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CONSOLIDATED EDISON AND BELLOTTI: FIRST AMENDMENT PROTECTION OF CORPORATE POLITICAL SPEECH

Robert A. Prentice*

I. INTRODUCTION

The value of free political expression to America's society and system of government cannot be doubted. As Judge Learned Hand eloquently wrote, the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."¹

Although criticized by Professor Emerson, America's leading first amendment theoretician, for failing to exert the initiative and innovation necessary to preserve the values underlying freedom of expression,² the Burger Court added the corporate voice to the "multitude of tongues" participating in American discussion when it established two major extensions of first amendment protection³—to commercial speech,⁴ and to corporate political speech. In *Central Hudson Gas &*

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1. *United States v. Associated Press*, 52 F. Supp. 363, 372 (S.D.N.Y. 1943).
2. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980).
3. Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 71 (1980).
4. This paper accepts Professor Farber's theories regarding the definition of "commercial"

Electric Corp. v. Public Service Commission,⁵ a commercial speech case, and *Consolidated Edison Co. v. Public Service Commission*,⁶ a corporate political speech case, the Supreme Court issued its latest words⁷ in both areas.

That *Central Hudson* and *Consolidated Edison* were decided on the same day symbolizes the close relationship between the developments in commercial speech and corporate political speech. Nonetheless, while the protection of commercial speech is now well established by a long line of cases,⁸ generally supported by a strong majority of the Supreme Court,⁹ and generally lauded by the commentators,¹⁰ the same cannot be said for the protection of corporate political speech. This fledgling doctrine is embodied only in *Consolidated Edison* and its predecessor *First National Bank of Boston v. Bellotti*,¹¹ has yet to develop a strong core of majority support on the Supreme Court,¹² and has received considerable adverse reaction from commentators.¹³ The corporate political speech doctrine remains in a formative stage, and it

speech, which emphasize the distinction between the informational and contractual aspects of speech. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. REV. 372, 387 (1979). The Farber theory has been summarized as one which would

define commercial speech as expression in which there is a direct functional relationship or nexus between the message and a later commercial transaction, depending upon such factors as whether the speech mentions a brand name product or service, whether it is of interest to a non-diverse consumer audience, whether it proposes a commercial transaction, or whether it discusses the merits or demerits of a particular company, product or service.

Prettyman and Minberg, *Corporate Speech: Extending the Evolving Doctrine*, Legal Times of Washington, Aug. 11, 1980, at 13, col. 1.

5. 447 U.S. 557 (1980).

6. 447 U.S. 530 (1980).

7. As this article is written, the Supreme Court has under advisement a case, argued February 25, 1981, which could produce a decision touching upon both commercial and political speech issues. In *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510, *prob. juris. noted* 101 S. Ct. 265 (1980), the California Supreme Court, over a strong first amendment-based dissent by Justice Clark, held that a San Diego ordinance banning off-premises billboards was a proper exercise of municipal police powers.

8. See notes 42-45 *infra* and accompanying text.

9. Only Justice Rehnquist remains a steadfast opponent of first amendment protection for commercial speech, as is typified by his lone dissent in *Central Hudson*.

10. *But see* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Rembar, *For Sale: Freedom of Speech*, ATLANTIC MONTHLY, March, 1981, at 28 (critical of "elevating simple moneymaking to the constitutional level of political comment and artistic expression").

11. 435 U.S. 765 (1978).

12. The vote to protect the corporate political speech in *Bellotti* carried by a slim 5-to-4 margin; the vote in *Consolidated Edison* was 7-to-2. Because Mr. Justice Blackmun was in the majority in *Bellotti* but dissented in *Consolidated Edison*, five of the nine Supreme Court Justices have voted against protection of corporate political speech when given the opportunity.

13. See Cox, *supra* note 3, at 70; Note, XIII SUFFOLK L. REV. 124, 137 (1979); Note, 1979 UTAH L. REV. 95, 106.

is conceivable that its future course will be affected by the commentary of scholars.¹⁴

The Supreme Court's decision to extend first amendment protection to corporate political speech has been subjected to criticism aimed at both its theoretical underpinnings and its practical implications. The most thoughtful and detailed criticism of the legal theories underlying the majority opinion in *Bellotti* (which is also applicable to *Consolidated Edison*) is that offered by Professor O'Kelley, who suggests that *Bellotti's* majority opinion is seriously inconsistent with prior Supreme Court decisions regarding corporate constitutional rights.¹⁵

Representative of the criticism of the practical effects of protecting corporate political speech is the comment from Professor Archibald Cox that the *Bellotti* decision will "increas[e] the relative influence of organizations with large financial resources . . . shrinking the attention paid to truly individual voices [resulting in] a net loss of human freedom."¹⁶

It is the thesis of this article that the Supreme Court's extension of first amendment protection to corporate political speech, although not immune from criticism, is a positive development which should be applauded. After a general discussion of the rights of corporations, this article will briefly sketch the development of the first amendment protection for commercial and corporate speech. Next, the article will examine with a critical eye the theoretical and practical criticisms that have been hurled against the decisions establishing first amendment protection for corporate political speech. Ultimately, the article will conclude that these criticisms constitute an overreaction to the potential implications of *Bellotti* and *Consolidated Edison* and an underappreciation of the beneficial effects of the protection of corporate political speech.

II. CORPORATIONS AND THE CONSTITUTION

It is clear that neither the Founding Fathers nor the framers of the fourteenth amendment had the rights of corporations foremost in their

14. It is apparent that the courts do pay attention to and are influenced by the comments of legal scholars. Edmunds, *Hail to Law Review*, 1 J. MAR. J. PRAC. & PROC. 1, 1-17 (1967); Traynor, *To the Right Honorable Law Review*, 10 U.C.L.A. L. REV. 3, 3-10 (1962); Warren, *Upon the Tenth Anniversary of the UCLA Law Review*, 10 U.C.L.A. L. REV. 1, 1-2 (1962).

15. O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347 (1979) [hereinafter cited as O'Kelley].

16. Cox, *supra* note 3, at 70.

minds as they carried out their historic functions.¹⁷ The word "corporation" does not even appear in the Constitution. A scanning of the courts' treatment of corporate constitutional rights reveals, as might be expected due to the dearth of guidance given by the Constitution, a rather spotty development.

The traditional view of corporations is epitomized in an often-quoted passage from Chief Justice Marshall's opinion in *Dartmouth College v. Woodward*:¹⁸

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.¹⁹

Consistent with this constricted view of the nature of corporations, the Supreme Court has denied that corporations are "citizens" for purposes of the privileges and immunities clauses of the Constitution, and has held that the "liberty" referred to as protected in the fourteenth amendment is that of natural, not artificial persons.²⁰ Similarly, the Court has denied corporations the right of privacy²¹ and the privilege against self-incrimination²² which the Constitution accords individuals.

On the other hand, the Supreme Court has given corporations some significant constitutional protections. Most importantly, corporations have been deemed "citizens" protected by the due process clauses of the fifth and fourteenth amendments,²³ and the latter amendment's equal protection clause.²⁴ Additionally, corporations have been given

17. It has been said that only twenty-six domestic corporations were in existence at the time of the framing of the Constitution. 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 2, at 6 (rev. perm. ed. 1974).

Similarly, the debates preceding passage of the fourteenth amendment paid little or no attention to the corporation. I. BRANT, *THE BILL OF RIGHTS* 351-52 (Mentor ed. 1965).

18. 17 U.S. (4 Wheat.) 518 (1819).

19. *Id.* at 636. Professor Cox has characterized this view as "Jacksonian." Cox, *supra* note 3, at 65. That it was also espoused by federalist judges accounts for the view's staying power.

20. *Asbury Hosp. v. Cass County*, 326 U.S. 207, 210-11 (1945); *Hague v. CIO*, 307 U.S. 496, 527 (1939); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907); *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-87 (1839).

21. *United States v. Morton Salt Co.*, 338 U.S. 632, 651-52 (1950).

22. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974); *Wilson v. United States*, 221 U.S. 361, 376 (1911).

23. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535-36 (1925); *Smyth v. Ames*, 169 U.S. 466, 522 (1898); *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26, 28 (1889).

24. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 80-81 (1938); *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886).

constitutional protection against double jeopardy²⁵ and unreasonable searches and seizures.²⁶

The early view of the role of corporations in the American political process was a restrictive one. Chief Justice Marshall, again in the *Dartmouth College* case, stated that the corporation “does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person.”²⁷

Notwithstanding Chief Justice Marshall’s sentiments, corporate political activity in the United States, which included various forms of political speech, commenced about the time the *Dartmouth College* case was decided.²⁸ Before another century had passed, corporations began the effective use of the media to amplify their political speech in ways we find familiar today.²⁹

Despite the considerable amount of litigation regarding corporate rights under the Constitution and the long-standing tradition of corporate political speech, when the era of the Burger Court dawned there was no clear rule that corporate political speech was protected by the first amendment. The closest the Supreme Court had come to the issue was its holding in *Grosjean v. American Press Co.*³⁰ which invalidated a Louisiana licensing tax on publishers of newspapers. *Grosjean*, however, was not a clear statement on general corporate political speech rights because its holding was grounded on fourteenth amendment due process precedents rather than on a separate recognition of free speech rights of corporations.³¹ Also, *Grosjean* involved the rights of a newspaper, a *media* corporation supposedly more deserving of first amendment protection than an ordinary business corporation.³² This distinction between most corporations and those involved in the media

25. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956).

26. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311-13 (1978); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353-54 (1977); *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

27. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

28. See E. EPSTEIN, *THE CORPORATION IN AMERICAN POLITICS* 22 (1969) [hereinafter cited as EPSTEIN].

29. *Id.* at 32.

30. 297 U.S. 233 (1936).

31. *Id.* at 244.

32. The *Grosjean* opinion involved lengthy discussions of the history of freedom of the press. *Id.* at 245-50.

Other cases in the *Grosjean* mold are cited in *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 382-83 (1973).

(and therefore benefiting from the freedom of the press) remained of legal significance for years.³³

The *Grosjean* holding was largely overshadowed just three years later by Justice Stone's concurring opinion in *Hague v. CIO*³⁴ that corporations do not enjoy freedom of speech.³⁵ Thus, *Hague* and *Grosjean*, when read together, indicated that only corporations able to claim freedom of the press would be accorded freedom of speech.³⁶

Although there was no Supreme Court holding supportive and on point,³⁷ some lower courts in the 1970's did recognize corporate free speech as protectible.³⁸ More importantly, the Burger era heralded the extension of first amendment protection to "commercial speech," with little attention paid to the identity of the speaker,³⁹ a development which was destined to pave the way for protection of corporate political speech.

III. EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE

It is customary in discussions of the doctrine of commercial speech to note that the long-recognized view that such speech was not entitled to first amendment protection stemmed from a statement in the 1942

33. Rome and Roberts, *Bellotti and the First Amendment: A New Era in Corporate Speech?* 3 CORP. L. REV. 28, 33 (1980).

This distinction explains the limited impact on corporate political speech rights of such cases as *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (involving "public figure" aspect of good faith defense in defamation actions); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating "equal space" reply requirement for newspaper as violative of first amendment's freedom of press clause); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (striking government's prior restraint against the printing of classified information); and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing the qualified good faith defense in defamation cases).

34. 307 U.S. 496 (1939).

35. *Id.* at 527.

36. See Note, 39 LA. L. REV. 1225, 1230 n.25 (1979).

37. Despite the lack of direct precedent, a guess was hazarded in Note, 78 HARV. L. REV. 1191, 1193 (1965) that union and corporate political speech was protected under the first amendment. The prediction was based on *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (establishing a political activity exception to the Sherman Act's ban on conspiracy); *United States v. Harris*, 347 U.S. 612, 621-24 (1954) (Supreme Court reversed conviction of agricultural association under Federal Regulation of Lobbying Act by limiting the Act to direct communications with members of Congress); and *United States v. CIO*, 335 U.S. 106, 121-24 (1948) (majority held that Federal Corrupt Practices Act did not apply to union magazine's endorsement of candidates; four Justices felt the act did apply and, as applied, was unconstitutional).

38. See *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314, 1334 (W.D. Pa. 1974); *Borough of Collingswood v. Ringold*, 66 N.J. 350, 331 A.2d 262, 270 (1975).

39. See Tyler and Bateman, *Is Corporate Speech Free Speech?*, 12 BUS. L. REV. 15 (1979).

opinion in *Valentine v. Chrestensen*⁴⁰ which Justice Douglas later described as a “casual, almost offhand” remark.⁴¹ The demise of the traditional view commenced with the Burger Court’s decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,⁴² which intimated that commercial speech might be deserving of first amendment protection, and was completed in the 1976 opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁴³ With but two exceptions,⁴⁴ the Burger Court has invalidated every commercial speech ban considered since 1973.⁴⁵

The single legal development most responsible for recognition of the protected nature of commercial speech is the rise of the doctrine of the “right to receive.” Noting that “[f]reedom to speak would be a hollow right if a concomitant right to hear the speech did not exist,”⁴⁶ one author has argued that “[t]he right to receive has its origins in the concept of freedom of communication that the framers of the Constitution sought to embody in the first amendment.”⁴⁷

The right to receive must, and does, find its rationale for first

40. 316 U.S. 52, 54 (1942).

41. *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

42. 413 U.S. 376, 388 (1973).

43. 425 U.S. 748 (1976).

44. *Friedman v. Rogers*, 440 U.S. 1 (1979) (sustaining ban on potentially misleading use of trade names by optometrists); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (upholding regulation of overreaching conduct by attorneys).

45. See Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437, 437 at n.2 (1980), which provides this thumbnail sketch of the pre-*Consolidated Edison* commercial speech cases:

The rise of commercial speech as a category of communication entitled to a degree of first amendment protection may be traced through *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973) (suggesting a degree of first amendment protection for commercial speech); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (four members of Court suggesting that commercial speech is protected); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial advertisement of abortion clinic protected); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (price advertising by pharmacists protected); *Carey v. Population Servs. Int’l, Inc.*, 431 U.S. 678 (1977) (advertising of contraceptives protected); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (for-sale signs on real property protected); and *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (price and service advertising by lawyers protected).

Id.

46. Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775, 777-78 (1975).

47. *Id.* at 777 n.16, quoting letter from James Madison to W.T. Barry, Aug. 4, 1882, in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 276 (J.B. Lippincott & Co. 1865):

A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge brings.

amendment protection in service of the goals of freedom of expression. Professor Emerson has written that freedom of expression is essential:

- (1) as a method of assuring the individual of self-fulfillment,
- (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as a means of maintaining the balance between stability and change in the society.⁴⁸

Alexander Meiklejohn, the other influential modern first amendment theorist, has stressed the crucial role freedom of expression plays in American self-government, stating “[t]he principle of freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”⁴⁹

In recent years, the right to receive messages has been increasingly recognized as integral to the values mentioned by both Emerson and Meiklejohn, and therefore deserving of elevation to a status of full constitutional protection. The Supreme Court’s first recognition of the right to receive appeared in *Martin v. Struthers*,⁵⁰ in which the Court reversed the conviction of a Jehovah’s Witness who had violated an ordinance prohibiting the ringing of doorbells for the purpose of handing out leaflets. In so doing, the Court recognized the right of willing listeners to receive defendant’s handbills, as well as the defendant’s right to distribute them.⁵¹ Later, in *New York Times Co. v. Sullivan*,⁵² the Court interpreted the first amendment to protect the “right to know” as well as the “right to speak.”⁵³ The initial clear recognition of a right to receive, existing independently of the right to speak, occurred in *Kleindienst v. Mandel*,⁵⁴ although the decision denied relief to a foreign Marxist who sought to enter this country to give a speech.

Full recognition of the right to receive arrived, not coincidentally, with full recognition of the first amendment’s protection of commercial speech in the *Virginia Pharmacy* case, which involved an attack on Virginia’s prohibition of price advertising by licensed pharmacists. Plaintiffs in the action were not pharmacists wishing to advertise, but

48. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (1966).

49. A. MEIKLEJOHN, POLITICAL EXPRESSION 27 (1965).

50. 319 U.S. 141 (1943).

51. *Id.* at 148-49.

52. 376 U.S. 254 (1964).

53. *Id.* at 269-70.

54. 408 U.S. 753, 762-63 (1972).

consumers seeking price information due to the documented phenomenon of price differentials from store to store of up to 650% for a particular drug.⁵⁵

Speaking for the majority, Justice Blackmun commenced with a brief history of the right to receive, noting that free speech is afforded “to the communication, to its source and to its recipients both,”⁵⁶ and concluding: “If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.”⁵⁷

Turning to the question of whether commercial speech deserved first amendment protection, Justice Blackmun felt that in *Bigelow v. Virginia*,⁵⁸ an opinion striking down a state’s attempt to ban circulation of abortion information, the *Valentine v. Chrestensen* “notion of unprotected ‘commercial speech’ all but passed from the scene.”⁵⁹ Framing the issue presented as whether commercial speech was “so removed from any exposition of ‘ideas’ ”⁶⁰ that it lacked first amendment protection, Justice Blackmun concluded for the majority that it was not.⁶¹ The critical role that the right to receive information played in this conclusion is highlighted in this passage:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formulation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.⁶²

No significant alteration of the commercial speech doctrine of *Virginia Pharmacy* occurred until *Central Hudson Gas & Electric Corp. v.*

55. 425 U.S. at 754.

