of others. He found no coercion present, however, in the case of a shareholder of a corporation that makes a contribution with which the shareholder disagrees, because the shareholder may sell his holdings at any time.¹⁹⁶

Inherent in the analysis of both Justice Powell and Justice White is the assumption that an expenditure of corporate assets involves expression by the shareholders of the corporation, although they differ about whether the expression is compelled or coerced. This assumption evinces a critical category-mistake. The expression in such a case is that of management, or whoever authorizes and directs the expenditure. The individual shareholder has in no sense engaged in an act of expression. He and the other shareholders have merely continued to hold shares in the corporation from which management has, for its own expression, extracted assets.

In order to uphold section 441b, then, the Supreme Court must construe the section as inapplicable to expenditures falling within this first category. Under the associational rationale such corporate expenditures are constitutionally protected to the same extent as like expenditures of natural persons associated in an unincorporated form. The speech made possible by the

189. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

190. *Id.* at 813-14.

191. 367 U.S. 740 (1961).

192. 431 U.S. 209 (1977).

193. See *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961).

194. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

195. 435 U.S. at 814.

196. *Id.* at 794 n.34.

expenditure is that of natural persons. The corporation, as the medium for this expression, has first amendment rights in connection with it. Without such a construction, section 441b would be impermissibly overbroad.

In the second category of expenditures, in which unanimity of view does not exist, the expression represented by an expenditure is still that of natural persons. But the speaker now does not represent all of the shareholders and the corporate agents. As an example of such a situation, let us assume that the expenditure is authorized and directed by top management and constitutes an expression of their common support for candidate X. The corporation in this case is not being utilized as a medium of expression by its owner or members. Instead, top management is using the assets of the corporation to further their own views. In order to avoid category-mistake and therefore to have any hope of reaching a sound decision concerning the validity of section 441b, the Court must realize that an expenditure of corporate assets authorized and directed by top management is the expression of top management. It is not the expression of the corporation because a corporation is incapable of expression. Unlike a corporation fitting the associational rationale, this corporation, as a corporation, has no first amendment rights in connection with this expenditure.

Top management, in contrast, does have first amendment rights. The Court must thus consider the extent of those individuals' first amendment rights in connection with expression accomplished with assets of the corporation. A prohibition of corporate expenditures does not constitute a prohibition of expenditures by top management from their *own* resources. Top management remains free to expend their own resources to the extent other natural persons are permitted to do so. Is the freedom of expression of the individual members of top management therefore infringed by restricting their use of corporate assets? Does management lack standing to challenge this prohibition because it does not in any way prohibit members of top management from making personal political expenditures?

The Supreme Court has considered a similar issue in *Cammarano v. United States*.¹⁹⁷ Two of the petitioners in *Cammarano* were engaged in an unincorporated form in the business of distributing beer wholesale in the State of Washington. Voters in that state were to consider an initiative measure to place the retail sale of beer and wine in the hands of the state.¹⁹⁸ Petitioners contributed money to an industry fund to purchase advertisements urging defeat of the measure and claimed a deduction for these contributions on their income tax returns for the years in which they were made. The Internal Revenue Service disallowed the deduction. Petitioners asserted that the deduction was an ordinary and necessary business expense under section 23(a)(1)(a) of the Internal Revenue Code of 1939.¹⁹⁹ They further argued that if the IRS regulations were construed to deny them a deduction, the disallowance would constitute an abridgment of their first amendment rights.²⁰⁰ The Court, in an opinion by Justice Harlan, held that the regulations

197. 358 U.S. 498 (1959).

198. *Id.* at 500.

199. *Id.* at 501.

200. *Id.* at 512-13.

did deny such a deduction²⁰¹ and gave short shrift to petitioners' first amendment argument:

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are *simply being required to pay for those activities entirely out of their own pockets*, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. *Nondiscriminatory* denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas." Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should *stand on the same footing* as regards its purchase so far as the Treasury of the United States is concerned.²⁰²

Is not the determination by Congress in section 441b that top management should be denied the use of the corporate treasury justified under the equal footing analysis used so eloquently by Justice Harlan in *Cammarano*? This restriction involves no discrimination or desire to suppress the views of management, but only a nondiscriminatory denial to any individual with greater access to resources than that available to other individuals. Not only may members of top management expend their own assets, but they may also, individually or in association with others, solicit contributions from those who desire to assist them in expressing their views. Section 441b can be considered merely an attempt to deny corporate management an unfair advantage.

Prohibiting expenditures not encompassed by the associational rationale protects society's interest in having each member of society stand on the same footing with regard to using the funds of others to express himself. Although a particular dissident shareholder may be aware of and enraged by management's use of corporate assets to express views with which he disagrees, the major interest served by a prohibition on these expenditures is not protecting the shareholder, but protecting the broader interest of society. The shareholder may have a unique personal interest in damages to his property interest as a shareholder if the expenditures are construed as waste, self-dealing, or ultra vires. This issue is a separate one that should not be confused with the important societal interest of requiring that all members of society be given an equal chance to convince others that their views are worthy of further expression and that others should aid that expression by a contribution of money.

