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Corporations: Can Corporations Safely Involve Themselves in the Political Process?

F.W. Dietmar Schaefer
THE FIRST AMENDMENT, MEDIA CONGLEMERATES AND "BUSINESS" CORPORATIONS: CAN CORPORATIONS SAFELY INVOLVE THEMSELVES IN THE POLITICAL PROCESS?

F. W. DIETMAR SCHAEFER*

INTRODUCTION

When the United States Supreme Court decided First National Bank v. Bellotti\(^1\) in 1978, it held on an issue of first impression that the corporate identity of the speaker does not deprive speech of the first amendment protection to which it would otherwise be entitled.\(^2\) In so holding, the Court effectively decided that, in addition to safeguarding individual self-expression, the first and fourteenth amendments protect the "process" of disseminating information to the public.\(^3\) Under the "process" rationale, first amendment protection is premised on the speech and its contribution to public information, rather than on the first amendment interests of the speaker itself.\(^4\) In Bellotti, that "process" involved

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\(^1\) 435 U.S. 765 (1978).

\(^2\) Id. at 778, 784, 795.

\(^3\) First amendment freedoms are viewed as part of the liberty safeguarded by the fourteenth amendment due process clause. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Stromberg v. California, 283 U.S. 359, 368 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).

\(^4\) Although the Bellotti Court clarified the first amendment "process" rationale as it applies to corporate expression, the concept that the first amendment protects a societal
the dissemination of political views by corporations concerning referendum issues. In essence, *Bellotti* confirmed what many corporate counsel have always believed to be the law; corporations cannot be prohibited from spending money to publicize management's views on public issues even where they are not "directly related" to the "business" of the corporation. The progeny of the *Bellotti* de-
cision, Consolidated Edison Co. v. Public Service Commission\textsuperscript{7} and Central Hudson Gas & Electric Corp. v. Public Service Commission,\textsuperscript{8} however, went further and established detailed standards which a state must meet before it can regulate either the "political" or the "commercial" speech of corporate entities, even highly regulated utility corporations.\textsuperscript{9} Yet subsequent to Bellotti, questions remained as to what state interests might qualify as "compelling" enough to warrant restrictions in the area of corporate political spending and expression.

This Article will begin with an examination of the Supreme Court's decision in Bellotti and its recognition of the first amendment "process." The inquiry into the scope of the process will be expanded upon by analyzing the two recent Supreme Court pronouncements in Consolidated Edison Co. v. Public Service Commission and Central Hudson Gas & Electric Corp. v. Public Service Commission. The Article will then attempt to apply the Bellotti "process" analysis in the areas of corporate lobbying and political election campaigns. Finally, and most importantly, the Article will analyze the problematic area of the regulation of corporate "commercial" speech where such speech addresses public issues. The Article concludes with the suggestion that the Supreme Court should clarify the role of issue advertising in the context of its contribution to the first amendment "process," lest the identity of the speaker reinject itself as an element in determining the scope of first amendment protection for corporate speech.

**Defining the First Amendment "Process"**

*The Birth of the Process*

The Massachusetts statute at issue in First National Bank v. Bellotti made it a criminal offense\textsuperscript{10} for banks and other specified

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\textsuperscript{7} 100 S. Ct. 2326 (1980).
\textsuperscript{8} 100 S. Ct. 2343 (1980).
\textsuperscript{9} See note 105 infra.
\textsuperscript{10} MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1980). Any corporation found guilty
business corporations to make direct or indirect contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." In addition to being applicable only to certain types of corporations, the statute specified that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." The constitutionality of the statute was challenged in a declaratory action brought by two national banking corporations and three business corporations. The petitioners alleged that the statute violated their first amendment rights by forbidding them from opposing publicly a referendum proposal to amend the Massachusetts con-

of violating this statute faced a fine of up to fifty thousand dollars and any officer, director, or agent of a corporation who violated or authorized a violation was subject to a maximum fine of ten thousand dollars or imprisonment for up to one year or both. Id.


Id. Because of the specific exclusion of individual taxation from the scope of matters that "materially affected" a corporation's business, the Massachusetts statute has been criticized as "a bold attempt to silence corporate opposition to a proposed constitutional amendment" that raised questions about the power of government to dictate permissible subjects and speakers. L. Trone, supra note 4, at 57-58.

First Nat'l Bank v. Attorney General, 371 Mass. 773, 359 N.E.2d 1262, 1265 (1977), rev'd, 435 U.S. 765 (1978). The petitioners, who planned to publicize their opinions on a proposed constitutional amendment which they claimed would adversely affect their business, brought their action after being informed by the Attorney General of Massachusetts that he would enforce the section against them. 435 U.S. at 769.

359 N.E.2d at 1265-70, 1275. The petitioners alleged that section 8 violated the first amendment as well as the due process and equal protection clauses of the fourteenth amendment, and analogous provisions of the state constitution. They requested, therefore, that the statute be declared unconstitutional, both on its face and as applied to their proposed expenditures. Id. In previous challenges to the statute, courts avoided the constitutional issues by narrowly construing section 8 and its predecessors. See First Nat'l Bank v. Attorney General, 362 Mass. 570, 290 N.E.2d 526 (1972); Lustwerk v. Lytron, Inc., 344 Mass. 647, 183 N.E.2d 871 (1962). As a result of such decisions, the Massachusetts legislature narrowed the legislation by a series of amendments to specifically prohibit corporate expenditures regarding ballot questions "solely" concerning "individual" taxation. First Nat'l Bank v. Bellotti, 435 U.S. at 769 n.3.
stitution to allow a graduated personal income tax. The full Supreme Judicial Court of Massachusetts upheld the constitutionality of the statute, holding "that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech and other activities entitling it to communicate its position on that issue to the general public."

The United States Supreme Court, after disposing of an initial question of mootness, noted that the Massachusetts court improperly had phrased the issue as whether corporations have first amendment rights coextensive with those of natural persons. Instead of focusing on the first amendment rights of the speaker, the United States Supreme Court chose to emphasize the type of expression involved, and stated the question as "whether the corporate identity of the speaker deprives this proposed speech of what

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18 359 N.E.2d at 1266. The petitioners argued that the graduated personal income tax would adversely affect their businesses because highly skilled executives would be discouraged from settling or continuing to work in Massachusetts. In addition, the petitioners felt that corporations would be hesitant to operate in the state in light of the proposed tax structure thereby causing a decrease in bank loans and other corporate activity. Id.

17 359 N.E.2d at 1270. The Supreme Judicial Court found that there was a rational basis for the legislative determination that a ballot question concerning the taxation of individuals should not be deemed materially to affect the property, business, or assets of a corporation. Id. at 1271. Adopting a narrow construction of the statute, the Supreme Judicial Court flatly rejected the contention that section 8 was overbroad or vague, finding that the specific prohibition against corporate expenditures on a referendum solely concerning individual taxation was "both precise and definite." Id. at 1273-74. In essence, the Supreme Judicial Court took the position that a corporation's first amendment rights of free speech and expression are an incident of its property rights which are protected by the fourteenth amendment due process clause. Id. at 1270; see note 21 infra.

19 435 U.S. at 774-75. Although the 1976 referendum had been upheld and the proposed constitutional amendment defeated, the United States Supreme Court held that, as a controversy "capable of repetition, yet evading review," the case was not moot. Id. at 774.

20 Id. at 776. Corporations are not entitled to the constitutional guarantees that are deemed purely personal, such as the privilege against self-incrimination, Wilson v. United States, 221 U.S. 361, 382-86 (1911), or the right to privacy, California Bankers Ass'n v. Shultz, 416 U.S. 21, 65-67 (1974). In determining whether a corporation may claim a specific constitutional protection, the Court has considered whether the "historic function" of the constitutional provision has been solely in the nature of protection for individuals. United States v. White, 322 U.S. 684, 686-701 (1944). This is not to say, however, that corporations are excluded from all constitutional protections. See United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (double jeopardy); G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977) (unreasonable search and seizure); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886) (due process, equal protection). In light of the historic function of the first amendment in ensuring the free flow of information and ideas, corporate speech clearly qualifies for at least some first amendment protection.
otherwise would be its clear entitlement to protection. 20

The majority opinion rejected the conclusion of the state court that a corporation's first amendment protection derives from its property rights under the fourteenth amendment. 21 Instead, the majority characterized the speech involved—comment on a referendum issue—as "at the heart of the First Amendment protection." 22 Therefore, full first amendment protections were deemed appropriate, since the type of speech involved was "indispensable to decisionmaking in a democracy." 23 Although it noted that prior decisions of the Court had afforded first amendment rights to corporations only where the speech involved was intrinsic to the corporation's business, the Bellotti majority found no indication in those opinions that such a consideration had been dispositive. 24 In-

20 435 U.S. at 778. The Bellotti majority indicated, however, that in some circumstances, restrictions on corporate expression might be applied for reasons that would be inadequate to support restrictions on individual speech. Id. at 777-78 n.13. See also id. at 783-84 n.20.


22 435 U.S. at 777.


24 435 U.S. at 781-83. Although a common factor linking cases that extended first amendment protection to corporate speech was the close relationship between the speech involved and the corporation's business, it is significant that none of the earlier opinions even refers to this factor. Instead, the decisions stress the importance of free information flow. See, e.g., Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 92 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763-64 (1976); Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-06 (1971) (Douglas, J., dissenting from denial of cert.). The informative function of corporate expression was first recognized with regard to commercial speech, which plays an indispensable role in the eco-
stead, the majority pointed out that these cases, the press cases in particular, stressed the informative function of the first amendment "in affording the public access to discussion, debate, and the dissemination of information and ideas."25 The Court concluded, therefore, that a statute which dictates "the subjects about which persons may speak and the speakers who may address a public issue"26 cannot survive constitutional muster without passing the test of "exacting scrutiny."27

Applying exacting scrutiny to the Massachusetts statute, the Court looked to determine whether the state asserted a "compelling" interest and whether the statute was narrowly drawn to further only that interest.28 Treating the state's first justification for the legislation, the Court found that the state's interest in preserving confidence in the electoral process was of the "highest importance."29 The statute was found constitutionally defective, how-

nomic decisionmaking of the public. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 100 S. Ct. 2343, 2349 (1980). In short, the Court's view has been that free discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940).


