formation or proceedings that the government wishes to remain confidential. For example, in *Pell v. Procunier,* 417 U.S. 817 (1974), the Court upheld a California law that prohibited the press from interviewing individual inmates. However, in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), the Court appeared to depart from that position, holding that criminal trials must be open to the public unless the trial court could articulate an "overriding interest" to the contrary.

Although the Court refused to allow members of the press to shield themselves from being called to testify before a grand jury in *Branzburg v. Hayes,* 408 U.S. 665 (1972), Justice Lewis F. Powell Jr. in his concurrence stated that members of the press did have "constitutional rights with respect to the gathering of the news." Accordingly, Powell noted that members of the press could petition the trial court for a protective order when they felt they were being improperly called to testify. Because a majority of lower federal courts have followed Powell's concurrence rather than the *Branzburg* majority decision, and because many states have passed laws giving the press limited immunity with regard to revealing their sources, it is relatively rare that members of the press are subpoenaed to testify today.

ASSOCIATION

As an extension of the enumerated right of the people to assemble to address their grievances to the government and the individual's right to free speech, the Supreme Court first articulated the "right to associate" with its decision in *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958). In that case, the Court stated that it would be a violation of the right to associate if Alabama required the NAACP to publicly disclose its membership list. In subsequent decisions involving the disclosure of membership information, one of which was *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963), the Court made clear that such disclosure would impermissibly infringe on the right to associate unless the state had a compelling interest and there was a "substantial relation" between that interest and the information sought.

*Martha M. Lafferty*

*See also: Abington School District v. Schempp; Brandenburg v. Ohio; Branzburg v. Hayes; Chaplinsky v. New Hampshire; Employment Division, Department of Human Resources of Oregon v. Smith;* Establishment Clause; *Everson v. Board of Education;* Free Exercise Clause; Hate Crimes; *Lee v. Weisman; National Association for the Advancement of Colored People v. Alabama ex rel. Patterson;* Right to Petition; *Schenck v. United States;* Separation of Church and State; *Sherbert v. Verner;* Time, Place, and Manner Restrictions; *Tinker v. Des Moines Independent Community School District; Virginia v. Black; West Virginia Board of Education v. Barnette.*

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## First National Bank of Boston v. Bellotti (1978)

In a holding that preserved a place for corporate speech in political debate, the U.S. Supreme Court in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), found unconstitutional a Massachusetts criminal statute that prohibited corporate contributions and expenditures designed to influence or affect the vote on questions submitted to the voters, unless the political issue materially affected the property, business, or assets of the corporation. First National Bank of Boston and others desired to "speak" (spend) in opposition to a proposed state constitutional amendment authorizing a graduated individual income tax and thus alleged a violation of its political speech rights under the First Amendment to the U.S. Con-

stitution. In defense of the restriction, the state argued that the significance of the context justified the regulation of certain "speakers" in the interest of preventing distortion, corruption, and the drowning out of citizens' voices in the electoral process.

Writing for a five–four majority, Justice Lewis F. Powell Jr. focused less on the messenger—essentially avoiding the question of whether corporations have certain rights—and more on the message, reasoning that the bank's contributions were essential to a diverse and vibrant exchange of ideas. What mattered most, in other words, was the political *speech* at stake, not the political *speaker,* because the general public was capable of sifting through the input and arguments proffered by a vast array of contributors. Justice Powell did not summarily reject the notion that corporate "speech" could overwhelm the electoral process—accepting that, with sufficient evidence, such a restriction could be constitutional—but he explained that the state had failed to provide proof justifying such a prohibition.

In separate dissents, Justices Byron R. White and William H. Rehnquist emphasized the particular nature and power of the corporate form. To varying degrees, each conceded that corporations may have a legitimate voice in the political arena, but made the important point that because corporate bodies are created by the state, they may legitimately be subject to various restrictions on expression not imposed upon individuals. In particular, the state had the obligation to prevent institutions enjoying state-conferred advantages from dominating or compromising the integrity of the electoral process.

Although state restrictions on corporate speech and state concerns for relative parity and equality of opportunity for political speakers would not garner majority support until *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), in many ways *Bellotti* anticipated the debate that ensued over campaign finance issues throughout the 1980s and 1990s. The *Bellotti* majority, following the logic of *Buckley v. Valeo,* 424 U.S. 1 (1976), criticized the state for its paternalistic regulation of the "marketplace of ideas," but the dissenters recognized the inherently problematic nature of certain speakers and certain forms of speech—acceding to the state the power to supervise such forms of expression in the service of larger public or societal interests. A significant comment, however, was that although the evidentiary burden was not satisfied in *Bellotti,* the Court did concede that the state assumes an important regulatory role during campaigns and elections.

*Brian K. Pinaire*

*See also: Buckley v. Valeo;* Corporate Speech.

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## Flag Burning

Perhaps nothing more symbolizes America's commitment to civil liberties than the constitutional status of the U.S. flag. A revered symbol of national unity, it flies in front of every public building, is mounted in almost every classroom in the country, and is witness to thousands of schoolchildren daily pledging allegiance to it and to the nation for which it stands. Boy and Girl Scouts through the decades have learned the proper way to display the flag, to fold it, and to dispose of flags that have worn out. One of the most famous monuments in the country stands in Arlington National Cemetery in Virginia and commemorates U.S. Marines raising the flag on the Japanese island of Iwo Jima after winning a bitter World War II battle. Yet the nation protects the right of people to desecrate its flag, the very symbol of its commitment to freedom. How did this happen?

During the Vietnam War years, antiwar protesters looked for ways to persuade citizens and lawmakers to end the war. They discovered that news media were more likely to broadcast dramatic events and developed a number of tactics to get their protests on the