Upholding the constitutionality of section 441b would also not infringe the first amendment rights of listeners to hear the desired speech. As Justice Powell noted in *First National Bank*, the Court's commercial speech cases make clear that certain speech is protected from governmental limitation because of the right of the listener to hear that speech.²⁰³ The first amendment

201. *Id.* at 510.

202. *Id.* at 513 (emphasis added).

203. 435 U.S. at 783.

forbids the suppression of commercial communication because the "people will perceive their own best interests if only they are well enough informed."²⁰⁴ The commercial speech cases, however, involve prohibitions of speech that are clearly not motivated by equal footing concerns. These cases involve attempts by government to prevent totally a particular message from being communicated.²⁰⁵ By contrast, a ban on corporate political expenditures is not an attempt to prevent the expression of a particular message. Rather, it represents a legislative determination that all who desire to amplify their expression by the use of the assets of others must obtain those assets from voluntary contributions instead of from the corporate treasury. No attempt is made to prevent those in management from using their own assets to further their own expression, a right guaranteed by *Buckley v. Valeo*.²⁰⁶ Nor is there any limit on the amount of contributed money that can be used to further this expression.

Moreover, the prohibition of section 441b against corporate political expenditures not only does not prevent the expression of a particular view, but also is based on, and results in, an enhancement of the first amendment rights of the listener. In the commercial speech cases the emphasis is solely on the listener as potential customer, not on the rights of the listener as potential speaker. Prohibiting corporate political expenditures focuses attention on the rights of the listener as listener *and* as potential speaker. As a potential speaker every citizen must have certain rights of equal opportunity to solicit contributions to further his or her own expression. A citizen's rights as listener and as speaker are not separable in the area of political expression, and section 441b protects them both.

Section 441b represents a congressional determination that all who desire to amplify their speech by the use of assets not their own must obtain those assets from voluntary contributions. This prohibition is necessarily grounded on a congressional realization that corporate management has been clothed by government with tremendous discretion in the management of corporate affairs. A law that requires those in management to look to voluntary contributions rather than the corporate treasury to further their own expression ensures that those who control corporations by virtue of the corporate management powers and privileges that the government has created and fostered also will not have unfair access to the assets of others. Such a law is justified, to paraphrase Justice Harlan's reasoning in *Cammarano*,²⁰⁷ because political speech will affect all in the community. All, as

204. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (state law forbidding pharmacists from advertising prescription drugs struck down).

205. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977) (state ban on attorney advertising denies consumer relevant information needed to reach an informed decision); *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977) (ordinance prohibiting posting of "For Sale" or "Sold" signs prevents residents from obtaining certain information and violates first amendment); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (state law forbidding pharmacists from advertising prescription drug prices suppresses flow of information to consumers).

206. *Buckley v. Valeo*, 424 U.S. 1, 51 (1976) (per curiam). This part of the *Buckley* decision has been both praised and criticized. Compare Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, in 1976 SUP. CT. REV. 1, 42 (P. Kurland ed.) (Court successfully balanced individual interest in unlimited speech against collective interest in honest democracy) with Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1001, 1005 (1976) (Court's view in *Buckley* that "money is speech" misconceives the first amendment).

207. See notes 197-202 *supra* and accompanying text.

potential listener-speakers, should stand on the same footing with regard to obtaining the assets of others for use in the amplification of their speech when governmentally created and fostered advantages are only available to some.

In sum, the Court must begin its analysis with a proper classification of corporate expenditures. It must then construe section 441b so that it will not apply to corporations protected by the associational rationale. The Court should note that speech not covered by this rationale involves only speech by top management or whoever authorizes and directs the expenditure. The Court should employ an equal footing justification, as found in *Cammarano*, to uphold the validity of the restriction of section 441b²⁰⁸ on corporate political expenditures.

The Court may be able to support its visceral feeling that section 441b should withstand a constitutional challenge²⁰⁹ without reassessing its mud-

208. Section 441b(b)(4)(B) provides that "it shall not be unlawful . . . for a corporation . . . or a separate segregated fund established by such corporation . . . to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation. . . ." 2 U.S.C. § 441b(b)(4)(B) (1976). Section 441b(b)(3)(B) makes it unlawful "for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation. . . ." 2 U.S.C. § 441b(b)(3)(B) (1976). And section 437d(a)(6) empowers the Federal Election Commission to initiate civil actions to enforce, among other things, § 441b. 2 U.S.C. § 441d(a)(6) (1976).

