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# Elections--Corrupt Practices--Corporate Money Contributions To Influence the Outcome of Ballot-Measure Campaigns--Schwartz v. Romnes

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*Gagnon*. This is a fertile area for parolees anxious to test their status under the expanding requirements of due process and the newly developing double jeopardy doctrine. Also, a precise definition of the standard of proof to be used in federal parole revocation hearings is needed. A radical modification of the standard of proof in revocation hearings will likely be difficult to achieve. Even though there are constitutional arguments favoring the change, the due process principles are sufficiently elusive to support either position.

In assessing the potential success of challenges to the law enunciated in *Standlee*, it is likely that an argument based upon the double jeopardy doctrine will be the stronger approach. First, there is already support for the position, as indicated by *Grayson*.<sup>74</sup> Second, the fifth amendment does not draw distinctions among the many types of proceedings, nor is the double jeopardy clause restricted to criminal trials. A single sovereign should not be able to circumvent a constitutionally guaranteed freedom by drawing meaningless distinctions between two closely related proceedings. Finally, the constitutional protection afforded by the double jeopardy doctrine in cases such as *Standlee* appeals to notions of fairness and justice, which may prove to be the single most important consideration when the question ultimately reaches the Supreme Court.

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**Elections — CORRUPT PRACTICES — CORPORATE MONEY CONTRIBUTIONS TO INFLUENCE THE OUTCOME OF BALLOT-MEASURE CAMPAIGNS — *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974).**

On May 24, 1971, the New York Legislature enacted the Transportation Capital Facilities Bond Act of 1971 which authorized the State Comptroller to issue bonds in the amount of \$2.5 billion upon approval by the voters in the 1971 general election.<sup>1</sup> A nonprofit corporation, Yes for Transportation in New York State, Inc. (YES), was organized on August 24, 1971, to campaign for voter approval of the Act. YES received individual and corporate contributions, including \$50,000 from the New York Telephone Company (NYT), a wholly owned subsidiary of American Telephone and Telegraph Company (AT&T).

By letter dated January 26, 1972, the executive director of the Project on Corporate Responsibility (Project), a nonprofit corporation owning one share of AT&T stock, notified the Chairman of the Board of AT&T and the President of NYT of the Project's belief that NYT's \$50,000 contribution to YES violated section 460 of the New York Election Law

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<sup>74</sup>319 N.E.2d 43.

<sup>1</sup>N.Y. CONST. art. VII, § 11 disallows any legislative enactment which increases the public debt unless approved by a majority of the voters in a general election. The Capital Facilities Bond Act of 1971 was not so approved in New York's 1971 general election.

which prohibits corporate contributions to "any candidate for political office, or for nomination for such office, or for any political purpose whatever . . . ."<sup>2</sup> Project demanded, on behalf of NYT's shareholders, that the officers and directors of NYT responsible for making the contribution be held personally liable for its repayment to NYT. NYT's General Solicitor responded that repayment would not be sought because NYT's officers and directors had made the contribution in the belief that it would advance the public welfare as well as NYT's interest in improved transportation, and in reliance upon the opinion of its own and outside counsel that the contribution did not violate section 460.

To compel repayment of the \$50,000, Project filed a shareholders derivative action, *Schwartz v. Romnes*,<sup>3</sup> against YES and the individual officers and directors of AT&T and NYT, respectively, alleging that NYT's contribution to YES violated section 460 of the New York Election Law and section 107 of the New York Public Service Law.<sup>4</sup> On cross motions for summary judgment, the district court entered summary judg-

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<sup>2</sup>N.Y. ELECTION LAW § 460 (McKinney Supp. 1973). In 1974, section 460 became section 480(a) of the N.Y. ELECTION LAW. The New York Legislature also enacted section 480(b) which allows corporations to make political expenditures not exceeding \$5000 in the aggregate in any one year notwithstanding the total prohibition of section 480(a).

(a) No corporation or joint-stock association doing business in this state, except a corporation or association organized or maintained for political purposes only, shall directly or indirectly pay or use or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee or organization, or for, [or] in aid of, any corporation, joint-stock or other association organized or maintained for political purposes, or for, or in aid of, any candidate for political office or for nomination for such office, or for any political purpose whatever, or for the reimbursement or indemnification of any person for moneys or property so used. Any officer, director, stock-holder, attorney or agent of any corporation or joint-stock association which violates any of the provisions of this section, who participates in, aids, abets or advises or consents to any such violations, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor.

(b) Notwithstanding the provisions of subdivision a of this section, any corporation or any organization financially supported, in whole or in part, by such corporation may make expenditures, including contributions, not otherwise prohibited by law, for political purposes, in any amount not to exceed five thousand dollars in the aggregate in any calendar year.

