SUPREME COURT OF LOUISIANA

99-CA-2337

CLAUDE M PENN, JR., GLADNEY L. MANUEL, JR., FELICIANA VENTURES, INC. AND MANUEL'S I-10 AUTO & TRUCK STOP, INC.

Versus

STATE OF LOUISIANA, THROUGH THE HONORABLE MURPHY J. FOSTER, JR., GOVERNOR, THE HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL, THE SUPERVISORY COMMITTEE ON CAMPAIGN FINANCE DISCLOSURE AND THE DEPARTMENT OF PUBLIC SAFEY AND CORRECTIONS, LOUISIANA GAMING CONTROL BOARD

KNOLL, Justice, dissenting.

I respectfully dissent. By this per curiam, the Court[1] ignores a body of federal and state jurisprudence that finds a restriction of a First Amendment right constitutionally permissive when the restriction is narrowly drawn and directly advances an asserted governmental interest, such as in this case: that the election process be not only free from corruption, but also free from the appearance of corruption. The inherent weakness in the Court's position is its total disregard of this State's history, steeped in gambling corruption, and application of the restriction as though it were applicable to the private sector. This omission strikes at the heart of the Legislature's narrowly drawn restrictions and the asserted governmental interest therein.

"[T]he ultimate good desired is better reached by ***free trade in ideas*** — that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) (emphasis added). At the heart of "free trade" in the political marketplace is the necessity that the election process be not only free from corruption, but also free from the appearance of corruption. I find that La.R.S. 18:1505.2(L)(3)(a)(i), La.R.S. 18:1505.2(L)(3)(b)(i) as applied to La.R.S. 18:1505.2(L)(3)(a)(i) and Rule 107 of Title 42 of the Louisiana Administrative Code permissibly curb the unhealthy political influence or the appearance of unhealthy political influence which persons substantially interested in this State's gaming industry could bring to bear on an election.[2]

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[1] Because of the unusual formation of this opinion, I collectively refer to the per curiam and the concurrences which elaborate upon that ruling as the "Court."

[2] For the fiscal year ending June 30, 1998, the video gaming industry collected $653,375,000 in net gaming proceeds from the devices. For the fiscal year ending June 30, 1997, the industry collected $618,477,000 in net proceeds from the devices.

The Louisiana Constitution of 1879 declared gambling a "vice" and the Legislature was directed to enact laws for its suppression. LA. CONST. art. 172 (1879). Louisiana's Constitutions of 1898, 1913, and 1921 all contained similar provisions regarding gambling. *See* LA. CONST. art. 19, § 8 (1921); LA. CONST. arts. 178, 188, 189 (1913); LA. CONST. arts. 178, 188, 189 (1898). Although the delegates to the Constitutional Convention which convened on January 5, 1973, eliminated the moral condemnation of gambling and chose to suppress gambling rather than prohibit it, it is clear that the Legislature continued its role of defining gambling. *Polk v. Edwards*, 626 So. 2d 1128, 1141 (La. 1993). Thus, the Louisiana electorate ratified the Constitution of 1974 which followed its predecessor documents with the inclusion of article XII, § 6(B) that "[g]ambling shall be defined by and suppressed by the legislature." In order to understand the reasons for these constitutional declarations throughout the period of Louisiana's statehood, reference to the history of gambling in this State is essential.

Historically, gambling has been recognized as a vice activity which poses a threat to public health and public morals. Although the vice of gambling existed throughout the State during the eighteenth and nineteenth centuries, New Orleans was recognized as the gambling capital. *See* TIMOTHY L. O'BRIEN, BAD BET: THE INSIDE STORY OF THE GLAMOUR, GLITZ, AND DANGER OF AMERICA'S GAMBLING INDUSTRY 99 (1998). The State outlawed gambling in 1812, but New Orleans received a special exemption that allowed gambling to continue.

