

**Testimony of Robert A.G. Monks
Before the Joint Standing Judiciary Committee
Of the Maine State Legislature**

In Support of LD 1495: An Act To limit the political speech of corporations
May 18, 2005

Legislative Document #1495:

“The large corporation fits oddly in the democratic theory and vision. Indeed, it does not fit.”

The State of Maine has a unique opportunity to lead the entire nation out of its current decline away from democracy towards corporatism. The power of corporations is so entrenched in most of the states that a bill such as LD 1495 would never achieve serious consideration. Maine not only has a firm legislative tradition of Hearings on every bill, but Mainers are not in the thrall of the power of large corporations. In brief, we can do the right thing and in doing it we can provide a single service to the nation.

LD 1495 purports to remove business corporations from the legal definition of “person”. We must recognize that in so doing we are defying at least the dicta of the United States Supreme Court dating back to 1878. Reflect on the judgment of noted lawyer author Scott Turow in considering the 1978 Supreme Court opinion upholding in Bellotti vs. Bank of Boston precisely that kind of corporate “political speech” that LD 1495 would prevent:

“As a futile gesture, railing in the opinion pages about a Supreme Court decision is probably rivaled only by King Canute's routine at the edge of the sea. But my view is that Buckley [Bellotti] may well come to be regarded as a sort of 20th-century stepchild to Dred Scott, the case that held that the property rights of Southern slaveholders in their slaves had to be recognized in the North.

To our eyes, Buckley [Bellotti] appears far less iniquitous. But as in Dred Scott, the Court used formalistic reasoning to find constitutional protection for economic interests at the cost of fundamental notions of equality. We can only hope that the long-run damage to the Republic is not as severe.”¹

As Turow points out, in the fabled “land of the free and home of the brave”, no sooner did our Constitution stop treating people of color as if they were property than it adopted the view that legal creatures were entitled to precisely the same rights as flesh and blood.

“Although the law varies from one country to another, it generally grants corporations as legally fictitious persons many of the rights, including rights of political participation that one might think appropriate in a democracy only for living, breathing persons. Corporations are legally entitled to engage heavily in political activity, even if they cannot vote or run for office. There, too, are legal rights of free speech and of communication with political elites. Corporations as person is a fundamental fact about democracy or, more precisely, about

¹ The High Court's 20-year Old Mistake, *New York Times*, 10/12/97

undemocracy even though its implications are often more timidly than bravely studied. The transformation of corporation into citizen can hardly be dismissed as insignificant on the ground that enterprises are, after all, composed of individual persons. The effect of granting the enterprise a citizen's rights in addition to the rights already enjoyed by participants in the enterprise is to confer great special power of groups of enterprise executives, who can make use of corporate assets and personnel in addition to exercising the rights and powers they enjoy as individual citizens. Other than by redefining democracy, I do not see how it is possible to reconcile democracy with the practice of conferring on institutions the rights and powers of real persons. The rationale for democracy is rights and power for living, hurting and aspiring persons whose assigned rights and powers give them protection as well as opportunities to pursue their aspirations. It would make no sense on democratic grounds to assign such rights and power to fire hydrants or computers - they neither suffer nor aspire. Neither does a corporation suffer or aspire. Only the people in it do. To them alone would a democratic state assign the rights and powers of persons."²

The problem is one of symmetry or more properly put of asymmetry. Dialogue between individuals has a certain harmony of scale, although it is clear some people are more verbally clever than others and some are richer. Corporations have the legally granted prerogative of gathering the investment of hundreds of thousands, sometimes millions, of investors in a single account which can finance advertisement, lobbying and professional services utterly out of the capacity of the flesh and blood citizen. The problem is that corporate speech tends to overwhelm the public dialogue. While corporations are an important element of wealth creation in a healthy society, theirs is not the only voice that should be heard.

“Presumably in a free market economy the players require some restraints in their pursuit of society's resources and creation of externalities, and those restraints are to be imposed by government acting in response to the preferences of individual human beings who have a much broader range of preferences than simply wealth maximization. To allow the wealth maximizing business corporation a power voice in determining how social resources are to be allocated by government is to give that corporation significant power in determining how the rules of the only game it is playing should be changed, rather than confining it to play under the rules preferred by human individuals.”³

On a national scale, we can understand the impact of major corporations' advocacy of particular policies by focusing on ExxonMobil's insistence contrary to virtually all reputable academic, business and governmental opinion that there is substantial doubt as to whether Global Warming exists. And if such a state is real, EM insists that there is no proven correlation with the carbon discharges from consuming fossil fuel. Let's consider at some length an article in the current Mother Jones (May, June 2005):

THIRTY YEARS AGO, the notion that corporations ought to sponsor think tanks that directly support their own political goals—rather than merely fund disinterested research—was far more controversial. But then, in 1977, an associate of the AEI (which was founded as a business association in 1943) came to industry's rescue. In an essay published in the *Wall Street Journal*, the influential neoconservative Irving Kristol

² Lindblom, The Market System, (Yale 2001) at p.238.239.