56. *Id.* at 756.

57. *Id.* at 757.

58. 421 U.S. 809 (1975).

59. 425 U.S. at 759.

60. *Id.* at 762 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

61. *Id.*

62. *Id.* at 765 (citations omitted).

Public Service Commission,⁶³ in which a regulated electric utility challenged a state regulatory commission's ban on promotional advertising. Reaffirming that the constitutional protection for commercial speech springs from the "informational function of advertising,"⁶⁴ Justice Powell's majority opinion again stressed the role of the right to receive:

Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them. . . ." Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.⁶⁵

Surveying the Court's past commercial speech opinions, Justice Powell discovered a four-part test for determining the status under the first amendment of particular commercial communications:

[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we must ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the government interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.⁶⁶

Justice Powell had little difficulty applying the criteria to the facts at hand. The defendant commission did not claim that the banned speech was either false or related to illegal activity, and Justice Powell found the information conveyed worthy of protection, despite plaintiff's monopoly position, because it would aid consumers in choosing among electricity and its energy substitutes such as fuel oil and natural

63. 447 U.S. 557 (1980).

64. *Id.* at 563.

65. *Id.* at 561-62 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), and citing *Linmark Associates, Inc. v. Township of Wil-lingboro*, 431 U.S. 85, 92 (1977); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)).

66. *Id.* at 566 (bracketed numbers added).

gas.⁶⁷

Although Justice Powell found that the state interests involved—energy conservation and prevention of advertising’s aggravation of the inequities caused by the failure to base the utility’s rates on marginal cost—were “clear and substantial,”⁶⁸ he determined that the latter interest was not directly promoted by the advertising ban and that the former interest could be met in a more limited fashion.⁶⁹

With some justification, Justice Rehnquist noted in dissent that the majority’s application of its four-part test would make it “quite difficult”⁷⁰ for a legislature to draft rules which would satisfy the test,⁷¹ and, consequently, he complained that the majority’s test “thus elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech.”⁷²

Because *Central Hudson* continued to key the protected status of commercial speech to the consumer’s need for information,⁷³ a survey of the Supreme Court’s commercial speech cases indicates that the most important factor in the analysis is whether the reason for the proposed ban is that the speech might be false and misleading. If that is the true justification for the regulation or prohibition, there is no listener interest to support such a false communication, and it will be considered unprotected by the first amendment.⁷⁴

If, on the other hand, the reason for the attempt to limit commercial expression rests on state interests other than preventing false speech or illegal activity, those reasons must be compelling. The Burger Court has yet to find a sufficient rationale for such regulation other than preventing untruth and illegality, although it has not formally announced that commercial speech is deserving of the same level of protection as political speech.⁷⁵

67. *Id.* at 566-67.

68. *Id.* at 569.

69. *Id.* at 569-70.

70. *Id.* at 595.

71. At least one author has agreed with Justice Rehnquist, arguing that a state legislature, to meet the majority’s test, would be required to undertake incredibly complicated economic studies measuring the correlation between consumer demand and advertising, isolating all other potential factors affecting peak demand. See Fein, *Free Speech in Ads Wins Key Plug from Brethren*, Nat’l L.J., Nov. 17, 1980, at 15, col. 1.

72. 447 U.S. at 591.

73. *Id.* at 567.

74. See Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437, 439 (1980).

75. A number of potential grounds for distinguishing between commercial and political

When one surveys the interests served by free expression, such as those listed above by Emerson and Meiklejohn, it appears that only self-expression is not served by the protection of commercial speech, and an argument can be made that even that interest is furthered in some instances.⁷⁶

Thus, as long as *Central Hudson* remains representative of the majority thinking of the Supreme Court, commercial speech will continue to receive a very high degree of first amendment protection. Where such speech is not false or inciteful of illegal activity, its informational value to recipients will be held to outweigh even plainly substantial state interests served by a speech ban, unless that ban directly serves the interest and is scrupulously circumscribed.⁷⁷

Although the right to receive doctrine has reached its fullest flower in the commercial speech area, it has also provided the basis for the Supreme Court's extension of first amendment protection to political speech by corporations.

IV. THE *BELLOTTI* LANDMARK

The first unmistakable Supreme Court recognition of corporate political speech as a protected form of expression came in *First National Bank of Boston v. Bellotti*.⁷⁸ At issue was the constitutionality of a state criminal statute which prohibited expenditures by banks and business corporations for the purpose of influencing the vote on state referendum proposals not "materially affecting" any of the property, business or assets of the corporation. The Supreme Judicial Council of Massachusetts had sustained the law against the challenge of several corpora-

speech remain, such as claims by some of the Justices that commercial advertising is more susceptible to empirical verification than is political speech, and that the profit motive behind commercial speech renders it less susceptible than political speech to the chilling effects of government regulation. For a complete discussion of these arguments, see Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 222-25 (1976).

76. *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 74, 164-65 (1980).

77. For other helpful discussion of the commercial speech doctrine, see Emerson, *The First Amendment and the Right to Know*, 1976 WASH. U.L.Q. 1; Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 758-60 (1980); Jackson and Jeffries, *Commercial Speech, Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Meiklejohn, *Commercial Speech and the First Amendment*, 13 CALIF. W.L. REV. 430 (1977); Rollinson and Oshway, *The Businessman and Commercial Speech: How Much Protection?* 2 CORP. L. REV. 275 (1979); Comment, *Regulating Commercial Speech: A Conceptual Framework for Analysis*, 32 BAYLOR L. REV. 235 (1980); Comment, *Prior Restraints and Restrictions on Advertising After Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64 (1978); Note, *The Constitutional Status of Commercial Expression*, 3 HAST. CONST. L.Q. 761 (1976).

78. 435 U.S. 765 (1978).

tions wishing to present their views on a state income tax referendum. The court held that corporate speech rights were not coextensive with those enjoyed by natural persons, but were limited to situations where “a general political issue *materially* affects a corporation’s business, property or assets.”⁷⁹

This ban on corporate political speech⁸⁰ did not fare as well at the hands of a slim majority of the Supreme Court whose views were announced by Justice Powell. The Court began by stating that the Massachusetts court had asked the wrong question when it focused on the extent of corporate rights.⁸¹ Justice Powell characterized the issue as a first amendment, rather than a corporate law question. Noting that some first amendment cases implicate more rights than just those of the speaker, Justice Powell stated that the proper question was whether the Massachusetts law “abridges expression that the First Amendment was meant to protect.”⁸² The majority of the Court felt that it did.

Justice Powell initially noted that the speech which the plaintiffs sought to undertake was “at the heart of First Amendment protection.”⁸³ Stating that our system of free expression serves not just the interest of self-expression, but also that of self-government,⁸⁴ the opinion established a theoretical basis for protecting corporate political speech which parallels the right to receive theory underlying the protection of commercial speech. Because the message itself deserves first amendment protection, Justice Powell wrote, its source was irrelevant to the analysis:

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes

79. *First Nat’l Bank of Boston v. Attorney Gen.*, 359 N.E.2d 1262, 1269-70 (Mass. 1977) (emphasis added). The state court’s holding was arguably consistent with the major nineteenth century Supreme Court opinions which established the basic outlines of corporate constitutional rights. See Comment, XIII SUFFOLK L. REV. 124, 129 (1979).

80. That political expenditures and contributions can constitute political speech is established in *Buckley v. Valeo*, 424 U.S. 1, 19, 39 (1976), which fully protected independent expenditures but not candidate campaign contributions because the latter have little communicative value because they are simply turned over to the candidate; and raise a greater danger of actual or apparent corruption.

81. 435 U.S. at 775-76.

82. *Id.* at 776.

83. *Id.*

84. *Id.* at 777 n.12. This recognition of the value of corporate political speech to the concept of self-government has been hailed as “the final and complete triumph for the Meiklejohn conception of the First Amendment.” Rome and Roberts, *Bellotti and the First Amendment: A New Era in Corporate Speech?* 3 CORP. L. REV. 28, 38 (1980).

from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.⁸⁵

Disdaining the lower court's examination of corporate due process rights and its conclusion that corporate free speech must be limited to matters "materially affecting" a corporation's business, Justice Powell stated that the Supreme Court's prior decisions implicitly recognizing corporate speech rights had never been based directly upon the fact that the corporations involved were media corporations.⁸⁶ Justice Powell explicitly recognized the importance of the evolution of the commercial speech doctrine to the present issue, noting:

Nor do our recent commercial speech cases lend support to appellee's business interest theory. They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information."⁸⁷

Placing the burden on the government to show a "compelling" interest which would justify the suppression of the speech involved,⁸⁸ the Court, in effect, applied the traditional first amendment standard of review⁸⁹ as developed and applied in earlier cases such as *NAACP v. Button*,⁹⁰ *Elrod v. Burns*,⁹¹ and *Buckley v. Valeo*,⁹² in the context of corporate political speech. Justice Powell examined Massachusetts' proffered justifications for the ban on corporate political spending—(1) preservation of the role of individuals in the electoral process, and (2) protection of minority shareholders who might disagree with the

85. 435 U.S. at 777 (footnotes omitted).

86. *Id.* at 781-83. Thus, Justice Powell discarded in rather summary fashion the long-recognized distinction between first amendment rights given those corporations which could claim freedom of the press and those accorded non-media corporations which could not. The distinction, of course, dated from the *Grosjean* case. See Rome and Roberts, *supra* note 84, at 33 (1980).

87. *Id.* at 783 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977)).

88. *Id.* at 786.

89. See Note, 20 B.C. L. REV. 1003, 1006 (1979).

90. 371 U.S. 516 (1960).

91. 427 U.S. 347 (1976).

92. 424 U.S. 1 (1976).

corporate position⁹³—and found them wanting. Justice Powell found the record insufficient to support the assumption that corporate political participation in the referendum would exert any undue influence overshadowing the individual voice,⁹⁴ adding “the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”⁹⁵

Regarding the protection of minority shareholders, Justice Powell found the statute invalid as both underinclusive (because corporations were banned only from spending in referenda elections, not from any other type of political activity such as lobbying) and overinclusive (because the law would prohibit even corporate expenditures unanimously authorized by shareholders, and because dissenting shareholders had other remedies such as derivative suits).⁹⁶ Additionally, Justice Powell found no direct relationship between the protection of minority shareholders and the ban itself.⁹⁷

Chief Justice Burger wrote a concurring opinion to emphasize the adverse consequences a contrary decision would have upon the rights of media corporations. Stating that “no factual distinction has been identified as yet that would justify government restraints on the right of appellants to express their views without, at the same time, opening the door to similar restraints on media conglomerates with their vastly greater influence,”⁹⁸ the Chief Justice stressed the close relationship between freedom of speech and freedom of the press,⁹⁹ concluding:

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. “[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as

93. The relative merits and demerits of these justifications are discussed in detail at notes 233 to 277 *infra* and accompanying text.

94. 435 U.S. at 789.

95. *Id.* at 790. This sentiment reflects the normal American reaction to successful political activity. For instance, the National Rifle Association is widely recognized as the nation’s most effective lobby, preventing the passage of any effective national handgun control legislation despite significant public support for such proposals. Weber, *The National Rifle Association: Public Enemy No. 2*, 91 CHRISTIAN CENTURY 958 (Oct. 16, 1974). Yet, opponents of the NRA speak of how to best it in a fair battle, not of how to silence the NRA’s voice.

96. 435 U.S. at 793-94.

97. *Id.* at 794.

98. *Id.* at 797.

99. *Id.* at 799.

to utter it. ' . . . the liberty of the press is no greater and no less . . . ' than the liberty of every citizen of the Republic." . . .

In short, the First Amendment does not "belong" to any definable category of persons or entities. It belongs to all who exercise its freedom.¹⁰⁰

Justice White filed a lengthy dissent which was joined by Justices Brennan and Marshall. Justice White disagreed with the majority's rejection of the two interests supposedly underlying the law in question. Justice White felt the record did contain evidence indicating corporate domination of the electoral process, and expressed concern about the implications of the majority's holding for state and federal corrupt practices legislation which limits corporate participation in the electoral process.¹⁰¹ He also argued that minority shareholders should not be forced to subsidize political statements with which they disagree,¹⁰² relying upon holdings in two cases involving employees, *Abood v. Detroit Board of Education*,¹⁰³ and *Machinists v. Street*.¹⁰⁴

In his dissent, Justice White made three major arguments. First, he argued that corporate speech is not as deserving of protection as individual speech because it does not serve the interest of self-expression.¹⁰⁵ Next, Justice White stressed that because corporations are created by the State and granted special privileges they should be subject to state regulation, even as to such sensitive matters as freedom of expression.¹⁰⁶ Finally, Justice White castigated the majority for substituting its judgment for that of the Massachusetts legislature regarding the

100. *Id.* at 802 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (Frankfurter, J., concurring)).

101. *Id.* at 810-11, 820-21.

102. *Id.* at 812-18.

103. 431 U.S. 209 (1977) (State may not require individual to contribute to the support of an ideological cause as a condition of employment).

104. 367 U.S. 740 (1961) (Railway Labor Act construed to prohibit use of compulsory union dues for political purposes).

105. 435 U.S. at 807. Justice White supported this argument with two claims: (a) that ideas which are not a product of individual choice are not entitled to protection, and (b) restrictions on corporate speech do not impinge severely upon the general availability of ideas because individuals, including corporate shareholders, employees and customers can still express their own views. Justice White did not seem to recognize the value of the right to receive information generated by a corporation outside the realm of commercial ideas and, thus, would accord much more protection to corporate commercial speech than to corporate political speech. *Id.*

106. *Id.* at 809. In response to the special privileges argument, it has been noted that "business corporations pay substantial amounts in corporate income taxes, various special privilege taxes, and all normal taxes, sales and property, as a condition of this legal existence." Smith, *Business, Buck\$ & Bull: The Corporation, The First Amendment & The Corrupt Practices Law*, 4 DEL. J. CORP. L. 39, 112 (1978).

proper balance to be struck among the competing interests involved.¹⁰⁷

Justice Rehnquist filed a separate dissent in *Bellotti*, stressing that corporations, as artificial entities created by the state, enjoy only the rights necessary to protect their property. In the eyes of Justice Rehnquist, this meant that corporations are entitled to commercial, but not political speech.¹⁰⁸

Although *Bellotti* has been accurately hailed as a victory for corporate freedom of speech,¹⁰⁹ it did not give corporations a true "carte blanche" in the political speech arena.¹¹⁰ The majority expressly declined to decide whether corporations enjoy the full speech rights which are accorded individuals,¹¹¹ or whether, under other circumstances, regulation of corporate speech might be justified, although regulation of an individual's speech would not.¹¹²

The primary reason *Bellotti* cannot be viewed as an unqualified establishment of corporate political speech is the majority's refusal to recognize a cognizable first amendment interest residing in the corporation as speaker.¹¹³ Rather, as noted above, protection of corporate political speech has been based upon the listener's right to receive, following the pattern of the commercial speech area.¹¹⁴ Thus, the corporate political message in *Bellotti* was deemed protected only because it provided a message valuable to society's search for truth and facilitated our system of self-government.¹¹⁵

That the interest of self-expression is probably not served by most corporate political speech could, in some future case, serve to differenti-

107. *Id.* at 804. Of course, if the legislature were always given discretion to strike a proper balance between competing interests, the first amendment would be gutted. History is replete with examples of governmental insensitivity and even hostility to freedom of expression. The Supreme Court cannot abdicate its duty to review such judgments. Generally, the Court has declared that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

108. 435 U.S. at 822-28.

109. H. SCHMERTZ, *CORPORATIONS AND THE FIRST AMENDMENT* 6 (1978). Mr. Schmertz has been the driving force behind Mobil Corporation's many public relations offensives, including the "op Ed" columns which appear regularly in many influential newspapers.

110. Note, 48 U.M.K.C. L. REV. 96, 107 (1979).

111. 435 U.S. at 777.

112. *Id.* at 777-78 n.13. Justice Rehnquist's dissent justifiably complained that the majority did not explain why such a distinction remained. *Id.* at 823 n.1.

113. Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437, 458 (1980).

114. Rome and Roberts, *Bellotti and the First Amendment: A New Era in Corporate Speech?* 3 CORP. L. REV. 28, 38 (1979); Note, 20 B.C. L. REV. 1003, 1017 (1979).