N.Y. ELECTION LAW § 480 (McKinney Supp. 1974).

<sup>3</sup>357 F. Supp. 30 (S.D.N.Y. 1973), *rev'd*, 495 F.2d 844 (2d Cir. 1974). Project commenced the original derivative action but was replaced by the present named plaintiff when it was determined that Project was not a shareholder of AT&T at the time of the act complained of, as required for a derivative action by Rule 23.1 of the Federal Rules of Civil Procedure.

<sup>4</sup>N.Y. PUB. SERV. LAW § 107 (McKinney 1955) provides:

Except with the consent and approval of the public service commission first had and obtained, no public utility shall use revenues received from the rendition of public service within the state for any purpose other than its operating, maintenance and depreciation expenses, the construction, extension, improvement or maintenance of its facilities and service, the payment of its indebtedness and interest thereon, and the payment of dividends to its stockholders.

ment<sup>5</sup> against the individual officers and directors for \$50,000, holding that NYT's contribution violated section 460 because an election referendum is *political* within the meaning of the phrase "for any political purpose whatever." The court also held that NYT's contribution violated section 107 of the New York Public Service Law because the payment was neither incurred by NYT as an operating expense nor approved by the New York Public Service Commission as a nonoperating expense. The court further held that prohibiting NYT's contribution to YES did not contravene NYT's first amendment rights of expression since the legislative purposes behind the statute "justify restriction of the rights of a public utility to engage in political advocacy." On appeal, the Second Circuit reversed, finding no violation of section 460 since NYT's contribution had been made in support of a *nonpartisan* bond referendum. The circuit court also held that section 107 had not been violated, relying primarily upon a New York Public Service Commission ruling, issued subsequent to the district court's decision, which approved NYT's contribution to YES.<sup>6</sup>

## I. REGULATING CORRUPT PRACTICES

### A. *History and Objectives of Corrupt Practices Legislation*

Section 460 of the New York Election Law was enacted in 1906<sup>7</sup> in response to a joint senate and assembly investigation of life insurance companies which revealed, in part, that several New York legislators consistently protected the interests of life insurance companies that had given financial assistance to their election campaigns.<sup>8</sup> Illustrative of the spirit in which the money had been given is the following statement by an executive officer of a life insurance company which made a practice of contributing to election campaigns:

I don't justify the use of money for campaign purposes. I justify the use of these funds in the protection of the policyholder's interests. I don't

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<sup>5</sup>Defendant YES was granted summary judgment in its favor on the ground that plaintiff had failed to establish that YES had acted unlawfully, or that it had, or breached, any duty to AT&T shareholders.

<sup>6</sup>Plaintiff also argued that NYT's contribution was ultra vires as an unauthorized corporate act. The court discarded this theory, however, holding that to the extent NYT's contribution was prompted by a concern for transportation and the economy as a whole, it was protected by N.Y. BUS. CORP. LAW § 202(a)(12) (McKinney 1963); and to the extent it was prompted by the business benefits to be derived from better roadways, it was protected by the traditional corporate benefit rule.

This case note will consider only the issues encompassed by section 460 and will reflect on the other main issues only as they relate to section 460.

<sup>7</sup>The initial prohibition against corporate campaign contributions was enacted as part of the General Corporation Law. From 1928 to 1965 it was part of the Penal Law. It became part of the Election Law in 1965.

<sup>8</sup>A. HEARD, *THE COSTS OF DEMOCRACY* 129 (1960).

care about the Republican side of it, or the Democratic side of it. . . .  
What is best for the New York Life is what moves and actuates me.<sup>9</sup>

Motivated by similar concerns, Congress and 33 other state legislatures passed statutes similar to section 460.<sup>10</sup> Most of these statutes are part of a comprehensive scheme regulating corrupt practices in election campaigns and were enacted to accomplish two main objectives:<sup>11</sup> (1) to prevent corporate officers from using shareholders' assets to influence the outcome of elections or to support candidates, parties, or issues which some shareholders might oppose; and (2) to prevent postelection obligations running from the successful candidate to the donor of the funds. Corrupt practice statutes typically provide criminal sanctions, both for those who authorize prohibited contributions and for the recipients of the contributions, including fines from \$500 to \$10,000 and jail sentences up to one year.<sup>12</sup>

### B. Scope of the Legislation

Although the federal and several of the state statutes prohibit only corporate contributions to political parties and candidates running for public office,<sup>13</sup> 18 of the state statutes are of breadth similar to New York's, in that they effectively prohibit corporate contributions for "any political purpose whatever."<sup>14</sup> The courts are divided, however, as to whether corporate contributions paid to others to influence the outcome of referenda constitute a prohibited contribution for a political purpose.<sup>15</sup> In *People v. Gansley*,<sup>16</sup> a brewing company's contribution to a political

<sup>9</sup>*Id.*

<sup>10</sup>The federal statute is found at 18 U.S.C. § 610 (1970). The state statutes include *e.g.*, FLA. STAT. ANN. § 104.091 (1960); MASS. GEN. LAWS ANN. ch. 55, § 7 (Supp. 1975); UTAH CODE ANN. § 31-27-11 (1953).