³ Brudney, Victor, Association, Advocacy and the First Amendment, William & Mary Journal, Vol4, Issue 1, Summer 1995, 1,63.

memorably counseled that “corporate philanthropy should not be, and cannot be, disinterested,” but should serve as a means “to shape or reshape the climate of public opinion.”

Kristol’s advice was heeded, and today many businesses give to public policy groups that support a laissez-faire, antiregulatory agenda. In its giving report, ExxonMobil says it supports public policy groups that are “dedicated to researching free market solutions to policy problems.” What the company doesn’t say is that beyond merely challenging the Kyoto Protocol or the McCain-Lieberman Climate Stewardship Act on *economic* grounds, many of these groups explicitly dispute *the science* of climate change. Generally eschewing peer-reviewed journals, these groups make their challenges in far less stringent arenas, such as the media and public forums.”

I believe the strategy is not to dispute on scientific grounds, but to create a sense of doubt in the minds of the public, to give the impression that there is still disagreement and rational dispute within the scientific community, because they cannot win the argument of scientific grounds, as demonstrated by the next sentence. That reminds me so much of the Tobacco Institute in the ‘70s! “Unproven! No causation!”

EXXONMOBIL’S FUNDING OF THINK TANKS hardly compares with its lobbying expenditures — \$55 million over the past six years, according to the Center for Public Integrity. And neither figure takes much of a bite out of the company’s net earnings — \$25.3 billion last year. Nevertheless, “ideas lobbying” can have a powerful public policy effect.

Consider attacks by friends of ExxonMobil on the Arctic Climate Impact Assessment (ACIA). A landmark international study that combined the work of some 300 scientists, the ACIA, released last November, had been four years in the making. Commissioned by the Arctic Council, an intergovernmental forum that includes the United States, the study warned that the Arctic is warming “at almost twice the rate as that of the rest of the world,” and that early impacts of climate change, such as melting sea ice and glaciers, are already apparent and “will drastically shrink marine habitat for polar bears, ice-inhabiting seals, and some seabirds, pushing some species toward extinction.” Senator John McCain (R-Ariz.) was so troubled by the report that he called for a Senate hearing.

Industry defenders shelled the study, and, with a dearth of science to marshal to their side, used opinion pieces and press releases instead. “Polar Bear Scare on Thin Ice,” blared [TV] columnist Steven Milloy, an adjunct scholar at the libertarian Cato Institute (\$75,000 from ExxonMobil) who also publishes the website *JunkScience.com*. Two days later the ... *Washington Times* published the same column. Neither outlet disclosed that Milloy, who debunks global warming concerns regularly, runs two organizations that receive money from ExxonMobil. Between 2000 and 2003, the company gave \$40,000 to the Advancement of Sound Science Center, which is registered to Milloy’s home address in Potomac, Maryland, according to IRS documents. ExxonMobil gave another \$50,000 to the Free Enterprise Action Institute — also registered to Milloy’s residence. Under the auspices of the intriguingly like-named Free Enterprise Education Institute, Milloy publishes *CSRWatch.com*, a site that attacks the corporate social responsibility movement. Milloy did not respond to repeated requests for comment for this article; a Fox News spokesman stated that Milloy is “affiliated with several not-for-profit groups that possibly may receive funding from Exxon, but he certainly does not receive funding directly from Exxon.”

Setting aside any questions about Milloy's journalistic ethics, on a purely scientific level, his attack on the ACIA was comically inept. Citing a single graph from a 146-page overview of a 1,200 – plus - page, fully referenced report, Milloy claimed that the document “pretty much debunks itself” because high Arctic temperatures “around 1940” suggest that the current temperature spike could be chalked up to natural variability. “In order to take that position,” counters Harvard biological oceanographer James McCarthy, a lead author of the report, “you have to refute what are hundreds of scientific papers that reconstruct various pieces of this climate puzzle.”

Nevertheless, Milloy's charges were quickly echoed by other groups.

TechCentralStation.com published a letter to Senator McCain from 11 “climate experts,” who asserted that recent Arctic warming was not at all unusual in comparison to “natural variability in centuries past.” Meanwhile, the conservative George C. Marshall Institute (\$310,000 [from ExxonMobil]) issued a press release asserting that the Arctic report was based on “unvalidated climate models and scenarios...that bear little resemblance to reality and how the future is likely to evolve.” In response, McCain said, “General Marshall was a great American. I think he might be very embarrassed to know that his name was being used in this disgraceful fashion.”

It is worthwhile to consider in some detail exactly how ExxonMobil dominates “speech” in the public debates about global warming. The most profitable company in the history of the world has literally limitless money to contribute to existing institutions, to create new ones and to directly lobby and advertise. During this month - incidentally when ExxonMobil's Annual Meeting takes place at which several Global Warming resolutions will be considered by its shareholders - one cannot read a magazine or turn on the television without being assaulted by some bland advertisement identifying Exxon Mobil with a balanced concern about the energy policy alternatives for the future.