115. *See* Note, *supra* note 110, at 99.

ate between treatment of corporate and individual speech.¹¹⁶ Further, because the basic Burger Court approach to first amendment problems is that of balancing,¹¹⁷ the corporate nature of the speaker can provide a government interested in prohibiting corporate speech with arguments to use on its side that would not be present if the speaker were an individual. *Bellotti* addressed two purported interests of this nature and found both wanting as bases for suppression of the corporate political speech in question. However, neither ground was unqualifiedly rejected. The potential problem of undue influence stemming from the corporate nature of the speaker was rejected as unsupported in the record.¹¹⁸ The majority opinion clearly indicated that if such findings persuasively appeared in a later record, the groundwork might well be laid for a different result.¹¹⁹ Similarly, the Court did not say that protection of minority shareholders could never be the basis for a ban on corporate political speech; rather, the Court held that this particular ban was underinclusive, overinclusive, and not directly related to such a goal.¹²⁰

The tenor of the *Bellotti* opinion, however, did indicate that such justifications would be closely scrutinized whenever a government attempted to stifle corporate political speech. This was confirmed by the ruling in the other corporate political speech case which has come before the Supreme Court.

V. THE NEXT STEP: *CONSOLIDATED EDISON*

The second and most recent application of the Burger Court's views on corporate political speech occurred in *Consolidated Edison Co. v. Public Service Commission*,¹²¹ which involved an electric utility's challenge to a New York regulatory commission's order prohibiting the mailing by public utilities of bill inserts discussing controversial issues of public policy, especially the desirability of nuclear energy. As did *Bellotti*, *Consolidated Edison* addressed a question of corporate political speech, rather than commercial speech.¹²²

116. Justice White's *Bellotti* dissent pointed out that the holding of *Buckley v. Valeo*, 424 U.S. 1 (1976) that individual campaign expenditures constituted protected speech was largely based upon the ground that such expenditures allowed an individual to speak his mind. Justice White argued that this rationale would not apply to a corporate speaker. 435 U.S. at 806 n.6.

117. See Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 457 (1980).

118. 435 U.S. at 789.

119. *Id.* at 788 n.26.

120. *Id.* at 792-95.

121. 447 U.S. 530 (1980).

122. The characterization of the speech in *Consolidated Edison* as "political" accepts Professor

Justice Powell again delivered the majority opinion, which commenced with a reference to *Bellotti*, indicating that first amendment protection of corporate political speech continued to be conditioned upon the hearer's right to receive rather than any right to speak residing independently in the corporate speaker.¹²³

After stressing the value of free speech to the search for truth and the creation of a "more capable citizenry and more perfect polity,"¹²⁴ Justice Powell, responding to the justifications for the insert ban proffered by the commission, set up a three-part test for determining the validity of the ban: "We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest."¹²⁵

The notion that this ban could be considered a reasonable time, place or manner restriction was quickly rejected because a basic element of such a restriction is that it not be based upon the content or subject matter of the proposed speech.¹²⁶ Such was not the case here, as the commission had "undertaken to suppress certain bill inserts precisely because they address controversial issues of public policy."¹²⁷

The Court easily dismissed the commission's argument that the in-

Farber's distinction between the informational and contractual aspects of speech potentially characterized as "commercial." See note 4 *supra*. The characterization has been questioned in this case because the speech was economically motivated. Schwarz and Straus, *Uneasy Spectre Raised by Corporate Speech Rulings*, Legal Times of Wash., Aug. 11, 1980, at 15, col. 3.

But Professor Farber has a strong answer to any approach which defines commercial speech on the basis of economic motivation:

Suppose that a company publishes an exhaustive and entirely truthful survey of the products of its industry. To make the point clear, assume that the survey was taken by *Consumer Reports* and enjoyed constitutional protection when it was published in that magazine. Distribution by the company could strip the survey of its constitutional protection only if profit motivation were a disqualifying factor. The *Virginia Board* Court was clearly correct in rejecting this approach. Economic motivation could not be made a disqualifying factor without enormous damage to the first amendment. Little purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic motives, and professional authors. Furthermore, the economically motivated speaker is often the most likely to raise the important issues, since disinterestedness is less common than apathy.

Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. REV. 372, 382-83 (1979). See also Schaefer, *The First Amendment, Media Conglomerates and "Business" Corporations: Can Corporations Safely Involve Themselves in the Political Process?* 55 ST. JOHN'S L. REV. 1, 39 (1980) [hereinafter cited as Schaefer]; Note, 43 Mo. L. REV. 64, 72 (1978).

123. 447 U.S. at 533-34.

124. *Id.* at 534 (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)).

125. *Id.* at 535.

126. *Id.* at 536, relying on *Carey v. Brown*, 447 U.S. 455, 470 (1980), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).

127. *Id.* at 537.

sert ban represented a permissible subject matter restraint in that it applied to all discussion of nuclear power, not just to the expression of a certain point of view. Noting that free speech means "governments must not be allowed to choose 'which issues are worth discussing or debating,'" ¹²⁸ the Court was unable to locate any precedent for a subject matter restriction of this type. ¹²⁹

Finally, the Court held the insert ban not to be a precisely-drawn means of serving a compelling state interest, as *Bellotti* required for a valid prohibition of corporate political speech. The commission advanced three proposed interests to support the ban. First, the commission claimed the ban was necessary to prevent Consolidated Edison from forcing its views on a captive audience. Stating that where a single speaker and several listeners are involved, "the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech," ¹³⁰ the Court said that the recipients of Consolidated Edison's message could "escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket." ¹³¹

128. *Id.* at 538 (quoting *Police Department v. Mosley*, 408 U.S. 92, 96 (1972)).

129. The Court admitted that subject matter regulations had been approved in limited circumstances in two cases relied on by the lower court, *Greer v. Spock*, 424 U.S. 828 (1976) (federal government allowed to prohibit partisan political speech on military base), and *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (city transit system renting space for commercial advertisements did not have to rent space for political ads), but limited these two cases to their facts, characterizing them as cases that rest "on the special interest of a government in overseeing the use of its property." 447 U.S. at 539-40.

130. *Id.* at 541-42.

131. *Id.* at 542. This answer seems a bit glib. It has been argued that:

[T]he consumer will have considerable difficulty ignoring the political materials when he opens his bills. The billing insert often contains useful information interspersed with the political materials (regarding rate increases, new company telephone numbers, and energy conservation tips), which increases the likelihood that the customer will peruse the contents of the billing envelope and see the unwanted political disclosures.

Note, *Regulating the Use of Political Inserts in Utility Bills*, 64 VA. L. REV. 921, 928 (1978).

The *Consolidated Edison* opinion did not undertake to reconcile a number of cases in this area which at first blush seem inconsistent. Compare *Rowan v. Post Office Dept*, 397 U.S. 728, 736-37 (1970) ("mailer's right to communicate must stop at the mailbox of an unreceptive addressee") with *Martin v. Struthers*, 319 U.S. 141, 146-47 (1943) (municipality cannot ban door-to-door solicitors because they may invade the privacy of households), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) (people driving by outdoor movie screen showing obscene film can avert eyes) with *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978) (to say one may avoid indecent radio broadcast by turning it off "is like saying that the remedy for an assault is to run away after the first blow").

However, in footnote 11, the Court suggested that the state could possibly achieve its goal by simply requiring Consolidated Edison to stop sending bill inserts to the homes of customers who objected. This is consistent with the remedy in *Rowan v. Post Office Dept* and a preferable approach because it allows the homeowner to decide whether the message is offensive, rather than having that decision made by the government. See *H & L Messengers v. City of Brentwood*, 577

The commission's second proposed compelling state interest was based upon the argument that because a billing envelope can accommodate only a certain amount of information, a corporation's political message should not be allowed to crowd out other inserts that promote energy conservation, safety, and the like. The Court rejected this analogy to broadcasting's *Red Lion* doctrine,¹³² holding that (a) billing envelopes are not a limited public resource comparable to the broadcast spectrum, and (b) no evidence in the record indicated that the inserts at issue had actually precluded the sending of other messages.¹³³

The third supposedly compelling interest, that the ban prevented ratepayers from subsidizing the costs of policy-oriented bill inserts, was also quickly rejected on the simple ground that the commission had not based the ban on an inability to fairly allocate costs between Consolidated Edison's shareholders and the ratepayers; rather, the ban applied even when the shareholders paid all costs of the inserts.¹³⁴

Justice Marshall wrote a brief concurring opinion solely to emphasize that the majority opinion did not address the question whether the commission could exclude the costs of bill inserts from the rate base, nor state a view on the appropriateness of such an allocation.¹³⁵

Justice Stevens also penned a brief concurring opinion which offered a very simple basis for the majority's result, based upon the commission's motivation: "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'" ¹³⁶ Justice Stevens felt that the commission's only basis for the ban was that the messages might be "offensive" to the recipients, and believed it beyond a doubt that "the offensive character of an idea" cannot justify

S.W.2d 444, 451 (Tenn. 1979); Comment, 9 MEM. ST. U.L. REV. 661, 667 (1979); Note, 44 ALB. L. REV. 515, 518 (1980).

132. *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) (holding that the regulation of television and radio broadcast frequencies permits the FCC to exercise unusual authority over speech).

133. 447 U.S. at 543.

134. *Id.* Although the Supreme Court disposed of the ratepayer subsidy argument in only a paragraph, a post-*Bellotti* commentator had considered it sufficiently significant to use as a basis for the prediction that "it is likely that the imposition of an absolute ban on political inserts in utility bills ultimately will survive a constitutional challenge." Note, *Regulating the Use of Political Inserts in Utility Bills*, 64 VA. L. REV. 921, 936-37 (1978).

135. 447 U.S. at 544. In a later decision involving another New York public utility company, *Rochester Gas & Elec. Corp. v. Public Serv. Comm'n*, 51 N.Y.2d 823, 825 (N.Y. App. 1980), the court upheld the commission's ruling that ratepayers need not foot the bill for all of a utility's *informational* advertising.

136. 447 U.S. at 546.

censorship.¹³⁷

Justice Blackmun, author of the majority opinions in some of the major commercial speech cases,¹³⁸ filed a dissent which was somewhat less vigorous than Justice White's *Bellotti* dissent.¹³⁹ The essence of Blackmun's argument was the conclusion that the bill insert practice constituted "forced subsidization" by ratepayers of the utility's speech, even though there was no extra cost to the ratepayers, as surely as if there had been a state law requiring a person to permit the utility to include its inserts in that person's private letters.¹⁴⁰ The prevention of this subsidy to the state-created monopoly,¹⁴¹ the dissent argued, was a legitimate state interest.¹⁴²

In summary, *Consolidated Edison* demonstrates that *Bellotti* was not an aberration; rather, the Burger Court seems, at this early stage of development, to be committed to protecting corporate political speech. However, the same caveats that applied to *Bellotti* also apply to *Consolidated Edison*. The majority opinion did not recognize a right to political speech residing in the corporate speaker, but continued to base protection of such speech upon the rights of the receiver. Nor did the Court hold that a government could never provide a compelling state interest to override the advantages of free corporate political speech,

137. *Id.* at 548.

138. *Bigelow v. Virginia*, 421 U.S. 809 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); and *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

139. Justice Rehnquist joined in the greater part of Justice Blackmun's dissent. 447 U.S. at 583.

140. *Id.* at 552-53.

141. Although the dissent gave significant weight to the monopoly status which the state had accorded *Consolidated Edison*, the majority disposed of the point in a brief footnote which cited several commercial speech cases for the proposition that the Court had "recognized that the speech of heavily regulated businesses may enjoy constitutional protection." *Id.* at 534 n.1. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

142. The dissenting opinion states:

Consolidated Edison is completely free to use the mails or any other medium of communication on the same basis as any other speaker. The order merely prevents the utility from relying on a forced subsidy from the ratepayers. This leads me to conclude that the State's attempt here to protect the ratepayers from unwillingly financing the utility's speech and to preserve the billing envelopes for the sole benefit of the customers who pay for it does not infringe upon the First and Fourteenth Amendment rights of the utility.

447 U.S. at 555 (Blackmun, J., dissenting).

Thus, even the dissent seems to have recognized substantial freedom for corporate political speech, although it argued that the Court was giving insufficient attention to the ratepayer subsidy argument in this particular case.

although three more proffered interests were addressed and rejected as inadequate under the circumstances.

VI. ASSESSMENT OF CRITICISM

In a country where it is generally accepted that every individual should have freedom of political speech, the Supreme Court's decision to extend similar rights to corporations has been greeted with an unusual amount of criticism. The remainder of this article will address and attempt to allay the fears expressed regarding the potential implications of *Bellotti* and *Consolidated Edison*.

First, the attack upon the theoretical basis of *Bellotti* and *Consolidated Edison* lodged by Professor O'Kelley will be examined. Then, attention will be turned to the adverse practical effects many fear will stem from these decisions. Two of these effects—the forced subsidization of corporate political speech by minority shareholders who disagree with the corporate message and the potential for corporate domination of political speech—were rejected in *Bellotti*. But the qualified nature of the *Bellotti* rejection and the fact that such arguments are applicable in almost any corporate speech case assure that they will be raised again.¹⁴³ The problem of corporate domination of political speech has been especially worrisome to commentators, particularly where the electoral process is concerned. Therefore, special attention will be paid to the true dimensions of the problem and the avenues of approach left open by *Bellotti* and *Consolidated Edison*.

A. Theoretical Approach

The most elaborate and thoughtful criticism of the theoretical underpinnings of the Supreme Court's extension of first amendment protection to corporate political speech is that offered by Professor O'Kelley.¹⁴⁴ O'Kelley views the *Bellotti* decision, and presumably *Consolidated Edison* as well,¹⁴⁵ as inconsistent with prior Supreme Court case law in the area of corporate constitutional rights. Because acceptance of Professor O'Kelley's theories would have dramatic repercus-

143. In contrast, the arguments supporting the speech ban at issue in *Consolidated Edison* arose out of a somewhat unique factual setting and do not have the same general application.

144. See O'Kelley, *supra* note 15, at 1368-74.

145. O'Kelley's article concerns itself primarily with the *Bellotti* decision and predates the *Consolidated Edison* opinion. Although the discussion of O'Kelley's theories will include only *Bellotti*, it appears that his views of *Consolidated Edison* would be generally the same.

sions adversely affecting the availability of the corporate political message, his views should be carefully examined.

O'Kelley's basic thesis is that "[e]xpression is possible only by natural persons, not by corporations."¹⁴⁶ O'Kelley believes that *Bellotti* foolishly ascribes the ability to speak to the artificial corporate entity.¹⁴⁷ This error, says O'Kelley, constitutes a "category-mistake"¹⁴⁸ which the Supreme Court has not made before. Rather, O'Kelley finds in such early Supreme Court cases as *Santa Clara County v. Southern Pacific Railroad*,¹⁴⁹ *Minneapolis & St. Louis Railway v. Beckwith*,¹⁵⁰ *Hale v. Henkel*,¹⁵¹ and *Northwestern Life Insurance Co. v. Riggs*¹⁵² a consistent theoretical approach, which he denominates the "Field rationale."¹⁵³

The Field rationale has two aspects. First, it provides that the constitutional rights of a corporation must be "coextensive with the rights that its shareholders would enjoy if they had chosen to conduct their business in an unincorporated form."¹⁵⁴ Second, it recognizes that "only natural persons can assert natural liberties, as opposed to rights necessary to protect property."¹⁵⁵

Although the Field rationale is an interesting theoretical concept, it is a device of Professor O'Kelley's construction, not a theory actually enunciated and applied by the Supreme Court.¹⁵⁶ Indeed, the theory is constructed from a few isolated statements made by Justice Field,¹⁵⁷

146. O'Kelley, *supra* note 15, at 1351.

147. *Id.* at 1370.

148. A "category-mistake" "represents the facts of mental life as if they belonged to one logical type or category (or range of types or categories) when they actually belong to another." *Id.* at 1350 (quoting G. RYLE, *THE CONCEPT OF THE MIND* 16 (1949)).

149. 118 U.S. 394 (1886) (corporations entitled to equal protection under the fourteenth amendment).

150. 129 U.S. 26 (1889) (corporations entitled to due process under the fourteenth amendment).

151. 201 U.S. 43 (1906) (corporations are not entitled to privilege against self-incrimination of fifth amendment, but indicating in dicta that corporations are entitled to fourth amendment's protection against unreasonable searches and seizures).

152. 203 U.S. 243 (1906) (the "liberty" referred to in the fourteenth amendment is reserved for natural, not artificial, persons).

153. *Id.* at 1356. The term "Field rationale" is derived from key opinions penned by Mr. Justice Field in his capacity as a Circuit Judge—the lower court opinion in the *Santa Clara County* case, reported at 18 F. 385 (C.C.D. Cal. 1883), and its predecessor *County of San Mateo v. Southern Pac. R.R.*, 13 F. 722 (C.C.D. Cal. 1882), *writ of error dismissed per application of counsel*, 116 U.S. 138 (1885).