When federal troops occupied New Orleans from 1862 to 1877, the Louisiana Lottery Company, a private corporation, went into business. O'BRIEN, *supra*, at 105-06. Even though the Constitution had previously declared lotteries illegal, a constitutional amendment was passed in 1866 and the Louisiana Lottery Corporation was given a 25-year charter to operate. *Id*. The Lottery was marketed nationwide via the mail and branch offices and by 1890 was taking in $28 million yearly. *Id.* at 106-07. Lottery proceeds not only paid for the first waterworks in New Orleans, but this lucre supported the New Orleans charity hospital and upgraded the public schools. *Id.* at 107; Stephanie A. Martz, Note, *Legalized Gambling and Public Corruption: Removing the Incentive to Act Corruptly, or, Teaching an Old Dog New Tricks*, 13 J.L. & Pol. 453, 458-59 (1997). In 1893, the federal government intervened in the Louisiana Lottery and passed a law prohibiting any form of lottery sales and promotion. Martz, *supra*, at 459.

Gambling remained available in New Orleans during the first decades of the twentieth century in small establishments around the city, even though the Constitution had outlawed all gambling. O'BRIEN, *supra*, at 108. In 1934, Huey P. Long allowed slot machines in New Orleans and several casinos outside the city. *Id.* In the 1950s a reform movement ran the larger casinos away, but the slot machines and back-alley casinos stayed in business until the 1970s. *Id.* at 109.

With the boom of the petrochemical industry during the 1970s and 1980s, the State's economy was revitalized. *Id.* There was no longer a need for gambling proceeds to fund government projects, that is until the bottom fell out of the oil industry. *See id.* However, when the State's economy went into a tailspin with the decline in the oil industry, the State Legislature, armed with its constitutional authority to "define gambling," turned to legalized gambling as a means out of the fiscal doldrums. *See id.* In a series of enactments in 1991 and 1992, the Legislature passed four acts providing for the licensing of gaming, to-wit: at a land-based casino in New Orleans, La.R.S. 4:601-686; on cruise ships operating out of New Orleans, La.R.S. 14:90(B); on river boats operating on designated rivers in the state, La.R.S. 4:501-562; and by means of video poker machines located throughout the State, La.R.S. 33:4862.1-19.

In *Polk*, although this Court upheld the power of the Legislature to provide for the licensing of gaming, it further recognized that the Legislature's authority to regulate gambling constitutes a legitimate exercise of police power.[3] *Id.* at 1137; *see also Theriot v. Terrebonne Parish Police Jury*, 435 So. 2d 515, 516 (La. 1983); *State v. Mustachia*, 152 La. 821, 94 So. 408 (1922); *Ruston v. Perkins*, 114 La. 851, 38 So. 583 (1905). "Defining and prescribing means of suppression are left to the state Legislature and the legislative determination in this regard constitutes an appropriate exercise of police power for the protection of the public." *Theriot*, 435 So. 2d at 521. Moreover, in *Polk* this Court further held that the power to suppress gambling and "to determine how, when, where, and in what respects gambling shall be prohibited or permitted" has been constitutionally delegated to the Legislature. *Polk*, 626 So. 2d at 1128.

In 1996, the Legislature, pursuant to its constitutional mandate to define and suppress gambling, enacted the Louisiana Gaming Control Law, La.R.S. 27:1 - :392. From the outset, the

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[3] Police power is "the inherent power of the state to govern persons and things for the promotion of general security, health, morals, and welfare." *Polk*, 626 So. 2d at 1142.

legislation announced the public policy of this State concerning gaming. In La.R.S. 27:2(A), the Legislature stated:

> The legislature hereby finds and declares it to be the public policy of the state that the development of a controlled gaming industry to promote economic development of the state requires thorough and careful exercise of legislative power to protect the general welfare of the state's people by keeping the state free from criminal and corrupt elements. The legislature further finds and declares it to be the public policy of the state that to this all persons, locations, practices, associations, and activities related to the operation of licensed and qualified gaming establishments and the manufacture, supply, or distribution of gaming devices and equipment shall be strictly regulated.

This legislation further declared that

> [a]ny license, casino operating contract, permit, approval, or thing obtained or issued pursuant to the provisions of this Title or any other law relative to the jurisdiction of the board is expressly declared by the legislature to be a pure and absolute revocable ***privilege*** and ***not a right***, property or otherwise, under the constitution of the United States or of the state of Louisiana.