<sup>11</sup>*See* United States v. UAW, 352 U.S. 567, 570-75 (1957); United States v. CIO, 335 U.S. 106, 113, 134-35 (1948); BARTOW, *Regulation of Campaign Funding and Spending for Federal Office*, 5 U. MICH. J.L. REFORM 159, 163 (1972); Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 39 (1966).

<sup>12</sup>*E.g.*, CONN. GEN. STAT. ANN. § 9-345 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 55, § 7 (Supp. 1975); TEX. ELECTION CODE ANN. art. 14.07 (Supp. 1974). In addition, several statutes provide for corporate fines or withdrawal of the right to do business within the state. *E.g.*, MINN. STAT. ANN. § 211.27 (Cum. Supp. 1974).

<sup>13</sup>The federal statute, 18 U.S.C. § 610 (1970), prohibits corporate contributions or expenditures "in connection with" any election for federal office. State statutes which apply only to corporate contributions to political parties or candidates include *e.g.*, ARIZ. REV. STAT. ANN. § 16-471 (Supp. 1974); N.J. STAT. ANN. § 19:34-45 (1964); ORE. REV. STAT. § 260.472 (1973).

<sup>14</sup>*E.g.*, MICH. COMP. LAWS ANN. § 168.919 (1967) (any election expenses whatever); OHIO REV. CODE ANN. § 3599.03 (Page 1972) (any other partisan political purpose); W. VA. CODE ANN. § 3-8-8 (1971) (other election expenses whatever).

<sup>15</sup>For a general discussion of the role corporate contributions play in ballot-measure campaigns see Comment, *Corporate Contributions to Ballot-Measure Campaigns*, 6 U. MICH. J.L. REFORM 781 (1973).

<sup>16</sup>191 Mich. 357, 364-67, 158 N.W. 195, 197-99 (1916).

committee organized to defeat a local option election in Michigan which would have prohibited the manufacture and sale of liquor within the county, was held to be a prohibited political contribution. Under similar facts, the Indiana Supreme Court in *State v. Fairbanks*<sup>17</sup> upheld an indictment charging a brewing company's president with making illegal campaign contributions. In a more recent case, however, *State ex rel. Corrigan v. Cleveland-Cliffs Iron Co.*,<sup>18</sup> a corporate contribution of \$500 to a committee created for the purpose of advocating certain propositions and issues to be submitted to the Ohio voters, was held proper. Citing the Ohio statute which proscribes corporate contributions to "partisan political purposes," the court stated:

Thus, although the words "political purposes" may be given a broad construction as including any purpose related to the principles of civil government and the conduct of public affairs, they may also be given a much narrower construction as including only a "partisan" political purpose. In the instant case, we must so limit these words because the General Assembly has used the word "partisan" to limit them.<sup>19</sup>

By judicial construction, a similar gloss has frequently been added to the corrupt practice acts of other states, even where the word *partisan* was lacking.<sup>20</sup> The range of activities comprehended by "partisan political activity," however, is often as unclear as the range of activities comprehended by "political activity." In the *Corrigan* case, for example, the court relied on the word *partisan* in reaching a decision but failed to articulate a meaningful definition.

### C. First Amendment Considerations

Closely associated with the definitional difficulties are the constitutional uncertainties of the corrupt practice statutes. In recent years, the corporate spending prohibition has been severely attacked by commentators who argue that total prohibition of corporate campaign spending is an unconstitutional violation of the corporation's first amendment right of expression.<sup>21</sup> Defenders of the prohibition answer that Congress

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<sup>17</sup>187 Ind. 648, 115 N.E. 769 (1917); *but see* *State v. Terre Haute Brewing Co.*, 186 Ind. 248, 115 N.E. 772 (1917), where the Indiana Supreme Court upheld dismissal of similar charges against the corporation.

<sup>18</sup>169 Ohio St. 42, 157 N.E.2d 331 (1959).

<sup>19</sup>*Id.* at 44, 157 N.E.2d at 333. *See also* *States ex rel Nybo v. District Court*, 158 Mont. 429, 492 P.2d 1395 (1972), where a statute prohibiting corporate contributions "in order to promote the interests, success or defeat of any political party or organization" was held inapplicable to contributions to support passage of a sales tax.