154. O'Kelley, *supra* note 15, at 1356.

155. *Id.*

156. Even O'Kelley characterizes the Field rationale as "unelucidated." *Id.* at 1351.

157. The statement most directly supportive of the Field rationale is the following from *County of Santa Clara v. Southern Pac. R.R.*, 18 F. 385, 403 (C.C.D. Cal. 1883):

Whatever affects the property of the corporation—that is, of all the members united by

sitting as a Circuit Judge, and an assumption that these statements made in lower court opinions were accepted (usually silently) as the rationale for later Supreme Court cases on the same subject.¹⁵⁸

Further, O'Kelley's claims of continuous Supreme Court treatment of corporate constitutional rights consistent with the Field rationale are belied by his own discussion of cases such as *Hale v. Henkel*,¹⁵⁹ which held the privilege against self-incrimination to be personal in nature and therefore not available to corporations, but opined in dictum that corporations are entitled to protection from unreasonable searches and seizures.¹⁶⁰ It seems incongruous that it is consistent with the Field rationale to accord corporations freedom from unreasonable searches and seizures, a right grounded in that most intimate of personal freedoms, the right of privacy,¹⁶¹ but inconsistent to give corporations free speech rights because they cannot actually speak.

Despite O'Kelley's claims that it is a category-mistake to assume that corporations can speak, he is willing to admit that they have a protected right to *commercial* speech similar to that of an individual because "[c]orporate advertising is a part of the business."¹⁶² If commercial speech aimed directly at creating a sale is part of the corporate business and therefore properly protected by the first amendment, O'Kelley does not explain why political speech aimed less directly but no less surely at advancing the economic prospects of the corporation is

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

Id.

The more basic ground for decision in both of Justice Field's lower court opinions was the use of principles of statutory construction and legislative history to conclude that the framers of the fourteenth amendment intended it to have a "broad and catholic spirit." *Id.* at 398.

158. O'Kelley, *supra* note 15, at 1355-56.

159. 201 U.S. 43 (1906). O'Kelley's discussion makes it clear that it is not easy to interpret this case as consistent with the Field rationale, although he manages to do so. O'Kelley, *supra* note 15, at 1357-58.

160. 201 U.S. at 86.

161. See E. FISHER, SEARCH AND SEIZURE 11 (1970):

The underlying purpose of those who framed our Constitution and its Amendments, particularly the Fourth, was to place salutary restrictions upon the power of government. They sought to guard against any attempt, by legislation or otherwise, to permit unreasonable governmental intrusion into private affairs. The Fourth Amendment and its state counterparts embody a comprehensive right of privacy for the individual against unwarranted violations thereof by officers of government.

Id.

162. O'Kelley, *supra* note 15, at 1373.

not also a "part of the business" and therefore properly protected by the first amendment. For example, the speech involved in *Consolidated Edison* was clearly political, rather than commercial in nature, but it was just as clearly designed to advance the economic prospects of the speaker.¹⁶³ It is now clear that corporate political activity has a direct impact on the economic success of many corporations.¹⁶⁴ Even simple image advertising (public relations) can have a substantial impact on a company's balance sheet.¹⁶⁵

O'Kelley's reliance on the Field rationale is further weakened by the need to recognize what he terms the "associational rationale" to account for such cases as *NAACP v. Button*,¹⁶⁶ and *NAACP v. Alabama ex rel. Patterson*,¹⁶⁷ in which the Supreme Court recognized the right of political speech for those corporations formed for the purpose of advancing and realizing the political goals of their members. O'Kelley concedes that "when individuals with a desire to express their common views exercise their freedom of expression through the medium of a corporation and its agents, the corporation may assert that the expression is protected under the first amendment."¹⁶⁸ Again, there is no convincing reason why protection should be afforded to the political speech of a corporation using that speech to further its owners' goals of propagating a particular political philosophy but not to the political speech of a corporation using that speech to further its owners' goals of achieving a profit.¹⁶⁹ The distinction becomes even less clear when a

163. Communications by for-profit corporations are more often prompted at least marginally by economic motivation. By some reasoning, therefore, it is commercial speech. The pro-nuclear message of Consolidated Edison, an operator of nuclear power plants whose economic future is at least partially dependent on the expanded use of nuclear power, is hardly less commercial than the message of Central Hudson Gas & Electric encouraging the consumption of electricity instead of other fuels.

Schwarz & Straus, *Uneasy Spectre Raised by Corporate Speech Rulings*, Legal Times of Wash., Aug. 11, 1980, at 15, col. 3.

164. Note, *Corporate Political Affairs Programs*, 70 YALE L.J. 821, 827 (1961):

A company's political persuasion program may be an important factor in its economic success. The ability to generate public support may be used defensively—to resist government measures likely to decrease profits—or offensively—to secure adoption of measures which will assist the company to increase its income.

Id.

165. See L. GOLDEN, ONLY BY PUBLIC CONSENT 370 (1969); H. MARQUIS, THE CHANGING CORPORATE IMAGE 37 (1970); B. ZOLLO, THE DOLLARS AND SENSE OF PUBLIC RELATIONS 3 (1967).

166. 371 U.S. 415 (1963).

167. 357 U.S. 449 (1958).

168. O'Kelley, *supra* note 15, at 1366.

169. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 166 (1978):

Political expression and associational activity should not be less protected when individuals are organized in a business corporation. Even though not organized primarily for

business corporation attempts to advance a particular political philosophy to foster an environment in which more profitable business activities can occur. As already discussed,¹⁷⁰ if political speech is disqualified from first amendment protection because of an economic motive, there will be very little political speech left for anyone to hear.

O'Kelley attempts to distinguish the situations by utilizing a passage from *NAACP v. Alabama ex rel. Patterson* in which the Supreme Court stressed the nexus between the NAACP and its members, stating that the NAACP "is the appropriate party to assert these rights, because it and its members are in every practical sense identical."¹⁷¹ Thus, O'Kelley would allow business corporations to engage in political speech only if they "share unanimity of interest and desires to express their common views."¹⁷²

There is no doubt that corporations such as the NAACP should be allowed to engage in political speech. But the same reasoning that supports protection of political speech for such organizations also supports protection of political speech of business corporations. Just as the members of the NAACP share the common goal of furtherance of a political point of view, so do the shareholders of most business corporations share the common goal of obtaining a monetary reward.¹⁷³ Just as the NAACP's speech is a means toward the common goal, so is a business corporation's speech a means toward a common goal. Just as some members of the NAACP may disagree with particular statements and particular programs of the organization,¹⁷⁴ so some shareholders of

political purposes, shareholders or their representatives may find political expression necessary to achieve their goals. When shareholders choose to advance political ideas collectively to further business objectives, their association and expression should be protected.

Id.

170. See note 122 *supra*.

171. 357 U.S. at 459.

172. O'Kelley, *supra* note 15, at 1365. O'Kelley views the result in *Bellotti* as correct only because the invalidated prohibition banned even corporate speech authorized by unanimous shareholder activity. Apparently any law which made an exception for such speech would meet with O'Kelley's approval. *Id.* at 1369.

173. M. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 30 n.2 (1976).

174. Certainly, members of organizations such as the NAACP cannot always agree as to the best method of advancing the general cause in which they all believe. Richard Kluger has chronicled some of the disagreements among civil rights proponents as to the proper approach to the 1954 desegregation cases that culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954). R. KLUGER, 2 *SIMPLE JUSTICE* 677 (1975).

Perhaps an even more vivid example of the disagreements over the means of accomplishing an agreed-upon goal is the controversy involving the right of American Nazis to march in Skokie, Illinois, which divided the American Civil Liberties Union. *N.Y. Times*, Oct. 14, 1979, at 59, col. 1.

a profit-seeking corporation may disagree with some of its political statements and programs. Nonetheless, if the political speech of the former is protected, so should be that of the latter. Unanimous agreement on the methods of achieving a corporation's goals is no more likely to be achieved among the owners of a "political" corporation than among the owners of a "business" corporation.

It has been argued that owners of a political corporation such as the NAACP realize that such a corporation will engage in political speech, but that shareholders of business corporations do not. This argument operates on the false assumption that shareholders of business corporations have never heard of lobbying, are unaware of the history of corporate campaign contributions, and do not read the popular literature in which corporate political advertisements appear almost daily.

Another major problem with O'Kelley's theories concerning the consistent application of the Field rationale lies in the need to protect the free speech rights of media corporations in cases such as *Grosjean v. American Press Co.*¹⁷⁵ O'Kelley freely admits that such protection is necessary because free speech is "essential to the business of newspapers,"¹⁷⁶ but insists that no category-mistake is involved because "[t]he corporation cannot speak, but its business requires individual speech and a corporation may be held legally responsible for the speech of its agents."¹⁷⁷ Why it is not a category-mistake to say that a media corporation can engage in speech through its agents because it is responsible for the legal consequences of their acts, but it *is* a category-mistake to (accurately) make the same statement as to business corporations is not clear.

If it is consistent with the Field rationale to allow media corporations to exercise free speech rights because it is *necessary* to protect their business, it is also proper to accord the same rights to non-media corporations whose speech can also be vital to their long-range economic security.¹⁷⁸ In fact, it is the lack of a reasonable basis on which to distinguish between the free speech rights of media corporations and those of non-media corporations that precipitated Chief Justice Burger's entire concurring opinion in *Bellotti*.¹⁷⁹

175. 297 U.S. 233 (1936).

176. O'Kelley, *supra* note 15, at 1360.

177. *Id.*

178. See note 164 *supra*.

179. 435 U.S. at 795-802.

This is more than just a hypothetical problem. A pre-*Bellotti* New York law aimed at preventing corporations from making expenditures for political purposes, if construed literally,

Even if one were to accept O'Kelley's theory of a consistent application of the Field rationale by the Supreme Court, his criticisms of the theoretical underpinnings of the corporate political speech cases would still miss the mark. O'Kelley effectively ignores the entire thrust of the Supreme Court's content-oriented rationale for protecting commercial and corporate political speech.¹⁸⁰ O'Kelley's argument that a content-oriented theory of free speech protection is theoretically invalid because it conflicts with his perception of the case law regarding corporate constitutional rights is unduly narrow.

It was clearly rational for the Supreme Court to treat *Bellotti* and *Consolidated Edison* as primarily free speech cases, rather than primarily corporate law cases.¹⁸¹ Given the appropriateness of this characterization, which Justice Powell established in the opening pages of *Bellotti*,¹⁸² the theoretical foundation of the corporate political speech cases has a firm base. If the Supreme Court's extension of first amendment protection to corporate political speech is inconsistent with the Field rationale, it is not surprising—the recognition of the protected nature of the corporate political speech at issue in *Bellotti* and *Consolidated Edison* did not spring from the body of corporate law discussed by O'Kelley. Rather, the recognition of a right of political speech for corporations evolved from the Court's recognition of the right to receive commercial speech. The Supreme Court's decision to extend freedom of expression to corporate political statements *is* theoretically consistent with its true doctrinal ancestors.¹⁸³

Because corporate political speech is protected on the basis of its value to the listener, rather than its value to the corporation itself, the bulk of O'Kelley's criticism is irrelevant. The value to the receiver of corporate political speech is not affected by the fact that the speaker of a particular message is a corporation formed for profit rather than the NAACP, or a non-media corporation rather than a newspaper. The

might have prevented The New York Times and other newspapers from endorsing candidates for political office. *Pecora v. Queens County Bar Ass'n*, 46 Misc. 2d 530, 260 N.Y.S.2d 116 (Sup. Ct. 1965), discussed in Schaefer, *supra* note 122, at 2-3 n.6, 13-14.

180. An even minimally adequate discussion of the right to receive theory upon which *Bellotti* is predicated is conspicuously absent from O'Kelley's article.

181. Smith, *supra* note 106, at 112.

182. 435 U.S. at 775-76.

183. Kiley, *PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear After First National Bank v. Bellotti*, 22 ARIZ. L. REV. 427, 439 (1980); Tucker, *Use of Corporate Funds for Political Speech*, 53 CONN. B.J. 185, 201 (1979); Note, 20 B.C. L. REV. 1003, 1017.

value of these messages to the receiver is ignored by O'Kelley and unduly minimized by other critics of *Bellotti* and *Consolidated Edison*.

What critics overlook is that *Bellotti* and *Consolidated Edison* merely recognized the realities of American political and democratic life. Corporations have been involved in politics and engaged in political speech since around 1800.¹⁸⁴ Corporations should and must be involved in American political life, and that has never been more true than today.

Corporations are and must be political participants; in performing their basic social function—the production and distribution of goods and services—they are, in this general process of goal attainment, inextricably bound up with the multitude of institutions and interests present in American society. They are, accordingly, subject to continuous claims by these coexisting interests and institutions and, in return, must seek to effect their own claims.¹⁸⁵

To a large extent, the need for corporate political speech and participation flows from the increasingly extensive governmental reaction with and control over the business sector. Businesses do little today that is not directly and actively affected by government.¹⁸⁶ Few managerial decisions are unaffected by health, safety, environmental, labor, antitrust, tax, tariff or some other variety of legislation or administrative action.¹⁸⁷ It is natural, proper, and in keeping with our traditions for corporations to react to this governmental influence by entering the political arena through various means such as lobbying, electoral activity, and political advertising.¹⁸⁸ The profit-and-loss statement of a corporation may well be determined by how vigorously and effectively that corporation engages in these political endeavors.¹⁸⁹

184. See notes 28-29 *supra*.

185. EPSTEIN, *supra* note 28, at 276.

186. *Id.* at 133.

187. Comment, *Corporate Advocacy Advertising: When Business' Right to Speak Threatens the Administration of Justice*, IV DET. C. OF L. REV. 623, 626 (1979) [hereinafter cited as Comment].

188. P. DOUGLAS, ETHICS IN GOVERNMENT 32 (1952) ("Wherever government controls a business, it becomes inevitable that the business should try to control the government"); Budde, *Business Political Action Committees*, in PARTIES, INTEREST GROUPS AND CAMPAIGN FINANCE LAWS (M. Malbin ed. 1980) ("[T]he more regulated an industry is and the more obvious an industry is a congressional target, the more likely it is to have a political action committee").

189. See Note, *Corporate Political Affairs Programs*, 70 YALE L.J. 821, 827, 834 (1961). This is true of political expenditures only indirectly affecting the corporation, and even of charitable contributions. In *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 167 n.33 (1980), it is pointed out:

Corporate expression designed to influence political decisions having only indirect effects on the corporation may often further corporate purposes. For example, a corporation

Because corporate political activity has been for a long time, and remains today, a necessary form of corporate endeavor, it is well established and well accepted in our political and social system. Corporations are today, and have been since our early history, an important interest group "accorded precisely the same political status as other groups."¹⁹⁰

An obvious example of the acceptance of corporations as legitimate participants in American political life, and hence as legitimate political speakers, lies in the practice of corporate lobbying. Such lobbying has long been allowed,¹⁹¹ and has recently reached significant proportions.¹⁹² Although such lobbying is subject to some modest controls,¹⁹³ it was formally legitimized by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,¹⁹⁴ in which the practice of lobbying was held to be outside the scope of the prohibitions of the Sherman Act.¹⁹⁵ This case involved a challenge by the trucking industry to the lobbying practices of the railroad industry, and, more specifically, the latter's attempts to block Pennsylvania legislation favorable to trucking industry efforts to secure a greater share of the long-distance freight business.¹⁹⁶ Without mentioning that the offending lobbyists were corporations, the Supreme Court held that a restriction of lobbying would have important constitutional

dependent for its success on the high quality of its employees may have a stake in political decisions which affect the corporation's ability to attract superior talent. Political expression intended to influence the creation of an attractive environment may further corporate objectives.

Id. Cf. *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 143, 98 A.2d 581 (corporate donations to private university intended in part to ensure a supply of trained personnel for corporate employment held *intra vires*), *appeal dismissed*, 346 U.S. 861 (1953).

190. EPSTEIN, *supra* note 28, at 125.

191. For a brief history of early lobbying, see K. SCHRIFTGIESSER, *THE LOBBYISTS* 3-21 (1951).

192. *Special Report, The Corporate Image: PR to the Rescue*, *BUS. WEEK*, Jan. 22, 1979, at 54 (500 major corporations and 1,700 trade associations have lobbying headquarters in Washington, D.C.).

193. The Federal Regulation of Lobbying Act, 2 U.S.C. §§ 271-272 (1976). For a critique of the restraints on corporate lobbying see M. NADEL, *CORPORATIONS AND POLITICAL ACCOUNTABILITY* 48-49 (1976); Land, *Federal Lobbying Disclosure Legislation*, 17 *HARV. J. LEGIS.* 295, 300-01 (1980).

194. 365 U.S. 127 (1961).

195. *Id.* at 136.

196. *Id.* at 128-131.