As noted, the Supreme Court in *Buckley v. Valeo* held that no limit could be placed on "independent expenditures" advocating the election or defeat of a candidate to federal office. See *Buckley v. Valeo*, 424 U.S. 1, 51 (per curiam) (1976); notes 177-78 *supra* and accompanying text. The Federal Election Commission, pursuant to its rulemaking authority under § 437d(a)(8), and in light of *Buckley*, has interpreted independent expenditures to include expenditures by a separate segregated fund established by a corporation, but not expenditures by a corporation. See 11 C.F.R. § 109.1(a), (b)(1) (1977). These separate segregated funds are commonly referred to as political action committees. The effect of § 441b under this interpretation is to allow management to set up political action committees to solicit voluntary contributions from its employees; these contributions can then be used to amplify the views of management. This scheme correctly recognizes the rights of corporate management, as individuals, to solicit contributions for the furtherance of their individual political views. At the same time, by prohibiting management from using corporate funds for amplification of their own views, this interpretation neutralizes the governmentally created advantages otherwise available to management and ensures that management is not given an unfair headstart in obtaining contributions.

Section 441b(b)(2)(C) appears to allow corporate expenditures that are not constitutionally protected by exempting from the definition of "contribution or expenditure" "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation. . . ." Without this exception, the use of corporate assets when the ultimate intended result is to enable management to obtain the money of others for amplification of management's views would constitute an expressive act by management. Such expenditures would be entitled to no greater first amendment protection than expenditures made directly by management to amplify their own views.

On the other hand, § 441b(b)(4)(A)(i) appears at first blush to restrict unconstitutionally the rights of management by making it unlawful "for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families. . . ." How can the possible sources of contributions be constitutionally limited? The answer lies in the interplay between § 441b(b)(2)(C) and § 441b(b)(4)(A)(i). Section 441b(b)(2)(C) allows management, through a political action committee, to use corporate assets to solicit contributions from shareholders and employees of the corporation. Section 441b(b)(4)(A)(i) merely prohibits management from using corporate funds for solicitation from other sources. Thus § 441b(b)(4)(A)(i) should properly be construed as permitting management to solicit contributions from whomever it wishes as long as it does not avail itself of the constitutionally unrequired advantage granted by § 441b(b)(2)(C).

Section 441b prohibits expenditures in connection with only federal elections. There is no prohibition against expenditures in connection with general political or social expression.

209. See notes 186-88 *supra* and accompanying text.

dled holding in *First National Bank*.²¹⁰ The addition of another layer of shaky doctrine and reasoning based upon the unsatisfactory foundation of *First National Bank*, however, would push farther from the body of the Court's jurisprudence the historically and conceptually correct principles that supported the Court's decisions prior to *First National Bank*.

The greatest cause for concern is that this flawed analytical structure may cause an incorrect result in a case in which the Justices' ideological leanings and analytical misconceptions suggest a different result than application of correct principles might require. Corporate expenditure to influence the vote on a referendum issue is an area in which the Court has already faltered in *First National Bank* and it may do so again. The greatest risk of error may lie in the area of general social expression. When Mobil Oil Corporation purchases an advertisement that promotes a particular social view, the real speaker is again top management. Should not Congress have the power to deny top management access to the corporate treasury based on an equal-footing rationale? Management could spend its own personal funds or solicit, individually or collectively, contributions from others to further their expression. This congressional action would not prevent the actual expression, but would only place all individuals at the same starting point.

It is difficult to predict the possible consequences of a decision by the Supreme Court giving those in management, or those in control of a corporation, a constitutionally protected right of access to corporate funds to promote their own views. As more and more corporations mutate into multinational creatures of immense power and influence, would it not be wise to preserve the ability of Congress to enact legislation to curb the headstart on expression and influence that the corporate treasury affords top management? It is to be hoped that the Court's future decisions will avoid category-mistake and preserve the possibility of political action in this area.

CONCLUSION

Prior to *First National Bank* the Supreme Court had carefully delineated the constitutional rights of a corporation, although it had not set forth in those decisions a unifying rationale. The principles deduced from these prior decisions are both mutually consistent and free of the category-mistake of treating corporations as either natural persons or creatures capable of physical acts such as speech or expression.

In determining whether a particular right is applicable to corporations, the Court, under the Field rationale, has extended to corporations the same constitutional rights in connection with their businesses that natural persons would have in connection with similar businesses. Constitutional rights that by their very nature can only apply to a natural person have not been extended to corporations. The Court has noted, however, that a corporation, although physically incapable of speech, may be utilized by its shareholders as a medium for the expression of their common views. In such limited cases a corporation, as the medium of expression, has first amendment rights.

The Court in *First National Bank* has indicated its lack of understanding of both its prior body of decisions and of the reality of whose speech is involved

210. See notes 124-70 *supra* and accompanying text.

in the case of a corporate expenditure. Except in those cases in which the shareholders and the party directing the expenditure share a desire to express common views, the speech is in no sense that of the corporation. In most situations the speech will be that of one or more members of the top management.

In reaching future decisions regarding limitations on corporate expenditures, the Court, to make proper analysis possible, must realize that the speech represented by the expenditure is that of the natural persons who authorize and direct it. From this starting point, the Court can then logically proceed to determine the permissible limitations on the expression.