<sup>20</sup>*See generally* *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). The Supreme Court has interpreted regulations limiting the political activities of civil service employees to include partisan political activities only.

<sup>21</sup>*See* T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 637 (1970); H. PENNIMAN AND R.

has reasonably exercised its constitutional authority in protecting the electoral system from harmful and corrupting influence.<sup>22</sup> In response, state and federal courts have generally tended to avoid delineating the permissible breadth of corporate expression in the context of corrupt practice acts,<sup>23</sup> and have adhered to the rule of statutory construction which requires a statute to be construed, if possible, so as to avoid the conclusion that it is unconstitutional.

Although the United States Supreme Court has never construed the federal ban on corporate campaign contributions, it has on three occasions construed that part of the Federal Corrupt Practices Act dealing with expenditures by labor unions in support of political campaigns,<sup>24</sup> which would appear to be equally applicable to corporate contributions to similar causes.<sup>25</sup> On each occasion, however, the Court stopped short of the constitutional issues raised, relying generally on statutory construction to hold that the union expenditures did not fall within the language of the statute.<sup>26</sup>

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HOWARD, *CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS* 1 (1972); Ferman, *Congressional Controls on Campaign Financing: An Expansion or Contraction of the First Amendment?*, 22 AM. U.L. REV. 1 (1972); King, *Corporate Political Spending and the First Amendment*, 23 U. PITT. L. REV. 847, 854-79 (1962); Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U.L. REV. 1033, 1060-66 (1965).

<sup>22</sup>See Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359 (1972) [hereinafter cited as Rosenthal], Note, *Statutory Regulation of Political Campaign Funds*, 66 HARV. L. REV. 1259, 1260-61 (1953). For a general discussion of the free speech implications of campaign spending prohibitions see Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 214 (1972).

<sup>23</sup>Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U.L. REV. 1033, 1060-66 (1965).

<sup>24</sup>

The Smith-Connally Act of 1943 contained a provision which extended the provisions of section 313 [18 U.S.C. § 610] to labor organizations . . . . In 1947 . . . a labor bill . . . had the effect of continuing permanently the application of section 313 to labor organizations.

Ruark, *Labor's Political Spending and Free Speech*, 53 NW. U.L. REV. 61 (1958).

<sup>25</sup>The REPORT OF THE PRESIDENT'S COMMISSION ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS 20-21 (1962) stated:

From our study of the section [18 U.S.C. § 610], its legislative history, and the applicable court decisions, it is clear that no distinction is intended between corporations and unions with respect to political contributions and expenditures.

<sup>26</sup>In *United States v. CIO*, 335 U.S. 106 (1948), the union supported a candidate for Congress in a regular union newspaper which was published with union funds and distributed solely to union members. The district court dismissed the indictment on the ground that the statute was an unconstitutional abridgment of the first amendment. The Supreme Court affirmed the dismissal but did so solely on the ground that a publication in a regular union newspaper which was distributed only to members and a few other persons is not reached by the statute. In a minority opinion, four Justices concurred in the result but argued that any prohibition against union expenditures would be unconstitutional as an interference with free speech.

In *United States v. UAW*, 352 U.S. 567 (1957), the Supreme Court upheld an indictment for using union funds to pay for a television broadcast supporting certain candidates for federal office. Holding that the constitutional issues were not ripe for adjudication, the Court re-

Several lower courts, however, have confronted the constitutionality of corporate spending prohibitions. In *United States v. United States Brewers' Association*,<sup>27</sup> the Western District Court of Pennsylvania upheld an indictment charging the corporation with conspiring to make money contributions in a congressional election. The district court explicitly upheld the constitutionality of the federal statute, stating:

The section itself neither prevents, nor purports to prohibit, the freedom of speech or of the press. Its purpose is to guard elections from corruption, and the electorate from corrupting influences in arriving at their choice.<sup>28</sup>

In a more recent case, *United States v. Boyle*,<sup>29</sup> the District Court of the District of Columbia sustained an indictment charging union officials with conspiracy to violate the federal statute. The court found that the statute did not unreasonably infringe on rights of free speech and association beyond those which the government had demonstrated a compelling interest in regulating.<sup>30</sup> On the other hand, the Massachusetts Supreme Court in *First National Bank v. Attorney General*<sup>31</sup> held unconstitu-

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manded the case for trial on the merits, suggesting the lower court analyze the following questions: (1) whether the expenditures were from union dues or from voluntary contributions of the members; (2) whether the broadcast reached the public at large or only union members; (3) whether the expenditures involved active "electioneering" or only the publication of statistics or records of candidates; and (4) whether the expenditure was made to affect the results of the election. On remand, the jury found the union not guilty after considering the foregoing factors. A three-Justice dissenting opinion labeled the statute unconstitutional and criticized the majority as allowing "a broadside assault on the freedom of political expression guaranteed by the First Amendment." *Id.* at 598.