This dispute apparently continues. In a recent full-page advertisement, the Association of American Railroads cited various facts and figures in an attempt to convince the reading public that "public subsidies to trucks and barges throw competition out of balance." *TIME*, Apr. 11, 1981, at 14.

implications,¹⁹⁷ and found no basis in the legislative character of the Sherman Act to "hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes. . . ." ¹⁹⁸

In language which foreshadowed the emergence of the right to receive rationale, the Court also said:

A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested *would thus deprive the government of a valuable source of information* and at the same time deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.¹⁹⁹

Contrary holdings in *Bellotti* and *Consolidated Edison* surely would have required that a serious reevaluation of the concept of protected corporate lobbying be undertaken.²⁰⁰ Yet, no critic of those decisions has advocated a change in the law to curtail this well established and well accepted practice. Although Watergate-era abuses have spurred consideration of dramatic revamping of lobbying regulations,²⁰¹ the legislation now under consideration does not contemplate limiting or restricting the quantity of lobbying,²⁰² and does not consider treating corporations differently from other lobbyists.

If corporations were denied the right to lobby or to otherwise convey political messages, the right to receive would be dealt a severe blow. This point is not emphasized by the majority rulings in *Bellotti*

197. 365 U.S. at 138.

198. *Id.* at 137. In this passage, the Supreme Court emphasized the value of free speech to self-government in terms quite consistent with Meiklejohn's theories. See note 49 *supra* and accompanying text.

199. *Id.* at 139 (emphasis added).

200. Justice Powell's majority opinion in *Bellotti* noted:

The State's paternalism evidenced by this statute is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying but had markedly less confidence in the electorate. If the First Amendment protects the right of corporations to petition legislative and administrative bodies, see *California Motor Transp. Co. v. Trucking Unlimited* 404 U.S. 508, 510-11 (1972); *Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961), there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity.

435 U.S. at 792 n.31.

Additionally, corporate expenditures for lobbying are just as much a burden on dissenting shareholders as are expenditures for electioneering. *Id.* at 793.

201. AMERICAN ENTERPRISE INSTITUTE, PROPOSALS TO REVISE THE LOBBYING LAW (1980).

202. Land, *Federal Lobbying Disclosure Reform Legislation*, 17 HARV. J. LEGIS. 295, 320 (1980).

and *Consolidated Edison*. Those opinions take for granted the value of free political speech—and it is understandable that they should—without examining the potential benefits to the right to receive arising from the nature of the corporate source. While the majority opinions omitted mention of the peculiar benefits stemming from a corporate source, the dissenters in both cases took the opportunity to highlight the potential disadvantages of allowing speech from such a source. The majority's omission in each case should be rectified. No fair evaluation of the practical effects of extending first amendment protection to the political speech of corporations can be undertaken without regard to the advantages of the corporate source. Unless these advantages are considered, it is difficult to fully appreciate the Supreme Court's theoretical approach in *Bellotti* and *Consolidated Edison* which based the holdings on the right to receive.

Corporate political speech is worthy of protection if only because of the importance of the source to our society. The corporation, as an institution, is a pervasive and critically important element of American life.²⁰³

[T]he large corporation is an indispensable element in our economy and community.

A preeminently American phenomenon, the very large corporation, for better or worse, depending on one's point of view, has done more than any other institution to render that economy distinct from all others. Far from being aberrant and dissonant, the large corporation—warts and all—is the essence of American life as we now know it.²⁰⁴

Without saying "What's good for large corporations is good for America,"²⁰⁵ the point must be made that the corporate voice is one of the many important voices that deserve to be heard as our people and politicians make the critical decisions of the 1980's. It should not be silenced. Trends in the American political system flow like tides in response to the various voices and pressures applied. The pendulum swings back and forth, now more conservative, now more liberal. Only if important voices are censored is the pendulum likely to swing too far in one direction, throwing the system out of kilter. If the corporate

203. See H. OLECK, MODERN CORPORATION LAW § 2, at 4 (Student ed. 1960) ("The corporation is a basic part of our entire social and economic structure").

204. J. GLOVER, THE REVOLUTIONARY CORPORATIONS 428 (1980).

205. Shareholders and employees of the Chrysler Corporation might well have some sympathy for the feelings expressed in this statement.

voice is silenced, there is an increased possibility that governmental regulation and interference might go too far. If such does occur, and a critical institution like the corporation is unduly injured, the adverse consequences may affect all Americans.

Justice White's *Bellotti* dissent argued that the right to receive would not be seriously injured if corporate views are suppressed, because shareholders, employees and customers would still be free to communicate.²⁰⁶ At the same time, Justice White recognized that commercial speech "could not be restricted without impinging seriously upon the right to receive information."²⁰⁷ The latter admission destroys the efficacy of the former argument because political speech is, if anything, less resilient and more subject to being unduly chilled by governmental regulation than is commercial speech.²⁰⁸ It is unrealistic to contend that if corporate political speech is censored that stockholders, employees, and customers will rush in to effectively fill the void.²⁰⁹

Justice White also ignored that, to an extent, the corporate point of view may be a unique one and therefore doubly valuable to the right to receive. As Professor Henn has stated, regardless of the various legal theories involved, a corporation "has group interests distinguishable from the individual interests of its individual members."²¹⁰ It would be impossible for corporate political speech to reflect only the views of individual shareholders of the major corporations. The owners, as individuals, have conflicting concerns and values, despite the common

206. 435 U.S. at 765. Justice White also suggested that corporate speech was entitled to less protection because it does not further self-expression reasoning that "ideas which are not a product of individual choice" are less worthy of protection. *Id.* This argument has been criticized:

The dissent nowhere suggested why corporate advocacy, even from a self-expression point of view, does not further the individual's right to speech. Indeed, the private citizen may be delighted to see views with which he agrees presented in a visible and important forum. On the other hand, if he is sufficiently upset, he can divest his holdings, or use his corporate vote to speak his mind.

Why "ideas which are not a product of individual choice" are entitled to less protection is not clear. This notion, like the entire argument, can arise only from a misconception of fundamental first amendment theory. The self-expression protected by the Constitution inures to the declarant. The listener's self-realization and self-fulfillment are equally protected. The listener may raise his voice in support or rebuttal, and make a choice from the views raised. It is this choice which is self-fulfillment. Expression without an audience and without rebuttal is valueless.

Comment, *supra* note 187, at 646-47.

207. 435 U.S. at 765.

208. Schaefer, *supra* note 122, at 36.

209. Contributions by individuals to corporate-sponsored political action committees indicate that to some extent individual action can fill this void. But there is no reason to believe that individual action could provide effective substitute advocacy in the broad range of areas in which corporations are now involved in political speech.

210. H. HENN, LAW OF CORPORATIONS § 78, at 107 (2d ed. 1970).

ownership of the corporation which they share. Thus, the corporate voice may well be a separate and unique one—not representative of all of the views of any single shareholder or employee, but representative of part of the views and interests of all of them.

O'Kelley argues, as have others, that corporations, as artificial entities, cannot physically speak, and concludes that corporate treasuries are used merely to amplify the views of management.²¹¹ This argument is subject to serious criticism. Certainly, there are cases where corporate officers have abused their authority by utilizing corporate funds to espouse their personal ideas and advance their personal causes.²¹² This is just one of countless forms of abuse of power by corporate officials. It should be curbed, as should embezzlement, expense-padding, and self-dealing, but its existence does not justify elimination of first amendment protection for corporate political speech.

Such abuse, fortunately, appears to be the exception rather than the rule. As a general principle, "[t]he premise that management will normally run corporate affairs without regard to its own self-interest is probably accurate as to business decisions."²¹³ More specifically, it has been stated that "managers, in conducting corporate political activities generally act in accordance with organizational rather than individual policies and seek to accomplish company as distinguished from personal objectives."²¹⁴ Indeed, a survey of the actual practice in corporate speech supports this conclusion,²¹⁵ and it has been noted:

It is unrealistic to suggest that the considerable costs of purchasing advertising space or broadcast time would not re-

211. O'Kelley, *supra* note 15, at 1377.

212. See EPSTEIN, *supra* note 28, at 129-30.

213. M. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 30 (1976).

214. EPSTEIN, *supra* note 28, at 124-25.

Professor Baker has suggested that abuse of corporate funds by management in the form of political speech for personal causes is not likely to be a widespread phenomenon because "the use of corporate funds to fulfill management in carrying out its fiduciary duties is normally described as either taxable compensation or illegal conversion." Baker, *Commercial Speech, A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 36 (1976) (citing INT. REV. CODE of 1954, § 61(a); 3A W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 1102-12 (rev. perm. ed. 1975)).

215. In addition to other political advertisements mentioned in this article, the author has recently observed a Union Carbide Corp. advertisement seeking public support for legislation which would supposedly make America more competitive in the world market, *Austin-American Statesman*, Apr. 30, 1981, at B12; a Mobil Corporation advertisement supporting recent government leasing of off-shore oil drilling sites, *Christian Science Monitor*, Mar. 10, 1981, at 22, col. 2-3; a two-page advertisement by the United States Steel Corp. seeking public support for tax reform to encourage industrial investment, *TIME*, Apr. 13, 1981, at 8-9; and a three-page essay on how to control inflation by limiting government spending sponsored by the Smith-Kline Corporation, *NEWSWEEK*, Mar. 23, 1981, at 67-69.

strain management from using corporate funds to wage personal public opinion campaigns that were not in the interests of the corporation. Indeed, anyone who has read corporate "issue advertising" in quality newspapers and news magazines will recognize that the items discussed generally relate to the concerns of the corporation, although they may not promote the company or its products directly.²¹⁶

Generally, it should not be surprising to learn that the personal political views of most corporate executives parallel the views which are most beneficial to the corporation's economic well-being.²¹⁷ However, a corporate officer's personal views or interests may occasionally diverge from those best serving the corporate interest. For example, it is likely that in 1972 at least a moderate number of business executives across the country felt strongly enough about the Vietnam war to have been "one issue" voters who personally supported Democratic candidate George McGovern for President. At the same time, if those managers believed that the re-election of President Nixon, for some direct or indirect reason, would have been more likely beneficial for the economy in general and the company's profitability²¹⁸ in particular, they would have been under a fiduciary obligation to support President Nixon's re-election *if* they had deemed any spending of corporate funds worthwhile and legal.²¹⁹ One author has suggested that:

[I]t requires little imagination to think of instances of potential conflict between the manager's individual interest and the objectives of the organization. For example, while tariff barriers aid a firm in a protected domestic industry, they may also have the effect of increasing prices of other items con-

216. Schaefer, *supra* note 122, at 13.

If corporate political advertising does stray from legitimate corporate purposes, the public will likely make the corporation pay for its sins. In the mid-1960's, Schick Electric joined in the battle in California over a referendum regarding pornography. The public apparently believed the corporation had overstepped its bounds, and the result was a boycott which apparently reduced Schick's profits by 53%. See EPSTEIN, *supra* note 28, at 130.

217. EPSTEIN, *supra* note 28, at 13 ("As a general rule, however, the political interests of the manager are in harmony with the objectives of his organization").

218. The normal function of business corporations is to undertake activity with the purpose and expectation of making a profit. W. CARY, *CASES AND MATERIALS ON CORPORATIONS* 60 (4th ed. 1969).

219. See Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 16 (1976). In the commercial speech sphere, Professor Baker has hypothesized a situation in which a whiskey distilling and distributing company's management and owners are all teetotalers who personally oppose the use of alcohol, but recognize the value of advertising to the ultimate profit of the venture. Although the example is far-fetched, it does make the point that a person's individual interests are not always completely congruent with the interests of the corporation in which he or she owns stock.

sumed by the corporate officer. Similarly, defeat of air- or water-pollution control measures lowers the operating costs of a company but increases the health hazards faced by the corporate manager.²²⁰

When the personal interests of corporate managers do not represent the best interests of the corporation, the managers can use corporate funds only to support the latter interests. When they do so via the conduit of political speech, that speech represents the corporation's best interests, not those of the managers. It is a unique voice, therefore, and especially valuable to the right to receive. Even when corporate managers do not personally subscribe to a political cause that appears to be in the corporation's best interest, they should have the power, and perhaps the duty,²²¹ to advance the corporate position by utilization of corporate political speech. That the speech must be communicated through representatives or agents should not affect its protected quality.²²²

The final important point about the corporate message which highlights its value to the right to receive is the importance of the information frequently conveyed by such entities. Soon after the decision was handed down, it was predicted that "*Bellotti* signals a revolutionary change which cannot but elevate the level of debate concerning political affairs and governmental action,"²²³ and there is evidence to

220. EPSTEIN, *supra* note 28, at 13.

221. It is the duty of management "to administer the corporate affairs for the common benefit of all the stockholders, and exercise their best care, skill and judgment in the management of the corporate business solely in the interests of the corporation." W. KNEPPER, *LIABILITIES OF CORPORATE OFFICERS AND DIRECTORS* § 1.02, at 4 (2d ed. 1973).

More specifically, it has been noted:

Corporate directors have a fiduciary duty to both the corporation and the shareholders to act in good faith. They may not act in a manner contrary to the best interests of the corporation. Spending on referendums may well fall within this fiduciary duty. Thus, if a director can reasonably claim that an expenditure is in the best interests of the corporation and will not result in the waste of the corporate assets, the expenditure should be permitted. When a referendum issue is closely related to a corporation's business, and the results of the referendum would have a substantial effect on the corporation's profits, directors should have not only the right but the duty to publicize the corporation's position.

Comment, *First National Bank of Boston v. Bellotti: Corporate Political Speech in Ballot-Measure Campaigns*, 8 N.Y.U. REV. L. & SOC. CHANGE 63, 79 (1978-1979).

222. Note, *First National Bank of Boston v. Bellotti: The Reopening of the Corporate Mouth—The Corporation's Right to Speak*, 21 ARIZ. L. REV. 841, 851 (1979).

No one suggests that the political speech rights of our major elected officials should be curtailed because their public statements are usually composed by others, and the content of the message delivered may well vary depending upon which speechwriter is used. See Bormann, *Ghostwriting and the Rhetorical Critic*, XLVI Q.J. SPEECH 284 (1960).

223. Rome and Roberts, *Bellotti and the First Amendment: A New Era in Corporate Speech?* 3 CORP. L. REV. 28, 49 (1980). See also Tucker, *Use of Corporate Funds for Political Speech*, 53

support this prediction.

Corporations have special knowledge in their fields of endeavor. The more complex and technical a political issue, the more likely it is that a corporate voice can illuminate it. Thus, the insert ban in *Consolidated Edison* was particularly inappropriate because in an era of skyrocketing petroleum prices and developing energy shortages, it is important that the consumer be given input from regulated electrical utilities "to explain the complexities of the subject about which they have peculiar knowledge."²²⁴

Some types of information may be available only from corporations with the tremendous resources, monetary and otherwise, necessary to gather it.²²⁵ It is generally recognized that large accumulations of capital make possible the magnificent technical and productive advances of the modern American economy.²²⁶ These accumulations of capital in the corporate form may also make possible the gathering of information relevant to many of our great political issues—information which would not be obtainable absent the corporate form or available absent the corporate voice.

Similarly, it is not difficult to foresee situations in which only big business can muster the resources necessary to persuasively challenge big government and big labor on issues so significant that the latter entities should not go unchallenged.²²⁷

Examples of the beneficial aspects of corporate political speech are not difficult to find. As early as the 1930's, A&P Food Stores responded to legislation introduced in Congress which would have had the probable effect of putting chain stores out of business, by running advertisements which explained why the abolition of chain stores would injure consumers, farmers, and A&P's nearly 90,000 employees. The ad stated frankly:

Since the task we have set before us is one involving the widest dissemination of complete information to all of the American people, and since this is a profession in which we are not expert, we have engaged Carl Byoir & Associates, public relations counsel, to do this work. We realize that our views are

CONN. B.J. 185, 202 (1979) (*Bellotti* "should have a beneficial impact on the democratic process. The more opportunity there is to publicly express points of view, regardless of the origin of the expression, the greater is the opportunity for the electorate to be better informed.").

224. Note, 44 ALB. L. REV. 515, 521-22 (1980).

225. See Comment, *supra* note 187, at 658.

226. See J. GLOVER, *THE REVOLUTIONARY CORPORATIONS* 427 (1980).

227. See Comment, *supra* note 187, at 658.

seldom news. We know, therefore, that we must be prepared to spend a substantial sum of money in telling our story to all of the American people.²²⁸

The public responded to the ads with an outpouring of support and the bill was defeated.²²⁹

More recently, Mobil Corporation has spent millions of dollars explaining its position on various energy issues. The information contained in these "advertorials" has helped to fill gaps left by what was felt to be mediocre coverage of the energy crisis by the mass media²³⁰ and it has been said that even "critics would be hard put to deny that Mobil's editorial insistence has brought new facts to the public debate on energy, and in the process has influenced editorial thought and political actions."²³¹

Herbert Schmertz, the driving force behind Mobil's issue advertising campaign, offers yet another example:

[A] health insurance company startled readers with advertisements urging them not to submit to surgery without obtaining a second opinion. This, it felt, would not only prevent unnecessary operations but also hold down the skyrocketing cost of medical care. The insurance company's view has since become public policy and, in some states, the law.²³²

In summary, those who attack the theoretical basis of *Bellotti* and *Consolidated Edison*, while ignoring the prudence of the right to receive theory which underlay those decisions, are being unduly narrow-minded. The corporate viewpoint is important, unique, and, in at least some instances, largely irreplaceable. At the very least, it is one more voice to be heard, and, in America, on that basis alone it should find protection in the shadow of the first amendment.