26 435 U.S. at 784-85. The Court observed that the Massachusetts statute, by singling out a particular type of ballot question, suggested that the legislature might have been attempting to assist one side of the debate. Id. at 785-86. The majority opinion also noted that "[i]f a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment." Id. at 785 (footnote omitted).

27 Id. at 786. The Supreme Court has established through consistent caselaw that the test of "exacting scrutiny" will be applied where direct governmental prohibitions suppress the communicative impact of protected speech. Elrod v. Burns, 427 U.S. 347, 362 (1976); L. Tribe, supra note 4, at 602; see Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam). In addition to the requirement that a "compelling state interest" be demonstrated, the exacting scrutiny test requires that there be a nexus between the goals sought and the legislative means adopted, and that the enactment be neither over- nor underinclusive. Bates v. Little Rock, 361 U.S. 516, 524 (1960); cf. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 100 S. Ct. 2343 (1980) (commercial speech regulations subjected to intermediate level of constitutional scrutiny).

28 435 U.S. at 788-95.

29 Id. at 788-89. The State of Massachusetts had advanced two principal justifications for the prohibition of corporate speech. The first was the state's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminu-
ever, because neither the state legislature nor the Massachusetts courts had made findings that corporate participation in referenda would unduly influence the outcome of the vote or reduce public confidence in the government.\textsuperscript{30}

As a second justification, the state asserted an interest in protecting the rights of shareholders whose views might differ from those expressed by the corporation's management.\textsuperscript{31} Assuming, \textit{arguendo}, that this interest was compelling,\textsuperscript{32} the Court nevertheless found that the statute was not narrowly drawn to further that interest.\textsuperscript{33} Specifically, the statute was underinclusive in that it prohibited corporate participation in referenda while permitting corporations to lobby or to speak on public issues.\textsuperscript{34} Moreover, the statute was limited in its application to a narrow class of business organizations.\textsuperscript{35} In addition to being underinclusive, the statute was also overinclusive, according to the majority, since it "would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure."\textsuperscript{36} As for dissident shareholders, the majority opinion pointed out that the remedies and procedures of corporate democracy were open to them in order to protect their interests\textsuperscript{37} in addition to the judicial remedy of a derivative suit in
the event of improper expenditures by management.\textsuperscript{38} Therefore, having found the statute to have failed under this exacting scrutiny analysis, the Court declared it unconstitutional and reversed the judgment of the Supreme Judicial Court of Massachusetts.\textsuperscript{39}

It is important to note that the \textit{Bellotti} majority did not hold that a corporation has first amendment rights coextensive with those of an individual;\textsuperscript{40} rather, the entitlement to first amendment protection was based on the nature of the speech involved and its contribution to the dissemination of information to the public. It is also significant that four Justices dissented on this very issue,\textsuperscript{41} arguing that the source of first amendment protection for corporate speech derives from the business interests of the corporation.\textsuperscript{42} In view of the closeness of the decision, it is necessary to examine the dissenters' "business interests" theory of first amendment protection, with a view to its possible reemergence outside the particular context of corporate speech on referenda.

\textsuperscript{40} The element of compulsion is absent, however, where shareholders of a corporation are involved, since unlike the case in \textit{Abood} where noncontributors were threatened with a loss of employment, 431 U.S. at 212, dissident shareholders may choose either to exercise their control through intracorporate means or reinvest their money elsewhere, 435 U.S. at 794 n.34.

\textsuperscript{41} 435 U.S. at 794-95. The Court has held that employees cannot be compelled to contribute union dues or service fees for the furtherance of political views with which they disagree. \textit{Abood} v. Detroit Bd. of Educ., 431 U.S. 209 (1977); \textit{Machinists} v. Street, 367 U.S. 740 (1961). The element of compulsion is absent, however, where shareholders of a corporation are involved, since unlike the case in \textit{Abood} where noncontributors were threatened with a loss of employment, 431 U.S. at 212, dissident shareholders may choose either to exercise their control through intracorporate means or reinvest their money elsewhere, 435 U.S. at 794 n.34.

\textsuperscript{42} Justice White authored a dissent, joined by Justices Marshall and Brennan. Justice Rehnquist dissented separately.

\textsuperscript{43} 435 U.S. at 777 & n.13.

\textsuperscript{44} Justice Rehnquist took the narrow view expressed in an early opinion by Chief Justice Marshall:

\begin{quote}
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.
\end{quote}

435 U.S. at 823 (Rehnquist, J., dissenting) (citing \textit{Dartmouth College} v. \textit{Woodward}, 17 U.S. (4 Wheat.) 518, 636 (1819)). Justice White's analysis emphasized the view that corporate speech is less entitled to first amendment protection than the speech of individual speakers, except where the corporations have been organized for the express purpose of disseminating opinion, see, e.g., \textit{NAACP} v. \textit{Button}, 371 U.S. 415 (1963), or are media corporations. 435 U.S. at 804-06 (White, J., dissenting).
The dissenting Justices in *Bellotti* argued that the proper issue before the Court was “whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business.”

Since corporations are creations of the state, the dissenting Justices reasoned that they have only those rights expressly granted by the state, or implied from the state’s grant of the power to acquire and use property. Thus, the four dissenting Justices in *Bellotti* would have conferred limited first amendment protection on the speech of “business” corporations only in narrow areas—commercial speech in the form of product advertising, and in the ambiguously defined context of speech on public issues “necessarily incidental” to the corporation’s business.

In a variation of this property rights analysis, three of the dissenting Justices emphasized the associational interests of shareholders. Under this mode of analysis, unless a corporation is one

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43 U.S. at 803 (White, J., dissenting); see id. at 822-23 (Rehnquist, J., dissenting).
43 U.S. at 825-26 (Rehnquist, J., dissenting); see id. at 807-08 (White, J., dissenting). The ambiguity inherent in any attempt to define what forms of expression might be viewed by courts as “necessarily incidental” to the business of a corporation would “chill” expression in areas other than direct product advertising because of corporate unwillingness to risk penalties. See New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); Smith v. California, 361 U.S. 147, 151 (1959); Speiser v. Randall, 357 U.S. 513 (1958). In addition to the valuable information that would be lost, corporations would be less willing to support philanthropic causes since such support might reasonably be construed as “political speech” on subjects unrelated to the corporation’s business. First Nat’l Bank v. Bellotti, 435 U.S. at 782 n.18. The result of the “business interests” test would be the undue impingement of corporate expression, and as expressed by the Court in *Smith v. California*, “the free dissemination of ideas [might] be the loser.” 361 U.S. at 151.
43 U.S. at 804 (White, J., dissenting). In Justice White’s view, any first amendment protection for corporate expression must derive from the expressional rights of its shareholders. See id. at 803-06 (White, J., dissenting). The informational value of corporate political speech, therefore, is offset by the fact that such opinions are “not a product of
formed for the purpose of communicating the views of its shareholders, or whose business is communications, the corporation’s speech on public issues is not entitled to first amendment protection. Conversely, commercial speech would be entitled to some degree of protection, since advertising presumably would be favored by all corporate shareholders as a means of increasing the company’s business. In terms of the first amendment “process,” the dissenting Justices recognized the informational value of corporate product advertising, or reports to employees, customers, and shareholders on “matters relating to the functioning of corporations.” Because of the dissociation with individual shareholders’ views, however, corporate speech on public issues not “integraly related” to the corporation’s business could be viewed only as expression of the “purely personal views of the management.” Therefore, in the interest of protecting the first amendment rights of shareholders who disagree with management’s opinions, political speech would be subject to the state’s control. Moreover, in the dissenters’ view, because of the ease with which corporations are permitted to accumulate capital, the state has a legitimate interest in preventing corporations from using their favored economic position to control public opinion on political issues not affecting their business.

What is unsettling about the reasoning used by the dissenting

individual choice,” and by the assumption that even the prohibition of corporate political speech would not severely “impinge . . . upon the availability of ideas to the general public.” Id. at 805 (White, J., dissenting). The dissenters’ views would work a curious inversion; a corporation’s “hawking of wares” would qualify for protection, whereas the discussion of public issues would not. Moreover, the premise that corporate expression should be afforded less protection than individual speech is equally applicable to any corporation—including those that publish newspapers.

47 Id. at 805 (White, J., dissenting).
48 Id. at 803 (White, J., dissenting). The validity of the assumption that all corporate shareholders are in favor of a corporation’s product advertising is questionable. See note 57 and accompanying text infra.
49 435 U.S. at 805 (White, J., dissenting).
50 Id. at 803 (White, J., dissenting).
51 Id. at 813 (White, J., dissenting).
52 Id. at 809-10 (White, J., dissenting). Except in the limited area of broadcast media, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Court has rejected the view that the state may regulate the “marketplace of ideas” by controlling the speech of powerful entities in order to enhance the voices of the less influential. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam); see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The evaluation of a particular speaker’s message is the public’s right, not the government’s responsibility. See Thornhill v. Alabama, 310 U.S. 88 (1940); Meiklejohn, The First Amendment is an Absolute, 1961 Sur. Ct. Rev. 245, 263.
Justices in *Bellotti*, is that if it had prevailed, or should prevail in the future, it would leave corporate management uncertain as to what communications might be viewed as within first amendment protection, and what deemed the "purely personal views of the management." The dissenting opinions either underestimate or deliberately disregard several important considerations. First, as the majority opinion pointed out, corporate shareholders have available intracorporate remedies where management advocates political or social causes with which shareholders disagree. Because they are subject to removal by the shareholders, with or without cause depending on the state statute and the corporate charter or bylaws, boards of directors are sensitive to expressions of disagreement with corporate policies by individual shareholders. The overwhelming majority of shareholders are principally interested in a well-managed company, an appreciation of their equity interest in the corporation, and in the dividends or earnings on their shares. To the extent that shareholders are aware of these economic interests, there is no comparable indication that shareholders of publicly held corporations—even news media corporations—necessarily share a common set of political or social views. It seems more likely that shareholders of corporations whose business is communications invest in these companies to receive a return on their investments as do most shareholders of so-called "profitmaking corporations." Moreover, to argue that a corporation's advertising is a protected form of speech because it advances the interests of all shareholders is shortsighted, since surely not all shareholders of a large corporation would approve of, or agree with, all of the corporation's commercial messages. At least some shareholders may be expected to oppose advertising expenditures altogether. Furthermore, the interaction between corporate man-

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53 See note 6 *supra*.
54 435 U.S. at 794-95.
55 See note 37 *supra*.
56 See generally *N. Lattin*, *supra* note 37; *W. Fletcher*, *supra* note 44, § 5318 at 603.
57 One commentator has illustrated the tenuousness of the argument that shareholders of other than some small, closely held organizations are unanimous in their approval of advertising:

[T]o presume this unanimity for a corporation such as General Motors is to stretch credulity past the breaking point. Probably all shareholders wish General Motors to prosper. Not all would wish to express that an Oldsmobile Cutlass is a great buy. Indeed, some shareholders certainly believe that General Motors should advertise more truthfully, some that it should advertise less truthfully, and some
agement and shareholders belies the dissenters’ concern that the corporation would abuse the economic benefits of the corporate form of organization by the unrestrained dissemination of views unrelated to the corporation’s business. It is unrealistic to suggest that the considerable costs of purchasing advertising space or broadcast time would not restrain 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 issues discussed generally relate to the concerns of the corporation, although they may not promote the company or its products directly.