In *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972), the Supreme Court reversed a circuit court decision upholding the constitutionality of the federal statute, but only on the grounds that an improper charge had been given to the jury regarding voluntariness of member contributions to union political funds.

<sup>27</sup>239 F.163 (W.D. Pa. 1916).

<sup>28</sup>*Id.* at 169. The court cited no precedent and gave no reasons for upholding the validity of the statute. It stated: "So far as I am aware, it has never been claimed that this general restriction upon political contributions was an infringement of the freedom of the press."

<sup>29</sup>338 F. Supp. 1028 (D.D.C. 1972).

<sup>30</sup>In reaching its decision, the court balanced the interests of the government in protecting the electoral system against the labor organization's interest in free speech. *See also* *United States v. Lewis Food Company*, 366 F.2d 710 (9th Cir. 1966); *United States v. Painters Local 481*, 172 F.2d 854 (2d Cir. 1949).

<sup>31</sup>290 N.E.2d 526 (Mass. 1972). MASS. GEN. LAWS ANN. ch. 55, § 7 (Supp. 1975) proscribes corporate contributions "[f]or the purpose of aiding, promoting or preventing the nomination or election of any person to public office . . . 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." A 1972 amendment added the provision 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." The court held that the amendment amounted to impermissible censorship and was unconstitutional under both the first and fourteenth amendments, since the defendant attorney general had failed to show a compelling state interest in imposing a total ban on corporate expression. *Id.* at 539.

tional the section of the Massachusetts corrupt practices statute which prohibited the plaintiff bank from spending money for advertising and publicity in its effort to defeat a proposed state constitutional amendment authorizing a graduated income tax. In a similar case, *United States v. First National Bank*,<sup>32</sup> the Southern District Court of Ohio dismissed the indictment of a national bank for having made a loan to a campaign committee. Emphasizing the difference between a prohibited political contribution by a corporation and a loan made in the ordinary course of a bank's activities, the court concluded with the following interpretation of section 610 of the Federal Corrupt Practices Act:

The evil in Section 610 is not that it prohibits the political expression of a national bank, but that it directly affects the political expression of individuals who may wish to utilize their assets to secure credit on behalf of a particular candidate.<sup>33</sup>

The most recent New York case construing section 460 of the New York Election Law, *Pecora v. Queens County Bar Association*,<sup>34</sup> held that endorsement of political candidates by a local bar association was not a prohibited activity. Although the court avoided the constitutional issue by narrowly interpreting the words "political purpose," it indicated that a literal interpretation would stifle constitutionally protected expression.<sup>35</sup>

## II. SCHWARTZ V. ROMNES

The present case is representative of how the courts have avoided the constitutional issue by narrowing the scope of the statute's application. The Second Circuit Court of Appeals held that a ban on contributions for "political purposes" did not include corporate contributions to "non-partisan" referenda. Citing legislative history leading to enactment of section 460, the court stated:

Thus the avowed objective was not to bar all corporate expenditures with respect to legislative matters generally but to prohibit corporate contributions to candidates or parties, since such contributions might tend to create political debts . . . .

In all this legislative history we find no indication that the framers envisioned the application of § 460 to referenda.<sup>36</sup>

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<sup>32</sup>329 F. Supp. 1251 (S.D. Ohio 1971).

<sup>33</sup>*Id.* at 1254. There is now included in the Federal Corrupt Practices Act an exception for bona fide bank loans. Campaign Act § 205, 86 Stat. 10, amending 18 U.S.C. § 610 (1970).

<sup>34</sup>46 Misc. 2d 530, 260 N.Y.S.2d (Sup. Ct. 1965).

<sup>35</sup>The court decided that the bar association had a professional duty to the public to see that only qualified candidates attained judicial offices and therefore the association was not using funds for an entirely "political" purpose. *Id.* at 537, 260 N.Y.S.2d at 123.

<sup>36</sup>495 F.2d 844, 850 (2d Cir. 1974).

The court concluded that referenda are not susceptible to those corrupting influences which prompted enactment of section 460.

Candidly avoiding the first amendment issue, the court further stated:

In adopting a narrow interpretation of § 460 we are but following the example set by the Supreme Court in its encounters with the Corrupt Practices Act, the federal analog of § 460. Concerned with the serious constitutional doubts that would afflict a broad interpretation of the federal statute's prohibition of contributions or expenditures in support of a political candidate, the court has consciously opted for a restrictive reading of the statute's words.<sup>37</sup>

Accordingly, the court held that the contribution from NYT to YES was not prohibited by section 460.