228. Fox, *Business/Media Influence: Who Does What to Whom?*, BUSINESS AND THE MEDIA 167 (C. Aronoff ed. 1979).

229. *Id.* A similar scenario was played out in 1962 when the U.S. Savings and Loan League sought and received public support to defeat President Kennedy's proposal to withhold the taxes due on interest earned on savings deposits. CONGRESSIONAL QUARTERLY, INC., THE WASHINGTON LOBBY 3 (2d ed. 1979).

More recently, The Savings & Loan Foundation has undertaken a massive advertising campaign to solicit public support for a proposed law to provide that the first \$1,000 of interest on savings earned by an individual (and \$2,000 for joint returns) shall be tax free. TIME, Mar. 16, 1981, at 17.

230. Baram, *Newspapers: Their Coverage and Big Business*, in BIG BUSINESS AND THE MASS MEDIA 159-60 (B. Rubin ed. 1977).

231. Banks, *The Rise of the Newsocracy*, ATLANTIC MONTHLY, Jan. 1981, at 58.

232. H. SCHMERTZ, CORPORATIONS AND THE FIRST AMENDMENT 14 (1978).

B. *Practical Effects*

The two most serious practical objections lodged against extending first amendment protection to corporate political speech are those qualifiedly rejected in *Bellotti*—(1) subsidization by minority shareholders of corporate political speech with which they disagree, and (2) the potential for undue influence by corporations in the political sphere. These criticisms were not finally laid to rest in either *Bellotti* or *Consolidated Edison*, and are likely to be presented for court consideration again in the future. Also of continuing concern will be the impact of these decisions upon electoral reform legislation. Close scrutiny indicates that these arguments do not strongly mitigate against protection for corporate political speech.

1. Protection of Minority Shareholders.

The *Bellotti* decision did not completely eliminate protection of minority shareholders as a basis for censoring corporate political speech. Rather, the particular law at issue was found overinclusive, underinclusive, and not directly related to the supposed goal,²³³ leaving open the possibility that a properly framed ban on corporate political speech could be upheld.²³⁴ Actually, the possibility is slight. To eliminate such a law's underinclusiveness, all corporate political activity, including the accepted practice of lobbying, would have to be prohibited—an unlikely development.²³⁵

The argument itself is based on two cases, *Machinists v. Street*,²³⁶ and *Abood v. Detroit Board of Education*,²³⁷ which held that it is unconstitutional to require employees to subsidize their union's political speech. The majority opinion in *Bellotti* provides the two answers which are dispositive of the shareholder subsidy argument. First, every shareholder investing in a major corporation realizes that the corporation's management is likely to undertake any number of specific actions

233. 435 U.S. at 792-95.

234. The *Bellotti* opinion assumed, for purposes of argument, that the protection of minority shareholders could constitute a compelling interest. *Id.* at 795.

235. Although unlikely, it is possible that some sort of partial rebate to the dissenting shareholders could be fashioned after the remedy allowed in *Machinists v. Street*, 367 U.S. 740 (1961), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Other methods of protecting minority shareholders that fall short of a complete ban on corporate speech are critically examined in Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending*, 67 KY. L.J. 75, 98-101 (1978-1979).

236. 367 U.S. 740 (1961).

237. 431 U.S. 209 (1977).

regarding the corporation's affairs with which the shareholder will disagree.²³⁸ These actions may range from investment and planning decisions to employee relations decisions, to matters of commercial speech, lobbying, and, as in *Bellotti*, political speech. Corporate political speech is just one of thousands of such decisions, and not a matter of special concern²³⁹ for the shareholder whose primary motivation in investing, no doubt, is to obtain an economic benefit, not to make, or refrain from making a political statement.²⁴⁰ Of course, persons who join any association or organization with political activities, be it a corporation, trade association, professional society, or union, are bound sooner or later to find themselves supporting, however reluctantly, political activity and speech with which they disagree.²⁴¹ As a practical matter, it seems unlikely that the Supreme Court could ever alter this situation.

The second answer is that *Abood* and *Street* are distinguishable because of the relative ease with which shareholders who dislike the corporate political message can disassociate themselves from it.²⁴² The employees in *Abood* and *Street* had their jobs, their entire source of livelihood on the line. On the other hand, few corporate shareholders would be seriously inconvenienced if they chose to oppose a corporate political statement by withdrawing their interests and reinvesting elsewhere.²⁴³

Additionally, shareholders who oppose the corporate message can also utilize any number of means to alter management's course, including the derivative suit, or intracorporate remedies such as voting to elect new directors, amending the by-laws, or submitting shareholder resolutions.²⁴⁴ If it is argued that these methods are not effective²⁴⁵

238. 435 U.S. at 794 n.34 (1978).

239. Fox, *supra* note 235, at 98. ("The minority shareholder's pocketbook interest would be adversely affected by any ill-advised investment or spending decision by management."); Comment, First National Bank of Boston v. Bellotti: *Corporate Political Speech in Ballot-Measure Campaigns*, 8 N.Y.U. REV. L. & SOC. CHANGE 63, 79 (1978-1979).

240. Schaefer, *supra* note 122, at 12.

241. A. HEARD, THE COSTS OF DEMOCRACY 210 (1960).

242. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 n.34 (1978).

243. See Comment, *supra* note 187, at 647.

244. For a discussion of the use of such devices, see Schaefer, *supra* note 122, at 8 n.37; *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 167 n.33 (1978); Note, First National Bank of Boston v. Bellotti: *The Reopening of the Corporate Mouth—The Corporate Right to Speak*, 21 ARIZ. L. REV. 841, 861 (1979).

245. The argument that shareholder remedies are completely ineffective in this area is belied by the settlements concluded in two cases involving illegal corporate campaign contributions by Gulf Oil Company and the Northrup Corporation. Comment, *Corporate Democracy and The Corporate Political Contribution*, 61 IOWA L. REV. 545, 576-78 (1975). See also Tyler and Bateman, *Is*

because most corporations remain management-controlled,²⁴⁶ the answer is that this is an indictment of the entire corporate structure and not a reason to isolate corporate political speech for special treatment.

Investors are primarily interested in profits, not the political activity or speech that may be helpful in obtaining them. Such speech contributes to the economic welfare of all shareholders,²⁴⁷ and opposition by a few to a particular corporate message does not justify totally silencing this important first amendment source.²⁴⁸

2. Undue Corporate Influence

Those who view critically the extension of first amendment protection to corporate political speech tend to emphasize the possibility that corporations will dominate political discussion in America if their political speech is given first amendment protection. Several commentators worry that the tremendous amounts of wealth that large corporations can muster and translate into political speech will allow them to dominate the first amendment's marketplace of ideas.²⁴⁹ Justice White's *Bellotti* dissent subscribed to this view, but offered no hard evidence to support it,²⁵⁰ and little has appeared in the literature. The

Corporate Speech Free Speech? 12 BUS. L. REV. 15, 23 (1979) ("[I]f the ownership regards the corporation's expenditures for free speech as wasteful, the corporation and its management is [*sic*] subject to suit. With owners today desiring to show their muscle and exercise their rights, this internal "gag" may prove to be most effective.").

246. Means, *Preface* to A. BERLE and G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* xxx (rev. ed. 1968).

247. Because corporate expenditures for political speech, if properly handled, do benefit the corporation, any shareholder challenge to proper expenditures on the ground that they are *ultra vires* should fail, although there are many cases on the books holding to the contrary. *Mobile Gas Co. v. Patterson*, 293 Fed. 208, 226 (M.D. Ala. 1923) (campaign contributions); *McConnell v. Combination Min. & Mill. Co.*, 31 Mont. 563, 79 P. 248 (1905) (lobbying expenses).

248. It has been suggested that it is *Abood* and *Street*, not *Bellotti*, that should be reconsidered by the Supreme Court. Smith, *supra* note 106, at 111.

249. M. NADEL, *CORPORATIONS AND POLITICAL ACCOUNTABILITY* 39-40 (1976); S. PRAKSASH SETHI, *ADVOCACY ADVERTISING AND LARGE CORPORATIONS* 292-93 (1977); Rubin, *Advocacy, Big Business, and Mass Media*, in *BIG BUSINESS AND THE MASS MEDIA* 21-22 (B. Rubin ed. 1977); and Rembar, *For Sale: Freedom of Speech*, *ATLANTIC MONTHLY*, Mar. 1981, at 31 ("If you and I are opponents, and I speak through a bullhorn while you speak through a kazoo, you have no freedom of speech.").

250. See 435 U.S. at 765, in which Justice White provided statistics indicating that in a earlier referendum in 1972, political committees funded largely by corporations had raised and spent large amounts of money to defeat the proposed personal income tax in Massachusetts. Mere reference to amounts of money spent, however, does not properly gauge the effects of such spending. In the 1976 referendum, the same question was defeated by the same margin despite the ban on corporate political contributions invalidated in *Bellotti*. *Id.* at 790 n.28.

It is well known that in no election, candidate or referendum, is the biggest spender a guaranteed winner. See C. GREENWALD, *GROUP POWER: LOBBYING AND PUBLIC POLICY* 159 (1977); A. HEARD, *THE COSTS OF DEMOCRACY* 3, 12 (1968).

evidence which has appeared has related primarily to the electoral process,²⁵¹ an area where the Supreme Court has provided special treatment.²⁵²

Focusing on political speech generally, and not specifically on the electoral process, one can see strong reasons to conclude that corporate domination or undue influence is not a likely result of the Supreme Court's decision to extend first amendment protection to corporate political speech. True, many corporations are rich and powerful. However, our society is filled with sufficient countervailing interests to prevent corporations from exercising the type of domination that critics of free corporate political speech fear. Among the most significant countervailing forces are the media, big labor, and the courts.

As long as the mass media do not fall under the control of an imaginary monolith called "Big Business," it is impossible to conceive that corporate political speech can ever become an overpoweringly dominant force in American political discussion.²⁵³ With justification,

251. In an article co-authored by Senator Gary Hart, reference was made to studies by Professor John Shockley which indicated that in several referendum situations, public opinion shifted in favor of the corporate point of view after corporation-supported groups entered the fray with large budgets. Hart and Stone, *Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti*, 29 CASE W. RES. L. REV. 808, 820-21 (1979). Even Hart and Stone admit that "[a]n accurate measure of the actual effect of corporate involvement on voters is very likely impossible to obtain, and Shockley's study results could be due to a wide range of variables unrelated to the effects of corporate engineering." *Id.*

Nonetheless, the California Supreme Court recently relied on Shockley's studies in upholding a municipal limitation on contributions in referendum elections. *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980). The dissent was less than enthusiastic about the the Shockley study, stating:

Indeed the only empirical data that appear in the record are studies of spending on statewide initiative campaigns in California during the period 1954-1974. The studies conducted by a Sacramento research organization, reveal that in 28 statewide contests the highest spenders won 14 times and lost 14 times. I must leave to the reader what that arithmetic proves.

Id. at 835-36, 614 P.2d at 752, 167 Cal. Rptr. at 94 (Richardson, J., dissenting).

There are even examples which indicate that the public reacts adversely to large, heavily financed campaigns. Opponents of large corporate spenders, although greatly outmanned financially can do quite well by attacking the motives of the big spender and utilizing a "David-and-Goliath" argument. Rubin, *Advocacy, Big Business, and Mass Media*, in *BIG BUSINESS AND THE MASS MEDIA* 11 (B. Rubin ed. 1977) (citing example of a Maine referendum on banning returnable bottles which passed although supporters spent only \$24,000 and opponents spent \$400,000).

Another example of big spenders who lost to less well-to-do opponents can be found in a 1971 New York referendum on transit fares. R. WINTER-BERGER, *THE WASHINGTON PAY-OFF* 313 (1972) ("The voters, in these obvious examples of monetary superiority, seemed to resent the pressure and voted their preference"). There are even candidate campaign examples which indicate a voter backlash against big-spending candidates. *Id.*

252. See notes 281-313 *infra* and accompanying text.

253. Thomas Jefferson once said that "[w]here the press is free, and every man able to read, all is safe." Letter to Col. Charles Yancey, in 14 *THE WRITINGS OF THOMAS JEFFERSON* 384 (Lips-

American business executives have complained that the mass media's coverage of business and industry is shallow, naive, and mediocre.²⁵⁴ More to the point, the coverage can fairly be characterized as largely "anti-business" in perspective.²⁵⁵ Chet Huntley once noted: "One general characteristic of the American press which seems inexplicable is the basic antipathy towards business and industry which I believe exists in our journalism. American business and industry, more than any other sector in our society, finds it difficult to get its story told accurately and fairly."²⁵⁶

In fact, since World War II, "[t]here is hardly an industry or a product that has not had to face up to severe criticism from the press."²⁵⁷ Sometimes, corporations cannot even purchase time to reply.²⁵⁸ One need only watch CBS's "Sixty Minutes" on a regular basis to realize that much of the corporate political speech to be presented in the future will have to be used to respond to attacks initiated by the mass media.²⁵⁹

comb ed. 1904), quoted in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 260 (1976) (White, J., concurring).

254. Cutlip, *The Media and the Corporation: A Matter of Perception and Performance*, in *BUSINESS AND THE MEDIA* 138 (C. Aronoff ed. 1979) ("Businessmen can justly quarrel with the superficiality of much of today's news coverage of the corporate and economic life of the nation"); Rubin, *Advocacy, Big Business, and Mass Media*, in *BIG BUSINESS AND THE MASS MEDIA* 21 (B. Rubin ed. 1977).

255. The overall anti-business bias that characterizes the mass media is qualified somewhat by business' influence of the media through canned editorials utilized by small newspapers and by threats to withhold advertising expenditures, which occasionally influence the content of the news. Green, *How Business Sways the Media*, in *BUSINESS AND THE MEDIA* 56-60 (C. Aronoff ed. 1979).

256. Chet Huntley, *Media Antipathy Toward Business*, *Wall St. J.*, Aug. 7, 1973, at 14, col. 3. Examples supporting this statement are not hard to find. See, e.g., Efron, *The Media and the Omniscient Class*, *BUSINESS AND THE MEDIA* 14, 18 (highly critical analysis of television network coverage of a California referendum on nuclear power and of media coverage of toxic materials); Cutlip, *The Media and the Corporation: A Matter of Perception and Performance*, in *BUSINESS AND THE MEDIA* 139 (C. Aronoff ed. 1979):

In March, April and May back a few years, a Senate subcommittee held hearings which were vital to the oil industry and the nation's oil import program. For seven days the committee heard what a Texaco spokesman termed "anti-industry" witnesses. These witnesses were extensively covered by the *Post*. After April 3, the pro-industry witnesses were heard. Not a single line of their testimony was reported. The score for the Washington Post was: anti-industry days, 300 lines; pro-industry days, 0.

Id.

257. Finn, *The Media as Monitor of Corporate Behavior*, in *BUSINESS AND THE MEDIA* 119-20 (C. Aronoff ed. 1979). Finn traces the beginning of the modern media's tendency to view business critically to Rachel Carson's *SILENT SPRING* and Ralph Nader's *UNSAFE AT ANY SPEED*.

258. Smith, *Corporate Access to the Electronic Media*, in *BIG BUSINESS AND THE MASS MEDIA* 97 (B. Rubin ed. 1977).

259. A recent Mobil Corporation "advertorial" which appeared in the Sunday newspaper supplement *Parade Magazine*, March 29, 1981, at 26, col. 1 was clearly defensive in tone, and aimed at rebutting media reports of the dangers of nuclear power ("[H]ysteria was spread by reports looking for the worst 'what if' cases because 'fear is an upper . . . fear is news'").