Perhaps the most significant deficiency in the dissenters’ “necessarily incidental to business” test is that it does not adequately justify the exclusion of media corporations, on constitutional or factual grounds, from regulations that premise first amendment protection of corporate speech upon the “business interests” of the speaker. Indeed, this problem was emphasized by Chief Justice Burger’s concurring opinion in Bellotti in which he recognized the problems inherent in attempting to distinguish media corporations from general business corporations. Since modern media corporations are frequently conglomerates that control other businesses involved in nonspeech activities, it is almost impossible to distinguish them on factual grounds from other “business” corporations. The similarity between media and “business” corporations

that it should not advertise at all.
O’Kelley, supra note 21, at 1373.


** For a discussion of corporate “issue” advertising, see notes 127 & 164-185 and accompanying text infra.

* 435 U.S. at 796-98 (Burger, C.J., concurring).

** Id. at 796 (Burger, C.J., concurring). The lines of business in which media corporations engage extend beyond publishing into areas such as pulp and paper manufacturing, trucking and shipping. In the case of one media corporation, Time Inc., forest products accounted for 28.8% of its business in 1977. N.Y. Times, June 23, 1978, § D (Business Day), at 12. It is clear that media corporations, as well as general business corporations benefit from the advantages of the state-created corporate form of organization. First Nat’l Bank v. Bellotti, 435 U.S. at 796-97 (Burger, C.J., concurring); id. at 809 (White, J., dissenting). Furthermore, the press is more likely to dominate public opinion, because of both editorial expertise and the tendency toward concentration in the media. See Kleinfield, The Great
“suggests the need for caution in limiting the First Amendment rights of corporations as such.” Moreover, it is doubtful whether a distinction can be made on constitutional grounds, since it is by no means clear that the first amendment’s freedom of the press clause confers on the “institutional” press special protection not enjoyed by other corporations. Because history provides no clear indication that the framers intended to single out an institution as the sole beneficiary of “freedom of the press,” and because of the difficulties involved in determining who would qualify for such a privilege, the Chief Justice concluded that the first amendment “does not ‘belong’ to any definable category of persons or entities,” but rather to all those “who exercise its freedoms.”

In addition to recognizing the “business interests” rationale espoused by the four dissenting Justices in Bellotti, it is also significant to note that the Court limited its holding to that portion of the Massachusetts statute prohibiting corporate speech on referenda. The majority expressly declined to decide whether the regulation of corporate expression in other areas would withstand constitutional scrutiny. As a result, much of this legislation, the Federal Election Campaign Act and similar state statutes, for ex-

Press Chain, N.Y. Times, April 8, 1979, § 6 (Magazine), at 41.


64 First Nat’l Bank v. Bellotti, 435 U.S. at 801 (Burger, C.J., concurring). The process of including some entities, while excluding others from the definition of “press” would be analogous to the practice of governmental licensing of the press, a system abhorrent to the framers of the first amendment. Id.; see Lovell v. City of Griffin, 303 U.S. 444 (1938); L. Levy, supra note 63, at 240-47.

65 435 U.S. at 802 (Burger, C.J., concurring).

66 2 U.S.C. § 441 (1976); see notes 116-30 and accompanying text infra.
ample, will have to be tested on a case-by-case basis. Bellotti left unclear, however, the guidelines for evaluating the constitutionality of legislation which impacts on corporate expression. Specifically, it was not clear what types of federal and state interests could be deemed compelling, or even substantial.\textsuperscript{67} Nor were reasonable standards articulated by the Court to enable a determination of whether a sufficient nexus between the legislation regulating corporate speech and the interest it was designed to further do in fact exist. As a result, the caselaw which followed the Bellotti decision relied on conclusive statements as to whether or not a compelling state interest was involved,\textsuperscript{68} likewise avoiding the type of reasoned analysis which, it would seem, the United States Supreme Court should have engaged in to buttress its conclusion in Bellotti. The Court has, however, come closer to establishing guidelines for analyzing restrictions on corporate expression in the recent cases of Consolidated Edison Co. v. Public Service Commission\textsuperscript{69} and Central Hudson Gas & Electric Corp. v. Public Service Commission.\textsuperscript{70}

\textsuperscript{67} 435 U.S. at 820 (White, J., dissenting). Professor Tribe points out that the Court merely assumed that the state's interests were compelling, and focused instead upon the defects of the statute in furthering those interests. Thus, he suggests, there was still considerable room after Bellotti for restricting corporate advocacy of public issues. L. Tribe, supra note 4, at 59 & n.14 (Supp. 1979). The Consolidated Edison and Central Hudson decisions, however, make it clear that legislatures will face a weighty burden in attempting to justify the curtailment of corporate speech on public issues and in the area of non-deceptive commercial speech. See Fein, Free Speech in Ads Wins Key Plug From Brethren, Nat'l L.J., Nov. 17, 1980, at 15, col. 1.

\textsuperscript{68} E.g., C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978); Washington Water Power Co. v. Kootenai Environmental Alliance, 99 Idaho 875, 591 P.2d 122 (1979). The Hanson court, under facts similar to those presented in Bellotti, invalidated that portion of an Idaho statute which prohibited certain business organizations from supporting or opposing ballot issues by direct contributions. C & C Plywood Corp. v. Hanson, 583 F.2d at 425. The court rather cursorily dismissed the state's interests as "not . . . sufficiently compelling to permit the abridgement of First Amendment rights . . . ", and in a brief paragraph labelled the proscription "overbroad" without discussing the implications of the distinction in the statute between contributions and expenditures. Id. at 425. In Washington Water Power Co., the court cited Bellotti approvingly, but avoided the first amendment issue. Washington Water Power Co. v. Kootenai Environmental Alliance, 99 Idaho at 875, 591 P.2d at 122. Instead, the court invalidated an order of the state regulatory commission that forbade the use of billing inserts for "political advocacy" on the ground that the commission had exceeded its statutory authority. Id. Thus, while lower court decisions did not indicate an attempt to pull back from the Bellotti decision, they also did not contribute to an understanding of how the first amendment process would be applied outside the context of corporate speech on referenda or ballot issues.

\textsuperscript{69} 100 S. Ct. 2326 (1980).

\textsuperscript{70} 100 S. Ct. 2343 (1980).
Refining The Process

The first significant test of the ramifications of *Bellotti* arose in New York when two electric utilities brought separate actions challenging orders of the Public Service Commission\(^{71}\) of the State of New York (PSC) as violative of the first and fourteenth amendments. In *Consolidated Edison*, the Consolidated Edison Company of New York (Con Edison) had enclosed an insert in its January 1976 billing envelope promoting the “benefits of nuclear power.”\(^{72}\) When Con Edison refused to send its customers a rebuttal as requested by the Natural Resources Defense Council, that group asked the PSC to make Con Edison’s billing statements available for the expression of contrasting views.\(^{73}\) Instead, the PSC issued an order prohibiting the use of bill inserts by utility companies to discuss “controversial issues of public policy.”\(^{74}\) The New York Court of Appeals upheld the order as a legitimate time, place, and manner restriction which served the state interest in protecting the right to privacy of the utilities’ customers.\(^{75}\)

In the second case, *Central Hudson Gas & Electric Corp. v. Public Service Commission*, Central Hudson sought to vacate that

\(^{71}\) The Public Service Commission (PSC) is a regulatory agency with broad supervisory powers over electric utilities in New York. N.Y. PUB. SERV. LAW §§ 2.12 & 66.1 (McKinney 1955). The extensive scope of the PSC’s powers is due to the position of electric utilities as monopolies permitted by the state in the public interest. See id. at § 68 (McKinney 1955); 2 A. KHAN, THE ECONOMICS OF REGULATION 113-171 (1971).

\(^{72}\) Id. at 106-08, 390 N.E.2d at 755-56, 417 N.Y.S.2d at 35-37. Under this mode of analysis, content-neutral regulations that indirectly impact upon speech will be acceptable, provided they do not unduly restrict the flow of information and opinion. L. TRIBE, supra note 4, § 12-2. The Court of Appeals, however, did not adhere to the caveat that in any balancing of interests under this approach, the first amendment “requires a ‘thumb’ on the scale to assure that the balance struck . . . properly reflects the central position of free speech in the constitutional scheme.” Id. The Supreme Court generally has not permitted the suppression of speech on the ground that it might be “offensive” to some listeners unless substantive privacy interests are infringed in a manner which makes it impossible to avoid the intrusion. See Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Cohen v. California, 403 U.S. 15, 21 (1971); Kovacs v. Cooper, 336 U.S. 77 (1949). Cf. Organization for a Better Austin v. O’Keefe, 402 U.S. 415, 420 (1971)(invalidating injunction against leafletting in suburban residential areas).
part of a PSC order that prohibited promotional advertising by electric utilities. The PSC had concluded that promotional advertising by utilities was adverse to the national energy conservation policy in that it would encourage the use of electricity by providing misleading signals that energy conservation was unnecessary. The New York Court of Appeals upheld this order as well, holding that the petitioner’s “expressional rights” were not unconstitutionally impaired since the governmental interest in conserving energy outweighed what the Court viewed as the limited informational value of advertising in the “noncompetitive market in which electric corporations operate.”