### III. ANALYSIS

#### A. Legislative History

In arriving at the conclusion that corporate contributions in the context of a "nonpartisan" referendum were not for "political purposes," the majority in *Schwartz* cited Elihu Root's proposed constitutional amendment presented to the New York State Constitutional Convention in 1894,<sup>38</sup> as the forerunner of section 460 and noted that the amendment was specifically concerned with the corruption of legislators, a concern usually of little importance in the context of a referendum vote. Although unsuccessful in his efforts, Root urged adoption of the amendment in order to:

[P]revent the great moneyed corporations of the country from furnishing the money with which to elect members of the Legislature of this State in order that those members of the Legislature may vote to protect the corporations. . . . [T]he time has come when something ought to be done to put a check to the giving of \$50,000 or \$100,000 by a great corporation toward political purposes, upon the understanding that a debt is created from a political party to it, a debt to be recognized and repaid with the votes of representatives in the Legislature and in Congress . . . .<sup>39</sup>

The dissenting opinion sharply criticized the court's reliance on the Root amendment as misplaced, and cited the 1906 *Report of the Joint Committee of the Senate and Assembly of New York Appointed to Investigate the Affairs of Life Insurance Companies*<sup>40</sup> as the impetus for section 460. The following statement from the committee's report illustrates that possible improper application of shareholder funds was con-

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<sup>37</sup>*Id.* at 852.

<sup>38</sup>3 Revised Record of the 1894 New York State Constitutional Convention 885 (1900).

<sup>39</sup>*Id.* at 894-95.

<sup>40</sup>495 F.2d at 855.

sidered as important a reason for regulating corporate contributions as the purchase of political influence.

Contributions by insurance corporations for political purposes should be strictly forbidden. Neither executive officers nor directors should be allowed to use the moneys paid for purposes of insurance in support of political candidates or platforms. . . . Whether made for the purpose of supporting political views or with the desire to obtain protection for the corporation, these contributions have been wholly unjustifiable. In the one case executive officers have *sought to impose their political views upon a constituency of divergent convictions*, and in the other they have been guilty of a serious offense against public morals.<sup>41</sup>

### B. Statutory Construction

The dissent also criticized the court's conclusion that the statute on its face is not applicable to a referendum which has bipartisan support.<sup>42</sup> Citing the statute's omnibus clause which prohibits corporate contributions "for any political purpose whatever," and a clause preceding the omnibus clause that prohibits gifts to "any corporation, joint-stock or other association organized or maintained for political purposes," the dissent suggested that the language of both clauses goes beyond contributions to the traditional political party or candidate for public office.

Although meager, New York case law supports the proposition that section 460 encompasses payments to any entity created to achieve a political purpose. In *People ex rel. Bohlinger v. International Workers Order, Inc.*,<sup>43</sup> a New York lower court found that contributions by a labor organization for the support of communist policies and candidates it favored violated section 460; no weight was placed on whether the recipient was one of the traditional political parties. The referendum matter in *Schwartz*, regardless of any support it may have received from the Republican and Democratic parties, was not a one-sided, non-political issue. The dissent properly characterized the campaign preceding the election as "perhaps the most bitterly contested issue of the 1971 campaign."<sup>44</sup> YES was organized and maintained for the sole purpose of campaigning for voter approval of the transportation bond referendum, an extremely partisan position, especially in light of the overwhelming vote against the action in the 1971 general election.

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<sup>41</sup>*Id.* (emphasis added).

<sup>42</sup>The court based this conclusion on the bipartisan support the bond issue received in the state senate and assembly. The senate vote was 42 in favor (27 Republicans and 15 Democrats) and 13 against (three Republicans and ten Democrats); the assembly vote was 124 in favor (61 Republicans and 63 Democrats) and 25 against (17 Republicans and eight Democrats). Brief for Individual Appellants at 5, *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974).

<sup>43</sup>305 N.Y. 258, 112 N.E.2d 280 (1953).

<sup>44</sup>495 F.2d at 857.

### C. Policy Considerations

The dissent further contended that the bond referendum did lend itself to the corrupting influences which prompted enactment of section 460. Appellees suggested that NYT's contribution to YES was motivated by a desire to purchase influence with the governor who was totally devoted to the passage of the proposition, and whose appointments secretary resigned for a brief period to head up the efforts of YES. The three public utility companies who had contributed to YES,<sup>45</sup> including NYT, were at that time seeking rate increases from the New York Public Service Commission, whose members are appointed by the governor.<sup>46</sup> Although there was no evidence to support suspicions of influence peddling, the dissent asserted that application of section 460 should not depend upon the purity of the donees or the probity of the donors, but rather upon the opportunities for abuse created by the corporate contribution.<sup>47</sup> The "opportunities for abuse" standard is particularly important in this case since large political contributions by public utilities may result in favors with respect to rate making or in higher utility rates to make up for the cost of the contributions.