Another influential countervailing force is big labor, which, one may assume, will have views diametrically opposed to those of large corporations on many important issues. Big labor can definitely raise the funds necessary to speak in a voice loud enough to prevent corporate domination of discussion about these issues.²⁶⁰

Other groups that should be mentioned include "consumerists, environmentalists, women's liberation advocates, the civil rights movement, and other activist groups" whose "demands are being steadily translated into an unprecedented wave of intervention by federal and state governments into the affairs of business."²⁶¹

Even the "anti-business" decisions of the state and federal courts in recent years have been viewed as an indication of the inability of corporations to muster any effective political influence.²⁶²

In addition to overlooking the powerful countervailing forces which exist in the American political system, those who fear corporate domination of political discussion have had a tendency to assume that America's large corporations speak with a single, overpowering voice. This is patently not the case. The political battle between the trucking and railroad industries that gave rise to the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*²⁶³ is illustrative. Professor Jacoby has noted other examples:

At any given time, business corporations are split on many national issues; there does not appear to be a monolithic "business interest." Thus, petroleum companies have opposed lib-

260. See Crain, *Do Corporations Wield Great Political Power?* in *THE ATTACK ON CORPORATE AMERICA* 60-61 (M. Bruce Johnson ed. 1978).

In the electoral arena, labor political action committees spent almost three times as much as all corporate committees in the congressional elections of 1976. Smith, *supra* note 106, at 46. In the 1980 congressional elections, these proportions apparently were reversed, Wall St. J., Apr. 8, 1981, at 1, col. 3, but all political action committee spending, labor and corporate combined, constituted only 22% of the \$160 million spent in congressional races in 1978, Cohen, *Congressional Democrats Beware—Here Come the Corporate PACs*, 12 NAT. J. 1304 (1980), and only 1% of the funds contributed to presidential aspirants in 1980. Lanouette, *PAC Gifts to Presidential Candidates Include Some Political Surprises*, 12 NAT. J. 1309 (1980).

261. *Special Report, The Corporate Image: PR to the Rescue*, BUS. WEEK, Jan. 22, 1979, at 47.

262. N. JACOBY, *CORPORATE POWER AND SOCIAL RESPONSIBILITY* 156 (1973). It would be difficult to think of a better illustration of this point than the recent decision in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 101 S. Ct. 285 (1980), allowing a products liability plaintiff to recover from a defendant which marketed a "substantial market share" of the defective product (DES) without demonstrating that the particular defendant marketed the particular items which injured plaintiff. For a fuller discussion of *Sindell* and like cases, see Birnbaum, *DES Concert-of-Action Theory: New Cases Bring New Confusion*, Nat. L.J. May 4, 1981, at 31; Note, *Manufacturers' Liability Based on a Market Share Theory: Sindell v. Abbott Laboratories*, 16 TULSA L.J. 286 (1980).

263. See note 196 *supra*.

eral oil import quotas, while petrochemical companies have favored them in order to obtain less expensive feedstocks; steel companies have sought restraints upon imports of foreign steel, whereas automobile companies and other large users of steel have fought them; and even with respect to such matters as labor union legislation or anti-pollution regulations, businessmen are far from presenting a united front because firms in some industries are much more deeply affected than those in others industries.²⁶⁴

Such conflicts also exist on an intra-industry basis,²⁶⁵ and even within a single large corporation in the case of conglomerates.²⁶⁶ The *Bellotti* opinion itself noted that closely held corporations might well differ from publicly held corporations, and small public corporations from large ones, on the issue of personal income taxation.²⁶⁷

In addition to these countervailing forces and their own divided nature, corporations must overcome an even greater stumbling block to effective political speech—the antipathy of the American public for big business. At least some public support for corporations is necessary for them to function effectively,²⁶⁸ and in recent years that support has been waning.²⁶⁹ In the face of the overwhelming public distrust of large corporations,²⁷⁰ the corporate message, to have any effect, must overcome the American public's natural fear and loathing of large, powerful entities,²⁷¹ and skeptical views of the intentions and motives of the corporate source.²⁷²

Mobil Corporation's "advertorial" campaign has been criticized as

264. JACOBY, *supra* note 265, at 155 (emphasis in original). See also Crain, *Do Corporations Wield Great Political Power?* in *THE ATTACK ON CORPORATE AMERICA* 61-62 (M. Johnson ed. 1978); S. PRAKASH SETHI, *ADVOCACY ADVERTISING AND LARGE CORPORATIONS* 290-91 (1977).

265. See EPSTEIN, *supra* note 28, at 172; Ellis, *The Media: Business Friend or Foe?* in *BUSINESS AND THE MEDIA* 91 (C. Aronoff ed. 1979).

266. EPSTEIN, *supra* note 28, at 172-73 (subsidiary divisions of DuPont took different positions on renewal of the Reciprocal Trade Act in early 1950's).

267. 435 U.S. at 785 n.22.

268. L. GOLDEN, *ONLY BY PUBLIC CONSENT* 3-4 (1969).

269. JACOBY, *supra* note 265, at 17, 153-154 ("As the 1970's began, the *relative* political influence of the corporate business was probably less than it had been since the dark years of the Great Depression. . . .").

270. See Posner, *Power in America—The Role of the Large Corporation*, in *LARGE CORPORATIONS IN A CHANGING SOCIETY* 103 (J. Weston ed. 1974). See also I. KRISTOL, *TWO CHEERS FOR CAPITALISM* 112-13 (1978) ("In any democracy, large and powerful organizations which are in business to make a profit will inevitably be regarded—and always have been regarded—with distaste and suspicion."); Aronoff, *Introduction* to *BUSINESS AND THE MEDIA* xii (C. Aronoff ed. 1979).

271. J. GLOVER, *THE REVOLUTIONARY CORPORATIONS* 427 (1980).

272. Efron, *The Media and the Omniscient Class*, in *BUSINESS AND THE MEDIA* 25 (C. Aronoff ed. 1979) ("Business will continue to be the symbolic scapegoat for all ills in this society."); H.

ineffective because it speaks only to the "converted."²⁷³ Professor George Lodge of the Harvard Business School has stated that "[i]t is naive on the part of Mobil to think that readers will believe a paid advertisement by an oil company self-righteously proclaiming its virtues and hurling blame on those who dare to differ with them."²⁷⁴

Readers know which newspaper and television advertisements have been paid for by the large corporations, and are much more likely to listen to the editorial views of the medium itself than those of large corporations which have purchased ads in the same issue or show. No matter how much money is spent, corporations will never be able to manipulate public opinion at will.²⁷⁵ Nor is there even any indication that corporate executives have the slightest desire to dominate political discussion in America, even if they could.²⁷⁶

The proof is in the pudding. *Bellotti* and *Consolidated Edison* have not opened the floodgates to corporate political speech. Mobil Corporation's enthusiastically financed "Op-ed" advertorial campaign has not pushed other voices off the editorial pages of the large newspapers of our country. Corporations have been engaged in political activity in America for almost 200 years, and in the use of the mass media for over 60 years; yet no domination such as that feared by critics of corporate political speech has occurred. Certainly the pendulum swings to and fro; in some decades corporations will have more influence than in others, but Adolph Berle has pointed out:

. . . the fact was, and is, that centralization of industrial economic power to a point where it could dominate the political state has been avoided in the American political system. It is

OLECK, *MODERN CORPORATION LAW* § 9 at 29 (Student ed. 1960) ("[T]he average American . . . has viewed the corporation with misgivings, often with downright antagonism. . . .").

273. *Special Report, The Corporate Image: PR to the Rescue*, *BUS. WEEK*, Jan. 22, 1979, at 54, quoting Mr. Velmans, of the advertising agency Hill & Knowlton.

274. S. PRAKASH SETHI, *ADVOCACY ADVERTISING AND LARGE CORPORATIONS* 292 (1977).

275. R. TEDLOW, *KEEPING THE CORPORATE IMAGE: PUBLIC RELATIONS AND BUSINESS, 1900-1950*, at 208 (1979).

276. EPSTEIN, *supra* note 28, at 176 ("[T]here has been virtually no evidence in the statements and activities of business managers that such a corporate political takeover is either contemplated or desired.").

It is at least arguable that the traditional problem has been not too much corporate speech, but too little. D. MOORE, *POLITICS AND THE CORPORATE CHIEF EXECUTIVE I* (1980). John deButts, former Chairman of AT&T once said:

What we need is more open, frank discussion between media and government and business. John Chancellor told me once "if we've got a controversial subject to put on the air, I can make one telephone call and get a consumerist. I can make one more call and get a labor leader, and I can make a half a dozen and not get a single businessman who is willing to come in here."

R. LAMB, W. ARMSTRONG, and K. MORIGI, *BUSINESS, MEDIA AND THE LAW* ix (1980).

not at present a major threat. . . . Dominance by them over the political state in major matters is not a present possibility.²⁷⁷

In summary, despite decades of corporate political speech, there has been no sign that the corporate voice has tended to dominate the first amendment's marketplace of ideas, and there is no sign today that the Supreme Court's decisions in *Bellotti* and *Consolidated Edison* will alter the present situation. For the myriad of reasons just discussed, the prospects for undue corporate influence on political discussion generally seem slim.

3. Election Reform Legislation

The aspect of *Bellotti* that has drawn the most attention from commentators is its potential adverse impact on electoral reform legislation, particularly the Federal Corrupt Practices Act,²⁷⁸ as now embodied in the Federal Election Campaign Amendments of 1976,²⁷⁹ found at 2 U.S.C. § 441b. This concern is understandable because corporate abuses of the electoral process, from Nicholas Biddle to Jay Gould to Nixon and the Milk Fund, have been well documented.²⁸⁰ Nonetheless, the supposed adverse impact of *Bellotti* on the ability of local, state, and federal governments to control corporate corruption and undue influence has been overestimated.²⁸¹

As a starting point, the actual effectiveness of present legislation is open to serious question. One may ask whether local and state officials are strongly motivated to prosecute corporate violators of election laws

277. A. BERLE, *THE AMERICAN ECONOMIC REPUBLIC* 13 (1963).

Parallel conclusions have been drawn by EPSTEIN, *supra* note 28, at 229 ("[D]espite the impressive array of political assets, corporate political power does not constitute a threat to democracy in the United States."), and JACOBY, *supra* note 265, at 156-57 ("The notion that corporate enterprise 'dominates' or unduly influences the American government simply does not withstand examination.") (emphasis in original).

278. Tillman Act of 1907, ch. 420, 34 Stat. 864, later repealed by Federal Corrupt Practices Act of 1925, tit. III, § 318, 43 Stat. 1074.

279. Pub. L. No. 92-225, tit. III, § 321, 90 Stat. 490 (1976).

280. Some of these abuses are noted in *Federal Election Comm'n v. Weinstein*, 462 F. Supp. 243, 249 n.7 (S.D.N.Y. 1978).

Other discussions appear in *Cox*, *supra* note 3, at 57, 65; Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U. L. REV. 1033, 1034-40 (1965); Comment, *First National Bank of Boston v. Bellotti: Corporate Political Speech in Ballot-Measure Campaigns*, 8 N.Y.U. REV. L. & SOC. CHANGE, 63, 73 (1978-1979); Comment, 13 SUFFOLK L. REV. 124, 135 (1979).

281. The very fact that the federal government and most of the states have on the books laws tightly controlling corporate participation in the electoral process indicates that corporations do not dominate the political process in America.

given the possibility that targeted corporations might relocate.²⁸²

The effectiveness of federal legislation is also suspect. That legislation requires corporations to do most of their political activity through political action committees (PACs).²⁸³ After a thorough analysis, however, one author recently concluded that the present structure of federal regulation actually enhances the corporate voice by allowing it to control and focus individual contributions:

Perhaps most bizarre, however, is the overall economic effect of this system. While the Act limits the amount of financial resources that corporations may direct to partisan political activity, it also provides a means by which corporations may control the flow of individual campaign contributions. A corporation is prohibited from contributing to political campaigns directly. It is permitted, however, to devote unlimited resources in the form of in-kind contributions to obtaining from shareholders and employees, through PAC solicitations, funds that management may then earmark for the candidates of its choice. Assuming there are limits on the amount of money that individual voters are willing to devote to political campaigning, contributions to PAC funds represent money that might otherwise be contributed to candidates directly by individuals. Thus, a PAC may operate to concentrate campaign contributions under the control of corporate management, a perverse effect if decentralizing financial political influence is a goal.²⁸⁴

282. Wallace and Stamps, *Corporate Free Speech and Campaign Finance in Mississippi*, 49 Miss. L.J. 819, 825 (1978). The authors note that cases in which corporations have been found not guilty of violating state corrupt practices acts outnumber those in which the corporation was found guilty. *Id.* at n.43.

283. Vandergrift, *The Corporate Political Action Committee*, 55 N.Y.U. L. REV. 422, 425-26 (1980):

The prohibition against corporate financial participation in federal political campaigns is contained in 2 U.S.C. § 441b. In essence, section 441b states that *no* corporate treasury money may be spent on a federal election.

Qualifying this broad prohibition, section 441b exempts three categories of corporate disbursements from its definition of contributions or expenditures. These statutory exemptions cover money spent for (1) "communications" directed at shareholders, executive and administrative personnel, and the families of each group, (2) nonpartisan voter registration and get-out-the-vote activity directed at shareholders and executive and administrative personnel, and finally, (3) setting up, running, and soliciting contributions to a "separate segregated fund," the statutory name for a PAC.

Id.

For a detailed discussion of the solicitation rights of organizations under § 441b and pertinent regulations, see *Bread Political Action Comm. v. Federal Election Comm'n*, 635 F.2d 621, 626-27 (7th Cir. 1980).

284. Vandergrift, *The Corporate Political Action Committee*, 55 N.Y.U. L. REV. 422, 470 (1980).

In addition to the fact that elimination of present state and federal corrupt-practices acts might not lead to a significant increase in corporate political influence, a second reason exists why *Bellotti* is not likely to alter the present balance of political power. *Bellotti* simply did not abolish such legislation on a wholesale basis. The Supreme Court explicitly refused to say there could never be a valid limitation on corporate electoral spending that did not apply to individuals.²⁸⁵ Although *Bellotti* rejected the argument that a ban on corporate referendum spending was needed to avoid undue corporate influence, it did so in the face of an inadequate record. It is important to remember that *Bellotti* was not formally tried but was decided on the basis of stipulated facts.²⁸⁶ The Supreme Court's majority specifically entered the caveat that a different result might be mandated *if* legislative findings were presented indicating "that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests."²⁸⁷ Thus, the Supreme Court left open the possibility that legislative action based upon substantial factual findings, rather than upon speculation, could be sustained.

Recently, in *Citizens Against Rent Control v. City of Berkeley*,²⁸⁸ the California Supreme Court held that even in referendum elections a ban on contributions, as distinguished from a ban on expenditures (*Buckley v. Valeo*), could be sustained as constitutional. The court felt that there was evidence showing a causal relationship between voter apathy and large campaign contributions,²⁸⁹ and held that a limitation, rather than a complete ban on contributions, served the compelling state interest of combatting voter apathy.²⁹⁰

Outside of the referendum setting, concern has been expressed

The same basic conclusion is reached by Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 943, 993-94 (1980) [hereinafter cited as Nicholson]; and Darr and Tift, *Campaign Finance Reform Fails in Essential Mission*, Legal Times of Wash., Apr. 20, 1981, at 8, col. 1.

However, it is clear that federal regulations have to some extent inhibited corporate political activity. See Budde, *Business Political Action Committees*, in PARTIES, INTEREST GROUPS AND CAMPAIGN FINANCE LAWS 14 (M. Malbin ed. 1980) (FECA regulations hinder trade-association PACs); Glen, *How to Get Around the Campaign Spending Limitations*, 11 NAT. J. 1044 (1979) ("Procedural obstacles have been one reason for the relative dearth of independent spending efforts.").

285. 435 U.S. at 777 n.13.

286. Kiley, *supra* note 183, at 430. Mr. Kiley represented the Commonwealth of Massachusetts and its officers in *Bellotti*.

287. 435 U.S. at 789.

288. 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980).

289. *Id.* at 828, 614 P.2d at 747, 167 Cal. Rptr. at 89.

290. *Id.* at 829, 614 P.2d at 748, 167 Cal. Rptr. at 90. A strong dissent by Justice Richardson

about the impact of *Bellotti* on state and federal bans on corporate contributions and expenditures in *candidate* elections, with particular attention paid to the federal ban in section 441b of title 2 of the United States Code. Read together, *Buckley v. Valeo*²⁹¹ and *Bellotti* might logically indicate the imminent demise of section 441b.²⁹² In fact, Justice White's *Bellotti* dissent felt that the majority opinion merely postponed the "formal interment" of the Act.²⁹³ But Professor Cox has expressed doubt that the Supreme Court would eviscerate such laws, deeming it "unlikely that the Court will pursue the logic so rigidly as to hold section 441b unconstitutional."²⁹⁴ Justice Powell's majority opinion in *Bellotti* indicated as much:

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. . . . 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 context of participation in a national 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.²⁹⁵

The key to predicting the exact impact of *Bellotti* lies in an analysis of the interplay between it and *Buckley*. In *Buckley*, the Supreme Court upheld a federal statutory limitation on contributions to candidates' campaigns,²⁹⁶ but invalidated a limitation on individual political

pointed out that the evidence relied upon by the majority did not exist anywhere in the record, *Id.* at 93, and concluded that the law in question was not consistent with *Buckley* and *Bellotti*.