It is interesting to analyze the decision of the New York Court of Appeals in terms of the Bellotti first amendment process. In both the Consolidated Edison and Central Hudson cases, the Court of Appeals, while implicitly recognizing that the free flow of information is indispensable to decisionmaking in a democracy, minimized the possible informational value of bill inserts or pro-

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76 100 S. Ct. at 2347. The PSC originally had ordered electric utilities in New York to cease all advertising that “promotes the use of electricity” originally in response to the 1973 fuel crisis. *Id.* After the fuel shortage had eased, the PSC nevertheless extended the prohibition, declaring all advertising promoting the use of electricity as contrary to the national policy of conserving energy, and that additional usage would cause spiraling rate increases to cover the marginal cost of new capacity. *Id.* The PSC’s actions were taken pursuant to its statutory obligations to assure a reasonable rate structure, see N.Y. Pub. Serv. Law. § 66(5) (McKinney 1955), and to encourage utility corporations to perform “with . . . care for the public safety, the preservation of environmental values and the conservation of natural resources, *id.* at § 5(2)(McKinney Supp. 1979-1980).

77 100 S. Ct. at 2348.

78 47 N.Y.2d at 111, 390 N.E.2d at 757, 417 N.Y.S.2d at 39.

79 *Id.* Unlike the ban on billing inserts, the Court viewed the PSC’s prohibition of all promotional advertising as a regulation aimed directly at the communicative impact of the speech. *Id.* Because commercial speech qualifies for only “some” first amendment protection, Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978); Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court of Appeals attempted “to apply the emerging principles” of commercial speech protection. 47 N.Y.2d at 108, 390 N.E.2d at 756, 417 N.Y.S.2d at 37. The result was that the New York Court upheld a total prohibition of commercial speech that had not been shown to be misleading, e.g., Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979), nor related to illegal activity, e.g., Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973). This unprecedented action was based on the conclusive presumption that commercial advertising in a noncompetitive market “lack[s] any beneficial informational content” and “may be affirmatively detrimental to the society.” 47 N.Y. 2d at 111, 390 N.E.2d at 756, 417 N.Y.S. 2d at 39. Furthermore, the Court’s opinion did not attempt to determine whether a sufficient nexus existed between the asserted state interest in energy conservation and the order, or whether the state interest could have been served by less restrictive means. *See* 47 N.Y. 2d at 111, 390 N.E.2d at 757, 417 N.Y.S.2d at 39.
motional advertising. Specifically, in Consolidated Edison, the Court overlooked the fact that the recipients might be interested in information concerning the operations of their utilities and the development of nuclear power. Furthermore, in Central Hudson, the Court grossly understated the value of commercial information emanating from a utility simply because of its monopoly status. In fairness to the New York Court of Appeals, however, it should be noted that the Bellotti decision, while recognizing that states could regulate in the area of corporate speech, did not clearly articulate the boundaries of the state's regulatory power. Interests which may appear "compelling" to regulatory authorities may not be so compelling when weighed against the public interest in the free flow of information and opinion. Furthermore, since the public's first amendment interest is so great, it is imperative for state regulatory authorities and legislatures to demonstrate by specific evidence that their actions are necessary to further their asserted interests and are narrowly drawn so as not to overly infringe on protected speech. Not surprisingly, therefore, the Supreme Court reversed the New York Court of Appeals, and invalidated both PSC orders.

80 The monopoly status of the utilities involved in Consolidated Edison and Central Hudson should not detract from the first amendment protection afforded to their speech. As the Bellotti majority made clear: "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." 435 U.S. at 777.

81 The full discussion of public issues has repeatedly been recognized as a primary first amendment interest. E.g., Mills v. Alabama, 384 U.S. 214, 218 (1966); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940). Particularly with regard to the subject matter of the PSC ban—"controversial matters of public policy"—the maxim often cited in support of the public's informational interest is applicable. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

82 Even if the commercial messages of a monopolist might be said to be of lesser interest to consumers, such speech should still qualify for its full measure of first amendment protection, provided it is not misleading and does not promote illegal actions, regardless of the speaker's monopoly status. See Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763-64 (1976). The Court has afforded constitutional protection in the past to other heavily regulated businesses, see, e.g., Friedman v. Rogers, 440 U.S. 1 (1979); Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Moreover, the degree of regulation of a business does not necessarily decrease the informative function of its speech. See generally Public Media Center v. FCC, 587 F.2d 1322 (1978); Pacific Gas & Elec. Co. v. City of Berkeley, 60 Cal. App. 3d 123, 127-29, 131 Cal. Rptr. 350 (1976).

In reversing Consolidated Edison, the United States Supreme Court decided that the PSC's suppression of bill inserts that discussed controversial issues of public policy directly infringed on speech protected by the first and fourteenth amendments. The Court observed, however, that the PSC's ban on bill inserts was not invalid per se merely because it restricted speech on public issues. Rather, the majority considered three possible justifications for upholding the PSC's prohibition of bill inserts. The Court first rejected the PSC's contention that the order was a content-neutral time, place, or manner restriction because the PSC order banned only the insertion of messages addressing controversial public issues, while permitting the insertion of "useful" information. In summary fashion, the Court also dismissed the PSC's second asserted justification, finding that even though the ban applied equally to all discussion of nuclear power, pro or con, the order was an unacceptable subject-matter regulation.

100 S. Ct. at 2332. Although the PSC argued that the prohibition furthered a governmental interest other than the suppression of speech, and should thus be evaluated according to second-tier scrutiny, see, e.g., United States v. O'Brien, 391 U.S. 367, 377 (1968), the New York Court of Appeals upheld the ban precisely because of the harmful effect of "controversial" speech on unwilling recipients, 47 N.Y.2d at 106-07, 390 N.E.2d at 755, 417 N.Y.S.2d at 36.

100 S. Ct. at 2332. The PSC's prohibition of speech on commercial public issues might have been upheld if it had been a content-neutral time, place, or manner restriction, see Cox v. New Hampshire, 312 U.S. 569 (1941), a reasonable subject matter restriction, see Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), or had been narrowly drawn to serve a compelling state interest, see Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). 100 S. Ct. at 2332.

100 S. Ct. at 2333. A permissible time, place, or manner restriction must not be aimed at controlling the content or subject matter of expression. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Police Dep't v. Mosley, 408 U.S. 92, 99 (1972). 100 S. Ct. at 2333.

100 S. Ct. at 2333. Subject matter restrictions have been permitted in narrow categories of speech, such as libel, obscenity, and fighting words. See note 4 supra. Although Con Edison is a highly regulated business, the case did not fall within the narrow line of decisions dealing with access to government property because the billing envelopes were the property of Con Edison, at least until the time they were mailed. 100 S. Ct. at 2334. See Greer v. Spock, 424 U.S. 828 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). Justice Blackmun, dissenting, reasoned that the PSC's prohibition was not a typical prohibition of a speaker's attempt to use his own "property" to promulgate the speaker's views. Rather, it was akin to an appropriation of a subsidy from Con Edison's ratepayers. 100 S. Ct. at 2343 (Blackmun, J., dissenting). Thus, he suggested that the state permissibly might define billing envelopes as the property of the ratepayers so that restrictions on the utility's use of the billing envelopes would not be viewed as a deprivation of the corporate speaker's first amendment rights. Id. This rationale is disturbingly reminiscent of the "property rights" basis for first amendment protection that was rejected by the Bellotti majority. See note 21 and accompanying text supra. If this line of reasoning should come to be accepted,
ajority’s view, a prohibition that barred discussion of an entire topic was no less objectionable than governmental restrictions of particular views:

As a general matter, “the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content.” . . . To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.90

Finally, the Court applied exacting scrutiny and determined that the PSC’s order was not a “precisely drawn means of serving a compelling state interest.”91 The state interest asserted by the PSC was based primarily upon the privacy rights of consumers and the need to protect a captive audience from the imposition of objectionable views.92 In order for the prohibition of “intrusive” speech to be upheld, however, there must be a showing that the “captive” audience simply cannot avoid the objectionable speech.93 Here, customers easily could have avoided the intrusion simply by throwing away the insert or averting their eyes.94 Only a showing that “substantial privacy interests are being invaded in an essentially intolerable manner”95 would justify the government’s shutting off discourse solely to protect others from hearing Con Edison’s views.96 The mere speculation of harm, the Court concluded, does not constitute a compelling state interest.97

The Supreme Court also invalidated the prohibition of promo-

90 Id. at 2333 (citations omitted).
91 Id. at 2334-35.
92 Id. at 2335. The PSC’s asserted interest in allocating limited resources for the benefit of the public, see Red Lion Broadcasting Corp. v. FCC, 395 U.S. 367 (1969), was dismissed because billing envelopes are not as limited as broadcast wavelengths and because multiple bill inserts would not result in a “cacaphony of competing voices.” 100 S. Ct. at 2336. The Court also found no basis in the record for the PSC’s third asserted interest in protecting ratepayers from bearing the costs of objectionable billing inserts. Id.
93 Id. at 2335; see note 75 supra.
95 100 S. Ct. at 2335.
96 Id.
97 Id. at 2336.
tional advertising that was the subject of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, reversing the New York Court of Appeals. Unlike the *Consolidated Edison* case, *Central Hudson* involved the issue of whether the PSC's order prohibiting promotional advertising by a utility corporation was an unreasonable restriction on protected commercial speech. Since commercial, rather than political speech was implicated, the Supreme Court did not apply exacting scrutiny. Rather, the Court stated that so long as the speech is not deceptive and does not concern unlawful activity, the state's authority to regulate commercial speech will not be upheld unless the regulation directly ad-

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98 *Id.* at 2354.

99 *Id.* at 2349. The *Central Hudson* Court defined “commercial speech” alternately as “expression related solely to the economic interests of the speaker and its audience,” or “speech proposing a commercial transaction.” *Id.* at 2349. The two definitions should not be viewed as being interchangeable, however, since different results may ensue, depending upon which standard is applied. See notes 174-85 and accompanying text infra. The threshold standard for determining whether regulations affect commercial speech is critical, since commercial expression, unlike direct comment on public issues, is afforded only “some” first amendment protection. Compare Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) with *Mills v. Alabama*, 384 U.S. 214 (1966).