La.R.S. 27:2(B) (emphasis added); *see also Catanese v. Louisiana Gaming Control Bd.*, 97-1426 (La.App. 1 Cir. 5/15/98), 712 So. 2d 666, 670, *writ denied*, 98-1678 (La. 11/25/98), 726 So. 2d 30; *Eicher v. Louisiana State Police, Riverboat Gaming Enforcement Div.*, 97-0121 (La.App. 1 Cir. 2/20/98), 710 So. 2d 799, 807, *writ denied*, 98-0870 (La. 5/8/98), 719 So. 2d 51.

In the same legislative session, the Legislature enacted La.R.S. 18:1505.2(L) relative to campaign finance. As the Court herein recognized, the provisions of La.R.S. 18:1505.2(L) prohibit persons substantially interested in the gaming industry of this State, as more particularly defined in the statute, from making campaign contributions, loans, or transfers of funds to any candidate, any political committee of any such candidate, or any other political committee which supports or opposes any candidate. The purpose of this prohibition against campaign contributions from this segment of society is set out in La.R.S. 18:1505.2(L)(1):

> [I]t is essential to the operation of ***effective democratic government*** in this state that ***citizens have confidence in the electoral process*** and that elections be conducted so as to ***prevent influence and the appearance of influence*** of candidates for public office and of the election process by special interests, particularly by persons substantially interested in the gaming industry of this state. (emphasis added).

It is against this well-defined backdrop that I view the provisions now before us, and it is this setting that I find the Court fails to reference in its assessment of the narrow restriction on relators' First Amendment rights which directly advances an asserted governmental interest. Partly because

of this State's history and in part because of the constitutional mandate that the Legislature suppress gambling, I find that the Court today impermissibly interferes with the legislative determination as to the need for prophylactic measures where corruption or the appearance of corruption is the evil feared. *See Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982). "These interests directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.'" *Id.* at 208 (quoting *United States v. Automobile Workers*, 357 U.S. 567, 570 (1957)).

Although the Court references *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), as the seminal case on campaign contributions and expenditures, I find that it only pays lip service to the opinion as a whole and misconstrues its holding as applicable herein. Without even entering the foray of whether *Buckley* requires strict scrutiny of the legislative enactments now implicated,[4] I find that the State has well demonstrated an important governmental interest in the enactment of legislation to insure an effective democratic government and has closely drawn the means to avoid the unnecessary abridgement of any associational freedom implicated. Thus, even if the legislation significantly interferes with these video draw poker licensees' protected rights of political association, I find no constitutional impingement which would interdict this legislation, because the restriction is narrowly drawn and directly advances an asserted governmental interest.

Buckley recognized the legislative proponents' assertion that the "primary interest served by the limitations [on campaign spending] is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* at 25. The *Buckley* opinion further embodies the principle that our system of democracy is undermined to the extent that large political contributions are given or appear to be given to secure a political quid pro quo from potential and current office holders. *Id.* at 26-27.

Even if *Buckley* protects both political expression and political association, it nonetheless stands for the proposition that these constitutional interests may be impeded if the state has a

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[4] Since *Buckley* held that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails ***only a marginal restriction upon the contributor's ability to engage in free communication,***" *id.* at 20, I find that it skirted the question of strict scrutiny and instead applied a balancing test which compared the legislative need for the limitation on political contributions to the degree of burden placed on First Amendment freedoms. Under either test, however, I find the legislative provisions constitutional.

sufficiently compelling countervailing interest, and the stricture is narrowly tailored to meet the state's concern. *Id.* at 28; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 528-29 (1996) (O'Connor, J., joined by Rehnquist, C.J., and Souter and Breyer, JJ., concurring in part and concurring in the judgment) (noting that for a commercial free speech restriction to pass constitutional muster, it must be decided whether the regulation "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