The majority's position ignores evidence from a 1978 Harvard University study which concluded: "The most competitive elections, where voters have the most information about candidates, are those in which the most money is spent. Election contests in which spending is comparatively high are also those in which voting participation tends to be the highest." Chapman, *An Expensive Hobby*, NEW REPUBLIC, Sept. 6 & 13, 1980, at 15.

291. 424 U.S. 1 (1975).

292. Cox, *supra* note 3, at 68.

293. 435 U.S. at 821.

294. Cox, *supra* note 3, at 68. Professor Cox bases his prediction not only on the majority's express reservation, but also upon Justice Powell's dissenting opinion in *Pipefitters Local 562 v. United States*, 407 U.S. 385, 443 (1972), which assumed the constitutionality of § 441b and accepted the argument that serious dangers result from "major participation in politics by the largest aggregations of economic power, the great unions and corporations."

295. 435 U.S. at 788 n.26 (citations omitted).

296. 424 U.S. at 16-19.

expenditures made independently of a specific candidate's control.²⁹⁷ Thus, the implications of *Bellotti* for corporate candidate contributions and for corporate independent expenditures must be examined separately.

Regarding campaign contributions to candidates, reasonable limitations on corporate spending should continue to be allowed.²⁹⁸ So long as limits on contributions by individuals remain intact, limitations for corporations probably will also. In fact, limitations for corporations might permissibly be more stringent in the contribution area. *Buckley* seemed to indicate that little true expression is involved in candidate contributions.²⁹⁹ Certainly there seems to be little informational value to a contribution which is merely turned over to the candidate to be spent at the candidate's direction.³⁰⁰ A communication without informational value to the recipient is without first amendment protection under the rationale of *Bellotti* and *Consolidated Edison*.³⁰¹

More importantly, the risk of creating political "debts" which allegedly exists in contributions to specific candidates, but not in referendum elections, could be found by the Supreme Court to be a compelling state interest justifying the ban on corporate contributions.³⁰² As noted above, Justice Powell's majority opinion in *Bellotti* suggested this distinction. The lower courts have been virtually unanimous in accepting the risk of creating political debts which could lead to corruption or the appearance of corruption as a compelling state interest, and in distinguishing between referendum and candidate elections on that basis.³⁰³

297. *Id.* at 20-21.

298. See Nicholson, *supra* note 284, at 948.

299. 424 U.S. at 20-21.

300. See Federal Election Comm'n v. Weinstein, 462 F. Supp. 243, 249 (S.D.N.Y. 1978) (corporate financial contributions "say little"). See also Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston v. Bellotti*, 28 AM. U.L. REV. 149, 171 (1979).

301. In Federal Election Comm'n v. Lance, 635 F.2d 1132, 1141 (5th Cir. 1981), a case involving former Presidential adviser Bert Lance, the court held that "the overdrafts made to the Lance out of the ordinary course of business has no speech elements at all" and therefore were not protected by the first amendment.

302. Mayton, *Politics, Money, Coercion, and the Problem with Corporate PACs*, 29 EMORY L.J. 375, 389 (1980); Kiley, *supra* note 183, at 439.

303. Bread Political Action Comm. v. Federal Election Comm'n, 635 F.2d 621, 629 (7th Cir. 1980) (upholding § 441b's limitation on solicitation by trade associations); Let's Help Florida v. McCrary, 621 F.2d 195, 199-200 (5th Cir. 1980) (invalidating Florida statute's limitation on contributions to political committees in issue election); C&C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (10th Cir. 1978) (invalidating Montana ban on corporate contributions in referendum elections); Schwartz v. Romnes, 495 F.2d 844, 852-53 (2d Cir. 1973) (pre-*Bellotti* case making candidate/referendum distinction); Federal Election Comm'n v. National Right to Work Comm., 501

Turning to a limitation on independent political expenditures by corporations, it seems less likely that a first amendment challenge could be wholly survived in light of the combined impact of *Bellotti* and *Buckley*. It is true that in footnote 26, the *Bellotti* opinion left the door open for Congress to document the danger of real or apparent corruption stemming from independent political expenditures. Some courts³⁰⁴ and commentators³⁰⁵ have indicated that the aggregate wealth of a corporation and the manner in which corporate managers can mobilize employees³⁰⁶ make independent corporate activities more likely to lead to corruption than those of even very wealthy individuals. Even if not directed by a candidate, a corporate expenditure to support the candidate could create a debt which would give rise to the appearance of corruption.

However, because of the informational value of independent expenditures as recognized in *Buckley*,³⁰⁷ it is strongly arguable that even corporate independent expenditures should be protected in light of *Bellotti*. However, nothing in *Bellotti* would prevent the federal government or the states and localities from using stringent disclosure requirements to ensure that the potential voter knows the source of the political message received.³⁰⁸ Such a disclosure requirement could provide a very effective guard against corrupting actions by corpora-

F. Supp. 422, 438 (D.D.C. 1980) (upholding § 441b's restrictions on solicitation by non-stock corporations to members); Federal Election Comm'n v. Weinstein, 462 F. Supp. 243, 247 (S.D.N.Y. 1978) (upholding conviction of corporate governmental contractor for making campaign contributions in violation of § 441b).

304. See Federal Election Comm'n v. Weinstein, 462 F. Supp. 243, 249 (S.D.N.Y. 1978).

305. See Nicholson, *supra* note 284, at 992-93.

306. Wallace and Stamps, *Corporate Free Speech and Campaign Finance in Mississippi*, 49 Miss. L.J. 819, 831 (1978).

307. See Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston v. Bellotti*, 28 AM. U.L. REV. 149, 172-73 (1979):

[W]hen a corporation gives money to a third party in order to publish an advertisement containing reasons why a particular candidate should be supported, that corporation is communicating political ideas to the reader of those advertisements. Hence, although expenditures are used like contributions to express the speaker's support of a candidate, expenditures also serve as a vehicle for transmitting political information to the public at large.

Id.

308. Indeed, in *Bellotti*, Justice Powell emphasized:

Corporate advertising, unlike some other methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed.

435 U.S. at 792 n.32 (citations omitted).

tions.³⁰⁹ True corruption, of course, would always be illegal and punishable under the law.

The main point to be made is that *Bellotti* has not ruled out limited regulation of corporate spending and participation in the electoral process.³¹⁰ The Supreme Court has left open, upon a proper showing, the possibility of significant restraints on both candidate contributions and independent political spending. But at the same time, *Bellotti*, and now *Consolidated Edison*, recognize that any corporate political activity which has informational value should not be denied to potential public recipients upon the grounds of mere speculation. The Supreme Court has not closed its eyes to potential corporate abuses, especially the risk of corporate abuse of the electoral machinery. But the Court has required that regulations be based on fact, not fancy.

VI. THE ALTERNATIVE: GOVERNMENT CENSORING

The potential dangers of corporate political speech just discussed are not imaginary; they are real. They have been exaggerated, but they do exist. It must be remembered, however, that similar dangers arise

309. Hart and Stone, *Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti*, 29 CASE W. RES. L. REV. 808, 823 (1979); Tucker, *Use of Corporate Funds for Political Speech*, 53 CONN. B.J. 185, 202 (1979).

Some have had reservations about the effectiveness of disclosure requirements. D. ADAMANY & G. AGREE, POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA 113-15 (1975). But the American electorate's increasing sophistication is a factor which cannot be discounted in weighing the potential effectiveness of such requirements. Chapman, *An Expensive Hobby*, NEW REPUBLIC, Sept. 6 & 13, 1980, at 14.

310. After an exhaustive analysis, Nicholson, *supra* note 284, at 1009-10, concluded:

There is much that Congress can still do within the constraints of *Buckley*, *Bellotti*, *Mosley* and *Consolidated*. Public funding of congressional campaigns is one possible solution. Others include substantially lowering the present \$5,000 contribution limitation, and limiting the amount candidates can receive from business and labor PACs. These solutions, however, will channel special interest funds into corruption-generating "independent expenditures." Such reforms, therefore, should be accompanied by limitations on independent expenditures set at a level that permits corporate and labor views to enter the marketplace of ideas without creating an incentive for corruption. A balance must be struck, albeit a precarious one, between the interests of hearers in having access to corporate and labor views and the interest of the electorate in being governed by representatives who are not indebted to special interests.

Id.

Additionally, Professor Mayton has recently built a strong argument for the necessity for and constitutionality of revision of the FECA to prevent corporate PACs from soliciting contributions from vulnerable junior executives who, unlike the shareholders, are in the position of the union members in the *Abood* and *Street* cases. This reform, Mayton argues, would discourage incumbent politicians from coercing contributions from corporations and would ensure that labor PACs and corporate PACs are evenly balanced. Mayton, *Politics, Money, Coercion, and the Problem with Corporate PACs*, 29 EMORY L.J. 375, 384-92 (1980). If Mayton is correct, this single reform could largely alleviate the bulk of the concerns critics have voiced about the potential undue influence of corporate PACs in the electoral setting.

from virtually every kind of speech. Government control of all speech to avoid these dangers is an option. Fortunately, the framers of the first amendment elected to run these risks.

Bellotti and *Consolidated Edison*, unfortunately, do not adequately discuss the alternative to their holdings. That alternative is the evaluation of speech by the government rather than by the people. Even Justice White's vigorous dissent in *Bellotti* did not seriously propose that the government should undertake to strike the proper balance of political views to which the public is to be exposed,³¹¹ yet that is the alternative implicitly suggested by his position.

Fortunately, the Supreme Court came down strongly against such government tinkering with free speech when, in *Buckley*, it said:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources" and "to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people."³¹²

Even if the government were to undertake this risky task, there could be no assurance that suppression of one group's voices would truly enhance the voices of an opposing group. The Supreme Court's decisions in *Buckley* and *Bellotti* clearly evince a reluctance to allow such tinkering.³¹³ This reluctance is well founded.

The problems arising from governmental interference with free speech may be clearly seen in the area of commercial speech. As Professor Rotunda has demonstrated persuasively, open regulation of corporate activity allows the people, through their representatives, to judge the pros and cons of government regulation of business. However, where legislatures attempt to suppress corporate activity indirectly through suppression of commercial speech, the costs of the regulation, and the government's true motives, are hidden from the people:

The public's insight into legislative decision-making suffers when legislators regulate truthful speech. Because of the

311. See Comment, *supra* note 187, at 647.

312. 424 U.S. at 48-49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964), quoting in turn *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and *Roth v. United States*, 354 U.S. 476, 484 (1957)).

313. Note, 20 B.C. L. Rev. 1003, 1023 (1979).

hidden burdens inherent in any regulation of speech, the legislature, at best, may not perceive the full consequences of its regulation. At worst, the legislature, by disguising its true objectives, may implement a policy that the majority of people would oppose if they had received adequate information about the true costs of the proposal. The legislature, in short, may impose regulations that a majority of the people would have rejected if they were cognizant of the regulation's true burdens. Restrictions on advertising reflect an anti-democratic means of implementing other policy judgments.³¹⁴

The classic example of the hidden costs of government regulation of commercial speech is the *Virginia Pharmacy* case in which, it may be confidently surmised, the legislative motive behind the ban on pharmacy advertising was to provide a hidden subsidy to small, less efficient pharmacies.³¹⁵

The same type of hidden motives pervades the suppression of corporate political speech. In *Bellotti*, for example, the legislation banning corporate political speech regarding a state personal income tax referendum "fairly reeked with a motive to prevent speech with which the legislators disagreed."³¹⁶ In *Consolidated Edison*, Justice Stevens accurately characterized the ban on inserts discussing the future development of nuclear energy as "motivated by nothing more than a desire to curtail expression of a particular point of view."³¹⁷

These bans on expression of a legitimate point of view, even if advanced by a large corporation, cannot be reconciled with the inter-

314. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080, 1081 (1976).

In this connection, it has been written:

The state cannot control commercial speech as an incident to its control over the economic operations of a corporation. Economic regulation is presumptively valid because it arises from and is subject to correction by an unfettered political process. Because it restricts the flow of information by which the public becomes aware of, and acts to change, legislation, regulation of expression cannot be similarly justified.

The Supreme Court, 1979 Term, 94 HARV. L. REV. 74, 167 (1980).

These statements constitute an effective rebuttal to the dissents of Justices White and Rehnquist in *Bellotti* in which it was argued that if the state can regulate the businesses of corporations and public utilities, surely the state can regulate or even ban their speech as well.

315. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080, 1098 (1976).

316. Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437, 458 n.56 (1980). See also Comment, *First National Bank of Boston v. Bellotti: Corporate Political Speech in Ballot-Measure Campaigns*, 8 N.Y.U. REV. L. & SOC. CHANGE 63, 69 (1978-1979); Comment, *From Dartmouth to Bellotti: The Political Career of the American Business Corporation*, 6 OHIO N.L. REV. 392, 399-400 (1979).

317. 447 U.S. at 546.

ests underlying the first amendment.³¹⁸ The true danger to freedom of speech lies not with corporate domination but with legislative usurpation of the people's right to weigh all points of view toward the goal of deciding for themselves which to accept or reject.

Even if one were to assume, in the face of rather strong evidence to the contrary, that government officials are always well-intentioned in their attempts to prohibit or regulate corporate political speech, attempting only to protect the public from its inability to cope with the onslaught of various messages, such an action would seem unacceptably paternalistic.³¹⁹ As the Supreme Court said in *Bellotti*:

[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the framers of the First Amendment.³²⁰

VII. CONCLUSION

The statements made and conclusions reached in this article should not be taken as an indication that the corporate political message should be believed by the listening public. The point is only that members of the American public should have the opportunity to evaluate that message for themselves without the assistance of government censorship. Nor should this article be taken as a defense of the activities of large American corporations. The distrust and apprehension many Americans feel toward large corporations is not unfounded. Many corporations have been guilty of political misconduct and other misdeeds, both here and abroad. Corporations have brought upon themselves much of the public opprobrium to which they have been

318. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974), a case involving a state's attempt to force a newspaper to provide "equal space" to those political candidates it opposed, the Supreme Court recognized the dangers of undue influence arising from the monopoly position of such a newspaper, but found the risk of government regulation of speech to be even more serious.

319. The concern for the susceptibility of the American public to the corporate political message overlooks the antipathy most Americans have for corporations. This anti-business outlook, discussed above at notes 271-275, is unlikely to change unless our society's most influential image-builder, television, alters its depiction of businessmen. "From *Dallas*' oily antihero J.R. Ewing on down, most businessmen on television are depicted as crooks, amoral wheeler-dealers, criminals with Mafia connections, cheats, employers of professional arsonists and, worse still, jerks, clowns and buffoons." *TIME*, Apr. 27, 1981, at 51.

320. 435 U.S. at 791-92.

recently subjected. However, these misdeeds do not justify government attempts to limit the expression of an important, unique political message. The people do not need to be protected from themselves, especially by government officials who tend to protect the people primarily from messages with which they themselves personally disagree. Freedom of speech is one of America's most precious commodities, and regulations which infringe upon that freedom, even if well-intentioned, should be carefully scrutinized.

It is therefore submitted that *Consolidated Edison* and *Bellotti* were both correctly decided. Both involved heavy-handed governmental attempts to prevent the public from hearing messages on important issues that the government did not wish to be heard. To uphold those bans would have been a serious blow to the values underlying the first amendment.

To deny corporations the right to speak on important political issues is to deny the American public the right to hear a potentially unique point of view emanating from a knowledgeable source with the resources to study and obtain information that might otherwise be unavailable. *Bellotti* and *Consolidated Edison* simply recognize the value of all information to the operation of a democratic society. The value of allowing the public to consider every point of view should not be underestimated by those who disagree with the corporate message.

Neither *Bellotti* nor *Consolidated Edison* gives corporations the same political speech rights accorded to individuals. Neither case renders impossible the reasonable limitation of corporate participation in the electoral process. *Bellotti* clearly allows, and even invites, government regulation of corporate electoral activity when that regulation is based upon solid evidence that the target activity would lead to corruption or the appearance of it.

What these two opinions do, to their credit, is recognize and emphasize the value of the free interchange of ideas in a democratic society and the potential corporate contribution to that interchange. No one's free speech rights are absolute. In virtually every free expression case, the Supreme Court engages in a balancing process. *Bellotti* and *Consolidated Edison* ensure that when the weighing process takes place in future corporate speech cases, full recognition will be given to the free expression interests served by corporate speech. And by their very tone, *Bellotti* and *Consolidated Edison* demand that any potential suppression of corporate speech with potential value to the community of

ideas be strictly circumscribed and factually justified. In short, the Supreme Court has directed that these words of Justice Douglas be kept in mind:

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate.³²¹

The recognition of corporate political speech as a protected form of expression is a positive development in first amendment law which should be hailed, not feared.

321. *United States v. UAW*, 352 U.S. 567, 591 (1957) (Douglas, J., dissenting).