### D. First Amendment Considerations

In narrowing the scope of section 460, the court believed that a broad construction of the statute would impinge upon corporate first amendment rights by prohibiting the expression of corporate views on important public issues. While this belief musters wide support, its legitimacy is dependent upon two substantive issues, neither expressly discussed by the court: (1) the extent to which corporate contributions for political purposes are expression entitled to first amendment protection, and (2) the appropriate scope of that protection.

1. *Extent of corporate first amendment protection: the corporate character.* Historically, corporations have been given some, but not all, of the constitutional rights of individuals.<sup>48</sup> Although they enjoy the protection of the due process and equal protection clauses, they are not deemed to be citizens for purposes of the privileges and immunities clause. In addition, they have no privilege against self-incrimination,

<sup>45</sup>N.Y. Times, Dec. 21, 1971, at 75, col. 3, reported seven known corporate contributors including the three utility companies. The contributions totaled \$159,000.

<sup>46</sup>495 F.2d at 857 n.3.

<sup>47</sup>*Id.* In recognition of this potential for abuse, legislatures of many states have enacted statutes similar to section 107 of the New York Public Service Law which prohibit the use of revenues received from the rendition of public service for nonoperating expenses.

The dissenting opinion criticized the majority in *Schwartz* for not determining whether NYT's contribution to YES actually came from nonutility revenues. To say that they had nonutility revenues at the time of the contribution, claimed the dissent, is not dispositive of the issue of what revenues were actually used. *Id.* at 859.

<sup>48</sup>See Rosenthal, *supra* note 22, at 380.

and significantly to this discussion, they cannot vote. The Supreme Court has held that corporations are entitled to first amendment protection.<sup>49</sup> The decisions so holding, however, appear to be confined to particular fact situations. In many of the cases, the corporations were in the business of communicating information to the public, and the expression protected "was related to that function rather than to some extraneous interest."<sup>50</sup> As one commentator stated:

There is a clear distinction between an editorial, news article, or advertisement in a newspaper in support of a candidate and contributions by a corporation to finance speeches or advertisements in support of a candidate it believes to be friendly to its interests.<sup>51</sup>

Other cases suggest that corporate first amendment protection is derived from the first amendment rights of individuals within the corporation. In *NAACP v. Alabama*,<sup>52</sup> for example, the Supreme Court upheld the refusal of a New York NAACP chapter to produce its membership lists on the ground that it was asserting the first amendment rights of its members. As to corporations engaged in the business of disseminating news to the public such as a newspaper corporation, however, it may legitimately be asked whether the rights protected are those of the corporation itself or those of the potential reader or listener.<sup>53</sup> In any event, it seems clear that the law is presently uncertain as to the extent of corporate first amendment rights.

2. *Scope of first amendment protection: the communicative act.* Apparently assuming that NYT was entitled to first amendment protection, the court in *Schwartz* went on to equate NYT's contribution with expression. Although the Supreme Court has held in certain areas of the law that protection under the first amendment is not limited to speech, but applies also to conduct which is so interrelated with expression that to divorce one from the other is to effectively deny the expression,<sup>54</sup> it does not follow that corporate money contributions, even if they are the only means by which a corporation can communicate, are part of expression entitled to first amendment protection. One author commented that:

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<sup>49</sup>Several cases are discussed in the materials cited note 21 *supra*.

<sup>50</sup>Rosenthal, *supra* note 22, at 380. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

<sup>51</sup>Rosenthal, *supra* note 22, at 380. This distinction was also important in *United States v. CIO* and *United States v. UAW*, *supra* note 26. It appears that the Court used an internal-external distribution test in upholding the publication of a solely owned union newspaper, but questioning the use of union funds to buy television time.

<sup>52</sup>357 U.S. 449 (1958).

<sup>53</sup>See note 33 *supra* and accompanying text.

<sup>54</sup>See, e.g., *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *NAACP v. Button*, 371 U.S. 415 (1963). See also *Brown v. Louisiana*, 383 U.S. 131 (1966).