In the present case, the Legislature, pursuant to its constitutional mandate to define and suppress gambling and with full knowledge of this State's corrupt gambling history, has narrowly excluded persons substantially interested in this State's gaming industry, to include video draw poker licensees, from making campaign contributions. Instead of a blanket regulation covering every individual as in *Buckley*, the Louisiana Legislature defined well-delineated restrictions on a strictly regulated industry in imposing this ban on campaign contributions. I would find that the Louisiana Legislature has enacted narrowly tailored statutes to achieve the expressed, compelling state interest.[5]

It is also significant to me that these legislative provisions only affect one aspect of political expression, *i.e.*, the making of campaign contributions. Notwithstanding this ban, these licensees can nonetheless participate in the direct exercise of their First Amendment speech rights, *e.g.*, they may make independent expenditures supporting or opposing particular candidates; they may urge their employees to support or oppose particular candidates; corporate officers and employees may openly support individual candidates by displaying yard signs and voluntarily working in political campaigns; they may even sponsor phone banks to encourage persons to vote.

It has long been held that neither the right to associate nor the right to participate in political activities is absolute. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973). In stark contrast to the direct speech rights that these licensed gaming entities and individuals can utilize, there are numerous instances where individuals are absolutely barred from the exercise of their First Amendment rights in the political process: classified civil servants and members of the Civil Service Commission, LA. CONST. art. X, § 9; judges, LA. CODE OF JUDICIAL

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[5] Contrary to the Court's argument, because the statutes prohibit only ***some,*** but not all, First Amendment activity and apply to ***selected,*** but not all, members of the video poker industry, the Legislature has enacted statutes narrowly tailored to achieve the expressed compelling state interest, thus, satisfying ***any*** constitutional strict scrutiny analysis.

CONDUCT, Canon 7; members of the Louisiana Board of Ethics, La.R.S. 42:1132(B)(3)(e). In the present case, I simply view the limitations of La.R.S. 18:1505.2(L) as *restrictions* that these licensees must abide by in order to engage in the *privilege* of licensed gaming activities.

Even though the present legislation goes beyond *Buckley's* sanctioned limitation on political contributions, I do not find that the ban of such political contributions impermissibly offends the relators' First Amendment rights because of the well demonstrated State interest in the regulation of this industry and the narrowness of the restriction drawn. In this regard, I wholeheartedly subscribe to the dissent of Justice Victory in the case *sub judice* and his reliance on *Petition of Soto*, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1988), *certif. denied*, 121 N.J. 608 (1989), *cert. denied*, 496 U.S. 937 (1990) and *Schiller Park Colonial Inn, Inc. v. Berz*, 63 Ill. 2d 499, 349 N.E.2d 61 (1976). As the New Jersey court observed in *Soto*, the state has a compelling state interest in upholding the integrity of the political process from corruption. Considering the Legislature's definition of gambling in this State and its mandate to suppress gambling, I find that a total prohibition on campaign contributions from this industry's substantial members directly advances an asserted governmental interest by the Legislature.

I likewise find the argument unpersuasive that this State's enactment of disclosure requirements for political contributions obviated the necessity for the more stringent ban adopted by the Legislature. As noted in *Buckley* where a similar argument was made, the Legislature was entitled to conclude that disclosure was only a partial answer to the problem. *Buckley*, 424 U.S. at 28. Thus, I find that the disclosure requirements did not supplant the Legislature's decision to require more.

The courts have repeatedly recognized that the legislative branch of government maintains a strong, vital interest in protecting the political process from distortion and corruption. *United States v. Classic*, 313 U.S. 299, 317-320 (1941); *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *Ex Parte Yarbrough*, 110 U.S. 651, 657 (1884). "Nothing bars us from choosing . . . a process wherein ideas and candidates prevail because of their inherent worth, not because . . . one side puts on the more elaborate show of support. Nothing in the First Amendment bars us from those steps." J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 Yale L.J. 1001, 1005 (1976). Albeit that there are industries that participate in the election process that are as well-monied as the gambling industry, that which differentiates the latter is its existence as an "absolute revocable privilege," its close governmental regulation, and its undistinguished place in this State's history.