100 100 S. Ct. at 2350. Until fairly recently, the value of commercial expression in the “marketplace of ideas” was not recognized and, therefore, such speech did not come within the scope of first amendment protection. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Even now, commercial speech is not afforded full first amendment protection. In view of the first amendment concern with the informational function of commercial speech, it is recognized that government may ban such speech if it is deceptive, see, e.g., *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979), or promotes illegal practices, see, e.g., *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). The importance of making a correct determination of whether a particular regulation impacts strictly on “commercial” speech, and the difficulties inherent in doing so are clearly indicated by the divergence of opinion expressed in the *Central Hudson* concurring and dissenting opinions. Justices Blackmun and Brennan argued that a stricter standard than the intermediate level of scrutiny generally applied in commercial speech cases would be appropriate where, as here, a state suppresses non-misleading advertising “in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly,” by depriving the public of the information necessary for making a free choice. 100 S. Ct. at 2355 (Blackmun, J., concurring). Indeed, Justices Stevens and Brennan concurred that New York's ban on promotional advertising by a utility exceeded the boundaries of commercial speech:

This ban encompasses a great deal more than mere proposals to engage in commercial transactions. It prohibits all advocacy of the immediate or future use of electricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders.

*Id.* at 2359 (Stevens, J., concurring). But cf. *id.* at 2361 (Rehnquist, J., dissenting) (commercial speech “occupies a significantly more subordinate position” in first amendment hierarchy than recognized by the majority).
ances "substantial" state interests. Further clarifying the Bel- lotti first amendment "process" rationale, the Court once again emphasized the importance of the public interest in the dissemination of information. Unlike the New York Court of Appeals, which saw no informative value in the promotional advertising of a public utilities monopoly, the Supreme Court pointed out that even advertising by a monopolist has legitimate economic significance. Since the decision to forego or not to forego increased consumption faces every consumer regardless of the nature of the producer, the Court rejected the view that commercial messages emanating from a monopolist have no informational value. Therefore, because the speech involved was neither false nor misleading, the Supreme Court rejected the New York Court of Appeals' suggestion that the utility company's advertising was not entitled to any first amendment protection.

The Court then went on to determine whether the PSC's prohibition of promotional advertising directly advanced the concededly substantial interests asserted by the state—energy conservation and a fair and efficient utility rate structure. First, examining the state's asserted interest in the optimal pricing of

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101 100 S. Ct. at 2350.
102 See notes 78-79 and accompanying text supra.
103 100 S. Ct. at 2352. Even assuming that consumers cannot choose the source of their electrical power, the existence of interfuel competition has been noted by the Court. See West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 72 (1935). Moreover, the decisions faced by a consumer specifically regarding the monopoly supplier are not inconsequential, and include choices such as whether or not to purchase new services offered, 100 S. Ct. at 2352, or choosing services that would result in more efficient energy use, id. at 2353.
104 100 S. Ct. at 2352.
105 Id. The Court enunciated the threshold requirement that commercial speech not be misleading and concern lawful activity as the first of a four-step analysis for commercial speech cases. Id. at 2351. Once that minimum standard has been met, the Court will consider whether the government interest is "substantial." If so, the third and fourth steps require a showing that the regulation directly advances the governmental interest, and that it is no more extensive than necessary to achieve that goal. Id. The four-step test has been criticized as imposing an almost insurmountable burden on government to establish the required nexus whenever complete prohibition of promotional advertising is contemplated. See Fein, Free Speech in Ads Wins Key Plug from Brethren, Nat'l L.J., Nov. 17, 1980, at 15, col. 1.
106 The state feared that promotion of the use of electricity would encourage increased demand and greater consumption, a concern that was warranted by our significant dependence on foreign energy resources. 100 S. Ct. at 2352.
107 Increased consumption of electricity during peak demand periods especially concerned the PSC because the increased cost of providing the additional power needed would exceed the amount received through rates charged. Thus, the extra costs of production would have to be compensated for by spiraling rates for all consumers. Id. at 2352-53.
electricity, the Court found it speculative to suggest that a sufficient nexus existed between the ban on promotional advertising and the PSC's interest in maintaining an equitable rate structure.\textsuperscript{108} Although such nexus was found to exist with regard to the state's interest in energy conservation,\textsuperscript{109} the Court nevertheless found the PSC order constitutionally infirm because it was more extensive than necessary to further that interest.\textsuperscript{110} Specifically, the Court found that the order would also prevent promotional advertising of energy-saving devices or services that would cause no net increase in energy use.\textsuperscript{111}

THE EFFECT OF THE BELLOTTI PROCESS ON REGULATION OF CORPORATE POLITICAL SPEECH

The United States Supreme Court's decisions in the Consolidated Edison and Central Hudson cases do not answer all questions regarding the effect of the first amendment "process" rationale on statutes designed to limit or prohibit corporate political expression. In the context of specific legislation or regulations, a case-by-case determination will be required. Even so, the Court's tandem decisions in these cases do clarify the first amendment "process" analysis in several respects. It now does appear to be settled that a state regulatory commission cannot, without violating a utility's first and fourteenth amendment rights, ban billing inserts by a utility expressing its views on controversial public policy issues. Furthermore, in Consolidated Edison, the Court reaffirmed

\textsuperscript{108} Id. at 2353. In spite of the "substantial" interest in maintaining an equitable rate structure, the ban on advertising failed because of the absence of any showing that advertising to increase usage during non-peak periods actually had the effect of increasing usage during peak demand periods. Thus, it has been suggested that in order to support such a prohibition, the state would have to undertake an economic study of the correlation between consumer demand and advertising, isolating the effect of advertising from other factors that affect peak demand, for example, price, community wealth, industrial, and residential growth. Fein, supra note 105, at 15, col. 1.

\textsuperscript{109} 100 S. Ct. at 2353.

\textsuperscript{110} Id. The ban indiscriminately pertained to all advertising by the utility company, including commercial messages that would not aggravate the energy conservation problem. Id. Moreover, the ban was sufficiently broad that it could be applied as well to "issue advertising" by the utility on matters relevant to political discussion and debate and about which the utility is particularly well informed. Id. at 2359 (Stevens, J., concurring).

\textsuperscript{111} Id. at 2353. The appellant contended that among its products and services were devices designed to promote efficient energy use, among them the "heat pump" for use in electrical heating, and the use of electric heat as a supplement to solar and other alternate heat sources. Id.
the importance of considering the nature of the speech involved, regardless of the identity of the speaker. Thus, with regard to direct comment on public affairs, the fact that the speaker is a heavily regulated industry which has been granted monopoly status by the state is of no import in determining the degree of protection to which the speech is entitled. Most importantly, however, when Bellotti, Consolidated Edison, and Central Hudson are read in conjunction, they provide valuable insights into the approach the Court may take in evaluating other restrictions on corporate expression. It is to these other restrictions that we now turn.

Federal and State Regulation of Corporate Spending in Political Campaigns

The Bellotti majority addressed, without deciding, the issue of whether legislative enactments prohibiting corporate spending in election campaigns would be able to withstand constitutional scrutiny. Due to the Court's determination in Bellotti that the corporate identity of the speaker does not deprive speech of the constitutional protection to which it would otherwise be entitled, speculation has arisen that the constitutionality of restrictions or prohibitions of corporate spending in election campaigns must be measured according to the same standards found appropriate for evaluating restrictions on individual campaign spending. The Federal Election Campaign Act of 1976 (also known as the Corrupt Practices Act), for example, limits but does not entirely forbid, individual "contributions" to political campaigns; limitations of an

1 Justice Powell, writing for the majority in Consolidated Edison repeatedly cited to the Bellotti decision in support of the view that the level of scrutiny to which regulations of speech will be subjected is determined by the type of speech involved, and not by the corporate identity of the speaker. Id. at 2331, 2332, 2335, 2336-37.

2 Consolidated Edison's status as a state-regulated monopoly did not affect the informative value of its opinions on public affairs, and, therefore, its status did not preclude first amendment protection for its speech. Id. at 2331 n.1. Similarly, in the area of commercial speech, the same principles were applied by the Court in Central Hudson, which rejected the view that the commercial messages of a monopolist were not entitled to protection because they did not contribute to the public's informational interest. See 100 S. Ct. at 2352.

3 435 U.S. at 788 n.26; see L. Tribe, supra note 4, at 76 n.2.

4 435 U.S. at 784.

5 See, e.g., 435 U.S. at 821 (White, J., dissenting); L. Tribe, supra note 4, at 76-77.

6 Federal Election Campaign Act Amendment of 1976, § 320, 2 U.S.C. § 441a (1976). The Act prohibits contributions by an individual to any candidate for federal office or his
individual's independent "expenditures" in connection with federal election campaigns are, however, constitutionally impermissible in view of the Court's decision in Buckley v. Valeo.\textsuperscript{118} Therefore, reasoning by analogy in Bellotti, Justice White stated in his dissenting opinion: "If the corporate identity of the speaker makes no difference, all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day."\textsuperscript{119} Nevertheless, application of the first amendment process rationale does not mandate such a drastic conclusion.

It is clear that compelling governmental interests underlie federal and state\textsuperscript{120} corrupt practices legislation restricting corporate political committee which exceed a total of $1,000. 2 U.S.C. § 441a(1)(A) (1976). The Act also prohibits individual contributions to political committees operating under the auspices of any national political party which exceed an aggregate of $20,000. 2 U.S.C. § 441a(1)(B) (1976). Additionally, the Act proscribes individual contributions to other political committees exceeding a statutory maximum of $5,000. 2 U.S.C. § 441a(1)(C) (1976). Finally, individual contributions to any of the aforementioned recipients may not exceed a maximum of $25,000 annually. 2 U.S.C. § 441a(a)(3) (1976).

\textsuperscript{118} In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court upheld limitations on individual contributions to federal candidates contained in the 1974 Amendments. Compare 18 U.S.C. § 608(b)(1)(Supp. V 1975) (repealed 1976) with 2 U.S.C. § 441a(a)(1)(A) (1976), and 18 U.S.C. § 608(b)(2) (Supp. V 1975) (repealed 1976) with 2 U.S.C. § 441a(a)(2)(A) (1976). However, the 1974 Amendments also set a maximum monetary limitation for individual expenditures that were made "relative to a clearly identified candidate." 18 U.S.C. § 608(e) (Supp. V 1975) (repealed 1976). This limitation on individual "expenditures," unlike the contribution limitations, was found by the Buckley Court to constitute "direct and substantial restraints on the quality of political speech" in a manner that was not warranted by the state interests involved. 424 U.S. at 38. First, the Court pointed out that the expenditure limit did not effectively preclude corruption in election campaigns or the appearance of corruption, because individuals could still spend money on the candidate's behalf, provided that they did not expressly support or oppose the candidate's election. Id. at 45. Second, and most important in terms of the first amendment process, the Court stated:

[T]he concept that the 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 changes desired by the people.'"