The right to speak . . . is more central to the values envisaged by the First Amendment than the right to spend. We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited without violating the First Amendment.<sup>55</sup>

The same author also compared the large contributor who exerts "influence through wealth" to speakers using a "bullhorn or a microphone to enlarge the reach of their voices," and stated that both "are operating vicariously through the power of their purse, rather than through the power of their ideas, and . . . I would scale that relatively lower in the hierarchy of First Amendment values."<sup>56</sup> The ultimate resolution of the constitutional issue requires that a distinction be drawn which upholds the validity of the restraint on mere contributions of money, but overturns applications that touch too closely upon the direct communication of ideas.<sup>57</sup>

3. *NYT's contribution to YES.* In *Schwartz*, the expressive element of NYT's contribution of corporate assets to YES was mitigated by several factors. First, the nature of NYT's communicative act, a money contribution to support the efforts of YES, was diluted because (1) control over the use of the money was given entirely to YES, and (2) identification of NYT as a corporate contributor occurred after the election and then only in response to inquiries made by the *New York Times*.<sup>58</sup> The importance of these facts was stressed by Mr. Justice Reed, writing for the five-man majority in *United States v. CIO*:

If section 313 [18 U.S.C. § 610] were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, or stockholders, or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.<sup>59</sup>

Second, the character of NYT, a public utility corporation not engaged in the business of disseminating news to the general public, and whose activities are closely scrutinized because of its unique nature and relationship with the general public, weakens its claim to absolute first amendment protection. Here NYT supported with shareholder assets a transportation bond issue which the majority of New York residents, including NYT shareholders, voted against. It is therefore difficult to

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<sup>55</sup>Freund, *Commentary* in A. ROSENTHAL, *FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 72 (1971).

<sup>56</sup>*Id.* at 74.

<sup>57</sup>Rosenthal, *supra* note 22, at 382.

<sup>58</sup>N.Y. Times, Dec. 21, 1971, at 75, col. 3.

<sup>59</sup>335 U.S. at 121 (footnote omitted) (emphasis added).

justify the contribution as an assertion of the rights of NYT's customers and stockholders in favor of the bond issue.

#### IV. CONCLUSION

The court in *Schwartz* should have balanced the firm judicial policy which favors avoidance of constitutional issues against an equally important rule of statutory construction: "[A]voidance of a difficulty will not be pressed to the point of disingenuous evasion."<sup>60</sup> Construing section 460 in view of the conditions which existed at the time of its enactment and which still exist today,<sup>61</sup> it is clear that the New York Legislature intended the proscriptions of the statute to apply to both candidate and ballot-measure campaigns. To hold otherwise is to elevate form over substance and effectively frustrate legislative objectives.

The court could have justifiably interpreted the statute to include referenda and still upheld its constitutionality since the first amendment protection to which NYT may have been entitled was mitigated by the nature of its alleged communicative act and by its corporate character. Failure of the court to confront the constitutional issue puts a loophole in the statute which may open the door to unlimited corporate financial participation in ballot-measure campaigns regardless of obvious opportunities for abuse.

The fact that there are some questions as to the constitutionality of the corporate spending prohibition does not justify judicial avoidance of those issues. The electoral system is fundamental to our system of representative democracy. Protecting it requires the highest degree of cooperation between the legislative and judicial branches of government.

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<sup>60</sup>Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

<sup>61</sup>Recent scandals arising from corporate campaign contributions illustrate the continued validity of the objectives which prompted enactment of the corrupt practice statutes. In 1970, the officers and directors of two large shipping lines were convicted and fined \$50,000 each for making illegal campaign contributions; each had recently received multimillion dollar government subsidies. REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON FINANCING CAMPAIGNS, ELECTING CONGRESS, THE FINANCIAL DILEMMA 49 (1970). In 1971, allegations of a link between an antitrust settlement favorable to International Telephone and Telegraph Company (ITT) and ITT's simultaneous pledge to underwrite for \$400,000 the 1972 Republican national convention initiated investigations which continue today. NEWSWEEK, Mar. 20, 1972, at 24. In 1973, officers and directors of several corporations including American Airlines Company, 3M Corporation, Goodyear Tire and Rubber Company, Gulf Oil Company, and Ashland Oil Company all pleaded guilty to formal charges of making illegal corporate contributions to President Nixon's reelection campaign fund. AVIATION WEEK, Oct. 22, 1973, at 36; NEWSWEEK, Nov. 26, 1973, at 34; U.S. NEWS, Nov. 26, 1973, at 28. In 1974, two former officials of the nation's largest milk producer-cooperative were sentenced to prison after being found guilty of charges involving illegal campaign donations, including \$600,000 for the Nixon reelection campaign. According to testimony before congressional committees, the money was part of \$2 million pledged to Nixon by the dairy group in connection with the 1971 milk support prices. Salt Lake Tribune, Nov. 2, 1974, at 1, col. 1.