It is worth pausing to consider in detail one account of Exxon's initiative with foundations. The current editions of *Economist* and the *New York Times* {Attachments 1 + 2} are embellished with “feel good” advertising on a lavish scale suitable for the world's most profitable company. There is no reflection of the effort by Exxon to dominate the dialogue concerning Global Warming. For that information, you must consult the current *Mother Jones*, a page from which is attached as #3. Exxon has been the principal source of funding for virtually all institutions who have published material casting doubt on the science of Global Warming; it has not conspicuously endowed those who support it.

Lets consider the case of Wal-Mart – the world's largest corporation and soon to become the nation's largest investor in political candidates for federal offices – wasn't pleased with a decision last year [2003] by officials in Contra Costa County (just east of San Francisco). The County recently joined a growing number of communities nationwide to pass laws limiting the size of enormous new ‘super centers’ that sell groceries as well as general merchandise. Wal-Mart used company funds to hire a corps of signature gatherers and placed an initiative on the ballot to rescind the law. In a slap in the face to its workers, Wal-Mart paid these political operatives \$10 per hour – \$2 more than its typical store employees. Wal-Mart's million-dollar public relations campaign tripled

spending by opponents and persuaded voters to overturn the ordinance (the company was aided by the poor construction of the law)’⁴

It is not appropriate here to do more than illumine the scope of corporate power in framing the public debate. The enactment of LD 1495 would place Maine as the leader in beginning the effort to recover the discussion space in our society for flesh and blood human beings. There should be no confusion. Passage of LD 1495 is only the beginning of the difficult struggle that alone has given democracy in America its distinctive characteristics. Comparable legislation in other states has been held to be unconstitutional by the United States Supreme Court. But we can learn from the example of others and there is a clear path to follow, which I will proceed to outline.

Life times of scholarship have been devoted to the effort to understand the United States Supreme Court’s views with respect to constitutional protection of various corporate rights. This is not the place to revisit them. Suffice it to say that the law of the land has been assumed for more than a hundred and twenty five years that a corporation is a “person”. LD 1495 purports to challenge that characterization.

In recent decisions, the Court has suggested that restrictions on corporate speech can be constitutionally permissible in the presence of a showing that it represents a threat. The classic statement of the Court’s current position was proclaimed in Bellotti vs. Bank of Boston, not untypically as a footnote to the opinion of the plurality.

FN26. In addition to prohibiting corporate contributions and expenditures for the purpose of influencing the vote on a ballot question submitted to the voters, § 8 also proscribes corporate contributions or expenditures "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." See n. 2, *supra*. In this respect, the statute is not unlike many other state and federal laws regulating corporate participation in partisan candidate elections. Appellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections. Cf. Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972); United States v. United Automobile Workers, 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957); United States v. CIO, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948). About half of these laws, including the federal law, 2 U.S.C. § 441b (1976 ed.) (originally enacted as the Federal Corrupt Practices Act, 34 Stat. 864), by their terms do not apply to referendum votes. Several of the others proscribe or limit spending for "political" purposes, which may or may not cover referenda. See Schwartz v. Romnes, 495 F.2d 844 (CA2 1974).

The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. See United States v. United Automobile Workers, *supra*, 352 U.S., at 570-575, 77 S.Ct., at 530-533; Schwartz v. Romnes, *supra*, at 849-851. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different

⁴ Kaplan, Jeffrey and Milchen, Jeff, Democracy vs. ‘Free Speech’, *The Free Press*, March 6, 2004.

context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections. Cf. *Buckley v. Valeo*, *supra*, 424 U.S., at 46, 96 S.Ct., at 647; Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U.Pa.L.Rev. 386, 408-410 (1977).

One quotes judicial opinions with reluctance as their permutations, so dear to the scholar, are just confusing to the rest of us. Enough said. Footnote 26 was more recently cited by the majority of the Court in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 636, 659 (1990):

State law grants corporations special advantages - such as limited liability, perpetual life and favorable treatment of the accumulation and distribution of assets - that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic market place" to obtain an "unfair advantage in the political market place"....

[T]his court has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections..."

While conceding that the language of both *Bellotti* and *Austin* is directed at candidate elections and not at broader "political speech", the greatest authority on this subject concludes: "Still, the *Austin* decision implements the logic and import of footnote 26 in *Bellotti* in terms that imply that footnote 26 of the *Bellotti* opinion offers a loose thread which might be pulled hard enough to unravel the decision."⁵

This brings us to conclusion and a respectful suggestion for this Committee. Before this legislation can be enacted, there needs to be an explicit finding of a "danger of real or apparent corruption posed by corporate expenditures" in such matters as referenda votes. I, therefore, suggest that the Committee consider the authorization of a Legislative Study Report to consider and report back for the next session. In the competition for funds enabling such studies, it seems not unlikely that private sector support could be availed of.

⁵ Brudney, *op.cit.supra*, at 69, fn 174