Id. at 48-49 (citations omitted). As a result, Congress amended the Federal Election Campaign Act in 1976, repealing the provisions limiting individual expenditures, but providing for a restriction on the total expenditures by or on behalf of candidates for the office of President as a condition of the candidate's receiving federal subsidies. Federal Election Campaign Act Amendments of 1976, § 320, 2 U.S.C. § 441a(b)(1976); see 424 U.S. at 57 n.65.

\textsuperscript{119} 435 U.S. at 820-21 (White, J., dissenting). Corporations are prohibited from making any "contribution" or "expenditure . . . in connection with" any primary election, convention, or caucus to select federal candidates. 2 U.S.C. § 441b(a) (1976).

\textsuperscript{120} The following 34 states currently have "corrupt practices" statutes prohibiting or limiting corporate political spending: Ala. Code § 10-2-168 (1975 & Supp. 1979); § 3-1110
campaign spending. The Supreme Court repeatedly has recognized the importance of the legislative goal of preserving confidence in the electoral process by preventing corruption or the appearance of corruption of elected officials.\textsuperscript{121} In contrast to the situation considered in the Bellotti case, the legislature might well be able to draw upon actual evidence of the corrupting influence on elected officials of indebtedness to unions and corporations.\textsuperscript{122} Furthermore, it is questionable whether direct monetary contributions by corporations to political campaigns actually further the first amendment process since they are sterile with respect to the ideas

\textsuperscript{121} See, e.g., Buckley v. Valeo, 424 U.S. 1, 25 (1976); Pipefitters Local 562 v. United States, 407 U.S. 385, 415-16 n.28 (1972); United States v. CIO, 335 U.S. 106 (1948). The legislative intent underlying the original federal enactment was stated succinctly by Justice Reed in United States v. CIO:

 This legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contributions to political parties without the consent of the stockholders.


\textsuperscript{122} American history is a fertile source of examples of campaign corruption and demonstrates that political contributors wield influence beyond their voting power. D. Adamany, Financing Politics 236 (1969). See also G. Benson, Political Corruption in America 169-272 (1973); O. Demaris, Dirty Business: The Corporate-Political Money-Power Game 362-63 (1974). See generally G. Thayer, Who Shakes the Money Tree? 108-22 (1973). The "political bondage" that can result from large campaign contributions runs the gamut from the contributor making the funds expressly conditional upon the politician advocating specific policies, to the more subtle, but no less pervasive tendency for the large contributor to more easily gain the "good wishes and attentive ear of the candidate." L. Tribe, supra note 4, at § 13-26 (1978).
or opinions of the contributing corporation. Thus, under the Bellotti process rationale, there appears to be continuing constitutional validity to federal and state legislation which prohibits corporate spending that directly supports or opposes a particular candidate for public office. Indeed, one lower federal court has considered and rejected the "interment" argument in the context of direct campaign contributions.

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124 The argument that the first amendment "process" rationale does not compel the "interment" of corrupt practices legislation is supported by the Bellotti decision itself. See 435 U.S. at 788 n.26. The Bellotti majority emphasized the importance of the governmental interest in preventing the corruption of political officials, and implied that in the area of corporate campaign spending, in contrast to corporate speech on referenda, even complete prohibitions could be upheld:

"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 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.

Id.

125 Federal Election Comm'n v. Weinstein, 462 F. Supp. 243, 248 (S.D.N.Y. 1978). See also Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974); United States v. Chestnut, 394 F. Supp. 581 (S.D.N.Y. 1976), aff'd, 533 F.2d 40 (2d Cir. 1976). In Weinstein, the Federal Elections Commission brought an action against a corporation and its sole shareholder for violations of various provisions of the Federal Elections Campaign Act, including the section 441(b) prohibition against "contributions" by corporations. 462 F. Supp. at 245. The Weinstein court upheld the pre-Bellotti determination in United States v. Chestnut, 394 F. Supp. 581 (S.D.N.Y. 1976), aff'd, 533 F.2d 40 (2d Cir. 1976), that such a ban on corporate "contributions" to federal election campaigns was permissible, notwithstanding the first amendment interest involved, as the least drastic means of assuring integrity in the political process during elections. 462 F. Supp. at 249. In attempting to ascertain the combined impact of the Buckley and Bellotti decisions, however, the Weinstein court misconceived the import of the first amendment process rationale, and instead analyzed the "speech" element of political contributions strictly as a function of the right to individual self-expression. Id. Nevertheless, in view of the lesser contribution to the first amendment informational process made by direct campaign contributions, and the likelihood that actual legislative findings of corruption or the appearance of corruption can be made, statutes that ban direct corporate contributions are likely to be upheld. Moreover, it is important to note that Bellotti did not hold that corporations have first amendment rights co-extensive with those of individuals, but rather the Court implied that corporate speech might, in some circumstances, be subjected to greater restrictions than could be placed on individual speech. 435 U.S. at 777-78 n.13. Thus, Bellotti does not compel the conclusion that corporate campaign contributions—like those of individuals—can be limited, but not prohibited. A total ban on
Unlike corporate contributions to a particular candidate, corporate “expenditures” in connection with a political campaign may be entitled to first amendment protection. Indeed, in *Buckley v. Valeo*, the Court nullified limitations on individual “expenditures” in connection with a political campaign. Since the informative function of these expenditures is theoretically the same whether the “speaker” is a corporation or an individual, the *Buckley* and *Bellotti* decisions read in conjunction dictate the conclusion that such limitations are constitutionally unsupportable.

The foregoing is not to suggest that easy distinctions can be made under all circumstances. Issue advertising by a corporation that may support the position of an unnamed candidate in an election campaign raises unique and complex questions which can only be resolved on a case-by-case basis. In particular, the critical inquiry is whether such corporate advertising is likely to be viewed as an “expenditure” in connection with a campaign, as opposed to a “contribution” to a particular candidate. Indeed, this problem presented itself in a recent United States senatorial election campaign. In *In re Mobil Oil Corp.*, a complaint was filed with the Federal Election Commission, alleging that the Mobil Oil Corporation had made an illegal campaign contribution to the campaign of Senator Lowell Weicker in the form of a nationally published ad-

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1. **424** U.S. 1 (1976) (per curiam). Unlike limitations on individual contributions, which were viewed as only a “marginal curtailment” of expressional and associational freedoms, the limitations on individual expenditures in relation to an election campaign constituted “direct and substantial restraints” on political speech. *Id.* at 39.

2. The term “issue advertising” as used in this Article refers to the purchase of space in publications or broadcast time to publicize the corporations’ views on issues of public interest.

3. While it is fair to conclude that, for the most part, the Federal Election Campaign Act provisions regarding corporate contributions to election campaigns will be unscathed by the first amendment “process” rationale, there are still state corrupt practices acts too numerous to treat in detail within this Article. *See note 120 supra.* Overly broad prohibitions of corporate expenditures “for any political purpose whatever” or prohibitions that include corporate spending on referenda, however, seem likely to fall. *But see* 1978 Op. N.Y. State Bd. of Elect. No. 9, which states that the *Bellotti* decision, while invalidating laws limiting a corporation’s spending with regard to non-partisan referenda, does not affect the validity of N.Y. ELEC. LAW § 14-116 (McKinney 1978) which restricts corporate support of candidates to an annual maximum of $5,000. *Id.*


5. *In re Mobil Oil Corp.*, MUR 319 (76) (Feb. 28, 1977).
The advertisement in question urged voters to be aware of candidates’ positions on energy-related issues but did not identify any particular candidate by name. Although the Commission found that an investigation was unwarranted, it pointed out that the mere fact that no candidate was named was not dispositive of whether the advertisement was an expenditure in connection with an election. Clarifying its position, the Commission stated:

[W]here, as here, no candidate was named or even indirectly suggested by the ads, the ads were distributed nationwide and were part of a series of ads relating to the subject of energy policy, and the issue to which the ads were related was one of multifaceted complexity, the mere fact that knowledgeable . . . voters might infer that Mobil preferred [one candidate] over [another] does not afford reason to believe that the advertisement was placed “in connection with” the Connecticut senatorial election.

This case is a good illustration of the jagged edges of issue advertising during political campaigns, since it points out that the result might have been different if the advertisement was in connection with an election in a particular district and had been targeted to that district. Although it would be futile to define in the abstract at what point issue advertising would run afoul of corrupt practices legislation, corporate speech on issues vital to informed public opinion appear to be protected by the Bellotti’s first amendment process. To the extent that the state interest in preventing corruption of the electoral process can be protected by narrower forms of

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131 The advertisement urged voters to familiarize themselves with the views of unnamed candidates on energy-related issues — oil and gas pricing in particular. It appeared on October 17, 1976 in a multitude of magazines and newspapers around the country, including the New York Times Magazine and the Sunday magazines of various Connecticut papers. The advertisement was not written with a specific candidate in mind, but rather was based on “typical arguments advanced by politicians attacking oil companies,” according to the response submitted to the Commission by Mobil’s General Counsel. The advertisement at issue was styled as a “Voters’ Guide to the Political Cheap Shot” and was purportedly an effort to “clean up” some of “the political pollution” caused by candidates who “continue to play politics with energy issues.” Under three colloquial-style headings — the “Dollar-a-Gallon Ploy,” the “Obscene Profits Bit,” the “Keep it Vague Crowd” — the advertisement set forth ploys used by what Mobil viewed as insincere “energy candidates.” In a final paragraph, the advertisement provided a “good-guy checklist,” without referring to any particular candidate or party. N.Y. Times, Oct. 17, 1976, § 6 (Magazine), at 38.

132 Id.

133 In re Mobil Oil Corp., MUR 319 (76) (Feb. 28, 1977).

134 Id.
regulation—such as requiring disclosure of the source of the advertisement—prohibitions of corporate expenditures in the area of political speech during election campaigns may survive constitutional attack.135

Corporate Lobbying Restrictions

The challenge to the Massachusetts statute in Bellotti developed out of an attempt by several corporations and banking associations to express their position on a referendum issue to the public, rather than to the legislators directly.136 The Court's decision indicates that such indirect or "grass roots"137 lobbying is entitled to first amendment protection. Therefore, absent a compelling subordinating interest, governmental action which prohibits indirect lobbying by corporations on legislation, propositions, or referenda should be declared unconstitutional.138 This is so even if the lobbying is totally unrelated to the corporation's business.

The Bellotti decision, therefore, raises the question of whether various state lobbying registration laws will withstand first amendment challenge. When lobbying registration legislation is examined in light of Bellotti's process rationale, it appears that content-neutral regulations will survive strict first amendment scrutiny.139

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135 See 1978 Op. N.Y. State Bd. of Elect. No. 9. Significantly, the Supreme Court in Buckley v. Valeo found that the disclosure provisions of the Federal Election Campaign Act withstood the test of exacting constitutional scrutiny. 424 U.S. at 64. By informing the voters of candidates' supporters, the disclosure provisions were found to enhance the ability of voters to make a meaningful choice; actual corruption was deterred by exposing large contributors to public view; and the disclosure provisions assisted the state in searching out violations of the contribution limitations. Id.

136 435 U.S. at 765. Corporations have long recognized the value of public opinion to legislators; thus, the practice commonly known as "grass roots lobbying," which is aimed at influencing public opinion, often supplements a corporation's direct lobbying activities. See generally A. Holtzman, Interest Groups and Lobbying 99-107 (1966).

137 For purposes of this Article, the term "grass roots" campaign refers to "attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation." See 26 C.F.R. § 1.162-20 (c) (4) (1980). See also Land, Federal Lobbying Disclosure Reform Legislation, 17 Harv. J. Legis. 295, 298 (1980). See generally House Select Comm. on Lobbying Activities, General Interim Rep't, H.R. Ref. No. 3138, 81st Cong., 2d Sess. 29 (1950).

138 See 435 U.S. at 786. Such a prohibition of "grass roots" lobbying would clearly have an adverse impact upon the first amendment process, since the essence of this type of lobbying campaign is public communication, and the speech itself is "intimately related to the process of governing." Id.

139 The Federal Regulation of Lobbying Act of 1946, 2 U.S.C. §§ 261-270 (1976), is the only federal statute regulating lobbying activities. The Act does not impose monetary restrictions on lobbying expenditures, but requires registration of lobbyists, and the regular
Typically, lobbying legislation is not aimed at restricting the free flow of information in a democracy, but rather is designed to promote integrity in government by requiring disclosure of the interests responsible for the dissemination of the views espoused by the lobbyist. Certainly the prevention of deception resulting from the concealment of the identity of the interests represented by the lobbyist furthers, rather than inhibits, the effective operation of the first amendment process. Indeed, although the Court in *Central Hudson* addressed a restriction on commercial speech, it noted the importance of ensuring that information not be misleading. Moreover, the possibility of deception in lobbying is hardly illusory. The Supreme Court previously had been confronted with a case involving the use of a third party to influence public and legislative opinion through the circulation of propaganda. Although the Court did not decide the issue, it implied that the control of such reprehensible conduct was within legislative competence.

While it may be reasonable to conclude that the federal and state lobbying registration statutes will withstand constitutional challenge after *Bellotti*, it is not certain whether other statutes which impact adversely on corporate political speech in the form of lobbying will likewise be sustained by the courts. For example, under existing United States Treasury Regulations, corporations are given deductions for “good will” and “institutional” advertising.

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141 100 S. Ct. at 2350.


143 Eastern R.R. Presidents Conf. v. *Noerr Motor Freight*, Inc., 365 U.S. 127 (1961). In *Noerr*, the plaintiffs, a group of trucking companies charged, *inter alia*, that the railroad companies had employed a public relations firm “to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws . . . destructive of the trucking business . . . and to impair the relationships existing between the truckers” and the general public. *Id.* at 129. The third-party technique used by *Noerr* in its alleged attempt to damage competition involved the circulation of propaganda by an interested party, who made it appear to be the spontaneous expression of independent groups, thereby deceiving both the public and the legislature. *Id.* at 140, 145.

144 365 U.S. at 141 & n.21.
ing, for expenditures on advertising presenting "views on economic, financial, social, or other subjects of a general nature," and for direct lobbying expenditures on legislation that is of "direct interest" to their trade or business. The regulations specifically provide, however, that "no deduction shall be allowed for any expenses incurred in connection with 'grassroot' campaigns."

This distinction is problematic, since it is not always discernible whether advertising on a particular subject is of a "general nature," and therefore deductible, or part of a "grass root campaign" and hence not deductible. Furthermore, the "business interests" of the speaker theory as a basis for regulating corporate speech was expressly rejected by the Supreme Court in Bellotti. To the extent, therefore, that the tax laws treat grass roots lobbying unfavorably relative to other types of advertising expenditures, their status is placed in question.

In terms of the Bellotti process rationale, such tax treatment inhibits the flow of information and ideas on public issues directly affecting legislation and self-governance. This is not to suggest that the courts will nullify the regulations, but suggests that the exacting scrutiny test may have to be satisfied. In fact, subsequent to Bellotti, an action seeking injunctive relief was brought by the National Association of Manufacturers attacking the disallowance of tax deductions for grass roots lobbying as an unconstitutional infringement on the business rights of free speech. Although the

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145 26 C.F.R. § 1.162-20(a)(2)(1980). Regarding institutional (or good will) advertising, the Treasury Regulation provides that "a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes." Id. This type of advertising would include, for example, corporate underwriting of programs for television, expenditures to urge support for a public library, sponsoring programs of concerts, opera and theatre in city parks, and promoting such activities as the Interracial Council for Business Opportunity.

146 26 C.F.R. § 1.162-20 (1980). This category would encompass non-controversial subjects, on which a company may be expected to have some expertise, such as fuel conservation in the case of an oil company. The category might also include broader socio-economic issues, dealing in general terms with subjects regarding technology or conservation measures.

147 Id. § 1.162-20 (c)(2)(ii)(b)(1).

148 Id. § 1.162-20 (c)(4); see 26 U.S.C. § 162 (e)(2) (1976).

149 The line of demarcation between "general" and "grass roots" advertising becomes tenuous when the issues addressed relate in whole or in part to topics that might have sufficient legislative potential to cast doubt on their deductibility. The development or conservation of energy resources is only one such area.


action was dismissed for lack of subject matter jurisdiction, the court did note that there was no showing "that under no circumstances could the Government ultimately prevail" on the merits. The court's decision appears to be at least some support for the argument that the Bellotti line of cases does not signal a change in the tax treatment of lobbying expenses.

The First Amendment "Process" and Commercial Speech

The effect of Bellotti on the regulation of corporate political expression will no doubt be substantial, but the greatest impact of the decision is likely to be in the area of corporate commercial speech. In no other area are corporations confronted with first amendment considerations more often than with regard to regulations concerning advertising. Several government agencies, for example, are empowered to prevent false or misleading advertising and, consequently, courts are faced continually with advertisers' claims that such efforts contravene the first amendment. Until recently, product advertising was denied first amendment protection altogether because of its commercial nature. The Supreme Court retreated from this view in a series of cases, and finally in...
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. it recognized that even pure commercial speech is entitled to “some” first amendment protection.\textsuperscript{157} Despite the recognition that commercial speech is entitled to “some” first amendment protection, however, the Court in Virginia State Board also noted that in certain circumstances, the “free flow” of information to consumers could be restricted.\textsuperscript{158} Thus, the government may ban speech that is more likely to deceive than inform,\textsuperscript{159} or that is related to illegal activity.\textsuperscript{160} Although the Court did not answer the question of how far a state may go in regulating commercial speech,\textsuperscript{161} its recent decision in Central Hudson elucidates the four-part test which must be satisfied in order for such restrictions to withstand first amendment challenge.\textsuperscript{162} The most important inquiry, however, remains obscured: When does a corporation’s advertising transcend the category of “commercial speech,” with its intermediate level of protection, and become entitled to the full first amendment protection that the Court found appropriate in the Bellotti and Consolidated Edison decisions?\textsuperscript{163}

The question whether purely commercial expression merited first amendment protection remained unanswered, however, until the Court’s decision in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

\textsuperscript{157} 425 U.S. 748, 770 (1976). In Virginia State Board the Court concluded that purely commercial speech warranted first amendment protection, \textit{id.} at 770, reasoning that the free flow of information was indispensable to the public in a free enterprise economy. \textit{Id.} at 765. Reiterating this position, the Court, in Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977), held that a town ordinance which prohibited the posting of real estate “For Sale” and “Sold” signs was unconstitutional because it restricted the free flow of truthful commercial information. \textit{Id.} at 98.

\textsuperscript{158} 425 U.S. at 771-72. The Court noted that some forms of commercial speech regulation are permissible, including time, place, and manner restrictions; regulations of deceptive misleading commercial speech; and prohibitions of advertisements relating to illegal activities. \textit{Id.}

\textsuperscript{159} Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979); Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 464-65 (1978).


\textsuperscript{161} The advertisements involved in Virginia State Board were not false or deceptive. \textit{Id.} at 771. The Court did not address, therefore, the issue of how pervasive a regulatory scheme could be without overburdening the free flow of information. See also Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 98 (1977); Bigelow v. Virginia, 421 U.S. 809 (1975); Reich, \textit{Preventing Deception in Commercial Speech}, 54 N.Y.U.L. Rev. 775 (1979).

\textsuperscript{162} 100 S. Ct. at 2351; see note 105 supra.

\textsuperscript{163} Compare Central Hudson Gas & Elec. Corp. v. PSC, 100 S. Ct. at 2350 with Consolidated Edison Co. v. PSC, 100 S. Ct. at 2332 and First National Bank of Boston v. Bellotti, 435 U.S. at 786.
Commercial Speech—Distinguishing “Product” and “Issue” Advertising

While product advertising was not at issue in Bellotti, the Court did observe in dicta that its recent commercial speech decisions were illustrative of the fact

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.”

The first amendment protection of commercial speech is thus predicated on the same principles which give rise to the safeguards for political expression. Nevertheless, the Court has indicated that the distinction between “commercial” and other forms of speech must be preserved. The boundaries between the two, however, become indistinct when the corporation uses advertising to address public issues, or purchases “institutional” advertising. Ironically, the Bellotti case is a prime example of how such distinctions may become blurred. Although the decision itself did not refer, not even in dicta, to “institutional” or “issue” advertising, the right sought by the petitioners—to disseminate their views on a graduated personal income tax—was actually the right to engage in issue advertising. It is true that the decision did not go so far as to say that corporations have full first amendment rights in the area of issue advertising, but a careful reading of the majority and concurring opinions would certainly support the position that Bellotti “process” affords first amendment protection to issue advertising on proposed referenda or other government action, without regard to

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166 See notes 127 & 145 supra.

167 See 435 U.S. at 768.
whether such speech is directly related to the corporate business.\textsuperscript{168}

The reasons for allowing a lesser degree of constitutional protection to commercial speech also support the argument that restrictions on issue advertising should be closely examined lest they be used to thwart the informational process. In \textit{Virginia State Board}, the Court noted that restraints on product advertising would not significantly affect public access to information because of the differences between product advertising and other forms of speech.\textsuperscript{169} But the factors singled out by the Court to illustrate the resiliency of commercial speech are less applicable when issue advertising is involved. While such advertising might ultimately inure to the economic benefit of the corporation, it differs from traditional product advertising in at least two important respects: the discussion of opinions on public issues does not lend itself to factual verification as do product claims; and, being less directly related to the profit motive, issue or institutional advertising is more likely to be “chilled” by overbroad regulations. Moreover, such advertising, when viewed as part of the first amendment process would seem to serve a broader societal interest than the “efficient allocation of resources,” the interest which commercial speech is said to serve.\textsuperscript{170}

To be sure, the Supreme Court has stated that where “direct comments on public issues” were made by utility companies discussing “controversial issues of public policy,” the full panoply of first amendment protections would apply to the speech.\textsuperscript{171} Yet, merely because an advertisement is editorial in tone and purports to address a topic of public concern, it does not necessarily rise to

\textsuperscript{168} It should be noted, however, that corporate contributions to an electoral campaign present substantially different considerations than “issue advertising” aimed at influencing the general public. Thus, statutory restrictions on campaign contributions are likely to be upheld. \textit{See} note 126 and accompanying text \textit{supra}.

\textsuperscript{169} \textit{Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.,} 425 U.S. 748, 771 n.24 (1976). In considering the nature of the speech involved, the Court in \textit{Virginia State Board} noted that product claims could be evaluated factually and were less likely to be inhibited by regulations because of the direct economic impact of advertising on the company’s business. \textit{Id.} Therefore, commercial expression could be subject to regulation to prevent deceptive claims without detriment to the informational process. \textit{Id.; accord, Ohralik v. Ohio State Bar Ass’n,} 436 U.S. 447, 455-56 (1978); \textit{Bates v. State Bar,} 433 U.S. 350, 381 (1977).

\textsuperscript{170} \textit{Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.,} 425 U.S. at 765.

\textsuperscript{171} 100 S. Ct. at 2349 n.5.
the level of full first amendment protection. Thus, corporations seeking to challenge the constitutionality of regulations restricting their advertising are confronted with a definitional problem at the outset. As noted by Justice Stevens, concurring in the Central Hudson decision:

Because “commercial speech” is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed.

Unfortunately, the various opinions in the Consolidated Edison and Central Hudson decisions present no clear picture of where the line should be drawn. Furthermore, the Central Hudson decision, in particular, raises once again the possibility that the “economic interests” of the speaker, rather than the value of the speech to the first amendment process, might come to be viewed as the basis for ascertaining the degree of first amendment protection.

172 Id. For an example of the distinction, compare Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir. 1980) and Rutledge v. Liability Ins. Indus., 487 F. Supp. 5 (W.D. La. 1979) with National Comm’n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978). In Egg Nutrition, the issue before the court was whether an editorial advertisement dealing with an issue of public concern should be classified as commercial speech. 570 F.2d at 162-63. The advertisement in question made the misrepresentation “that there is no scientific evidence that eating eggs increases the risk of . . . heart [and circulatory] disease . . . .” Id. at 159. In response to the argument advanced by the Commission on Egg Nutrition that such expression was protected speech, the court noted that the concept of commercial speech is not restricted to the “mere proposal of a particular commercial transaction but extends to false claims as to the harmlessness of the advertiser’s product asserted for the purpose of persuading members of the reading public to buy the product,” id. at 163. The court concluded, therefore, that an advertiser must be prevented from misleading the consumers under the veil of discussing matters of public interest. Id. While the Egg Nutrition court did not elevate the commercial message in question to the level of an issue advertisement, the court in Rutledge did just that. The plaintiff, an attorney, sought to enjoin publication of insurance company advertisements that allegedly would have influenced jurors to award lower amounts in damages. 487 F. Supp. at 7. The court noted that regardless of the fact that the advertisements were of a commercial nature, “they proposed no commercial transaction” and therefore should “not be characterized as commercial speech.” Id. at 8. The court concluded that because the advertisements were “statements on matters of the public interest,” any restrictions on their expressions would be subjected to strict first amendment scrutiny. Id. In a similar factual situation, in Quinn v. Aetna Life & Cas. Co., the Second Circuit affirmed the District Court’s finding that the insurance company’s advertisements criticizing the present system of adjudicating tort cases were “not commercial speech removed from any ‘exposition of ideas,’” 482 F. Supp. 22, 29 (E.D.N.Y. 1979), but rather were “fully protected political expression,” id. at 29. Quinn v. Aetna Life & Cas. Co., 616 F.2d at 40-41.

173 100 S. Ct. at 2388 (Stevens, J., concurring) (footnote omitted).
to which the speech is entitled.

The Consolidated Edison—Central Hudson Dilemma: Re-emergence of the Business Interests Rationale?

As noted throughout this Article, the Bellotti decision based its extension of first amendment rights to corporate political speech upon the inherent value of the speech in the first amendment's informational process. While Central Hudson and Consolidated Edison reaffirmed the emphasis on the first amendment process,174 they also indicate that a distinction must be made in the level of protection where the regulation in question restricts "only commercial speech."175 Even when the advertisement may "relat[e] to . . . questions frequently discussed and debated by our political leaders," the Central Hudson opinion indicated that full first amendment protection would not automatically apply, since "many, if not most products may be tied to public concerns."176

While few would quarrel with the need for the distinction, the majority's bifurcated definition of "commercial speech" in Central Hudson seems to obscure, rather than clarify the difference. One of the definitions—"speech proposing a commercial transaction,"177 — appears to accord with the considerations previously noted that justify lesser protection of commercial speech and therefore is not objectionable from the standpoint of the first amendment process.178

Alternatively, however, the Court defines "commercial speech" as "expression related solely to the economic interests of the speaker and its audience."179 This second definition, though apparently used interchangeably with the first, is not synonymous. Unlike the "commercial transaction" definition, the "economic interests" test would seem to have the potential to reach into all forms of corporate advertising,180 if we can reasonably assume that even

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174 Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 100 S. Ct. at 2350; Consolidated Edison Co. v. Public Serv. Comm'n, 100 S. Ct. at 2331.
175 Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 100 S. Ct. at 2349.
176 Id. at 2349 n.5.
177 Id. at 2349.
178 Courts repeatedly have emphasized the capacity of product advertising to withstand being "chilled" by regulation, due to the advertiser's profit motive. E.g., Bates v. State Bar, 433 U.S. at 381; see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853-58 (1970).
179 100 S. Ct. at 2349.
180 Indeed, corporate speech regarding the proposed Massachusetts constitutional
issue advertising is undertaken because of the potential economic benefit to the corporation. Moreover, the "economic interests" test could be equally applicable to almost any form of expression. Justice Stevens' opinion cautioned in this regard that:

Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of the speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.181

In the particular context of corporate speech, an emphasis on "economic motivation" as grounds for lesser constitutional protection for valued forms of expression raises the questions of whether and how media corporations can be excluded from the operation of the rule, given the broad range of interests encompassed by modern communications conglomerates.182 Might not an editorial supporting or opposing forest conservation efforts, for example, be viewed as a form of "commercial speech" where a significant percentage of the corporation's business interests involve forest products manufacturing?183 Notably, it cannot be ignored that nonmedia corporations frequently perform press functions themselves by disseminating their views on public issues.184

amendment in Bellotti, see 435 U.S. at 770 & n.4, and the billing inserts discussing the benefits of nuclear power in Con Edison, see 100 S. Ct. at 2330, arguably could have come within the "economic interests" standard, thereby relegating the speech involved to the lesser first amendment status of "commercial" expression.

181 100 S. Ct. at 2358 (Stevens, J., concurring). The damage that would ensue should the economic interests test be applied to disqualify speech from full first amendment protection was clearly pointed out by one commentator: "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." Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rsv. 372, 382-83 (1979) (footnotes omitted).

182 In 1977, the main lines of business for Time, Inc. were: Publishing, 57.5%; Forest Products, 28.8%; Video, 6.3%; and Other, 7.4%. N.Y. Times, June 23, 1978 § D, at 12. Temple-Eastex, the forest products company of Time, Inc. at the time, was described as "the biggest private landowner in Texas." Id. The article also reported that Time, Inc. planned to enter the containerboard industry by acquiring a company which allegedly controlled "half a million more acres in Georgia and Alabama." Id.

183 See note 182 supra.

184 Corporate issue advertising performs a service traditionally identified with the press—the broad dissemination of information and opinion to the general public. See Nimmer, Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?, 26
example is the oil corporation that seeks to explain to the public the complexities of its earnings versus investment requirements during an energy crisis because it believes press coverage to be inadequate due to a lack of time, space, or understanding of the issues. If the process of disseminating information to the public is to be protected, therefore, a distinction in first amendment protection based on whether a corporation manages publishing or broadcasting facilities is untenable. The dangers inherent in such distinctions further highlight the fact that classifying corporate speech on public issues as “commercial speech” because it relates to the corporation’s economic interests goes beyond what is necessary to distinguish commercial from other protected forms of speech and invites damage to the process that Bellotti recognized as the primary first amendment interest.

CONCLUSION

The Bellotti case, and the decisions of the United States Su-
ume Court in *Consolidated Edison* and *Central Hudson* portend significant changes in the law relating to constitutionally permissible regulation of corporate speech. Although it is impossible to anticipate what effect the decisions will have on the myriad statutes restricting corporate expression now found in the codices of the several states and the United States Code, it does appear that such restrictions are now open to question. If nothing else, however, *Bellotti* and its progeny have created significant first and fourteenth amendment safeguards for corporate management interested in asserting their companies' positions on issues which have arisen or may arise in the political process. While the limits of this constitutional right to speak out on important issues of public concern remain carefully circumscribed, it is hoped that the right will continue to evolve in order that corporations may contribute to more enlightened discussion in the political process.